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FLSA FOCUS

Wage and hour information for employers

May 2005

WELCOME

This client bulletin represents the first of a series of periodic alerts relating to this evolving area of the law. As you know, FLSA litigation has mushroomed in recent months and employers must be increasingly diligent in their application of the new wage and hour standards adopted last year by the Department of Labor. As a firm, we have created an FLSA task force comprised of a number of our employment law attorneys and we have conducted numerous seminars and training programs for clients over the past several months. We will continue to keep you apprised of developments. I hope that you find this bulletin useful. Please feel free to direct any questions to me or contact any of our employment law attorneys in the firm with your questions or concerns. Thank you.

Bruce R. Alper, Chair, Labor and Employment Law Group

COMPUTER SUPPORT SPECIALIST ENTITLED TO OVERTIME AND LIQUIDATED DAMAGES

Many employers continue to struggle with the proper classification of computer support personnel under the FLSA. One recent case highlights common mistakes employers make and the consequences that arise from misclassification.

In *Martin v. Ind. Mich. Power Co*, 381 F.3d 574 (6th Cir. 2004), the United States Court of Appeals for the Sixth Circuit ruled that a computer specialist in the employer's information technology department did not fall within the overtime exemptions for computer professionals or administrative employees under the Fair Labor Standards Act ("FLSA"). The court overturned a district court order granting summary judgment to the employer and instead entered summary judgment for the employee on his claims for lost overtime and liquidated damages.

The employee was part of the "IT Support" team, a division of the company designed to maintain the computer workstation software, troubleshoot and repair equipment, and monitor and document network performance. When other employees had problems with their computers, they would call the IT Support team. The plaintiff would then "troubleshoot" the problem, fixing it if possible. To fix computer problems, the plaintiff primarily uninstalled malfunctioning software, reinstalled software and installed software patches.

The district court concluded that the plaintiff was a computer professional under the FLSA because his work required highly specialized knowledge of computers and software and he customarily and regularly exercised discretion and independent judgment in his work. In reversing the district court's ruling, the Sixth Circuit noted that the lower court made an "understandable mistake, one that arises from the common misperception that all jobs involving computers are necessarily highly complex and require exceptional expertise." The Sixth Circuit explained that to meet the computer professional exemption, the employee must apply "theoretical and practical knowledge in computer systems analysis, programming, and software engineering," not simply "highly specialized knowledge of computers and software."

The court noted that the plaintiff did not work on the plant process computer; made no decisions or recommendations as to whether a piece of equipment should be serviced or replaced; made no recommendations for the purchase of equipment, hardware or software; and was not involved in designing or configuring the software or hardware he installed. Because the evidence did not demonstrate that the plaintiff was employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the software field, as required under the FLSA regulations, the computer professional exemption did not apply.

The court also found the administrative exemption inapplicable. The employer argued that because the plaintiff's job did not involve line-production work, which, in this case would have meant that the employee "made electricity" by operating the nuclear reactors, he must have been engaged in administratively exempt work. In rejecting the employer's argument, the Sixth Circuit noted that "the regulations do not set up an absolute dichotomy under which all work must either be classified as production or administrative."

The court also rejected the employer's argument that the plaintiff's job dealt with matters of significance because of the value of the systems he worked on and the consequences of mistakes. Noting the example found in the regulations of a messenger handling a large sum of money, the court commented that clearly the messenger is nonexempt. The employer's last argument—that because the plaintiff made more than the average blue-collar worker, his job was more important and, thus, exempt—was also rejected. The court noted that the fact that a "nonexempt, unionized, skilled plumber may earn more than an exempt public school teacher does not change the [nonexempt] nature of the plumber's work."

An employer who violates the FLSA's overtime provisions is liable for the amount of the unpaid overtime compensation and an additional equal amount known as liquidated damages if the employer fails to demonstrate both good faith and reasonable grounds for the incorrect classification of an employee. Noting that liquidated damages are normally awarded, the court explained that the employer failed to meet its burden. The employer contended that it acted in good faith because it relied on a form the plaintiff had filled out during the reorganization of the IT department. On this form, the plaintiff categorized his job level in the new organization as an "IT Support Specialist I," an exempt position. Evidence demonstrated, however, that the plaintiff was told to choose this classification by his supervisor. The court concluded that because the position included both non-exempt and exempt tasks, the employer was not permitted, in good faith, to classify anyone in that position as exempt without further information concerning their job tasks.

