

WAGE AND HOUR UPDATE

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I. INTRODUCTION AND SCOPE OF PAPER

This paper will focus on current developments in federal and California wage/hour law and assumes basic familiarity with wage/hour principles. The paper addresses developments in the following three areas:

- A. Meal and Rest Breaks
- B. Professional Exemption
- C. Administrative Exemption

The law continues to evolve as to all three issues. Developments as to meal periods and rest periods, primarily under California and other state labor laws, currently attract tremendous attention. The future of these claims awaits a ruling at the California Supreme Court (see below). Much of the attention has been centered on the slew of cases filed against the giant retailer, Wal-Mart, including the recent \$172 million class action jury verdict in Alameda Superior Court (Oakland).¹

The professional exemption continues to be the subject of frequent litigation. The United States Department of Labor (DOL) may or may not have softened the requirement of an advanced degree to qualify for the learned professional exemption. However, even if this FLSA

¹ Steven Greenhouse, "Walmart Told to Pay \$78 Million," New York Times, at http://www.nytimes.com/2006/10/14/business/14_walmart.html (Oct. 14, 2006); see court files re Savaglio v. Wal-Mart Stores, Inc., No. C-835687-7 (Alameda County); see also Braun v. Wal-Mart Stores, Inc., 2005 Phila. Ct. Com. Pl. LEXIS 551 (Dec. 27, 2005)(certifying class claims for unpaid rest breaks; followed by \$78 million jury verdict).

issue were to be resolved in an employer friendly manner, California law relating to the professional exemption would likely continue to be more restrictive.²

Finally, the administrative employee exemption will continue to be the focus of wage/hour litigation as employers seek to use the exemption as a “catch all” for employees who are not clearly executives, professionals, or computer professionals and as plaintiffs seek to restrict the scope of this potentially expansive loop hole in state/federal overtime protections.

All of these wage/hour issues should be examined in light of studies that show that Americans tend to work abnormally long hours, to the detriment of both their health and safety and to the quality of family life. Employers’ demands for longer hours from workers represent a national crisis that is taking its toll on working people. Tosh Anderson, *Overwork Robs Workers’ Health: Interpreting OSHA’s General Duty Clause*, 7 N.Y. Cty. L. Rev. 85, 85-86 (2004). Over the last two decades, there has been a substantial increase in the number of hours that employees work. *Id.* at 99. One study indicates that the average number of overtime hours has jumped 48% since 1991, and that American workers work 350 more hours each year, or nine more full-time weeks, than Europeans. *It’s About TIME!-Campaign for Workers’ Health* (2001) at <http://www.nmass.org/nmass/wcomp/workerscomp.html>. One in five workers works more than forty-nine hours per week, while immigrant workers are forced to work upwards of eighty or ninety hours per week. *Id.* Another study indicates that almost one-third of the workforce regularly works more than the standard 40-hour week, and one-fifth work more than 50 hours. Lonnie Golden & Helene Jorgensen, *Time after Time: Mandatory Overtime in the U.S. Economy*, 3 Econ. Pol. Inst. (2002), available at http://www.epinet.org/content.cfm/briefing_papers_bp120. Employees who regularly work large amounts of overtime experience a diminution in their overall quality of life. See Golden & Jorgensen, *supra*. Studies indicate that

² See “Sounding Off on \$27M Siebel Settlement,” Petra Pasternak, *The Recorder*, November 7, 2006.

overtime is linked with increased work-related injuries, stress, depression, fatigue, repetitive motion injuries, illness, and increased mortality. U.S. Dept. of Health & Human Servs., *Overtime and Extended Work Shifts: Recent Findings on Illnesses, Injuries and Health Behaviors* (27) (2004), available at <http://www.cdc.gov/niosh/docs/2004-143/pdfs/2004-143.pdf>; see also Juliet Schor, *Worktime in Contemporary Context: Amending the Fair Labor Standards Act*, 70 Chi.-Kent L.R. 157, 161 (1994); Golden & Jorgensen, *supra*; John Schwartz, *Always on the Job, Employees Pay with Health*, N.Y. Times, Sept. 5, 2004 § 1, at 1, available at <http://benefitslink.com/links/20040907-030551.html>. The power of employers to require overtime also undermines the ability of workers to spend more time with their families and to participate in civic activities that help create healthy communities. See Shirley Lung, *Overwork and Overtime*, 39 Ind. L. Rev. 51, 56 (2005).

