Class Action Suit Seeks Overtime Pay For Recruiters

A class action suit has been filed in federal court in Florida, in which present and former direct hire recruiters are claiming that, under the Fair Labor Standards Act ("FLSA"), they are entitled to overtime pay for each hour they worked in excess of 40 in any given workweek. In Ashley Vaccaro v. Candidates on Demand Group, eleven former recruiters for the defendant are seeking back pay for all of the defendant's recruiters since 2004. The employees appear to have been paid on a salary/draw plus commission arrangement which is common to recruiters, but they are contending that they are entitled to time and one half the regular rate of pay for overtime, because they do not fall within any of the exemptions from the overtime requirements. At this time, the case is in its preliminary stages, and it will probably be quite some time until any decision on the merits is reached. We will keep you advised.

In the meantime, the following is an article I have previously written concerning the possible impact of the FLSA on your business. Maybe it will be helpful to those who wish to plan how to deal with this issue.

Paying recruiters without paying attention to the legal requirements of the Fair Labor Standards Act is, in many ways, the equivalent of driving with your eyes closed - you do not know when the catastrophe will occur, but it will, and the consequences can be significant enough to force you to close your business.

The Fair Labor Standards Act ("Act") is the federal law which requires that covered employees receive a minimum hourly wage, and be paid at the overtime rate under certain circumstances. Basically, start with the premise that all employees, unless an exemption is available:

1. Must receive the minimum wage for each hour worked each pay period. The current federally mandated minimum wage is $5.85 per hour, with several states having higher requirements, and the federal minimum is scheduled to rise in increments.

2. Must receive one-and-one-half times their "regular rate of pay" for each hour worked in excess of 40 hours per work week.

(If need be, take a moment here to disabuse yourself of the notion that placement counselors can be treated as "independent contractors," rather than "employees" and therefore be paid on a straight commission basis, without the bothersome necessity of deducting withholding taxes and other legally mandated payments. With certain very, very rare exceptions - maybe - recruiters working for placement firms are employees who must be afforded the rights granted to all employees by statute.)

The above two requirements mean that, unless an employee falls within an exception to the law (more about that later) your recruiters must be paid $5.85 an hour every pay period for every hour worked, regardless of whether they made any placements during that period or whether the firm has received any fees from their efforts.

But the real problems occur when your recruiter works more than forty hours in a week, often as a result of telephone calls made from home at night. Suppose in a given week one of your recruiters, whom you have been paying (improperly) on a "straight commission" basis, with no "draw" or salary, works fifty hours. Further suppose that, during that week, the firm receives $40,000 in fees resulting from placements by the recruiter, of which the recruiter receives $20,000. To determine the "regular rate of pay," which is the basis for determining the overtime compensation due the recruiter, divide the $20,000 in commission earnings by 50 hours. This means that the recruiter's regular rate of pay for that week was $400 per hour. For the 10 hours worked in excess of 40, therefore, the recruiter was required to receive an extra $200 an hour (since he is entitled to be paid time-and-a-half for overtime) for a total additional compensation of $2,000.

If this underpayment was discovered as a result of litigation brought either by the recruiter or the United States Department of Labor, the recruiter would be entitled to an additional $2,000 as liquidated damages, plus his attorneys' fees.

To make matters worse, if the Department of Labor inspects your records (usually as the result of a complaint by a disgruntled former employee) they will go back two years (three years for a "willful" violation) and calculate the amount due to every present and past employee at your firm during those past two or three years (plus liquidated damages equal to the deficiency). It is for this reason that people who pay their employees on a straight commission basis, with no salary, are literally betting their business against the odds that their violations of the law will not be discovered. (No, an employee cannot waive his or her rights by "consenting" or "requesting" to be paid on a straight commission basis, whether in writing or otherwise.)

So what can be done about this? Well, first, pay your employees at least the minimum wage (I am going to suggest at least $455 per week, for reasons that will be discussed below). While this guaranteed payment to the employee is better called a salary than a draw, it can work much like a draw, in that the employee would only be entitled to commissions to the extent that his designated percentage of fees collected exceeds salary and commissions paid to date. However, you cannot recover these payments from the employee if the employee "goes in the red," even after termination of employment.

