

FILED

JAN 16 2018

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

CASE NO. 353931

COURT OF APPEALS, STATE OF WASHINGTON,
DIVISION III

KIMBERLY KITTLE and LEAH WESTBY

Plaintiffs/Respondents,

vs.

RIVERVIEW LUTHERAN CARE CENTER, ET AL.

Defendants/Appellants

APPELLANTS RIVERVIEW'S OPENING BRIEF

James M. Kalamon, WSBA No. 7922
Dale A. De Felice, WSBA No. 21373
Paul S. Stewart, WSBA No. 45469
PAINE HAMBLEN LLP
717 West Sprague, Suite 1200
Spokane, WA 99201-3505
Telephone: 509-455-6000
Facsimile: 509-838-0007
Attorneys for Appellants Riverview

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I. INTRODUCTION

Defendant-Appellant Riverview Lutheran Care Center, d/b/a Riverview Care Center and Riverview Lutheran Home of Spokane, Washington, d/b/a Riverview Terrace (“Riverview”) calculates its nursing employees’ overtime wages based on an 80-hour workweek. This method of calculating overtime is expressly authorized by the federal Fair Labor Standards Act to accommodate the unique scheduling needs of residential care centers that provide around-the-clock care to residential patients.

Plaintiffs-Respondents are former nursing employees of Riverview who have initiated a class action lawsuit against Riverview. Plaintiffs allege, inter alia, that Riverview failed to pay its employees overtime based on a 40-hour workweek. Plaintiffs cite Riverview’s overtime policy as providing a factual and legal question common to all class members, which makes their case amenable to class treatment.

Through a Motion for Partial Summary Judgment, Riverview sought to establish that its overtime policy is valid as a matter of law. The trial court denied Riverview’s Motion based on issues it perceived to be questions of fact. Riverview appeals that ruling.

II. STATEMENT OF THE CASE

Riverview is a Washington non-profit corporation that has been doing business as a residential care establishment since 1959. Clerk's Papers (CP) at 15. Plaintiffs-Respondents Kimberly Kittle, RN, and Leah Westby, NAC ("Plaintiffs"), are former nursing employees of Riverview. Supp. CP.¹ (Class Action Complaint, p. 2, ¶¶ 1.1, 1.2).

Plaintiffs filed a class action lawsuit against Riverview on behalf of themselves and other former and current nursing employees of Riverview. *Id.* Plaintiffs allege, inter alia, that Riverview failed to pay its employees for all hours worked, including overtime. *Id.* (Class Action Complaint, p. 4, ¶ 3.4; p. 7, ¶¶ 6.2-6.9). Plaintiffs also allege that Riverview's overtime policy violates Washington law. *Id.* (Class Action Complaint, p. 7, ¶ 6.7). Specifically, Plaintiffs allege that Riverview's overtime policy fails to comport with RCW 49.46.130 because the policy is based on an 80-hour workweek, not a 40-hour workweek. *Id.* (Class Action Complaint, p. 7, ¶ 6.4).

Since at least 2003, Riverview's overtime policy is to pay overtime based on hours worked by employees in excess of eight hours in any

¹ On December 19, 2017, Riverview filed a Supplemental Designation of Clerk's Papers to include the Class Action Complaint and First Amended Complaint. Plaintiffs' First Amended Complaint adds an additional named plaintiff, Erika Malitzky, but is otherwise substantively identical to Plaintiffs' initial Class Action Complaint.

workday or in excess of 80 hours in a 14-day pay period. CP at 15, 19. This type of overtime policy is commonly referred to as an “8 and 80” or “8/80” overtime policy. The Fair Labor Standards Act (FLSA) expressly authorizes hospitals and “establishments engaged in care of sick, aged, and mentally ill” to utilize an 8/80 policy as long as employers and employees have an “agreement or understanding” about the policy prior to the employee beginning work. 29 U.S.C. § 207(j).²

Riverview’s 8/80 overtime policy is set forth in its Personnel Manual, which it provides to all of its employees prior to the employees beginning work. CP at 15-16, 19; *see also* CP at 39-136 (complete Personnel Manual). When Plaintiffs Kittle and Westby began working for Riverview in 2011, they signed acknowledgements that they had read the Personnel Manual in its entirety and fully understood it. *Id.* at 21, 23. Plaintiffs Kittle and Westby admitted in their depositions that they understood Riverview paid overtime in accordance with its 8/80 policy. CP at 153, 156-57. In their initial Complaint and First Amended Complaint, Plaintiffs allege that the Personnel Manual constituted a “contract” between Riverview and Plaintiffs. Supp. CP. (Class Action Complaint, p. 8, ¶ 7.2; First Amended Class Action Complaint, p. 8, ¶7.2).