II. UPDATE RE MEAL AND REST BREAK ISSUES

Labor and employment lawyers in California start the new year exactly where they were at the end of 2006 – waiting anxiously for a ruling from the California Supreme Court in Murphy v. Kenneth Cole Productions, 134 Cal. App. 4th, 728 (2005), review granted, 2006 Cal. LEXIS 2547 (2006). At issue is the meaning of Labor Code Section 226.7 which requires “an additional hour of pay” for every missed meal or rest period.

The primary dispute goes to whether this additional hour of pay is properly characterized as a “penalty” or as “lost wages.” If these statutory remedies are lost wages, then CCP Section 338(a) would mandate a three year statute of limitations, or possibly a four year restitutionary relief period under the Unfair Competition Law (UCL) in B&P Code Section 17200. If the available recovery is a “penalty,” then only a one year recovery period would be available under CCP Section 340(a).

Many other cases are pending that will be impacted by this ruling, including Mills v. Superior Court, 135 Cal. App. 4th 1547 (2006), review granted, 2006 Cal. LEXIS 6 (2006), and National Steel & Shipbuilding Co. v. Superior Court, 135 Cal. App. 4th 1072, review granted,

2006 Cal. LEXIS 4401 (2006). Parties in these and in other cases are currently in limbo waiting for some direction from the California Supreme Court. Employers are left without much credible guidance on this issue. The DLSE issued regulations on the issue and then withdrew them, ultimately issuing a “precedential decision” holding that the one year limitations period applies. Hartwig v. Orchard Commercial, Inc., Case No. 12-56901RB (May 11, 2005)(available on DLSE website).

A further issue continues to plague practitioners in this area, which goes to the question of whether an employer must ensure that employees are relieved of all duties during their meal periods. See Cicairos v. Summit Logistics, Inc., 133 Cal. App. 4th 949 (3DCA, Oct. 27, 2005), review denied, January 18, 2006 (employer’s summary judgment reversed; employers have an affirmative duty to make sure that employees are relieved of all duties during meal periods).

III. UPDATE RE PROFESSIONAL EXEMPTION ISSUES

California employers seeking refuge under the professional exemption must avoid wishful thinking that they may rely on the FLSA counterpart exemption that appears to have been broadened to include categories of employees that typically were not considered professionals in the past. There appears to be little in the way of authority for any such extension under California law.

It is well established that California’s professional employee exemption is narrower than that found under the FLSA. Nordquist v. McGraw, 32 Cal. App. 4th 555, 562 (1995). Under California law, in order to qualify for the learned professional exemption, the position must require the employee to have an “advanced degree.” DLSE Manual, Section 54.8.1. An “advanced degree” will mean “a degree above a baccalaureate degree.” O.L. 2002.08.14; DLSE Manual Section 54.8.1. It is not sufficient that a particular employee have a graduate degree; rather the position the employee occupies and the work performed must actually require such a degree. Wage Order 4-2001(1)(A)(3)(b)(1); DLSA Manual Section 54.8.1. In sum, if the janitor cleaning your office has a Ph.D., he is still not exempt as a learned professional under California

law. Similarly, even if a computer software engineer has a BS in computer science, this will not suffice to establish entitlement to the professional exemption. Employers of employees with advanced degrees must still establish that the employees are paid on a salary basis. If the individual in question is in the IT field, remember that the income requirements apply. In 2006, the computer software employee exemption required a pay rate of \$47.81 per hour (nearly \$100,000/year assuming a full time position).³

That the DOL appears to have relaxed the advanced degree requirement for the FLSA's learned professional exemption would appear to have little relevance to California employers (who must prove up both state and federal exemptions in order to avoid paying overtime compensation). However, there have been FLSA developments which may bear watching as to this issue.

