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U.S. Supreme Court Tips the Scale on FLSA Exemptions

On April 2, 2018, the U.S. Supreme Court ruled in *Encino Motor Cars v. Navarro* that service advisors at car dealerships are Exempt from the federal Fair Labor Standards Act (FLSA) overtime requirements. The FLSA, at 29 U.S.C. § 213(b)(10)(A) says any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements is exempt from overtime pay. According to the court, the service advisors in *Encino* are "salesmen who are primarily engaged in servicing automobiles," and are, therefore, exempt from the FLSA's overtime-pay requirement.

The service advisors had argued that they did not sell cars or perform repairs as a part of their job or job description and, therefore, they were not exempt from overtime compensation. They also argued that the FLSA requires any Exemptions to be narrowly applied and strictly construed.

The majority of the Court found that, because service advisors sell services, they "are integral to the servicing process." The Court acknowledged that these positions do not spent a majority of their time repairing automobiles, but pointed out that this is also true of partsmen, who are exempt from overtime pay. Therefore, the Court found that the phrase *primarily engaged in servicing automobiles* includes some individuals who do not physically repair automobiles themselves but who are integrally involved in the servicing process.

The Court also rejected Navarrro's argument that the FLSA language strictly limits the application of the overtime exemptions.

Professional Pointer: This case is notable as it rejects a longstanding principal that FLSA exemptions should be narrowly applied and strictly construed. This seems to free employers up to designate more positions as exempt from the overtime provisions of the FLSA.

9th Circuit Weighs In on Equal Pay and Prior Salaries

The Equal Pay Act (EPA) prohibits sex-based wage discrimination in jobs that require substantially equal skill, effort, and responsibility under similar working conditions.

On April 9, 2018, in *Rizo v. Yovino*, the Ninth Circuit Court of Appeals held that, under the EPA, an employer cannot justify a wage differential between male and female employees based on prior salary. According to the court's opinion, "[w]e now hold that prior salary alone or in combination with other factors [aka 'any factor other than sex'] cannot justify a wage differential. To hold otherwise … [would] capitalize on the persistence of the wage gap and perpetuate that gap… would be contrary to the text and history of the EPA, and would vitiate the very purpose for which the act stands."

Professional Pointer: The Ninth Circuit covers employers in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. The Second, Sixth, Tenth, and Eleventh Circuits have also

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held that the "any-factor-other-than-sex" defense is limited in its application. Since the U. S. Supreme Court generally won't even consider hearing a case until there are conflicting decisions among the Circuits, it is wise to heed the 9th Circuit's guidance on this issue when establishing pay.

EEOC Releases New Guidance for Preventing Harassment

In April 2018, the U.S. Equal Employment Opportunity Commission (EEOC) released a new guidance, *Promising Practices for Preventing Harassment*, which identified five core principles that have generally proven effective in preventing and addressing harassment. These 5 principles are:

- Committed and engaged leadership.
- Consistent and demonstrated accountability.
- Strong and comprehensive harassment policies.
- Trusted and accessible complaint procedures.
- Regular, interactive training tailored to the audience and the organization.

Professional Pointer: The practices identified in the guidance are not legal requirements. However, according to the EEOC, they may enhance employers' compliance efforts. (It's also possible that the degree to which an employer took these steps may be considered when evaluating an employer's defense to a harassment charge.)

DOL Releases New Fact Sheet and Opinion Letters

In March 2018, the U.S. Department of Labor (DOL) released *Fact Sheet 17(s): Higher Education Institutions and Overtime Pay Under the FLSA*, addressing white collar exemptions and their applicability to jobs that are common in higher education institutions.

In April 2018, the DOL released three new opinion letters on the following topics:

- Compensability of frequent rest breaks required by a serious health condition and the federal Fair Labor Standards Act (FLSA). Rest breaks to accommodate an employee's serious health condition that predominantly benefit the employee are not compensable.
- Compensability of travel time and the FLSA.
- Lump-sum payments and earnings under the garnishment provisions of the federal Consumer Credit Protection Act (CCPA).

Read the Fact Sheet, the FLSA opinion letters, and the CCPA opinion letter.

Professional Pointer: If you haven't made yourself familiar with the DOL's opinion letters, take some time to look at them. They address FLSA and FMLA issues and are truly a wealth of information! And, *FLSA Opinion Letters issued by the Administrator* may be relied on pursuant to the Portal to Portal Act as a good faith defense to wage claims arising under the FLSA.

DOL Guidance on Paying Interns

One of the biggest challenges employers face is determining what interns should be paid – or not paid.

On January 5, 2018, the Department of Labor issued new guidance that gives for-profit employers more flexibility in deciding whether to pay interns. Seven criteria will be used to determine whether an internship may be unpaid. Unlike earlier guidance, not all the criteria need to be met: the determination should be made based on the unique circumstances of each case.

Professional Pointer: Review the Guidance. If there is any doubt, the best approach is to pay the student.