² *See* Appendix for full text of 29 U.S.C. § 207.

Riverview filed a Motion for Partial Summary Judgment seeking to establish, as a matter of law, that its 8/80 overtime policy was valid under state and federal law. CP at 1-23. Plaintiffs opposed the Motion on the basis that “issues of fact exist on whether the parties mutually agreed on the 80 hour pay period for overtime purposes.” CP at 25.

In an oral ruling, the trial court denied Riverview’s Motion for Partial Summary Judgment. The trial court concluded that there were genuine issues of material fact as to whether Riverview and Plaintiffs reached an “agreement or understanding” concerning Riverview’s 8/80 policy. Verbatim Report of Proceedings (VRP) at 5-6. In reaching this decision, the trial court cited to disclaimer language contained in Riverview’s Personnel Manual that stated that the policies contained in the manual were “guideline[s] . . . which Riverview may or may not follow at its sole discretion.” *Id.* at 6-7. The trial court found this disclaimer language determinative. *See id.* at 7-8 (“[I]t’s not considered an understanding arrived at when one of the two parties is able to rescind the understanding in its sole discretion or at will.”).

Riverview moved for reconsideration of the trial court’s denial of summary judgment. CP at 171-73. The trial court denied Riverview’s motion for reconsideration via a Letter Ruling. CP at 197-200. In its Letter Ruling, the trial court stated that partial summary judgment was not

appropriate because the “agreement or understanding” regarding overtime had to be “mutual.” *Id.* at 200.

Riverview appealed the trial court’s denial of its Motion for Reconsideration of its Motion Partial Summary Judgment and this Court accepted discretionary review. CP at 223-34; Order (1) Granting in Part and Denying in Part Motion to Determine Appealability and (2) Granting Discretionary Review, Dec. 14, 2017.

III. ASSIGNMENTS OF ERROR

The trial court erred in denying Riverview’s Motion for Partial Summary Judgment upon finding that there were genuine issues of material fact whether Riverview and its employees reached an “agreement or understanding” under 29 U.S.C. § 207(j). The trial court erroneously concluded that whether the parties reached an “agreement or understanding” involved questions of fact concerning (1) whether Plaintiffs mutually consented to Riverview’s 8/80 overtime policy, and (2) whether the existence of discretionary language contained in Riverview’s Personnel Manual negated the possibility that the parties reached an “agreement or understanding.”

IV. STANDARD OF REVIEW

An appellate court reviews a grant or denial of summary judgment de novo, performing the same inquiry as the trial court. *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006).

Summary judgment is proper only if there is no genuine issue of material fact. CR 56(c). A party moving for summary judgment bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the defendant shows an absence of evidence to establish the plaintiff's case, the burden then shifts to the plaintiff to set forth specific facts showing a genuine issue of material fact exists. *Id.* In response to a motion for summary judgment, the non-moving party must produce more than mere speculation and unsupported assertions to defeat the motion. *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359-61, 753 P.2d 517 (1988). When reasonable minds can reach but one conclusion, questions of fact may be determined as a matter of law. *Ruff v. King County*, 125 Wn.2d 697, 704, 887 P.2d 886 (1995). The purpose of summary judgment is to avoid a useless trial. *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963).

V. ARGUMENT

Under Washington's Minimum Wage Act (MWA), employers must generally pay employees one and one half times their regular rate for any hours worked over 40 hours in a week. RCW 49.46.130(1); *see also* 29 U.S.C. § 207(a)(1) (FLSA setting forth same general rule). The MWA does not apply, however, to "[a]ny industry in which federal law provides for an overtime payment based on a workweek other than forty hours." RCW 49.46.130(2)(h).³

Under the FLSA, hospitals and "establishments engaged in care of sick, aged, and mentally ill" are not required to calculate overtime based on a 40-hour workweek. Instead, such employers may calculate overtime based on hours worked by employees in excess of eight hours in any workday or in excess of 80 hours in a 14 day pay period as long as employers and employees have an "agreement or understanding" about the policy prior to the employee beginning work. 29 U.S.C. § 207(j).

The Washington Department of Labor & Industries, the agency responsible for overseeing and administering the MWA, recognizes the

³ Page 9 of this Administrative Policy states:

Hospitals and residential care establishments that pursuant to a prior agreement or understanding with their employees, utilize a fixed workweek period of 14 consecutive days in lieu of the workweek for the purpose of computing overtime, *if* they pay one and one-half times the regular rate for hours worked over eight in any workday, or 80 in the 14-day period, whichever is the greater number of hours.

