



Tolerating Poor Performance Can Bolster Exemption Challenges

Insights

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Employers generally appreciate the importance of promptly, effectively, and consistently addressing an employee's inadequate performance. Not doing so can adversely affect productivity and workplace morale, can establish bad precedent, and can make future discipline problematic.

However, the importance of insisting that an employee perform each of his or her job duties to management's complete satisfaction is rarely discussed in the context of the federal Fair Labor Standards Act's Section 13(a)(1) "white collar" exemptions. Overlooking or even permitting substandard work can make it harder to defend against claims that an employee should not have been treated as exempt.

Expectations vs. Facts

Consider the following scenario: An applicant is hired to manage an e-commerce firm's shipping warehouse. As Warehouse Manager, he will be paid on a salary basis at more than the required dollar threshold. The firm expects the employee to supervise eight other full-time warehouse workers each day and has given him the authority to hire and fire. Management knows that the employee will occasionally do some of the same physical labor performed by his subordinates, but it makes clear to him that his most-important work will be to manage and oversee the warehouse's personnel, operations, logistics, inventory, stock flow, vendor relationships, and so on. In light of this anticipated work, the firm treats the Warehouse Manager as an exempt "executive" employee for FLSA purposes.

But it turns out that the employee is utterly inept at directing others, and he does not do so. He also neglects his managerial responsibilities, and instead he spends 90% of his time stocking and straightening shelves, picking and shipping orders, receiving and unpacking stock, and so on. He neither counsels nor disciplines employees, and he does no hiring or firing. Management assumes that he is doing what it expected until customer and vendor complaints cause it to terminate him months later. If the employee then files an FLSA lawsuit challenging his exempt status, who wins?

Facts vs. Expectations

Generally speaking, an employee's *actual work* determines whether the duties-requirements for one of the FLSA's "white collar" exemptions have been met. This might suggest that the FLSA executive-exemption requirements were not satisfied as to the Warehouse Manager, because he mainly performed non-exempt work, rather than the work that management expected him to do. In

effect, then, he might be said to have unilaterally undermined his exempt status by failing to perform to management's expectations.

A few courts have pushed back against such an outcome. For example, on facts similar to those above, a lower federal court acknowledged that a plaintiff spent a large percentage of his time performing non-exempt work but noted that this was due to his failure to discharge his responsibility to direct subordinates. The court held that the plaintiff's not having properly assigned non-exempt work to others was an exercise of managerial discretion.

Another lower federal court reasoned that an employee's "incompetence" did not cancel-out management's legitimate expectations about the duties of the position. It held that, even though the employee willfully disregarded management's expectations through his poor performance, the exemption was not lost.

The Bottom Line

It certainly makes sense that a challenge to exempt status should not prevail because an employee failed to perform, and/or poorly performed, duties that management properly concluded supported an exemption and genuinely believed the employee was carrying out consistently with its expectations.

Nevertheless, this proposition is evolving slowly in the courts, and management cannot be certain that a decisionmaker will react this way. Employers should not simply rely on what they *expect* an employee to do or *assume* that he or she is doing.

Instead, once an employer has determined that the nature of the work it anticipates meets an exemption's requirements, management should monitor the employee's performance to ensure that these duties are being carried-out both in fact and to its satisfaction.

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