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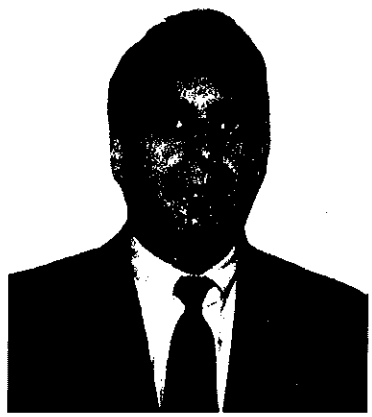
"Reviewing Overtime White-Collar Exemptions"

Most people know that the Fair Labor Standards Act (FLSA) requires employers to pay overtime at one-and-one-half times an employee's regular hourly rate for all work performed by the employee in excess of forty hours per week.1 Most people also know that the FLSA contains certain exemptions from such requirement. In order to avoid the overtime costs associated with FLSA compliance, employers often mistakenly (or not) treat nonexempt employees as exempt. Inasmuch as failure to pay proper overtime can result in liability for the unpaid overtime, an equal amount in liquidated damages, plus attorney's fees, misclassification of employees is a growing area for class action litigation. This article will help prevent misclassification by explaining the "white-collar" exemptions.

The FLSA does not contain a "white-collar" exemption per se; the phrase refers to persons "employed in a bona fide executive, administrative or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman...."2 Any person employed in such capacity who meets both the salary and duties tests established by the Department of Labor is exempt, and need not receive overtime pay regardless of how many hours she works.

The Salary Test

The salary test starts with the rule that an employee must "regularly receive each pay period, on a weekly or less frequent basis, a predetermined amount constituting all or part of [her] compensation, which amount is not subject to reduction because of variations in the quality or quantity of work performed."3 For all practical purposes, the employee must receive at least two hundred and fifty-dollars per week.4 An



employer need not pay the employee for any week in which the employee performs no work.5 Subject to certain exceptions, the employee must receive her full salary — without deduction — for any week in which she performs any work without regard to the number of days or hours worked. Deductions from the weekly salary may be made only under certain circumstances.

Deductions may be made for absences of a day or more resulting from:

(1) personal reasons other than sickness or accident;6

(2) "sickness or disability (including industrial accidents), [but only] in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability";7 or

(3) good-faith discipline for "infractions of safety rules of major significance."8

Other than in cases of intermittent leave pursuant to the Family and Medical Leave Act, private employers may not make deductions for periods of less than a day under any circumstances.9 Several courts and the Department of Labor, however, take the position that absences of less than a day may be charged against an employee's accrued vacation, sick, or holiday time.10

Employers may not deduct from the compensation for absences of less than a week caused by jury duty, attendance as a witness, or temporary military leave, but may offset any amount the employee receives as jury or witness fees or military pay for a particular week against the salary due for that week.

11 The employer also may not reduce the compensation for absences occasioned by the employer or operation of the business itself (e.g., lack of work).12

Employers who make deductions under other circumstances do not satisfy the salary test, and cannot take advantage of the exemption. Understanding the circumstances under which deductions are prohibited is critical because an employer with "either an actual practice of making [improper] deductions or an employment policy that creates a 'significant likelihood' of such deductions" forfeits the exemption.13 Under certain circumstances, however, the employer can take advantage of the "window of correction."

The effect of making a deduction which is not permitted ... will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction ... is inadvertent, or is made for reasons other than for lack of work, the exemption will not be ... lost if the employer reimburses the employee for such deduction and promises to comply in the future.14 " '[I]nadvertence' and 'reasons other than lack of work' [are] alternative grounds", so employers can correct all inadvertent deductions, but only those intentional deductions that were made for reasons other than lack of work.15 To do so, the employer must reimburse all affected employees for all improper deductions and promise them (and the union representing them, if applicable) future compliance.16 In the Second Circuit, the window of correction is not available to employers who engage in a pattern of improper deductions.17

Regardless of whether an employee meets the salary test, she must also satisfy the duties test for the white-collar exemption to apply.

