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buyer who pays in cash or whose check or note is paid before repossession by allowing a tardy buyer to escape liability, and it would conform with the intention of the parties that the amount of a check or note given as cash down payment would be paid. In the final analysis, the seller and buyer would be neither better nor worse off than they would have been if cash had been paid in the place of the check or note.

ROY W. DAVIS, JR.

Labor Law—Fair Labor Standards Act—Nonexempt Work Tolerance for Executives

A great many decisions determining whether, under the Fair Labor Standards Act, a particular employee is a "bona fide executive," have turned on the sections of the regulations issued by the Administrator of the Wage and Hour Division of the Department of Labor relating to nonexempt work tolerance. One writer has estimated that at least half of the overtime violations of the Act emanate from misinterpretations of the executive exemption.¹ The various administrative regulations dealing with this exemption have therefore been chosen for comment in this note.

Section 13 (a) (1) of the Fair Labor Standards Act exempts from the provisions of Section 6 (minimum wage) and Section 7 (maximum hours) of the Act, any employee who is employed in a bona fide executive capacity, as such term is defined and delimited by the regulations of the Administrator.² The reason for this exemption is that a bona fide executive is not ordinarily in the group that requires the protection of the Act.³

It is to be noted at the outset that the Administrator's definition of a "bona fide executive" is given Congressional sanction and is controlling in determining who shall be exempt from the Act.⁴ The North Carolina Supreme Court, in applying the Administrator's definition, has said: "Valid definitions within the delegated power speak with authority and become the dictionary of the law."⁵

Since 1938, when the Fair Labor Standards Act became effective, the Administrator has acted three times to define the term "bona fide

¹ Bookstaber, *Exemption of the "Boss Man" Under Section 13 (a) (1) of the Fair Labor Standards Act*, 69 N. J. L. J. 81 (1946). It is to be noted that since all of the requirements of the definition must be met and since Section (f) of the present definition requires that the employee be compensated on a salary basis at a rate of not less than \$55 per week, except in Puerto Rico or the Virgin Islands where the minimum salary is \$30, there are few cases where the general minimum wage requirements of the act have been involved; most of the cases involve compensation for overtime.

² 52 STAT. 1067 (1938), 29 U. S. C. § 213 (1952). The Act's original provision has remained unchanged since 1938.

³ Bookstaber, *supra* note 1.

⁴ *Zaetz v. General Instrument Corp.*, 21 N. J. Misc. 76, 30 A. 2d 504 (1943).

⁵ *Pye v. Atlantic Co.*, 223 N. C. 92, 96, 25 S. E. 2d 401, 404 (1943).

executive capacity." In each of these definitions there has been some limit placed on the amount of nonexempt work which may be performed by an executive employee without losing his exemption. In the definition which went into effect simultaneously with the Act itself, the term "employee employed in a bona fide executive capacity" was defined in relation to nonexempt work tolerance as "one who does no substantial amount of work of the same nature as that performed by nonexempt employees of the employer."⁶ While this original "white-collar" regulation defined both executive and administrative employees together, both the later regulations contain a separate definition for exempt administrative and executive employees.⁷

Section (f) of the Administrator's definition of an executive employee, which was in effect from 1940 to 1950, relating to nonexempt work, required that the employee's work of the same nature as that performed by nonexempt employees not exceed 20 per cent of the number of hours worked in any workweek by nonexempt employees under his direction, except where the employee was in sole charge of an independent establishment or a physically separated branch establishment.⁸ During this same period there was no similar 20 per cent limitation in the Administrator's definition of an "administrative employee." Since there was no similar requirement at least one court held a factory superintendent to be exempt as an administrative employee even though the time he spent on nonexempt activities exceeded 20 per cent of the workweek of the nonexempt employees under his direction, on the ground that the nonexempt activities were not wholly without relation to his primary responsibility.⁹ This ruling illustrates the distinction which still exists between executive and administrative employees.