FLSA, and specifically the exemption created by 29 U.S.C. § 207(j), as a federal law that provides an overtime payment scheme based on a workweek other than 40 hours. Wash. Dep't. of Labor & Inds. Administrative Policy ES.A.8.1, § 8(h), at 9 (rev. July 15, 2014) *available at* <http://www.lni.wa.gov/WorkplaceRights/files/policies/esa81.pdf> (last visited Dec. 28, 2017).

In this case, Plaintiffs have not disputed that the FLSA is a federal law that provides for an overtime payment based on a workweek other than forty hours. Plaintiffs further have not disputed that Riverview is a “residential care establishment” as defined by 29 U.S.C. § 207(j). Thus, the only issue presented is whether there was an “agreement or understanding” between Riverview and its employees concerning the 8/80 policy.

The trial court denied Riverview’s Motion for Partial Summary Judgment upon finding two issues of material fact: (1) whether Riverview’s employees mutually consented to the 8/80 policy, and (2) whether the existence of discretionary language contained in Riverview’s Personnel Manual might negate an “agreement or understanding” reached by the parties. These “factual” issues, however, are not material to whether the parties reached an “agreement or understanding” under 29 U.S.C. § 207(j). The *material* facts of the case

are undisputed and trial court's grounds for denying Riverview's Motion for Partial Summary Judgment are contrary to state and federal law. This Court should reverse, and enter judgment in favor of Riverview declaring that its 8/80 overtime policy is valid as a matter of law and dismissing Plaintiff's claim for failure to pay overtime compensation.

A. The Trial Court Erred in Finding that It Is Necessary for An Employee and His or Her Employer to Mutually or Expressly Consent to An 8/80 Policy Under 29 U.S.C. § 207(j); To the Contrary, an "Agreement or Understanding" Exists when the Employer Provides Clear Notice of the Policy Prior to the Employee Starting Work, Pays Overtime in Accordance with the Policy, and/or Includes the Policy in an Employee Handbook Provided to the Employee Prior to Beginning Work.

Enacted in 1938, the FLSA "set up a comprehensive legislative scheme" in part to prevent the production of goods under labor conditions that were "detrimental to the maintenance of the minimum standards of living necessary for health and general well-being." *United States v. Darby*, 312 U.S. 100, 109, 61 S. Ct. 451, 85 L. Ed. 609 (1941). The FLSA prohibits child labor, requires overtime pay for certain jobs, and establishes a minimum wage. 29 U.S.C. §§ 203, 206, 207. The FLSA was enacted "to ensure that each covered employee would receive a fair day's pay for a fair day's work and would be protected from the evil of overwork as well as underpay." *Williamson v. Gen. Dynamics Corp.*, 208

F.3d 1144, 1150 (9th Cir. 2000) (internal quotation marks and alterations omitted).

Under 29 U.S.C. § 207(j), hospitals and “establishments engaged in care of sick, aged, and mentally ill” may use an 80 hour workweek to calculate overtime, i.e., an 8/80 overtime policy, as long as employers and employees have an “agreement or understanding” about the policy prior to the employee beginning work. *See also* 29 C.F.R. § 778.601(c). The purpose of the exemption created by § 207(j) has been stated as follows:

Because hospitals must operate around the clock, they frequently need to schedule workers for a series of consecutive days before giving them days off or for shifts that have fewer than two intervening shifts between scheduled work periods. Because of unexpected high occupancy rates at certain times, hospitals need to schedule more workers for a series of days and allow them days off when the occupancy rate falls. The special exception reserved for hospitals is intended to reflect the manner in which a hospital operates.

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The FLSA does not define “agreement or understanding.” Thus, the question presented in this case turns on principles of statutory interpretation. The phrase “agreement or understanding” is not ambiguous and the plain meaning of the phrase requires only that health care employees grasp or comprehend an 8/80 overtime policy; they do not have

to mutually or expressly consent to it. Agency guidance and judicial interpretation of related statutes support the same conclusion. That is, an “agreement or understanding” exists when a health care employer provides clear notice of the policy prior to employees starting work, pays overtime in accordance with the policy, and includes the policy in an employee handbook provided to the employee prior to beginning work.

1. The meaning of the terms “agreement” and “understanding” is unambiguous; there is no genuine issue of material fact that Plaintiffs had an “understanding” of Riverview’s 8/80 overtime policy prior to beginning work for Riverview.

The starting point for an issue involving the meaning and application of a statute is the statute’s plain language. *State Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Washington courts “may use a dictionary to discern the plain meaning of an undefined statutory term.” *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 881, 357 P.3d 45 (2015).

