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Today's Presenter:

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Fair Labor Standards Act (FLSA):
Learning from Court Cases on Classification

Legislative Update:

- Joint Employer Rule blocked by court
- Independent Contractor Misclassification Rule in effect

FLSA Classification – Why do we care?:

The U.S. Department of Labor (DOL) collects about \$200-240 million EACH year in back wages for nearly 200,000 employees who the DOL determines were not paid in accordance with the Fair Labor Standards Act (FLSA).

Experts report that more than 6,000 lawsuits alleging FLSA violations are filed each year in federal courts throughout the country, and that private settlements of FLSA lawsuits cost employers hundreds of millions each year.

There are also state wage law violations/investigations/lawsuits which rake in similar amounts.

These claims are often not insured.

Administrative Exemption:

- The employee is compensated on a salary or fee basis of at least \$684 per week (\$35,568 per year);
- The employee's primary duty is the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance

Fowler v. OSP Prevention Loss Group, Inc. (11th Cir. 2022)

- Company's business was looking at damage to broadband infrastructures of its broadband clients.
- Employees were "Property Damage Investigators."
- Investigators were tasked with investigating the damage to OSP's client's broadband infrastructure, determining the source of the damage and who was liable, and calculating the cost of repairs.
- Employees were classified as exempt under the administrative exemption.
- The District Court concluded that the employees were properly classified as FLSA-exempt administrative workers, and further held that the plaintiffs performed work that was "important and significant to the management or general business operations of OSP."
- Employees appealed. What did the Circuit Court say?

The Circuit Court Decision:

- The Eleventh Circuit disagreed. (Note this is the Court for FL, GA, AL)
- Notably, the court determined that the workers' fact-finding investigations did not include any authority to make higher-level business decisions. The investigators did not have the authority to recommend litigation, negotiate settlements or otherwise shape company policy.
- The Court found that the employees were not performing work directly related to management or general business operations. Instead, they were akin to production employees, carrying out their employer's core property damage-related services.

Marcus v. American Contract Bridge League (1st Cir. 2023)

- No, not the bridges like you see in Pittsburgh – this is the card game. 😊
- The organization set up local, regional and national bridge tournaments. They also offered mentoring to help folks learn/play the game better.
- ACBL employed individuals with the following titles: (1) tournament director, (2) national tournament director, (3) associate national tournament director, (4) field supervisor, (5) area manager, and (6) mentor.
- ACBL classified employees in all six positions as exempt from the FLSA’s overtime requirement under the FLSA Administrative Exemption.
- The District Court held that five of the six positions at issue (all but “tournament director”) qualified for the administrative exemption, because the primary duties of those positions—“managing large tournaments and associated staff; training and mentoring other directors in making rulings and tournament scheduling; guiding disputes; and drafting and updating tournament regulations”—involved the performance of office or non-manual work directly related to ACBL’s general business operations and required the employees to exercise discretion and independent judgment with respect to matters of significance. Thus, the district court held that only the tournament directors had been misclassified as exempt and were entitled to unpaid overtime wages.

The Circuit Court Decision:

- Tournament director position - the Circuit Court agreed with the District Court that the primary duty of the position was not directly related to the management or general business operations of ACBL because the primary duty of employees in that position was to supervise bridge contests, and thus they were responsible for providing the very service that ACBL was in the business of providing.
- Field supervisors, area managers, and mentors - the Circuit Court agreed with the district court that that these employees qualified for the administrative exemption because their duties went beyond simply producing ACBL-sanctioned bridge tournaments and instead required them to supervise and set standards for other employees, and thus were directly related to the management of ACBL's business. (Does this sound like the Executive Exemption??) They also had to exercise discretion and independent judgment on matters of significance because they were responsible for making high-level customer service decisions.
- National tournament directors and associate national tournament directors - the Circuit Court disagreed with the District Court and concluded that although the employees in those positions may have had additional duties related to training and mentoring other employees, those duties all related directly to producing ACBL-sanctioned bridge tournaments—which, as the court had held with respect to tournament directors, was the very service that ACBL was in the business of providing (and thus did not relate directly to the “management” of the business).

