

Employment & Immigration Law

Designing and Programming vs. Repairing

Troubleshooting the computer professional employee exemption under the FLSA

By Andrew M. Moskowitz

Under what circumstances are computer professionals entitled to time-and-a-half for hours worked in excess of 40 hours per week under federal law? The common perception is that such individuals are “exempt” employees not entitled to overtime pay. However, while those who design or modify computer programs, networks or systems are exempt, individuals who “troubleshoot” or repair software and systems problems or perform “help” desk services are usually not.

Under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. Section 201-219, employees may earn “time-and-a-half” for work performed in excess of 40 hours per week. 29 U.S.C. Section 207(a) (1). An employer who violates the FLSA’s overtime provisions is liable to the employee for the unpaid overtime compensation; “[an] additional equal amount as liquidated damages”; attorney’s fees and costs. 29 U.S.C. Section 216(b).

Individuals “employed in a bona fide executive, administrative, or professional capacity” are exempt from the FLSA and

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therefore do not qualify for overtime pay. 29 U.S.C. Section 213(a) (1). Because the FLSA is a remedial statute, its exemptions are to be construed narrowly. *Reich v. State of New York*, 3 F.3d 581, 586-87 (2d Cir. 1993), cert. denied, 510 U.S. 1163 (1994). Moreover, the employer has the burden of demonstrating that an employee “falls within the claimed exemption...” *Bobadilla v. MDRC*, 03 Civ. 9217, 2005 WL 2044938 at *19 (S.D.N.Y. Aug. 24, 2005) (citing *Bohn v. Park City Group, Inc.*, 94 F.3d 1457, 1461 (10th Cir. 1996)).

Many positions in the computer field are exempt from the FLSA. First, such positions may qualify for the administrative exemption. See 29 C.F.R. Section 541.200. Alternatively, computer systems analysts, programmers, software engineers or “other similarly skilled workers in the computer field” are considered “professionals” exempt from overtime pay. To qualify for this exemption, employees must earn at least \$455 per week (or \$27.63 per hour). In addition, their primary duty must consist of the following, either individually or in combination: (1) applying systems analysis techniques and procedures to determine hardware, software or system functional specifications; or (2) designing, developing, documenting, analyzing, testing or modifying computer systems,

programs or machine operating systems.

In *Bobadilla v. MDRC*, the district court held that a Network Administrator whose functions included network analysis, design, configuration and modification was an exempt employee. Although the plaintiff contended that “he never wrote computer programs, engineered software, or engaged in systems analysis,” the court noted that he made independent decisions concerning network design and modification.

In contrast, individuals whose primary tasks are troubleshooting, maintenance and repair typically do not qualify as computer professionals (similarly, individuals engaged in the manufacture or repair of computer hardware and related equipment are not exempt employees. 29 C.F.R. Section 541.401). For example, the Sixth Circuit held that an “IT Support Specialist” who assisted in “[m]aintaining the computer workstation software, troubleshooting and repairing, [and] network documentation” was nonexempt and therefore eligible for overtime pay. *Martin v. Indiana Michigan Power Co.*, 381 F.3d 574, 576, 583 (6th Cir. 2004). In reversing the lower court, the panel noted that the plaintiff was not a systems analyst, programmer or software engineer, and that it was insufficient that he may have

possessed a “highly-specialized knowledge of computers and software.” The court noted that “Martin d[id] not do computer programming or software engineering; nor d[id] he perform systems analysis, which involves making actual, analytical decisions about how Cook’s computer network should function.” Instead, “[his] tasks — installing and upgrading hardware and software on workstations, configuring desktops, checking cables, replacing parts, and troubleshooting Windows problems — [we]re all performed to predetermined specifications in the system design created by others.”

Similarly, in an October 2006 Opinion Letter, the U.S. Wage and Hour Division determined that an Information Technology (IT) Support Specialist was a nonexempt employee entitled to overtime pay. This employee’s responsibilities were described to be 55 percent troubleshooting

and resolving complex computer problems with limited supervision; 20 percent assisting users to identify needs and installing and testing new computers and applications; 10 percent designing and testing “business applications to client systems”; five percent analyzing needs and selecting vendors “for new technology required for expanding computing needs throughout organization”; five percent documenting “technical processes and troubleshooting guidelines . . . for the entire organization”; and five percent monitoring and responding to automated alerts. See also *Jackson v. McKesson Health Solutions L.L.C.*, Civ. No. 03-11177-DPW, 2004 WL 24543000, at *2, *10 n. 3 (D. Mass. Oct. 29, 2004) (noting in dicta that plaintiff, whose primary task was “troubleshooting computer problems which would come to him in the form of ‘trouble tickets,’” along with maintaining server hardware; diagnosing

hardware problems and replacing malfunctioning equipment, did not qualify for FLSA’s professional exemption).

As the above demonstrates, in determining who is a computer professional under the FLSA, the easier cases involve troubleshooters, “help” desk employees, and others who have defined, repetitive tasks. These individuals are not exempt from the FLSA. In turn, computer programmers and software engineers are exempt. The more difficult cases involve the line between the Network Administrator who designs and modifies systems and the “IT Support Specialist” who “troubleshoots” such problems.

One way for employers to limit their exposure is to create accurate and comprehensive job descriptions. As many employers have learned, the potential penalties for misclassifying employees make this additional effort time well spent. ■