Merriam-Webster defines “agreement” as a “harmony of opinion, action, or character,” and “[a]n arrangement as to a course of action,” and “a contract duly executed and legally binding.” <https://www.merriam-webster.com/dictionary/agreement> (last visited Dec. 26, 2017). Merriam-Webster defines “understanding” as “a mental grasp” and “the power of

comprehending.” <https://www.merriam-webster.com/dictionary/understanding> (last visited Dec. 26, 2017).

Thus, the plain meaning of the phrase “agreement or understanding” as used in 29 U.S.C. § 207(j) requires only that an employer and employee understand, i.e., grasp or comprehend, an 8/80 overtime policy for the policy to be effective. (Because an “understanding” suffices to meet the statutory criteria, an employer does not need to prove that it had an “agreement” with its employees to satisfy 29 U.S.C. § 207(j).)

Only one federal district court has analyzed whether an employer and employee reached an “agreement or understanding” regarding overtime pay pursuant to an 8/80 policy under 29 U.S.C. § 207(j). *Duff-Brown v. City & Cty. of San Francisco, California*, 2014 WL 2514555 (N.D. Cal. June 4, 2014). In *Duff-Brown*, plaintiffs brought a class action suit against their employer, a public mental health institution, alleging unpaid overtime pay. *Id.* at *1. The institution paid plaintiffs pursuant to an 8/80 policy. *Id.* The institution moved for summary judgment on the issue of whether an “agreement or understanding” was reached regarding the policy. *Id.*

The adoption of the 8/80 policy by the employer in *Duff-Brown* was not entirely clear because the policy came about through several

sessions of union negotiations spanning the course of two months. *Id.* Apparently, there was neither a written policy, nor formal notice given to employees, nor an explanation of overtime policy contained in an employment handbook. To determine the plain meaning of an “agreement or understanding,” the federal district court turned to Black’s Law Dictionary: “Black’s Law Dictionary defines an ‘agreement’ as a ‘mutual understanding between two or more persons about their relative rights and duties,’ and an ‘understanding,’ as an ‘agreement, esp[ecially] of an implied or tacit nature.’” *Id.* at *3 (citation omitted).⁴

In concluding that the plaintiffs and the mental health institution reached an “agreement or understanding,” as a matter of law, the court cited to plaintiffs’ deposition testimony in which the plaintiffs admitted that they had agreed to a 14-day, 8/80 overtime policy. *Id.* at *3. The court rejected plaintiffs’ arguments that there was a genuine issue of material fact because the plaintiffs did not sign waivers. *Id.* at *4. The court also rejected plaintiffs’ argument that “the absence of a written contract precludes the [institution] from establishing that an agreement existed.” *Id.*

⁴ The Washington Supreme Court has counseled against using Black’s Law Dictionary to ascertain the common meaning of a statutory term. *Lynott v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn.2d 678, 701–02, 871 P.2d 146 (1994) (Guy, J., dissenting) (“The use of a legal dictionary, which by title and common sense indicates that it will contain a legal or technical meaning, is inappropriate unless the party proposing the legal definition proves that it was clear to both parties that a legal meaning was intended.”).

at *5. The Court remarked, “[29 U.S.C. § 207(j)’s] language requires merely an “agreement or understanding” and does not explicitly require a written contract.” *Id.*

In this case, the meaning of the phrase “agreement or understanding” is plain. Moreover, as applied to the facts of this case, it is undisputed that Plaintiffs “grasped” or “comprehended” that Riverview paid them pursuant to the 8/80 overtime policy. Riverview’s evidence is similar to, but even more indicative of an “understanding,” than the evidence put forth by the mental health institution in *Duff-Brown*. In *Duff-Brown*, the employees admitted that they understood the institution was adopting an 8/80 overtime policy, even though there was no written policy or formal notice given to employees. 2014 WL 2514555 at *3. Plaintiffs Kittle and Westby likewise admitted at deposition that Riverview paid overtime based on an 8/80 policy. CP at 153, 156-57. In addition, the 8/80 policy is clearly set forth in Riverview’s Personnel Manual, which Plaintiffs Kittle and Westby both acknowledged receiving prior to beginning their employment at Riverview. *Id.* at 21, 23. *Cf. Duff-Brown*, 2014 WL 2514555 at *3-5 (no written policy or waivers signed by employees). Under the plain meaning of the term “understanding,” there is

no genuine issue of material fact that Plaintiffs “understood,” i.e., grasped or comprehended, that Riverview paid them pursuant to an 8/80 policy.⁵

2. Agency interpretation of 29 U.S.C. § 207(j) supports that an employee’s mutual or express consent is not required for employers and employees to reach an “agreement or understanding.”