Three recent DOL Opinion Letters are illustrative of the issues at play, but even here the advice rendered is more restrictive than may have been suggested by the "reforms" of the FLSA white collar exemptions that became effective on August 23, 2004 (29 CFR Part 541); see also "Preamble Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," published in the Federal Register, April 23, 2004.

In FLSA 2006-26 (July 24, 2006), the DOL opined that a hospital's Respiratory Therapists (RTs) did not meet the test for the learned professional exemption. In this example, the RT job required a state license in respiratory therapy, which in turn was based on a credential of Certified Respiratory Therapist which itself required the passing of a Certification Examination for Entry Level Respiratory Therapists administered by the National Board for Respiratory Care. In order to qualify to take the examination, the prospective RT had to complete an accredited educational program in respiratory therapy which included two to four years of specialized

³ This hourly rate will be higher for 2007 and can be determined by reference to the DLSE website showing rates required under Labor Code Section 515.(a)(3).

instruction leading to an Associates or Bachelors degree. The hospital writing the DOL indicated that its goal was to hire at the Bachelors degree level, but that only 20 of 68 of the incumbent RTs possessed a Bachelors Degree in Respiratory Therapy. Of the remaining 48 RTs, 15 had a Bachelors Degree in some field. After reviewing the current regulations, the DOL concluded that the RT job in question did not qualify for the exemption because the “occupation does not require knowledge of an advanced type that is customarily acquired by a prolonged course of specialized intellectual instruction.”⁴

The Opinion Letter acknowledges that 29 CFR 541.301(f) recognizes that the areas in which the learned professional exemption applies are “expanding.” New professions may come into existence based on accreditation, certification, or licensing by state boards based on specialized curricula. The favored example is the newish profession of “certified physician assistant” which is based on a certification program requiring “four years of specialized post-secondary school instruction.”⁵

Another DOL Opinion Letter issued the same day, FLSA 2006-27 (July 24, 2006), confirmed the DOL’s opinion that Senior Legal Analysts would not qualify for the professional exemption. The employee in question had a “two year legal studies degree.” The opinion refers to 29 CFR 541.301(e)(7) which states that paralegals are generally not to be considered professionals, even those with four year degrees, since the typical paralegal program is a two year associate degree program from a community college.

⁴ The conclusion appears based on the fact that an Associates Degree with the required RT training would suffice.

⁵ See also 29 CFR 541.301(e) which recognizes certified medical technologists, registered nurses (but not LPNs), dental hygienists, physician assistants, CPAs, executive and sous chefs with four year degrees, certified athletic trainers with four year degrees, and certain funeral directors or embalmers as learned professional; but not most paralegals. Again, it is the author’s opinion that none of these positions would be professionals under California law (except perhaps accountants).

The third recent DOL Opinion Letter, FLSA 2006-41 (October 26, 2006), examines the teaching professional exemption (as opposed to the learned professional duties test). Here, the DOL opined that instructors at a career school qualified as exempt teachers. The career school in question provided technical instruction to students seeking careers as automotive, diesel, collision repair, motorcycle, and boat technicians. The instructors had to be certified to teach and had to meet minimum standards established by the Accrediting Commission of Career Colleges and Technology. As such, even though these instructors lacked a four year degree they qualified as teachers of an “educational establishment” as defined by 29 CFR 541.204(b) and as “teachers of skilled and semi-skilled trades and occupations” under 29 CFR 541.303(b).

In sum, there is not much new law as to the professional exemption. However, employers will continue to try to carve out new professions based on changes in the economy and expansive readings of the specialized learning requirement. However, under California labor law, there appears to be little tolerance for expanding the established list of recognized professions or permitting the exemption to be proven by anything less than an advanced degree (a graduate or professional degree beyond a four year academic program).

