

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT

LEGAL SECTION

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H. THOMAS CADELL, JR., *Chief Counsel*

January 12, 1998

Re: Similarly Situated Employees

This is intended to respond to your letter of December 29, 1997, wherein you ask what the Division enforcement policy would be in a situation where our investigation reveals that an employer has erroneously placed a group of similarly situated employees in an exempt classification.

Most of the opinion letters this agency sends contain language to the effect that each exemption situation must be determined on an individual basis and make clear that the Division does not offer blanket opinions finding a group of employees exempt or non-exempt.

This is not to say, however, that in a situation where the evidence shows that a large group of employees is being misclassified that the Division would not bring an action on behalf of all of the employees who are similarly situated without specifically investigating the status of each individual employee. Investigation of the status of each employee would be neither prudent nor necessary and the limited resources of the Division would not allow for such a waste of time and effort.

As with the view of the federal courts regarding the application of exemptions to the Fair Labor Standards Act, it must be remembered that it is the employer who must prove that the exemption is applicable as an affirmative defense¹.

¹See *A. H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493, 65 S.Ct. 807, 808, 89 L.Ed. 1095 (1945); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S.Ct. 453, 456, 4 L.Ed.2d 393 (1960); *Walling v. General Industries Co.*, 330 U.S. 545, 547--548, 67 S.Ct. 883, 884, 91 L.Ed. 1088 (1947); *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295, 79 S.Ct. 756, 759, 3 L.Ed.2d 815 (1959).

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The Division is not mandated to investigate every claim that is filed nor is it mandated to bring an action to enforce every violation it finds; however, assuming that the Division agreed that a particular action were appropriate and the investigation reveals that a substantial number of the employees allege that they are subject to work rules or practices which clearly make them non-exempt, the Division would bring an action in the name of all of the employees in the classification. Of course, the action by the Division, while it would inure to the benefit of the affected employees, would be in the nature of a law enforcement effort designed to insure that the employer did not gain an unfair competitive advantage over other businesses as a result of the misclassification.

The affirmative defense that these are exempt employees may be raised by the employer regarding any of the employees, but this would be a defense which the employer would have the burden of proving.

I hope this adequately addresses the questions you raised in your letter of December 29th. If I may be of further assistance, please feel free to call.

Yours truly,



H. THOMAS CADELL, JR.
Chief Counsel

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