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2020 Virtual Annual Convention

Thursday, August 13th

Employment Law Session

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FLSA Collective and Class Action Cases

Rachel Sabo Friedmann, Esq. and Greg Mansell, Esq.

FLSA Collective and Class Action Cases

OHIO ASSOCIATION OF JUSTICE
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AGENDA:

- Basic Difference Between Class and Collective Actions (Greg Mansell)
- Pre-Suit Evaluation of a Case, and Selecting the Named Plaintiff (Rachel Sabo Friedmann)
- Opt In or Opt Out? Or Both? (Greg Mansell And Rachel Sabo Friedmann)
- Class Certification Challenges (Greg Mansell And Rachel Sabo Friedmann)
- The Logistics of Managing Collective And Class Actions; Common Issues that Arise (Greg Mansell And Rachel Sabo Friedmann)
- Arbitration Agreements and Class/Collective Action Waivers (Greg Mansell And Rachel Sabo Friedmann)

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BASIC DIFFERENCE BETWEEN CLASS AND COLLECTIVE ACTIONS (GREG MANSELL)

- History of the Fair Labor Standards Act ("FLSA")
- Typical types of FLSA cases
  - Exemption/misclassification
  - Off-the-clock
  - Pre-shift and post-shift work
  - Uncompensated work during meals/breaks
  - Time-rounding cases
  - Independent contractor issues
- Liquidated (double) damages are available unless Defendant can prove "good faith" defense
- Statute of Limitations is two years but can be extended to three years for willful claims
- Reasonable attorneys' fees are awarded to prevailing plaintiffs.

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BASIC DIFFERENCE BETWEEN CLASS AND COLLECTIVE ACTIONS (cont'd)

(GREG MANSELL)

- Section 216(b) (29 U.S.C. §216(b))

(b) Damages; right of action; attorney's fees and costs; termination of right of action

* * *

An action to recover the liability prescribed in the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction **by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought**.

* * *

- Employees must be "similarly situated" to join a collective action.
- Employees must affirmatively opt-in to the action.

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BASIC DIFFERENCE BETWEEN CLASS AND COLLECTIVE ACTIONS (cont'd)

(GREG MANSELL)

- Rule 23 Class Actions
  - Higher Standard;
  - Rights of putative class members differ;
  - Procedural timing during case;
  - Class is so numerous that joinder of all members is impracticable;
  - There are questions of law or fact common to the class;
  - The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
  - The representative parties will fairly and adequately protect the interests of the class

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PRE-SUIT EVALUATION OF A CASE, AND SELECTING THE NAMED PLAINTIFF

(RACHEL SABO FRIEDMANN)

- Compile all necessary info from potential client
  - Paystubs (send payroll records request)
  - Conduct legal research into claim, potential loopholes, potential immunity
  - Talk to other former or current employees
  - Research whether other employers have been sued for same/similar practice
- Evaluate potential named plaintiff
  - Must be: knowledgeable, responsive, can easily articulate how the timekeeping policy and pay practices apply to employees, knows how to access documents if still currently employed (payroll practices, attendance policy, etc.)
  - Ideally should be someone who is well-connected and can put us in touch with other current/former employees
- Demand Letter?
  - To send or not to send, pre-suit
  - Advantages/disadvantages of sending a pre-suit demand
    - SOL
    - Element of surprise
    - Payments to potential class?

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OPT IN OR OPT OUT?
(GREG MANSELL AND RACHEL SABO FRIEDMANN)

- Conditional Certification: Notice is issued to putative (i.e., "assumed" or "supposed") class members
- Motion for Condition Certification focuses on whether sufficient evidence exists to suggest that the named plaintiffs and the putative class members are "similarly situated"
- Lenient Standard with a modest factual showing
- Key Factors
  - The employment and factual settings of the named plaintiffs, when compared to the putative class
  - Company-wide policies or practices
  - Types and various defenses that could be raised by defendants to defeat similarly situated and considerations of fairness procedure and manageability.
- The Statute of Limitations does not toll based on the filing of the action
  - The Statute of Limitations stops running when actual opt-in notice is filed.
  - After conditional certification, a more rigorous standard is applied at the decertification stage.

