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**Are Service Writers Exempt Under the FLSA?**

Whether Auto Dealer Service Writers (or Service Advisors) are exempt from federal and state overtime pay requirements has been an issue for years. The U.S. Department of Labor ("DOL") has flip-flopped on the issue since the exemption for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles" was written into the Fair Labor Standards Act ("FLSA") in 1966. The DOL's latest position was set forth in 2011 when it issued a Final Rule amending the "salesman, partsman, mechanic" exemption that did not include Service Writers employed at a retail dealership as exempt. This was in contradiction to the DOL's action in 2008, when it issued a Notice of Proposed Rulemaking in which it stated that it considered Service Writers to be exempt.

The Courts have not always agreed with the DOL's interpretation of this exemption. The U.S. Courts of Appeals for the Fourth Circuit (which includes Maryland, as well as North Carolina, South Carolina, Virginia and West Virginia) and Fifth Circuit (covering Louisiana, Mississippi and Texas), several federal district courts, and the Supreme Court of Montana have found Service Writers exempt. Specifically, the Fourth Circuit in *Walton v. Greenbrier Ford, Inc.* found that Service Writers are "salesman" because their job is to sell services for cars, and because their role is to help customers receive mechanical work on their cars they are involved in the general business of "servicing automobiles." The Fifth Circuit in *Brennan v. Deel Motors, Inc.* found the duties and pay structure of Service Writers to be functionally similar to those of salesman, partsman and mechanics whom the statute expressly exempts.

Just this week, however, the Ninth Circuit, in *Navarro v. Encino Motorcars, LLC* (March 24, 2015) disagreeing with the Fourth and Fifth Circuits, decided that it was required to defer to the DOL's interpretation and ruled that an auto dealer's service advisors did not fall within the FLSA's "salesman, partsman, mechanic" exemption. Essentially the court said that, while there were good arguments supporting both interpretations of the exemption, where a regulatory agency, like the DOL, has chosen one interpretation, it must defer to that choice. The DOL's view is the exemption is limited to salesmen who sell vehicles and partsman and mechanics who service vehicles. Service Writers do neither.

What does this mean for auto dealers in Maryland? Ultimately this issue may wind its way to the Supreme Court. In the meantime, the Ninth Circuit decision is not controlling on federal district courts outside the Ninth Circuit, like Maryland. That may not be as comforting as it appears on


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first blush. The Fourth Circuit case was decided in 2004, well before the DOL's 2011 Final Rule. Given that fact, and the reasoning of a well-regarded court like the Ninth Circuit, it's entirely possible that the federal court in Maryland or the Fourth Circuit itself could reach a different conclusion than was reached in 2004.

We also note that the DOL is poised to issue proposed regulations that are intended to substantially revise and limit the FLSA white collar exemptions (executive, administrative and professional employees). Once issued, the public will have the opportunity to offer comments on the proposed regulations, and the DOL will then issue final regulations – a process that could take a year or more. Thus, although any impact of these regulations will not be immediate, auto dealers should keep in mind that further changes to service writers' exemption status may be forthcoming.

FLSA compliance is a tricky area. Wage-hour litigation is a booming industry for plaintiffs' lawyers. Now may be a good time to revisit your exemption classification decisions in order to stay ahead of current litigation trends. Please contact Mark Swerdlin, (410) 843-3468 or swerdlin@shawe.com, or any Shawe Rosenthal lawyer you work with to discuss.

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