

Employment Law 102: Wage and Hour Issues

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State and Federal laws apply

- Employers must carefully analyze both federal and state law.
- The more restrictive rule – the rule that provides more expansive benefits to employees – controls.

The Fair Labor Standards Act (FLSA)

- Federal wage and hour law primarily is contained in the Fair Labor Standards Act (“FLSA”) and its implementing regulations. See 29 U.S.C. §§ 201 *et seq.* (1998); 29 C.F.R. pt. 1 *et seq.* (2001).
- The Department of Labor (“DOL”) is responsible for enforcing the FLSA.

Classifying employees under the FLSA

- Non-exempt employees are entitled to compensation for all overtime hours worked.
- Employees are presumptively non-exempt. Employer bears the burden of proving that an employee is exempt.
- Exemptions are narrowly construed against the employer and their application is limited.

Classifying employees under the FLSA

- Hotly-contested and increasingly litigated.
- Generally, exempt status is based upon (1) the amount of compensation received, and (2) the employee's duties.
- The proper classification is very fact-specific.

Classifying employees under the FLSA

- Executive employees
- Administrative employees
- Professional employees
- Computer-related professionals
- Commissioned employees
- Outside salespeople

NOTE: These are terms of art.

Executive employees

- (1) compensated on a salary basis at a rate of not less than \$455 per week, exclusive of board, lodging, or other facilities;
- (2) primary duty is management of the enterprise or a customarily recognized department or subdivision thereof;
- (3) customarily and regularly direct the work of two or more employees; and
- (4) have the authority to hire or fire other employees or their suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight. 29 C.F.R. § 541.100.

Executive employees

- A “customarily recognized department or subdivision” describes a unit with permanent status and function.
- “Two or more other employees” refers to two full-time employees or their equivalent. One full-time and two half-time employees, for example, are equivalent to two full-time employees, as are four half-time employees. 29 C.F.R. § 541.104(a).
- An employee who merely assists the manager of a particular department and supervises two or more employees only in the actual manager’s absence does not meet this requirement. 29 C.F.R. § 541.104(c).

Executive employees

- The executive exemption also applies to business owners, defined as employees who own at least a bona fide 20 percent equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization, and who are actively engaged in its management.
29 C.F.R. § 541.101.

Administrative employees

- (1) compensated on a salary or fee basis at a rate of not less than \$455 per week, exclusive of board, lodging, or other facilities;
- (2) primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- (3) primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. 29 C.F.R. § 541.200.

Administrative employees

- An employee must perform work directly related to assisting with the running or servicing of the business, including but not limited to, work in functional areas such as:
tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.
29 C.F.R. § 541.201(a, b).

Administrative employees

- An employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. 29 C.F.R. § 541.201(c).

Administrative employees

Exercise of discretion and independent judgment:

- involves comparing and evaluating possible courses of action, then acting or making a decision -- even if the decision is reviewed at a higher level. 29 C.F.R. § 541.202(a, c).
- is more than applying well-established techniques, procedures or standards described in manuals or other sources. 29 C.F.R. § 541.202(e).

BUT exemption not precluded by the mere fact that an employee uses manuals, guidelines or other established procedures relating to highly technical, scientific, legal, financial, or other complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills. 29 C.F.R. § 541.704.

Administrative employees

- The administrative exemption also applies to employees:
 - (1) who are compensated on a salary or fee basis at a rate of not less than \$455 per week, exclusive of board, lodging, or other facilities, or on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which employed; and
 - (2) whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof. 29 C.F.R. § 541.204.

Professional employees

- (1) compensated on a salary or fee basis at a rate of not less than \$455 per week, exclusive of board, lodging, or other facilities; and
- (2) primary duty is the performance of work (i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or (ii) requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. 29 C.F.R. § 541.300.

Professional employees

- Learned professionals
- Creative (or artistic) professionals
- Teachers
- Law/medicine

Learned professionals

- Primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. 29 C.F.R. § 541.301(a).
- This primary duty test includes three elements: (1) the employee must perform work requiring advanced knowledge; (2) the advanced knowledge must be in a field of science or learning; and (3) the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. 29 C.F.R. § 541.301(a).