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OPT IN OR OPT OUT? (cont'd)
(GREG MANSELL AND RACHEL SABO FRIEDMANN)

Rule 23 Class Actions

- Once a class action is certified, notice of the class action provides an opportunity for class members to opt out of the action.
- Otherwise, class members who do not opt out are bound by the judgment or settlement in the case.
- Cases can be maintained under the FLSA and analogous state laws
- So called "hybrid actions" involve both a Section 216(B) collective action and a Rule 23 class action. Some states provide for greater remedies under their Wage & Hour Laws than the FLSA.
- Ohio laws vs. FLSA
- Typically, the Statute of Limitations tolls upon the filing of a class action for all members of the class.

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OPT IN OR OPT OUT? (cont'd)
(GREG MANSELL AND RACHEL SABO FRIEDMANN)

Considerations related to Collective, Class or Hybrid

- State law remedies
- State law Statutes of Limitations
- Size of potential class
- Common policy or practice of employer
- Lack of individualized defenses
- Non-wage and hour supplemental claims (i.e., such as prompt pay or pay stub laws)

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CLASS CERTIFICATION CHALLENGES
(GREG MANSELL AND RACHEL SABO FRIEDMANN)

From the Plaintiff:

- It should be noted that the class certification standard in a FLSA action is a VERY low bar and is an easier standard to establish than joinder.
- This is because most Motions for Conditional Certification are made before any discovery has occurred.
- Class certification occurs in two parts: initial class certification and decertification. Decertification typically occurs after discovery has been conducted and the Defendant believes it can decertify the entire class or portions of the class.
- Lack of commonality/a common policy
- Potential to break potential class down into smaller groups so you can establish commonality if you encounter challenges at class certification stage

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CLASS CERTIFICATION CHALLENGES (cont'd)
(GREG MANSELL AND RACHEL SABO FRIEDMANN)

From the Defense:

- Defendants need to promptly investigate claims
- Obtain key policies and records
- Defendant can typically speak with unrepresented non-opt in putative class members prior to conditional certification
- Obtain declarations of putative class members
- Conducting early depositions of class representatives
- Option to stipulate to conditional certification and stipulated notice

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THE LOGISTICS OF MANAGING COLLECTIVE AND CLASS ACTIONS
(GREG MANSELL AND RACHEL SABO FRIEDMANN)

From the Plaintiff:

- How to track opt-in Plaintiffs
- Damages calculations for opt-in Plaintiffs
  - How to organize data
  - Whether you need an expert or analyst
- Utilizing a website once class has been certified
- Settlement
  - Hiring a case administrator
    - Assists with sending Notice and Claim form to potential opt-ins/opt-outs
    - Creates and manages website
    - Toll-free number to call administrator
    - Reminder post card?
    - How many states are involved?
    - They want to know if payments will be 1099, W-2 or both
    - Cost for this will vary based on all of these factors, number of potential class members, etc.
    - Cost includes case specific website, call center, creating and mailing Notice, processing opt-outs if Rule 23, processing opt-ins if collective, process all tax reporting, distribution of benefits to class members

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THE LOGISTICS OF MANAGING COLLECTIVE AND CLASS ACTIONS (cont'd)
(GREG MANSELL AND RACHEL SABO FRIEDMANN)

From the Defense:

- Track opt-in dates
- Pull personnel/time records
- Verify employment dates
- Note any late opt-ins
- Engage in representative discovery (statistically relevant sample)
- Attempt to find evidence of disparities in class members
- Show individualized defenses for each plaintiff

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ARBITRATION AGREEMENTS AND THE IMPACT OF *EPIC SYSTEMS*
(GREG MANSELL AND RACHEL SABO FRIEDMANN)

Epic Systems Corp. v. Lewis, 584 U.S. ___ (2018)

- 5-4 decision
- The Federal Arbitration Act (9 U.S.C. §1 et seq.) makes individual arbitration agreements enforceable.
- The National Labor Relations Act does not override the FAA.
- "Congress has instructed federal courts to enforce arbitration agreements according to their terms — including terms providing for individualized proceedings."
- Intent behind the FAA was a "liberal federal policy favoring arbitration."