The present definition of "bona fide executive," which became effective on January 25, 1950, lists six requirements which must be met before the employee is exempt from the coverage of the Act.¹⁰ If an

⁶ *George Lawley & Sons Corp. v. South*, 140 F. 2d 439 (1st Cir. 1944), *cert. denied*, 322 U. S. 746 (1944); *Roberts v. John Sperry Co.*, 7 W. H. Cases (BNA) 349 (D. Mass. 1947).

⁷ WAGE AND HOUR MANUAL (BNA) 20:615 (1948).

⁸ 29 CODE FED. REGS. § 541.1 (Cum. Supp. 1949).

⁹ *Sparks v. Pedersen*, 9 W. H. Cases (BNA) 156 (D. Conn. 1949).

¹⁰ "The term 'employee employed in a bona fide executive . . . capacity' in section 13 (a) (1) of the act shall mean any employee—

(a) whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; *and*

(b) who customarily and regularly directs the work of two or more other employees therein; *and*

(c) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; *and*

(d) who customarily and regularly exercises discretionary powers; *and*

(e) who does not devote more than 20 per cent of his hours worked in the

employee fails to meet any one of the requirements, he is not exempt.¹¹

Section (e) of the present regulations takes the place of Section (f) of the regulations in effect until 1950 and requires that the employee shall not devote more than 20 per cent of his hours worked in the workweek to activities which are not directly and closely related to the performance of his managerial functions.¹²

As has been noted, prior to 1940 the definition of a "bona fide executive" used the words "substantial amount" in referring to the quantity of nonexempt work which the executive might perform without loss of his exemption.¹³ Much criticism was directed to the vagueness and ambiguity of this wording.¹⁴ The Stein Report, which was later adopted as the official explanation of the new definitions in 1940,¹⁵ suggested that instead of deletion, an arithmetic equivalent be substituted.¹⁶ The result was the old Section (f) requirement that an employee not spend more than 20 per cent of the time spent by his subordinates doing non-exempt work. These requirements were obviously inserted to prevent merely nominal classification of employees for the purpose of evading the coverage of the act.¹⁷ A typical and unsuccessful attempt at evasion was an employer's affixation of the label "building superintendent" to an employee whose duties would generally be performed by a janitor and who exercised only slight supervision over other employees.¹⁸

Under old Section (f) it was possible for an employee to spend more than 20 per cent of his own time in nonexempt activities, at purely physical tasks of the same general nature as those of the employees working under him, and still be exempt as an executive. The Stein Report said that the base upon which the percentage was to be taken was not the workweek of the employee himself, since on that basis he could obtain exemption merely by increasing his hours of exempt work.¹⁹ Two

workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: *Provided*, That this paragraph (e) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20 per cent interest in the enterprise in which he is employed; *and*

(f) who is compensated for his services on a salary basis at a rate of not less than \$55 per week (or \$30 per week if employed in Puerto Rico or the Virgin Islands) exclusive of board, lodging, or other facilities. . . ." 29 CODE FED. REGS. § 541.1 (Cum. Supp. 1953).

¹¹ 29 CODE FED. REGS. § 541.99 (c) (Cum. Supp. 1953); *Fanelli v. United States Gypsum Co.*, 141 F. 2d 216 (2d Cir. 1944); *Rankin v. Jonathan Logan, Inc.*, 98 F. Supp. 1 (D. N. J. 1951); *Kreeft v. R. W. Bates-Price Dye Works, Inc.*, 63 F. Supp. 881 (S. D. N. Y. 1945).

¹² 29 CODE FED. REGS. § 541.1 (Cum. Supp. 1953).

¹³ 29 CODE FED. REGS. § 541.1 (Supp. 1938).

¹⁴ WAGE AND HOUR MANUAL (BNA) 20:93 (1948).

¹⁵ WAGE AND HOUR MANUAL (BNA) 20:83 (1948).

¹⁶ WAGE AND HOUR MANUAL (BNA) 20:93 (1948).

¹⁷ *Jones v. Bethlehem-Fairfield Shipyard*, 75 F. Supp. 86 (D. Md. 1947).

¹⁸ *Schmidt v. Emigrant Indus. Sav. Bank*, 148 F. 2d 294 (2d Cir. 1945).