Smith v. Johnson & Johnson, (3rd Circuit 2010)

- Employee was a pharmaceutical sales representative.
- Employer deemed her to be exempt under the FLSA Administrative Exemption
- Visited doctors' offices; discussed products. Could set her own schedule and the order in which the visits occurred. Worked on her own, primarily out of her home.
- District Court found her to be exempt.

The Circuit Court Decision:

The Circuit court focused on the plaintiff's own testimony, which described the independent and managerial qualities of her position (*e.g.*, the order and number of visits made to doctors was left to her discretion), and her testimony that 95 percent of the time she was unsupervised.

HOW do you reconcile Fowler v. OSP with this case?

Note: DOL Opinion letter opining that PSRs are exempt under the FLSA Administrative Exemption and in 2011 in an almost identical case the U.S. Supreme Court agreed.

Professional Exemption:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$684 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

- (There is also a "creative" professional exemption.)

Solis v. Washington (9th Circuit 2011):

- Employees were social workers.
- A four year college degree was required for the position. Only certain degrees were acceptable and these included degrees could in anthropology, education, criminal justice or gerontology. The social workers worked with a diverse group of the population. The job also required eighteen months of experience in social work.
- Washington Department of Social Services (the employer) contended that each of the acceptable degrees related to the duties of its social workers. However, while social workers no doubt have diverse jobs that benefit from a multi-disciplinary background, the “learned professional” exemption applies to positions that require “a prolonged course of *specialized* intellectual instruction,” not positions that draw from many varied fields.
- The District Court held that plaintiffs- social workers employed by the State of Washington- were exempt as so-called “learned professionals,” because a prerequisite for their position was a 4 year academic degree in fields related to the population that they served.
- The employees appealed – what did the 9th Circuit say?

The Circuit Court Decision:

- Whether a position requires a “prolonged course of specialized intellectual instruction” must be sufficiently specialized and relate directly to the position. An educational requirement that may be satisfied by degrees in fields as diverse as anthropology, education, criminal justice, and gerontology does not call for a “course of *specialized* intellectual instruction.”
- The Circuit Court also took issue with the fact that the employer required each social worker to undergo a six-week on-the-job training session. Learned professional workers should be able to hit the ground running (?!).
- The Circuit Court found the 18 months of social work experience requirement to be irrelevant. It noted that the FLSA regulation states clearly that the exemption does not apply to “occupations in which most employees have acquired their skill by experience.” 29 C.F.R. § 541.301(d).

Ellenberger et al. v. JusticeWorks Youthcare Inc., (filed W.D.Pa 2021):

The employees were social workers and included job titles such as case managers, family resource specialists and ongoing case specialists. The employees claimed that their duties, such as collecting data and coordinating client care were not exempt duties and, therefore, they are owed overtime. They claimed that these routine duties involved them following corporate guidelines and procedures and thus, they were not exercising discretion and independent judgment, which is an essential element of the administrative exemption. Required degree – BA or MA in Social Work.

Nurses:

- Are nurses exempt under the FLSA professional exemption?
- Must attend school to obtain nursing degree.
- Must take nursing boards and obtain state license to be a nurse.
- Nursing school includes “on-the-job” experience/internship before graduating.
- Do you know any nurse in Pittsburgh who is exempt?

DOL Fact Sheet 17N:

- Registered nurses who are paid on an hourly basis should receive overtime pay. However, registered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption and, if paid on a salary basis of at least \$684 per week, may be classified as exempt.
- Licensed practical nurses and other similar health care employees, however, generally do not qualify as exempt learned professionals, regardless of work experience and training, because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations, and are entitled to overtime pay.

