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**Information Memos, Articles, White Papers****Labor and Employment Law: When Are Computer Staff Entitled To Overtime Pay? (9/28/06)**

By Robert A. Doren, *Buffalo Law Journal*, (9/28/06)

Thanks to rapidly changing technology, computer employees will continue to become increasingly important assets to any employer.

Computer employees perform tasks ranging from answering common questions at "help desks" to exercising a considerable amount of discretion in designing, modifying and developing computer systems and programs.

Because the skills, duties and responsibilities of computer employees vary greatly, employers face the vexing responsibility of determining which of their IT employees are entitled to overtime compensation.

The Fair Labor Standards Act requires employers to compensate employees who are not within a defined exemption with overtime pay for hours worked beyond 40 hours in one week.

The computer-employee exemption continues to cause employers difficulty in categorizing their computer personnel because the classification of computer employees remains a fact-specific endeavor that employers should conduct on a case-by-case basis.

**New DOL rules**

The federal Department of Labor has acknowledged the difficulty of classifying computer employees, noting that "Because job titles vary widely and change quickly in the computer industry, job titles are not determinative of the applicability of the (computer employee) exemption" (29 C.F.R. §541AOO[a], 2005). Instead, employers must examine each employee's skills, duties and compensation individually when classifying their workers.

Under the new DOL regulations, computer employees must be compensated at a rate of not less than \$455 per week on a salary basis or at an hourly wage of at least \$27.63 to be eligible for this exemption (29 C.F.R. § 541 AOO[b], 2005).

The computer-employee exemption applies to employees who are systems analysts, programmers, software engineers or similarly skilled workers whose primary duties are:

- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
- The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
- The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
- A combination of the duties described above, the performance of which requires the same level of skills (29 U.S.C. § 213[a][17], 2006).

The DOL also identifies employees who are not covered under the exemption. Employees engaging in the "manufacture or repair of computer hardware and related equipment" as well as those who are highly dependent on computers, but "not primarily engaged in computer systems analysis and programming," do not satisfy the computer exemption (29 C.F.R. § 541.401, 2005).

**Bobadilla v. MDRC**

A recent case from the Southern District of New York offers insight on how courts have interpreted the computer-employee exemption. In *Bobadilla v. MDRC* (2005 U.S. Dist. LEXIS 18140; S.D.N.Y. Aug. 23, 2005), the Southern District found that a network administrator with several years' experience satisfied the computer-employee exemption.

The plaintiff earned a salary of approximately \$75,600 a year, which was significantly higher than the approximately \$24 per hour, or about \$43,680 annually, made by help-desk personnel. Bobadilla asserted that he did not meet the duties test under the computer-employee exemption because he performed primarily help-desk functions by assisting employers with routine computer problems.

However, MDRC successfully argued that Bobadilla had "sophisticated knowledge of computing that went beyond that of a non-exempt help-desk employee." He was a certified network associate who had significant prior experience in managing and analyzing networks.

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Indeed, Bobadilla admitted that he was responsible for configuring MDRC's network and analyzing and testing the network in California and New York.

While granting summary judgment for MDRC, the court carefully analyzed Bobadilla's tasks performed, job description, performance review, and his salary and experience. Based on his accomplishments and responsibilities, the Southern District found that Bobadilla satisfied the computer-employee exemption's duties test. (Although the Southern District analyzed this case under the previous DOL regulations, the duties test did not change once the new regulations became effective in 2004.)

The court held that Bobadilla met the duties test because his responsibilities included "the design, development, analysis and modification of computer systems or programs" and he also engaged in the "design, documentation, testing, creation or modification of computer programs relating to machine operating systems." In the future, courts will also likely review the same forms of evidence in conducting their fact-specific examination of the applicability of the computer-employee exemption.

### **Other exemptions**

Employers seeking to avoid overtime expenses are not without recourse if their employees do not satisfy the computer-employee exemption. Computer employees who perform administrative or executive duties may fit other FLSA exemptions. For example, a computer programmer could meet the administrative exemption if his or her duties require discretion and independent judgment and if his or her "primary duty includes work such as planning, scheduling, and coordinating activities required to develop systems to solve complex business problems, scientific or engineering problems" (29 C.F.R. § 541.402, 2005). Similarly, a senior computer programmer who acts in a supervisory capacity insofar as he or she can make "recommendations as to the hiring, firing, advancement, promotion or other change of status of the other programmers" could satisfy the FLSA executive exemption.

While an entry-level help-desk technician or an information-technology director at a large law firm may be easily classifiable, many computer employees are not so neatly categorized under the FLSA. Importantly, employers may not circumvent the DOL regulations by granting employees high-ranking titles that are not commensurate with their duties.

The DOL and courts will be especially cognizant of classification issues concerning computer employees because technology fosters changes in job responsibilities and the development of skills to meet new demands. Therefore, employers should actively monitor, on a case-by-case basis, the duties and responsibilities of their computer employees to ensure that exempt employees satisfy the computer-employee or other exemptions.

Note: This article first appeared in the September 28, 2006 edition of the *Buffalo Law Journal*.  
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