

WAGE AND OVERTIME QUARTERLY

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ABUSES OF THE "EXECUTIVE" EMPLOYEE EXEMPTION TO OVERTIME COVERAGE CONTINUE TO FLOURISH. WHAT YOU CAN DO TO FIGHT BACK.

The Boss has found so many ways to violate federal and state overtime law that it's not really possible to say which violation is most pervasive. In this edition of *The Wage and Overtime Quarterly*, however, we explore a violation that certainly ranks near the top of the list of overtime rip-offs: **Misclassifying salaried employees as "executives" who are exempt from overtime coverage.**

This is an important topic for all you Trial Lawyers, advocates, and Winebrake Law Firm clients who receive this newsletter. Government investigators cannot possibly clean up America's wasteland of wage and overtime violations. So it is up to **Trial Lawyers** and **Workers** to recognize workplace abuses and refer the abuses to lawyers who are dedicated to wage and overtime litigation. History has proven that lawsuits are the most effective way to vindicate the rights of American workers.

The "Executive" Employee Exemption from Overtime Coverage

The Fair Labor Standards Act ("FLSA") and state laws such as the Pennsylvania Minimum Wage Act ("PMWA") generally require that employees receive overtime pay equaling one-and-one-half-times their regular rate of pay for hours worked over 40 during the workweek. Under these laws,

however, "executive" employees are exempt from receiving overtime pay.

The Executive Exemption makes good sense. After all, **real** company "executives" are not the types of employees who need the protections of the FLSA's overtime provision. That is because real executives have the clout and bargaining power to fend for themselves in negotiating with The Boss for fair pay.

Unfortunately, as discussed below, many companies use the Executive Exemption to deny overtime pay to mid-level and low-level employees who lawmakers never intended to exempt from overtime pay protections. Year after year, these abuses of the Executive Exemption illegally deprive working American families of millions of dollars in hard-earned wages.

Corporate America's Abuse of the Executive Exemption

The Executive Exemption is a bonanza for American business. And far too many companies abuse the exemption to force supposedly exempt "Managers," "Assistant Managers," "Department Managers," "Office Managers," and "Team Leaders" (the list of exaggerated job titles is endless) to work absurdly long hours performing routine tasks **for free**. For sure, there is nothing "executive" about the day-to-day work performed by many of these employees. Working

the cash register, completing routine paperwork, stocking the shelves, unloading delivery trucks, taking inventory, cleaning the work area, and performing manual labor are not the types of job duties that are supposed to fall within the Executive Exemption to overtime coverage.

Abuse of the Executive Exemption is devastating to America's working families. I am very sorry to report that The Winebrake Law Firm represents many supposedly exempt "executives" who routinely work 60, 70, and even 80 hours per week. Some of these individuals barely make minimum wage when their weekly salaries are divided by their hours worked. Their classification as exempt from the overtime laws is disgraceful.

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Recognizing Abuses of the Executive Exemption

The Executive Exemption rip-off thrives when employees do not understand their rights. Too many employees believe they are “exempt” from overtime coverage just because they are “salaried.” ***This belief is simply wrong.*** Under the law, a salaried employee qualifies as an exempt “executive” ***only if*** the employee’s real-life job duties entail work of a truly executive nature.

Most overtime misclassification lawsuits turn on whether the employee’s real-life job duties actually entail executive work. Importantly, in determining whether the Executive Exemption applies, the employee’s job title is not particularly relevant. The federal regulations specifically state that “[a] job title alone is insufficient to establish the exempt status of an employee.” 29 C.F.R. § 541.2. Thus, it does not matter whether the supposedly exempt employee has the term “Manager” in his or her job title.

To qualify for the Executive Exemption, ***all*** of the following requirements must be satisfied:

- The employee must receive a guaranteed weekly salary of at least \$455 per week;
- The company generally may not make deductions from the fixed weekly salary;
- The employee’s ***primary duty*** must be managing the business operation or a recognized department or subdivision of the business operation;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; ***and***
- The employee must have the authority to hire and fire other employees, or, at least, his/her recommendations as to hiring and firing must be given particular weight.

Moreover, under Pennsylvania law, any employee classified under the Executive Exemption must spend at least 60% (and, sometimes, 80%) of his/her time performing the types of tasks listed above.

Application of the above requirements requires a careful analysis of the employee’s actual job experience and a detailed review of federal/state regulations and court decisions. If you have *any reason* to suspect that you, a co-worker, or a client might have been improperly denied overtime under the Executive Exemption, you should call a law firm that concentrates in wage and overtime law (e.g. The Winebrake Law Firm!!!) for a detailed evaluation.

Examples of Salaried Employees who are Commonly Misclassified as Exempt from Overtime Coverage

Here are some examples of salaried employees who commonly are misclassified as exempt from overtime coverage under the Executive Exemption and other “white collar” exemptions:

- Managers and Assistant Managers of small retail stores such as “dollar stores,” “convenience stores,” and retail shops within shopping malls;
- Managers of departments within larger retail establishments such as department stores, “big box” stores, supermarkets, and drug stores;
- Newspaper sales managers;
- Bookkeepers or Accountants without CPAs;
- Social Workers and Case Managers working for social service agencies;
- Licensed Practical Nurses (LPNs), Medical Assistants, and similar line-level health care employees;
- Computer technicians and computer support staff (including help desk staff) who do not regularly write code;
- Warehouse managers and supervisors;
- Work crew captains or foremen;
- Mortgage loan officers;
- Home health aids or visiting nurses employed in Pennsylvania;
- Call center sales representatives; and
- Trainees for exempt positions.

