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Take a **Fresh Look** at the FLSA

New activity addresses overtime, interns and independent contractors.

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This past summer yielded a slew of activity on the wage and hour front, including newly proposed regulations issued by the U.S. Department of Labor (DOL) that will, if finalized, severely restrict the scope of the overtime exemptions for so-called white-collar workers under the Fair Labor Standards Act (FLSA). There was also a Second Circuit ruling addressing the exempt status of lawyers hired on a temporary basis to perform document reviews; another significant Second Circuit opinion interpreting the FLSA, this time in regard to the status of unpaid interns; and a new and clear warning from the head of the DOL's Wage and Hour division that independent contractor classifications will be closely scrutinized by a watchful and skeptical eye. Management-side attorneys take note.

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The DOL's Proposed Update to the FLSA's Overtime Regulations. On June 30, 2015, the DOL issued a set of proposed regulations designed to dramatically alter, and narrow, the most commonly invoked exemptions to the FLSA's minimum wage and overtime requirements for "white-collar" employees. It is estimated that, if implemented in the proposed form, some five million heretofore exempt workers would suddenly become eligible for overtime pay.

The 10-year-old regulations currently in place limit the white-collar exemptions to employees whose "primary duty" consists of exempt executive, administrative or professional work and are paid a salary of at least $455 a week, or $23,660 a year. Generally speaking, an employee satisfies the "primary duty" test for executive status if he or she primarily performs management duties and directs the work of at least two other employees; an exempt administrative employee must primarily perform office or non-manual work directly related to general business operations and exercise independent judgment; and a putative professional will qualify for an exemption if he or she primarily engages in work requiring advanced knowledge "in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction" and consistently exercises discretion. For now, at least, the DOL has not proposed any changes to the primary duty test.

Rather, the DOL has fixed the salary standards in its sights. The proposed regulations seek to more than double the minimum salary requirement for exempt status to $921 per week, or $47,892 annually, representing the 40th percentile of earnings for salaried workers. In an effort to prevent the regulations from becoming outdated, the proposal provides for periodic automatic increases that would keep the minimum salary levels at the 40th percentile of weekly earnings for full-time salaried workers.

Over the course of a 60-day comment period, the DOL received over 250,000 submissions. As expected, criticism came primarily from a business community concerned about the potentially crushing cost of doubling

the salary required for workers to be exempt from overtime. A number of commentators lamented the absence of any consideration for market variances: The salary threshold for exempt status is the same in Dubuque and Mobile as it is in New York and San Francisco. Support for the rule changes predictably came from unions, employee advocates and nonprofits, many of whom took the position that the new regulations would protect low income workers from exploitation and represent a much needed modernization of the white-collar exemptions.

Now that the comment period is over, the regulations are expected be finalized within the next several months. Employers may have as little as 120 days following publication to comply with the new regulations. Practitioners are therefore well-advised to encourage their clients to start preparing by identifying employees currently earning less than $50,440 a year (the estimated adjusted threshold if the regulations go into effect in 2016) who are classified as exempt and determining what impact the new salary limits will have on the company's organizational structure and bottom line. Although, contrary to expectations, the DOL did not make any changes to the primary duties test, practitioners should be alert to the possibility of further reshaping of the white-collar exemptions in the near future.

Second Circuit Rules That Attorney Tasked With Document Review Is Not Necessarily Exempt Under the FLSA. The white-collar exemptions recently took center stage in a case before the U.S. Court of Appeals for the Second Circuit that was closely watched by the legal community. At issue in *Lola v. Skadden, Arps, Slate, Meagher & Flom*, __ F. App'x __, 2015 WL 4476828 (2d Cir. July 23, 2015), was whether temporary lawyers retained by Tower Legal Staffing to perform document reviews for Skadden in connection with a multi-district litigation qualified for the FLSA's professional exemption, which applies to licensed attorneys engaged in the practice of law. The lead plaintiff, David Lola, albeit licensed, claimed to not actually be practicing law, and hence entitled to overtime pay, because he operated under the close supervision of Skadden attorneys in performing rudimentary tasks, in particular "(a) looking at documents to see what search terms, if any, appeared in the documents, (b) marking those documents into the categories predetermined by Defendants, and (c) at times drawing black boxes to redact portions of certain documents based on specific protocols that Defendants provided."

