



How Did They Manage? Part One

Insights

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The jury said Family Dollar store managers did not "manage" the stores. A federal appeals court affirmed the \$35.5 million overtime verdict. Take steps now to minimize the risk of this happening to your business.

The Ground Rules

Every company has a culture – its own personality and way of doing business. Different companies have differing philosophies about span of control, autonomy at lower levels within the organization, how to run efficiently in a tough economy and how to delegate (or not delegate) responsibilities.

What every company and senior manager must realize is that the federal Fair Labor Standards Act (FLSA) determines whether a supervisor or manager is exempt from overtime according to the way the law and regulations are written and applied – not according to what title the company uses nor according to that company's management or operating philosophies. Whether or not an employee is exempt from overtime depends on that individual's job duties and the proper application of complicated, unclear FLSA regulations.

Even within a single company a store manager at one location may be exempt from overtime, while a store manager at another location operating under slightly different circumstances is not. The difference is sometimes subtle and difficult to understand even among experts familiar with the FLSA tests. Imagine having a jury decide whether your first level managers are exempt after reviewing your company's internal documents and communications, and listening to managers from all levels in the company testify about what they believe the FLSA means.

January, 2008, we warned about the danger of increasing FLSA litigation on the issue of whether managers meet the "executive" test for exemption from overtime. ("Who's Minding the Store?", *Retail Update*, Winter 2008). We noted a case where a federal appeals court sided with a retailer in ruling that even when managers perform many non-managerial tasks they can still meet the test and be exempt from overtime. But we also noted many other cases, including a *Family Dollar* case, where retailers continue to face challenges to the exempt status of managers.

Just how much upper-management control limiting the authority of store managers is "too much" such that the store manager is not exempt from overtime requirements because his or her "primary

duty" is not "management"? A recent jury decision clearly shows what was "not enough" to establish the exemption, at least in that case. We should all take note and learn from the this decision what can be done to improve the likelihood of convincing a jury that the FLSA "executive" test is met. *Morgan v. Family Dollar Stores*.

Years Of Litigation About Hours

By the time of the second trial in 2006 (the first trial in 2005 ended with a deadlocked jury), there were 1,424 "opt-in" store managers suing Family Dollar for overtime payment (this was down from approximately 2,500 earlier because many store managers failed to appear for proceedings, filed bankruptcy or for other reasons dropped out of the case). The case spanned more than five years; the trial lasted eight days. There were 39 witnesses including store managers who had worked at 50 different stores, district managers who ran 134 different stores and three executives who were in charge of 1,400 or more stores.

Payroll records showed that the store managers worked 60 to 70 hours each week. Family Dollar documents entered into evidence included policy and training manuals, work schedules, payroll records and emails. Family Dollar claimed that the store managers were exempt from overtime under the FLSA because it believed they met the "executive" test.

Following trial, the district court found that 163 of the store managers were not exempt as a matter of law because the evidence showed they did not customarily and regularly direct the work of two or more other full-time employees or the equivalent. Family Dollar wanted to use its standard for defining full-time employees as "those scheduled to work 30 hours per week" in order to lower the hours requirement necessary to equate to "two or more other full-time employees." The Court instead required 80 hours of other employee work time to satisfy this part of the executive test. Thus, managers at a large number of stores supervised fewer than 80 labor hours for more than 20% of the time. These managers were found to be nonexempt on that basis alone, that is, without regard to the primary-duty test.

It's A Control Thing

That left it for the jury to decide whether the remaining store managers met the test to be exempt as executives whose primary duty was management as required by the FLSA. The jury not only found that the store managers were not exempt from overtime because their primary duty was not management, it found that Family Dollar "willfully" violated the law. A three-judge panel for the U.S. Court of Appeals for the 11th Circuit affirmed the decision.

The appeals court recognized that whether or not a manager's primary duty is "management" under the FLSA must be based on all the particular facts of the case. The Court noted that under the newest version of the FLSA regulations, "primary duty" means the principal, main, major or most important duty that the employee performs. The determination must be made with a major emphasis on the character of the employee's job as a whole. An employee performing some nonexempt work can still be exempt if the individual's primary duty is management.

The Court noted the following facts from the Family Dollar trial:

- no matter what size a store or district was "every detail of how the store is run is fixed and mandated through Family Dollar's comprehensive manuals";
- district managers head the store team and "closely scrutinize store managers to ensure compliance with the manual and corporate directives" covering the "tiniest of details";
- Family Dollar store managers "exercise little discretion and spend 80-90% of their time performing manual labor tasks";
- a Family Dollar executive testified that the Company "classified store managers as executives, across the board, without ever determining how store managers spent their time" and that "the biggest chunk of the store manager's time was being spent on manual labor"; and
- another Family Dollar executive added that "Family Dollar never studied whether store managers were exempt executives" but that the decision to classify them as exempt was company wide without any consideration of individual factors – and they had always been classified as exempt for as long as anyone remembered.

In reviewing the jury's application of these facts in reaching a decision, the appeals court recognized the fact-intensive nature of the primary duty determination. The Court said the jury's decision must be left intact if there was evidence on which the jury could reasonably have reached its decision, then found that the jury's verdict was supported by the evidence and by the FLSA regulations.

Family Dollar argued on appeal that its managers were solely "in charge" of a store, and thus exempt as a matter of law. Family Dollar cited cases supporting the idea that a manager of a free-standing store or restaurant is always exempt under the FLSA. But the Court noted factual differences in the cases cited and said such facts about being "in charge" cannot justify departing from a fact-intensive analysis of the primary-duty test. There is thus no categorical approach to the executive exemption based on an individual being solely "in charge." The question, according to the Court, was not whether the evidence was sufficient such that Family Dollar could have won, but whether there was evidence upon which the jury could say Family Dollar lost.

Family Dollar also claimed that because fewer than 1% of the plaintiffs testified at trial, the sample size was too small rendering the jury's verdict unreliable. The appeals court noted that despite the fact that only seven of the plaintiffs testified at trial, there was an abundance of other documentary evidence and testimony and "good old-fashioned direct evidence" supporting the jury's decision. Moreover, Family Dollar had itself objected to the plaintiffs' attempt to present more store-manager testimony, and Family Dollar cut short its own defense by not using additional time allotted during which it could have presented additional testimony.

As to the jury's finding of willfulness, which extended the statute of limitation from two to three years, the appeals court noted trial evidence showing that Family Dollar never studied the exemption and that no one knew who made the decision to classify store managers as exempt. Because the jury

determined that Family Dollar's conduct was "willful" under the FLSA, the Court was precluded from finding that Family Dollar acted in good faith. Therefore, liquidated damages in an amount equal to the back pay award were appropriate.

In our next issue of *Retail Industry Update*, available in June, we'll look at some specific lessons you can learn from this case, and offer some advice about steps to take to avoid a similar problem. In the meantime if you'd like to discuss the implications of this case to your own operation, contact your regular Fisher Phillips attorney.

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