Learned professionals

- “Work requiring advanced knowledge” is predominantly intellectual, and requires the consistent exercise of discretion and judgment (as distinguished from routine mental, manual, mechanical, or physical work). Advanced knowledge cannot be attained at the high school level. 29 C.F.R. § 541.301(b).
- “Field of science or learning” includes law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status (as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning). 29 C.F.R. § 541.301(c).

Learned professionals

- “Customarily acquired by a prolonged course of specialized instruction” restricts the exemption to professions where specialized academic training is a standard prerequisite.
- However, the exemption is available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction.
- The exemption does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction. 29 C.F.R. § 541.301(d).

Creative professionals

- Primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.
- Exemption does not apply to work which can be produced by a person with general manual or intellectual ability and training. 29 C.F.R. § 541.302(a).

Creative professionals

- Generally met by actors, musicians, composers, conductors, soloists; painters; essayists, novelists, short-story writers and screen play writers; and persons holding the more responsible writing positions in advertising agencies.
- Generally not met by persons employed as a copyist, an “animator” of motion-picture cartoons, or a retoucher of photographs, since such work is not properly described as “creative” in character. 29 C.F.R. § 541.302(c).

Professional employees -- teachers

- The professional exemption also applies to any employee whose primary duty is teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed. 29 C.F.R. §§ 541.204(b)(2), 541.303(a) .
- The exemption applies whether or not teachers meet the salary requirements or the other criteria required for other learned or creative professionals generally, as discussed above. 29 C.F.R. § 541.303(d).

Professional employees – practice of law or medicine

- Professional exemption also applies to employees who hold:
 - (1) a valid license or certificate permitting the practice of law or medicine and is actually engaged in the practice thereof; or
 - (2) the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of the profession. 29 C.F.R. § 541.304(a).

- This exemption applies whether or not the employee meets the salary requirements or the other criteria required for other learned or creative professionals generally, as outlined above. 29 C.F.R. § 541.304(d).

Highly compensated employees

- An employee with total annual compensation of at least \$100,000 is deemed exempt under the executive, administrative, or professional exemptions if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee identified in the applicable DOL regulations. 29 C.F.R. § 541.601(a).

Computer-related professionals

- The exemption requires one or more of the following duties:
- (1) The 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. 29 C.F.R. § 541.400

Computer-related professionals

- An employee may be hourly (compensated at a rate of at least \$27.63 per hour) or salaried (at least \$455 per week). 29 U.S.C. § 213(a)(17); 29 C.F.R. § 541.600.
- No particular license, certification, or academic degree is required, but it does not apply to trainees or entry-level positions. 29 C.F.R. § 510.705.
- Does not apply to employees who operate computers, employees who manufacture, repair, or maintain computer hardware or related equipment, or employees whose work is highly dependent on, or facilitated by, the use of computers but who are not engaged in computer systems analysis and programming occupations. 29 C.F.R. § 541.401.

Commissioned employees

- Employees of retail or service establishments are exempt from the payment of overtime compensation if two factors are satisfied: (1) the regular rate of pay of such employee is in excess of one and one half times the minimum wage (\$10.88 an hour, based on the minimum wage of \$7.25); and (2) more than half of this compensation for a representative period (not less than one month) represents commissions on goods or services. See 29 U.S.C. § 207(i) (1992).

Commissioned employees

- However, the DOL regulations define “retail or service establishment” very narrowly as stores and other business establishments that traditionally have operated under a “retail concept,” such as department stores, drug stores, grocery stores, and barber shops, (but excluding banks, insurance companies, accounting firms, stock brokerages, law firms, medical clinics, realtors and other firms that arguably provide services or products on a retail basis). See, e.g., 29 C.F.R. § 779.317.

Outside salespeople

- (1) Primary duty is:
 - (i) Making sales, or
 - (ii) 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

- (2) Is customarily and regularly engaged away from the employer's place of business in performing such primary duty. 29 C.F.R. § 541.500.

Outside salespeople

- Work incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, are not nonexempt work. 29 C.F.R. § 541.500(b).
- Special considerations apply to drivers who deliver the employer's products and also perform functions concerned with the selling of these products. 29 C.F.R. § 541.503, 504.

