

## Texas – Law Firms

# Working 9-to-5 In Texas: Selected Court Decisions On FLSA Compliance

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The flextime assignments and always-on communication expected by today's employers, in Texas and throughout the nation, frequently violate a federal labor law that was passed 70 years ago, before these concepts were part of the workplace. The law is the Fair Labor Standards Act (FLSA) of 1938, which requires employers to pay a minimum wage (which Texas state law ties to the national standard) and overtime compensation of 1.5 times an individual's regular rate to employees who are not independent contractors and who work more than 40 hours per week. Exempted from this rule are "white-collar" salaried employees working in executive, administrative, professional, outside sales or computer technology capacities. Various tests define these exemptions, but employers still often are sued by – and must pay big judgments to – salaried employees who demonstrate that company policies have created a situation where the white-collar exemptions no longer apply to them.

The federal courts of Texas and the U.S. Fifth Circuit Court of Appeals generally are thought to be supportive of employers' interests. However, various recent decisions in these forums show that FLSA litigation can also favor employee positions. This article makes no attempt at completeness in considering either the FLSA or Texas litigation related to it. It does indicate that counsel for employers should not assume that Texas rulings consistently will uphold a pro-employer view of the law.

### Primary Duty

The FLSA requires that an employee who is exempt from overtime must meet both of two tests:

*The salary test* requires payment of a full and predetermined salary at least weekly to employees who perform work in any week, without regard to the number of days or hours worked. The latest revision by the U.S. Department of Labor ("DOL") puts the minimum salary for an exempt employee at \$455/week (\$23,660/year).

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*The duties test* seeks to identify whether an employee's "primary duty" is sufficiently independent from supervision to justify a white-collar exemption. In 2004 the U.S. DOL issued its first major overhaul of the duties test in more than half a century. The new regulations define "primary duty" as "the principal, main, major or most important duty that the employee performs." A variety of criteria define "primary duty," including the relative importance of the exempt work; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for nonexempt work.

Generally, "primary duty" will typically involve over 50% of the employee's work time. *Lott v. Howard Wilson Chrysler-Plymouth, Inc.*, 203 F.3d 326, 331 (5th Cir. 2000). However, time is not the sole test. *Smith v. City of Jackson*, 954 F.2d 296, 299 (5th Cir. 1992). An employee's "primary duty" cannot be ascertained by applying a simple "clock" standard that compares the amount of time each day an employee spends on exempt and nonexempt work. *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1227 (5th Cir. 1990). An employee's primary duty will usually be what he or she does that is of principal value to the employer, not collateral tasks also performed, even if they consume more than half of the employee's time. *Dalheim*, 918 F.2d at 1227.

In one significant case, *Mims v. Starbucks Corp.*, No. H-05-0791, 2007 WL 10369, at \*8 (S.D.Tex. January 2, 2007), the court granted summary judgment for Starbucks where it found that the plaintiff store managers' primary duties were management and, as such, they were properly classified as exempt. The court held that although the plaintiffs claimed they spent less than 50% of their time on management, their duties were primarily management based on four factors enumerated in the FLSA regulations: relative importance of the managerial duties (responsibility for hiring and supervising employees, for company policies, and for store operations); frequent exercise of discretion; relative freedom from supervision; and compensation (including bonuses and benefits) when compared to paid shift operators.

### Exempt Categories

The DOL standards define five categories of exempt duties:

**Executive:** The primary duty is management of an enterprise, department or subdivision. Exempt employees must direct the work of two or more people and their personnel recommendations must be given "particular weight."

**Administrative:** Primary duties are office or non-manual work directly related to management or general business operations. Persons in this category can have titles like project team leader, purchasing agent or computer network administrator.

**Professionals:** The exemption requires advanced knowledge in a field of science or learning customarily acquired through such specialized training as a college degree. Professionals can be doctors, lawyers, scientists, accountants, teachers, even graphic artists.

**Outside sales:** The exemption requires devoting primary and regular time to sales activity outside the employer's physical location.

**Computer professional:** The exemption requires emphasis on creating, developing and testing computer software and systems. It doesn't apply to computer operation or repair.