Assuming for purposes of analysis only that the phrase “agreement or understanding” is ambiguous, this Court should interpret the phrase in accordance with guidance provided by the U.S. Department of Labor, Wage & Hour Division (“DOL”). An agency’s interpretation of law is entitled to deference “to the extent that it falls within the agency’s expertise in a special area of the law.” *Plum Creek Timber Co. v. State Forest Practices Appeals Bd.*, 99 Wn. App. 579, 588, 993 P.2d 287 (2000).

DOL, the federal agency charged with enforcing the FLSA, interprets “agreement or understanding” in a way that does not require an employee’s mutual or express consent. The DOL Field Operations Handbook provides:

⁵ Arguably, Riverview and its employees also reached an “agreement,” 29 U.S.C. § 207(j), concerning the 8/80 policy. Plaintiffs allege in their Complaint that Riverview’s Personnel Manual created a “contract.” Supp. CP. (Class Action Complaint and First Amended Complaint, p. 8, ¶ 7.2). Plaintiffs cannot both allege that the Personnel Manual creates a contract and also argue that Riverview and its employees did not reach an “agreement” concerning the policies contained in the Personnel Manual. The Court need not reach this issue, however, because Riverview need only show the existence of an “understanding.”

An agreement or understanding may be presumed to exist for the purposes of [29 U.S.C. § 207(j)] with respect to any employee who accepts payment of wages pursuant to notice by the hospital that compensation will be made according to [29 U.S.C. § 207(j)]. **Posting a notice on a bulletin board or advising employees by means of payroll inserts constitutes sufficient notification for this purpose.**

DOL Field Operations Handbook, Chp. 25h Other Exemptions, *available at* https://www.dol.gov/whd/FOH/FOH_Ch25.pdf (last visited Dec. 28, 2017) (emphasis added.)

Under the DOL’s interpretation of “agreement or understanding” under 29 U.S.C. § 207(j), employees and employers do not need to mutually or expressly consent to payment under an 8/80 policy as found by the trial court in this case. It is sufficient that the employer provide notice of the policy to the employee and the employee accept wages pursuant to the policy. This Court should interpret 29 U.S.C. § 207(j) consistent with this agency guidance to find that Plaintiffs did not need to mutually or expressly consent to Riverview’s 8/80 overtime policy as a prerequisite to reaching an “agreement or understanding.”

3. Judicial interpretation of other FLSA overtime provisions that require an “agreement or understanding” supports that employees’ mutual or express consent is not required for employers and employees to reach an “agreement or understanding.”

Assuming for purposes of analysis only that the phrase “agreement or understanding” is ambiguous, the phrase should be

interpreted consistent with other times the phrase is used under the FLSA. If the meaning of the language is ambiguous, courts should “examin[e] the statute as a whole, or a statutory scheme as a whole . . .” *Dep’t of Ecology*, 146 Wn.2d at 10; *see also State ex rel Peninsula Neighborhood Ass’n v. Dep’t of Transp.*, 142 Wn.2d 328, 343, 12 P.3d 134 (2000) (“Statutes are to be read together, whenever possible, to achieve a harmonious total statutory scheme . . . which maintains the integrity of the respective statutes.”) (Internal quotation marks omitted). The phrase “agreement or understanding” is used in several other provisions of the FLSA. *See, e.g.*, 29 U.S.C. § 207(g) (employment at piece rates); 29 U.S.C. § 207(o) (public employees compensatory time off in lieu of monetary payment); 29 C.F.R. § 778.114 (fluctuating workweek payment plan).

Courts interpreting these other FLSA provisions using the phrase “agreement or understanding” universally hold that employers and employees reach an “agreement or understanding” regarding the employer’s overtime policy when the employer provides clear notice of the policy, pays overtime in accordance with the policy, and/or includes the policy in an employee handbook provided to the employee prior to beginning work (all of which occurred in the instant case). Failure to find that an “agreement or understanding” under 29 U.S.C. § 207(j) is reached

under the circumstances of the case at bar would result in an interpretation of 29 U.S.C. § 207(j) that is not in harmony with related statutes.

a. *“Agreement or understanding” under 29 U.S.C. § 207(g) (employment at piece rates).*

29 U.S.C. § 207(g) provides for a “piece-rate” compensation plan, under which employers are not required to pay overtime at the rate of one and one-half times the regular rate of pay. To implement such a plan “an **agreement or understanding** [must be] arrived at between the employer and the employee before performance of the work.” *Id.* (Emphasis added).

