

Wage & Hour Litigation Update

Presented By:

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FLSA & Overtime

EXEMPT, OR NOT EXEMPT?



EXEMPTIONS DEFINED

- Executive
- Administrative
- Professional



EXEMPTIONS

- **SALARY BASIS TEST**
 - \$455/week or more
 - Any week where employee performs any work
 - Strict limits on docking
- **“PRIMARY DUTIES” TEST**
 - Varies by exemption
- **Some have additional requirements**

A. EXECUTIVE EXEMPTION

Primary duty = Management of the
Business of a Recognized Department

A manager must:

- Direct the work of two or more employees
- His/her suggestions regarding subordinates' hiring, firing and discipline must be given "particular weight"

B. ADMINISTRATIVE EXEMPTION

“Primary Duty” – 2 components:

- Office/non-manual work directly related to management or general business operations of the employer or its customers; and**
- the exercise of discretion and independent judgment**

C. LEARNED PROFESSIONAL EXEMPTION

Primary duty requires:

Knowledge in a field of science or learning
customarily acquired by formal education;
or



C. CREATIVE PROFESSIONAL EXEMPTION

Primary duty requires:

Use of invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor



DOL Guidance on “Acquisition Agents”

June 29, 2006 DOL Opinion Letter

Meet the Administrative Exemption

- work in purchasing, procurement and legal/regulatory compliance
- interpret mgt. policies, negotiate, bind the client financially on significant matters
- meet discretion/independent judgment standards
- similar to insurance claims adjustors

EXEMPTIONS DEFINED

“Salary Test”: Must be guaranteed a minimum weekly salary of \$455 regardless of number of hours worked (\$23,660 annually)

Beware of deductions



Field Agents and “Day Rates”

Can be exempt if meet duties and salary tests

DOL Regulations state salary test met where:

- Paid on Daily Rate
- Paid on Shift Basis
- Even Hourly (not recommended)

BUT...If paid anything other than guaranteed salary, then employee must receive guaranteed compensation that has a “reasonable relationship” to actual pay

Field Agents and “Day Rates”

DOL Regulations give example of “reasonable relationship” of guaranteed compensation of \$500 per week where employee normally works 4-5 shifts at \$150 per shift (or \$600-\$700 per week)

- Amounts to approximately 65-80% of actual earnings for week
- Some courts have held that 70% was too low

Field Agents and “Day Rates”

Can also be non-exempt under day rate

MUST pay additional overtime pay for hours worked over 40 hours in a work week

Only have to pay HALF TIME for hours worked over 40
(employees paid hourly must be paid TIME AND A HALF)

Calculate Regular Hourly Rate by dividing total compensation for week by number of hours worked in that week

Then pay HALF of Regular Hourly Rate for all hours worked over 40 (in addition to daily rate)

Crabtree vs. Volkert, Inc.

Crabtree vs. Volkert, Inc. (U.S. District Court, Southern District of Alabama, 2011)

-Plaintiffs allege that they were non-exempt and entitled to overtime even though positions were “Right of Way Consultant/Senior Real Estate Specialist” and “Project Manager”

Crabtree vs. Volkert, Inc.

Volkert denies allegations and states that employees were exempt under FLSA's administrative exemption

Mediation on June 19, 2012 failed

Parties filed cross Summary Judgment motions



Court's Ruling

- The issues:
 - Primary duties test met?
 - Independent judgment and discretion on matters of significance?
 - Primary Duties = Production work or office/non-manual work directly related to operations of business of customer's business.
 - Paid on a salaried basis?

Court's Ruling: Judgment/Discretion

- Plaintiffs' evidence: just applying well-established standards set for in URA and client manual; just copied from appraisals when completing certified opinions; when faced with unusual situation, had little discretion, had to go to client for instruction
- Volkert's evidence: employees served as expert witnesses, assisted property owners in preparing for closing, and had "great latitude" to make "judgment calls" re comparable properties
- Court concludes: Jury must decide because "genuine and hotly contested issues of material fact" on extent of independent judgment and discretion. Hints if Volkert's version is correct, employees "may well be" exempt. Cites to other federal case in Alabama

Court's Ruling:

Production work or non-manual work related to business ops of employer or client?

- Court doesn't reach issue officially.
- Dicta in footnote hints Volkert would win:
 - “Primary duty . . . [is] assisting Volkert clients during eminent domain process with respect to acquisition of parcels and relocation of property owners. This is not . . . 'production work.' Volkert's clients . . . [a]re not in the relocation business; rather they are in the business of building roads and other infrastructure projects.”
 - Cites DOL opinion letter
 - “Appears highly unlikely plaintiffs could prevail at trial” on this issue

Court's Ruling: Salary Basis

Docking occurred, but safe harbor applied because:

1. Clear policy prohibiting improper deductions
2. Policy includes a complaint mechanism
3. Affected EEs were paid back pay owed
4. ER took steps to comply after complaint
5. No more improper deductions after complaint

Other Issue in Case: Retaliation

- Employee included in layoff shortly after complaint, alleged he was fired for claiming he was owed OT
- ER's "non-discriminatory reasons"
 - ER had lost work, need to lay off employee
 - Client did not want this employee
 - Employee was not as "loyal" as other employees
- **RULING:** Jury had to decide

What happened next?

- Court set jury trial
- Parties engaged in court-mediated settlement
- Court approved settlement with both plaintiffs for \$150K
 - Attorneys got 44%
 - Confidentiality provisions upheld
 - Court said Defendant had “colorable (and perhaps even compelling) argument”

Lessons from Volkert?

- Independent judgment and discretion:
 - Job descriptions emphasize it
 - Managers actually allow it
 - Still could be fact issue, though would probably win at trial
- Rely on DOL letter re non-production work
- Be careful about docking
 - Good policies
 - Train managers
 - Promptly address complaints
- Retaliation claim avoidance
 - Open door policies
 - Train managers
 - Company attitude of receptiveness to concerns being brought forward
 - Double check reasons for term versus non complaining employees

INDEPENDENT CONTRACTORS

- FLSA and IRS “Economic Realities” Test
 - Degree of Control Exercised by “Employer”
 - Extent of Relative Investment by Worker
 - Degree to which Worker’s Opportunity for Profit or Loss is Determined by “Employer”
 - Skill and Initiative Required in Performing Job
 - Permanency of the Relationship

INDEPENDENT CONTRACTORS

- State Taxing Authority Test (Texas Workforce Commission)
 - Worker receive detailed instructions on when, where, how work is to be performed?
 - Employer provide worker with training?
 - Worker's services merged into overall operation of Employer's business?
 - Worker's services must be rendered personally (rather than worker's e'ees)?

INDEPENDENT CONTRACTORS

- Does worker continue to work for same employer month after month or year after year?
- Can worker set own hours for services?
- Is worker required to work full time? Can't work at same time for anyone else?
- Does the company dictate where work must be performed?
- Worker paid by hour, week or month?

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