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THE SALARY BASIS TEST FOR OVERTIME AND MINIMUM WAGE LAWS

*Allen Vaught**

Responsible businesses do their best to stay in compliance with applicable overtime and minimum wage laws. The overtime and minimum wage law that generally covers most businesses in the United States and certain other locations¹ is the federal Fair Labor Standards Act (“FLSA”).² Depending on the particular state in which the business has employees, there may be state laws that provide more overtime wage and/or minimum wage protections for employees than the FLSA.

Employers should watch developments relative to the amount of salary an employer is required to pay its FLSA exempt employees (*i.e.* those who are not owed overtime wages and/or minimum wages) carefully. A recent court ruling prevented a regulatory increase of the weekly salary to \$913, leaving in place the previous \$455 weekly amount. However, new FLSA regulations raising that amount are likely to be issued. Additionally, even if an employer knows the salary it pays its employees meets the FLSA minimum, it should nevertheless investigate applicable state laws that may require higher salary levels than the FLSA.

I. WHAT IS THE SALARY BASIS TEST?

Many of the common FLSA exemptions relied on by employers are known as the white-collar exemptions,³ which exempt “from both minimum wage and overtime requirements any employee employed in a bona fide executive,

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¹ *Smith v. Raytheon Co.*, 297 F. Supp. 2d 399, 401 (D. Mass. 2004) (citing 29 U.S.C. § 213(f)(1938)) (“The [overtime and minimum wage] provisions of [the FLSA] shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act . . . ; American Samoa; Guam; Wake Island; Eniwetok Atoll; Kwajalein Atoll; and Johnston Island”).

² 29 U.S.C. §§ 201–219 (1938) & 29 U.S.C. §§ 251–262 (1947).

³ 29 C.F.R. § 541.3; *Johnson v. Big Lots Stores, Inc.*, 561 F. Supp. 2d 567, 572 (E.D. La. 2008).

administrative, or professional capacity.”⁴ Congress did not define the elements for “bona fide executive, administrative, or professional capacity,” and instead delegated the “power to define and delimit [those] terms through regulations” to the Secretary of the United States Department of Labor (“USDOL”).⁵

While each of those exemptions has a different test an employer must prove, many of them require or include payment on a salary basis.⁶ For example, the executive exemption requires that the employee be: (1) paid on a salary basis; (2) have a primary job duty of management of the business or a customarily recognized department or subdivision of the business; and (3) have the authority to hire and fire, or make suggestions and recommendations on hiring, firing, advancement, promotion, or any other change of status of other employees that are given particular weight.⁷

Payment on a salary basis means that the “employee regularly receives, each pay period on a weekly or less frequent basis, a predetermined amount constituting all or part of the employee’s compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.”⁸

II. WHAT IS THE MINIMUM SALARY THAT MUST BE PAID TO MEET RELEVANT FLSA EXEMPTIONS?

Currently, the FLSA exemptions that mandate or allow payment on a salary basis require that the employee be paid a salary of no less than \$455 per week.⁹ However, if an employer were to simply review the currently published Electronic Code of Federal Regulations¹⁰ relative to the white-collar

⁴ *Nevada v. United States Dep’t of Labor*, 218 F. Supp. 3d 520, 524 (E.D. Tex. 2016) (citing 29 U.S.C. § 213(a)(1) (quotations omitted)).

⁵ *Id.* The white-collar exemption regulations are at 29 C.F.R. § 541.100–541.304.

⁶ The executive exemption requires payment on a salary basis. 29 C.F.R. § 541.100(a)(1). The administrative and professional exemptions require payment on a salary or fee basis. 29 C.F.R. § 541.200(a)(1); 29 C.F.R. § 541.300(a)(1). “Fee basis” means that the employee is paid an agreed sum for a single “unique” job regardless of the time for its completion. 29 C.F.R. § 541.605. That regulation provides as an example an artist who is paid a fixed amount to make a painting. *Id.*

⁷ 29 C.F.R. § 541.100(a).

⁸ 29 C.F.R. § 541.602(a); *Snead v. EOG Res., Inc.*, No. 5:16-CV-1134-OLG, 2018 WL 1151138, at *2–3 (W.D. Tex. Feb. 13, 2018) (payment on a salary basis requires pay above the minimum amount that is “both “predetermined” and “guaranteed” and “not subject to reduction because of variations in the quality or quantity of the work performed [subject to certain exceptions].”).

⁹ *Nevada*, 218 F. Supp. 3d at 525, 534 (enjoining current salary basis test set forth in relevant white collar exemption regulations thus leaving prior regulation requiring salary level of \$455 per week in place.).

