FAIR LABOR STANDARDS ACT:

SYSTEMIC ISSUES

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FAIR LABOR STANDARDS ACT (FLSA)

Under the Fair Labor Standards Act ("FLSA") non-exempt employees must be paid: (1) at least the minimum wage for all "hours worked" in a workweek; and (2) an overtime rate equal to one-and-a-half the employee's regular rate for all hours worked over 40 in a workweek.[1] While these two basic requirements are easy to state, they are sometimes difficult to understand.

This paper provides an overview of some of the common, systemic errors employers make with respect to FLSA compliance. To be clear, this is an overview only, with an emphasis on errors that tend to multiply once made. With that in mind, note that that FLSA permits for "collective actions" (the FLSA version of a class action) and that damages under the FLSA include unpaid wages (including unpaid overtime) for the period beginning two years preceding suit (three if the violation is "wilful"), plus the same amount over again as liquidated damages.[2] Attorney's fees are also recoverable, and the relationship between the plaintiff's recovery and the amount of fees eligible for recovery is sometimes a loose one.[3]

I. MISUNDERSTANDING THE "SALARY BASIS"

A. Salary Does Not Equal Exempt

Contrary to popular belief, the mere fact that an employee is paid a salary does not mean the employee is "exempt" from the minimum wage and overtime provisions of the FLSA.[4] Rather, an employee must have a "primary duty" that fits within one of the enumerated exemptions—the most common being executive, learned professional, creative professional, computer professional, administrative, and outside sales—*and* be paid a salary.[5]

B. Job Duties, Not Job Titles, Control

Job titles do not determine whether an employee is exempt; the employee's actual primary duty does.[6] An employee's "primary duty" is the principal, main, major or most important duty the employee performs.[7] While the amount of time an employee spends performing exempt work

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[1] 29 U.S.C. §§ 201 *et seq.*

[2] 29 U.S.C. § 216 (b); *Reich v. Tiller Helicopter Services, Inc.*, 8 F.3d 1018, 1030 (5th Cir. 1993) (citations omitted) ("A district court may not exercise its discretionary authority to reduce or eliminate a liquidated damage award unless the employer sustains the "substantial burden of persuading the court by proof that his failure to obey the statute was both in good faith and predicated upon ... reasonable grounds.").

[3] 29 U.S.C. § 216(b); *see Lucio-Cantu v. Vela*, 239 Fed. Appx. 866 (5th Cir. 2007) (attorney's fee of $51,750 upheld even though the plaintiffs were only awarded less than $5,000 collectively).

[4] 29 U.S.C. § 213.

[5] Teachers, doctors, lawyers, and outside sales employees are exempt even without a salary, provided the other elements of exemption are met. See 29 C.F.R. §§ 541.303(d) (teachers), 541.304(d) (doctors and lawyers), and 541.500(c) (outside sales). Likewise, computer professionals can be exempt even if paid on an hourly basis, provided they are paid $27.63 per hour. 29 C.F.R. § 541.400(b). In addition, administrative employees and professional employees (but not executive employees) may be paid on a "fee basis" and still be exempt. *See* 29 C.F.R. §§ 541.200(a)(1) (administrative) and 541.300(a)(1) (professional). Given that the fee basis method of compensation is far less common than the salary basis, this paper focuses on salary basis.

[6] 29 C.F.R. § 541.2.

[7] 29 C.F.R. § 541.700(a).

can be a useful guide in determining whether exempt work is the primary duty of an employee, time alone is not the sole test and nothing in the FLSA requires that exempt employees spend more than 50 percent of their time performing exempt work.[8] It should also be remembered that an exemption is just that: an exemption. The burden is on the employer to prove it applies, and courts frequently interpret the FLSA narrowly and in favor finding against exemption.[9] Employers should also remember that the DOL almost always takes the narrowest view possible of any exemption, such that an employer will likely have to fight to prevail in any case where the applicability of the exemption is a close call.

With those basics in place, a brief summary of the exemptions follows:

1. **Executive** – An employee: (1) whose primary duty consists of the management of the enterprise or a customarily recognized unit thereof; (2) who customarily and regularly direct work of two or more other employees; and (3) who has the authority to hire or fire other employees or have their recommendations regarding hiring, firing, and advancement, promotion, or any other change of status given particular weight.[10]

2. **Administrative –** An employee whose primary duty: (1) consists of 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 (2) includes the exercise of independent judgment and discretion with respect to matters of significance.[11] The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision, although their decisions or recommendations may be reviewed at a higher level.[12] The concept of "judgment and discretion" is a bit more difficult to master. Put very simply, judgment and discretion is not the same thing as knowledge and skill.[13] Instead, it means comparing and evaluating possible courses of conduct, and acting or making a decision after those various possibilities have been considered.[14]

3. **Learned Professional** – An employee whose primary duty is the performance of work as a learned professional requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction (*e.g.*, law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical,

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[8] 29 C.F.R. § 541.700(b). Note, however, that some states (e.g., California) require that an employee spend at least 50% of his or her time performing exempt work to be considered exempt. *See, e.g.*, Cal. Lab. Code, § 515(e) (West 2013).

[9] *See Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960) (Section 213 exemptions should be "narrowly construed against the employers" and limited to those "plainly and unmistakably" within their terms).

[10] 29 C.F.R. § 541.100(a).

[11] 29 C.F.R. § 541.200(a).

[12] 29 C.F.R. § 541.202(c).

[13] 29 C.F.R. § 541.202(e).

[14] 29 C.F.R. § 541.202(a).

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