In *Amador v. Guardian Installed Servs., Inc.*, 575 F. Supp.2d 924, 927 (N.D. Ill. 2008), plaintiff insulation installers sued their employer under the FLSA for failure to pay overtime wages. Plaintiffs were originally paid an hourly rate and overtime. *Id.* The employer later decided to implement a “piecework” program under which the employees were paid pursuant to “a commission-based system using team production footage.” *Id.* The employer told all employees of the new piecework program six months before it was implemented. The employer circulated a memorandum seeking employees’ signatures to acknowledge the change in compensation programs. The plaintiffs did not sign the memorandum because they did not agree with the pay rate. Plaintiffs assumed that, by not signing the memorandum, they would continue to be paid on an hourly

basis. The district court granted summary judgment in the employer's favor finding as follows:

[T]he parties agree that [the employer] notified plaintiffs in advance on two occasions that it was going to implement the piecework program [and] that, before the piecework program was implemented, plaintiffs were provided with an example explaining it and the method of compensation, which was read aloud to the installers. After the piecework program took effect, plaintiffs spoke to [their employer] about their belief that they were not being properly paid. Plaintiffs worked overtime hours and accepted pay under the piecework compensation structure, and continued to do so for approximately seven months from the time when the piecework program took effect . . . Based on the foregoing facts, I find that [employer's] piecework program was implemented based on an agreement or understanding reached before the work was performed. Although plaintiffs may have been dissatisfied with piecework compensation, they were informed prior to performing the work that they would be compensated in this fashion.

Id. at 929–30.

All that is required under 29 U.S.C. § 207(g)'s "agreement or understanding" requirement is that the employee was notified of the compensation plan and was paid according to the compensation plan. *Amador*, 575 F. Supp.2d at 929-30. By analogy, 29 U.S.C. § 207(j)'s "agreement or understanding" requirement should be interpreted the same. Because Plaintiffs Kittle and Westby admitted receiving notification of Riverview's 8/80 policy and admitted they were paid in accordance with

the policy, CP at 21, 23, 153, 156-57, there was an “agreement or understanding” between Riverview and Plaintiffs.

b. “Agreement or understanding” under 29 U.S.C. § 207(o) (compensatory time).

Under another provision of the FLSA § 207, public employers may provide employees with compensatory time off in lieu of monetary payment so long as employers and employees reach “an **agreement or understanding** . . . before the performance of work.” 29 U.S.C. § 207(o)(2)(A)(ii) (emphasis added); *see also* 29 C.F.R. § 553.23(c)(1) (defining “agreement or understanding” for purposes of § 207(o)).

According to the Supreme Court, the agreement or understanding required by § 207(o), and further defined by the regulation, “need not be formally reached and memorialized in writing, but instead can be arrived at informally, such as **when an employee works overtime knowing that the employer rewards overtime with compensatory time.**” *Christensen v. Harris County*, 529 U.S. 576, 579 n. 1 (2000) (citing 29 C.F.R. § 553.23(c)(1)) (emphasis added); *accord Baker v. Stone County*, 41 F. Supp.2d 965, 992 (W.D. Mo. 1999); *Smith v. Upton County*, 859 F. Supp. 1504, 1509 (M.D. Ga. 1994), *aff’d*, 56 F.3d 1392 (11th Cir. 1995).

A court should summarily dismiss an employee’s unpaid overtime claim based on an alleged lack of “agreement or understanding” when the

employee admits he or she knew of the overtime policy, used the policy, and signed an acknowledgement of the policy. *E.g.*, *White v. Cty.*, 2015 WL 5047955, at *4–5 (E.D. Tex. Aug. 26, 2015), *report and recommendation adopted sub nom. White v. Denton Cty.*, 2015 WL 5766720 (E.D. Tex. Sept. 28, 2015), *aff'd*, 655 Fed. Appx. 1021 (5th Cir. 2016).

In *White*, the federal district court granted summary judgment in favor of the employer on plaintiff's claims of unpaid overtime against his former employer, the Denton County Sheriff's Office. 2015 WL 5047955, at *1. The County presented the following evidence of its overtime policy:

- Affidavit of human resources director that when a new employee is hired, he or she receives and acknowledges receipt of the County's Employee Handbook;
- Employee Acknowledgment form signed by Plaintiff stating that he had received and agreed to read and follow the County Handbook;
- A copy of Denton County Personnel Policy 3.3 for non-exempt employees, and a copy of the Denton County Handbook in effect at the time of Plaintiff's employment.
- Deposition testimony by Plaintiff agreeing that, assuming he received a copy of the Handbook, he would have been informed by the language in it that "overtime compensation could be in the form of monetary payment or compensatory time." Plaintiff also conceded that the County's personnel policy contained details on overtime pay and compensatory pay.

- An email to County employees, including Plaintiff, setting forth information about the County's modification to the manner in which it calculated accrued compensatory time.