¹⁰ See Electronic Code of Federal Regulations (Oct. 12, 2018), https://www.ecfr.gov/cgi-bin/textidx?SID=498499b9b422af8f372c880d59a2e5f4&mc=true&node=se29.3.541_1600&rgn=div8.

exemptions, it would see a different amount - \$913 per week.¹¹ Specifically, the current regulations state:

[A]n employee must be compensated on a salary basis at a rate per week of not less than the 40th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region [which is the Southern United States¹²]. As of December 1, 2016, and until a new rate is published in the Federal Register by the Secretary, such an employee must be compensated on a salary basis at a rate per week of not less than \$913 (or \$767 per week, if employed in American Samoa by employers other than the Federal government), of board, lodging or other facilities.¹³

The reason the required salary is \$455 per week instead of the amount stated in the current regulation is due to a United States District Court ruling in the case styled *Nevada v. United States Department of Labor*.¹⁴

Prior to the *Nevada* case ruling, the operative white-collar exemption regulations, which were enacted in 2004, set the required salary level at \$455 per week, in addition to requiring certain job duties for each such exemption.¹⁵ On May 23, 2016, the USDOL issued regulations increasing the salary level to \$913 per week with an effective date of December 1, 2016.¹⁶ The *Nevada* case plaintiffs, which were a consortium of certain states and various business organizations, sought an injunction prohibiting the implementation of the new salary requirements for the white-collar exemptions.¹⁷

Although the *Nevada* Court confirmed that Congress had delegated the rule making authority for the white-collar exemptions (which were not defined in the FLSA itself) to the DOL, it concluded that the “significant increase” to the salary level created a de facto salary-only test that essentially excluded the job duties component of the white-collar exemption test.¹⁸ Resulting in a nation-wide injunction prohibiting implementation of the new salary level for the white-collar exemptions.¹⁹ Although the USDOL initially appealed the injunction in

¹¹ 29 C.F.R. § 541.600(a). \$913 per week, but \$767 per week if the employment is in American Somoa by employers other than the U.S. government.

¹² *Nevada*, 218 F. Supp. 3d at 525.

¹³ 29 C.F.R. § 541.600(a).

¹⁴ *Nevada*, 218 F. Supp. 3d at 520.

¹⁵ *Id.* at 524.

¹⁶ *Id.* at 525. However, that case identifies the weekly salary in the new regulations at \$921 per week when the relevant regulations actually identify \$913 per week. *See* 29 C.F.R. § 541.600(a).

¹⁷ *Nevada*, 218 F. Supp. 3d at 524–25.

¹⁸ *Id.* at 531.

¹⁹ *Id.* at 531, 534.

the *Nevada* case, that appeal was withdrawn after the Trump Administration took office.²⁰

Accordingly, due to the *Nevada* case, the required minimum weekly salary relative to the white-collar exemptions is not \$913 as listed in the current version of the Electronic Code of Federal Regulations, but is instead \$455 per week pursuant to the 2004 regulations for those exemptions.²¹ However, it is anticipated that the USDOL will, at some point in the future, enact new regulations with an increase in the salary required for the white-collar exemptions.²²

III. CERTAIN STATES HAVE STATE OVERTIME AND/OR MINIMUM WAGE LAWS THAT REQUIRE A HIGHER SALARY THAN THE FLSA

The FLSA does not preempt states from enacting wage and hour laws that provide more relief for employees than required by the FLSA.²³ Accordingly, a prudent business should not conclude it is in compliance with overtime and minimum wage laws by looking at the FLSA only. Instead, it should evaluate applicable state laws in areas in which it has employees.

For example, to satisfy the salary element of California's white-collar exemption to its overtime and minimum wage laws, the employee's monthly salary equivalent must be no less than two times the state minimum wage for full-time employment (which is 40 hours per week).²⁴ The California minimum wage rate as of October 12, 2018 is \$10.00 per hour for employers with less than 25 employees and \$10.50 per hour for employers with more than 25

²⁰ *Nevada v. United States Dep't of Labor*, 321 F. Supp. 3d 709, 715 n.1 (E.D. Tex. 2018).

²¹ *Nevada*, 218 F. Supp. 3d. at 531.

²² See Dep't of Labor, *Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales and Computer Employees* (July 26, 2017), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=1235-AA20>.

²³ See 29 U.S.C. § 218(a) ("No provision of [the FLSA] or of any order thereunder shall excuse noncompliance with any [] State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under [the FLSA]. . ."). See also, *McLeland v. 1845 Oil Field Servs.*, 97 F. Supp. 3d 855, 864 (W.D. Tex. 2015) (holding that the FLSA did not pre-empt the New Mexico Minimum Wage Act, which provided greater overtime and minimum wage protections for employees than the FLSA).