¹⁹ WAGE AND HOUR MANUAL (BNA) 20:94 (1948).

cases show the problems that arose from this point of view. In *Walling v. Morris*,²⁰ the United States Supreme Court said that if the suit had been brought by the employee to collect for overtime rather than by the Administrator to enjoin violation of the Act, the employee would not be exempt in the absence of a showing in the record of the extent to which the laborers under his direction devoted themselves to the type of work performed by the employee in question. In this case, the record did show that the employee devoted 25 per cent of his own time to nonexempt activities. In *Grant v. Bergdorf and Goodman Company*,²¹ it was held that the trial court erred in instructing the jury that the nonexempt hours were to be measured by a percentage of the particular employee's workweek rather than by the workweek of those under his direction.

Another holding under old Section (f) was that the nature of the work, and not necessarily performance of the same type work as the subordinates, controlled in determining exemption. Thus the work of editors of a newspaper, although not of the same type as that of the reporters under their supervision, in that it consisted mainly of copy-reading, was of a general nonexempt nature and therefore the editors were not exempt.²²

It is to be remembered that the present regulations require that the employee shall not devote more than 20 per cent of his own hours worked in a workweek to nonexempt activities. It is also to be remembered that exemptions from the coverage of the Act are to be strictly interpreted,²³ and that the employer seeking to avoid payment of overtime has the burden of proving that the employee is exempt.²⁴ This burden must be met by establishing the exemption by a clear preponderance of the evidence.²⁵ Of course, the burden of establishing the existence and extent of overtime is on the employee.²⁶

The real problem is in determining whether particular work of the employee is exempt. As one court expressed it, the application is "troublesome because actual experience teaches that the effective, thorough, conscientious executive or administrator frequently lends his own hands, in addition to the words of advice . . . , as he teaches and instructs those for whose work he is responsible, and whose work he desires to press to a speedy and accurate conclusion."²⁷ Granting that this is an

²⁰ 332 U. S. 422 (1947).

²¹ 172 F. 2d 109 (2d Cir. 1949).

²² *American Newspaper Guild v. Republican Publishing Co.*, 271 App. Div. 1026, 68 N. Y. S. 2d 906 (2d Dep't 1947).

²³ *A. H. Phillips, Inc., v. Walling*, 324 U. S. 490 (1945).

²⁴ *Woods Lumber Co. v. Tobin*, 199 F. 2d 455 (6th Cir. 1952); *Richter v. Barrett*, 173 F. 2d 320 (3d Cir. 1949); *Abram v. San Joaquin Cotton Oil Co.*, 49 F. Supp. 393 (S. D. Cal. 1943). *Contra*: *Zaetz v. General Instrument Corp.*, 21 N. J. Misc. 76, 30 A. 2d 504 (1943).

²⁵ *Walling v. Newman*, 61 F. Supp. 971 (D. Iowa 1945).

²⁶ *Rankin v. Jonathan Logan, Inc.*, 98 F. Supp. 1 (D. N. J. 1951).

²⁷ *Marian v. Lockheed Aircraft Corp.*, 65 F. Supp. 18, 19 (N. D. Tex. 1946).

accurate statement of the general situation, the courts are nevertheless in disagreement as to whether the exemption should be whittled away where the executive employee steps in to help. Another court noted, "It is an American characteristic of the relationship of executive and those under him that the foreman might 'pitch in' almost any time to help. He would be the exception if he didn't."²⁸ The court then held such an employee to be an executive. However, still another court said of an employee that "he is a good employee and pitches in and helps whenever and wherever he is needed. The Administrator in adopting his regulations intended to make an employee of this class subject to the Act."²⁹

At any rate, the regulations and cases have established as exempt work certain types of manual work performed by executives. The present regulations, in addition to exempting manual work which is directly and closely related to the executive's managerial function,³⁰ specify two situations in which normally nonexempt work will be considered exempt because of its over-all relation to the executive duties of the employee: (1) work done because of the existence of a real emergency,³¹ and (2) infrequent or occasional tasks performed as a means of properly carrying out management functions.³² These regulations follow closely the rules set out by the Kentucky court in the leading case, *Mafizola v. Hardy-Burlingham Mining Company*.³³

