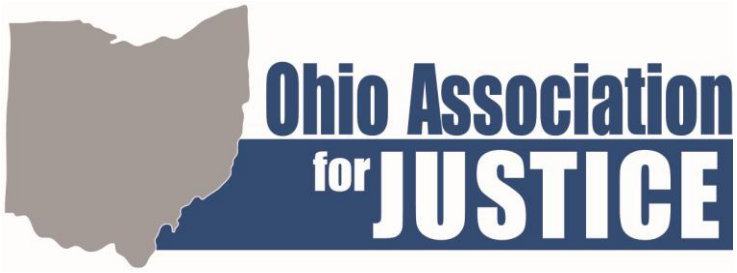

OAJ Destination CLE: Trial Tactics Seminar

March 24-26, 2014 – Park City, UT

Wage & Hour Law - A Primer for Trial Lawyers

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OVERTIME COVERAGE UNDER THE FAIR LABOR STANDARDS ACT AND THE OHIO WAGE ACT

This article is intended to provide lawyers with a very brief and general overview of the federal Fair Labor Standards Act ("FLSA") and which workers are covered by the FLSA's overtime provisions. Of course, what follows does not come close to addressing the many coverage issues arising under the FLSA and similar state statutes.

The FLSA, codified at 29 U.S.C. § 201, *et seq.*, is the primary source of this Nation's minimum wage, overtime, and child labor protections. With respect to overtime, the FLSA generally prohibits companies from requiring workers to work over forty hours in a workweek unless the worker is compensated for all overtime hours at a rate not less than one-and-one-half times the worker's regular rate of pay.[1]

Enacted in 1938, by President Franklin D. Roosevelt, the FLSA overtime provision reflects the progressive values underlying so much of the New Deal legislation. The legislative purpose behind the time-and-one-half overtime premium was two-fold. First, the overtime premium was intended "to ensure that each employee covered by the Act would receive "'[a] fair day's pay for a fair day's work' and would be protected from 'the evil of overwork as well as underpay.'"[2] Second, "[i]n a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work."[3] In other words, Congress intended that, by making overtime prohibitively expensive, the FLSA would force companies to hire more workers instead of requiring existing workers to work overtime.

Are My Clients Covered?

According to the Department of Labor, over eighty million American workers are covered by the FLSA.[4] For purposes of coverage, the FLSA interprets the term "employee" in the broadest sense to include "any individual employed by an employer."[5] Covered employees can include, among others, independent contractors[6] and even trainees.[7]

Workers fall within the FLSA's reach so long as they are engaged in covered activity. Covered activity can be established under either the "individual/traditional coverage" doctrine or the "enterprise coverage" doctrine. Under individual/traditional

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[1] 29 U.S.C. § 207(a)(1).
[2] Barrentine v. Arkansas-Best Freight Sys. Inc., 450 U.S. 728, 739 (1981) (quoting 81 Cong. Rec. 4983 (1937) (message of President Roosevelt)).
[3] Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 578 (1942).
[4] See DOL Wage and Hour Division Fact Sheet No. 14 (available at "www.dol.gov/esa/whd/").
[5] 29 U.S.C. § 203(e).
[6] See Johnson v. Unified Govt. Wyandotte Cty., 371 F.3d 723, 729 (10th Cir. 2004) (describing factors to be considered in deciding whether worker is covered employee or independent contractor)
[7] See Chelen v. John Pickle Co., 344 F. Supp. 2d 1278, 1291-92 (N.D. Okla. 2004) (describing factors to be considered in determining whether trainee is covered employee).

coverage, workers are covered if, based on their job function, they are engaged in commerce or in the production of goods for commerce.[8] Under enterprise coverage, workers, regardless of their job function, are covered if their company is part of a business enterprise that is engaged in commerce or the production of goods in commerce.[9] In order to qualify for enterprise coverage, the company generally must do at least $500,000 in annual business[10], but this threshold can be reached by combining the company with other business partners in a "common business purpose.[11] Also, exceptions are made for various non-profit and public entities.[12]

Given the extraordinarily broad parameters of the individual/traditional and enterprise coverage doctrines, you generally can assume that most of your clients are covered by the FLSA.

Specific Ohio Requirements, different from the FLSA.

