

**In This Issue:**

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The administrative exemption is one of the most frequently litigated wage and hour issues, and two recent court cases in California and Maryland examine the administrative exemption as it applies to staffing firm recruiters.

## **Are Your Recruiters Exempt or Non-Exempt? Recent Court Cases Scrutinize Staffing Industry Classification Practices**

**By Suellen Oswald and Reagan Wilkins Oden**

Recently, a California appeals court sent shockwaves through the staffing industry when it ruled in *Pellegrino v. Robert Half International, Inc.*, No. G039985,<sup>1</sup> that staffing firm recruiters are not overtime-exempt administrative employees under California law. Since many staffing firms classify their recruiters as exempt administrative employees, there was concern that this decision could have a sweeping effect on staffing industry overtime classification practices. Soon after *Pellegrino*, a federal district court in Maryland decided *Andrade v. Aerotek, Inc.*, No. CCB-08-2668,<sup>2</sup> another case in which a staffing firm recruiter challenged her classification as administratively exempt from the requirement to pay overtime. The *Aerotek* court held the complete opposite of the California appeals court in *Pellegrino*, and found that the recruiter was an exempt administrative employee under the Fair Labor Standards Act, and thus not entitled to overtime.

Read together with *Aerotek*, *Pellegrino* does not suggest the need for any wholesale, industry-wide change in staffing firm classification practices as was initially feared. Rather, these cases serve to remind staffing firm industry employers of the parameters of the exemption, and to illustrate its application to two very different types of staffing firm recruiters – those who exercise high-level human resources and management functions, and others who do not.

### ***Pellegrino v. Robert Half International, Inc.***

This case was brought by a group of Account Executives against Robert Half International (RHI) alleging that the company failed to comply with provisions of California law pertaining to overtime compensation, commissions, meal periods, itemized wage statements and unfair competition.

For its primary defense, RHI argued that the plaintiffs' claims were barred because most of them had signed employment agreements containing a clause that shortened the limitations period applicable to their claims to six months. RHI also argued that the plaintiffs were exempt from wage and hour laws based on California's administrative

exemption. The trial court disagreed and determined that the limitations provision contained in the employment agreements violated public policy and was thus unenforceable. Thereafter, the trial court found that the plaintiffs did not qualify for the exemption. The appeals court affirmed the trial court opinion in its entirety.

#### Plaintiffs' Job Duties

The duties and responsibilities of RHI Account Executives involved recruiting, interviewing, and evaluating candidates to be placed as temporary employees. Additionally, Account Executives were responsible for selecting and placing candidates on job orders, assisting clients with business needs, and developing new business.

In performing these functions, Account Executives were expected to follow the "recipe" established by RHI's corporate headquarters. This "recipe" required Account Executives to operate on a three-week rotation broken down into a "sales week," followed by a "desk week," and then a "recruiting week." During sales week, Account Executives were expected to make 125 telephone calls to clients, conduct 15 client visits, and participate in networking events. During desk week, Account Executives were required to handle incoming phone calls and take job orders from clients. During recruiting week, Account Executives were expected to interview 15 to 25 potential candidates to determine whether they should be added to RHI's "inventory" of potential placements.

Account Executives did not set policy for RHI, but were expected to operate within the guidelines established for them. They did not supervise candidates in their performance of services for RHI clients, nor did they make staffing recommendations to clients.

#### California's Five-Part Administrative Exemption Test

The court noted that California law requires employers relying on the administrative exemption to demonstrate that the employee:

1. performs "office or non-manual work directly related to management policies or general business operations" of the employer or its customers;
2. customarily and regularly exercises discretion and independent judgment;
3. performs under only general supervision work along specialized or technical lines requiring special training, or executes under only general supervision special assignments and tasks;
4. engages in the activities meeting the test for the exemption at least 50 percent of the time; and
5. earns twice the state's minimum wage.