Id. at *4.

In response to the County's evidence Plaintiff cited his own affidavit that he never agreed to accept compensatory time "in lie [sic] of overtime pay" and that he had sent an email to the County Treasurer complaining about how his overtime compensation time was being calculated. *Id.* at *5.

Based on this evidence, the Court found that there was no evidence in the record to demonstrate that the employee expressed any unwillingness to accept the compensatory time in lieu of pay until August 2012 (the time Plaintiff sent his email to the Treasurer) at the earliest. *Id.* Thus, the agreement or understanding was presumed to exist under Section 7(o). *Id.* (citing 29 C.F.R. § 553.23(a)(1)).

Again, in this case, 29 U.S.C. § 207(o) applies by analogy to 29 U.S.C. § 207(j) as both subsections require an "agreement or understanding" between employees and employers. Plaintiffs Kittle and Westby worked for Riverview knowing that Riverview pays overtime based on the 8/80 policy. Like the County in *White*, Riverview clearly states its overtime policy in its Personnel Manual and maintains signed copies of the acknowledgments signed by all its employees, including

Plaintiffs Kittle and Westby. CP at 21, 23. There is no evidence that Kittle and Westby objected to the 8/80 policy or being paid pursuant to that policy like the employee in *White*. Judicial interpretation of 29 U.S.C. § 207(o) compels the conclusion that Riverview and its employees had an understanding about the 8/80 overtime policy.

c. “Clear mutual understanding” under 29 C.F.R. § 778.114(a) (*fluctuating workweek*).

29 C.F.R. § 778.114(a) provides that certain employees may be paid based on a fluctuating workweek, rather than a 40 hour workweek, so long as “there is a clear mutual understanding of the parties” regarding the compensation scheme.⁶ “Section 778.114 does not represent an ‘exception’ to FLSA. It merely provides an alternative means by which an employer can determine its employees’ regular and overtime rate of pay.” *Flood v. New Hanover County*, 125 F.3d 249, 252 (4th Cir. 1997).

In *Griffin v. Wake Cty.*, 142 F.3d 712, 714 (4th Cir. 1998), a class of emergency medical technicians (EMTs) employed by Wake County, North Carolina, alleged that the County erroneously paid them a half-time overtime premium according to the “fluctuating workweek” pay plan rather than the standard time-and-a-half overtime compensation under the FLSA, 29 U.S.C. § 207(a)(1). The district court granted summary judgment in favor of the County and the Fourth Circuit affirmed.

⁶ See Appendix for full text of 29 C.F.R. § 778.114.

The EMTs alleged that the County “unilaterally imposed” the fluctuating workweek pay plan and they (the EMTs) lacked a “clear mutual understanding” of the plan. *Id.* at 715-16. The Fourth Circuit found that “this argument confuses understanding with agreement, and the regulation speaks only in terms of the former.” *Id.* at 716. The Court was “unable to find . . . any case in which a court has required that employees consent to the fluctuating workweek plan to satisfy section 778.114—employees need only understand it.” *Id.* In reviewing the evidence of the understanding of the plan, the Court noted that “the County took pains to explain [the plan] to employees” at employee meetings and in memoranda circulated among employees. *Id.* Further, County employees signed an acknowledgement pertaining to the fluctuating workweek pay plan, which the Court noted, “is certainly probative of the employees’ clear understanding of the fluctuating workweek plan.” *Id.* (citation omitted). Finally, the Court found significant that the County implemented the “fluctuating workweek plan nearly eight years ago.” *Id.* The Court commented:

In these eight years the EMTs have not identified a single instance of the County paying an EMT less than his full salary for a week in which he performed any regular work. Thus, since 1990, **the EMTs have received a regular lesson-in the form of their paychecks-about how the fluctuating workweek plan operates.** This circuit noted in [an earlier decision] that an employer can also demonstrate

the existence of this clear mutual understanding from employment policies, practices, and procedures. . . . The EMTs lived with the fluctuating workweek plan for nearly six years before filing this lawsuit in 1996. Thus it is clear from [the EMTs'] actions that [they] understood the payment plan . . .

Id. at 716–17 (emphasis added) (internal quotation marks and citations omitted).

The Court further rejected the EMTs' claim that the pay plan was confusing and that some supervisors misunderstood the details of overtime calculation under the plan. *Id.* at 717.

