

Wage and Hour Issues in 2017

Delaware Valley Labor and Employment Law Conference

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FLSA UPDATE

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WHITE COLLAR EXEMPTION RULE UPDATE

- New rule set to take effect December 1, 2016, which would have raised the salary threshold for exempt employees to \$913/week or \$47,476 per year
- 21 States and several business organizations challenged the rule in the Eastern District of Texas. On November 22, 2016, Judge Mazzant issued a nationwide injunction to stop the implementation of the new rule.
- On December 1, 2016, the DOL (still under the Obama Administration) filed an appeal with the 5th Circuit. The 5th Circuit expedited the briefing schedule with the final reply brief due January 31, 2017
- Under the new Administration, the DOL sought an extension until March 2, 2017. After Secretary of Labor nominee Puzder withdrew his nomination, the DOL asked for and was granted a second extension until May 1st "to allow incoming leadership personnel adequate time to consider the issues."

WHITE COLLAR EXEMPTION RULE UPDATE

- While Secretary of Labor nominee Andrew Puzder was an open critic of the rule, Alexandra Acosta has yet to comment on his position
- The Texas AFL-CIO filed a motion with the Court to join the case so it could take over if the DOL drops its defense. The Court has yet to rule on the motion.
- Also pending is Plaintiff's summary judgment motion which, if granted, would permanently invalidate the rule

RECENT CASES

San Gabriel v. Flores

- Plaintiff police officers claimed they were underpaid for overtime hours because the City excluded from the regular rate cash payments made to them in lieu of benefits. Specifically, the payments were for officers who chose to opt-out of receiving medical benefits and the cash payments were included in their regular paycheck.
- The 9th Circuit found that cash-in-lieu of benefits payments should be considered compensation and included in the regular rate of pay, even though it is not technically tied to the hours worked. This is inconsistent with other circuit decisions.
- Petition for certiorari is pending in the Supreme Court
- In the meantime, if employers provide these benefits to non-exempt employees, they may want to reevaluate the regular pay rate or decide to eliminate the benefits altogether

RECENT CASES

Gloucester County School Board v. G.G

- Background – G.G., a transgender boy, sought to use the boys’ restroom at his high school. Although he had the approval of the school administration, the local school board passed a policy banning him from the boys’ room. G.G. alleged the school discriminated against him in violation of Title IX and the Equal Protection Clause.
- An opinion letter from the Office for Civil Rights interpreted a Title IX regulation as requiring schools to treat transgender students consistent with their gender identity. G.G. and the United States as Amicus Curiae asked the court to give the OCR’s interpretation deference pursuant to *Auer v. Robbins* (the “Auer Doctrine”), which requires an agency’s interpretation of its own ambiguous regulation to be given controlling weight unless it is plainly erroneous or inconsistent.
- The 4th Circuit agreed, and concluded that the OCR’s interpretation of its own regulation was entitled to deference

RECENT CASES

Gloucester County School Board v. G.G

- On February 22, 2017, the Trump Administration issued a Dear Colleague letter which withdrew the statements of policy and guidance on gender identity issued under the Obama Administration
- March 6, 2017, the Supreme Court vacated the judgment and remanded the case to the 4th Circuit for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017
- Effect on W&H – *Auer* Doctrine frequently comes into play in W&H cases, where cases are often resolved based on opinion letters, the Field Operations Handbook, and other administrative sources
- The SC's remand means the *Auer* Doctrine will remain unchanged, subjecting employers to uncertainty and changes in law with each new Administration

FLSA UNDER THE TRUMP ADMINISTRATION

Andrew Puzder

- Nominated by Trump on December 8, 2016 to be the Secretary of Labor
- Is the CEO of CKE Restaurants, the parent company of Hardee's and Carl's Jr.
- Puzder withdrew nomination on the eve of his confirmation hearing due to allegations he mistreated his employees, opposed the minimum wage, employed an undocumented immigrant as a housekeeper, and engaged in spousal abuse

FLSA UNDER THE TRUMP ADMINISTRATION

Alexander Acosta

- Nominated by Trump on February 16, 2017; if confirmed, would be first Hispanic member of Trump's cabinet
- Currently serves as the Dean of the Florida International University College of Law; appointed by GWB to the National Labor Relations Board; served as Assistant Attorney General for Civil Rights and federal prosecutor for the Southern District of Florida
- No public comments on wage & hour or other similar topics
- Will likely take on the traditional GOP Agenda
- However, in the past has been a friend to both employees and employers, and has spoken out against Trump's agenda

