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## EXECUTIVE AND ADMINISTRATIVE EXEMPTIONS

HINMAN, HOWARD AND KATTELL, LLP


**Lunch with a Lawyer  
February 2021**

ATTORNEY ADVERTISING

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## QUICK UPDATE-COVID LEAVE

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- NY ISSUED GUIDANCE REGARDING COVID LEAVES:
- [https://coronavirus.health.ny.gov/system/files/documents/2021/01/guidanceonuseofcovid-19sickleave\\_0.pdf](https://coronavirus.health.ny.gov/system/files/documents/2021/01/guidanceonuseofcovid-19sickleave_0.pdf)



## WHAT DOES EXEMPT MEAN?

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## WHY EXEMPT

- Employee not covered by federal or state wage and hour law
- Not overtime eligible
- Is Salaried Employee the same? Maybe



## MUST MEET SALARY REQUIREMENT

- Federal: \$684 per week/\$35,568 per year
- New York in 2021: \$937.50 per week/\$48,750 (higher for downstate and NYC)
- Cannot be reduced for quality or quantity of work
  - Limited exception for employer with bona fide sick leave program



## WHAT ABOUT PART-TIME?

**NO SUCH THING**



**NO SALARY = NO EXEMPTION**

## THE EXCEPTION FOR A BONA FIDE SICK LEAVE PROGRAM

- There are defined sick leave benefits.
- The benefits have been communicated to eligible employees.
- The plan operates as described.
- The plan is administered impartially.
- The plan's design does not reflect an effort to evade the requirements that exempt employees be paid on a salary basis.

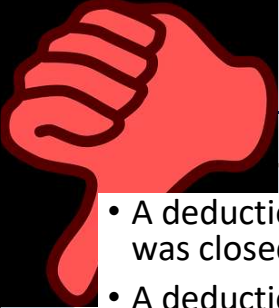




- “reasonable” number of absences on account of sickness—at least five days of paid sick leave
- Waiting period—up to one year (but not clear what happens during that first year)

## **WHEN CAN WE NOT PAY EXEMPT EMPLOYEES?**

- Performs NO work in a week (not even phone calls and emails) and the time off is for “personal reasons” other than sickness or disability
- Full day NO work performed and no accumulated PTO and not for sickness or disability
- Partial Day—any work performed, must pay full day or use accumulated PTO
- Full day Suspension for Major Policy Violation/Safety Rule
- FMLA




## IMPROPER DEDUCTIONS

- A deduction of a day's pay because the employer was closed due to inclement weather;
- A deduction of three days pay because the exempt employee was absent for jury duty;
- A deduction for a two-day absence due to a minor illness when the employer does not have a bona fide sick leave plan, policy or practice of providing wage replacement benefits; and
- A deduction for a partial day absence to attend a parent-teacher conference.

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## TYPES OF EXEMPTIONS

- EXECUTIVE
- ADMINISTRATIVE
- PROFESSIONAL
- COMPUTER PROFESSIONAL



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## EXECUTIVE EXEMPTION

1. [https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fs17b\\_executive.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fs17b_executive.pdf)
2. <https://www.labor.ny.gov/sites/legal/counsel/pdf/executive-employee-overtime-exemption-frequently-asked-questions.pdf>



- The Employee's primary duty consists of the management of the enterprise
- The Employee customarily and regularly directs the work of two or more other employees
- The Employee has the authority to hire or fire other employees
- The Employee's suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees have particular weight
- The Employee customarily and regularly exercises discretionary powers

## Primary Duty-Management

- What does the job description say?
- What do they do day-to-day?
- What is their major duty?
- Regularly supervise 2 or more full-time (or FTE) employees

## What Is Management?

- Interviewing, selecting, and training of employees;
- Setting and adjusting their rates of pay and hours of work;
- Directing the work of employees;
- Maintaining production or sales records for use in supervision or control;
- Appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status;



## MANAGEMENT CONT.

- Handling employee complaints and grievances;
- Disciplining employees;
- Planning the work;
- Determining the techniques to be used;
- Apportioning the work among the employees;



## MANAGEMENT CONT.

- determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold;
- controlling the flow and distribution of materials or merchandise and supplies;
- providing for the safety and security of the employees or the property;
- planning and controlling the budget; and
- monitoring or implementing legal compliance measures.