IV. UPDATE REGARDING THE ADMINISTRATIVE EXEMPTION

The most important new development in this area is the Ninth Circuit’s recent opinion in In re Farmers Insurance Exchange Claims Representatives’ Overtime Pay Litigation (“Farmers MDL”), 466 F.3d 853 (9th Cir., Oct. 26, 2006).

Up until recently, the overtime claims of insurance claims adjusters asserting that they were misclassified as administrative employees had been extremely successful under California state labor law and to a lesser degree under the FLSA. On July 10, 2001, an Alameda County Superior Court jury awarded a class of Farmers claims adjusters \$90 million in back overtime pay. The jury award was affirmed on appeal. Bell v. Farmers Ins. Exchange, 115 Cal. App. 4th 715 (2004). The Bell litigation spawned a series of successful claims adjuster misclassification class actions brought under California law that resulted in class settlements against nearly all

major insurance companies operating in California, including settlements against Allstate (\$120 million) and State Farm (\$135 million).⁶

Federal law overtime cases for adjusters proceeding under the FLSA were less successful initially,⁷ but were beginning to see more success as time progressed. Robinson-Smith v. GEICO, 323 F.Supp.2d 12 (D.D.C. 2004)(lower level adjusters non-exempt); In re Farmers Ins. Exchange, 336 F.Supp.2d 1077 (D. Or. 2004)(same).⁸

However, the new Ninth Circuit Farmers MDL opinion seems to alter the terrain once more by holding that all insurance claims adjusters, no matter what level of authority, are exempt as administrative employees regardless of their level of claims authority. The Ninth Circuit relied on the “new” white collar regulation at 29 CFR 541.203 that provided that insurance claims adjusters would generally meet the duties tests for the administrative exemption where their duties included interviewing insureds, inspecting property damage, preparing damage estimates, and making recommendations regarding the settlement of such claims.

Other issues involving the administrative exemption include:

***Paralegals:** The recent DOL opinion letter (FLSA 2006-27)(July 24, 2006) confirmed that paralegals, even if skilled and knowledgeable, perform their duties under the direction of attorneys (who are the personnel who exercise the requisite discretion and independent judgment).

⁶ Peter Zuckerman, “Class of Insurance Adjusters Wins \$120 Million Settlement,” Los Angeles Daily Journal, Dec. 2, 2005. But see, Hodge v. Superior Court, 145 Cal. App. 4th 278 (2006) (class claims brought by AON adjusters whose jury trial resulted in a mistrial permitted to amend complaint to drop Labor Code claims and proceed to bench trial on UCL claims).

⁷ Palacio v. Progressive Ins. Co., 244 F.Supp.2d 1040 (C.D.Cal. 2002); Jastremski v. Safeco Ins. Co., 243 F.Supp.2d 743 (N.D. Ohio 2003).

⁸ See also, DOL Opinion Letter FLSA 2005-2 (Jan. 7, 2005)(junior level claims adjusters non-exempt).

***Mortgage Loan Officers:** The DOL has now opined (FLSA 2006-31)(September 8, 2006) that salaried mortgage loan officers may be characterized as exempt as administrative employees where their primary duty is to advise customers (as opposed to non-exempt loan processors or outbound sales personnel). Mortgage personnel whose primary duty is selling mortgages will not qualify for the exemption under 29 CFR 541.203(b).⁹

***Stock Brokers:** Generally, these employees will not be treated as administrative employees because they will fail the salary basis test. Takacs v. A.G. Edwards & Sons, Inc., 2006 WL 2297616 (S.D. Cal. Aug. 2, 2006)(denying summary judgment to employer on stock broker overtime claims). Financial services firms have agreed to pay out millions of dollars in back overtime wages, including UBS (\$89 million), Morgan Stanley (\$42 million), and Smith Barney (\$98 million).

