DELAWARE
EMPLOYMENT LAW LETTER
Part of your Delaware Employment Law Service

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Young, Conaway, Stargatt & Taylor

Vol. 15, No. 11
November 2010

EXEMPT EMPLOYEES

Court to NutriSystem salespeople: fat chance of earning overtime

by Lauren E. Moak

The Fair Labor Standards Act (FLSA) requires employers to pay certain employees overtime compensation when they work more than 40 hours in a given week. However, certain types of employees, including employees paid on commission, are exempt from the FLSA's overtime requirements. A new opinion from the Third U.S. Circuit Court of Appeals, the federal appellate court governing Delaware, recently defined "commission" for the FLSA purposes, indicating that more employees may be "exempt" than previously thought.

Facts

Sales associates in NutriSystem's Horsham, Pennsylvania, call center were responsible for making calls to and receiving calls from past, current, and prospective customers seeking to place orders for NutriSystem products. The employees were compensated based on the higher of two calculations: (1) their hourly pay with overtime paid pursuant to the FLSA if they worked more than 40 hours or (2) a flat-rate payment for each sale.

The employees sued NutriSystem, alleging that when they received a flat- rate payment, they were entitled to overtime compensation under the FLSA.

Proportionality matters

The first issue the court addressed was whether to give deference to the U.S. Department of Labor's (DOL) interpretation of the term "commission." The DOL has a long-standing policy of limiting "commission" to mean a fee equal to a percentage of the money received from a sales transaction. In an unusual move, the court decided not to grant any deference to the department's interpretation, holding that the DOL did not "provide sufficiently thorough reasoning, consistency, or factual similarities to [this] case to warrant deference."

The court then went on to define a commission to include "flat-rate payments made to an employee based on that employee's sales [when the payments] are proportionally related to the charges passed on to the consumer." In other words, as long as the flat-rate payment bears a proportional relationship to the product's final cost to the customer, the payment need not be a consistent percentage of the final cost.

In this case, the court noted that the flat rates NutriSystem paid its sales associates varied between $18 and $40, and the cost of the products varied from $342.36 to $371.50. As a result, an employee could earn a fee of five percent to 14 percent of the value of the product sold. Those amounts were sufficiently proportional to the cost of the product to constitute commissions. The court didn't otherwise define what it meant by "proportional."

It's important to note that the court's conclusion rested heavily on the facts of the case and its determination that NutriSystem's compensation scheme didn't offend the purpose of the FLSA's overtime provisions. In particular, the court noted the high average income for NutriSystem's employees ($40,000 to $80,000) and the slim chance that paying overtime would cause the company to hire additional employees. *Wynn v. NutriSystem Inc.,* No. 09-3545, 2010 U.S. App. LEXIS 18691 (3d Cir., Sept. 7, 2010).

Bottom line

The Third Circuit's decision expands the definition of "commission" beyond its traditional bounds. As a result, employees who are paid a flat-rate fee per sale may be exempt from the FLSA's overtime provisions if the fee is proportional to the cost of the product they sell. If you pay your sales employees a flat-rate fee per sale, it may be time to review their treatment under the FLSA.