

AI In Accounting Raises OT Exemption Questions

By **Bradford Kelley and Stephen Malone** (March 28, 2024)

The nationwide shortage of accountants, largely due to the decline in accounting major college enrollments and increased retirements, has caused many to look to artificial intelligence tools to fill the void, especially now that we are in tax season.

AI has been shown to make accountants more productive and possibly increase value to their clients. However, the rising use of AI to address the accountant shortage simultaneously illustrates how AI may test the limits of certain exemptions under the Fair Labor Standards Act.

Indeed, the use of AI in accounting calls into question whether accountants who were previously classified as exempt under the FLSA can now argue that they should no longer be so, which could entitle them to additional pay and expose employers to litigation and penalties.

FLSA Requirements

The FLSA establishes the federal minimum wage and overtime requirements when compensating covered employees for all hours worked. Under the FLSA, employees may be exempt from minimum wage and overtime protections under the so-called white collar exemptions, including employees working in executive, administrative or professional capacities.[1]

In addition to meeting specific compensation requirements, employees generally must meet certain tests regarding their job duties.[2] The FLSA's learned professional exemption requires that an employee's primary duty must involve the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and requires "the consistent exercise of discretion and judgment." [3]

The FLSA regulation expressly states that "[c]ertified public accountants generally meet the duties requirements for the learned professional exemption" and that "many other accountants who are not certified public accountants but perform similar job duties may qualify as exempt learned professionals." [4]

The FLSA regulation further notes, however, that "accounting clerks, bookkeepers and other employees who normally perform a great deal of routine work generally will not qualify as exempt professionals." [5]

How Accountant AI Interacts With The FLSA

The question therefore becomes: Does the use of AI adversely affect an accountant's consistent exercise of discretion and judgment, which the FLSA's professional exemption requires?

On one hand, the use of AI and algorithmic technologies may fundamentally alter accountants' primary duties, causing currently exempt accountants to lose their exempt



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status. The fact that AI in accounting streamlines data processing and financial analysis by automating repetitive tasks, such as data entry and reconciliation, will undoubtedly affect the profession.

Some plaintiffs attorneys will certainly argue that accounting positions previously satisfied the "exercise of discretion" and "judgment" tests but the use of AI means that they no longer meet the tests, because AI has replaced the consistent exercise of discretion and judgment that was previously exercised by humans.

Plaintiffs attorneys may contend that AI now enables accountants to do a great deal of routine work generally and therefore this work no longer qualifies these professionals as exempt, making them eligible for minimum wage and overtime for their hours worked.

On the other hand, these AI tools may increase an employee's consistent exercise of discretion and judgment, especially since these tools will chiefly replace the laborious or burdensome aspects of accountants' work, such as mundane administrative tasks.

In addition, AI enhances decision making and forecasting through sophisticated algorithms that analyze trends and patterns in financial data, reinforcing the argument that AI enhances the user's discretion and judgment.

Moreover, despite the productivity gains and increased value that AI offers, these tools normally cannot replace key fundamentals that human accountants provide, including intuition, the ability to pose insightful questions, and thoughtful and creative approaches to new situations.

In this way, AI may bolster the argument that accountants are FLSA-exempt.

AI Infiltrating Other Industries

Accountants are not the only professionals that will feel the impact of the growing use of AI.

For example, the FLSA learned professional exemption for attorneys will likely be impacted by AI, especially with the explosive growth of generative AI tools used for legal research, discovery and even AI-powered tools that draft demand letters, nondisclosure agreements and employment agreements.

The FLSA learned professional exemption for doctors will also be tested because AI tools are increasingly used to review medical charts, monitor patients' health, diagnosis diseases and even predict therapeutic responses.

Nevertheless, the FLSA regulations regarding attorneys and doctors state that the FLSA's professional exemption includes:

Any employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and is actually engaged in the practice thereof.[6]

As in the case of accountants, AI will almost certainly allow attorneys and doctors to focus on the more challenging and thoughtful aspects of their practice rather than administrative tasks.

Thus, the use of AI will not somehow instantaneously mean they are no longer actually

engaged in the practice of law or medicine, and thus, they may remain classified as exempt.

Journalism is another profession in which the increased use of AI tools will have significant effects. The FLSA regulations specifically identify journalism as a field whose duties may qualify under the creative professional exemption but not if the journalists only collect, organize and record information that is routine or already public, "or if they do not contribute a unique interpretation or analysis to a news product." [7]

An exempt journalist who increasingly relies on generative AI to produce news products may argue that their role is no longer exempt under the FLSA.

Therefore, as AI changes the way accountants, attorneys, doctors, journalists and other professionals work, a prudent employer must periodically reassess their job duties to verify that their primary duties are still exempt professional work.

If the professional work is no longer primary, an employer may consider whether exempt executive or administrative work, or a combination of such work under the white collar exemptions, is predominant in order to maintain FLSA-exempt status.

Wage and Hour Considerations

The explosive growth of AI will surely generate litigation challenging the contours of the FLSA's exemptions, especially after the proposed overtime rule goes into effect, which is predicted to make millions more workers newly overtime eligible.

The final overtime rule was recently sent to the White House for review, which signals that the U.S. Department of Labor has completed its work on the rule and a finalized rule will likely be issued in the coming months.

At this time, the DOL's Wage and Hour Division has not shown much interest in AI, but this will certainly change soon. In October 2023, President Joe Biden issued an executive order directing the DOL to issue guidance emphasizing that employers must ensure employees are appropriately compensated for all hours worked under the FLSA when using AI tools to monitor or augment employees' work.

In December 2023, the DOL held a series of AI listening sessions that explored the implications of AI in the workplace. The guidance is coming. And so are the enforcement actions and lawsuits.

Conclusion

At the end of the day, the wage and hour risks associated with the use of generative AI tools will continue to evolve as the technologies become more widespread, sophisticated and ubiquitous in the workplace.

Ultimately, these AI tools will help increase an employee's consistent exercise of discretion and judgment by automating more routine and mundane tasks, freeing up the employee to focus on more analytical and creative activities.

At the same time, other AI tools will largely help employers comply with wage and hour laws, especially as the tools improve.

Regardless, organizations must be proactive and forward-thinking when addressing the

likely wage and hour compliance challenges that these tools have brought into consideration.

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[1] See 29 U.S.C. § 213; 29 C.F.R. § 541.0.

[2] Several state minimum wage and overtime laws set higher compensation requirements or job duties tests that differ from federal law, making it more difficult to classify a position as exempt under state law than the FLSA. See, e.g., California, Colorado, New York and Washington.

[3] 29 C.F.R. § 541.301(b).

[4] *Id.* at § 541.301(e)(5).

[5] *Id.*

[6] 29 C.F.R. § 541.304(a)(1).

[7] See 29 C.F.R. § 541.302(d) (also noting that "newspaper reporters who merely rewrite press releases or who write standard recounts of public information by gathering facts on routine community events are not exempt creative professionals.").