WAGE AND HOUR UPDATE

Examining Developing Trends under the FLSA and Related Wage and Hour Regulations

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I. INTRODUCTION

Little more than one year into the Trump presidency, employers are operating in a substantially altered wage and hour legal landscape. Some of those changes are a direct result of shifting priorities and objectives at the Department of Labor ("DOL"); others represent the continuation of efforts to reform the Fair Labor Standards Act ("FLSA") that began long before the current administration took office; still others stem from the evolving sociopolitical zeitgeist in which gender equality, including pay equity, remains a driving force.

This paper explores these latest developments and their consequences for employers and legal practitioners. First, this paper explores the latest status of the DOL's efforts to revise the compensation tests for employees to be eligible for exemption from the FLSA's overtime requirements. Next, this paper discusses recent trends and guidance with respect to compensable time, especially in light of an increasingly mobile and connected workforce. This paper then examines the DOL's new unpaid intern test. Finally, this paper analyzes recent developments and the future of states' efforts to bridge the gender pay gap.

II. WHAT'S NEXT FOR THE COMPENSATION TESTS UNDER THE FLSA EXEMPTIONS FROM OVERTIME

As the bedrock of America's minimum wage and overtime protections, the FLSA affects the most fundamental aspects of millions of American workers' employment relationships, including with respect to overtime requirements. But not all employees are subject to the FLSA's overtime protections, as the law exempts certain categories of employees these provisions.. . Under the Obama administration, the DOL engaged in a years-long effort to reform the exemption tests in ways that would bring the FLSA's protections to millions more employees within the orbit of the law. While these reforms were blocked when challenged in the courts, the fight does not appear to be over, and reform efforts continue under the current DOL and in individual states. The sections below discuss the history of the FLSA overtime exemptions, the Obama-era efforts to reform those exemptions, and the current status of further efforts to reform the exemptions.[1]

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[1] Although not nearly as significant as the saga of the exempt status reforms, another recent development in the area of FLSA exemptions came recently in the DOL's first batch of opinion letters issued in the past nine years. On January 5, 2018, the DOL reinstated its previously revoked opinion letter regarding the exempt status of community members who coach athletic teams for a public school that employs no full-time coaches. The opinion letter finds that such coaches qualify as teachers under the FLSA and are exempt from federal minimum wage and overtime pay provisions, so long as the coaches primary duty is teaching and imparting knowledge to students in an educational establishment, including instructing student athletes in the rules, fundamentals, philosophy, skills, and techniques of their respective sports, and provided that the coaches are not also employed by the school or school district in a different, non-exempt capacity. There is no minimum compensation test for such exempt coaches. For more information, see U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2018-16 (Jan. 5, 2018).

A. Historical Overview of the Compensation Tests

Since enactment in 1938, the FLSA has contained a number of exemptions to its minimum wage and overtime requirements. Most notable are the white collar exemptions for employees "employed in a bona fide executive, administrative, [or] professional . . . capacity . . . or in the capacity of outside salesman,"[2] otherwise known as the "EAP exemptions," which have survived through to today (and which now include a fourth exemption for computer professionals). The FLSA itself has never defined the EAP exemptions, instead delegating authority to the Department of Labor to "define[ ] and delimit[ ]" the exemptions.[3]

When the DOL first defined the exemptions in 1938, the regulations established sets of duties that would qualify for each of the EAP exemptions. In addition to the enumerated duties, the executive and administrative exemptions required that eligible employees also make no less than $30 each week, but employers were free to pay this amount as a salary, hourly wage, or on any other basis.[4] The 1938 regulation's description of the professional and outside sales exemptions likewise defined the requisite duties, but did not even require any minimum earnings threshold.[5]

In 1940, the DOL issued amended regulations, which included revisions to the definitions of the EAP exemptions.[6] While subject to some revisions, the specific duties tests remained the central

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[2] Fair Labor Standards Act, Pub. L. No. 75-718, § 13, 52 Stat. 1060, 1067 (1938) (codified as amended at 29 U.S.C. § 213.

[3] *Id.*

[4] 3 Fed. Reg. 2518 (Oct. 20, 1938). The regulations established a single, merged definition of "executive and administrative capacity," which required that the employee's "primary duty is the management of the establishment, or a customarily recognized department thereof, in which he is employed, and who customarily and regularly directs the work of other employees therein, and who has the authority to hire and fire other employees or whose suggestions and recommendations as to the hiring and firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight, and who customarily and regularly exercises discretionary power, and who does no substantial amount of work of the same nature as that performed by nonexempt employees of the employer, and who is compensated for his services at not less than $30 (exclusive of board, lodging, or other facilities) for a workweek." *Id.*

[5] *Id.* For the professional exemption, the 1938 regulations required that the employee be "customarily and regularly engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work, and (ii) requiring the consistent exercise of discretion and judgment both as to the manner and time of performance, as opposed to work subject to active direction and supervision, and (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time, and (iv) based upon educational training in a specially organized body of knowledge as distinguished from a general academic education and from an apprenticeship and from training in the performance of routine mental, manual, mechanical or physical processes in accordance with a previously indicated or standardized formula, plan or procedure." *Id.* The regulation further required that eligible employees must do "no substantial amount of work of the same nature as that performed by non-exempt employees of the employer." *Id.* The 1938 regulations defined outside salesman as one who "customarily and regularly performs his work away from his employer's place or places of business, who is customarily and regularly engaged in making sales . . . and who does no substantial amount of work of the same nature as that performed by non-exempt employees of the employer." Further, "routine deliveries, whether or not prior orders are placed by the purchases, and collections," were not to be considered sales. *Id.*

[6] 5 Fed. Reg. 4077-78 (Oct. 15, 1940).

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