9th Circuit Holds Service Advisors Non-Exempt Under FLSA Dealership "Salesman" Exemption; Section 7(i) Exemption Is Still Available

Insights
3.25.15

The 9th Circuit U.S. Court of Appeals (with jurisdiction over the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington) has ruled in *Navarro v. Encino Motorcars, LLC* that Service Advisors employed by automobile dealerships do not qualify for the Section 13(b)(10)(A) overtime exemption under the federal Fair Labor Standards Act. It is the first court to have held this way.

"Service Advisor" Status under the FLSA
Section 13(b)(10)(A) exempts from the FLSA's overtime requirements "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."

Historically, this exemption has been extended to Service Advisors. Beginning in 1973, in the federal appellate decision in *Brennan v. Deel Motors, Inc.,* and continuing to as recently as 2013 in the Montana Supreme Court's decision in *Thompson v. J.C. Billion, Inc.*, courts have uniformly held that Service Advisors are covered by that exemption.

The Department of Labor's Revision to its Administrative Regulations
However, the U.S. Labor Department's track record in this area has been inconsistent. At some times in the past, it has said that Service Advisors could qualify; at other times, it has said that they could not. At one point, USDOL issued an interpretative provision at 29 C.F.R. § 779.372(c)(4) in which it took the position that Service Advisors were not within the exemption. But after several courts nevertheless applied the exemption to them, for many years USDOL said that it would no longer dispute the issue.

In April 2011, USDOL deleted Section 779.372(c)(4). In accompanying commentary, it said that the change was made to reflect its view that the exemption is limited "to salesmen who sell vehicles and partsmen and mechanics who service vehicles," and that Service Advisors did not fall within this description.

The 9th Circuit's Ruling
In *Navarro*, Service Advisors challenged the overtime exemption's application in light of USDOL's

revision and statements. The lower federal court dismissed their claims, finding that they did fall within the Section 13(b)(10)(A) exemption.

On appeal, the 9th Circuit first found Section 13(b)(10)(A) to be ambiguous on the issue. The court said, "It is not clear from the text of the statute whether Congress intended broadly to exempt any salesman who is involved in the servicing of cars or, more narrowly, only those salesmen who are selling the cars themselves."

The 9th Circuit then evaluated whether it felt that USDOL's revised administrative interpretations represented a reasonable reading of the exemption. Despite USDOL's shifting positions, the 9th Circuit found:

> ***Here, the Department of Labor has interpreted the statutory exemption to exclude service advisors by choosing the narrower definition of the term "salesman." * * * [W]e conclude that the agency has made a permissible choice. The interpretation accords with the presumption that the § 213 exemptions should be construed narrowly.***

On this basis, the court concluded that the Service Advisors are not exempt under Section 13(b)(10)(A).

The Court specifically acknowledged that its holding conflicted with decisions of the 4th and 5th Circuits, of several district courts, and of the Supreme Court of Montana.

Practical Impact of the Court's Ruling

Employers in states outside of the 9th Circuit should note that its ruling applies only within its jurisdiction. And while in the 9th Circuit the case undercuts the Section 13(b)(10)(A) overtime exemption where Service Advisors are concerned, even there it does *not* mean that Service Advisors can never be exempt from FLSA overtime.

The FLSA's Section 7(i) provides another overtime exception for certain employees paid under a *bona fide* commission pay plan. It applies to an employee:

- Of a "retail or service establishment" (meaning a location 75% of the annual dollar volume of sales of which (i) is not for resale and (ii) is recognized as retail sales in the particular industry); *and*
- *More than half* of whose compensation for a "representative period" (of not less than one month) represents commissions on goods or services; *and*
- Whose regular hourly rate of pay for each overtime workweek is *more than* 1.5 times the FLSA's minimum wage.

Of course, an employer must determine whether the applicable overtime laws of a state or another jurisdiction include any exception like Section 7(i), or whether any similar provision is different from Section 7(i) in important ways.

Thus, although automobile dealerships in the 9th Circuit cannot rely upon Section 13(b)(10)(A) for Service Advisors (unless *Navarro* is later reversed or overruled), it is possible that those employees can be exempt from FLSA overtime under Section 7(i). Those dealers should evaluate whether Section 7(i) provides a viable alternative.

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This Legal Alert provides an overview of a 9th Circuit Court of Appeals ruling. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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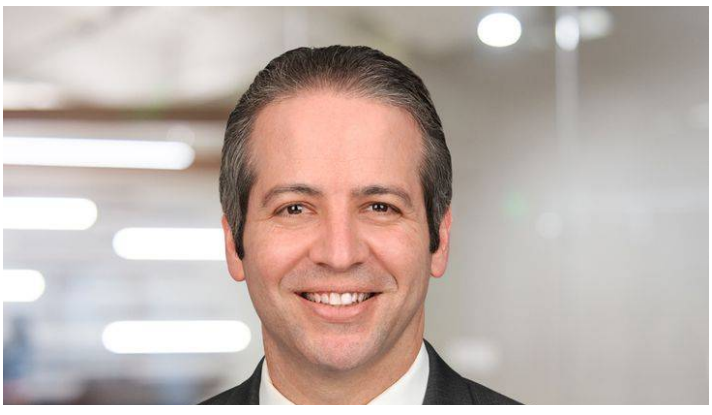

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