In Ohio, workers are covered by the Ohio Minimum Fair Wage Standards Act ["the Ohio Wage Act"] codified at Ohio Rev. Code §4111 *et seq.* The Ohio Wage Act adopts the federal standards as its own by numerous references to the FLSA.[13] Ohio regulates the wages of employees of employers whose gross volume of sales are more than $150,000, but less than $500,000. An employer that falls in this category must pay overtime at a rate of one and one half the employee's regular rate after 40 working hours in a week.

On November 7, 2006 Ohio passed the Ohio Fair Minimum Wage Amendment. The Ohio Wage Act now provides more minimum wage protection to employees than the federal regulations by mandating treble damages without the need to show the employer engaged in "willful" conduct.[14] The Ohio minimum wage rate is increased every January 1st by the rate of inflation for the previous twelve month period tied to the consumer price index rounded to the nearest five cents.[15] The Ohio minimum wage for 2013 is $7.85 per hour for employees of employers with gross annual receipts of $250,000 or more; unlike the federal minimum wage which is a static $7.25 per hour. If the employer's gross annual receipts of less than $250,000, it is only required to pay the federal minimum wage of $7.25 an hour.

Under, what is commonly called the Ohio Prompt Pay Act, employers must pay employees at least two times in a month. Also, if more than 30 days has passed since the regular pay date without payment of wages, the employee has a claim for nonpayment and is entitled to "as liquidated damages…an amount equal to six percent of the amount of the claim still unpaid and not in contest or disputed or two hundred dollars, whichever

[8] 29 U.S.C. §§ 206(a)(1) and 207(a)(1).
[9] Id. at §§ 203(r)-(s).
[10] Id. at § 203(s)(1)(A)(ii).
[11] See Chao v. A-One Med. Serv., Inc., 346 F.3d 908, 914-15 (9th Cir 2003) (citing 29 U.S.C. § 203(r)(1)).
[12] 29 U.S.C. § 203(s)(5)-(6).
[13] See e.g. O.R.C. § 4111.03(A)
[14] O.R.C. § 4111.14 et seq. and Oh. Const. Art. II, § 34a.
[15] Oh. Const. Art. II, § 34a.

is greater."[16] Contrary to popular belief, an employer does not have to pay bonuses or give vacation in Ohio. Also, there is no requirement, absent an employment contract, for the employer to repay vacation days when an employee leaves the employer.

Are "Salaried" Employees Entitled to Overtime?

One of the myths of the American workplace is that "salaried" workers are not entitled to overtime. Exploiting this myth, some companies promote workers from "hourly" to "salaried" positions with the understanding that, in exchange for the salary, the worker gives up her right to overtime pay. Because these "salaried" job titles often carry an elevated status within the workplace, working without overtime may seem reasonable to the worker.

But the FLSA does *not* exempt all salaried workers from overtime pay. Rather, where a salaried worker is covered by the overtime provision, her salary is usually calculated by dividing her weekly salary by the number of hours the salary is intended to compensate.[17] However, many variations on this general rule exist and these variations are too detailed for coverage here.

Are "Salaried" Employees Ever Exempt From Overtime?

The FLSA exempts certain executive, administrative, professional, outside sales, and computer employees from the entitlement to time-and-one-half overtime benefits.[18] These exemptions commonly are referred to as the "white collar" exemptions, and they have spawned substantial litigation as some American companies choose to push the envelope in increasingly aggressive efforts to deny overtime pay to workers and their families. The white-collar exemptions – like all FLSA exemptions – are narrowly construed against the employer.[19] To utilize a white-collar exemption, a company generally must clear two independent hurdles:

A. The "Salary Basis" Requirement

First, the employee must be paid on a "salary basis" at a salary of at least $455 per week.[20] "An employee will be considered to be paid on a 'salary basis' . . . if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed."[21] Generally, the employee "must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours

[16] O.R.C. § 4113.15(B)
[17] 29 C.F.R. § 778.113(a).
[18] 29 U.S.C. §§ 213(a)(1) and 213(a)(17).
[19] See Arnold v. Ben Kanowski, Inc., 361 U.S. 388, 392 (1960); A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945).
[20] 29 C.F.R. § 541.600(a); see generally Auer v. Robbins, 519 U.S. 452 (1997) (discussing "salary basis" concept).
[21] 29 C.F.R. § 541.602(a).

worked."[22] However, under appropriate circumstances (which are described in the regulation), deductions may be made for full-day absences attributable to, *inter alia*, illness or disciplinary suspensions.[23]