Compensating non-exempt employees

- To properly compensate its non-exempt employees, an employer first must determine the number of compensable hours its employees have worked.
- The FLSA does not define “hours worked.” Rather, whether an employee’s time is compensable generally turns on whether the time spent by the employee is primarily for the benefit of the employer.

On-Call, standby and waiting time

- The FLSA does not expressly define whether on-call, standby, and waiting time are “hours worked.” Rather, the inquiry is fact specific and depends on whether the employee’s time was spent primarily for the benefit of the employer.

On-duty time

- Time spent on duty during periods of unplanned inactivity, usually of short duration, is counted as work time when the employee is unable to use the time effectively for his or her own purposes, and the time is controlled by the employer. 29 C.F.R. § 785.15 (2001).

Off-duty time

- Periods of time during which an employer completely relieves an employee from duty and which are long enough to enable the employee to use the time effectively for his or her own purposes may be excluded from the calculation of hours worked.
- The employee must be informed in advance that he or she may leave the job and need not commence work until a specified hour.
- Whether the time is long enough to allow the employee to use the time for his or her own purposes is fact-specific. *Id.* § 785.16(a).

On-call time

- “On-call” time refers to periods of time during which an employee is off duty, but is required to remain available to be called in to work. According to the federal regulations:
- “An employee who is required to remain on call on the employer’s premises or so close thereto that he cannot use the time effectively for his own purposes is working while “on call”. An employee who is not required to remain on the employer’s premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call.” *Id.* § 785.17.

On-premises time

- Special considerations are applicable to employees who reside on the employer's premises on a permanent basis or for extended periods of time (twenty-four hours or more) and who do not perform duties during the entire time that they are on the premises.
- Time spent eating, sleeping, entertaining, and other periods of complete freedom from all duties is not work time.
- Because of the difficulty of determining the exact hours worked under these circumstances, the federal regulations provide that "any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted." 29 C.F.R. § 785.23 (2001).

Training time

- Attendance at lectures, meetings, training programs, and similar activities need not be counted as working time if all of the following criteria are met:
 - (1) Attendance is outside of the employee's regular working hours;
 - (2) Attendance is in fact voluntary;
 - (3) The course, lecture, or meeting is not directly related to the employee's job (training is directly related to the job if it is designed to make the employee handle the job more effectively, as distinguished from training the employee for another job or in a new or additional skill); and
 - (4) The employee does not perform any productive work during his or her attendance.
- 29 C.F.R. § 785.27 (2001).

Travel time

- Time spent walking, riding, or traveling to and from the actual place of performance of the employee's principal activity or activities, either prior to the commencement of the workday or subsequent to the time on the workday at which the employee ceases the principal activity or activities, is generally non-compensable. 29 U.S.C. §§ 254(a)(1), (b); 29 C.F.R. § 785.34 (2001).
- However, this time may be made compensable by contract, custom, or practice. 29 C.F.R. § 785.34 (2001).

Travel time

- Normal travel between work and home is not compensable.
- For a special one-day assignment in another city, travel from the point of departure or arrival (e.g., airport) to the location of the assignment is work time. Travel from home to the point of departure, and any meal periods, are excludable. *Id.* § 785.37.
- Travel that is part of the employee's principal activity, such as traveling to different job sites during the workday, or reporting to meeting places to receive instructions, is compensable regardless of contract, custom, or practice. *Id.* § 785.38.

Travel time

- Overnight travel is work time when it cuts across the employee's regular workday and corresponding hours on nonworking days, excluding regular meal periods. Thus, if an employee regularly works from 9 a.m. to 5 p.m. on Monday through Friday, travel time during these hours is work time on the weekends as well as on the other days.
- As an enforcement policy, however, the DOL will not consider as hours worked time an employee spends in travel away from home as a passenger on an airplane, train, boat, bus, or automobile outside of regular working hours. *Id.* §§ 785.39, 40.

Meal and rest periods

- Meal periods are not hours worked as long as the employee is relieved of his or her duties. 29 C.F.R. § 785.19(b).
- Compensation is not required for a meal period when the employee can use the time effectively for his or her own purposes.
- Nothing in the FLSA requires an employer to provide employees with rest breaks.