***IT Support Specialists:** The DOL recently opined that help desk support staff who diagnose computer related problems and close out trouble tickets are not administrative employees (FLSA 2006-42)(October 26, 2006). See also, Martin v. Indiana Michigan Power Co., 381 F.3d 574 (6th Cir. 2004)(technical computer employee not administrative); Turner v. Human Genome Services, Inc., 292 F.Supp.2d 738 (D. Md. 2003)(computer troubleshooter not administrative); Bothell v. Phase Metrics Inc., 299 F.3d 1120 (9th Cir. 2002)(denying summary judgment to employer for employee responsible for customers' IT operations). But see, Bagwell v. Florida Broadband, LLC, 385 F.Supp.2d 1316 (S.D. Fla. 2005)(employee whose primary duty was developing, improving, and maintaining the employer's computer network was an exempt administrative employee).¹⁰ More recently, a federal district denied summary judgment on the

⁹ For example, see "Countrywide Home Loans Agrees to Pay \$30 Million to Settle Overtime Class Action," 6 Class Action Litigation Report 395 (2006).

¹⁰ Note that employers may also seek to qualify computer related employees under the Computer Employee exemptions, learned professional exemption, or executive exemption, depending on the facts of each case.

administrative exemption issue as to an IT engineer earning over \$50,000/year. Hunter v. Sprint Corp., D.D.C. No. 04-0376 (September 22, 2006). See also, class and collective action settlement of “technical support services workers” employed nationwide by IT industry giant IBM. Rosenburg v. IBM, N.D. Cal. No. 06-00430PJH (preliminary approval hearing scheduled for January 3, 2007).

V. CONCLUSION

There appears to be no reason to think that the current wave of wage/hour litigation will diminish any time in the foreseeable future. Issues regarding the administrative exemption, the professional exemption, meal and rest periods, and claims arising from the financial services and computer related industries will continue to dominate the docket.

However, practitioners should be aware of any number of other wage/hour issues which are likely to spawn litigation in the coming period, including:

***Claims Related to Working At Home:** Telecommuters have rights too.¹¹ In addition, workers who are required to start work at home and then drive to another location may have wage claims for compensable time worked both for the work at home and for the drive time.¹²

***New Limits on the Motor Carrier Act Defense to Overtime Claims:** Federal law now appears to be aligned with California labor law in permitting overtime claims by drivers of vehicles weighing less than 10,000 pounds. See, 49 U.S.C. Section 31132(1); Musarra v. Digital

¹¹ Sheri Qualters, “Telecommuters Are Suing Employers,” The National Law Journal, December 11, 2006.

¹² Dooley v. Liberty Mutual Ins. Co., 307 F.Supp.2d 234 (D. Mass. 2004)(appraisers may be entitled to pay for work at home and for drive time); IBP v. Alvarez, 126 S.Ct. 514 (2005) (affirming continuous work day and first principal activity rules as against argument by employer based on Portal to Portal Act).

Dish Inc., 2006 WL 2779856 (S.D. Ohio Sept. 28 2006); Dell'Orfano v. IKON Office Solutions, Inc., 2006 WL 2523113 (M.D. Ga. Aug. 29, 2006).

***Restaurant Employees:** Look for litigation involving improper tip pooling as in recent cases including Matoff v. Brinker Restaurant Corp., 439 F.Supp.2d 1035 (C.D. Cal. 2006) (California's tip pooling claims may be brought as UCL cause of action); Jameson v. Five Feet Restaurant Inc., 107 Cal. App. 4th 138 (2003)(affirming judgment for restaurant employee forced to share tips with floor manager/agent). But see, Louie v. McCormick & Schmick Restaurant Corp., 2006 WL 3087112 (C.D. Cal. Oct. 18, 2006)(granting motion to dismiss as to improper tip pooling claim based on bartender participation in tip pool).

In sum, labor law enforcement litigation will continue unabated into the coming years unless and until employers become more vigilant about policing their personnel policies themselves.