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Submitted to the Subcommittee on Workforce Protections of the Committee on Education and Labor for the hearing entitled "Restoring the Value of Work: Evaluating DOL's Efforts to Undermine Strong Overtime Protections"

Wednesday, June 12, 2019

2175 Rayburn Office Building

Let me begin by thanking Chairwoman Adams, Ranking Member Byrne, and other Members of the Subcommittee for the opportunity to testify about the Fair Labor Standards Act, which I believe is one of our Nation's most precious laws.

I am a wage and overtime rights lawyer from Pennsylvania. My three-person law firm is located several miles north of Philadelphia and exclusively represents employees. We work on a pure contingency fee basis because few of our clients can afford to pay a lawyer on an hourly basis.

Our firm handles both "individual" lawsuits that seek relief on behalf of a single employee and "class/collective" lawsuits that seek damages on behalf of groups of employees. Since opening in 2007, our firm has recovered unpaid wages for thousands of employees under the FLSA and similar state laws.

Basic Requirements of the FLSA's "White Collar" Exemptions

Many of my clients are salaried employees who have been classified as overtime-exempt "executives," "administrators," or "professionals" under the FLSA's "white-collar" exemptions. Generally speaking, the white-collar exemptions require the employer to satisfy two basic requirements:

First, the employee must earn a salary (or, in some cases, a "fee") of at least $455 per

week. As discussed later, this $455 floor is so low that it is essentially meaningless.

Second, the employee must demonstrate that the employee's duties are "executive," "administrative," or "professional." This is where all the action is. The outcome of white-collar misclassification lawsuits almost always turns on competing arguments over the employees' duties.

My Clients – "Blue Collar" Workers with "White Collar" Job Titles

I have represented thousands of employees who have been denied overtime pay under the FLSA's white collar exemptions. These employees are classified as exempt "executives," "administrators," and "professionals" by their employers. Under current law, it is relatively easy for corporate lawyers and HR executives to concoct legal justifications for extending the FLSA's white collar exemptions to blue collar workers.

Our firm's current white-collar misclassification lawsuits will provide you with some real-life examples of the types of workers who are denied overtime pay under the current law:

- Dollar store "Manager" who earned approximately $38,000/year and regularly worked over 70 hours per week. She spent almost all of her time running the cash register, stocking shelves, waiting on customers, and doing the same type of work as the store's hourly employees.
- "Managers" at small convenience stores who generally earn annual salaries in the mid-$30,000's and regularly work over 55 hours per week. They spent most of their work hours either alone in the store or with only one other store employee. They spend almost all of their time waiting on customers, running the register, cleaning, and performing other non-managerial jobs.
- "Superintendents" who work for a real estate conglomerate for under $40,000/year,

regularly work over 50 hours per week, and spend almost all of their time performing janitorial and handyman duties in apartment buildings.

- "Assistant Managers" at a restaurant chain who earn around $40,000/year and often work over 60 hours per week. They spend almost all their time running food to customer tables, expediting food orders, working in the kitchen, cleaning, and performing other non-managerial duties.
- "Case Managers" who work for third-party contractors pursuant to a city's foster care program. They earn annual salaries in the low-$40,000's, and often work over 50 hours per week. Before the City privatized its foster care program, employees performing the same job were in a labor union and paid overtime.
- "Assistant Managers" at a large retail chain who are paid salaries in the mid-$40,000's and spend almost all of their time stocking shelves, taking inventory, assisting customers, running the cash register, and performing other non-managerial tasks.

I can assure you that the above clients would gladly trade away their managerial job titles in exchange for overtime pay. Job titles do not put food on the table or pay the mortgage or put the kids through college. And the HR department's designation of a job as "executive" or "administrative" or "professional" cannot alter what my clients know to be true: that their *actual* working hours are spent performing the same routine tasks as their hourly co-workers.

FLSA Misclassification Fuels a Business Model
that Hurts *Both* Salaried and Hourly Employees

Over many years of handling FLSA cases, I have observed how the retail and fast food industries follow a business model that exploits both salaried and hourly workers. In these industries, the corporate office requires each individual store to comply with a very strict payroll

budget. Failure to stay within the payroll budget can result in discipline and even termination for the store's highest-ranking employee (often called the "Store Manager") and for a higher-ranking employee with jurisdiction over multiple stores within a geographic area (often called a "District Manager" or "Territory Manager"). In fact, these individuals' bonuses usually are tied to compliance with the payroll budget.

Meanwhile, each individual store is staffed with a combination of hourly employees (who are eligible for overtime pay) and salaried employees (who are classified by HR as overtime-exempt). The store's salaried employees usually get job titles like "Assistant Manager" or "Department Manager."

