

Zinsergram a/k/a Legal Update

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GETTING READY FOR THE NEW FLSA OVERTIME RULE: NEWSPAPER Q&AS

As readers will know from my previous column, the U.S. Department of Labor recently finalized its Proposed Rule to increase the salary threshold necessary for employees to be classified as exempt from overtime. The Final Rule, which goes into effect on December 1, 2016, has prompted many questions from newspapers. Here are a few I have recently received regarding potential exemptions from the new Rule:

Question – Our District Managers regularly deliver down routes, including home delivery. Could our newspaper use the Section 13(d) exemption from minimum wage and overtime requirements to avoid the higher salary requirements of the U.S. Department of Labor’s new Rule?

Answer – Two reported newspaper cases – one from 2008 and one from 2012 – make a compelling argument that the delivery of down routes by Circulation Department District Managers may be enough to make the Section 13(d) exemption applicable.

The net result is that the increased salary requirements of the new DOL Rule would not apply. Assuming analogous facts, these cases could be relied upon. They have not been overruled or reversed. There has not been a lot of litigation under Section 13(d).

In both cases, the job description of the District Manager-type position included responsibility for delivering non-contracted routes in the absence of a contracted independent contractor. The two courts focused on the precise language of the Section 13(d) exemption:

The provisions of Sections 6, 7, and 12 (minimum wage, overtime, and child labor) shall not apply with respect to any employee *engaged in* the delivery of newspapers...

The 13(d) exemption is different than the exemption for bona fide Executive, Administrative, Professional, and Outside Sales positions. That provision in the statute provides that the Secretary of Labor may “define and delimit” those terms by regulations pursuant to the Administrative Procedure Act. No such proviso is present in the statutory language of the 13(d) exemption.

Thus, the Secretary of Labor has promulgated regulations imposing a “primary duty” requirement for the Executive, Administrative, Professional, and Outside Sales positions. A part of those regulations has included a salary requirement. Those regulations specifically provide that the salary requirement does **not** apply to the Outside Sales exemption. Therefore, with respect to the Section 13(d) exemption, the statutory language is distinct and different. It contains neither a “primary duty,” nor a salary requirement.

The cases make the following points:

- “Engaged in” is a much lesser requirement than “primary duty.”
- A minimal amount of participation is required to constitute “engaging in” an activity.
- If the activity is “regular and reoccurring” even though “small in amount,” it qualifies.
- So long as the employee is consistent in performing the exempt duty, he is exempt from the provisions of the Fair Labor Standards Act.
- The District Manager must deliver newspapers (including shopping news) to a subscriber’s address.

In these cases, the plaintiff District Managers delivered down home delivery routes as infrequently as twice a week. This regularity, as well as **job descriptions** and **mileage logs** kept by the District Managers, appeared to be key to the decision.

Based upon these facts and the analysis of these two cases, many newspaper Circulation Department District Managers could qualify for the Section 13(d) exemption. At this time, I have not located any stated position of the U.S. Department of Labor with respect to these cases.

This article addresses only the federal law. Individual states may have Wage and Hour laws that must be checked as well.

Question – Are journalists and photographers exempt from overtime under the Fair Labor Standards Act as creative professionals?

Answer – It will really depend on the facts in the particular situation. There are reported cases where reporters/columnists at papers such as *The Washington Post* and *USA TODAY* have been found to be exempt as creative professionals under the Wage and Hour Law.

While this is judged on a case-by-case basis, the U.S. Department of Labor interprets this exemption strictly. It typically adopts the position that reporters and photographers at weeklies

and small daily newspapers are not creative professionals – and are therefore entitled to overtime after working 40 hours.

It is also entirely possible that, within one newsroom, some individuals could be deemed professional due to their unique duties, while others would be deemed not professional, due to the routine nature of their duties.

Question – How would you advise newspapers that have circulations under 4,000 with regard to the new overtime rules? Are papers under 4,000 exempt? Is the exemption for an individual newspaper or does a corporation that has multiple newspapers need to reach the 4,000 threshold when all of its circulations are aggregated?

Answer – The following are exempt from the Wage and Hour minimum wage and overtime requirements, pursuant to the small newspaper exemption:

Any employee employed in connection with the publication of any weekly, semi-weekly, or daily newspaper with a circulation of less than 4,000, the major part of which circulation is within the county where published or counties contiguous thereto.

Thus, an individual publication with circulation under 4,000 is exempt.

If one corporation owns multiple newspapers under the 4,000 circulation threshold, the question becomes whether they are separate publications, or must the circulation be aggregated? This is decided on a case-by-case basis. Key considerations will be as follows:

- Is all the writing, editorial, and printing work done from the same location by the same employees for all the publications?
- Do all the newspapers have separate payrolls?
- Is the editorial content different?
- Is the advertising content different?
- Do the publications have different tax payer ID numbers?
- Do the publications have separate U.S. Postal IDs?

The U.S. Department of Labor is very aggressive in trying to make overtime available to more people. Each case would need to be legally evaluated on an individual basis to reach a determination.

However, the May 18, 2016 Final Rule to increase the salary threshold for overtime exemption did **not** repeal the small newspaper exemption. That is statutory and cannot be repealed by a unilateral Department of Labor Rule.

Editor's Note: If your newspaper has additional questions about the new Rule on overtime, please plan to attend Michael Zinser's upcoming webinar through the Online Media Campus. The webinar will be held at 1:00 p.m. Central time on Thursday, July 14, 2016. To register, visit <http://www.onlinemediacampus.com/2016/06/new-labor-rule/>