

## Employment Law Update - February 2011

### Employer Ammunition in Overtime Pay Cases

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The United States Court of Appeals for the Fourth Circuit has given employers ammunition in some cases involving overtime claims. In *Desmond v. PNGI Charles Town Gaming, LLC*, 2011 U.S. App. Lexis 702 (4th Cir. Jan. 14, 2011), the Fourth Circuit held that plaintiffs were only entitled to overtime using the "half-time" methodology in Fair Labor Standards Act ("FLSA") misclassification cases. Employers can use *Desmond* to reduce damages in some cases by two-thirds.

The FLSA is the federal statute that governs overtime pay and minimum wage for nonexempt employees. Employers know that hourly employees are entitled to overtime pay at time-and-one-half (150%) their regular rate of pay when they work more than 40 hours in a workweek. Some employers, however, mistakenly believe that paying an employee a salary exempts the employee from the overtime and minimum wage obligations of the FLSA. In truth, not all salaried employees are exempt from overtime pay. Employees may be exempt from overtime if they are paid on a salary basis AND if they meet tests regarding their job duties.



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Employers who classify a salaried employee as exempt where the employee's duties do not meet the requirements of an FLSA exemption are said to have "misclassified" the employee. If that employer fails to pay the misclassified employee overtime pay for all hours worked over 40 in a workweek, the employer has violated the FLSA. Plaintiffs' lawyers argue that a misclassified employee is entitled to overtime calculated by dividing the weekly salary by 40 and then paying time-and-one-half (150%) of that rate for each overtime hour worked.

In *Desmond*, the Fourth Circuit disagreed. The plaintiffs in *Desmond* worked as racing officials at a horse track and were paid a fixed weekly salary intended by employer and employees to cover all hours worked. The race track mistakenly believed that the employee racing officials were exempt pursuant to the administrative exemption set out in the FLSA and did not pay the racing officials overtime. In their suit, the racing officials asserted that they worked more than 40 hours per workweek and that they were entitled to time-and-one-half (150%) of their regular rate of pay. The race track employer argued that employees were only entitled to one-half (50%) of their regular rate for all hours worked over 40 in a workweek.

Four other Courts of Appeal that have addressed the issue found that a half-time (50%) overtime premium was appropriate in calculating unpaid overtime compensation in mistaken exemption classification cases, so long as:

- the employer and the employee had a mutual understanding that the fixed weekly salary was compensation for all hours worked each workweek, and
- the salary provided compensation at a rate not less than the minimum wage for every hour worked.

The United States Department of Labor agrees. Based on this rationale, the Fourth Circuit held that the half-time (50%) overtime premium was the correct methodology in calculating the overtime due to the former racing officials.

For example, an employee is misclassified as exempt, works 50 hours a week and earns an annual salary of \$40,000.00. The employee and the employer agree that the employee will be paid a set salary for 50 hours or more of work per week. After working for two years, the employee is terminated and goes to a lawyer to determine what claim, if any, the employee may assert against the employer. The former employee's lawyer identifies that the employee was improperly classified as exempt and files a FLSA suit seeking unpaid overtime pay against the employer in federal court. The former employee's lawyer argues that damages should be calculated as follows:

- 40 hours per week x 52 weeks = 2,080 hours per year
- \$40,000.00 annual salary ÷ 2,080 hours per year = \$19.23 regular rate of pay
- \$19.23 regular rate of pay x time-and-one-half (150%) = \$28.85 overtime rate of pay
- 10 overtime hours per week x \$28.85 overtime rate of pay = \$288.50 weekly overtime pay
- 104 weeks x \$288.50 weekly overtime pay = \$30,004.00 two years of overtime pay

In *Desmond* the Court notes that per the employee-employer agreement to pay a salary for all hours worked, the employee has been paid for all hours worked, but must be paid a 50% overtime premium for all hours over 40 worked in a workweek. Therefore, under the *Desmond* "half-time" methodology and assuming that the plaintiff's lawyer correctly calculated the regular rate of pay, damages in the above example would be correctly calculated as follows:

- \$19.23 regular rate of pay x half time (50%) = \$9.62 overtime premium
- 10 overtime hours per week x \$9.62 overtime premium = \$96.20 weekly overtime pay
- 104 weeks x \$96.20 weekly overtime pay = \$10,004.80 two years of overtime pay

As you can see from the above example, the *Desmond* decision gives the employer a strong argument to reduce alleged damages from \$30,004.00 to \$10,004.80.

The *Desmond* decision is certainly positive for employers and sets a standard for employers located within the Fourth Circuit's jurisdiction. Employers should continue to track this issue as the appropriate calculation remains unaddressed in seven federal circuits and a plaintiff in the Seventh Circuit has petitioned the United States Supreme Court to review the Seventh Circuit 2010 decision asserting the "half-time" methodology.

Employers are advised to review their classifications of employees to ensure that the exempt status is analyzed correctly. Where, however, misclassification errors have been made with respect to salaried employees and are brought to the employer's attention by a FLSA suit, employers should utilize the *Desmond* decision to reduce potential exposure by two-thirds.

For more information regarding classification of employees or other employment matters, please contact [Betsy Davis](#) at (804) 697-2035 or email [bdavis@spottsfain.com](mailto:bdavis@spottsfain.com).

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