The Seventh Circuit Further Clarifies FLSA Overtime Exceptions…For Window Washers

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A recent Seventh Circuit decision may provide ammunition for employers defending FLSA claims brought by commission-based employees or employees who work irregular hours.

In *Ramon Alvarado, et al. v. Corporate Cleaning Services, Inc., et al.*, No. 13-3818 (7th Cir. April 1, 2015), the plaintiffs were 24 window washers employed currently or formerly by Corporate Cleaning Services ("CCS"), one of Chicago's largest providers of window-washing services to high-rises. They filed a lawsuit against CCS for failure to pay overtime wages under the FLSA, alleging they worked in excess of 40 hours in individual work weeks for CCS but were not paid at a rate of one and a half times their regular hourly rate of pay for all the time they worked in excess of 40 hours per week.

There is a commission-related exception to the FLSA that requires satisfaction of three conditions: (i) the worker's regular pay exceeds one and a half times the federal minimum wage; (ii) more than half of the worker's compensation represents commissions on goods or services; and (iii) the worker must be employed by a retail or service establishment. *See* 29 U.S.C. § 207(i). CCS conceded that it did not pay the window washers for work in excess of 40 hours a week; and the window washers conceded that their regular pay exceeds one and a half times the federal minimum wage (under the exception's first required condition).

Examining the "commission" issue, Circuit Judge Richard Posner reviewed certain facts, including CCS's assignment of "points" to jobs based on complexity and the number of hours that the window washers took to complete the job, as well as how each worker usually received the same amount of points allocated to the job. CCS then used the number of points assigned to the job to determine the amount it charged the customer and often made price adjustments for the costs of permits, equipment rentals, competition, or the desire to maintain good relations with customers. Because the plaintiffs' compensation was based on the points assigned to each job on which they worked, their compensation would vary from job to job.

Posner analyzed the differences between two compensation systems - commission based and piecework based compensation. In a piece-rate system the worker is paid by the item produced by him; but in a commission system, a worker is paid by the sale. Varying compensation does not invalidate the compensation system as a commission system. *See Yi v. Sterling Collision Centers, Inc.*, 480 F.3d 505, 509-10 (7th Cir. 2007). Another important consideration is that commission-compensated work involves irregular hours of work. *See Id.* at 510. Furthermore, if sales are made at a uniform rate, so that the hours worked-to-pay ratio is constant, then an employee who is paid by the sale is not a commission worker. Piece-rate workers are not within the FLSA commission exception because they keep producing even when no sale is imminent – the hours-to-output tend to

be constant.

Here, however, the plaintiffs could only work when CCS was hired (or sold its services), and therefore, their employment was irregular because of the peculiar conditions of the window-washing business. In addition, Posner listed other reasons why their work was irregular, such as: weather, unable to amass an inventory, delays due to other work being done on the buildings or failure to notify residents, slowdown in demand, and, oddly enough, peregrine falcon attacks. Posner concluded that the plaintiffs' compensation represented commission because they were paid only if there had been a sale of window washing services.

With respect to whether CCS was a "retail or service" establishment, Posner stated that the terms are not defined in the statute, and concluded that the CCS met the "retail or service establishment" requirement under the FLSA (section 207(i)), and was probably best described as a "retail services establishment." The Court found that CCS was a retailer as opposed to a wholesaler, and that it sold its services by the building – which is a unit of sale recognized in the industry. Posner then discredited the plaintiffs' and The Department of Labor's (which filed an *amicus curiae* brief), attempts to establish that CCS "lacks a retail concept" and that the building managers "resell" CCS's services to the occupants. According to the Department of Labor regulation, 29 C.F.R. § 779.317, although it is impossible to give a complete list of the types of establishments that have no "retail concept," it is possible to give a partial list of establishments to which the retail concept does not apply. The partial list does not reference window washers. Moreover, The Department of Labor cited to definitions from regulations that come from a section of the statute that pertains to the intrastate business exemption – which has no connection to this case.

This opinion is a management-side victory and will likely be cited by FLSA defendants in industries whose business models are substantially similar to CCS's, including those with commission-based compensation systems and employees who work irregular hours. Companies and their counsel, however, are well advised to carefully review the regulations listing the establishments to which the "retail concept" does not apply.