

## Fourth Circuit Holds Insurance Fraud Investigators are Not Exempt from Overtime Pay, Creating Circuit Split

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April 5, 2016

Disagreeing with a sister circuit, the U.S. Court of Appeals for the Fourth Circuit has held that insurance fraud investigators were misclassified as exempt from overtime pay under the administrative exemption of the Fair Labor Standards Act, signaling that it will construe the exemption narrowly. *Calderon v. GEICO General Insurance Co.*, 2015 U.S. App. LEXIS 22546 (4th Cir. 2015). The Fourth Circuit has jurisdiction over Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

The decision creates a circuit split. As the Court acknowledged, on “essentially identical” facts, the Sixth Circuit (which has jurisdiction over Kentucky, Michigan, Ohio, and Tennessee) previously held that the administrative exemption does apply to insurance fraud investigators.

### Background

The plaintiffs were investigators working in GEICO’s Special Investigations Unit, a division of its Claims Department. Their primary responsibility was investigating claims suspected of being fraudulent. Investigations typically involved creating an action plan, interviewing witnesses (sometimes under oath), taking photographs, reviewing property damage, and writing reports. The Fourth Circuit noted that the investigators must use their judgment in deciding how to conduct the investigations, determining the credibility of witnesses, and drawing conclusions.

Relying on the administrative exemption, GEICO had long classified the investigators as exempt from overtime pay. To meet that exemption, employers must prove with “clear and convincing evidence” that the employees at issue pass the both the salary and duties tests. The employees must earn over \$455 per week or \$23,660 per year (a threshold which the Department of Labor has proposed raising to \$921 per week or \$47,892 per year in 2016). To meet the duties test, the primary duty of the employee must be “office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers” and include “the exercise of discretion and independent judgment with respect to matters of significance.” 29 C.F.R. § 541.200(a). The district court rejected the employer’s argument for exemption, entering an order containing “a complete formula for the computation of backpay” based on the rulings that the court had made and the parties’ stipulations. Both parties appealed.

### Exemption

The Fourth Circuit determined that the plaintiffs’ primary duty, investigating fraud, was not “directly related” to management or general business operations of GEICO. The Court reasoned that the investigators had no supervisory responsibilities and did not help develop business policies and strategies. Rather, according to the Court, their primary duty was simply carrying out day-to-day operations of the business.

This interpretation is quite narrow; it is also surprising — especially since the Sixth Circuit held earlier in *Foster v. Nationwide Mutual Insurance Co.*, 710 F.3d 640 (6th Cir. 2013), that the investigation of fraud is directly related to an insurance company’s general business operations.

Although federal regulations provide that “claims adjusters generally meet the duties requirements for the administrative exemption” and GEICO argued its investigators performed many of the same duties of adjusters, the Fourth Circuit disagreed. The Court found that the typical duties of claims adjusters, as stated in the regulation, are broader than the investigators’ duties, as they included negotiating settlements and making recommendations regarding litigation, in addition to interviewing witnesses and evaluating damages. The Sixth Circuit, in contrast, relied on this regulation in finding that investigative work “drives the claims adjusting decisions” and therefore is directly related to business operations.

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### Practices

Wage and Hour

The Fourth Circuit relied on another federal regulation, which states that the administrative exemption does not apply to police officers, correctional officers, probation officers, detectives, *investigators*, and various types of first responders who perform work such as conducting investigations and writing reports. In *Foster*, the Sixth Circuit held that this regulation was intended to apply only to law enforcement and other public safety personnel, not private sector investigators. The Fourth Circuit, in *Calderon*, disagreed and held the regulation did not distinguish between public and private sector workers.

Although the Fourth Circuit held that GEICO's investigators were not exempt from overtime pay, the Court also held that GEICO's classification of the workers as exempt was made in good faith, was reasonable, and was not a willful violation of the FLSA — given the “close and complex” exemption question. Accordingly, the plaintiffs could recover only two years of lost overtime pay (as opposed to three) and could not recover liquidated damages. However, now that there is controlling precedent, courts in the Fourth Circuit are likely to be less forgiving when it comes to “good faith” and “willful” misclassification of investigators.

## Takeaways

For employers in the Fourth Circuit in particular, there are some cautionary lessons here. First, classification of any private sector investigators as exempt should be re-evaluated with counsel. Second, employers should re-evaluate regularly all workers classified as exempt relying on the administrative exemption. This exemption is notoriously difficult to apply and subject to re-interpretation by plaintiffs' counsel. As the *Calderon* and *Foster* decisions show, even federal courts applying the same facts have now arrived at different conclusions.

The risk of misclassification is significant. The Fourth Circuit's narrow interpretation of the “directly related” prong of the duties test suggests that only a limited group of employees will qualify for the exemption.

Considering the Department of Labor's plan to roughly double the salary threshold for the administrative and other white-collar exemptions, now may be the perfect time to re-evaluate and ensure employees are properly classified.

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