



Should You Use Online Exemption "Advisors" Or Checklists?

Insights

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Various websites now provide questionnaires, checklists, programs, decision-trees, and so on to guide an employer in trying to decide who qualifies as an exempt executive, administrative, professional, or outside-sales employee under the defining federal Fair Labor Standards Act regulations. These tools are fine as far as they go, but their usefulness is normally very limited.

No such approach (whether online or otherwise) can substitute for the indispensable analysis and judgment required to determine whether one of these "white collar" exemptions applies. Typically, these systems simply break-down the regulations into their component parts and then take the responder through them one-by-one, asking him or her to indicate whether the requirement is satisfied by clicking "Yes" or "No" or some other abbreviated answer.

You Need More Than An Outline

But many important regulatory requirements and concepts are vague or ambiguous and do not lend themselves to such quick/easy/short responses. Moreover, most of the controlling principles have been the subjects of years or even decades of definition, refinement, explanation, elaboration, and application in numerous court decisions and in U.S. Labor Department interpretations and opinions. These authorities have often revealed or established exemption nuances, variations, and pitfalls that are by no means readily apparent in the regulations themselves, and some of which do not actually appear in the regulations at all. A person who can effectively bring to bear the knowledge, expertise, and experience necessary to apply the exemption rules probably has no need for an online questionnaire in the first place.

And sometimes the questions raised in or statements made by these online resources can be inaccurate and potentially misleading. For example, even the U.S. Labor Department's "FLSA Overtime Security Advisor" asks as to the executive exemption, "Does the employee's primary duty **involve** management . . ." [Emphasis added]. However, the regulatory requirement is that an exempt executive employee's primary duty must **BE** management; this is not a trivial difference.

Furthermore, while these websites often provide what might seem to be definitive and reliable answers, employers should not take these statements at face value. As an illustration, after a series of exemption-supporting responses, USDOL's Advisor pronounces that the employee "appears" to meet an exemption's duties-related tests. Even if an employer could someday prove that it had relied upon the Advisor in deciding that an employee was exempt, one likely counter-argument will be that

management's Advisor responses did not reflect the proper application of the relevant legal principles to the actual content of the employee's work.

"Garbage In, Garbage Out"

No software magic is at work in these online resources. Their results do not transcend the user's own, independent and essential understanding and analysis of each determining factor and fact. The best these tools can do is serve as preliminary, very-general guidance to an evaluator who is undertaking:

- ◇ To elicit all of the relevant, current, clear, accurate, detailed, and specific facts and circumstances from someone who thoroughly understands the job in question;
- ◇ To evaluate those facts and circumstances against, and with a thorough knowledge and understanding of, the controlling legal tests, requirements, and related refinements and interpretations; and
- ◇ To make his or her own, independent judgments about what exemption-related conclusions should be drawn from this process.

Finally, remember that state and local laws might not recognize all of the exemptions available under the FLSA or might recognize them only on different or more-limited terms. Consequently, FLSA-focused online resources do not necessarily address whether an employee is also exempt from wage-hour requirements imposed by a different jurisdiction.