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Nurses Held Exempt Under N.J. Wage and Hour Law

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On Nov. 16, 2011, the Appellate Division held that registered nurses are exempt from overtime compensation under the New Jersey Wage and Hour Law (NJWHL), N.J.S.A. 34:11-56a1 to 56a30, even if paid on an hourly basis, because they fall within the “professional” exemption. *Anderson v. Phoenix Health Care, Inc.*, A-2607-10T2 (N.J. App. Div. Nov. 16, 2011). The court further held that, even if registered nurses were not exempt, a claim for overtime compensation may nevertheless fail under the NJWHL’s good-faith exception, N.J.S.A. 34:11-56a25.2, if the employer establishes that it conformed to the Division of Wage and Hour Compliance’s “longstanding interpretation that registered nurses are not entitled to overtime so long as they are compensated in excess of the weekly minimum” salary required for exemption.

An employer’s obligation to pay overtime wages is a component of New Jersey’s minimum wage law, which was enacted “to establish a minimum wage level for workers in order to safeguard

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their health, efficiency, and general well-being[.]” See *Marx v. Friendly Ice Cream Corp.*, 380 N.J. Super. 302 (App. Div. 2005). The NJWHL requires that employers pay one-and-one-half times an employee’s hourly wage for each hour worked in excess of 40 hours per week. Excepted from this general rule are individuals employed in a bona fide executive, administrative, professional or outside sales capacity. N.J.A.C. 12:56-7.1.

Under N.J.A.C. 12:56-7.3(a), which was in effect until mid-2011, a professional was defined as an employee whose primary duties consisted of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education, and who is compensated not less than \$400 per week. The regulation, however, has since been superseded by regulations promulgated in August 2011 that adopted the federal regulations under the federal Fair Labor Standards Act (FLSA). N.J.A.C. 12:56-7.2(a); 43 N.J.R. 2353.

The newly promulgated regulations define a “professional” as an employee: (1) whose primary duty consists of the performance of work that requires knowledge of an advanced type in a field of science or learning customarily ac-

quired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual or physical processes; (2) whose work requires the consistent exercise of discretion and judgment in its performance; and (3) whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work) and is of such a character that the output produced or the result accomplished cannot be standardized to a given period of time; (4) who devotes less than 20 percent of his or her workweek to nonexempt work; and (5) who is compensated for his or her services on a salary or fee basis at a rate of not less than \$400 per week. N.J.A.C. 12:56-7.3.

In *Anderson*, the plaintiffs, registered nurses formerly employed by Phoenix Health Care, Inc., filed a putative class action seeking relief for overtime compensation under the NJWHL. The plaintiffs moved for class certification and the defendants cross-moved for summary judgment, arguing that registered nurses are exempt from the overtime requirements and asserting that the plaintiffs’ claims were otherwise barred by the NJWHL’s good-faith defense. The trial judge granted the defendants’ cross-motion, and the plaintiffs appealed.

On appeal, the court affirmed dismissal of the plaintiffs’ NJWHL claim despite the plaintiffs’ argument that they were not exempt because they were paid on an hourly, not salaried, basis. The court reasoned that although the appli-

cable regulation did not expressly exempt professionals paid on an hourly basis, such as a majority of registered nurses, “the NJWHL was not intended to permit overtime to such employees when they are compensated at least as much as the weekly minimum referred to in N.J.A.C. 12:56-7.3(a)(5).” The court also held that summary judgment was appropriate based upon the NJWHL’s good-faith exception because the defendants conformed to the division’s “longstanding interpretation that registered nurses are not entitled to overtime so long as they are compensated in excess of the weekly minimum.”

In a footnote, the court recognized that N.J.A.C. 12:56-7.3 was superseded by regulations adopting the federal regulations under the FLSA. The court stated that it was not opining as to whether the result would be the same under the newly adopted regulations.

Like the NJWHL, the FLSA requires employers to pay their employees at least one-and-a-half times their regular wage rate when the employee works in excess of 40 hours in a given work week. 29 U.S.C. 207(a)(1). The FLSA,

however, exempts from this requirement any employee employed in a bona fide executive, administrative or professional capacity, as such terms are defined and delimited by regulations of the secretary. 29 U.S.C. 213(a)(1).

The regulations state that the term “professional” generally “includes those professions which have a recognized status and which are based on the acquirement of professional knowledge through prolonged study.” 29 C.F.R. 541.300. In pertinent part, the regulations state that “[r]egistered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption but licensed practical nurses generally do not qualify as exempt learned professionals.” 29 C.F.R. 541.301(e)(2).

In order for a registered nurse to be exempt under the FLSA, the registered nurse must be paid on a salary basis. See 29 C.F.R. 541.600(e) (stating that the salary requirement applies to nurses); *Anani v. CVS Rx Servs.*, 788 F.Supp.2d 55 (E.D.N.Y. 2011) (registered nurses perform exempt duties and question as to whether they are, in fact, exempt turns on

whether they are paid on a salary basis). Therefore, an employee comes within the exception if they are considered a professional and paid on a salary basis.

Employers should proceed with caution as a result of the court’s decision in *Anderson*, specifically because it construed regulations that have been superseded. If New Jersey courts continue to follow this ruling under the newly promulgated regulations, it may lead to inconsistent results under the NJWHL and FLSA. It is clear that registered nurses paid on a salary basis will likely qualify under the professional exemption under both the NJWHL and the FLSA.

It remains unclear, however, whether registered nurses paid on an hourly basis will be found exempt under the NJWHL. If New Jersey courts follow the FLSA regulations, as the newly promulgated New Jersey regulations state they will, registered nurses paid on an hourly basis will not be found exempt under the NJWHL. If, however, the decision in *Anderson* is followed under the new regulations, then registered nurses paid on an hourly basis will likely be found to be exempt under the NJWHL. ■