The FLSA Overtime Exemption For Service Writers

IS THE SKY REALLY FALLING?

Insights
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Last week, the U.S. Department of Labor published a Final Rule concerning changes to its regulations and interpretations. One portion of the Final Rule's commentary appears to say that the DOL is now taking the position that employees doing the typical work of service writers/service advisors/service salespeople (we'll refer to them all as "service writers") are NOT exempt from overtime under the federal Fair Labor Standards Act.

This has prompted a flood of alerts warning dealers that they should immediately start paying service writers overtime. We disagree; the sky is not falling. Instead, we recommend that dealers should calmly think through the different possibilities.

First, Some Historical Perspective
In order to understand the significance of the Final Rule, you have to understand what has gone on with service writers over the last 40 years. In 1966, Congress amended the Fair Labor Standards Act (FLSA) to create an exemption for any "salesman," "partsman" or "mechanic" employed at a retail dealership. The following year, the DOL issued an Opinion Letter stating that an individual performing service writer duties would be included within the exemption.

However, about a month later, the DOL issued another Opinion Letter stating the opposite â€“ that service writers were not exempt under the 1966 provision. Over the next four years, the DOL issued at least three Opinion Letters reiterating its position that service writers were not exempt from overtime. In 1970, the DOL restated that position in its Interpretive Bulletin.

Of course, the DOL is not the final authority on what Congress meant by "salesman, partsman or mechanic." The courts are. In the early 1970s, the DOL sued a dealership in Florida because it had not paid its service writers overtime. The DOL argued that the exemption must be "narrowly construed" and that if Congress had intended to make service writers exempt, it would have listed them along with salesmen, partsmen and mechanics. Based upon arguments raised by Fisher Phillips in the dealership's defense, the court disagreed. Ruling for the dealership, the court stated that the DOL's interpretation was too narrow and that Congress intended it to cover employees who were selling service as well as selling vehicles. The DOL appealed to the U.S. Court of Appeals for the 5th Circuit, and that court also rejected the DOL's position, ruling that service writers were exempt. Dealers: 2; DOL: 0.

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In 1975, the DOL tried again, suing a dealership in Michigan. The district court rejected the DOL's arguments and found service writers to be exempt from overtime. The DOL appealed the case and the U.S. Court of Appeals for the 6th Circuit affirmed the district court. Dealers: 4; DOL: 0.

The DOL subsequently sued two other dealerships, one in Kansas and one in Nebraska. In both cases, the district courts rejected the DOL's position and ruled in favor of the dealerships. The DOL did not appeal either of these cases. Dealers: 6; DOL: 0.

In 1978, the DOL changed its position. It announced that it would consider a service writer to be exempt from overtime if the dealership could show that the employee was primarily engaged in "selling service." So, service writers who wrote a majority of customer-pay work would be exempt. On the other hand, those who wrote a majority of "warranty work," would not be selling service because the warranty work had already been sold when the vehicle was purchased.

In 1987, the DOL finally cried "uncle." Realizing the difficulty in enforcing its "customer-pay v. warranty" position, the DOL reversed its enforcement position on that issue. In its Field Operations Handbook, it stated:

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 ["salesman, partsman and mechanic" exemption] by two appellate courts (5th and 6th Circuits) and two district courts (in the 8th and 10th Circuits). Consequently, [the DOL] will no longer deny the OT exemption for such employees. This policy (that these employees are within the exemption) represents a change from the position in [the 1970 Interpretations], which will be revised as soon as practicable.

Apparently, it was not "practicable" to do this for the next 24 years.

In 2004, a former service writer sued a dealership in Virginia claiming that he was entitled to overtime. The district court granted summary judgment for the dealership, finding the service writer to be exempt from overtime. The service writer appealed to the U.S. Court of Appeals for the 4th Circuit and argued that the DOL's Interpretation specifically stated that service writers were *not* exempt. (He was referring to the same Interpretation the DOL said it was going to change, but never did). The court concluded that the DOL's interpretation of the exemption was "an impermissibly restrictive construction of the statute" and went on to state "we reject the [DOL's] interpretation.â€¦" Dealers: 8; DOL: 0.

In 2008, the DOL under the Bush Administration issued a Notice of Proposed Rule Making designed to revise some Interpretations that had become out of date due to subsequent legislation or court decisions. One of the proposed changes was to finally change the Interpretation concerning service writers to align the published regulation with the DOL's position and to make it clear that the DOL now considered them to be exempt from overtime.