Historically, many misclassification cases have been won because companies made improper deductions from a salaried employee's pay.[24] However, seeking to protect business from large damages awards, the Department of Labor recently expanded regulations allowing companies to escape some liability for "inadvertent" pay deductions that are voluntarily reimbursed by the company.[25]

Deductions are permissible in certain limited circumstances:

1. An employee is not required to be paid for any week in which she performs no work.[26]
2. An employee is not required to be paid for a day where she missed a full day for personal reasons.[27]
3. An employee is not required to be paid for any day occasioned by sickness or disability if the deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation for loss of salary occasioned by both sickness and disability.[28]
4. The Family Medical Leave Act of 1993 created some limited exceptions permitting employers to place otherwise exempt, salaried, employee on unpaid leave.[29]
5. Employees can be docked pay for major safety violations.[30]

B. The "Job Duties" Requirement

Even if the worker is paid on a "salary basis," an analysis of the worker's job duties must reveal that she actually works as an executive, administrative, professional, outside sales, or computer employee, as those terms are defined under the FLSA. In 2004, the Department of Labor expanded the reach of the white-collar exemptions in its business-friendly amendments to the overtime regulations. The amended regulations appear at 29 C.F.R. §§ 541.0, *et seq.* Employers must comply with any Federal, State, or municipal laws, regulations, or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the Act and overtime lawsuits may be

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[22] Id.
[23] 29 C.F.R. § 541.602(b).
[24] See, e.g., Takacs v. Hahn Automotive Corp., 246 F.3d 776 (6th Cir. 2001) (managers and assistant managers of retail establishment not exempt from overtime entitlement because company subjected them to improper deductions for certain disciplinary infractions); Oral v. Aydin Corp., 2001 U.S. Dist. LEXIS 20625 (E.D. Pa. Oct. 31, 2001) (workers not exempt from overtime entitlement because company subjected them to improper deductions for partial-day sick absences).
[25] 29 C.F.R. § 541.603.
[26] 29 C.F.R. § 541.118(a).
[27] 29 C.F.R. § 541.118(a).
[28] 29 C.F.R. § 541.118(a) (3).
[29] 29 C.F.R. § 825.206(a).
[30] 29 C.F.R. § 541.118(a) (5)

litigated under both federal and state laws.[31] Unfortunately, the Ohio Wage Act incorporates the definitions and tests of the FLSA and adds no additional protections for the employee.[32]

It is important to remember the well-established principle that "[a] job title alone is insufficient to establish the exempt status of an employee."[33] In other words, a company cannot escape its overtime obligations by giving a worker a salary and a glamorous title but requiring her to perform the same work as her non-exempt co-workers. With the above in mind, we turn to the FLSA's various white-collar exemptions.

1. The Executive Employee Exemption

To qualify for the "executive" employee exemption, the following criteria must be established: (i) the worker's primary duty must be managing the enterprise or managing a customarily recognized department or subdivision of the enterprise; (ii) the worker must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and (iii) the worker must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.[34] The concurrent performance of executive and non-executive work does not necessarily disqualify a worker from classification as an executive employee.[35]

In applying the executive exemption, the devil is in the details. Before deciding whether a worker meets the above criteria, one must carefully study the definitions of applicable terms such as "primary duty,"[36] "customarily and regularly,"[37] "management,"[38] "department or subdivision,"[39] "two or more other employees,"[40] and "particular weight."[41] In issuing the 2004 amendments, the Department of Labor generally altered these definitions for the benefit of corporate America. However, there remains ample room to argue that workers do not fall within the revised executive

[31] DeAsencio v. Tyson Foods, Inc., 342 F.3d 301 (3d Cir. 2003)
[32] Ohio Rev. Code § 4111.01(D)(4).
[33] 29 C.F.R. § 541.2; see also Martin v. Indiana Michigan Power Co., 381 F.3d 574, 585-86 (6th Cir. 2004) ("The FLSA requires the employer to make FLSA exemption decisions based on the employee's actual job duties, not the employee's job title."); Barth v. Wolf Creek Nuclear Operating Corp., 125 F. Supp. 2d 437, 439 (D. Kan. 2000) (quoting previous regulatory language for proposition that "[t]itles can be had cheaply and are of no determinative value").
[34] 29 C.F.R. § 541.100(a).
[35] 29 C.F.R. § 541.106.
[36] 29 C.F.R. § 541.700
[37] 29 C.F.R. § 541.701
[38] 29 C.F.R. § 541.102
[39] 29 C.F.R. § 541.103
[40] 29 C.F.R. § 541.104
[41] 29 C.F.R. § 541.105

exemption, and, like many regulatory changes, the amended exemption probably is neither as beneficial as business hopes nor as harmful as workers fear.[42]

