Legal Update Article

Door-to-Door Salesmen, Chauffeur Drivers Not Entitled to Overtime Pay under 'Fair Reading' of FLSA, Second Circuit Finds

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September 25, 2018

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Acknowledging its obligation to give a "fair reading" to all Fair Labor Standards Act (FLSA) overtime exemptions, as the U.S. Supreme Court stated in *Encino Motorcars, LLC v. Navarro,* 138 S. Ct. 1134 (2018), in separate cases, the U.S. Court of Appeals for the Second Circuit concluded that door-to-door salespersons for an energy supply company fit squarely within the FLSA's outside sales exemption to overtime pay, *Flood, et al. v. Just Energy Marketing Corp.,* 2018 U.S. App. LEXIS 26629 (2d Cir. Sept. 19, 2018), and that drivers for a chauffeured limousine company are covered by the FLSA's taxicab exemption, *Munoz-Gonzalez, et al. v. D.L.C. Limousine Serv.,*2018 U.S. App. LEXIS 26628 (2d Cir. Sept. 19, 2018). For years, courts have narrowly construed the FLSA exemptions, resulting in many decisions adverse to employers.

The Second Circuit has jurisdiction over Connecticut, New York, and Vermont.

Outside Sales Exemption

The FLSA exempts from its minimum wage and overtime requirements anyone who is an "outside sales" employee. To qualify for this exemption, an employee must have the primary duty of making sales or of obtaining orders or contracts for services. 29 C.F.R. § 541.500(a). In addition, the employee must customarily and regularly work away from the employer's place of business.

Flood involved the outside sales exemption. The Second Circuit held the exemption applies even if a door-to-door salesperson, who makes the sale and takes the order for the sale, might have that order reviewed by the company prior to the order being finalized.

Kevin Flood and his putative class were employed by a group of affiliated energy supply companies (collectively, "Just Energy") to engage in door-to-door solicitation. The salesperson's goal was to persuade customers to buy their electricity or natural gas from Just Energy, rather than a local utility. If the salesperson successfully pitched the services, the customer filled out a service agreement. The sale was subject to further review based on customer credit and other business concerns. The sale was not finalized until the customer completed a verification call with a third party to ensure the customer understood and agreed to switch from the utility to the company's services.

Following his departure from the company, Flood filed suit against the company, claiming minimum wage and overtime violations under the FLSA and New York law. The district court dismissed the claims, finding Flood was not entitled to overtime pay under the outside sales exemption. Flood appealed and the Second Circuit affirmed the lower court decision.

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Citing the plain language of the FLSA regulations, and applying the "fair reading" dictated by *Encino Motorcars,* the Second Circuit had little trouble concluding that (a) Flood's primary duty was making sales (or, alternatively, obtaining orders or contracts for Just Energy's services), and (b) Flood regularly worked away from Just Energy's offices.

While some of the customers Flood signed up ultimately did not receive the company's services (*e.g.,* example, because they lacked sufficient creditworthiness, they changed their minds, or they were unable to change energy providers due to a "slam block" on their account), the only reason customers ever received, or intended to receive, the company's services was because of Flood's sales efforts. As the Second Circuit noted, "[T]he outside salesman exemption does not require that the employee have the ultimate authority to bind the customer or close the deal. It is enough that the employee secures a customer's commitment to engage in a sales transaction as the term 'sale' is broadly defined by the law."

Moreover, while Flood received some level of supervision and was required to attend regular meetings at company headquarters, the Court said it was not controlling in determining whether he was engaged in "sales" and covered by the exemption.

Taxicab Exemption

The FLSA exempts from overtime (but not minimum wage) "any driver employed by an employer engaged in the business of operating taxicabs."

Munoz-Gonzalez involved whether drivers of chauffeured cars are considered "taxicab" operators and, thus, are subject to the taxicab exemption, even though customers do not hail such cars on the street.

The plaintiff, Alejandro Munoz-Gonzalez, was a former driver for DLC, a chauffeured car service in New York's Westchester County. DLC's fleet consists mostly of five-person cars, but it also has some SUVs, luxury vans, and mini-coaches. DLC's vehicles are not metered and, on the outside, appear to be regular, non-commercial vehicles. DLC drivers must wear a black suit, white shirt, company tie, black shoes, and black socks. Drivers may not choose their own jobs or pick up passengers who hail them from the street. Rather, most of the drivers' trips are local (rarely exceeding 70 miles) and most of DLC's work came from trips originating at the Westchester County Airport, where it operated a customer service counter and taxi stand.

Munoz-Gonzalez brought suit on behalf of himself and other DLC drivers, alleging DLC failed to pay them overtime. The company asserted the drivers were exempt under the FLSA's taxicab exemption. The district court agreed with the company, dismissing the overtime claims. The plaintiffs appealed. The Second Circuit affirmed the lower court decision.

As with the outside sales exemption, and again citing the *Encino Motorcars* "fair reading" mandate, the Second Circuit considered the plain language of the statute and the relevant regulations (plus the USDOL's Field Operations Handbook) to determine the applicability of the taxicab exemption. As the FLSA does not define "taxicab," the Second Circuit turned to the dictionary definition, other statutes, and other courts' decisions to arrive at the "ordinary meaning" of the word: passenger vehicles available for hire by individual members of the general public that do not operate on regular routes.

With a "fair reading" of the exemption, the Second Circuit readily concluded that the drivers in question qualified for the exemption. DLC's fleet of non-metered vehicles are available for hire by individual members of the general public and will take passengers wherever they want to go, without assigned routes, fixed schedules, or fixed ending locations.

The plaintiffs contended that DLC is an "airport limousine service," which the USDOL's Field Operations Handbook expressly provide do not qualify for the exemption. Rejecting this argument, the Second Circuit noted that, although upscale vehicles used as taxis often are referred to as limousines, the strict definition of a "limousine" is "a vehicle used to carry passengers on a regular route, as between an airport and a downtown area." In this case, while a large percentage of DLC's business originated at the airport, drivers did not routinely traverse the same route or arrive at the same location once they departed the airport and, thus, are not airport limousine services within the meaning of the Field Operations Handbook. Rather, the Second Circuit concluded, "airport limousine service" in the Field Operations Handbook referred to "shuttles that drive on a regular route between an airport and another location." Otherwise, if the mere fact that the trip began at the airport is determinative, then a substantial number of taxis would be deemed limousines and the exemption would swallow itself, the Court explained. Moreover, even though DLC has a couple of corporate clients for which it regularly provided passenger services pursuant to "recurrent contracts," it did not mean the company did not provide services to the community at large, when those corporate clients constituted less than five percent of the company's business. Furthermore, although DLC's drivers made some longer trips, they primarily operated in the local Westchester area. Regardless, the Second Circuit noted, if the drivers routinely traveled out of state, a separate exemption might apply. According, the Second Circuit found the drivers at issue unquestionably qualified for the taxicab exemption.

Takeaway

It is unclear whether the Second Circuit would have concluded differently absent the Supreme Court's rejection of the "narrow construction" principle for exemptions. However, these two decisions from the Second Circuit, as well as recent decisions from other federal courts of appeals, serve notice to district courts that the Supreme Court has lifted any thumb that might have been on the scale against employers seeking to apply an exemption, and that exemptions are just as much a part of the FLSA as are the minimum wage and overtime requirements, entitled to a "fair reading."

If you have any questions about these decisions, any exemption, or any other wage and hour issues, please contact the Jackson Lewis attorney(s) with whom you regularly work.