MOVING FORWARD

Although the *Martin* case was decided under the regulations as written before August 23, 2004, the substance of the regulations applied did not materially change. Indeed, in denying a request for a rehearing, the Sixth Circuit determined that all issues presented were fully considered upon the original submission and decision of the case. *See Martin v. Ind. Mich. Power Co.*, 2004 U.S. App. LEXIS 23117 (6th Cir., Nov. 2, 2004).

As employers continue the process of examining and reclassifying employees under the new regulations, the *Martin* decision emphasizes several important points:

- First, simply because an employee can fix computers, install software or troubleshoot computer issues, it does not automatically follow that the employee is exempt under the computer professional exemption.
- Second, the mere value or importance of an employee's work and the consequences of a mistake is not a determinative factor in determining an employee's exempt status under the administrative exemption.
- Third, employers have an *affirmative duty* to know and properly apply the FLSA's requirements for exempt status.
- Finally, employers must conduct a thorough analysis for any position an employer intends to treat as exempt under the FLSA. Exemptions must not be based merely upon job titles or job descriptions, but rather on the employee's actual duties. Employers must ensure that they have a sound and demonstrable basis for each individual claimed to be exempt within their organization.

DOL ISSUES OPINION LETTER RULINGS ADDRESSING NEW WHITE-COLLAR EXEMPTION REGULATIONS

The U.S. Department of Labor (DOL) has issued several new administrative letter rulings discussing the recently revised Fair Labor Standards Act (FLSA) white-collar exemption regulations that took effect August 23, 2004. Several other letters address long-standing, but often-confusing FLSA issues.

The eleven opinion letters addressing the application of the FLSA regulations cover several topics, including the exempt status of paralegals, prepayment plans for overtime, applicability of the administrative exemption to receptionists and claims adjusters, leave-bank deductions and timekeeping requirements.

Consistent with recent court decisions addressing the new regulations, DOL states in many of the letters that the new regulations in most cases clarify, rather than change, the former rules.

Timekeeping Requirements

One of the recent letters addressed an employer's policy of recording exempt employees' hours of work on weekly timesheets. The policy also required exempt employees to notify their supervisors if they planned to arrive after 9:00 A.M., and of the reason for full days of absence, such as for illness, vacation, jury duty or compensatory time off. The employer said the policy was designed to aid the company in tracking the amount of time in each employee's leave bank, and in determining whether any full-day deductions from the leave bank were warranted. The employer asked if the policy was consistent with the provisions of the FLSA.

In finding that the policy did not violate the FLSA, the DOL noted that the preamble to the new white-collar regulations provides that employers may require exempt employees to record and track their hours and to work a specified schedule, and may take deductions from accrued leave accounts without affecting the employees' exempt status.

Deductions from Leave Banks

In a separate opinion letter, the DOL addressed the related topic of leave bank deductions. To qualify for exempt status, an employee must be paid on a "salary basis"—i.e., a predetermined amount of salary regardless of the quality or quantity of work performed. In this instance, the employer asked whether taking partial-day deductions from leave banks was inconsistent with the salary basis requirement.

The DOL reiterated its position that employers may deduct partial-day absences from an exempt employee's leave bank. Thus, where an employer has an accrued time off plan (e.g., PTO, vacation time, sick leave), it may substitute or reduce the accrued leave in the plan for the time an employee is absent from work, whether the absence is a partial day or a full day, without harming the salary basis component of the employee's exempt status, so long as the employee receives his or her guaranteed salary. The DOL also noted that if an employee uses all of his paid time off in the bank, payment of the employee's guaranteed salary must be made nonetheless. However, the employer may still charge the absence to the employee's leave bank, resulting in a negative leave balance.

Paralegals

DOL issued a pointed letter regarding the applicability of the professional exemption to paralegals. The employer in this case noted that the paralegal in question possessed a four-year college degree and a paralegal certificate, and had taken continuing legal education courses throughout her 22-year paralegal career.

