

VIRGINIA EMPLOYMENT LAW LETTER

Wage and hour law

Manager's claim for overtime headed to trial

by Stephen J. Stine

With many workforces being cut to the bone, we're all working longer and harder these days. The traditional nine-to-five 40-hour workweek is a rarity in today's fast-paced 24/7 world. So with employees working longer and longer hours, what happens when it comes to paying overtime and complying with the federal Fair Labor Standards Act (FLSA)? It may be easy to determine if your employees are entitled to overtime pay. But what about your managers?

The FLSA contains an exemption from overtime for employees who qualify as "executives or managers," but be careful. Merely giving an employee the title "manager" doesn't make her a manager under the FLSA. That's the problem Dollar General Stores is facing in defending a lawsuit in Abingdon. Whether the company owes a former manager overtime is a question that will be decided by a jury. How Dollar General found itself facing a jury trial provides a good lesson on the basic requirements of the FLSA and who is and who isn't exempt from overtime pay.

Hale's employment at Dollar General

Teresa Hale worked at Dollar General as a store manager and was paid a salary. She worked far more than 40 hours a week, averaging between 60 and 70 hours. After she was terminated, she filed suit against Dollar General, contending she had been denied overtime pay in violation of the FLSA.

Under the FLSA, employers are required to pay time and a half to employees who work more than 40 hours a week, unless an employee falls under an exemption. Exemptions apply to employees who qualify as "executives or managers." To qualify for an exemption, an employee must meet all three of the following conditions:

- (1) The employee is compensated on a salary basis at a rate of no less than \$250 per week.
- (2) Her primary duty is management of the enterprise.
- (3) Her work includes customary and regular direction of the work of two or more employees.

Hale didn't dispute the first and third elements of the exemption test, but she claimed that she didn't meet the second element because her primary duty wasn't managing the Dollar General stores where she worked. FLSA regulations list five factors to determine whether an employee's primary duty is management:

- (1) the amount of time she spends performing managerial duties;
- (2) the relative importance of her managerial duties compared to other duties;

- (3) the frequency with which she exercises discretion;
- (4) her relative freedom from supervision; and
- (5) the relationship between her salary and the wages paid to other employees for the nonexempt work she performs.

Court's decision

Dollar General sought to have the federal court dismiss Hale's suit, arguing that her managerial duties clearly satisfied the five required factors. The district court refused to dismiss the case. In its opinion, the court analyzed each factor separately and explained why the analysis of Hale's duties wasn't as clear-cut as Dollar General maintained.

Addressing the first factor, time spent performing managerial duties, the court explained that if an employee spends more than 50 percent of her time supervising others or performing management tasks, her primary duty is management. Hale testified that only 10 percent of her time was devoted to purely managerial tasks. The rest of her time was spent doing menial tasks, such as stocking shelves or operating the cash register.

As to the second factor, importance of managerial duties, Dollar General asserted that it valued Hale primarily for her management ability. She had to take a test to become a manager, and she was transferred twice to "rescue" troubled stores. Nonetheless, the court concluded that a reasonable jury could find that the company mainly valued Hale for her ability to quickly stock shelves, man a cash register, and report any problems promptly to her district manager — all nonexempt nonmanagerial tasks.

Turning to the third factor, frequency of discretion, the court acknowledged that Hale was permitted to engage in hiring, training, and disciplining employees, as well as setting work schedules, but — and this was a big but — Dollar General had rules in place that limited her ability to truly exercise discretion. She had no control over the amount of labor hours allotted to her store, and she didn't have the authority to discipline or terminate employees without the district manager's approval.

For the fourth factor, freedom to supervise, the court found that the district manager left frequent voice mails for Hale with specific instructions regarding the operation of the store, leaving her little freedom to manage herself. Finally, addressing the fifth factor, amount of salary, the court found that when converted to an hourly rate, Hale's salary was essentially the same as a clerk's.

Based on the assessment of the five-factor test establishing management as a primary duty, the court ruled that a reasonable jury could determine that Hale's primary duty was not management, and the case should therefore go to trial. *Hale v. Dolgencorp*, 2010 U.S. Dist. LEXIS 62584 (W.D. Va., June 11, 2010).

Bottom line

FLSA litigation for overtime pay is heating up across the country, particularly for salaried employees who are called “managers” but don’t necessarily fall under the Act’s definition of that term. Indeed, Dollar General has been sued by 17 employees under the FLSA in Abingdon alone.

Your company needs to closely evaluate supervisory employees to determine whether they truly perform management functions as their primary duty. If they have little discretion in making management decisions, if they are performing primarily clerical, manual, or menial tasks, or if their hourly take-home pay is ultimately comparable to an hourly employee’s, you may need to reclassify them as nonexempt employees subject to overtime. ❀

Reprinted with permission from Virginia Employment Law Letter
<http://www.hrhero.com/vaemp.shtml>
Copyright 2010 M. Lee Smith Publishers