

independent judgment; regularly and directly assist another exempt employee or perform work along specialized or technical lines requiring special training, experience or knowledge under only general supervision or perform special assignments and tasks under only general supervision; and devote no more than 20 percent (or as much as 40 percent in retail or service establishments) of work hours in a week to activities that are not directly and closely related to the performance of exempt work. The short test requires that the employee have a primary duty of performing office or non-manual work directly related to management policies or general business operations, which must include work requiring the exercise of discretion and independent judgment. Under both tests, when considering whether an employee's work is "directly related to management policies or general business operations" the regulations and the courts assess whether the work is "related to the administrative operations of the business as distinguished from production"—known as the "production versus staff dichotomy"—and whether the work is "of substantial importance to the management or operation of the business."

The current duties test for administrative employees is the most difficult to apply of all the duties tests. The requirement that the employee exercise "discretion and independent judgment," for instance, has generated significant confusion and litigation, as noted in the GAO report discussed above. This rule has been interpreted to deny the exemption to an employee who follows a procedures manual, even though most employees in the modern workplace are required to operate within standard procedures. The "production versus staff dichotomy" also is difficult to apply uniformly in the 21st century workplace.

The proposed regulations at § 541.200 would retain the requirement that an exempt administrative employee have a "primary duty" of "performing office or non-manual work related to the management or general business operations of the employer or the employer's customers," but replace the "discretion and independent judgment" requirement with a new requirement that the employee hold "a position of responsibility" with the employer.

The primary duty requirement of "performing office or non-manual work related to the management or general business operations" is defined in a new § 541.201. New § 541.201 clarifies that this requirement refers to the type of work performed by the employee and

includes an illustrative list of the types of work areas that meet this requirement: tax, finance, accounting, auditing, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations and similar activities. The Department invites comments on any other areas that should be included in this list and on any areas that should be deleted. Like the proposed changes to the executive exemption, the proposed administrative exemption focuses on "primary duty" and eliminates the percentage restrictions on non-exempt work currently required by the now-inoperative long duties test, for the same reasons discussed above under the executive exemption.

The proposed rule would also reduce the emphasis on the so-called "production versus staff" dichotomy in distinguishing between exempt and non-exempt workers, while retaining the concept that an exempt administrative employee must be engaged in work related to the management or general business operations of the employer or of the employer's customers. These changes are needed to reflect emerging case law in this area. For example, the court in *Piscione v. Ernst & Young*, 171 F.3d 527 (7th Cir. 1999), examined whether an employee's duties were directly related to Ernst & Young's management policies or general business operations or those of the firm's clients. The employee worked as a consultant in the firm's Human Resources Consulting Group on several multi-million dollar defined benefit plans and defined contribution plans in which thousands of individuals participated. The employee's work involved benefits calculations, actuarial valuations, government filings, compliance testing, and client advice. The court stated that this work influenced the internal business operations and policies of Ernst & Young's clients with regard to their benefit plans. The employee was the primary contact for several clients; the employee identified problems with their plans and suggested solutions, and the employee offered suggestions to clients regarding how to improve their efficiency. The court rejected the argument that, because the employee provided clients with reports and government forms to file, the work was production work. Rather, the employee was an advisory specialist or consultant whose work was exempt. In addition, the court found that the employee

contributed to the management policies of Ernst & Young because the employee played a major role in developing new methods for improving client services and the timeliness of firm operations.

The proposed § 541.200 also contains a second requirement for the administrative exemption relating to the importance of the work performed or the high level of competence required by the work performed—a requirement that an exempt employee must hold a "position of responsibility." The term "position of responsibility" is defined in the proposed regulations at new § 541.202. To meet this new "position of responsibility" requirement, an employee must either (1) perform work of substantial importance, or (2) employ a high level of skill or training. The concept of "work of substantial importance" has been in the interpretive regulations since 1950, as a factor for determining whether a worker is an exempt administrative employee. The proposed regulations at new § 541.204 define this phrase based on language in the current regulations and include a revised list illustrating the types of activities that are generally considered of "substantial importance" for purposes of the exemption including: Formulating or interpreting management policies; providing consultation and expert advice to management; making or recommending decisions that have a substantial impact on business operations or finances; analyzing and recommending changes to operating practices; planning long or short-term business objectives; analyzing data, drawing conclusions and recommending changes; and handling complaints, arbitrating disputes or resolving grievances. The Department invites comments on any additional activities that should be included in this list and on any activities that should be deleted. The second alternative for meeting the "position of responsibility" requirement, "work requiring a high level of skill or training," defined in the proposed regulations at new § 541.205, would ensure that the administrative exemption is not denied to a highly trained and skilled employee who performs administrative functions merely because the employee uses a procedures manual, so long as the manual contains information that can only be interpreted properly by someone with a high level of specialized skills or training, as opposed to a manual in which the employee simply looks up the correct answer for a particular set of circumstances. As reflected in the GAO report noted above,