In that case, the employee claimed certain time was nonexempt. In this was included time he spent checking his men in and out of the mine and getting together supplies such as time and report books, first aid equipment, and safety devices. The court said it was apparent that those duties were such as are performed by an executive employee and are not manual labor or nonexempt work. The court further held that the "executive's" teaching of first aid to his men was exempt work. More important for our purposes, perhaps, was the court's holding that time spent by the employee acting as a watchman during a strike was exempt. The court said that "ordinarily a watchman's job is nonexempt work, yet when a strike is in progress and a foreman undertakes a watchman's duties, he is performing such services in an executive capacity. In such circumstances, it is only an executive employee who is not a member of the union on strike who can be depended on to perform such duties."³⁴

²⁸ *Clougherty v. James Vernon Co.*, 74 F. Supp. 364, 369 (E. D. Mich. 1947).

²⁹ *Walling v. Jacksonville Paper Co.*, 69 F. Supp. 599, 606 (S. D. Fla. 1947), *rev'd on other grounds*, 336 U. S. 187 (1949).

³⁰ 29 CODE FED. REGS. § 541.108 (Cum. Supp. 1953).

³¹ 29 CODE FED. REGS. § 541.109 (Cum. Supp. 1953).

³² 29 CODE FED. REGS. § 541.110 (Cum. Supp. 1953).

³³ 306 Ky. 492, 207 S. W. 2d 769 (1947).

³⁴ *Id.* at 497, 207 S. W. 2d at 771; *accord*, *McReynolds v. Pocahontas*, 192 F. 2d 301 (4th Cir. 1951).

Another court observed before the present regulations were adopted that "there are times when the executive will appear to the observer as doing manual work, when, as a matter of fact, he is merely making an investigation or exercising his discretion in laying out work for his subordinates."³⁵ Work in keeping production and personnel records, inspecting and testing work of the employees and making recommendations following such inspections, and manual labor in demonstrations or emergencies,³⁶ is not work which is to be counted against the nonexempt work tolerance.

In an interesting case which may mark the outer limits of exemption, engineers, whose duties included making necessary repairs and spending a small amount of their time cleaning and oiling machinery, in addition to making constant observation and regular inspections, were held to be exempt by the United States Supreme Court.³⁷ Here, however, the employees under their direction were firemen and coal passers and the supervisory work was not of the same type as that of the subordinates. The dissent attacked the sufficiency of the amount of discretion which the engineers exercised rather than the type of work which they performed.

Several other circumstances have been considered by the courts in determining whether the employee's work was exempt. One consideration is whether the work which is claimed to be nonexempt was performed as a part of the employee's duty, something which he was at least expected to do, or whether it was done of the employee's own volition.³⁸ Thus, the fact that the plaintiff's mechanical tasks were performed on a voluntary basis was accorded some weight in one case.³⁹ And where the supervision and management of a department was the employee's primary duty, the North Carolina Supreme Court said that the duty was uninterrupted "except where, as a matter of convenience, plaintiff assisted in some work which was regularly in the routine of other employees."⁴⁰ However, where an employee owed his job to his ability to make necessary adjustments and keep machinery in operation, his work was nonexempt.⁴¹

Another circumstance which has been considered is whether the employee in a union plant is or is not a member of the union. In one case, the Supreme Court took cognizance of the fact that the union had abandoned a long contested claim of the right to represent engineers at

³⁵ *Corey v. Detroit Steel Corp.*, 52 F. Supp. 138 (E. D. Mich. 1943).

³⁶ *Evans v. Continental Motors Corp.*, 105 F. Supp. 784 (E. D. Mich. 1952).

³⁷ *Walling v. General Industries Co.*, 330 U. S. 545 (1947).

³⁸ *Evans v. Continental Motors Corp.*, 105 F. Supp. 784 (E. D. Mich. 1952). See 29 CODE FED. REGS. § 541.110 (Cum. Supp. 1953).

³⁹ *Pugh v. Lindsay*, 206 F. 2d 43 (4th Cir. 1953).

⁴⁰ *Pye v. Atlantic Co.*, 223 N. C. 92, 96, 25 S. E. 2d 401, 403 (1943).