“Only YOU Can Prevent Overtime Abuse”

Smokey the Bear used to appear on TV to tell us: “Only You Can Prevent Forest Fires.” Well, the same can be said of overtime abuse. Too many Trial Lawyers, advocates, and workers believe that the overtime laws are too complicated for them to understand, so they leave it to The Boss to interpret the law.

But The Boss is under pressure to feed the bottom line, so his interpretation of the overtime law might not be too worker-friendly. If you believe the overtime rights of you or your client are being violated, give us a call. Stop guessing at your overtime rights.

FLSA MYTHBUSTER: UNDERSTAND THE LIMITS OF NON-PROFIT GROUPS IN PROTECTING WORKERS’ WAGE AND OVERTIME RIGHTS

The FLSA Mythbuster (identity and whereabouts unknown) usually dedicates this column to “busting” commonly accepted workplace rules that, in fact, violate federal and state overtime law. In this quarter’s edition, however, we digress to address a myth that is gaining traction among certain commentators.

The myth I speak of is the notion that companies that blatantly violate this Nation’s overtime laws can be brought to justice by non-lawyers who lack the resources and bar admissions necessary to vindicate the rights of workers *in the United States District Courts*.

Make no mistake about it: this Nation is blessed with many individuals and non-profit groups that play crucial roles in organizing, educating, and protecting workers. Indeed, President Obama exemplifies how “community activists” can change the world.

History has proven, however, that lawsuits handled by skilled lawyers from private law firms or the United States Department of Labor are the most efficient and effective way to bring justice to workers whose overtime rights are violated.

In enacting the FLSA, Congress recognized the central role to be played by private lawyers and lawsuits in vindicating workers’ overtime rights. Congress placed in the FLSA a provision allowing workers to file private lawsuits and allowing workers who prevail in court to recover attorney’s fees *in addition to* unpaid wages and liquidated damages. Congress also provided that workers are *not* bound by private agreements that are not subjected to judicial scrutiny.

Entering into “conciliation discussions” with overtime violators without a meaningful threat of litigation seems a lot like bringing a slingshot to a gunfight. The FLSA exists so that workers can vindicate their rights in the United States District Courts.

QUARTERLY QUOTE

“In reaffirming the greatness of our nation, we understand that greatness is never a given. It must be earned. Our journey has never been one of short-cuts or settling for less. It has not been the path for the faint-hearted - for those who prefer leisure over work, or seek only the pleasures of riches and fame. Rather, it has been the risk-takers, the doers, the makers of things - some celebrated but more often men and women obscure in their labour, who have carried us up the long, rugged path towards prosperity and freedom. For us, they packed up their few worldly possessions and travelled across oceans in search of a new life. For us, they toiled in sweatshops and settled the West; endured the lash of the whip and ploughed the hard earth. For us, they fought and died, in places like Concord and Gettysburg; Normandy and Khe Sahn.

Time and again these men and women struggled and sacrificed and worked till their hands were raw so that we might live a better life. They saw America as bigger than the sum of our individual ambitions; greater than all the differences of birth or wealth or faction.

This is the journey we continue today. We remain the most prosperous, powerful nation on Earth. Our workers are no less productive than when this crisis began. Our minds are no less inventive, our goods and services no less needed than they were last week or last month or last year. Our capacity remains undiminished. But our time of standing pat, of protecting narrow interests and putting off unpleasant decisions - that time has surely passed. Starting today, we must pick ourselves up, dust ourselves off, and begin again the work of remaking America.”

President Barack Obama, Inauguration Address, November 20, 2009

ABOUT THE WINEBRAKE LAW FIRM

Workers deserve to get paid for *all time spent working*, and most workers are entitled to valuable *overtime pay* when they work over 40 hours in a workweek. Yet, every year, millions of American workers are cheated out of their full pay because they do not understand their rights under the Nation's complex wage and hour laws.

Wage and overtime violations hurt working families. When a company violates the law, it should be held accountable. **No one is above the law.**

The Winebrake Law Firm believes workers pursuing their wage and overtime rights are entitled to the same high quality legal representation enjoyed by big corporations. We also understand that workers have a right to be treated with the same level of professionalism, courtesy, and respect accorded to corporate CEOs.

The Winebrake Law Firm goes to Court to fight for workers who have been deprived of full regular pay and overtime pay in violation of the federal Fair Labor Standards Act ("FLSA") and similar state laws. Attorneys Pete Winebrake and Andy Santillo have negotiated settlements in federal wage and overtime lawsuits worth millions of dollars to American workers and their families.

The wage and overtime laws are complicated. Don't hesitate to contact **The Winebrake Law Firm** for a *free consultation* if you believe the wage and overtime rights of you or one of your clients may have been violated. Workers never pay a fee unless they recover.

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