The Duties Test

The duties test focuses on the employee's "primary duty", i.e., what the employee does that is of primary value to the employer. Situations in which an employee performs both exempt and nonexempt duties will be evaluated based upon several factors.

Although the time spent on each task is important, it is not controlling. In most instances where an employee spends more than fifty percent of her time performing exempt duties she will be exempt, but an employee may still be exempt even if she devotes less than fifty percent of her time to such activities. In such case, courts look at all relevant facts, including the "relative importance of the [exempt] duties as compared with other types of duties ...

and the relationship between [her] salary and the wages paid other employees for the kind of nonexempt work performed" by her.18

The regulations provide the following example illustrating the concept of primary duty.

[I]n some departments, or subdivisions of an establishment, an employee has broad responsibilities similar to those of the owner or manager of the establishment, but generally spends more than 50 percent of his time in production or sales work. While engaged in such work he supervises other employees, directs the work of warehouse and deliverymen, approves advertising, orders merchandise, handles customer complaints, authorizes payment of bills, or performs other management duties as the day-to-day operations require. He will be considered to have management as his primary duty. In the data processing field an employee who directs the day-to-day activities of a single group of programmers and who performs the more complex or responsible jobs in programming will be considered to have management as his primary duty.19

The regulations provide separate duties test for executives, administrative personnel, professionals, and outside salesmen.

• Executive: (1) the employee's primary duty is management of the enterprise in which employed or a customarily recognized department or subdivision thereof, and (2) the employee customarily and regularly directs the work of two or more full time employees (or the equivalent).20

• Administrative: The employee's primary duty requires the exercise of discretion and independent judgment, which consists of either: (1) performing office or nonmanual work directly related to management policies or general business operations of the employer or its customers, or (2) performance of functions in the administration of a school system or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic institution or training carried on therein.21

• Professional: The employee's primary duty consists of either: (1) work requiring knowledge of an advanced type in a field of science or learning, or (2) work as a teacher in the activity of imparting knowledge, which includes work requiring the consistent exercise of discretion and judgment, or consists of the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor.22

"Some employers erroneously believe that anyone employed in the field of accountancy, engineering, or other professional fields, will qualify for exemption as a professional employee by virtue of such employment. While there are many exempt employees in these fields, the exemption of [an] individual depends upon his duties and other qualifications."23 The exemption does not apply to "all employees of professional employers, or all employees in industries having large numbers of professional members, or all employees in any particular occupation. Nor does it exempt, as such those learning a profession. Moreover, it does not exempt persons with professional training, who are working in professional fields, but performing subprofessional or routine work."24

• Outside Salesman: The employee is someone:

(A) employed for the purpose of and who is customarily and regularly engaged away from his employer's place of business in: (1) making sales within the meaning of section 3(k) of the Act; or (2) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and (B) whose hours of work of a nature other than that described above do not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employer: Provided, that work performed incidental to and in conjunction with the employee's own outside sales, including incidental deliveries and collections, shall not be regarded as non exempt work.25

"Characteristically the outside salesman is one who makes his sales at his customer's place of business.... Thus any fixed site, whether home or office, used by a salesman as a headquarters or for telephone solicitation of sales must be construed as one of his employer's places of business even though the employer is not in any formal sense the owner or tenant of the property."26

• Computer Programmers: In 1990, the FLSA was amended to provide an exemption for "computer systems analysts, computer programmers, software engineers, or other similarly skilled workers in the computer software field."27 Unlike the other "white collar" exemptions, however, computer programmers need not satisfy the salary test to be exempt. Rather, they must receive an hourly rate that exceeds 6 and 1/2 times the minimum wage, and have the primary duty of:

(1) application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications; (2) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; (3) the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or (4) a combination of the aforementioned duties, the performance of which requires the same level of skills.28