Despite these facts, and noting that many commentators to the proposed rule changes lobbied for the DOL to make paralegals eligible for the exemption, the DOL reiterated its position that "paralegals and legal assistants do not qualify as exempt learned professionals because an advanced specialized degree is not a standard prerequisite for entry into the field." The letter ruling did not address whether the paralegals qualify for the administrative exemption.

Application of the Administrative Exemption

The most difficult aspect of the white-collar exemptions continues to be determining whether an employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance—the key element of the administrative exemption.

At the request of two separate employers, the recent DOL opinion letters address this element of the administrative exemption with respect to receptionists and claims adjusters. In each case, the DOL found that the employees lacked the requisite discretion and independent judgment necessary to meet the exemption.

In the letter addressing the receptionist position, the Agency found that where the employee is simply performing duties that involve clerical or secretarial work, recording or tabulating data, and performing other

mechanical, repetitive and routine work, s/he does not have the authority to make independent choices, free from immediate direction and supervision, as required by the regulations. DOL reiterated that the regulations clarify that such work does not involve the exercise of discretion and independent judgment.

In the letter addressing claims adjusters DOL noted that the employees in question primarily spent their time: conducting telephone interviews to determine whether to accept or deny a workers' compensation claim for benefits, and filling out preprinted forms needed to make or deny payments.

DOL found that the processing duties involved the routine, recurrent and repetitive tasks of collecting information usually obtained by telephone and from submitted documents. "Completion of these forms requires only the level of skill needed to apply well-established techniques, procedures or specific standards usually described on the face of the forms." The claims adjusters in question did not perform investigations in person and never visited the scene of an accident.

DOL also noted that the employees did not make determinations as to questions of coverage or liability, nor did they have any authority to negotiate or make settlements of disputed claims. DOL further found that the employees did not make recommendations regarding litigation. Moreover, they conducted their telephone interviews based on a list of standardized questions and simply entered responses onto forms.

Based on this information, DOL found that the administrative exemption did not apply because the primary duty of the claims adjusters was performing duties involving application of their particular skills and knowledge rather than exercising "discretion and independent judgment with respect to matters of significance."

Overtime Prepayment Plans

In another opinion letter, DOL was asked to opine on whether an employer could pay its nonexempt employees wages equal to forty hours per week, even during weeks when the employee worked less than 40 hours, and count that overpayment as a "credit" for weeks in which the employee would work more than 40 hours, offsetting overtime pay due.

DOL reiterated its long-standing position that, in an attempt to keep an employee's wages or salary constant from pay period to pay period, an employer may pay its employees a sum in excess of what they earn or are entitled to in a particular week or weeks, with the understanding that overpayment is considered a pre-payment or advance payment of compensation for overtime to be worked on a later date.

Plans such as these are appropriate as long as the employer does not fall behind in overtime due. In other words, although the employer may run a "credit," it may never end a pay period "owing" overtime due. DOL noted that plans of this type require the use of a system whereby the employer can maintain a running account for each employee of the amount to the employer's credit. "In any workweek in which the prepayment credits are not sufficient to equal the additional overtime compensation due the employee, the difference must be paid on the next payday."

DOL noted that this type of pay arrangement will not fit every employee's situation. For example, a prepayment plan cannot be applied to an employee who is paid a salary under an agreement that the employee will receive the salary even when he or she works less than the regular number of hours in some weeks. Moreover, it cannot be applied to an employee paid a salary for a fluctuating number of hours worked from week-to-week. DOL explained that in regard to the fluctuating workweek model, because "the nature of such employees' employment is that they will receive the fixed basic salary regardless of the number of hours worked, it cannot be said that they are paid in excess of what they earn, or to which they are entitled, in any week in which they receive the fixed salary, even though such weeks may have been short workweeks."

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Vedder, Price, Kaufman & Kammholz, P.C. is a national, full-service law firm with over 210 attorneys in Chicago, New York City and New Jersey. The firm combines broad, diversified legal experience with particular strengths in labor and employment law and litigation, employee benefits and executive compensation law, occupational safety and health, general litigation, corporate and business law, commercial finance, financial institutions, environmental law, securities, investment management, tax, real estate, intellectual property, estate planning and administration, health care, trade and professional association and not-for-profit law.

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