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ARBITRATION AGREEMENTS AND THE IMPACT OF *EPIC SYSTEMS* (cont'd)
(GREG MANSELL AND RACHEL SABO FRIEDMANN)

From the Plaintiff:

- Potential benefits to Plaintiffs' to litigate class and collective actions in arbitration
- Potential pitfalls to Plaintiffs' to litigate cases and collective actions in arbitration

From the Defense:

- Can limit scope of notice and participation of putative class members
- Motions to Stay and/or Compel Arbitration under the FAA
- Interlocutory Appeal
- Question of arbitrability—typically one for the arbitrator
- Issues with Managing individual arbitrations
- AAA Fee Schedule https://www.adr.org/Rules
- Risk of different decisions on similar issues and arguments related to res judicata
- Overall still a benefit to a larger workforce: participation rate lower

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Strategies for Successful Mediations and Settlement Conversations

Hans Nilges, Esq.

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Employment Law Session

Recent Changes in Wage and Hour Laws Under the Trump Administration

Robert DeRose, Esq

Recent DOL Changes During the Trump Administration

By: Bob DeRose, Esq.
BARKAN MEIZLISH DEROSE
WENTZ MCINERNEY PEIFER, LLP

FLSA2019-7 Calculating overtime pay for nondiscretionary bonuses paid on a quarterly and annual basis. (July 1, 2019)

The employer sought an opinion whether the Fair Labor Standards Act (FLSA) requires an employer to include a nondiscretionary bonus that is a fixed percentage of straight-time wages received over multiple workweeks in the calculation of the employees' regular rate of pay at the end of each workweek. Based on the bonus calculations specific to that employer, the DOL found that the employer complied. The Opinion did not change any existing law.

FLSA2019-8 Application of the highly compensated employee exemption to paralegals employed by a trade organization. (July 1, 2019)

This letter responds to your request for an opinion regarding whether a trade organization's paralegals are exempt from minimum wage and overtime requirements under Section 13(a)(1). The paralegals in question engaged in non-manual work and received an annual salary of at least $100,000, which includes at least $455 per week paid on a salary or fee basis. The DOL found that at least one of the paralegal duties fit one prong of the administrative exemption thus qualifying the paralegals for highly compensated employee exemption. The Opinion did not change any existing law.

FLSA2019-9 Permissible rounding practices for calculating an employee's hours worked (July 1, 2019)

This letter responds to your request for an opinion concerning whether a certain organization's rounding practices are permissible under the Service Contract Act (SCA), which uses principles applied under the Fair Labor Standards Act (FLSA) to determine hours worked. The Opinion did not change any existing law.

FLSA2019-10 Compensability of time spent in a truck's sleeper berth while otherwise relieved from duty. (July 22, 2019)

This letter responds to your request for an opinion on whether the time spent in a truck's sleeper berth is compensable hours worked under the Fair Labor Standards Act (FLSA). The DOL ruled that the employer properly paid the drivers at least the federal minimum wages for all the time they worked. The DOL found that the "driver's time spent in the berth was time when the driver was relieved of all duties and was permitted to sleep in adequate facilities furnished by the employer,

and presumptively non-working, off-duty time." The Opinion did not change any laws; however, it did state that the sleeper berth of a company provided truck was considered "adequate facilities furnished by the employer." This was a minimum wage only issue since the drivers were subject to the Motor Carrier Act relative to the issue of overtime.

FLSA2019-11 Application of the section 7(k) overtime exemption to public agency employees engaged in both fire protection and law enforcement activities. (August 8, 2019)

This letter responds to your request for an opinion regarding whether an employee of a public agency who works for both the agency's fire department and its police department is entitled to any overtime pay "irrespective of the number of hours worked in either position, or cumulatively, provided the hours comply with the 29 U.S.C. § 207(k) exemption." The employees in question held the position of fireman and police officer simultaneously for the same public entity and each position requires the employees to work more than 7 days in a 28-day work period and work within the maximum hour standards set forth in 29 C.F.R. § 553.230. The city in question aggregated the employees' time but applied the police (29 C.F.R. § 553.230(b)-(c)) or fire protection (29 C.F.R. § 553.230(a),(c)) subsection regarding overtime to whichever classification the employee spent the most time during the week. The DOL found that the city properly paid its employees because it properly followed 29 U.S.C. §207(k) and no new law was created.

