Are Full-Time Employees of Staffing Companies Exempt? It Depends

By Jennifer Carsen, J.D., Senior Legal Editor Dec 15, 2017 Employment Law, FLSA/Wages

A new 6th Circuit case sheds some light on whether full-time employees of staffing companies are considered exempt from overtime.

In *Perry v. Randstad Gen. Partner (US) LLC*, 2017 U.S. App. Lexis 23297 (6th Cir. Nov. 20, 2017), three full-time employees of Randstad claimed that a district court had erred in granting summary judgment to Randstad on the basis that they were covered by the administrative exemption.

Staffing Employees Worked Long Hours

All three plaintiffs worked in-house at the company's Troy, Michigan office, and all regularly put in 50+ hours of work each week. Their individual duties varied, but collectively included:

- Recruiting for positions, both temporary and permanent
- Interviewing and hiring talent
- Matching candidates to clients based on fit
- Attending networking events
- Conducting administrative tasks and completing paperwork for new hires
- Maintaining the relationship between Randstad and its clients via regular check-ins
- Monitoring placements and counseling workers as needed
- Cold-calling prospective clients and visiting both prospective and current clients in person
- Marketing tasks, including mailing out materials

Elements of the Administrative Exemption

An employee who falls under the administrative exemption, the 6th Circuit noted, is one:

- Who earns at least $455 per week;
- Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

In order to determine whether the employees exercised discretion and independent judgment "such that they were covered by the administrative exemption … we must decide whether their 'primary duty' was 'the performance of exempt work,'" the court said. This requires "a totality-of-the-circumstances analysis."

The court looked at two particular jobs performed at Randstad, Account Manager and Staffing Consultant.

Account Manager Analysis

The 6th Circuit agreed with the lower court that:

[M]atching candidates to clients based on fit—meaning subjective criteria such as the match between a candidate's personality and a client's corporate culture—as opposed to objective criteria such as years of experience or test scores, involves meaningful discretion and independent judgment. So, too, does independently drafting job descriptions, deciding which recruitment tools to use, negotiating how much to pay the worker and how much to bill the client (even without ultimate decision-making authority), and counseling workers and otherwise dealing with unsuccessful placements.

The next question was whether these exempt tasks constituted the employees' primary duties. The court noted that employees who spend more than 50% of their time performing exempt work will generally satisfy the primary duty requirement.

In this case, Randstad presented no evidence as to how much time the employees spent on exempt tasks—and many of the workers' tasks, such as handling payroll and processing workers' paperwork, were clearly nonexempt and "quite frequent and time consuming," the court said.

The court could not conclusively determine that the employees spent more than 50% of their time on exempt "matchmaking" tasks. However, the court noted that the matchmaking tasks were extremely important to the business and were the employees' "principal, main, major, or most important duty." Furthermore, the employees had flexibility and autonomy in how they went about their work—"'relative freedom from direct supervision'… which supports the conclusion that the administrative exemption applied."

Given all of these facts, the 6th Circuit agreed with the lower court that the plaintiffs' "primary duties as Account Managers involved the exercise of sufficient discretion and independent judgment such that the administrative exemption applied."

Staffing Consultant Analysis

"A Staffing Consultant's duties, like an Account Manager's, included a mix of exempt and non-exempt recruitment and placement tasks. Staffing Consultants had the same sort of matchmaking responsibilities as Account Managers, but generally with less independence and more supervision," the court said.

Additionally, one worker in this position testified that her most important duty as a Staffing Consultant was selling Randstad services, not matching candidates to clients. Her job involved "sending out marketing materials according to Randstad policies, making phone calls on a schedule set by the company, and knocking on doors in specific areas and on specific streets assigned by branch management. [The plaintiff] was free to use her own network and initiative to identify new prospects, but even then, those prospects had to fit criteria set by Randstad."

The court concluded that most of a Staffing Consultant's sales responsibilities involved "little more than 'use of skill in applying well-established techniques, procedures or specific standards' prescribed by Randstad." Staffing Consultants had little or no ability to deviate from established policies and procedures without prior approval, and there was no evidence that they worked on major assignments or performed work that affected Randstad's business operations to a substantial degree. Accordingly, the court concluded that Staffing Consultants' sales activities were nonexempt.

While it was not clear how much time the Staffing Consultants spent on exempt matchmaking tasks, it appeared that at least 5 hours a day and possibly more were spent on the nonexempt sales activities. Additionally, unlike the Account Manager position, here the facts did not support a finding that the exempt activities actually constituted the "primary duty" of the Staffing Consultants' work.

Because a finder of fact could reasonably conclude that the Staffing Consultants were non-exempt, the 6th Circuit ruled that the lower court had erred in granting summary judgment to Randstad on the grounds that the Staffing Consultants fell under the administrative exemption.

Randstad's Reliance on WHD Letter Was Not in 'Good Faith'

The court also rejected Randstad's argument that it was protected by its good-faith reliance upon a 2005 Wage and Hour Division (WHD) Letter in determining that both positions fell under the administrative exemption. The court noted, "[t]he Portal-to-Portal Act of 1947 'protect[s] employers from liability if they took certain actions on the basis of an interpretation of the law by a government agency, even if the agency's interpretation later turned out to be wrong.'"

While it was undisputed that Randstad had relied on the letter, the "good faith" element was lacking because the facts of the letter differed in important ways from Randstad's particular situation.

The employees in the letter, for example, had full authority to discipline, fire, promote, and assign employees, while Randstad's employees were merely involved in these decisions. This meant that Randstad arguably should have known to make additional inquiries rather than merely relying on the letter: "At minimum, then, there is a factual question whether Randstad reasonably relied on the 2005 WHD Letter to classify Plaintiffs as FLSA-exempt without conducting a review of their individual duties, or at least a review of the duties of employees in the Troy, Michigan office or the relevant region."

Takeaways for Employers

The 6th Circuit noted that this was a case of first impression: "We have not [previously] addressed the question whether staffing company employees such as Plaintiffs fall within the administrative exemption. Nor, as best we can tell, has any other federal Court of Appeals."

It's important to note that this sort of analysis is incredibly fact-specific and subject to multiple interpretations; there was not even a clear consensus among the three 6th Circuit judges who heard the case. Two of the three concurred in part and dissented in part (one disagreed that the matchmaking duties were exempt; the other disagreed that the sales duties were nonexempt).

In general, the more important to your business an employee's work is, and the more discretion and autonomy he or she has in performing it, the more likely it is that the work will be considered exempt from overtime—the relative amount of time an employee spends on exempt vs. nonexempt tasks comes into play, too.

Although the 6th Circuit ruled differently in this case, it is difficult to argue that an employee's "primary" duty is one the employee spends less than half of his or her time on. (This also begs the question: If the so-called primary duty is so important to the employer's business, why on earth is the employee not spending more time on it?)

The case also serves as an important reminder to review questions of exemption on an individual basis. Employers should never rely on previously published opinion letters as conclusive evidence of exemption status unless they are precisely parallel to the current situation—and maybe not even then. Consultation with counsel is always a good idea in these cases and can save hassle and money in the long run.

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