Now that you have complied with the minimum wage portion of the Fair Labor Standards Act, you may want to deal with the overtime issue simply by prohibiting your employees from working overtime. At most firms, the regular work day is 7 or 7½ hours, since time off for lunch is not working time. This allows you to allow the employee to take 2½ to 5 hours per week to make those recruiting calls at night. If you can be a bit more flexible with the employee's daytime schedule, you can also create more available recruiting time at night without running the risk of exceeding the 40-hour workweek. You must, however, keep accurate contemporaneous records of each employee's hours worked. The failure to have such records is an extremely severe handicap if the employee later contends he or she worked more than 40 hours in a given week. As much as I hate to do this, I'm going to suggest that recruiters who work from home be required to keep time sheets and turn them

in weekly. The sheets should not just state how many hours the employee worked, because this is easily, even if unintentionally, exaggerated. Rather each item of work should be broken down by start and end time, e.g. 7:45-7:53, telephone conversation with John Smith.

If you are going to try to limit your employees to working forty hours per week, you should, at the least, have clear written rules against it, ideally incorporating those rules into an employment contract with each recruiter. However, do not think that it is enough to promulgate a rule and then wink if your employees break it. If you are going to have to argue that employees are not authorized to work in excess of forty hours a week, you will have to show that you are serious about enforcing that limitation.

There is a possible better way around the problem, although one that is not without risk. There are several "white collar" exemptions from the minimum wage and overtime requirements. One of them is the exemption for administrative employees. Let's look at the criteria for the exemption to see if placement counselors might fit.

1. Compensation – The employee must be paid at least $455 per week. (This is why I suggested the $455 salary above rather than one equivalent to the minimum wage.);

2. Duties – The primary duties of the employee must be office or non manual work directly related to the management or general business operations of the employer or the employer's customers; and

3. Responsibilities – The employee's duties must require the exercise of discretion and independent judgment. This involves the comparison and evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The employee must have authority to make an independent choice, free from immediate direction or supervision. The fact that an employee's decisions are revised or reversed after review, does not mean that he or she is not exercising discretion and independent judgment.

While the Labor Department's regulations do not specifically discuss recruiters, they do note that people in personnel management, human resources, employee benefits, and labor relations would qualify as having a duty related to management or general business operations. In addition, employees acting as advisors or consultants to their employers, clients or customers as tax experts or financial consultants, for example, may qualify for the exemption.

Court cases in related fields have not always been helpful, with some opinions appearing to indicate that the administrative exemption is not available to sales or production employees, since they are not performing work "directly related to management policies or general business operations."

However, in 1969, the Wage-Hour Administrator issued an opinion letter that has remained little publicized, but which might offer significant help to those recruiters desiring to classify their employees as exempt. The letter addressed the exemption status of "a placement counselor engaged in the placement of executive, administrative and professional personnel." The duties of the counselor were defined as follows: "The placement counselor's primary duty consists of office work directly related to general business operations of its employer's customers. He seeks out applicants and employers with common interests and arranges negotiations between them. Once such negotiations result in an employment agreement, a fee is received by the placement counselor. The counselor receives a weekly guaranteed draw or salary and receives commissions to the extent that his portion of the fees received exceeded his salary to date."

Under these facts, the Wage-Hour Administrator opined that the employee would be exempt. "If the placement counselor you have in mind does, in fact, meet the salary requirement, and has the duties and responsibilities described in your letter, he will qualify for exemption from the minimum wage and overtime pay requirements as a bona fide administrative employee. However, where an employee fails to meet any of the applicable tests for exemption, he must be paid in accordance with the Act's minimum wage and overtime pay requirements, . . ."

You may find that most Department of Labor regional offices are unaware of the opinion letter (really a combination of Opinion Letters 974 and 999 of March 27, 1969, and June 6, 1969, respectively). However, when confronted with the opinion letter, many administrators will conclude that the recruiters are exempt. (It is possible that the Department of Labor could argue that regulations which became effective in 2004 somehow render the 1969 opinions null and void, but I do not see a strong basis for that position.)