FLSA UNDER THE TRUMP ADMINISTRATION

Independent Contractor – Administrator’s Interpretation 2015-1

- States economic realities test should be applied when determining employment status
- Narrows classification of independent contractors; most workers are employees
- Employers hopeful AI-2015-1 will be repealed or replaced by the new Secretary
- Employers will still be liable for compliance with state laws and existing case-law

FLSA UNDER THE TRUMP ADMINISTRATION

Department of Labor Budget

- On March 16, 2017, Trump issued his budget plan, which would cut the DOL budget by 2.5 billion, scaling back funding by 21%
- Cuts include job training programs that benefit seniors and disadvantaged youth
- Eliminates the Senior Community Service Employment Program, which helps low-income seniors find work
- Closes poor-performing centers for Job Corps, a job-training program for disadvantaged youth
- Eliminates grants that help nonprofit groups and public agencies pay for safety and health training
- Expands efforts to reduce improper payments made to people receiving unemployment benefits

FLSA UNDER THE TRUMP ADMINISTRATION

Department of Labor Budget

- Although some of the programs tagged to be eliminated include concrete savings, it is unclear where Trump expects to cut almost \$2 billion
- Experts predict the remaining cuts will be from the DOL's enforcement agencies
- With limited enforcement resources, the DOL will have to limit the cases they bring and increase the cases they settle
- Funding to independent agencies will likely be cut, which means less assistance to low income workers with litigation
- Rulemaking efforts will also likely be scaled back

FLSA ASSESSMENT

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INTERNAL ASSESSMENT

Employer Self-Assessment Best Practices

- We (and the DOL) strongly recommend that employers set periodic times (e.g. 1x per year) to review all positions for proper classification
- Internal assessments should include review of job descriptions as well as ensuring the actual job being performed matches the job description and the employer's expectations
- Assessments should also evaluate whether employees have been properly classified for FLSA purposes
- We will now take you through an internal assessment

ASSESSMENT 1 – STORE MANAGER

Arielle is a store manager for “Dolla’ Holla,” a nationwide retailer of discount products including groceries, clothing, and household items. Arielle is the head of her store, but she reports to a District Manager and must comply with an instruction manual with operating policies issued by the Corporate office. Arielle’s job duties include hiring and training employees, supervising all store personnel, making recommendations regarding pay rate and advancement, preparing reports, managing inventory, maintaining a clean store, and working as a cashier and stock clerk when needed.

EXECUTIVE EXEMPTION

An employee satisfies the duties test for the Executive Exemption if the employee:

- Has a primary duty of managing the enterprise (or a customarily recognized department or subdivision thereof)
- Customarily and regularly directs the work of two or more employees
- Has the authority to hire or fire employees (or whose recommendations are given particular weight)

ASSESSMENT 1 – STORE MANAGER

What is Arielle's primary duty?

1. Amount of time spent performing exempt work
2. Relative importance of exempt duties versus non-exempt duties
3. Employee's relative freedom from direct supervision
4. Relationship between Employee's salary and the wages paid to other employees for non-exempt work

ASSESSMENT 1 – STORE MANAGER

	Ari	Elle
Time spent on work	<ul style="list-style-type: none"> 80-90% on non-exempt, manual labor, including stocking shelves, running the cash register, unloading trucks, and cleaning the parking lots, floors and bathrooms. 	<ul style="list-style-type: none"> ~50% on non-exempt work
Relative Importance of Managerial Duties	<ul style="list-style-type: none"> Essential job duties included the same work as stock clerks and cashiers Manual labor was key to business model given store's limited payroll budget and large requirement for manual labor 	<ul style="list-style-type: none"> Performance review based on predominately management duties (based on categories and percentages) with little emphasis on non-managerial duties Plaintiff was only store employee who handled training and day-to-day management. Without her, the store would be incapable of doing business.
Relative Freedom from Direct Supervision	<ul style="list-style-type: none"> District Managers closely supervised store managers and every aspect of store operations 	<ul style="list-style-type: none"> Contact with District Manager were daily voicemails, a ten-minute visit every other month and one annual visit of 6-7 hours. Otherwise, rarely spoke. DM never interfered with her ability to run the store how she saw fit.
Relationship Between Salary of Non-Exempt Employees	<ul style="list-style-type: none"> Using a 70-hour work week, store managers earned roughly the same as hourly assistant managers. Using a 60-hour work week, store managers earned approximately 2-3 dollars more per hour than hourly assistant managers 	<ul style="list-style-type: none"> Earned at least 35% higher than other employees
	<p align="center">NON-EXEMPT</p> <p>Morgan v. Family Dollar Stores, 551 F.3d 1233 (11th Cir. 2008)</p>	<p align="center">EXEMPT</p> <p>King v. Dolgencorp, Inc., 2010 U.S. Dist. LEXIS 140302 (M.D. Pa. May 6, 2010)</p>