FLSA2019-12 Employment status of volunteer reserve deputies who perform paid extra duty work for third parties. (August 8, 2019)

This letter responds to your request for an opinion on whether volunteer Reserve Deputies who paid security work for third parties maintain their status as volunteers or are instead employees under the Fair Labor Standards Act (FLSA). Third-party businesses and individuals request the Sheriff's Office to provide deputies for certified peace officer and security protect work. The Sheriff's Office called it "extra duty work." The Sheriff's Office runs a Deputy Sheriff's Association ("DSA") which is incorporated as a separate entity but is staffed by off-duty sheriff's deputies. Within the DSA are civilians who volunteer to receive training as Reserve Deputies and serve, without compensation, as state-certified reserve officers. The Sheriff's Office meets the demand for extra duty work by using the DSA volunteers without pay. The DOL ruled that the volunteers did not lose their volunteer status by engaging in extra duty work requested of the Sheriff's Office. The DOL held that the volunteers were not employed by the Sheriff's Office and that their access to the DSA was not dependent on performing extra duty work.

The DOL went on to state that even if a volunteer's access the DSA "were to be construed as compensation, such access would be a "reasonable benefit" for volunteering and would not alter his or her volunteer status. 29 U.S.C. § 203(e)(4)(A)(i)." The DOL said that a public agency can provide reasonable benefits to its volunteers according to 29 C.F.R. § 553.106(d). The DOL found that the volunteers only provided a minimal amount of the extra duty work available, so it did not

prevent Sheriff's deputies for the extra work, and it did not cost the Sheriff's Office anything. No new law was created.

FLSA2019-13 Ordinary meaning of the phrase "not less than one month" for purposes of FLSA section 7(i)'s representative period requirement. (September 10, 2019)

The Opinion Letter concerned a question from a restaurant about application of the retail service establishment overtime exemption under Section 7(i). The DOL dealt with the representative pay for the calculation of commissions of the Section 7(i) exemption:

"compensation for a representative period (not less than one month) must represent commission on goods and services."

The restaurant did not keep daily pay information and instead used a four week pay period or two bi-weekly pay periods to calculate commissions. The restaurant was concerned that "not less than a month" meant a calendar month and they did not use a calendar month. It offered to use six weeks or three bi-weekly pay periods instead. The DOL said the four week or two bi-weekly pay period method was not in compliance with the not less than one-month requirement. Thus, the DOL says a calendar month is the minimum. It recommended that the restaurant adopt the proposed six week or three bi-weekly pay period model. Great clarification of existing law.

FLSA2019-14 Whether active duty servicemembers participating in a job-training program through the Department of Defense's SkillBridge program would be subject to the FLSA, DBA, SCA, and CWHSSA. (November 7, 2019)

A small business specializing in general construction and construction management that operates as a contractor on many federal construction projects, including one at a major military installation was interested in participating in the DOD's Job Training, Employment Skills Training, Apprenticeships, and Internships program (known as the SkillBridge program) in order to offer on the job training opportunities to active duty military servicemembers and wanted know if the FLSA applied to its participants. The DOL advised that if the business complied with the DOD's SkillBridge rules the participants would not be subject to the FLSA. No new laws were created.

FLSA2020-1 Calculating overtime pay for a nondiscretionary lump sum bonus paid at the end of a multi-week training period. (January 7, 2020)

The Opinion letter dealt with the method of calculating overtime pay for a non-discretionary lump sum bonus under the FLSA. The employer paid a $3,000 bonus if the employee successfully competed ten weeks of training and agreed to continue training for an additional eight weeks. The employer acknowledged in the request letter that the bonus was non-discretionary. The DOL advised that the $3,000 should be allocated equally to each week of the ten-week training period. No new law was created.