It remained to be seen how courts would deal with the opinion letter, given their reluctance to qualify sales personnel for an administrative exemption.

The results from Hudkins v. Maxim Healthcare Services, a 1998 Federal District Court decision in Florida, affirmed without opinion by the 11th Circuit, are encouraging to those seeking to qualify their recruiters as exempt administrative employees. In that case, in attempting to determine whether nurse recruiters fell within the administrative exemption, the court focused on an amendment to the Fair Labor Standards Act which provides that an employer is entitled to rely in good faith upon an interpretation of the law made by the administrator of the Wage and Hour Division. If an employer can show that it acted in good faith, acted in conformity with the opinion letter, and acted in reliance upon the opinion letter, then the employer will not incur liability under the Fair Labor Standards Act. The staffing firm was given the opportunity to establish at trial that its employees performed those duties and exercised the discretion and judgment described in the opinion letter. If, on the other hand, the former employees were able to establish their contention that they were required to refer all candidates who met the specifics of the job description, then they would not be exercising independent judgment or discretion, and would be non-exempt.

A Connecticut Superior Court case approached the issue a bit differently. In Crist v. O'Keefe and Associates, a 2005 case decided under Connecticut state law, which appears to be identical in all relevant respects to the federal statute, the court looked at the relative time a recruiter spent recruiting candidates (exempt) and attempting to obtain job orders (non-exempt). "The defendants maintain that the plaintiff's services as an executive recruiter consisted of office or non-manual work directly related to the general business operations of the customers of O'Keefe & Associates because he, in effect, performed human resource or personnel services for those customers through the recruitment of executives for them While it is undisputed that the plaintiff performed such work, it is not evident from the evidence before me that such tasks constituted the plaintiff's 'primary duty. "

The Court went on to state that, to the extent the recruiter's work consisted of marketing to companies to obtain job orders, those were sales tasks, not "traditional personnel tasks," and, if that constituted a majority of the recruiter's work, he would be non-exempt. On the other hand, if a majority of the recruiter's work consisted of the "recruitment and placement of individual executives," that would indicate the employee was exempt.

Other jurisdictions are not bound to follow the decision of either the Florida District Court, or the Connecticut Superior Court, but these decisions, when coupled with the language of the opinion letter, at least send a signal that, if the recruiter's duties are properly structured and described by the placement firm, there is a possibility that recruiters who perform the services set forth in the opinion letter will be exempt from the minimum wage and overtime requirements of the Act, if they are paid a weekly salary of at least $455.

Please, however, keep this in mind:

1. You will never see a court decision or administrative ruling, at least under the current law, that holds that all recruiters are exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act. At best, you will get something like the language of the opinion letter or court cases, which state that if a recruiter performs certain duties and in performing those duties exercises discretion and independent judgment, then he is exempt (assuming, of course, that he is paid that all important $455 a week salary).

   For example, if a plaintiff employee can demonstrate that he was told to refer all candidates who met the specifications of a particular job order, he may well not be exercising the independent judgment and discretion necessary to qualify for the exemption. If he can show that most of his time was spent trying to obtain job orders, he will be considered a non-exempt sales employee rather than an exempt human resources consultant. In constructing job descriptions for your recruiters, you should emphasize the need to make subjective decisions about which candidates are suitable for which clients and vice versa, and be wary of requirements that would tend to limit their judgment and independent discretion, such as requirements that they open the mail at certain times of day, make a specified number of phone

calls at specified hours of the day, spend more than half their time soliciting job orders (or candidate marketing to a firm from which you have no job order) or refer any candidate who meets the objective criteria of the job order.

2. There is also an exemption for employees who earn over $100,000 a year. I have a feeling that the great majority of those employees will have negotiated a salary of over $455 a week.

   3. It is hard to say you relied on an opinion letter if you have never seen it. You should get a copy from your attorney for your files.

4. In assessing your risks in attempting to qualify for the administrative exemption, remember that the burden of proof will be on you to demonstrate that your recruiters are exempt.