The exemption applies only to: highly skilled employees who have achieved a level of proficiency in the theoretical and practical application of a body of highly specialized knowledge in computer systems analysis, programming, and software engineering, and does not include trainees or employees in entry level positions learning to become proficient in such areas or to employees in these computer-related occupations who have not attained a level of skill and expertise which allows them to work independently and generally without close supervision.29

It does not apply to employees who operate, repair, or maintain computers, nor to employees whose "work is highly dependent upon, or facilitated by, the use of computers and computer software programs, e.g., engineers, drafters, and others skilled in computer-aided design software like CAD/CAM, but who are not in computer systems analysis and programming occupations...."30

Conclusion

Employees who meet the applicable salary and duties tests are exempt from the FLSA's overtime requirements, as are computer programmers who earn at least 6-1/2 times the minimum wage and satisfy the duties test. All other employees must receive overtime pay, and, contrary to common belief, private employers may not grant compensatory time off in lieu of overtime pay (although there is a bill pending in Congress to change that).31 Moreover, courts narrowly construe the exemptions, and the employer bears the burden of proving an exemption applies.32

It is imperative that all employers understand these rules. Failure to pay overtime can result in liability for unpaid overtime for the previous three years, liquidated damages equal to the amount of unpaid wages, attorneys' fees, and costs; the prospect of which has caught the attention of class action attorneys. In cases of repeated willful violations, the FLSA also allows the imposition of civil penalties and imprisonment.33

Employers should review their pay practices to insure that all employees are properly classified. As part of that process, employers should develop written job descriptions delin-

eating the duties of each position within the company, which will help establish that a position meets the duties test.34 Of course, the employee's actual duties — not the job description — will control. Employers must also implement a system to prevent improper deductions that could violate the salary test. Certainly, taking the time to insure that a company's pay practices comply with the FLSA is a worthwhile endeavor.

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(1) 29 U.S.C. §207(1). For a discussion of what constitutes an employee's "regular rate" see 29 U.S.C. §207(e); 29 C.F.R. §§778.107-122. Certain states (e.g. California) have additional overtime requirements. This article addresses only the FLSA.

(2) 29 U.S.C. §213(a)(1). An employee of a retail or service establishment "shall not be excluded from the definition of ... executive or administrative [employee] because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per [cent] of his hours worked in the workweek are devoted to such activities...." Id.

(3) 29 C.F.R. §541.118(a). Professionals and administrative employees may also be paid on a fee (per job) basis, as long as the fee amounts to the requisite salary amount in relation to a 40-hour workweek. See generally 29 C.F.R. §541.313.

(4) The duties tests discussed herein apply only to employees earning at least $250 per week. Those earning between $155 and $250 per week must meet additional requirements. See generally 29 C.F. R. §541.1-.3 (setting forth additional tests for those making less than $250). The minimum salary amounts have not been revised since 1981. See, e.g., 29 C.F.R. §541.1(f).

(5) 29 C.F.R. §541.118(a). An exempt employee need not receive a full week's pay in her initial or terminal weeks of employment, but need only be paid for the actual days worked. 29 C.F.R. §541.118(c).

(6) 29 C.F.R. §541.118(a)(2).

(7) If the plan provides compensation for such absences, deductions for a day or longer may be made before an employee qualifies under the plan and after he has exhausted his leave allowances thereunder. The employee need not receive any portion of his salary for days for which he receives compensation under the plan. This provision also applies to industrial accidents where the employee receives worker's compensation benefits. 29 C.F.R. §541.118(a)(3).

(8) Safety rules of major significance are limited to those designed to prevent serious danger to the plant or other employees. 29 C.F.R. §541.118(a)(5).

(9) See 29 C.F. R. §541.118. Only leave time actually taken under the FMLA may be deducted in hour increments. For example, deductions may not be made for employees who do not qualify for FMLA leave, nor for leave pursuant to state leave law. See 29 C.F.R. §825.206. Public employers may deduct for periods of less than a day. 29 C.F.R. §541.5d.