⁴¹ *Walling v. Jacksonville Paper Co.*, 69 F. Supp. 599, 606 (S. D. Fla. 1947), *rev'd on other grounds*, 336 U. S. 187 (1949).

the plant, thereby recognizing their supervisory status.⁴² Again, another court said, in speaking of the nonunion head of the materials division of a plant, that "under the ever watchful eyes of the shop stewards there was little opportunity for [the employee] to carry parts by hand without detection."⁴³ The court then held that the employee's nonexempt work did not exceed the 20 per cent tolerance. It is not, however, reversible error to refuse to receive testimony of union officials intended to show labor's point of view with respect to classification in the industry generally, since it is the work of the particular employee that governs in each individual case.⁴⁴

A third circumstance that the cases establish as important is whether the employee claims to be an executive, or conversely, whether the employer recognizes the employee as nonexempt. One court was impressed with the fact that both employee and employer told a union official that the employee was a foreman when the official complained because the employee had cut some hoods for parkas.⁴⁵ In another case, the employee was paid overtime for continuing to do the same type work after the disputed period in which no overtime was paid. The court said that this was consistent with a recognition by the employer that the employee was not an executive.⁴⁶

The courts have generally had little trouble in deciding whether the 20 per cent tolerance has been exceeded, once they have decided which work is exempt and which is not. Perhaps the extreme case segregating exempt from nonexempt working time is *Kaczanowski v. Home State Bank*.⁴⁷ There the plaintiff-employee of the bank spent part of her time in the teller's cage, in addition to carrying out her primary duty of approving mortgages and loans. If the entire time that the employee was supposed to be in the teller's cage had been considered, this time would have exceeded the 20 per cent limitation in the Administrator's regulations. The court said that the frequent interruptions which took the plaintiff away from the cage to carry out her supervisory functions made her total non-executive hours much less than 20 per cent.

Both the regulations in effect from 1940 to 1950 and those in effect at the present time have made specific exceptions to the limit on non-exempt work. The present regulations except from Section (e) two classes of workers: (1) employees who are in sole charge of an independent branch establishment, or a physically separated branch establishment, and, (2) employees who own at least a 20 per cent interest in the

⁴² *Walling v. General Industries Co.*, 330 U. S. 545 (1947).

⁴³ *Evans v. Continental Motors Corp.*, 105 F. Supp. 784, 788 (E. D. Mich. 1952).

⁴⁴ *Gill v. Mesta Machine Co.*, 165 F. 2d 785 (3d Cir. 1948), *cert. denied*, 334 U. S. 832 (1948).

⁴⁵ *Kupperman v. M. & J. Becker, Inc.*, 198 F. 2d 765 (2d Cir. 1952).

⁴⁶ *Sawyer v. Selig Mfg. Co.*, 74 F. Supp. 319 (D. Mass. 1947).

⁴⁷ 77 F. Supp. 602 (E. D. Wisc. 1948).

enterprise by which they are employed.⁴⁸ The exception which relates to part owners was not included in the old regulations.⁴⁹ There seems to have been little litigation involving these exceptions.

The new requirement relating to nonexempt work differs from that in the 1940-1950 regulations in the following ways:

1. The ceiling on the time which may be devoted to nonexempt work is now measured by 20 per cent of the employee's own time rather than by the weekly hours of the employees under his direction.
2. Nonexempt work is now defined as work which is not "directly and closely related" to the exempt duties, rather than "work of the same nature" as that performed by the subordinates.⁵⁰

While these changes may permit an employee to keep himself from becoming an "executive" by performance of more nonexempt duties, as was feared in the Stein Report of 1940,⁵¹ the scope of exempt work has probably been broadened in that an employee may now perform certain menial tasks which, because of their relation to his entire employment, will not be counted against the nonexempt work tolerance.⁵²

The Administrator's new definition includes a "streamlined" exemption for employees who are paid \$100 weekly or more.⁵³ Of these employees, the Administrator, after setting down certain requirements which do not mention nonexempt work at all, says that they "shall be deemed to meet all of the requirements"⁵⁴ of the definition of an executive. This would seem to indicate that as to these employees there is no limit, except perhaps reasonableness, on the amount of nonexempt work they may perform without losing their exempt status.

