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You Can't Work Overtime – And We Really Mean It!

Friday, Apr 04, 2008 --- As employment lawyers working under the Fair Labor Standards Act and state wage-and-hour laws, we often devote substantial attention to relatively complex problems of calculating overtime pay.

Indeed, over fifty-five pages of FLSA regulations, in ten point type, are devoted to this subject alone. When you add the volume of interpretative authority, the resulting stack of paper becomes frighteningly high.

There is, of course, a much simpler way of avoiding this laborious analysis when figuring out how to pay non-exempt employees. If employees don't work overtime, then we can dispense with nuanced interpretations of the regular rate and the applicable overtime premium.

The resulting equation is quite simple: no overtime work = no overtime pay. But, as in so many matters under the wage and hour laws, the prospect of a simple equation may be illusory.

Before getting to the meat of the argument, let me anticipate the critics.

This short essay does not take on the "wink and a nod" by management that is sometimes alleged as an unspoken corollary to a "no-overtime" work policy. I will save that issue for when we debate class certification.

Let's also save for another day a discussion of whether certain activity is "preliminary" or "post-liminary," and whether that time must be included in calculating the regular rate and overtime premium.

So, what is a no-overtime policy? Consider a manager who has to provide certain business unit services at customer sites within a weekly labor budget of n dollars. She has five non-exempt employees in her unit, and she calculates that she can meet her labor budget and earn the bargained return on her customer contracts if none of those employees work overtime in the week.

Accordingly, she tells her employees that they are not authorized to work more than 40 hours in the week (or, in California, more than eight hours in a day) without her prior approval, and that unauthorized work will not be paid as overtime. In short, she implements the simple equation.

But is the equation really as simple as it should be? Let's return to our manager with the weekly labor budget of n dollars. She adopts the no-overtime policy and communicates it to her employees.

Because she is quite savvy on wage and hour matters, she knows that "[t]he mere promulgation of a rule against such work is not enough [and that] management has the power to enforce the rule and must make every effort to do so." 29 C.F.R. § 785.13.

Accordingly, she constantly reminds the employees of this policy by including a legend on their time sheets, she carefully reviews overtime work authorization requests, and she often denies those requests and makes sure that the employees know about her decisions.

Because the employees often work away from the office, such as at customer sites where the customers tell the employees what to do, our manager usually cannot directly observe their work throughout the week. She relies on reported hours from the employees and pays according to the policy.

Her contracts with customers usually do not provide for extra costs to cover overtime. But, on occasion and to meet customer needs, she may negotiate an agreement that the customer will pay for additional time.

In those situations she increases her labor budget from n dollars to n + x dollars and pays the overtime. But, otherwise she reasonably expects the employees to adhere to the no-overtime policy as instructed and she has no information to the contrary.
Good enough? Maybe not – at least in the Second Circuit.

In Chao v. Gotham Registry Inc., __ F.3d __, 2008 WL 191038 (2d Cir. 2008), the employer – a staffing agency for healthcare professionals – was in roughly the same position as the manager described above.

Result: the employer violated the Fair Labor Standards Act, because the employer was deemed to have controlled or required the off-site unauthorized overtime work, and because that work benefited the employer.

According to the panel majority, the employer should have done more, such as tracking hours each day, firing employees who habitually disregard the policy, or – remarkably – refusing to pay employees anything for unauthorized overtime work.

Chief Judge Jacobs vehemently and lucidly disagreed with his colleagues' decision that the employer had violated the FLSA, at least on the record presented. In his view, the employer had taken sufficient steps to avoid controlling or requiring the overtime work.

And, the employer did not benefit from the overtime work because, due to the fixed price contracts with customers which were based on no unauthorized overtime, "the documented administrative costs would wipe out any remaining profit if Gotham were to pay an overtime rate on shifts reimbursed at a straight-time rate." Id. at 12.

What should we tell our manager with the n dollars labor budget to do? One possibility is to hope that what is now a circuit split, id. at 7-8, will reach the Supreme Court and that Judge Jacobs' reasoning will prevail.

That's a long time to wait, and the odds of a cert grant are always low. The cautious advisor, particularly as to employers with employees in the Second Circuit, might counsel adding some of the management controls suggested by the panel majority, although one would have to admit Judge Jacobs' powerful showing that those controls may be practically unrealistic to the point of being illusory. Cf. id. at 9-10 (unanimous holding that employer which was subject to an earlier consent judgment should not be held in contempt because the "novel question" of the no-overtime policy "was not the subject of an obvious answer").

The advisor might also consider adding a self-certification on time sheets (e.g., "I certify by signing this time sheet that it reflects all hours that I worked for Employer during this week.") While this would be helpful from an evidentiary perspective, it does not, of course, directly overcome the substance of the panel's ruling on the intrinsic failing of the no-overtime policy.

If our manager is particularly adventuresome, she could take the Second Circuit at its word by adopting a no overtime/no pay policy: "Any hours over the limit would not be billed to the [customer] and would not result in any compensation for the [employee] (as opposed to the current policy of regular pay)." Id. at 9.

I doubt that was the litigating position of the Department of Labor. Let's hope for the emergence of a brave litigant who will be willing to challenge such reasoning.

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