Using The Duck Test For Professional Employees

Insights
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When classifying their employees for overtime purposes under federal and state wage-hour laws, employers often rely on the equivalent of the "Duck Test": the job's title sounds professional and its duties require expertise and a high degree of skill – it sounds and looks like a professional job, and so it must qualify for the professional exemption even if most of its occupants lack advanced degrees. In other words, they assume that when a high degree of skill and years of experience are needed to perform the position's essential tasks, and the position requires either advanced education or long years of experience, the occupants can be treated as exempt professionals under the Fair Labor Standards Act (FLSA).

But a recent decision by a federal appeals court should serve as a warning that relying on mere assumptions in classifying employees as exempt professionals, without analyzing the position under *all* the FLSA criteria for the professional exemption, is a prescription for trouble. *Young v. Cooper Cameron Corp.*

Background
Under the FLSA, employers must pay their non-exempt employees at least the federal minimum wage and overtime for all hours worked over 40 in any workweek. But the FLSA's overtime provisions do not apply to employees who fit within one of the enumerated exceptions, including those who qualify for the "professional exemption."

The FLSA itself does not define what a professional is, but the U.S. Department of Labor (DOL) has issued detailed regulations on the subject. To qualify for the professional exemption, an employee's position must first require advanced knowledge. The advanced knowledge must be in a field of science or learning, and "customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education or from an apprenticeship, and from training in the performance of routine mental, manual or physical processes." The *Young* case re-emphasizes that courts interpreting these DOL regulations narrowly construe the exemption and are likely to consider that the "prolonged course of specialized intellectual instruction" means that a degree or license from such a "course" is an implied requirement of the regulation.

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Andrew Young worked as a Product Design Specialist II (PDS II) for Cooper Cameron Corp., designing hydraulic power units for oil rigs. The work involved a high level of complexity and required significant technical expertise. However, neither Young nor any of the other PDS II employees had a college degree, though he did have almost 20 years of experience in the engineering field and was a member of the American Society of Mechanical Engineers.

Small factual details in a case often tip the balance, and here, the court noted that Young was first offered a job with Cooper Cameron as a Mechanical Designer – a non-exempt position that was lower-rated (and lower-paid) than PDS II. He declined the offer of that position because he considered its compensation inadequate; the company then offered him the PDS II position, which it paid on a salary basis and classified as exempt. Compensation for PDS IIs, translated into an hourly wage, was $3 per hour higher than for the Mechanical Designer. The requirements for the PDS II job were articulated as at least 12 years of relevant experience, with no requirement for any particular type or amount of education, or for a degree, and none of the current occupants of the job had a college degree. Significantly, both the trial and appellate courts concluded that despite holding the PDS II title, Young performed the same duties that he would have as a Mechanical Designer.

Young apparently held the PDS II job title happily enough for three years, never complaining about not receiving overtime. But as with much FLSA misclassification litigation, an intervening event led Young to sue: he was involuntarily terminated in a 2004 RIF. His federal court suit alleged that he had been misclassified as an exempt professional and was due overtime for his years with the company.

The district court granted summary judgment for Young on the exemption issue, holding that the work of a PDS II did not satisfy the FLSA professional exemption, since it was "not of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study." The court also held that Cooper Cameron's misclassification was a willful violation of the FLSA because even though it had engaged in detailed studies of the PDS II position before concluding that it should be classified as exempt, what mattered was the nature of the duties that *Young* was performing, and Cooper Cameron knew that he was performing the same duties as its non-exempt Mechanical Designers. The employer appealed both aspects of the decision.

The Appeals Court Ruling

Relying on the DOL regulations in effect at the time of the alleged violation, the U.S. Court of Appeals for the 2nd Circuit held that an employee cannot be considered an exempt professional unless the work performed requires knowledge that is customarily attained from intellectual study. The court parsed the regulation on the professional exemption into a three part test: 1) the employee's "knowledge must be of an advanced type"; 2) "the knowledge must be in a field of science or learning"; and 3) the knowledge "must be customarily acquired by a prolonged course of specialized intellectual instruction and study."

The issue in the case centered on the third prong and the term "customarily." Cooper Cameron argued that use of the term demonstrated that an academic degree was not always required. Under the employer's view, the lack of a degree requirement for the position did not matter, because the duties of the position required knowledge of an advanced type, and Young's prior experience was a satisfactory substitute for education or a degree. The court disagreed.

Focusing on the meaning of "customarily," the appeals court returned to the DOL regulations for guidance. The regulations provide that "the word 'customarily' implies that in the vast majority of cases the specific academic training is a prerequisite for entrance into the profession." The court expressed the view that the use of "customarily" in the regulations means that a specialized degree is required in *almost all cases*.

As the court noted, the use of the term "customarily" means that an employer cannot merely give lip service to the degree requirement, filling all or a substantial majority of the slots in a job title with non-degreed individuals. "[T]he term 'customarily' in this context makes the exemption applicable to the rare individual who, unlike the vast majority of others in the profession, lacks the formal educational training and degree." The court then went on to note that "[i]f a job does not require knowledge customarily acquired by an advanced educational degree . . . then, regardless of the duties performed, the employee is not an exempt professional under the FLSA."

Simply put, an employee might occasionally be deemed an exempt professional without having a degree, but only in a situation where a specialized degree is typically required for the position, the vast majority of the occupants have been required to have one, and an almost singular exception has been made for the individual at issue.

What It Means To You

The lesson from *Young* for employers is clear: just because a position seems like a professional position does not render it exempt from overtime. The fact that a position requires high levels of technical expertise and significant experience will not be enough to qualify it for the professional exemption. Rather, it must *both* require the use of knowledge of an advanced type in a field of science or learning *and* require an advanced degree in that specialized field. The exemption is not based merely on a duties test. Employers that impose an advanced degree requirement when hiring for a position, but still populate the job category mostly with workers who lack a degree but qualify based on a certain number of years of experience, are at fairly high risk of not satisfying the requirements for the professional exemption.

The decision in *Young* is from only one circuit court (though it cites two other similar decisions from other federal appeals courts). But the message to employers with positions being treated as exempt under the professional exemption is that it's worth taking another look at the educational requirements for the position and the academic credentials of the occupants.

If the job description states, as many will, that an advanced degree is required but that some number of years of experience can substitute for an advanced degree or license, and most of the

number of years of experience can substitute for an advanced degree or license, and most of the occupants don't have an advanced degree, the odds of sustaining the exempt status of those employees, in the event of a challenge, will not be good. Conversely, if the job description mentions a degree requirement, and the vast majority of occupants do hold degrees, while only a small minority do not, the employer will be in a much better position to defend treating employees as exempt professionals.

In addition to reassessing the appropriateness of treating employees as exempt under the professional exemption, you should confirm that all employees you consider to be professional-exempt are recording their work time, and that such records are being safeguarded. Challenges to exempt status can be filed years after an employee terminates employment. If you have not required employees to record their time (since you considered the job classification to be exempt), you have not only violated FLSA recordkeeping requirements but also left your company all but defenseless in trying to dispute a litigant's self-proclaimed set of time records that can be counted on to show hours and hours of overtime worked in the three years prior to the suit. A good set of time records can be an FLSA-defendant's last line of defense.