#### Application of the Five-Part Test

The appeals court concluded that "substantial evidence" did not support that the "office or non-manual work" performed by plaintiffs was "directly related to the management policies or general business operations" of RHI or its clients. Following the Department of Labor's interpretation of the federal administrative exemption, the court determined that the plaintiffs' duties as Account Executives constituted "sales work" rather than work directly related to management policies. The court noted that the plaintiffs were primarily responsible for selling the services of RHI's temporary employees to its clients, and that they were trained in sales and evaluated on their ability to meet sales targets. Also significant was that Account Executives played no role in supervising the temporary employees after they were placed with clients, and that they were required to follow RHI's "recipe" in carrying out their sales duties.

The court noted that its decision was consistent with an opinion letter issued by the California Department of Industrial Relations. The opinion letter considered whether recruiters who worked at a recruiting company qualified for the administrative exemption. The letter concluded that the recruiters were not exempt because, as recruiters, they were involved in the "core function" of the recruiting company's business – to provide services, in the form of temporary workers, to clients. In addition, the recruiting positions were considered "entry level" and their primary function was to locate temporary workers, gather information about potential temporary workers, and input the information into a computer database, and occasionally meet temporary workers at client sites to confirm attendance and deliver paychecks.

## ***Andrade v. Aerotek, Inc.***

In the Maryland case, a former Aerotek employee sued the company under the federal Fair Labor Standards Act (FLSA), alleging she was improperly classified as administratively exempt during her employment. The plaintiff worked in two positions during her employment with Aerotek – as a Recruiter and as an Account Recruiting Manager.

### Plaintiff's Job Duties

As a Recruiter, the plaintiff's primary duty was to locate and place financial services contractors with Aerotek's financial services clients. To carry out this duty, the plaintiff developed her own methods to identify potential contractors and maintain a "pipeline" of prospective hires, and also conducted screenings and interviews of candidates. As part of her screenings, the plaintiff met with managers at the client companies to determine whether the candidates would be a "good fit" for the position she was considering, and also contacted their references to verify employment history and work performance.

The plaintiff did not make hiring recommendations directly to client companies. Instead, she sent the resumes of those candidates she believed to be most qualified for the positions under consideration to Account Managers within Aerotek. Approximately 75% of the candidates the plaintiff forwarded to the Account Managers were ultimately presented to client hiring managers for their consideration.

In addition to finding, screening, interviewing, and recommending candidates, the plaintiff also negotiated their pay within a pre-determined range, and negotiated their vacation and holiday allotments. The plaintiff also prepared candidates for their interviews with client companies, and managed hired contractors while on assignments, including monitoring their performance, coaching, and disciplining them.

The plaintiff's job as a recruiter also included a sales component. Thus, she was required to meet periodically with business managers at the client companies to obtain referrals and develop industry contacts.

As an Account Recruiting Manager, the plaintiff's sales duties increased. She became responsible for generating more business and was also required to have a number of weekly meetings with client managers. The plaintiff's recruiting duties also continued, and she also began mentoring junior recruiters.

### The Three-Part Administrative Exemption Test

Applying the three-part test for the administrative exemption set forth in regulations adopted by the Department of Labor ("DOL"),<sup>3</sup> the court noted that the exemption only applies when:

1. an employee is compensated on a salary or fee basis of at least \$455 per week;
2. an employee's 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
3. the employee's primary duty "includes the exercise of discretion and independent judgment with respect to matters of significance."

At issue in the case were the second and third elements of the test – whether the plaintiff's work was directly related to the management or general business operations of Aerotek or its customers, and whether she exercised discretion and independent judgment on matters of significance.

### Work Directly Related to Management or Business Operations

Examining the plaintiff's duties, the court held that her work in both positions satisfied the test. With regard to the requirement to perform "work directly related to management or business operations," the court first noted the DOL's interpretation and its October 2005 opinion letter indicating that such work includes "personnel management" and "human resources." The court also noted the findings of other

courts that employees engaged in recruiting or staffing functions perform work that is “directly related to the management or business operations” of their employers or their employers’ clients.

According to the court, the plaintiff engaged in “human resources” and “personnel management” functions when she interviewed candidates, negotiated pay and benefits, and helped manage the contractors after their hire. Additionally, the court found that the plaintiff played a significant role in projecting Aerotek’s “public face” in her meetings and communications with its clients, thus meeting the second element of the test.

