

## MORE NEWS



Lou DiLorenzo

### **Avoid Making Unwarranted Assumptions About The Applicability Of The Professional Exemption**

Employers often assume that because an employee performs "professional" work she must be an exempt professional under the Fair Labor Standards Act ("FLSA"). Late last year, the

United States Court of Appeals for the Second Circuit issued a decision which serves as a valuable warning to employers who make that assumption, *See, Young v. Cooper Cameron Corp.*, 586 F.3d 201 (2d Cir. 2009). For those of you who may not know or recall what the professional exemption is all about, here is a quick primer. The FLSA's overtime provisions do not apply to exempt professionals. An exempt professional is one who, among other things, is "employed in a bona fide professional capacity." The FLSA does not define that term any further. But the U.S. Department of Labor ("DOL") has issued extensive regulations on the subject. In the *Young* case, the Second Circuit's interpretation and application of these regulations revealed a common employer mistake in applying the exemption: Just because the position seems like a "professional" position does not mean it falls within the professional exemption. In this case, the plaintiff was performing a type of engineering design work on a pretty sophisticated piece of equipment used on oil drilling rigs. While he had 20 years of engineering-type experience, he had only a high school degree. Nevertheless, based on the amount of engineering experience the individual had and the type of work he was performing, the employer classified him as exempt.

The employer got it wrong. As the Court observed, DOL's regulations are quite clear: one of the requirements for the exemption is that the work must be in a field of science or learning customarily acquired by a prolonged course of specialized study, and the best evidence of this is a specialized academic degree. The crux of the dispute then centered around the term "customarily," the employer arguing that use of that term showed that an academic degree was not required in all circumstances and that the plaintiff's engineering experience was an adequate substitute. Under the employer's view, the lack of a degree requirement for the position did not matter because the duties of the position required knowledge of an advanced type. The Second Circuit disagreed, noting that the regulations dealt with that issue as well. The Court concluded that "customarily" means a specialized degree is required in the vast majority of cases. In the Court's view, this means that a rare individual could still be exempt without having a degree, but only in a situation where other individuals performing the work typically held such a specialized degree. As the Court observed, the term "customarily" does not mean that the degree requirement can simply be ignored in favor of focusing solely on the type of work being performed. In the case

before it, the plaintiff was not the only employee holding the engineering position and no one who held it had anything more than a high school degree. As a result, it could not be said that advanced education in a specialized field was customarily required for the position.

The lesson for employers is clear: in order for the professional exemption to apply, the duties performed must require use of knowledge of an advanced type in a field of science or learning and the position must typically require an advanced degree in that specialized field of science or learning. Having the right duties alone is not sufficient.

On a side note, the plaintiff apparently did not complain about being treated as exempt until he lost his job in a reduction in force after holding the position for three years. This in itself is a small lesson in how exemption issues can pop up unanticipated.

Be Careful Out There!