The Fair Labor Standards Act of 1938

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Introduction

The Fair Labor Standards Act of 1938[1] ("FLSA") guarantees workers a minimum-wage rate and overtime pay for hours worked in excess of 40 hours in a week.[2] But the FLSA does not cover all employees. Instead, certain employees may fall under one or more of the FLSA's numerous exemptions. Some employers wrongfully consider certain employees exempt—either intentionally or unintentionally—which is the overarching theme of this article.

FLSA Exemptions

A broad category of exemptions is known as the "White-Collar" exemptions—a category that includes executive, administrative, and outside-sales employees.[3] The Department of Labor has established requirements that must be met for these exemptions to apply:

Executive Exemption

- The employer must pay the worker a salary of at least $455 per week.
- The employee's primary duty[4] must be the performance of management duties.[5]
- The employee must—customarily and regularly—direct the work of two or more employees.[6]
- The employee must have the authority to hire or fire employees, or at least have the ability to offer suggestions and recommendations as to hiring, firing, advancement, promotion, or other status changes for employees—with the employer giving "particularly weight"[7] those suggestions and recommendations.[8]

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[1] 29 U.S.C. § 201 *et seq.*
[2] *See id.* §§ 206 & 207.
[3] *See id.* § 213(a)(1)("The provisions of section 206 . . . and section 207 of this title shall not apply with respect to . . . any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman . . . .").
[4] The "primary duty" of an employee is "the principal, main, major or most important duty that the employee performs." 29 C.F.R.§ 541.700(a).
[5] *See* 29 C.F.R. § 541.102 (giving examples of what duties are considered management duties).
[6] *See* 29 C.F.R. § 541.104(a)(discussing what "two or more employees" means).
[7] *See* 29 C.F.R. § 541.105 (explaining the factors used to determine whether "particular weight" is given to suggestions and recommendations).
[8] 29 C.F.R. 541.100(a).

Administrative Exemption

- The employer must pay the worker a salary of at least $455 per week.

- It must be the primary duty[9] of the employee to perform office or nonmanual work that is directly related to the management or general business operations of the employer or the employer's customers.[10]

- The primary duty of the employee must encompass the exercise of discretion and independent judgment[11] regarding matters of significance.[12]

Outside-Sales Exemption

- The employee's primary duty[13] must be:

  - Making "sales;"[14] or

  - Obtaining orders or contracts for services, or for the use of facilities.[15]

- The employee must engage customers—customarily and regularly[16]— away from the employer's place or places of business[17] in performing her primary duty.[18]

Misclassification of Employees

Misclassification of Managers

Businesses often pay "managers" and "assistant managers" a salary in return for their working 60 hours or more each week. Employers skirt the FLSA's overtime requirement by

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[9] *See supra* note 4.
[10] *See* 29 C.F.R. § 541.201(a)(discussing what it means to perform work directly related to the management or general business operations of the employer).
[11] *See* 29 C.F.R. § 541.202(a)(explaining what the exercise of discretion and independent judgment involves).
[12] The phrase "matters of significance" "refers to the level of importance or consequence of the work performed." 29 C.F.R. § 541.202(a).
[13] *See supra* note 4; The regulations provide that "work performed incidental to and in conjunction with the employee's own outside sales or solicitors, including incidental deliveries and collections, shall be regarded as exempt outside sales work." 29 C.F.R. § 541.500(b).
[14] Section 203(k) of the FLSA defines "sale" as "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k).
[15] *See* 29 C.F.R. § 541.501(c)("Obtaining orders for 'the use of facilities' includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies.").
[16] *See* 29 C.F.R. § 541.701 (explaining the frequency required to be considered "customarily and regularly").
[17] *See* 29 C.F.R. § 541.502 ("The outside sales employee is an employee who makes sales at the customer's place of business or, if selling door-to-door, at the customer's home.").
[18] 29 C.F.R. § 541.500(a).

asserting the executive exemption. But many of their "managers" have very little—if any—decision-making authority. Further, the employees' primary duties often include tasks such as unloading delivery trucks, stocking shelves, running the cash register, and mopping the floor.

Misclassification of Mortgage Loan Officers

Many employees employed as "mortgage loan officers" are treated as exempt administrative employees. But in March 2010, the Department of Labor issued an Administrator's Interpretation finding the exemption unavailing.

The Department of Labor found that the second requirement of the exemption—the employee's primary duty must be "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"[19]—inapplicable, meaning mortgage loan officers are entitled to overtime pay.

Misclassification of Pharmaceutical Sales Representatives

Employers of pharmaceutical sales representatives often assert the outside-sales exemption to deny these employees overtime compensation. But the cornerstone of the outside-sales exemption is that the employee must have a primary duty of making sales.[20] An employer promoting a product that eventually might be sold by another person does not constitute "making sales" within the meaning of the exemption.[21]

But that is exactly what pharmaceutical sales representatives do on a daily basis. Physicians do not actually purchase any pharmaceuticals from representatives. And while pharmaceutical sales representatives often give free samples to physicians, there is no transfer of ownership for value.[22] Further, pharmaceutical sales representatives do not receive commitments to buy—or even a commitment to prescribe—as physicians have an ethical obligation to prescribe only drugs suitable for the medical needs of their patients.[23]

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[19] 29 C.F.R. § 541.200(a)(2).

