

Overtime Pay Lawsuits: *Nightmare for Employers*

by Joel J. Greenwald, Esq.

A wave of lawsuits based on alleged overtime pay violations is adding to employers' current financial woes. While *Fortune 500* companies are grabbing headlines with nine-figure settlements, in many ways, small and midsize companies are even more vulnerable than these behemoths. The recent \$4.6 million judgment against New York's *Saigon Grill* based on the claims of just 36 employees is an example of the kind of impact an overtime pay suit can have on a relatively small business. It only takes one disgruntled employee to initiate a government audit or lawsuit, and with so many layoffs taking place these days in response to market conditions, the number of wrongful termination claims is exploding. Plaintiffs' attorneys are also adding claims for unpaid overtime to wrongful discharge complaints to increase potential payouts. It is, therefore, more important than ever for employers to review their pay practices to avoid putting their companies at risk.

Who is Entitled to Overtime Pay?

Many employers think they know which employees are entitled to overtime compensation. In my experience, employers are wrong at least half the time. People have a pretty good understanding of the fact that almost all hourly employees and those in traditional "blue collar" jobs are generally entitled to overtime pay, but the confusion creeps in when management looks at its salaried and "white collar" staff.

Under the Fair Labor Standards Act ("FLSA") and the wage and hour laws of most states, employees are entitled to be paid at one and one-half times their base rate of pay for all hours worked in excess of forty in a single workweek. The only exceptions are those working in certain high-end (and generally salaried) positions that are described in specific "exemptions" detailed in the laws. Thus, employees who ARE entitled to overtime pay are described as "non-exempt," while those who ARE NOT entitled to overtime pay are termed "exempt" under the law.

Being paid "on a salaried basis" is a prerequisite for most legal overtime exemptions – this means that exempt employees must be paid their full weekly salary for every week in which they perform any work, with very limited exceptions.

Understanding the Key Overtime Exemptions

While there are a number of miscellaneous overtime exemptions under federal and state wage and hours laws, there are several key exemptions that apply to certain employees across a majority of industries. Most of these key exemptions require that employee pay meet not only the "salaried basis" requirement, but also a minimum salary test. The minimum weekly salary for most exempt positions is \$455 per week under federal law. Certain state laws have higher minimum salary requirements.

The salary basis and minimum salary tests are merely the initial hurdles that must be overcome in the process of establishing that an employee is exempt and thus ineligible for overtime pay. Equally important are the specific duties tests associated with the various exemptions. The duties tests for key exemptions are described below:

- ***Executive Exemption*** – An executive exempt employee’s primary duties must include the management of the entire business or a major division of it AND the supervision of at least two full-time employees on a regular basis. The exempt executive generally must also have the authority to hire and fire subordinate employees.
- ***Administrative Exemption*** – An administrative exempt employee’s work must relate directly to management or operations, and must require regular use of “discretion and independent judgment” to make decisions on “matters of significance” to the business. Hence, an individual who is exempt on this basis must have the authority to make important independent decisions and execute them. This exemption is often interpreted too broadly by employers, which frequently gets them into legal trouble.
- ***Professional Exemptions*** – The “learned professional” exemption demands that the employee’s primary duty be work requiring advanced knowledge in a recognized field of science or learning acquired through a long course of specialized education; the “creative professional” exemption requires that the employee’s primary duty be work that demands “invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.”
- ***Outside Sales Exemption*** – Outside sales people are not required to meet salary basis or minimum salary criteria to qualify for this exemption. Their primary duty, however, must consist of making sales or taking orders for goods or services marketed by the employer, AND they must work away from the employer’s premises all or most of the time. Inside sales and customer service representatives generally do NOT qualify for this exemption (even if they work from a remote location).
- ***Other Exemptions*** – Among the more commonly applied miscellaneous exemptions are the “computer professional” exemption, which covers certain computer programmers, analysts and engineers (but NOT your average IT manager); the “retail or service establishment” exemption, covering certain employees who earn most of their pay in commissions and work for companies that meet the Department of Labor’s definition of a “retail or service” organization; and the “highly paid” exemption, which applies to some employees who earn at least \$100,000 per year and perform at least one of the duties of an administrative, executive or professional exempt employee.

Calculating Overtime Pay

As discussed above, the basic overtime rate under the FLSA is one and one-half times base pay for all time worked in excess of forty hours in a single workweek. What about commissions, bonuses, tips, piece rates, shift differentials and other variable forms of pay? In most cases, all pay received in a single workweek must be added together and divided by the number of hours

worked to arrive at a base rate of pay for purposes of calculating overtime. However, there are some narrowly-defined exceptions including pay for time not actually worked (such as paid vacation or sick days) and “discretionary” (unusual) bonuses.

Recordkeeping Requirements

In an overtime case, the burden is always on the employer to demonstrate that it paid workers appropriately for every hour worked. It is therefore crucial that employers maintain detailed timekeeping records on all non-exempt (and “borderline” exempt) employees. It is best if time records are signed each week by employees to verify their accuracy. Accurate payroll records should also be kept, and include any peculiarities such as cash payments. Deductions from pay that are not mandated by the government should be authorized by the employee, in writing, and described accurately on the paycheck stub.

Action Plan for Avoiding Overtime Claims

There are steps you can take now to protect your business in case you are subjected to an overtime claim:

- Make sure employee job descriptions are up-to-date and properly describe employees’ primary responsibilities. If an employee is performing exempt duties, an accurate job description will help document the employee’s exempt status.
- Confirm that time and payroll records are in order for any employees you anticipate terminating. Many claims come from former employees unhappy about being let go.
- Remember that all hours worked must be paid – you can’t cut down on overtime by discouraging employees from reporting it.
- Develop an overtime authorization process to discourage employees from putting in unnecessary time. If they work anyway, pay them – you can discipline them for violating your rules, but this needs to be done carefully (to prevent retaliation claims).
- Avoid conspiring with employees to circumvent wage and hour laws. Employees can’t waive their rights under the FLSA – that means that if you make some deal that involves money under the table or any other questionable practice, your business can clearly be held liable.
- Don’t offer “comp time” in lieu of overtime pay. This practice is currently illegal for private employers.
- Update your employee handbook and/or published policies as required in relation to the latest changes to wage and hour laws. Most modern employers now understand the importance of having a formal discrimination and harassment policy as a legal defense, but they don’t always realize that there are also a number of defensive policies relating to

compensation and timekeeping practices needed to protect them in overtime or other wage-based litigations.

- Provide any training necessary to bring your supervisors up to speed on the requirements of the FLSA and state wage and hour laws.

You need to be concerned about the possibility that your company may be at risk for overtime claims. The sooner you bring your company's practices into compliance, the less you can potentially be assessed in the event that an overtime action is filed against your company.

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