(10) Compare Graziano v. Society of the N.Y. Hosp., 1997 U.S. Dist. Lexis 15926 (S.D.N.Y. Oct. 15, 1997) (such deductions do not destroy exempt status) and Department of Labor Opinion Letter dated July 23, 1997, reprinted in 6A Wage and Hour Manual (BNA) 99:8090 (same) with Service Employees Int'l Union Local 102 v. County of San Diego, 784 F. Supp. 1503 (S.D. CA 1992) (deductions negate salary status).

(11) 29 C.F.R. §541.118(a)(4).

(12) 29 C.F.R. §541.118(a)(1).

(13) Auer v. Robbins, 519 U.S. 452, 461, 117 S. Ct. 905, 911 (1997).

14 29 C.F.R. §541.118(a)(6).

(15) Auer, 519 U.S. at 463, 117 S.Ct. at 913.

(16) See Yourman v. Giuliani, 1999 U.S. Dist. Lexis 15700 (S.D.N.Y. Oct. 7, 1999).

(17) Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 617 (2d Cir. 1991), cert. denied, 506 U.S. 905, 113 S. Ct. 298 (1992). For a discussion of the disagreement among the courts as to situations involving a pattern or practice of improper deductions see Hoffman v. Sbarro Inc., 982 F. Supp. 249, 256 (S.D.N.Y. 1997).

(18) See, e.g., 29 C.F.R. §§541.103, 541.118, 541.206, 541.304, 541.600.

(19) 29 C.F.R. §103.

(20) 29 C.F.R. §§541.1, 541.105(a). The phrase "a customarily recognized department or subdivision is intended to distinguish between a mere collection of men ... and a unit with permanent status and function." 29 C.F.R. §541.104(a).

(21) 29 C.F. R. §541.2. The "exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered.... [It] implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance." 29 C.F.R. §541.207(a). It "does not necessarily imply that the decisions ... must have a finality that goes with unlimited authority and a complete absence of review." 29 C.F.R. §541.207(e).

The phrase "directly related to management policies or general business operations ... describes those types of activities relating to the administrative operations of a business as distinguished from 'production' or, in a retail establishment, 'sales' work." 29 C.F.R. §541.205(a).

(22) 29 C.F.R. §§541.3, 541.315. The requirement that the knowledge be of an advanced type means, "generally speaking, it must be knowledge which cannot be attained at the high school level." 29 C.F.R. §541.301(b). The requirement that it be in a field of science or learning "serves to distinguish the professions from the mechanical arts where in some instances the knowledge is of a fairly advanced type, but not in a field of science or learning." 29 C.F.R. §541.301(c).

(23) 29 C.F.R. §541.308(a).

(24) 29 C.F.R. §541.308(b).

(25) 29 C.F.R. §541.500 (emphasis added).

(26) 29 C.F.R. §541.502(b). For example, driver salesmen whose primary duty is sales, and who are customarily and regularly engaged in such activities, come within this exemption. 29 C.F.R. §541.505. In contrast are, "persons such as servicemen even though they may sell the service which they themselves perform. Selling the service in such cases would be incidental to the servicing rather than the reverse." 29 C.F.R. §541.501(e). Only "employees who sell or take orders for a service, which is performed ... by someone other than the person taking the order" are exempt. 29 C.F.R. §541.501(d).

(27) 29 C.F.R. §541.303(a).

(28) 29 C.F.R. §541.303.

(29) 29 C.F.R. §541.303(c).

(30) 29 C.F.R. §541.303(d).

(31) 29 U.S.C. §207(o). See H.R. 1380, 106th Cong., 1st Sess. (1999) (a bill to amend the FLSA to allow an employee to receive, "in lieu of monetary overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of overtime for which overtime compensation is required under the Act").

(32) 29 U.S.C. §216(b); Arnold v. Ben Kanowoky, Inc., 361 U.S. 388, 392, 80 S. Ct. 453, 456 (1960); Martin v. Malcolm Pirnie, 949 F.2d at 614.

(33) 29 U.S.C. §216(a).

(34) It will also help define the essential functions of the job for purposes of the Americans with Disabilities Act.

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