[20] *See* 29 C.F.R. § 541.500(a)("The term 'employee employed in the capacity of outside salesman' in section 13(a)(1) of the Act shall mean any employee . . . [w]hose primary duty is . . . making sales within the meaning of section 3(k) of the Act . . . .").

[21] *See* In re Novartis Wage & Hour Litig., 611 F.3d 141, 153 (2d Cir. 2010)(finding that "the regulations . . . make it clear that a person who merely promotes a product that will be sold by another person does not, in any sense intended by the regulations, make the sale.").

[22] *See id.* at 154 ("The reps may give physicians free samples, but the Reps cannot transfer ownership of any quantity of the drug in exchange for anything of value.").

[23] *See id.* ("As the district court noted, 'physicians have an ethical obligation to prescribe only drugs suitable for their patients' medical needs, meaning that *they cannot make a binding commitment to a Rep to prescribe*' a particular Novartis product.")(citation omitted)(emphasis in original).

Other FLSA Violations

Misclassification of Independent Contractors

There must be an employer-employee relationship in order for the FLSA to apply. Some employers attempt to dodge the requirements of the FLSA—and numerous tax and other legal obligations—by classifying their employees as independent contractors. The problem is that employers often maintain a level of control over these individuals that is indicative of an employer-employee relationship.

Certain factors assist in determining whether an individual is an independent contractor or employee:

- The nature and degree of the alleged employer's control over the manner in which work is to be performed.
- The alleged employee's opportunity for profit or loss depending upon her managerial skill.
- The alleged employee's investment in equipment or materials required for her tasks or the employing of workers.
- Determining whether a special skill is required for the employee to render the services.
- Analyzing the degree of permanency and duration of the working relationship.
- The extent to which the service rendered is an integral part of the alleged employer's business.[24]

Off-the-Clock Cases

The FLSA generally requires employers to pay employees for all hours worked. Any physical or mental exertion that is controlled or required by the employer and that primarily benefits the employer is work within the meaning of the FLSA.[25]

Activities which are preliminary to or postliminary to principal activities are not covered by the FLSA.[26] But any activity that is considered "integral and indispensable" to a principal activity will itself be considered a principal activity.[27] Certain factors are considered when determining whether an activity is integral and indispensable to a principal activity:

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[24] Freund v. Hi-Tech Satellite, Inc., 185 Fed.Appx. 782, 783 (11th Cir. 2006)(*quoting* Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1535 (7th Cir. 1987)).
[25] IBP, Inc. v. Alvarez, 546 U.S. 21, 25 (2005)(*quoting* Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944)).
[26] 29 U.S.C. § 254(a)(2).
[27] *Alvarez*, 546 U.S. at 37.

- Whether the activity is required by the employer;
- Whether the activity is necessary for the employee to perform her duties;
- Whether the activity primarily benefits the employer.[28]

The issue of integral and indispensable activities often arises in "donning and doffing" cases. These cases involve employees required to put on and remove protective gear prior to and after their shift's end without compensation for the time spent doing so. An employee's donning and doffing of protective gear is often integral and indispensable to principal activities.[29] This means compensation is required and—due to the "continuous workday rule"—all activities that occur between must be compensated.

Interrupted Meal Periods

Typically, an unpaid meal period of 30 minutes or more is considered a bona fide meal period—although the meal period can be shorter than 30 minutes under special conditions.[30] The employee must be completely relieved from duty during the meal period.[31] The employee will not be considered relieved from duty if she is required to perform any duties—active or inactive—while eating.[32]

While an employer can prevent employees from leaving the premises during their meal periods,[33] any interruption during the meal period will cause the entire time to be counted as working time. For example, if a nurse is paged 15 minutes into her unpaid 30-minute lunch break to go perform work duties, the entire 30 minutes must be compensated.

Conclusion

It has been estimated that 70% of employers are out of compliance with the FLSA in some way.[34] Unwary and conscious employers alike are exposed to huge potential liability as a result of their violations. FLSA litigation has increased significantly over the past several years—with no signs of it slowing down.

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[28] Bonilla v. Baker Concrete Constr., Inc., 487 F.3d 1340, 1344 (11th Cir. 2007).

[29] *See Alvarez*, 546 U.S. at 30 ("Thus, under *Steiner*, activities, such as the donning and doffing of specialized protective gear, that are 'performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by Section 4(a)(1).'" (*quoting* Steiner v. Mitchell, 350 U.S. 247, 256 (1956))).

[30] 29 C.F.R. § 785.19(a).

[31] *Id.*

[32] *Id.*

[33] 29 C.F.R. § 785.19(b).

[34] Diane Cadrain, *Guard against FLSA claims: Fair Labor Standards Act lawsuits are increasing. Are your classifications in order?*, HR MAGAZINE, Apr. 1, 2008, at 97.