

News & Types: Client Advisories

A Million Dollar Problem: Paying Field Service Engineers Improperly

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Practices: Employment, Labor & Benefits

Many clients employ Field Service Engineers ("FSEs") who install, service and repair a wide range of machinery (i.e., printing presses, injection molding machines, factory automation equipment, etc.) that has been sold to a customer. These FSEs often work out of their homes and travel on a regular basis throughout the U.S. and internationally in order to provide initial and ongoing technical support as well as orientation and training to new and existing customers. If your company is not paying overtime to these FSEs, your company may be audited by the U.S. Department of Labor ("DOL") or sued by current and former FSEs.

Recently, a company that designs, develops, manufactures and markets retinal imaging devices settled a case brought by an FSE who sued on behalf of himself and all other current and former FSEs. The FSE who brought the suit alleged that his primary job duty was to install, repair and maintain retinal imaging devices manufactured by his current employer. Although the company paid him a salary, he alleged in his complaint that he was also entitled to overtime pay because the company often required him to work more than 40 hours per week. After the first FSE brought the suit, 30 other current and formerly employed FSEs chose to join the suit. After about 7-months of litigation in federal court, the company settled the matter for \$1,600,000.00. A summary of the settlement:

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| \$1,600,000.00 | Gross Settlement |
| - \$533,333.33 | Plaintiff Attorneys' Fee (33 1/3%) |
| - \$11,754.20 | Plaintiff Attorneys' Costs To Prosecute Case |
| - \$10,000.00 | Incentive Award to First FSE |
| - \$ 5,000.00 | Contingency Fund to Implement Settlement |
| | |
| \$1,039,912.40 | Distributed to 30 Current and Former FSEs |

The FSEs received an average of \$52,833.33 in unpaid back pay.

Although a company may pay FSEs a salary, a company must pay overtime pay to the FSEs, unless the FSEs are exempt because they are administrative, professional, or highly compensated employees. Many companies believe the FSEs are administrative or professional employees and are not entitled to overtime. However, in one opinion letter, the DOL stated that the FSEs were not administrative or professional

employees. They were not administrative, because FSEs do not use discretion and independent judgment when installing and repairing machinery. In addition, installing and repairing machinery is not a matter of significance. The FSEs were not professional employees because their primary job duties did not require the performance of work that required advanced knowledge in engineering that was received after a "prolonged course of study." As a result, the DOL stated that "It is our opinion that the above employees are best characterized as highly skilled technicians who are non-exempt under . . . the FLSA." Therefore, all of the FSEs must be paid both minimum wage and overtime for all hours worked over 40 hours in a given work week.

As the above settled case illustrates, because many wage and hour cases include both currently employed and formerly employed FSEs, all companies should audit the job descriptions and job duties for FSEs to ensure that they could meet one of the exemptions under the law. Because wage and hour suits continue to dominate state and federal courts filings throughout the U.S., a review of a company's FSEs will help prevent an unplanned and potentially substantial impact on the company's financial statements.