²⁴ Cal. Lab. Code § 515(a), 515(c) (West 2018); *Novoa v. GEO Grp., Inc.*, No. EDCV17-2514JGB(SHKx), 2018 WL 3343494, at *6 (C.D. Cal. June 21, 2018) ("In California, the essential predicate of each employer's obligation to pay a minimum wage is the Industrial Welfare Commission's (IWC) issuance of an applicable wage order fixing the minimum wage and providing the legal basis for an action by the employee to recover unpaid minimum wages.") (citing *Martinez v. Combs*, 49 Cal. 4th 35, 56 (2010)).

employees.²⁵ That results in a current minimum monthly salary of \$3,640 for employers with less than 25 employees and \$3,813.33 for employers with more than 25 employees.²⁶

States other than California that have overtime and/or minimum wage laws include: Alaska, Arkansas, Colorado, Connecticut, Florida, Hawaii, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, West Virginia, and Wisconsin.²⁷

CONCLUSION

Employers who want to ensure that they comply with the FLSA overtime and minimum wage laws should regularly check the required salary amount for the white-collar exemptions. The current minimum weekly salary is \$455 despite the fact that the current Electronic Code of Federal Regulations lists the amount as \$913 per week. Due to the injunction issued by the court in the *Nevada* case, the \$455 amount will remain in place until a date to be determined. However, the USDOL has provided notice that it intends to issue a new final rule on the amount of salary required for the white-collar exemptions.

Regardless of the amount of salary required for the FLSA white-collar exemptions, prudent employers should be aware that certain states have wage

²⁵ Cal. Minimum Wage Order MW-2017. Effective January 1, 2019, the hourly minimum wage rates increase to \$11 for employers with less than 25 employees and \$12 for those with more than 25 employees. See State of California Department of Industrial Relations, *Labor Law* (Oct. 12, 2018), <https://www.dir.ca.gov/dlse>.

²⁶ Sebastian Chilco & Dan Thieme, *Exempt Employee Pay Minimums Will Increase in 2018 in Various States*, LITTLER (DEC. 11, 2017), <https://www.littler.com/es/node/536376>.

²⁷ Alaska – ALASKA STAT. §§ 23.10.060, 23.10.065 (2018); Arkansas - ARK. CODE ANN. §§ 11-4-210(a), 11-4-211(a) (2018); Colorado – 7 COLO. CODE REGS. 1103-1 (2018); Connecticut - CONN. GEN. STAT. §§ 31-60, 31-76(c)(2018); Florida - FLA. STAT. § 448.110 (2018); Hawaii - HAW. REV. STAT. §§ 387-2, 387-3 (2018); Illinois - 820 ILL. COMP. STAT. §§ 105/4, 105/4a (2018); Indiana - IND. CODE § 22-2-2-4 (2018); Kansas - KAN. STAT. ANN. §§ 44-1203, 44-1204 (2018); Kentucky - KY. REV. STAT. ANN. §§ 337.275, 337.285 (LexisNexis 2018); Maine - ME. REV. STAT. tit. 26, § 664 (2018); Maryland - MD. CODE ANN., LAB. & EMPL. § 3-413, 3-415 (LexisNexis 2018); Massachusetts - MASS. GEN. LAWS ANN. ch. 151, §§ 1, 1A (2018); Michigan - MICH. COMP. LAWS §§ 408.414, 408.414a (2018); Minnesota - MINN. STAT. §§ 177.24, 177.25 (2018); Missouri - MO. ANN. STAT. §§ 290.502, 290.505 (West 2018); Montana - MONT. CODE ANN. §§ 39-3-404, 39-3-405 (2017); Nevada - NEV. CONST. art. XV, § 16, NEV. REV. STAT. ANN. § 608.018 (2017); New Hampshire - N.H. REV. STAT. ANN. § 279:21 (2018); New Jersey - N.J. STAT. § 34:11-56a4 (2018); New Mexico - N.M. STAT. ANN. § 50-4-22 (2018); New York – N.Y. COMP. CODES R. & REGS. tit. 12, §§ 142-2.1, 142-2.2 (2018); Oregon - OR. ADMIN. R. 839-020-0010, 839-020-0030 (2018); Pennsylvania - 34 PA. CODE §§ 231.21, 231.41 (2018); Rhode Island - 28 R.I. GEN. LAWS §§ 28-12-3, 28-12-4.1 (2018); Vermont - VT. STAT. ANN. tit. 21, § 384 (2018); West Virginia - W. VA. CODE §§ 21-5C-2, 21-5C-3 (2018); and Wisconsin - WIS. ADMIN. CODE DWD §§ 272.03, 274.03 (2018).

and hour laws that provide more protections and higher minimum salaries than the FLSA. Therefore, in addition to ensuring compliance with the FLSA, employers should analyze applicable state laws.