Cutting Through The Half-Time Murk In "Failed Exemption" Cases

Insights
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How does one calculate overtime pay due to plaintiffs who were erroneously treated as "white collar" employees exempt from the federal Fair Labor Standards Act's minimum-wage and overtime requirements? Court decisions continue to demonstrate much confusion and misunderstanding on this score.

Nevertheless, there are preemptive measures employers should take that will go a long way towards heading-off the potential adverse effects of all-to-frequent fuzzy thinking. Understanding what to do and why to do it requires an explanation of the underlying concepts.

"Half-Time" Versus "Time And One-Half"
Most employees for whom employers claim an FLSA executive, administrative, professional, or derivative exemption must be paid at least in part on a "salary basis". If a court later finds that an employee's job duties did not meet an exemption's requirements, then one thing to be resolved is how to compute overtime compensation on that salary for the employee's overtime hours worked.

Doing so entails determining the "regular rate" of pay under fundamental, longstanding FLSA principles. Where a salary is concerned, those principles call for dividing the employee's workweek salary by the total number of workweek hours worked *for which that salary was paid*.

This arithmetic also determines whether the employee is owed FLSA-required overtime wages at 1.5 times that rate, or instead at only 0.5 times that rate. When a salary is paid to compensate *all* hours worked, such that it is divided by *all* those hours worked in producing the regular rate, the salary itself is the "one" of "one and one-half". FLSA overtime premium is therefore due based upon one-half of that rate.

Some courts have erroneously invoked the so-called "fluctuating workweek" concept in these "failed exemption" situations, while some others have instead applied the correct approach described above. We have discussed this in more detail previously.

So What Can Be Done?
For present purposes, the point is that the outcome is much more likely to be employer-favorable if management clearly and unequivocally expresses from the outset of an employee's employment

(and thereafter) that the salary is compensation for *all* hours worked. Whatever approach a court later uses, having this sort of evidence in-hand if and when it matters could make all the difference.

Management should ensure that offer letters, pay policies, compensation memos, employee manuals or handbooks, presentation slides, responses to employee questions, and all other written or oral descriptions of or references to exempt-employee pay leave no doubt:

◊ That the employee's salary is paid to compensate *all* of the work of *every* amount and kind that the employee performs in accomplishing the job he or she has been hired to do;

◊ That the salary does *not* represent compensation only for the expected, regular, scheduled, average, normal, or typical amount or kind of work done in a workweek or in a pay-period, nor is it compensation only for any other particular amount or kind of work performed within any other timeframe; and

◊ That these things are true despite (as illustrations):

- How computer software goes about generating the employee's check;
- What a resulting pay-stub or pay-statement might show;
- How paid-time-off or other benefits are computed, determined, or accumulated;
- How bonuses, commissions, or other incentive payments are calculated;
- How any permitted, appropriate absence-related salary reductions might be figured; and
- That hourly-equivalents might be computed for one or more of these reasons based upon generalized assumptions.

Furthermore, the employer should always act consistently with these themes in implementing, administering, and communicating about its pay plan.

The Bottom Line

There is no end to the allegations that "failed exemption" plaintiffs might create in an effort to convince a court that higher-than-half-time-based FLSA overtime compensation is due. Moreover, the current state of affairs provides no assurance that a court can be counted on to engage in the proper analysis.

Of course, management should make well-considered, well-founded exemption decisions in the first place so as to reduce the chances that it will ever have to face this situation. That said, employers should also do everything they reasonably can to try to head-off the sorts of recurring back-wage assertions and mistaken rulings that have been surfacing in recent times.