## CASE STUDY

- Store Manager—Worked over 90 hours per week; spent less than 10 hours per week on management tasks
  - Defendant paid \$8.3 million to settle misclassification lawsuit



## ADMINISTRATIVE EXEMPTION

[https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fs17c\\_administrative.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fs17c_administrative.pdf)

<https://www.labor.ny.gov/legal/counsel/pdf/administrative-employee-overtime-exemption-frequently-asked-questions.pdf>

## **ADMINISTRATIVELY EXEMPT**

- The Employee's primary duty consists of the performance of office or non-manual field work
- directly related to management policies or general operations
- The Employee customarily and regularly exercises discretion and independent judgment
- The Employee regularly and directly assists an employer, or an employee employed in a bona fide executive or administrative capacity or who performs under general supervision, work along specialized or technical lines requiring special training, experience or knowledge

## **DIRECTLY RELATED TO MANAGEMENT POLICIES OR GENERAL OPERATIONS**

- **taxes finance accounting**
- **budgeting auditing**
- **insurance**
- **quality control**
- **purchasing procurement**
- **advertising**
- **marketing**
- **research**
- **safety and health**
- **personnel management**
- **human resources**
- **employee benefits**
- **labor relations**
- **public relations**
- **government relations**
- **computer network**
- **Internet and database**
- **administration**
- **legal and regulatory compliance**

## MATTERS OF SIGNIFICANCE

- These are high level employees who make decisions that affect the organization
- These people can formulate or deviate from policy without permission
- These are people for whom how is more important than what



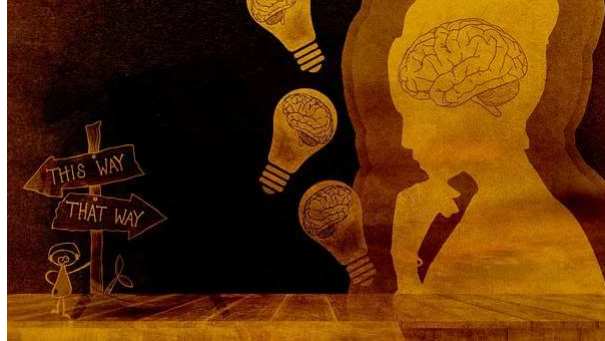
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## CASE STUDIES

- Mortgage Loan Processors—Not exempt because the business of the bank included making loans
- Medical Records Clerk—Not exempt because all decisions made in accordance with company policy



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## **INDEPENDENT DISCRETION AND JUDGMENT**

### **Independent Discretion and Judgment**

- The comparison and evaluation of possible courses of conduct
- Acting or making a decision after considering the possibilities
  
- Employee has authority to make an independent choice, free from immediate direction or supervision.
- NOT: Performed in accordance with set company policies
- NOT: Choosing from a list of acceptable alternatives or in accordance with policy set by someone else

## QUESTIONS TO CONSIDER

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- Does the employee formulate, affect, interpret, or implement policies or practices?
- Does the employee carry out major assignments in conducting the business?
- Does the employee's work affect business operations to a substantial degree?
- Can the employee commit the employer in matters that have significant financial impact?
- Does the employee have authority to waive or deviate from established policies and procedures without prior approval?



## COMMON PROBLEMS

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## PROBLEMS



- JOB CREEP
- Managers who do everything
  - Beware the Assistant Managers
  - Beware Tiered Categories for the same job
- The “bad” employee—are they doing the job?

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## HOW TO SURVIVE A DOL AUDIT

- Get an Attorney
- Job Descriptions In Order
- Paperwork Up to Date
  - Hiring, firing, reviews
  - Policy documents
- Interviews—Who? What will they say? Consider conducting exemption interviews on a rolling basis



## WE FOUND SOMETHING—NOW WHAT?

- Statute of Limitations in NY is 6 years, but claims can be released
- Federal SOL is 2 or 3 years—Cannot Be Released
- Reclassify and explain
  - Understand the psychology for some people that exempt is “better” than nonexempt
  - Be careful in reclassifying if it affects benefits

## QUESTIONS