2. The Administrative Employee Exemption

To qualify for the administrative employee exemption, the employee's primary duty (i) 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 and (ii) must include the exercise of discretion and independent judgment with respect to matters of significance.[43] The regulations, as amended in 2004, define in great detail key terms, such as "primary duty,"[44] "directly related to management or business operations,"[45] and "discretion and independent judgment."[46]

Also, the 2004 amendments include various "examples" of positions that "generally" fall within the administrative exemption.[47] Not surprisingly – given the pro-business tenor of the 2004 amendments – these examples read like a "who's who" of job titles that have been the subject of recent class action lawsuits. However, at least one court has observed that a job title's inclusion in the Department of Labor's list of examples does not preclude the judiciary from finding that, in reality the worker is not exempt from overtime benefits. Robinson-Smith v. Government Employees Ins. Co., the D.C. District Court held that insurance claims adjustors are not exempt from overtime notwithstanding new regulatory language that "[i]nsurance claims adjustors generally meet the duties requirement for the administrative exemption . . ."[48] This same court has observed that "[t]he general criteria for employees employed in a bona fide administrative capacity are essentially the same under the August 2004 Regulations as under the current regulations."[49]

3. The Professional Employee Exemption

Workers are classified as exempt "professional employees" if their "primary duty is the performance of work (i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or (ii) requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor."[50] Similarly, workers are classified as exempt "learned professionals" if their primary duty is "the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a

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[42] See, e.g., Beauchamp v. Flex-N-Gate, LLC, 2005 U.S. Dist. LEXIS 3108, *10 N. 3 (E.D. Mich. Feb 23, 2005) (suggesting that 2004 regulations did not significantly alter analysis of whether production supervisor was exempt executive employee).
[43] 29 C.F.R. § 541.200(a).
[44] 29 C.F.R. § 541.700
[45] 29 C.F.R. § 541.201
[46] 29 C.F.R. § 541.202
[47] Id. at § 541.202
[48] Robinson-Smith v. Government Employees Ins. Co., 323 F. Supp. 2d 12, 21-22 (D.D.C. 2004)
[49] Id. at 18.
[50] 29 C.F.R. § 541.300.

prolonged course of specialized intellectual instruction."[51] Finally, workers are classified as "creative professionals" if their primary duty is "the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work."[52]

As with the administrative exemption, the 2004 regulations gratuitously suggest that various job titles generally fall within the professional exemptions. These include, among others, certain "medical technologists,"[53] "registered nurses" (but not "licensed practical nurses")[54], certain "dental hygienists,"[55] certain "physician assistants,"[56] most "chefs and sous chefs" (but not "cooks who perform predominantly routine mental, manual, mechanical or physical work")[57], some (but not nearly all) paralegals[58], most teachers[59], and medical interns and residents.[60] The Department of Labor apparently is not concerned with the fact that these examples disrespect the well-established principles that a worker's job title is not determinative of his coverage status under the FLSA and that coverage should be determined on a case-by-case basis depending on the worker's *actual* job duties. Accordingly, a job title alone is insufficient to establish the exempt status of an employee and each client should be interviewed and the determination of their exempt status should be made on their particular facts.[61]

4. Outside Sales

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.[62] The outside sales exemption applies to an employee (1) whose primary duty is . . . making sales . . . and (2) who is customarily and regularly engaged [at the customer's place of business or, if selling door-to-door, at the customer's home] in performing such primary duty.[63]

Importantly, the regulation defining "away from the employer's place of business" also notes:

> [A]ny fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the

[51] 29 C.F.R. § 541.301.
[52] 29 C.F.R. § 541.302.
[53] 29 C.F.R. § 541.301(e)(1).
[54] 29 C.F.R. § 541.301(e)(2).
[55] 29 C.F.R. § 541.301(e)(3).
[56] 29 C.F.R. § 541.301(e)(4).
[57] 29 C.F.R. § 541.301(e)(6).
[58] 29 C.F.R. § 541.301(e)(7).
[59] 29 C.F.R. § 541.303(b).
[60] 29 C.F.R. § 541.304(c).
[61] 29 C.F.R. § 541.2
[62] 29 C.F.R. § 541.502.
[63] 29 C.F.R. §§ 541.500, 541.502.

> employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property.[64]

The regulations provide that an employer may have many "places of business" that negate the outside sales exemption. Specifically, "any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property."[65] Further, the general rule for outside sales employees provides that employees must be selling "away from the employer's place or places of business."[66] So, *any* fixed location from which the employee made a sale is considered the employer's place of business under the FLSA.

5. Computer Employees and Highly Compensated Employees

The regulations also exempt "[c]omputer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field,"[67] as well as most "outside salesmen,"[68] and most employees with a total annual compensation in excess of $100,000[69]. Because such individuals probably do not make up a substantial portion of your client base, these exemptions are not discussed further.

6. "Blue Collar" Workers and Public Safety Employees

Even though there never was much doubt about the non-exempt status of "blue collar" workers, the 2004 regulations explicitly state that the exemptions do *not* apply to "manual laborers or other 'blue collar' workers who perform work involving repetitive operations with their hands, physical skill and energy."[70] More significantly, the 2004 regulations assert that the following public safety providers generally are *not* exempt from receiving overtime:

> [P]olice officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses;

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[64] 29 C.F.R. § 541.502; see also Arnold v. Reliant Bank, --- F. Supp. 2d ----, 2013 WL 1182563 (M.D. Tenn. March 21, 2013).
[65] 29 C.F.R. § 541.502.
[66] 29 C.F.R. § 541.500.
[67] 29 U.S.C. § 541.400(a).
[68] 29 C.F.R. § 541.500, *et seq*.,
[69] 29 C.F.R. 541.601
[70] 29 C.F.R. § 541.3(a).

interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.[71]

Apparently, local governments could not match big business' success in impacting the regulatory drafting process. But the outcome is one of the only bright spots in the 2004 regulations, and you should carefully review whether your law enforcement and other public safety clients are receiving full overtime benefits. If these workers are unionized, be especially mindful that FLSA rights cannot be waived by collective bargaining agreements that provide less generous overtime benefits.[72]

Are any Other Employees Exempt From Overtime Under the FLSA?

In addition to the white-collar exemptions discussed above, the FLSA contains various statutory exemptions for other types of workers. These exemptions, some of which are quite broad, include, *inter alia*:

1. Workers (such as truck drivers) employed by common carriers and whose qualifications and maximum hours are dictated by the federal Motor Carrier Act;

2. Most newspaper delivery drivers;

3. Many chartered bus drivers;

4. Taxicab drivers;

5. Most railroad and airline employees

6. Workers employed in certain "amusement or recreational establishment[s], organized camp[s], or religious or non-profit educational conference center[s];"

7. "Seamen" and certain workers employed in the fishing and seafood industry;

8. Most agricultural workers;

9. Most workers employed by small-market news publications; and

10. Babysitters and certain domestic service workers "employed on a casual basis."[73]

Are any Other Employees Exempt From Overtime Under the Ohio Wage Act?

In addition to the white-collar exemptions and specific FLSA exemptions discussed above, the Ohio Wage Act contains several statutory exemptions for specific types of workers in Ohio;

[71] 29 C.F.R.§ 541(b)(1).
[72] 29 C.F.R. § 541.4.
[73] 29 U.S.C. § 213

1. Any individual who works or provides personal services of a charitable nature in a hospital or health institution for which compensation is not sought or contemplated;

2. A member of a police or fire protection agency or student employed on a part-time or seasonal basis by a political subdivision of this state;

3. Any individual in the employ of a camp or recreational area for children under eighteen years of age and owned and operated by a nonprofit organization or group of organizations described in Section 501(c)(3) of the "Internal Revenue Code of 1954," and exempt from income tax under Section 501(a) of that code; and

4. Any individual employed directly by the House of Representatives or directly by the Senate.[74]

Conclusion

Enforcement of our Nation's wage and hour laws is a noble undertaking that may be rewarding and profitable for plaintiffs' attorneys. As discussed above, many of your existing clients may be entitled to overtime, and, as more companies violate the overtime laws, it becomes increasingly likely that your clients will have legitimate overtime claims. I encourage you to expand your practice to include protecting workers from what has been characterized as "wage theft in America."[75]

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[74] See generally Ohio Rev. Code §4111.01(D).
[75] Kim Bobo, *Wage Theft in America: Why Millions of Working Americans Are Not Getting Paid—And What We Can Do About It.*, The New Press 2009