

# When Exempt Employees Don't Meet Performance Expectations

By **Shlomo Katz**

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At some point in the coming months, some employers may begin to suspect that some of their recent hires aren't going to live up to their promise. Maybe these employees are classified as exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act because they were hired to perform work that involves making recommendations about matters that are significant to the employer or because they were thought to be ready to work as professional lawyers, doctors or engineers, but they don't seem to be working on the level usually associated with such exempt positions. Should they be classified as nonexempt and paid overtime? Is there a minimum level of performance necessary to qualify for exemption? This article will examine that question.



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First, a caveat: Even bona fide exempt employees go through periods when their work is less glamorous than what they were hired to do; in fact, at times their work is downright mechanical, repetitive, recurrent or routine work, i.e., it is work typically performed by a nonexempt employee. That ordinarily will not affect an employee's exempt status because the [U.S. Department of Labor](#) has stated: "[T]he primary duty test does not expressly apply on a workweek basis and must be applied using a holistic approach that is sufficient to capture the character of the employee's job as a whole, rather than a day-by-day scrutiny of the tasks performed."<sup>[1]</sup>

Rather, what we are talking about here is an employee who simply does not meet expectations. To date, the Department of Labor and the federal courts do not seem to have dealt with this issue directly in the context of exemption determinations. However, the California Supreme Court has addressed the case of an outside salesman who wasn't meeting expectations; specifically, he did not attempt to sell to existing customers for fear of offending them.<sup>[2]</sup> Did his failure to do the job that was expected of an outside salesman mean that he was not exempt and therefore was entitled to overtime? The court said:

On the one hand, if hours worked on sales were determined through an employer's job description, then the employer could make an employee exempt from overtime laws solely by fashioning an idealized job description that had little basis in reality. On the other hand, an employee who is supposed to be engaged in sales activities during most of his working hours and [does not] due to his own substandard performance should not thereby be able to evade a valid exemption.

To resolve this tension, the California Supreme Court said:

A trial court, in determining whether the employee is an outside salesperson, must steer clear of these two pitfalls by inquiring into the realistic requirements of the job. In so doing, the court should consider, first and foremost, how the employee actually spends his or her time. But the trial court should also consider whether the employee's practice diverges from the employer's realistic expectations, whether there was any concrete expression of employer displeasure over an employee's substandard performance, and whether these expressions were themselves realistic given the actual overall requirements of the job.

Relying on that decision by the California Supreme Court, a New Jersey court applied a similar analysis in a case involving restaurant managers and the New Jersey state executive exemption.[3] The New Jersey court said:

The benefits of the Ramirez approach are particularly apparent in this case involving managers who schedule the hours of the non-exempt staff. On the one hand, there is a concern that the employer may provide an unreasonable labor budget which requires the managers to take on non-exempt work to succeed. On the other hand, there is a concern that the managers may schedule their staff time poorly, through inexperience, incompetence or design, thereby creating the necessity that justifies their own performance of non-exempt work and receipt of overtime pay. By considering both the realistic basis for the employer's job description and the employees' fulfillment of the employer's reasonable expectations, the Ramirez test measures percentage of exempt and non-exempt work by a standard that is not only more practical but also more meaningful than a moment-to-moment analysis.[4]

There are no similar cases applying the federal regulations. Nevertheless, if an employer wanted to argue that an underperforming exempt employee was nevertheless still exempt, the argument could go like this: The U.S. Department of Labor has stated that, in drafting its regulations, it resorted to a dictionary to define the word "primary," as in "primary duty." [5] (Remember, an employee's exempt status depends on his or her "primary duty.") Similarly, in interpreting the outside sales exemption, the [U.S. Supreme Court](#) looked to the dictionary for the meaning of multiple words used in the FLSA.[6] Therefore, it seems reasonable, as well, to look up the dictionary definition of the word "duty" in order to further understand what is required by the exemption tests for the executive, administrative, professional, computer and outside sales exemptions — all of which focus on the employee's "primary duty." Dictionary definitions of "duty" include the following: "obligatory tasks, conduct, service or functions" and "having the responsibility for certain assigned tasks or functions";[7] "A service, function, or task assigned to one" and "function or work; service." [8] And, consistent with these definitions, the California Supreme Court in Ramirez stated that "the federal exemption focuses on defining the employee's 'primary *function*'." [9]

If this analysis is correct, then an employer should be entitled to determine an employee's exempt status based on the duties that the employer reasonably assigns to the employee, not just based on the duties that the employee actually performs. Indeed, it could be argued that no other rule would be workable since the contrary rule would preclude any employer from making an exemption determination before the work was actually performed. And, as the California and New Jersey courts noted, it would allow the employee to earn overtime pay by underperforming, which makes no sense.

It follows that new employees may be classified as exempt based on the work they are expected to do, even if it takes them longer than anticipated to get up to speed. Of course, if the employee does not work out at all, there must be some time beyond which the employee cannot be maintained in the exempt category. (A final caution: Don't forget the related issues that may need to consider before taking any action against the employee; for example, whether the employee is entitled to any accommodations under the Americans with Disabilities Act. However, that would be unlikely to impact the FLSA exemption determination.)

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*This article is part of a [regular column](#) by Katz discussing regular challenges that employers face under the Fair Labor Standards Act.*

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[1] DOL Wage & Hour Division Field Operations Handbook §22a03.

[2] *Ramirez v. Yosemite Water Co.*, 978 P.2d 2 (Cal. 1999).

[3] *Marx v. [Friendly Ice Cream Corp.](#)*, 882 A.2d 374 (N.J. Super. Ct. 2005).

[4] *Id.* at 386.

[5] 69 Fed. Reg. at 22,185.

[6] *Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156 (2012).

[7] Webster's Third New International Dictionary, 705 (1981).

[8] American Heritage Dictionary 431 (1985).

[9] 978 P.2d at 9 (emphasis added).