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Nearly three years have passed and the DOL has finally published its Final Rule. After receiving comments strongly opposing the proposed change for service writers from the AFL-CIO and from plaintiff's attorneys' groups, the DOL under the Obama Administration issued a Final Rule announcing that it has decided that it is not going to change the Interpretation after all, because it now believes that Congress did not intend to make service writers exempt from overtime.

Now, What Does It All Mean?

This Final Rule commentary simply represents the current DOL's professed beliefs about what Congress meant when it included the "salesman, partsman and mechanic" exemption in the FLSA. It is certainly *not* the final word on what Congress meant. The courts are the final word.

The DOL's latest position represents at least its fifth shift since 1966. It said in July, 1967 that the work of service writers *was* exempt. It said in August, 1967 that this work was *not* exempt. It said in 1978 that *some* such work was exempt. It said in 1987 that *all* such work was exempt. Now, its Final Rule commentary says that "there are circumstances under which the requirements for exemption would not be met" and then seems to say that the "salesman" exemption is limited to sales of vehicles. Fortunately, four district courts and the two Courts of Appeals have unanimously rejected the DOL's interpretation as being too narrow.

While an agency's interpretation of a statute is generally given some deference by the courts, the DOL has now changed its position on service writers five times over the last 40+ years. Particularly in light of what the courts have already said, we contend that its latest position is not entitled to any deference at all.

This change in position probably does not signal any significant change in the DOL's enforcement posture in at least some jurisdictions. That's because the DOL has a policy of deferring to decisions of the Courts of Appeals that are contrary to its position in those jurisdictions. Therefore, if one assumes for the moment that the current administration will not also change *that* policy, the DOL is unlikely to bring a lawsuit involving a previously-exempt service writer in the 4th, 5th, 6th, or 11th Circuits[1]. While we do not yet know if DOL will attempt to assert its new position in other jurisdictions, if it does, it should face an uphill battle given the consistent court decisions rejecting it.

What Should You Do?

For now, dealerships should not be in any hurry to begin paying service advisors overtime. Thirty years of consistent federal court decisions supports the fact that, under federal law, service writers *are* exempt from overtime and the DOL's new position does not change that.

Any dealership that does not already have a possible back-up exemption for their service writers â€“ the so-called "commission-paid retail" employee exemption â€“ should immediately consider taking the steps to claim it. This exemption is available to any employees of a retail dealership who receive the majority of their compensation in the form of bona fide commissions, *and* receives more than 1½ times the federal minimum wage ($10.89/hr. at the current federal minimum wage of $7.25/hr.) for all hours worked in an overtime workweek. If your service writers currently do not

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$7.25/hr.) for all hours worked in an overtime workweek. If your service writers currently do not meet all three requirements, it should be a relatively simple matter to restructure their pay plans to meet those requirements and we recommend that you do this.

If you are audited by the DOL and the investigator says that you must pay service writers overtime, explain to the investigator that past court decisions unanimously say that you do not have to pay overtime. DOL then has the option of dropping its demand or filing a lawsuit. We expect that it will choose the former, although it may tell your employees that it believes that they are entitled to overtime and encourage them to bring their own lawsuits.

Plaintiffs' attorneys may well be emboldened by this new development to threaten lawsuits in an effort to extort overtime for current or former service writers. Again, do not be intimidated. The Final Rule is not the law. The law has been spelled out by the courts over the years and clearly says that service writers are exempt from overtime.

Please keep in mind that this article deals with only one group of employees â€“ service writers whose job duties met the requirements for exempt status before the DOL changed its mind yet again. Dealerships have many other employees who are exempt from overtime ONLY if the employee's job duties and pay plan are properly structured. This is a complicated area of the law which can significantly impact your dealership.

Because the DOL has already announced that it intends to aggressively enforce the wage-hour law, we strongly urge every dealership to carefully audit its entire payroll on a regular basis to ensure that all employees are being paid properly. If you do not have an attorney who is familiar with these laws, we will be happy to help you.

Finally, please keep in mind that this article deals only with the exemption under the FLSA. Dealerships must comply with both state and federal wage-hour laws. Some state wage-hour laws do not contain an exemption from overtime for service writers and may not contain a "commission-paid" exemption. Again, we urge every dealership to ensure that it is in compliance with both state and federal law. If we can help, please let us know.

For more information visit our Wage and Hour Laws Blog or contact any attorney in our Dealership Practice Group.

This Legal Alert provides an overview on certain aspects of a specific law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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[1] 4th Circuit: MD, VA, WV, NC, SC; 5th Circuit: MS, LA, TX; 6th Circuit: MI, OH, KY, TN; 11th Circuit: AL, FL, GA.

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