Title & Pay Are Not Enough to Guarantee Exempt Status

August 2022

By: Brian Giardina

Porzio Employment Law Monthly

The Problem

A cycle of wage growth and declining unemployment has left employers competing for fewer new employees while striving to retain current ones. Recruiting and retention efforts typically include increasing pay, offering a bump in title, or both. However, now more than ever, employers must be careful when these efforts ostensibly place employees in overtime exempt positions. New case law clarifies that employers will pay the price if their drive to incentivize results in misclassification.

The Law

The Fair Labor Standards Act ("FLSA") and the New Jersey Wage and Hour Law ("NJWHL") have long established that nonexempt employees are entitled to overtime and other benefits. The FLSA specifically requires employers to pay nonexempt employees "time and one-half" for all hours worked over 40 hours per week. Exceptions to this rule are to be construed narrowly. *See Smith v. Johnson and Johnson,* 593 F.3d 280, 285 (3d Cir. 2010)(citing *Lawrence v. City of Philadelphia*, 527 F.3d 299, 310 (3d Cir. 2008)).

This summer, amidst the ongoing hiring scramble, the federal court gave refreshed scrutiny to the bestowal of new titles and pay increases that purport to convey overtime "exempt" status. In *Perez v. Express Scripts, Inc*. No. 19-cv-7752, 2022 WL 29810002 (D.N.J. July 28, 2022), Plaintiff Diane Perez worked as a Senior Program Communications Manager at Express Scripts. Like thousands of other Express Scripts employees, Plaintiff was given the title "manager" but had been designated internally as an "individual contributor," while other "managers" were designated internally as "people leaders". Plaintiff's job for Express Scripts mainly involved assembling letters to its clients alerting them to prescription drug related changes. This required her to use specific letter templates, adhere to a set timeline, and satisfy strict quality control requirements. Plaintiff had no input as to the mailings' contents. *Perez*, 2022 WL 29810002 at *2. Plaintiff earned an annual salary exceeding $100,000.

Express Scripts sought to automate Plaintiff's job, owing to its relative simplicity. In response, Plaintiff sued alleging, among other things, that Express Scripts had violated the FLSA and NJWHL by misclassifying her and other similarly situated employees as exempt managers, depriving them of overtime pay. Express Scripts sought summary judgement, arguing that the administrative and highly compensated employee exemptions applied to Plaintiff and her peers. Under the administrative exemption, an employee can be considered an administrative employee, acting in a *bona fide* administrative capacity, when paid $684 per week or more, her primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or employer's customers, and she primarily

exercises discretion and independent judgment regarding matters of significance. *See* 29 C.F.R. § 541.200. Additionally, a worker may be exempt as a highly compensated employee, if she earns more than $100,000 in total annual compensation, so long as the employee customarily and regularly performs one or more duties of an executive, administrative, or professional employee. *See* 29 C.F.R. § 541.601(a).

The District Court analyzed the tasks Plaintiff performed to determine whether the exemptions could apply. The court noted that Plaintiff performed the same type of work every day, had to follow standard operating procedures, and oversaw quality control. *Id.* at *6. The Court found that despite Plaintiff's responsibility for communication on project management and reporting tools, and her in-depth knowledge of the communications and brands she oversaw, she did not exercise discretion, nor did she have authority regarding management policies or operating practices. *See Id*. at *8. The Court held that Plaintiff's edits and suggestions to the letters she oversaw did not affect the business operations to a substantial degree. *Id*. Because Express Scripts could not demonstrate that Plaintiff exercised authority regarding management policies or operating practices, and because it was unclear if Plaintiff was responsible for the administrative responsibilities listed in 29 C.F.R. § 541.202(b), the Court concluded that Defendant had not shown that Plaintiff exercised discretion and independent judgment regarding matters of significance, as an exempt employee would have. *Id.* The Court thus denied Express Scripts' motion for summary judgment. *Id.*

The Take Aways

Notwithstanding the competitive climate, employers must be mindful of their incentive offers. Elevated pay and a title change do not an exempt employee make. Courts will continue to scrutinize an employee's specific responsibilities. As such, it is recommended that employers advise their Human Resource professionals to review their employee designations to determine whether managers earning over $100,000 "customarily and regularly perform" administrative, executive, or administrative duties to warrant their exempt status.