Under the above scenario, paying any significant overtime to the store's hourly employees will put the store over its payroll budget. Since that is not an option, there is only one way for the store to both make its payroll budget and remain adequately staffed: the store's salaried employees must work *very* long hours. Since these salaried employees do not get any extra overtime pay, there is no impact on the payroll budget. From a payroll budget standpoint, every extra hour worked by a salaried employee is a "free" hour.

This business model (which our firm has repeatedly encountered) is profoundly unfair to salaried employees. As indicated earlier, many of our salaried clients in the retail industry work very long hours. In fact, our clients' "effective" hourly pay rates sometimes fall *below* the pay rates of their hourly co-workers. That's why many of our salaried clients complain that they were better off before they got "promoted" to a salaried position.

But that's only the half of it. The above business model also hurts the store's *hourly* employees. Many of these employees would relish the opportunity to work more hours and even earn "time and one-half" wages for overtime work. Unfortunately, such opportunities are rare.

Faced with a strict payroll budget, company decision-makers are incentivized to assign any extra work to the salaried employees (who work the extra hours free-of-charge) rather than the hourly employees (who get paid extra for working extra hours).

The above scenario contradicts the FLSA's public policy goals. As you know, the FLSA requires that employees receive extra "time and one-half" pay for working over 40 hours per week. *See* 29 U.S.C. § 207(a)(1). In enacting this requirement, Congress intended "to spread work and thereby reduce unemployment, by requiring an employer to pay a penalty for using fewer workers to do the same amount of work as would be necessary if each worker worked a shorter week." *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1176 (7th Cir. 1987) (Posner, J.).

This public policy favoring "work-spreading" is fundamental to the FLSA's overtime pay mandate. As the Supreme Court explained shortly after the FLSA's passage:

> The provision of § 7(a) requiring this extra pay for overtime is clear and unambiguous. It calls for 150% of the regular, not the minimum wage. By this requirement, ***although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage*** and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours of the act. ***In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work.*** Reduction of hours was part of the plan from the beginning.

Overnight Motor Transport v. Missel, 316 U.S. 572, 577-78 (1941) (emphasis supplied); *see also Bay Ridge Operating Co., Inc. v. Aaron*, 334 U.S. 446, 460 (1948) (overtime pay mandate intended "to spread employment through inducing employers to shorten hours because of the pressure of extra cost"); *Walling v. Youngerman-Reynolds Hardwood Co., Inc.*, 325 U.S. 419, 423-24 (1945) (overtime pay mandate intended "to reduce the hours of work and to employ more men"); *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America*, 325 U.S.

161, (1945) ("the plain design of § 7(a) to spread employment through imposing the overtime pay requirement on the employer"); *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 40 (1944) (overtime pay mandate intended "to spread employment by placing financial pressure on the employer through the overtime pay requirement").

In sum, when employers can too easily shift overtime work onto the backs of salaried employees, the FLSA's remedial purpose of spreading work hours across the workforce is undermined. It should not be so easy for companies to pay workers a low salary, classify them as overtime-exempt, and assign them all the overtime work. This practice greatly benefits the employer, who escapes the FLSA's overtime pay mandate. But it is terrible for *both* the salaried employee (who must work many extra hours without any extra pay) and for the hourly employee (who is deprived of the opportunity to work extra hours).

Increasing the Annual Salary Threshold to $47,476
Will Promote Certainty and Decrease Litigation

The current $455/week salary threshold is so low that it plays no meaningful role in the classification analysis. As a result, the outcome of white collar misclassification investigations and lawsuits turns on competing arguments over the employees' "duties." The employee argues that her duties are not "executive,' "administrative," or "professional." The employer argues the opposite. The analysis is highly subjective and unpredictable. *Compare*, *e.g.*, *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233 (11th Cir. 2008) (Family Dollar store managers entitled to overtime), *with In re. Family Dollar FLSA Litig.*, 637 F.3d 508 (4th Cir. 2011) (Family Dollar store manager properly classified as overtime-exempt).

All this uncertainty is terrific for lawyers. But is terrible for both employers (who lack meaningful "bright-line" rules and must pay corporate law firms for advice and litigation

defense) and employees (who cannot fathom the complicated duties test and must file DOL complaints and lawsuits to obtain overtime).