Several Fifth Circuit decisions show the variations in defining these categories. *Cheatham v. Allstate Ins. Co.*, 465 F.3d 578 (5th Cir. 2006) held that insurance adjusters were employed in an "administrative" capacity, and thus were exempt, because they exercised discretion in determining coverage, conducting investigations, determining liability and assigning percentages of fault to parties, evaluating bodily injuries, and carrying out other responsibilities. However, in *Belt v. EmCare Inc.*, 444 F.3d 403 (5th Cir. 2006), the Fifth Circuit held that physician assistants and nurse practitioners are not practicing medicine and, therefore, must fully satisfy all aspects of the professional exemption, including the salary basis test, in order to be exempt from overtime pay. The court determined that because physician assistants and nurse practitioners are not specifically listed as exempt professionals, those employees must be paid on a salary basis in order to be exempt from the overtime requirements of the FLSA.

### Payroll Practices

Employers are increasingly being sued by non-exempt employees who claim, under the FLSA, they are being forced to work "off the clock," without pay, by performing work tasks, undergoing training, or responding to supervisors during lunch breaks or before or after regular working hours. Such allegations can be a major problem for employers to counter if they do not have scrupulously accurate time records on employee activities. However, several older Fifth Circuit cases illustrate that the availability of personal choice can be a determining factor. A single repair technician on call via beeper 24 hours a day, 365 days a year did not have to be compensated because he could use the time effectively for his own purposes. *Bright v. Houston Northwest Medical Ctr. Survivor, Inc.*, 934 F.2d 671 (5th Cir. 1991). And an ambulance dispatcher required to remain at home from 5:00 p.m. to 8:00 a.m. to respond to calls did not have to be compensated for these hours because she was free to use the time as she pleased. *Halferty v. Pulse Drug Co.*, 864 F.2d 1185 (5th Cir. 1989).

A specific Texas payroll practice caution relates to the FLSA. The FLSA requires employers to pay non-exempt employees a minimum wage (presently \$5.85 an hour but rising to \$7.25 by 2009 under both federal and Texas law). In Texas, exempt employees must be paid at least once a month, non-exempt employees must be paid at least twice a month, discharged employees must receive their final pay no later than the sixth day after the discharge, and employees who leave employment for any other reason must be paid no

later than the next regularly scheduled payday. Employers are subject to penalty for noncompliance.

### Class Notification

The FLSA provides that "[n]o employee shall be a party plaintiff to [an action brought under the FLSA] unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." A representative action brought pursuant to this provision follows an "opt-in" rather than an "opt-out" procedure. *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1212 (5th Cir. 1995). Notice under the FLSA is important to the plaintiffs and is generally effected at an early stage of the proceedings so that sufficient information is available to determine if there are others "similarly situated." *Allen v. McWane, Inc.*, 2006 WL 3246531, at \*2 (E.D.Tex. Nov. 7, 2006).

In one recent Texas federal case, *Johnson v. TGF Precision Haircutters, Inc.*, No. Civ.A. H-03-3641, 2005 WL 1994286, at \*8 (S.D. Tex. 2005), the Court held that plaintiff hair stylists and receptionists were not "similarly situated" within the meaning of the FLSA such as to make a collective action feasible, and granted defendants' motion to decertify. The court based its decision on "(1) the disparate factual and employment settings of the opt-in Plaintiffs, and the absence of a uniform, systematically applied policy violating the FLSA; (2) the highly individualized nature of defendants' exemption defenses; and (3) fairness and procedural considerations."

### Damages

When calculating damages owed to plaintiffs who did not receive overtime wages to which they were entitled, an employer can permissibly calculate overtime amounts owed by taking the total amount earned by the employee in a given week and dividing that by the amount of hours worked by that employee. That amount constitutes the "regular rate" the employee earned, and the employer need only pay one-half this rate for each hour the employee worked in excess of forty (40) hours. In *Dufrene v. Browning-Ferris, Inc.*, 207 F.3d 264 (5th Cir. 2000), the employer paid its employees on a flat, day rate basis, regardless of the number of hours worked per day. Pursuant to the FLSA, the employer calculated the regular rate (for the purposes of overtime) by totaling all weekly compensation paid at the day rate and dividing by the total hours actually worked. This amount was the "regular rate" and was used by the employer to determine overtime compensation. The court affirmed summary judgment for the employer, despite the employees' argument that the greater number of hours they worked, the lower the amount of overtime compensation they would receive.

Neither the FLSA nor the regulations of the U.S. DOL provide a concise definition of many key wage-and-hour concepts. Federal court decisions at the trial and appellate levels are a primary source of clarification for employers, but the examples given here show that these decisions are not always consistent. The best advice for any employer is never to assume that current workplace practices are in compliance – instead, ask qualified counsel for a proactive assessment and guidance on remedial action.

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