It must be remembered that the problem of whether a particular employee is a "bona fide executive" does not arise until it has first been determined that he is an employee. In one recent case, the plaintiff was held not to be an employee within the meaning of the act when it appeared that while he worked for the defendant corporation as a pattern maker, or as a machinist at a specified hourly rate, he was also an officer, a stockholder, and a director of the corporation.⁵⁵ Of course, the court

⁴⁸ 29 CODE FED. REGS. § 541.1 (Cum. Supp. 1953).

⁴⁹ Editorial Analysis, WAGE AND HOUR MANUAL (BNA) 20:403 (1950). For examples of employees in sole charge of physically separated branch, see *Gruenstein v. Brust Footwear Corp.*, 72 F. Supp. 485 (E. D. Pa. 1947); *Antis v. Montgomery-Ward Co.*, 63 F. Supp. 669 (E. D. Mich. 1946).

⁵⁰ Editorial Analysis, WAGE AND HOUR MANUAL (BNA) 20:402 (1950).

⁵¹ WAGE AND HOUR MANUAL (BNA) 20:83 (1948).

⁵² WAGE AND HOUR MANUAL (BNA) 20:402 (1950).

⁵³ Levitt, *The "New" Wage and Hour Law*, N. Y. U. THIRD ANNUAL CONFERENCE ON LABOR 269 (1950).

⁵⁴ 29 CODE FED. REGS. § 541.100 (Cum. Supp. 1953).

⁵⁵ *Hoy v. Progress Pattern Co.*, 121 F. Supp. 371 (E. D. Mich. 1953).

did not discuss the exception relating to part owners provided in Section (e) of the regulations since the plaintiff was not even an employee.

In spite of the clear and helpful regulations supplementing the definition of a "bona fide executive" employee, it remains difficult to draw a line with all true executives falling on one side and all remaining employees falling on the other. All of the requirements of the Administrator's definition must be met. The requirement that will probably continue to be most troublesome deals with nonexempt work tolerance. The courts must still decide on the particular facts of each case whether work is "directly and closely related," and, if it is not, then whether the amount of that work exceeds the tolerance.

F. KENT BURNS

Real Property—Personal Restrictive Building Covenants

Although the case of *Julian v. Lawton*¹ presented for decision a very narrow question on the matter of restrictive building covenants and perhaps turned on an agency question as much as on the construction of the covenant involved, the case is of interest because of the growth of residential subdivisions in the last two decades and the almost universal inclusion of certain restrictions imposed by means of covenants in the deeds given for the lots in these developments.² In this case the use of the term "personal" as applied to a valid restrictive building covenant is believed to be unique.

In the principal case, the grantor, in conveying certain lands in a real estate subdivision which he was promoting, inserted in the deeds certain restrictive covenants one of which stated "that no dwelling house or other building shall be erected on the tract until the type and exterior lines of the building to be erected shall have been approved by [the grantor] or by an architect selected by him. . . ."³ The court held that the covenant was personal to the grantor and that both the restriction and the agency of the architect ceased to be effective at the death of the grantor.

By definition, "a real covenant is one having for its object something annexed to, inherent in or connected with land or other real property";⁴ it is a covenant that is said to "touch and concern" the land.⁵ These

¹ 240 N. C. 436, 82 S. E. 2d 210 (1954).

² "The number of decisions in comparatively recent years involving the validity, construction and effect of agreements restricting the use of real property indicate the increasing use being made of them. This reflects, it has been aptly commented, the expansion of the law to meet the demands of home owners for a protection adequate to the more crowded conditions of modern life." TIFFANY, LAW OF REAL PROPERTY § 858 (3rd ed. 1939).

³ *Julian v. Lawton*, 240 N. C. 436, 437; 82 S. E. 2d 210, 211 (1954).

⁴ 14 AM. JUR., *Covenants* § 19, at p. 495 (1938); 21 C. J. S., *Covenants* § 22 (1940).

⁵ TIFFANY, LAW OF REAL PROPERTY § 854; at p. 455 (3rd ed. 1939).