It does not need to be this way. If the white collar exemptions' salary threshold had been increased to $47,476/year under either the Obama Administration's 2016 Proposed Rule, *see* 81 Fed. Reg. 32391, or the Restoring Overtime Pay Act of 2017, many of the legal battles surrounding the duties test would be rendered irrelevant. Indeed, there would be little to litigate. Employees earning under $47,476/year would either (i) receive overtime pay from the employer or (ii) have a "slam dunk" legal claim that the employer could quickly and efficiently resolve. Meanwhile, employees earning over $47,476/year and classified as overtime-exempt would be far less likely to challenge their overtime-exempt status, since they would be paid a salary that differentiated themselves from their hourly co-workers. Plus, good plaintiffs' lawyers know that it is difficult to win a misclassification lawsuit when the employee earns a salary that most judges and jurors consider to be reflective of "white collar" status.

For the above reasons, I estimate that *over 70%* of my law firm's white collar misclassification lawsuits would never have been filed if the white collar exemptions had carried a $47,476/year salary threshold.

Unlike the 2016 Proposed Rule and the Restoring Overtime Pay Act, the Trump Administration's recently proposed rule will not significantly impact the litigation landscape. The proposed rule merely raises the salary threshold to $679/week (or $35,308/year). See 84 Fed. Reg. 10900 (Mar. 22, 2019). This is less than most of my firm's while-collar misclassification clients *already* earn.

The Trump Administration's proposed $679/week salary threshold simply does not go far enough to differentiate salaried-exempt employees from their hourly co-workers. A salaried

employee who works and average of 60 hours per week (which is not unusual in the retail and restaurant industries) in exchange for $679 is only earning $11.32/hour [$679 *divided by* 60 hours]. Moreover, an overtime-eligible hourly employee working 60 hours would only need to earn $9.70/hour to earn $679 [($9.70 X 40 hours) + ($9.70 X 1.5 X 20 hours)]. Thus, many salaried employees earning $679/week will nonetheless have good grounds to feel cheated and pursue overtime claims under the duties test.

The White-Collar Exemptions Should Require the *Actual* Performance of Executive, Administrative, and Professional Work

As already discussed, litigation involving the FLSA's white-collar exemptions generally boils down to competing arguments regarding the salaried employee's job duties. The employee seeking overtime emphasizes the significant amount of time she actually spends performing the same routine activities as hourly co-workers. The employer, meanwhile, downplays the employee's actual work activities and, instead, focuses on her purported "responsibilities."

Here is an example of what I mean. Suppose Ms. Jones is an "Assistant Department Manager" working at a supermarket and wants to challenge her overtime-exempt classification. Under the FLSA's "executive" exemption, Ms. Jones is entitled to overtime unless her "primary duty" is "management." 29 C.F.R. § 541.100(a)(2). So Ms. Jones presents evidence that she spends 90% of her time performing non-managerial tasks such as stocking shelves, counting inventory, and cleaning.

One might think that, under the above circumstances, Ms. Jones is sure to win overtime. How, after all, can someone's "primary duty" be "management" if she spends 90% of her time performing non-managerial work?

Unfortunately, even under these facts, Ms. Jones can possibly to lose her bid for overtime pay. That's because, under interpretive guidance issued by the Department of Labor in 2004,

"the amount of time spent performing exempt work" is merely one of four factors to be considered in determining whether the exempt work is an employee's "primary duty." *See* 29 C.F.R. § 541.700(a). The 2004 regulations go on to state: "Time alone . . . is not the sole test, and nothing in this section requires that exempt employees spend more than 50% of their time performing exempt work." *See id.* at § 541.700(b).

But that is not all. In addition to diminishing the role of time in the "primary duty" analysis, the DOL's 2004 guidance included a "Concurrent Duties" provision that sows more confusion by stating that purported "executives" can "concurrently" perform both managerial and non-managerial work at the same time. *See* 29 C.F.R. § 541.106. Under this guidance, DOL postulates that "[a]n assistant manager can supervise employees and serve customers at the same time without losing the exemption" and that "[a]n exempt employee can also simultaneously direct the work of other employees and stock shelves." *See id.* at § 541.106(b).

The above provisions cannot be squared with the FLSA's overtime pay mandate, which, as explained earlier, was enacted to ensure that employers spread work opportunities to *all* employees. As such, the amount of time a purportedly overtime-exempt spends on non-exempt activities should be paramount.

If Congress wants to level the playing field for salaried and hourly employees alike, it should draft legislation strictly limiting the FLSA's white collar exemptions to employees who ***actually*** spend ***the majority*** of their time on activities that are ***exclusively*** "executive," "administrative," or "professional." *See*, *e.g.*, California Industrial Welfare Commission Wage Order No. 4-2001 (focusing white collar exemption analysis on "[t]he work actually performed by the employee").

In sum, while increasing the salary threshold to $47,476/year is crucial, an additional

legislative change reorienting the "duties" test towards the salaried employee's *actual* work performed will ensure that the salaried employee – regardless of her salary level – does not displace hourly employees' work opportunities.