### Work Requiring Discretion and Independent Judgment in Matters of Significance

Discussing the third element of the test, work that requires “discretion and independent judgment with respect to matters of significance,” the court reviewed the DOL’s interpretive guidance. Specifically, the court noted that the regulations explain that discretion and independent judgment involves the comparison and evaluation of possible courses of action, and acting or making a decision after the possibilities have been evaluated. The court further noted that the phrase “matters of significance” requires consideration of factors such as whether the employee carries out “major assignments” in the business, or whether the employee performs work that affects business operations “to a substantial degree.”

Applying the guidance to the plaintiff’s duties, the court found that her work required the exercise of discretion and independent judgment in matters of significance. First, the court noted that the plaintiff developed her own recruiting strategies, compared candidates’ skills to the applicable job descriptions, interviewed candidates, and determined whether they were a good fit for the position based on her knowledge of each client’s personality. Second, the court found it significant that the plaintiff negotiated overall pay and certain benefits for the candidates, and managed them in their work on-site. Third, the court found that the plaintiff’s sales duties demonstrated her use of discretion and judgment in significant matters because those responsibilities required her to build business relationships for the company.

Notably, the court expressly rejected the argument that the plaintiff did not exercise sufficient discretion and independence simply because her staffing recommendations were subject to review by the Account Managers, or because she negotiated pay within pre-determined ranges. The court also rejected plaintiff’s argument that she was engaged in “production work,” and thus did not qualify for the exemption. In holding that the administrative/production dichotomy did not apply, the court held that the services of the contractors supplied by Aerotek are the product of its business, not the contractors themselves.

## Conclusion

While the *Pellegrino* and *Andrade* opinions expressed different views about the application of the administrative/production dichotomy, the reason for the divergent outcomes lies primarily in the distinct differences in the duties performed by the plaintiffs. The plaintiffs in *Pellegrino* exercised very little discretion, performing their recruiting function within the “recipe” established by corporate officials, and did not perform higher-level administrative functions, such as supervising other employees or making staffing recommendations to clients. The *Andrade* plaintiff, on the other hand, developed her own recruiting procedures, made staffing recommendations, negotiated pay and benefits for placements, and supervised them.

The administrative exemption is one of the most frequently litigated wage and hour issues. And, given the trend toward increased use of temporary and other contingent workers, the staffing industry can expect increased scrutiny of its classification and other employment practices. Following are several strategies that staffing firms can use to aid legal compliance in this area:

- Training and Education. Train managers on wage and hour compliance. Make sure that they understand the legal basis for any exemption, and how it applies to the jobs under their supervision.
- Internal Audits. Make sure employees are properly classified. Determine the legal standards applicable to classification decisions in the appropriate jurisdiction(s), and analyze employee duties in light of those standards to assess whether the exemption applies. Consider seeking assistance from legal counsel to determine whether the exemption applies.

- Manage Reclassification. If your audit reveals that some positions are improperly classified, make sure that the reclassification process is properly managed. Explain to affected employees (preferably in writing) the reasons for the company’s reclassification decision, and make clear that, going forward, the employees will receive the applicable hourly rate of pay for all hours worked and overtime as appropriate. Consider settling any claims for back wages pursuant to a valid and enforceable release agreement. Reclassification presents a variety of challenges, so seek the assistance of experienced legal counsel.
- Monitor Working Time. For non-exempt employees, develop, circulate, and require written acknowledgment of policies requiring employees to report all hours worked and explaining that all such hours will be compensated at the applicable pay rate (including overtime as required). Implement a system to monitor employee working time, and ensure compliance with other wage law requirements, such as recordkeeping and mandatory meal/rest breaks.
- Wage Complaints. Develop a procedure to respond to and resolve wage-related complaints, and treat those issues seriously. Train managers to avoid retaliation against employees who make complaints regarding wage issues.

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<sup>1</sup> 104 Cal. Rptr. 3d 790 (Cal. App. 4th Dist. 2010). *Pellegrino* is currently on appeal to the California Supreme Court.

<sup>2</sup> 2010 U.S. Dist. LEXIS 30765 (D. Md. Mar. 30, 2010).

<sup>3</sup> 29 C.F.R. § 541.200(a).