Skadden and Tower successfully sought dismissal of the complaint, with the district court holding that Lola, who rendered the services in North Carolina, where he resided, was not engaged in the practice of law as defined by North Carolina precedent. The Second Circuit had a different read of North Carolina precedent and reversed. As the Second Circuit saw it, the ethics opinion issued by the North Carolina State Bar relied upon by the district court strongly suggested that inherent in the concept of practicing law is "at least a modicum of independent judgment." Because Lola's complaint alleged that he exercised *no* such judgment whatsoever in performing his assigned tasks, "a fair reading of the complaint … is that [Lola] provided services that a machine could have provided," and therefore was not engaged in the practice of law, as required in order to qualify for the professional exemption.

The suit was sent back to the district court level, where the parties have turned their attention to discovery aimed at divining whether Lola actually exercised any legal judgment. In the meantime, this case serves as yet another reminder that the white-collar exemptions should never be viewed in cookie cutter fashion. Rather, the actual work performed by each employee classified as exempt must be examined closely to make sure the classification would pass close scrutiny by either a court or DOL auditors.

Second Circuit Adopts "Primary Beneficiary" Test for Determining Status of Interns Under the FLSA. The Second Circuit tackled another vexing and hotly contested FLSA-related question this summer, namely, in what circumstances will an intern working in the for-profit private sector qualify

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as an employee so as to garner protection under the FLSA's minimum wage and overtime pay provisions.

In *Glatt v. Fox Searchlight Pictures*, 791 F.3d 376 (2d Cir. 2015), two former unpaid production interns who worked on the movie *Black Swan* filed suit under the FLSA and New York Labor Law alleging minimum wage violations. According to the plaintiffs, they performed basic functions normally undertaken by paid employees, such as making copies and answering phones. For purposes of determining whether the plaintiffs qualified as "employees," the district court looked to the test promulgated by the DOL in a Fact Sheet published in 2010.

Noting that unpaid internships must include some type of training designed to develop skills that are fungible in the industry "beyond on-the-job training that employees receive," the district court determined that because the benefits enjoyed by the plaintiffs, like résumé building and job references "were incidental to working in the office like any other employee and were not the result of internships intentionally structured to benefit them," the internship failed to meet the DOL's test. The district court also granted class certification to a group of unpaid interns who worked across multiple divisions of the Fox Entertainment Group.

The Second Circuit disagreed with the district court on both fronts. As to the merits, the Court of Appeals concluded that the DOL's test was "too rigid" and instead crafted a more flexible "primary beneficiary" test that focuses on "whether the intern or the employer is the primary beneficiary of the relationship" and includes the following "non-exhaustive set of considerations":

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation;

2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training;

3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or receipt of academic credit;

4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar;

5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning;

6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern;

7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

The Second Circuit remanded the case to the district court with instructions to evaluate the particulars of the plaintiffs' internships under the newly conceived "primary beneficiary" test. The court also threw out the district court's class certification ruling, concluding that because the primary beneficiary test requires a "highly individualized inquiry," class certification—which must be accomplished with "generalized proof"—is inappropriate.

The new test is already gaining traction: In *Schumann v. Collier Anesthesia, P.A.*, __ F.3d __, 2015 WL 5297260 (11th Cir. Sept. 11, 2015), the U.S. Court of Appeals for the Eleventh Circuit followed the Second Circuit's lead and rejected the DOL's approach in favor of the primary beneficiary test. Regardless of the governing test, employers are well-advised to memorialize the parameters of internships in writing, including specifics regarding compensation, if any, each intern's duties, and the opportunities for hands on training.

