



Courts Clarify Methods for Determining Exempt Status & Calculating Overtime

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A recent decision by the Washington Court of Appeals clarifies two tests that are often misunderstood and misapplied by employers. In *Fiore v. Ppg Indus.*, 2012 Wash. App. LEXIS 1556 (Div. I 2012), the Washington Court of Appeals considered the test for applying the administrative exemption test under Washington's Minimum Wage Act ("MWA"). It also reviewed the test for calculating overtime when a non-exempt employee is paid a salary. Although the decision turned out badly for employer PPG Industries (PPG), the Court's decision provides guidance for employers seeking to avoid costly overtime suits.

The plaintiff, Andrew Fiore, held the position of Retail Sales Representative. The position required that he travel to various Lowe's home improvement stores to build displays and stock shelves. He also spent time answering customer questions while at stores. PPG compensated Fiore on a salary basis and classified him as "exempt" from the MWA's overtime requirements pursuant to the "administrative exemption," asserting that his primary duty was "promoting sales." PPG also changed his title to "Territory Manager" without changing his job duties.

After Fiore was terminated, he filed a suit for unpaid overtime, claiming that PPG intentionally misclassified him and other territory managers as exempt. After losing at arbitration, he sought a new trial at which he prevailed on summary judgment. The trial court awarded approximately \$12,000 in unpaid overtime, which it also doubled because it found PPG's failure to pay overtime was willful. The trial court also awarded nearly \$600,000 in attorneys' fees and costs.

The Washington Court of Appeals considered the actual work performed by the plaintiff and found that he primarily engaged in manual work and individual retail sales to Lowe's customers. The court held that his duties were not "directly related to management policies or general business operations," which the MWA administrative exemption requires. In reaching its holding, the Court collected a series of Administrative Policy memos and federal cases to adopt a test for what it means to qualify for the administrative exemption. According to the Court, "the administrative exemption applies only to 'persons who perform work of substantial importance to the management or operation of the business.' For example, an individual meets the administrative exemption where he or she 'participate[s] in the formulation of management policies, or in the operation of the business as a whole' or where his or her work 'affects policy' or involves 'execut[ing] and carry[ing] the policy out.' According to interpretive regulations, 'examples of administrative operations include advising the management, planning, negotiating, representing the company, purchasing, promoting sales, [and conducting] business research.'"

The Court was also critical of the employer's attempts to re-package the plaintiff's duties into administrative work, noting that he did not participate in the development of PPG's advertising or promotional campaigns; did not work with PPG's finance department to prepare budgets and cost estimates; did not have the authority to mark down prices or to vary store promotional materials without the approval of a store manager; could not sign legal documents on behalf of PPG or negotiate and bind PPG on significant matters; and did not have the authority to formulate management policies or operating procedures. In reciting this list, the Court highlighted the types of duties and responsibilities courts will look for when evaluating a claim under the administrative exemption.

The Court was unimpressed with the employer's attempt to use the job title to convey the sense that the position was exempt, writing "[a]lthough a job title is not determinative of whether an employee is an administrative employee, . . . the former title for Territory Managers suggests that such employees were engaged in individual retail sales—not operations deemed 'administrative' for purposes of the MWA exemption. In addition, . . . the fact that PPG changed the title of the position from Retail Sales Representative to Territory Manager tends to prove that PPG sought to evade statutory overtime wage requirements."

After concluding that the administrative exemption did not apply, the Court affirmed the trial court's award of unpaid overtime calculated at "time and a half" for all hours worked over 40 per week during his employment. In so doing, the Court gave us further guidance on the calculation of overtime when paying a non exempt employee a salary, and how to apply the "fluctuating workweek" method.

PPG argued that because Fiore had received a fixed salary, he should only be entitled to "half time" for hours over 40, similar to payment under a "fluctuating workweek" method. An employee paid using the fluctuating workweek method may be paid a fixed weekly salary to cover straight time hours, and then a half-time premium for overtime hours. The Court clarified that to utilize the fluctuating workweek method to reduce overtime liability:

- There must be a mutual understanding between the employer and employee to use the fluctuating workweek method
- Overtime hours must be calculated each week of employment and paid each pay period
- The number of hours for which the fixed salary is paid must be established in advance; otherwise, by default the salary will be considered to be for the first 40 hours only

Because PPG claimed that the plaintiff was exempt from overtime requirements, it could not meet any of the requirements for the fluctuating workweek method.

Practical Guidance. *Fiore* addresses several important points concerning the use of the administrative exemption and the fluctuating workweek method of calculating overtime. In order to be administratively exempt from the MWA, an employee must primarily work in the performance of office or non-manual work directly related to management policies or business operations of his employer or employer's customers. A "primary duty" is generally one the employee is engaged in more than 50 percent of the time, but a court will consider all of the facts of the case in determining whether an employee is exempt. Job titles alone are not sufficient evidence that an employee is exempt. Further, should an employer wish to utilize the "fluctuating workweek" method of calculating overtime, an employer must comply with the prerequisites in advance, and pay overtime each pay period; one cannot invoke the "fluctuating workweek method" after claiming someone is exempt from overtime requirements. Finally, an employer should pick its battles wisely, because liability for attorney fees can quickly eclipse liability for unpaid wages.

If you would like additional assistance concerning the information addressed in this note, please contact Jeff James at (425) 450-3384 or Laura Edwards at (425) 450-3383.

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