FLSA2020-2 Whether per-project payments satisfy the salary basis test for exemption. (January 7, 2020)

An employer sought an opinion concerning whether proposed payments to educational consultants constitute payments on a fee basis or salary basis under Section 13(a)(1) of the FLSA. The consultants completed projects that lasted various periods of time. If the consultants met the duties tests of the administrative or professional exemptions, the DOL was asked if it could pay them "equal pre-determined installments" on a bi-weekly or monthly basis to meet the salary basis test. One of the examples given was where a consultant would be paid $80,000 for a 20-week project and paid $2,000 per week and work exclusively on that sole project. The second example involved a consultant who work on two projects simultaneously and would receive an additional $6,000 for an eight-week project and be paid an additional $750 per week for a total of $2,750 per week. The DOL opined, citing 29 C.F.R.§ 541.604(a), that both methods comply with the FLSA salary basis test because employers are permitted to pay flat sums, bonuses, and hourly rates to meet the weekly minimum.

FLSA2020-3 Excludability of longevity payments from the regular rate of pay. (March 26, 2020)

A City currently paid a longevity pay at the rate of $2 per week for any employee who worked longer than five (5) years and paid the longevity pay every two-weeks. The City wanted to change its practices and make one lump sum payment around Christmas time. A city asked the DOL if changing the longevity pay from bi-weekly to one lump sum around Christmas time would need to now be included in the employee's regular rate for calculating overtime. The DOL declined the invitation to treat the City's payments as gifts under Section 207(e)(1), rather finding that the City's 1981 Resolution creating the longevity payments made it a requirement and thus not excludable under *Featsent v. City of Youngstown* 70 F.3d 900, 902 & n.3, 905 (6th Cir. 1995). The DOL pointed to the 1981 City Resolution which used the word *shall* and went on the say that if the Resolution used the word may it would be more in the nature of a gift because the Resolution would of only authorized the City to make the payments not mandating the City to make them. Although the DOL came to the correct conclusion, its letter contained tortured analysis in its dicta to try and limit the scope of the letter.

FLSA2020-4 Excludability of referral bonuses from the regular rate of pay. (March 26, 2020)

Employer inquired whether referral bonuses must be included in the employees' rate of pay for purposes of calculating overtime. The employer described its referral bonus program completely voluntary and did not require any significant time of the employee beyond submitting a name of a potential recruit to Human Resources. Only non-human resource employees would be eligible. The bonus would be paid in two installments, the first is paid when the recruit is hired, and the second is paid upon the referred employee's one-year anniversary if the referring employee is still employed with the company. The employer self -characterized the bonuses as "significant."

The DOL opined that the first installment was excludable from the regular rate because it "was not renumeration." *Citing*, 29 C.F.R. § 778.211(d); 84 FR 68755-56; WHD Fact Sheet #54; WHD

Opinion Letter FLSA (Jan. 27, 1969); see also Shiferaw, 2016 WL 6571270, at *25. However, the DOL stated that the second installment could be included in the regular rate because the employee had to continue to work with the company to get paid and equated it to a longevity bonus again citing *Featsent v. City of Youngstown* 70 F.3d 900, 902 & n.3, 905 (6th Cir. 1995). Once again, the DOL tries to limit the scope of this opinion by offering hypotheticals of shorter periods of employment by the referring employee to get the second installment.

The DOL's final opinion was inconclusive because the DOL said the company's facts were "unclear" as to whether it mandated the second payment or just made a pronouncement. The DOL dodged giving a meaningful opinion because it stated that the second installment could only be required by statue to be included in the regular rate if the employer created contractual right to pay it.

FLSA2020-5 Excludability of an employer's contributions to a group-term life insurance policy from the regular rate of pay. (March 26, 2020)

An employer asked the DOL if it needed to include $50,00 worth of group-term life coverage it provides employees in the regular rate for purposes of calculating overtime. Essentially, the DOL citing Section 7(e)(4) said that just because the IRS makes you include it in gross pay the FLSA does not for purposes of the regular rate.