More News from the DOL: Limitations on the Scope of Independent Contractor Status. The DOL continued its busy summer with the July release of Administrative Interpretation No. 2015-1 (AI), authored by David Weil, head of the DOL's Wage and Hour Division. The AI represents yet another element of the DOL's ongoing efforts to expand the FLSA's coverage, and the ranks of those entitled to overtime pay and other statutory protections, by broadly construing the term "employee" and thereby limiting the capacity to engage independent contractors. The DOL has long taken a skeptical view of consultancies and has recently partnered with the Internal Revenue Service and state governments to track down and penalize perceived abusers of the independent contractor label. As Weil explained in the AI, when employees are not properly classified as such,

they "may not receive important workplace protections such as the minimum wage, overtime compensation, unemployment insurance, and workers' compensation. Misclassification also results in lower tax revenues for government and an uneven playing field for employers who properly classify their workers."

The FLSA defines "employ" as "to suffer or permit to work." Using this vague definition as a starting point, the AI takes the position that the FLSA contemplates "as broad a scope of statutory coverage as possible" such that a "broader or more comprehensive coverage of employees … would be difficult to frame." Accordingly, the AI explains, workers should only be classified as independent contractors, and therefore non-employees, on the rare occasion when the worker "is really in business for him or herself" rather than "economically dependent on the employer (and thus its employee)."

Courts have historically used an "economic realities" test, comprised of the factors listed below, to determine whether a worker has been properly given independent contractor status:

1. The extent to which the work performed is an integral part of the employer's business;

2. The worker's opportunity for profit or loss depending on his or her managerial skill;

3. The extent of the relative investments of the employer and the worker;

4. Whether the work performed requires special skills and initiative;

5. The permanency of the relationship; and

6. The degree of control exercised or retained by the employer.

The AI does not alter the elements of this well-established inquiry; rather, it details the DOL's view on each element with an obvious tilt in favor of employee status and a dismissive attitude toward several factors that have historically tended to support an independent contractor designation. For example, the AI explains that "investing in tools and equipment is not necessarily a business investment or a capital expenditure that indicates that the worker is an independent contractor," rather, the worker's investment must be compared to that of the employer. Thus, when a "substantial" investment by the worker is "relatively minor" as compared with expenditures by the employer, the factor will weigh against independent contractor status.

Significantly, the AI downplays the control factor, which courts have relied upon heavily in the past as a key element of the economic realities test. According to the AI, this factor only indicates independent contractor status if the worker controls "meaningful aspects of the work performed such that it is possible to view the worker as a person conducting his or her own business." The AI also emphasizes that all six factors must be considered in each case "with an understanding that the factors are indicators of the broader concept of economic dependence" and the ultimate objective being to determine whether the worker "is really in business for him or herself (and thus its independent contractor)."

Because the AI is by definition an interpretation rather than a proposed regulation subject to the pre-implementation notice and comment process required whenever the DOL issues new legislative-type rules, it will likely be afforded less weight by the courts than the DOL's proposed changes to the white-collar exemptions. That being said, courts often rely on the interpretations of government agencies, particularly when that agency has taken a consistent position in an otherwise unclear area of the law. It would therefore be foolhardy to discount the AI and ignore the DOL's broader message that aggressive efforts to root out and fine employers who improperly classify workers as independent contractors remain a staple of the agency's enforcement protocol. Indeed, the Wage and Hour Division has requested over $30 million to hire hundreds of new employees to facilitate the agency's goal of "planned enforcement—as opposed to reactive." The writing on the wall is clear and management-side attorneys should counsel clients to closely examine each independent contractor, consultant, or freelancer relationship to ensure the non-employee designation is supported by application of the economic realities test, as interpreted by the DOL, with an eye toward minimizing potential exposure to DOL audits, fines, claims for back wages, and misclassification lawsuits.