Rosenberg v. Renal Advantage, Inc., (S.D. Cal. Apr. 24, 201

- Dieticians and RNs. All paid on a salary basis.
- Dieticians required to have a Bachelor's Degree in Nutrition/Dietetics, register with the American Dietetic Association, obtain a license (if required by the state of operation) and have a minimum of one year of experience. Employees used their knowledge to independently “counsel patients on how to correct...[various medical] deficiencies through diet corrections.”
- District Court found RNs NOT exempt. Dieticians exempt. WHY?

WHY????

- No, not why did you pick HR as a profession. 😊 Why did we get this court result?
- Never forget state law. California has a unique wage regulation that prohibits RNs from being exempt. That state regulation – because it is more favorable to the employee – trumps the FLSA Fact Sheet or any FLSA regulation.
- These “quirks” – where the state law is different from and trumps the Federal law – are pervasive.
 - In Pennsylvania, one of the biggest differences (with respect to classification) is Computer Professionals.

Executive Exemption:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than \$684 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee 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.

Jones v. Williams, (D. Md. 2012):

- Jones, the employee, worked as a police supervisor with the rank of lieutenant. Jones’s duties include making shift assignments, reviewing paperwork, responding to calls in the event he is needed, and “mak[ing] sure everybody is on their post, looking clean and doing their jobs.”
- He was also responsible for maintaining emergency generators when needed, ensuring campus safety, and setting up traffic barrels.
- Jones was, apparently, essential to front line security during the snow storms that caused him to work substantial overtime.
- Employer sought summary judgment – that is a key legal strategy. Court denied summary judgment noting that Jones may perform enough non-exempt duties like (the snow storm duty and setting up traffic barrels) to fall outside the scope of the executive exemption – because there is a question of fact as to what his “primary duty” is.

Maestas v. Day & Zimmerman, LLC, (10th Cir. 2012):

- Employer provided private security force for around-the-clock protection to the Los Alamos National Laboratory.
- The force has a hierarchical, military-style structure.
- At the lowest level of the hierarchy are security officers (“SOs”) and security police officers (“SPOs”). SOs and SPOs, who are unionized and non-exempt employees, are supervised by three ranks of field supervisors: lieutenants, captains, and majors, in ascending order.
- Supervisors maintain the same certifications as SOs and SPOs, including first responder training, respirator training, and hazardous materials training. In addition, all supervisors must have some supervisory experience and must complete a basic supervisory course on leadership, management, and administration.
- The lieutenants also conduct and supervise alarm maneuvers. When an alarm sounds, they are responsible for responding. They may order an SPO to investigate the alarm or investigate it themselves. In the event of an emergency, they are expected to direct the response and coordinate with outside emergency personnel. Lieutenants could personally respond to emergencies – it is up to them.
- Captains oversees fifteen SPOs and three lieutenants. They are the highest commanding officer in their zone of the facility during his shifts. They are responsible for supervising the daily work of their subordinates, implementing policies handed down by upper management, reporting on personnel incidents in the field, and recommending discipline or changes in SOC policies. In an emergency, Captains are expected to command the response of their subordinates from a remote location. They would not personally address any emergency unless it occurred in their immediate vicinity.
- The District Court found all supervisors to be exempt (either executive or administrative). But what did the Circuit Court rule?

The Circuit Court Decision:

- No one is exempt. Question of fact. Remanded to trial.
- Note although the decision did not necessarily hinge on this, there is an FLSA regulation that indicates that most “first responders” are nonexempt.

Takeaways:

- These are ALL close calls. Likely could get different decisions in different Circuits for similar positions.
 - Many of these cases involve lower and higher courts that couldn't agree.
 - If you ask counsel, you are going to be told "it's a grey area."
- Be aware of state specific issues (or regulation specific issues) – especially with remote workers. It's the state law where the employee is located/working – not where the business is located.
- Consider overlapping exemptions – to make multiple arguments to the DOL/court. Perhaps document in job description.
- Could take protective measures:
 - Track hours – OT
 - Employee vs. Employer timekeeping
 - Know the exposure – hours x number of employees (plus interest, penalties)
 - Know the risk – it can be acceptable to take risk.
 - Can you insure it?

Thank you for attending!