A University of Tennessee

Technical Bulletin

Bulletin 45 May 6, 1991

Do Your Executives Pass The FLSA's Salary (And Duties) Test?

by Sidney Hemsley and Richard Ellis

Certain battalion chiefs in the Kern County, California fire department are not executives under the Fair Labor Standards Act (FLSA). That's what the 9th U. S. Circuit Court of Appeals said in *Abshire v. County of Kern*, 908 F.2d 483 (1990). In March, the U. S. Supreme Court refused to review that decision, in effect upholding it. Some newspapers called that case an expensive disaster for municipalities.

Maybe. Maybe not. But the real question is whether the executives in your municipal departments are executives as defined by FLSA.

In the *Abshire* case, the Court of Appeals pointed out that to qualify as an executive under the FLSA regulations, an employee must pass both a duties test and a salary test [29 C.F.R., Sec. 541.1(a-e) (1988); 29 C.F.R., Sec. 541.a(f) (1988)]. The battalion chiefs failed the salary test; therefore, it was not even necessary to decide whether they passed the duties test, declared the court.

There were two reasons the battalion chiefs failed the salary test, according to the court:

1. Their biweekly salary exceeded $250 a week, but it could be docked for absences of less than a day if vacation, sick leave, or accrued compensatory time didn't cover the absences. That was enough to violate both:

   - the requirement in 29 C.F.R., Sec. 541.118(a) that "the employee must receive his **full** salary for any week in which he performs any work without regard to the number of days or hours worked,"

   - the declaration in U.S. Department of Labor, Wage and Hour Division's Letter Ruling of January 15, 1986, that "deductions from the salary of an otherwise exempt employee for absences of less than a day's duration for personal reasons, or for sickness or disability, would not be in accordance with Sections 541.118(a)(2) and (3)."

   It didn't matter to the court that no such deductions from the salaries of the battalion chiefs had ever been made. Kern County's **general policy** requiring such deductions was enough to remove the battalion chiefs from executive status under the FLSA.

2. They received compensatory time off for working overtime. Such extra compensation was not consistent with salaried status.

So what should a municipality do in response to the *Abshire* case? The court gave a clue on how an executive should **not** be treated for FLSA pay purposes in the following language:

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> Subjecting an employee's pay to deductions for absences of less than a day, including absences as short as an hour is completely antithetical to the concept of a salary employee. A salaried employee is compensated not for the amount of time spent on the job, but rather for the general value of services performed. It is precisely because executives are thought not to punch a time clock that the salary test for "bona fide executives" requires that an employee's predetermined pay not be "subject to reduction because of variations in . . . the quantity of work performed" -- especially when hourly increments are at issue.

Municipalities that exempt any of their management employees under the FLSA's executive exemption provisions should immediately review their compensation practices towards those employees. End those practices that are not consistent with their executive status, such as: punching time clocks, docking pay for absences of less than a day (including for disciplinary reasons), and officially allowing the accumulation and compensation for overtime.

In addition, remember that in the *Abshire* case the court never reached the question of whether the battalion chiefs passed the duties test. A review of compensation practices toward management employees claimed exempt under the FLSA's executive exemption provisions should also ensure that such employees pass the duties test.

For Further Information

For further information on FLSA, contact your local MTAS municipal consultant in Knoxville at (615) 974-0411; Nashville at (615) 256-8141; or Jackson at (901) 423-3710.

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Authorization Number E14-1050-00-001-91