



Court Clarifies Impact Of Multi-Tasking On Exempt Status

Insights

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The salaried exemptions remain an actively litigated area in employment litigation. In order to be exempt from overtime and related regulations governing timekeeping and meal and rest periods, it's not enough that an employee be paid a salary; rather, a number of other important requirements apply as well, including the customary and regular use of discretion and independent judgment in carrying out work functions, and engaging in predominantly exempt rather than non-exempt duties.

In California, courts use a quantitative method for the exempt duties test, which requires an employer to establish that exempt tasks comprise more than 50% of the total time spent by the salaried employee during the work week. In reality, because of the demands placed on executives, they often find themselves performing a variety of tasks, including multi-tasking exempt and manual tasks simultaneously.

So What's My "Real" Job?

A recent appellate case addressed this very issue and provides workable guidelines for employers who are creating legitimate exempt positions which are taxed with the occasional need to perform some non-exempt tasks. *Heyen v. Safeway*

Linda Heyen, was a former assistant manager for Safeway Inc. After Safeway terminated her employment, Heyen contended that she was misclassified as exempt. She sued for unpaid overtime pay because she regularly spent more than 50% of her work hours doing "nonexempt" tasks such as bagging groceries, checking, bookkeeping, and stocking shelves.

Clearly, Heyen performed a variety of bona fide management duties, as well. She was assigned to manage all store operations, including supervising from 25 to 35 employees. She hired and trained staff, maintained employee files, disciplined employees, did salary-performance paperwork, responded to management emails, prepared reports, handled the master budget, scheduled employees, and completed employee evaluations. She was also responsible for safety, cash security, and assuring that employees did not over-order supplies.

According to Heyen, the real problem was that Safeway did not allocate sufficient labor capital to the store, forcing the manager to perform nonexempt tasks to fill in the gaps. This need was further exacerbated by difficulties hiring bookkeepers and labor issues.

Heyen produced evidence that managers were evaluated according to an “operating ratio” or “O.R.,” which refers to the number of labor hours Safeway budgeted to a store based on the store’s sales. A manager could be disciplined for missing O.R. in any week, and the O.R. was calculated on a weekly basis. Evidence indicated that Heyen’s store could not make O.R. without both her and the store manager doing the work of hourly employees. Heyen produced witnesses, former Safeway managers, who gave supportive testimony.

Safeway argued that the time spent by Heyen in “multi-tasking,” or engaging in both “exempt” and “nonexempt” activities, should have been credited as exempt work. Non-exempt activity included checking, bagging, or stocking shelves. Exempt activity included simultaneous observance of store operations and employees performing their work activities, and taking corrective action as needed. Safeway produced witnesses that contradicted Heyen’s evidence, including the amount of time she was spending performing nonexempt tasks.

An advisory jury and the trial court agreed with Heyen and awarded her overtime pay of \$26,184.60. Safeway appealed.

New Guidance

The court rejected Safeway’s multitasking argument, noting that “the regulations look to the supervisor’s reason or purpose for undertaking the task. If a task is performed because it is helpful in supervising the employees or contributes to the smooth functioning of the department for which the supervisors are responsible, the work is exempt; if not, it is nonexempt.” The trial court’s jury instruction, approved by the court, read in part as follows:

If a party claims that an employee is engaged in concurrent performance of exempt and nonexempt work, you must consider that time to be either an exempt or a nonexempt activity depending on the *primary purpose for which the employee undertook the activity at that time*. The nature of the activity can change from time to time. (Italics added).

In performing the duties analysis, the court inquired into the “work actually performed by the employee during the workweek,” and also to the “employer’s realistic expectations and the realistic requirements of the job.”

Practical Impact On Employers

This decision makes clear that managers still can perform some nonexempt work as long as it does not comprise the majority of the manager’s working time, but gray zones may still exist where the primary purpose of an overlooked manual task may be nonexempt.

Check with your legal counsel to develop job descriptions and procedures for exempt positions consistent with these clarified standards including the evaluation of tasks in light of their primary purpose given an employer’s “realistic expectations.” You should carefully evaluate the reasons why labor budgets are out of range and develop means of monitoring whether managers are employing too much of their time in non-exempt tasks to make the numbers look better.

Managers faced with labor shortages will need to come up with more effective legally safe means of producing financial results demanded by their superiors. By structuring expectations in a manner that rewards managers who succeed by performing primarily within their executive functions, employers will be able to strengthen their defenses to claims of misclassification.

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