What To Do About "Service Writers" And Similar Employees?

Insights
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The federal Fair Labor Standards Act's Section 13(b)(10)(A) provides an overtime exemption for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers."

This exemption was adopted in the mid-60s. DOL initially said that the exemption included a service manager who was primarily engaged in diagnosing the mechanical condition of cars brought in for repair, assigning the work to employees, directing and checking their work, and being responsible for the work performed. But soon thereafter, DOL reversed itself and began to say that dealership employees who primarily engaged in selling vehicle repairs and maintenance services and in related activities were *not* exempt. DOL adopted an interpretative provision saying, "Employees variously described as service manager, service writer, service advisor, or service salesman who are not themselves primarily engaged in the work of a salesman, partsman, or mechanic as described above are not exempt under section 13(b)(10)." 29 C.F.R. § 779.372(c)(4).

Following a series of DOL court losses and other adverse rulings, DOL's Wage and Hour Division threw in the towel. In 1987, the Division added this to its internal Field Operations Handbook:

Employees variously described as service writers, service advisors, service managers, or service salesmen whose primary duty is to record the condition of a vehicle and write up a report indicating the parts and mechanical work needed have been construed as within the exemption in Sec[tion] 13(b)(10)(A) by two appellate courts (5th and 6th Circuits) and two district courts (in the 8th and 10th Circuits). Consequently, [the Wage and Hour Division] will no longer deny the [overtime] exemption for such employees. This policy (that these employees are within the exemption) represents a change from the position in [29 C.F.R. §] 779.372(c)(4), which will be revised as soon as is practicable.

FOH Section 24L04(k). After almost 24 years, the current administration's DOL apparently found it "practicable" to say essentially, "Never mind." In last week's Final Rule, DOL announced that it was *not* going to revise 29 C.F.R. § 779.372(c)(4). For more details, read our partner John Donovan's Legal Alert on the topic.

At least one source has opined that dealership employers now have no choice but to start treating these workers as being subject to the FLSA's overtime requirements. Paying them overtime is

always one alternative, but there are others.

One might be for a retail dealership to implement a pay plan that meets the requirements for the FLSA's Section 7(i) overtime exception for commission-paid employees of a retail establishment. We have summarized this provision in an earlier post.

And some dealership employers might be willing to fight if need be to convince a court that prior rulings (and DOL's interpretation before April 5) have it right. Some might be particularly so inclined in federal appellate jurisdictions governed by decisions that have already rejected DOL's April 5 position. For one thing, internal DOL policy statements indicate that it will not seek to enforce its views in a federal appellate jurisdiction that has rebuffed them (whether DOL will subvert these policies by assisting private complainants in those jurisdictions remains to be seen). Moreover, current or former employees who sue in these jurisdictions will have to overcome those prior rulings.

Employers who consider taking this posture will want to give special consideration to implementing a back-up Section 7(i) plan.