Determining the regular rate of pay

- Under both federal and state law, the regular rate of pay includes all remuneration paid to or on behalf of a non-exempt employee, including hourly earnings, salary, piecework earnings, commission, bonus, and the value of meals and lodging, unless it falls within a statutory exclusion. See 29 U.S.C. § 207(e) (2001); 2002 D.L.S.E. Man. § 49.1.1.
- An employee's regular rate of pay is always expressed as an hourly rate for determining overtime compensation.
- The method for determining this hourly regular rate of pay differs under federal and state law.

Determining the regular rate of pay

- For hourly employees whose only compensation is an hourly rate of pay, the regular rate of pay is the hourly rate. 29 C.F.R. § 778.110(a) (2001).
- If an hourly employee also receives other compensation in that workweek, such as a bonus or standby pay, the regular rate of pay is computed by dividing the total compensation (hourly rate plus, e.g., bonus) by the total number of hours worked in that workweek. *Id.* § 778.110(b).
- Overtime for salaried, nonexempt employees may be determined by dividing the weekly salary by the number of hours which the salary is intended to compensate. See *id.* § 778.113(a).

Regular rate of pay -- bonuses

- An employee's regular rate does not include bonuses if both: (1) the fact that payment is to be made, and (2) the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly. 29 C.F.R. § 778.211(a) (2001).
- Nondiscretionary bonuses are included in the regular rate. *Id.* § 778.211(b).
- Incentive or production bonuses are included as well. *Id.* § 778.211(c).

Regular rate of pay – gifts

- Regular rate does not include gifts.
- However, a payment will *not* be considered to be a gift if:
(1) it is measured by hours worked, production, or efficiency; (2) it is so substantial that it can be assumed that employees consider it a part of the wages for which they work; or (3) it is paid pursuant to a contract.
- Holiday bonuses may constitute gifts (and thus be excluded from the regular rate) even though it is paid with sufficient regularity so that the employees are led to expect it. 29 C.F.R. § 778.212 (2001).

Regular rate of pay – profit-sharing plans

- Regular rate of pay does not include sums paid pursuant to a bona fide profit sharing plan or trust or bona fide thrift or savings plan. 29 C.F.R. § 778.213.
- The requirements of a bona fide profit sharing plan or trust or bona fide thrift or savings plan are exacting. No employer should assume that a payment to an employee from profits satisfies the regulations under the FLSA without carefully reviewing the terms of the Code of Federal Regulations. See *id.* §§ 547.0-.3, 549.0-.4.

Regular rate of pay -- prizes

- Prizes are includable in the regular rate as a form of bonus if they are paid as remuneration for the quality, quantity, or efficiency of work done by employees during their customary working hours at their normal assigned tasks. 29 C.F.R. § 778.331.
- Under certain circumstances, prizes paid pursuant to a bona fide suggestion system are not included in the regular rate. *Id.* § 778.333.

Calculating overtime

- An employer must pay non-exempt employees for overtime at a rate of one and one-half times their regular wage rate for hours worked in excess of forty hours in one workweek. 29 U.S.C. § 207(a).
- Overtime must be computed for each workweek and cannot be averaged over more than one workweek. 29 C.F.R. §§ 778.103-104 (2001).
- Holiday, sick, vacation or any other type of pay for hours not actually worked need not be counted toward the forty-hour workweek. *Id.* § 778.102.

Calculating overtime – different regular rates of pay

- Two permissible methods of determining the regular rate for employees who work at two or more different rates of pay during a single workweek.
- The usual method is to use the weighted average of the two rates. 29 C.F.R. § 778.115.
- The second method is to compute overtime on the basis of the regular rate for the work being performed during the overtime hours. This method is permissible only by prior agreement of the employee where the employee is performing two or more different types of work. See *id.* § 778.419.

Potential liability for unpaid overtime

- FLSA provides for liquidated (“double damages”) for willful violations of the statute.
- FLSA defines “employer” broadly as including “any person acting directly or indirectly in the interest of an employer in relation to an employee.” 29 U.S.C. § 203(d). Based on this definition, federal courts have occasionally found corporate officers or managers individually liable for unpaid overtime or minimum wages due under the FLSA.

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