

I Can See Clearly Now: The Seventh Circuit Reaffirms Exception to Overtime Rule in Case of Chicago Window Washers

Article By:

Labor and Employment Relations

Employers today face liability in few areas more than they do in that of wage and hour. The misclassification of employees as exempt, the hiring of “interns,” the payment of time for “donning and doffing” clothing and equipment – all are areas of the law significantly interpreted by the courts recently, and only sometimes in favor of employers. In the case of ***Alvarado v. Corporate Cleaning Service, Inc.***, the Seventh Circuit Court of Appeals recently fleshed out an often-ignored exception to an employer’s obligation to pay overtime.

The U.S. Fair Labor Standards Act (“FLSA”) requires that employers pay every “non-exempt” employee time-and-a-half the employee’s regular hourly rate of pay for hours worked in excess of 40 in a week. However, the FLSA provides an exception if three conditions are met:

1. The employee’s regular pay is more than one and a half times the federal minimum wage;
2. More than half of the employee’s compensation for a “representative period” (which may not be less than a month) is comprised of “commissions on goods and services”; and
3. The employer is a “retail or service establishment.”

In *Alvarado*, the Seventh Circuit focused its attention on the last two conditions.

The employer in the case provided window washing services, and the 24 plaintiff employees were window washers. When the employer received a customer order, the employer assigned points to it, depending on the complexity of the job and how long the employer estimated it would take. The points then were used to calculate the cost to the customer *and* were input into a formula prescribed by the employer’s collective bargaining agreement (“CBA”) to calculate the window washers’ compensation.

The court found, given the formula upon which the employees’ pay was calculated and the irregularity of the employer’s business and the employees’ work, which were seasonal based on weather and – notable to the court – the risk of falcon attacks on window washers, the compensation

constituted commissions. “The result of these impediments to steady work,” the court reasoned, “is that a window washer can't count on working 40 hours each week for an entire year. This is the reason for exempting his employer from the requirement of paying the worker time and half for overtime.”

The court also observed that, although the employer's CBA provided for the payment of overtime and never referred to the employees' pay as “commissions,” the union had never grieved or objected to the employer's treatment of the pay as subject to the FLSA's commission exception. Seventy-six window washers, moreover, had declined to join the lawsuit.

The court also concluded that the employer was a “service establishment,” given that it sold services, not goods. The seller of goods, the court noted, can make up for decreased demand by producing inventory for future sale; a seller of services must simply weather any storm of decreased demand.

Consequently, the court concluded the compensation the window washers received was “commissions on ... services” paid by their employer, a “service establishment.” Thus, according to the court, all three elements of the retail commissions exemption were met, and the employees were not entitled to overtime pay.

The court seemed to go out of its way to note that the union and most of the employer's window washers acted as if satisfied with the way and the amount the employees were being paid. While the window washers worked long weeks during the window washing season, the court observed, this allowed many to visit family during the winter in the single, small town in Mexico from which most of them came.

While not every employer can take advantage of the retail commissions overtime exception, those who operate retail or service establishments should consider whether their compensation systems for employees are or can be reframed to provide for commissions on the sale of goods or services where the employee's regular rate of pay is more than time-and-a-half the federal minimum wage. The exception is a narrow one, but it can be used to a potentially significant advantage by employers who qualify.

©2025 MICHAEL BEST & FRIEDRICH LLP

National Law Review, Volume V, Number 118

Source URL: <https://natlawreview.com/article/i-can-see-clearly-now-seventh-circuit-reaffirms-exception-to-overtime-rule-case>