FLSA2020-6 Whether salespeople who travel to different locations to sell products using their employer's mobile assets qualify for the outside sales exemption under section 213(a)(1) of the FLSA. (June 25, 2020)

An employer deployed salespeople to densely populated areas to sell products, allowing the salespeople to use trucks as marketing tools (to garner attention to the product and salesperson). 80% of working time (4 or 5 days a week) the salespeople are deployed with the truck. The remaining 20% of the time the salespeople spend their time on sales related duties, such as event planning and inventory management. Salespeople are responsible for how to stock truck and when to deploy it. They receive sales training from employer and are paid a base salary plus commission based on their own sales.

Employees deployed "in the capacity of outside salesman" are exempt from the FLSA's minimum-wage and overtime pay requirements. 29 U.S.C. § 213(a)(1). Employees are considered "outside salesman" if they meet 2 requirements: (1) primary duty must be "making sales" to or "obtaining orders or contracts for services" from customers. 29 C.F.R. §§ 541.500(a), 541.501; (2) employees must be "customarily and regularly engaged" in performing that duty "away from the employer's place or places of business." 29 C.F.R. §§ 541.500(a), 541.502.

Regarding the first requirement, "sale" includes "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k). The "primary duty" standard is satisfied by employees who spend more than half their time (50%) performing exempt work ("exempt work" being in-office work for the furtherance of sales, *i.e.* planning events and locations to which the mobile assets are deployed, *etc.*).

Regarding the second requirement, customarily has been interpreted to mean "greater than occasional but … less than constant." 29 C.F.R. § 541.701. Outside sales work away from employer's place of business for approximately 1 or 2 hours a day, once or twice per week can pass the test. In this light, 60 times where an employee has conducted "outside sales work away from employer's place of business for approximately 1 or 2 hours a day" was enough according to one federal appellate court (D.C. Cir. 2010). Additionally, a "fixed site … used by a salesperson as a headquarters" is considered a "place of business." 29 C.F.R § 541.502. The truck that a salesperson uses does not full under this definition. No new law was created.

FLSA2020-7 Whether incentive payments are considered wages for purposes of satisfying a dealerships' minimum wage requirements under the FSLA. (June 25, 2020)

Automobile sales consultants ("sales consultants") employed by automobile dealerships ("dealerships") are, at times, receiving payments directly from automobile manufacturers ("manufacturers") pursuant to incentive programs for selling certain vehicles or meeting certain sales goals. The manufacturers establish these incentives, but participating dealerships communicate these program terms to their sales consultants and work with manufacturers to determine whether payments need to be made. These incentive program payments are in addition to the compensation that dealerships provide to their sales consultants.

Whether these incentive payments are considered wages for purposes of satisfying the dealerships' minimum wage requirements under the FSLA depends upon the agreement between the parties. In the situation described above, the facts demonstrate that the payments are an implicit part of the agreement. This is because the dealerships embrace these third-party incentive payments as wages; these payments' inclusion in the employment agreement establish employees' knowledge of said programs' terms; and the employing dealerships' role in facilitating these payments is significantly more than serving as a pass-through vehicle (dealerships learn program terms, communicate them to the employees, and work with the program sponsors to determine payment amount). Therefore, the incentive payments are considered to be part of the employment agreement and count toward minimum wage obligations by the employing automobile dealership. No new law was created.

FLSA2020-8 Whether salespeople who travel to various retail operations to sell products using their employer's mobile assets qualify for the outside sales exemption under section 213(a)(1) of the FSLA. (June 25, 2020)

All of the standards of FSLA2020-6 apply here, however the facts in this case regard salespeople who travel to various retail operations (home and garden shows, trade shows, state and county fairs, big-box stores, etc.) where they set up displays in which they exhibit and demonstrate the products they are selling. The duration of such shows can range from a one-day to 21-day event (but typically 10 days). The salespeople spend time working from their homes, which they use as personal "headquarters," but they do not perform any direct sales activities there. They spend more than 80% of their workweek directly engaging in active sales pitches to customers.

Salespeople at locations other than big-box stores qualify for the outside sales their primary duty is performing sales work directed toward the consummation of their own sales. Home and garden shows, trade shows, and fairs allow salespeople at these locations to qualify for the exemption

because the employees here sell the products directly to the customers, thus they are making sales within the meaning of the FSLA. *See* 29 U.S.C. § 203(k); 29 C.F.R. § 541.501.

