



## "The Online Exemption Checklist Says . . ."

Insights

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Coming changes in at least some of the U.S. Labor Department's definitions for the federal Fair Labor Standards Act's Section 13(a)(1) "white collar" exemptions are leading employers to evaluate whether employees they treat as exempt meet all of the duties-related requirements.

Numerous online sources offer checklists, questionnaires, decision-trees, and so on to guide management's efforts. While these tools might provide a starting point, their usefulness is normally very limited.

The typical approach is simply to break USDOL's definitions into their component parts, and then to ask the responder to indicate whether each requirement is satisfied by clicking "Yes" or "No" or some other abbreviated answer. No such approach substitutes for the indispensable analysis and judgment required to determine whether one of these exemptions applies.

### It Takes More Than An Outline

Many of the important requirements and concepts are so vague or ambiguous that they cannot be adequately evaluated merely by supplying such quick/easy/short responses. As just one example, even the seemingly-straightforward question of whether an employee "customarily and regularly directs the work of two or more other employees" for executive-exemption purposes has been a subject of decades of refinement, explanation, elaboration, and application in court decisions and in USDOL interpretations and opinions. The responder might think that "yes" is the clear answer, but he or she might not be aware of all of the necessary considerations.

Any satisfactory analysis of exempt status must take into account innumerable nuances, variations, and potential pitfalls that are by no means readily apparent in USDOL's regulations themselves, and some of them do not actually appear in those regulations at all. A person who can effectively bring to bear the knowledge, expertise, and experience necessary to apply the exemption rules recognizes that going through a questionnaire or checklist is no more than the first step.

### What Do The Results Really Mean?

And sometimes the questions raised in or statements made by these online resources can be inaccurate and/or potentially misleading. For instance, even USDOL's own "FLSA Overtime Security

Advisor" asks as to the executive exemption, "Does the employee's primary duty *involve* management . . ." [Emphasis added]. However, the actual requirement is that an exempt executive employee's primary duty must *be* management; the difference is not trivial.

Furthermore, while the ultimate "answers" might seem to be definitive and reliable, employers should not take them 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.

## **The Bottom Line**

No computer magic is at work in these online resources. Their output does not and cannot replace 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.

Remember also that the wage-hour laws of other jurisdictions might not recognize all of the exemptions available under the FLSA or might recognize them only on different and/or more-limited terms. Consequently, FLSA-focused website resources do not necessarily address whether an employee is also exempt from wage-hour requirements imposed by *another* applicable law.