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LABOR AND EMPLOYMENT GROUP NEWS

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CAFE MANAGER SEEKS CLASS ACTION FOR OVERTIME PAY

By Barry J. Waters

A Chicago-based Barnes & Noble Café Manager filed a collective action on September 20, 2016 in federal court, Southern District of New York, seeking overtime compensation for herself and similarly situated individuals who have worked as Café Managers “or in comparable roles with different titles,” for Barnes & Noble anywhere in the United States. According to the complaint, Barnes & Noble operates 640 retail stores in the 50 states. *Brown v. Barnes and Noble, Inc.*, 1:16-cv-07333-RA (S.D.N.Y. 2016).

The plaintiff, Kelly Brown, claims that Barnes & Noble deliberately understaffs its Cafés, and strictly manages hours worked by non-exempt Café employees to avoid paying them overtime. As a consequence, the suit claims, Café Managers “spend the vast majority of their time performing the same duties as non-exempt employees, such as: making coffee and other beverages, preparing food, serving customers, working the cash register and cleaning the Café.” Ms. Brown claims that Café Managers regularly work in excess of forty hours and frequently work ten or more hours a day.

The lawsuit asserts that Café Managers are not exempt “executive” employees because they: (1) are closely supervised by their Store Managers and their work is specifically defined by corporate policies and procedures; and (2) are not responsible for the overall performance of the stores, or for coaching, evaluating, hiring or firing employees.

To be exempt from overtime as an executive employee, the employee must satisfy both the duties and the salary test:

Duties Test

The “executive” exemption requires that the employee:

1. regularly supervises two or more other employees;
2. has management as the primary duty of the position; and
3. has some real input into the job status of other employees (such as hiring, work assignments, promotions and/or firing).

With regard to the first factor, the supervision must be a regular part of the employee’s job. The “two employees” requirement may be met by supervising two full-time employees or the equivalent number of part-time employees.

For the second factor, the FLSA Regulations set forth a list of typical management duties, which, in addition to supervising employees, includes:

- interviewing, selecting, and training employees;
- setting rates of pay and hours of work;
- maintaining production or sales records (beyond the merely clerical);

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- appraising productivity, handling employee grievances or complaints, or disciplining employees;
- determining work techniques;
- planning the work;
- apportioning work among employees;
- determining the types of equipment to be used in performing work, or materials needed;
- planning budgets for work;
- monitoring work for legal or regulatory compliance; and
- providing for safety and security of the workplace.

An employee may qualify as performing executive job duties even if she performs a variety of “regular” job duties, such as preparing food or drinks and/or serving customers. However, she must also perform at least some of the tasks a “boss” would typically perform, as set out above. For example, the executive must have genuine input into personnel matters. This does not require that the employee be the final decision maker, but the employee’s input must be given “particular weight.”

Salary Test

Ms. Brown’s salary of \$33,000 is above the current salary threshold for exempt employees, \$23,600. **However, the new USDOL Rule will raise the threshold to \$47,476 effective December 1, 2016.**

Recent Attorneys General Court Challenge to New Salary Test

On September 20, 2016, the same day that Ms. Brown filed her lawsuit, officials from 21 U.S. states filed a lawsuit claiming that the DOL acted unlawfully in issuing the new salary limit, which the states assert will place a heavy burden on state budgets. Hours after the states announced their lawsuit, the U.S. Chamber of Commerce and other business groups filed a separate challenge to the rule in the same federal court in Sherman, Texas. Business groups and Republican officials say that the rule will force employers to demote salaried workers to hourly positions and create more part-time jobs.

Whether this challenge is sustained, the Barnes & Noble case serves as a reminder that an employee must meet both the duties and the salary tests to qualify for the exemption.

TAKE-AWAYS:

1. Regardless of which salary threshold applies, the “duties” test remains unchallenged.
2. The restaurant and related-food and drink businesses are targets for plaintiff class action lawyers.
3. Assistant Managers in larger operations have asserted claims similar to Ms. Brown’s here: that is, that they primarily do the same work as the rank-and-file employees.
4. All employers should conduct regular audits of the jobs currently classified as exempt. We are reminded again and again in the case law that the employee’s job title is not the a significant factor in the outcome.
5. Non-compliance will result in exposure for the overtime pay owed plus heavy penalties; double damages under federal and Connecticut law, treble damages under Massachusetts law.

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