Big-box stores do not allow salespeople at these locations to qualify for the exemption because the sales made at these locations are through a third-party retailer. These may not qualify as sales work directed toward the consummation of their own sales unless the employees obtain a commitment to buy from the customers and are given credit for the sales that were consummated specifically through their efforts. Employees are exempt outside-sales employees only if the employer "demonstrates objectively that the employee, in some sense, has made sales." 69 Fed. Reg. 22, 121, 22, 162 (Apr. 23, 2004). No new law was created.

FLSA2020-9 Whether emergency management coordinators employed by a county government qualified for the administrative exemption under the FSLA section 13(a)(1). (June 25, 2020)

If a Director of Emergency Management or emergency management coordinator's primary duty is to spend their time at work primarily doing duties like management or general business operations, then, yes, they likely fall under this exemption. To claim the administrative employee exemption, the employee's primary work duty or duties must relate to management or general business operations, revolve around office or non-manual work, and perform duties that require the exercise of discretion/judgment on matters of significance. The evaluation about whether the duties require discretion or judgement is equally necessary in determining if the exemption applies as evaluating what tasks the employee/coordinator is performing. This evaluation looks at the manner in which the coordinator/employee is performing their work as well as evaluating the scope of their work.

The duty to organize a disaster management drill, plan and furnish an emergency management training to county personnel, compose reports and project plans about emergency operations would all be exempt, "general business operation" duties-especially if these activities go towards long-term planning. Other than duties that could be exempt would be maintaining and operating and Emergency Operations and Recovery Coordination Centers to the extent that these are continuity of the government-operating duties. The duty of assisting schools in emergency operation plans would be exempt as well. Coordinating activities of agencies would be an exempt activity, if the agencies were state, municipal or federal agencies or other local and county governments. Preparing new releases as a press officer or furnishing other info to the media/public, recruiting/supervising volunteers, writing and reviewing grants proposals are all exempt activities. Delivering lectures at schools probably wouldn't be an exempt activity, however, preparing the work involved in those speeches likely is an exempt activity. Overall, coordinators, depending on which activities are their primary activities on their primary duty, may be exempt administrative employees.

A person qualifies for the Section 13(a)(1) exemption if they are a bona fide executive, administrative, professional or outside sales employees- this exemption exempts these types of employees from minimum wage and overtime pay protections. These employees must be compensated on a salary or fee basis at no less than the standard salary level. 29 C.F.R.

541.200(a)(1), .300 (a)(1). To qualify for one of these exemptions, an executive or administrative duty or duties must be your certain primary duty at your job. Determining which duties are your primary duties depends on a variety of factors. The factors include the relative importance of the duties and the amount of time spent on the duties, among others. Keeping in mind that exemptions to the FLSA are interpreted to the conventional canons of statutory interpretation rather than narrowly or widely interpreting these exemptions.

FLSA2020-10 Excludability of employees that are employed at a retail or sevice establishment, whose regular pay exceeds one- and one-half times the minimum hourly rate and whose compensation is more than half made up of commissions for a given period fo time under FLSA section 7(i). (June 25, 2020)

The question revolves around employees that sell home furnishing to the general public at small stores with two or five employees. The scenario in more detail states that: This employee primarily makes commissions but is also paid on an hourly basis with overtime pay when the commissions earnings will not be earned during the pay period. However, the big concern here is that when a person is hiring a new sales associate, they have no pay history to determine if the employee is making more than half of their earnings off commission or if the employee is new that their sales volume is unknown. The questioned asked is if an employer is committing a violation of the FLSA if they attempt to use the overtime exemption for a retail or service establishment even though the employee's compensation for the relevant representative period ultimately does not consist of mostly commissions. Ultimately, the employer is not sure if the salesperson's compensation will be more than half commission by the end of the representative period.

Nothing in the FLSA prohibits an employer from claiming the exemption on a prospective basis. However, of the employer does this and at the end of the representative period the commissions are not more than half of the employer's compensation then you must pay the employee their premium owed for overtime wages. No new law was created.