ASSESSMENT 1 – STORE MANAGER

Take-Aways

- Time spent on exempt duties
 - Generally (very generally), employees who spend more than 50% of their time performing exempt work will satisfy the primary duty requirement
 - Time alone is not the sole test
- Pay attention to job descriptions, performance reviews and company policies
- Cases are very fact-sensitive – seek counsel

ASSESSMENT 2 – AUDIT ASSOCIATE

Kyle works as an Audit Associate for a company that provides audit, tax and advisory services. Kyle is on an engagement team to conduct audits and is the most junior member on the team, below Partners, Senior Managers and Senior Associates. Kyle is not required to have a CPA but must be CPA-eligible. Although it differs by state, this typically means a bachelor's degree in any field with a significant number of courses in accounting. Kyle attended a one-week in-person training when he was hired called "Audit Fundamentals" and routinely receives training from the company on procedures he is likely to perform.

Kyle's primary job responsibility is to perform audit work on clients' financial records. While doing so, he is subject to company methodology and professional standards, as well as national auditing standards. His tasks include testing internal controls over financial reporting, auditing inventory, substantive analytical procedures, preparation of audit work papers, recalculations, reconciliations and confirmations. Many of these tasks are laid out in company policy and he is closely supervised in their performance.

Until recently, Kyle's company always paid overtime compensation to Audit Associates. They recently changed their policy without any change in job duties. 20

PROFESSIONAL EXEMPTION

An employee satisfies the duties test for the Professional Exemption if the employee's primary duty is work:

- Requiring knowledge of an advanced type
- In a field of science or learning
- Customarily acquired by a prolonged course of specialized intellectual instruction

ASSESSMENT 2 – AUDIT ASSOCIATE

The Court's Reasoning

- Audit Associates are Exempt Professionals
- No dispute over “field of learning”
- “Customarily acquired” is satisfied by bachelors degree and additional coursework in a specific, job related field
- Knowledge of an advanced type
 - Emphasis on Client contact and lack of policy prescribing interaction or questions to be asked
 - Differentiated Audit Associates from bookkeepers or accounting clerks
 - Audit Associates engage in professional skepticism, and challenge and prove information and documents provided by clients
 - Looked to Plaintiff's description of accounting experience on his CPA application for true testimony on his duties
- *Pippins v. KPMG LLP*, 921 F. Supp. 2d 26 (S.D.N.Y. 2012)

ASSESSMENT 3 – EXECUTIVE ASSISTANT TO PRESIDENT

Elsa was hired as an Executive Administrative Assistant to the CEO of her company. She spends a lot of her time doing personal work for the CEO, who is disabled, including preparing his food, driving him to doctors' appointments, and picking up his children from school. While not serving as his caregiver, Elsa manages his calendar for the business, prepares and submits expense reports on his behalf, creates lists to ensure his political and charitable contributions are recorded, drafts and prepares documents for his review and approval, sends emails on his behalf, and attends meetings on his behalf. Elsa supervises three employees, approving their leave requests and assigning them work, and is the organizer for the Company's Board of Advisors. Her job description does not mention any supervisory, human resource, marketing or office management duties.

ADMINISTRATOR EXEMPTION

An employee satisfies the duties test for the Administrative Exemption if the Employee's primary duty is work that:

- Is office or non-manual
- Is directly related to the management or general business operations of the employer
- Includes the exercise of discretion and independent judgment with respect to matters of significance

ASSESSMENT 3 – EXECUTIVE ASSISTANT TO PRESIDENT

- Work directly related to management or business operations
 - Court considered plaintiff’s job description on two resumes she used during the relevant time period
 - No evidence that personal assistant tasks supplanted administrative tasks or that she diverted administrative tasks to complete personal ones
 - Plaintiff was administrative assistant 100% of the time, even while performing personal tasks
- Discretion and Independent Judgment
 - Served as point person on HR issues pertaining to a specific government contract and for the company while screening calls for the CEO, drafting letters for him, and communicating with the Board of Advisors
- Salary was relatively high (independent of the salary threshold test)
- *Lane v. Sys. Application & Techs.*, 2015 U.S. Dist. LEXIS 27422 (D. Md. Mar. 6, 2015)

QUESTIONS?



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THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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