



Sixth Circuit Court of Appeals Clarifies FLSA Regulation

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Courts often deal with the issue of whether a particular employee is exempt under the Fair Labor Standards Act (“FLSA”). The results are significant. Exempt employees are not entitled to overtime wages or the minimum wage. As well, an employer does not have the same record keeping obligations for exempt employees.

The Sixth Circuit Court of Appeals recently considered whether an employee is no longer exempt when the company stops paying his or her annually base salary. In *Orton v. Johnny’s Lunch Franchise*, the plaintiff filed suit when his employer began to experience cash flow problems and stopped paying his annual salary. The district court dismissed the claim, holding that the employer’s failure to pay the plaintiff did not convert his position from salary based to hourly, stressing that “administrative employees are exempt from coverage within the meaning of the FLSA based on the salary that they were owed under their employment agreements and not based on the compensation that they actually received.”

Under Section 213(a)(1) of the FLSA, an employee is exempt if they are employed in a “bona fide executive, administrative, or professional capacity,” as defined by the Secretary of Labor. For each of these three functions, the Secretary of Labor has promulgated rules regarding when an employee is exempt. For each rule, the defendant must satisfy three “tests” to qualify: (1) a duties test; (2) a salary-level test; and (3) a salary-based test. This *Orton* appeal focused entirely on the salary-based test.

The Sixth Circuit reversed and remanded the matter, finding the lower court had applied an outdated rule of law. The appellate court clarified that the 2004 amendment to the regulations governing the salary-based test changed the test to “focus on pay received,” rather than the terms of the employment agreement. Accordingly, the question was not what the employee was owed under the employment agreement; rather, it was what compensation the employee had actually received. Likewise, the Sixth Circuit noted that an improper deduction alone will not necessarily render an employee non-exempt. Rather, “[a]n employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer did not intend to pay employees on a salary basis.” 29 C.F.R. § 541.603(a) (2004).