[T]his argument reads too much into the requirement of a “clear mutual understanding” outlined in section 778.114. . . . Neither the regulation nor the FLSA in any way indicates that an employee must also understand the manner in which his or her overtime pay is calculated. . . . That is to say, **the regulation does not require an employer to make all employees personnel specialists.** Further, we do not find that the FLSA places the burden on the employer **to hold an employee's hand** and specifically tell him or her precisely how the payroll system works, particularly “if that **fact can be easily gleaned from employment policies, practices, and procedures . . .** It is enough if, as here, the employer provide[d] its employees with a **reasonably clear and accurate explanation of their compensation, . . . and paid its employees according to that system of compensation . . .**

Id. (emphasis added) (internal quotation marks and citations omitted).

In this case, it cannot be disputed that Riverview “provided its employees with a reasonably clear and accurate explanation of their compensation . . . and paid its employees according to that system of

compensation.” *Id.* at 717 (internal citations and alterations omitted). *Cf.* CP at 19, 153, 156-57. Riverview was not required to make its employees “personnel specialists” or to tell each employee precisely how Riverview’s payroll system works as the processes can be easily gleaned from Riverview’s Personnel Manual and payroll practices. *See Griffin*, 142 F.3d at 714. Judicial interpretation of 29 C.F.R. § 778.114(a) (which in fact poses a higher standard, “**clear mutual** understanding”) suggests that Riverview and its employees had an “understanding” about the 8/80 overtime policy.

In conclusion, the trial court erred in denying Riverview’s Motion for Partial Summary Judgment based on its finding that there were genuine issues of material fact as to whether Riverview and its employees “mutual[ly]” agreed to the 8/80 overtime policy. CP at 200. Pursuant to the plain meaning of the term “understanding,” 29 U.S.C. § 207(j), there are no genuine issues of material fact that Plaintiffs grasped or comprehended that Riverview used an 8/80 overtime policy. CP at 21, 23, 153, 156-57. Assuming for purposes of analysis only that 29 U.S.C. § 207(j) is ambiguous, guidance provided by DOL and decisions of federal courts interpreting other FLSA provisions further support that an “agreement or understanding” exists when an employer provides notice of the policy to its employees and pays in accordance with the policy. This

Court should find, under the undisputed material facts of this case, that Riverview and Plaintiffs had an “agreement or understanding” concerning Riverview’s 8/80 policy.

B. The Trial Court Erred in Finding that Discretionary Language Contained in Riverview’s Personnel Manual Might Negate the Existence of an “Agreement or Understanding.”

In denying Riverview’s Motion for Partial Summary Judgment, the trial court erroneously found that discretionary language contained in Riverview’s Personnel Manual created a genuine issue of material fact as to the existence of an “agreement or understanding” under 29 U.S.C. § 207(j). *See* CP at 7-8 (“[I]t’s not considered an understanding arrived at when one of the two parties is able to rescind the understanding in its sole discretion or at will.”). This finding is not supported by Washington law and the discretionary language contained in Riverview’s Personnel Manual does not create a genuine issue of material fact as to whether the parties reached an “agreement or understanding.”

It is well established that an employer can unilaterally amend or revoke policies and procedures established in an employee handbook. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 229, 685 P.2d 1081 (1984). Where an employee retains employment with knowledge of new or changed conditions, although free to leave, the employee supplies the necessary consideration. *Gaglidari v. Denny’s Restaurants, Inc.*, 117

Wn.2d 426, 434, 435, 815 P.2d 1362 (1991). As noted by the Washington

State Supreme Court in *Thompson v. St. Regis Paper Co.*:

When the employment relationship is not evidenced by a written contract and is indefinite in duration, the parties have entered into a contract whereby the employer is essentially obligated to only pay the employee for any work performed. In this contractual relationship, **the employer exercises substantial control over both the working relationship and his employees by retaining independent control of the work relationship.** Thus, the employer can define the work relationship. Once an employer takes action, for whatever reasons, an employee must either accept those changes, quit, or be discharged. Because the employer retains this control over the employment relationship, **unilateral acts of the employer are binding on his employees and both parties should understand this rule.**

102 Wn.2d at 229 (emphasis added).

It is equally well-established that employers may reserve the right to modify policies or write them in a manner that retains discretion to the employer, therefore, disclaiming any promises of specific treatment and instead, merely making general statements of company policy. *Thompson*, 102 Wn.2d at 230-31.

In this case, Riverview's Personnel Manual states, inter alia,

These policies are designed to provide a guideline for the application of the opportunities, responsibilities, limitations, benefits and requirements of employment at Riverview.

...
THE MANUAL IS INTENDED AS A GUIDELINE FOR
MANAGEMENT AND EMPLOYEES WHICH

RIVERVIEW MAY OR MAY NOT FOLLOW IN ITS
SOLE DISCRETION.

...
Riverview reserves the right to add, delete, interpret or
otherwise modify any of the policies set forth in this
manual . . .

CP at 46.

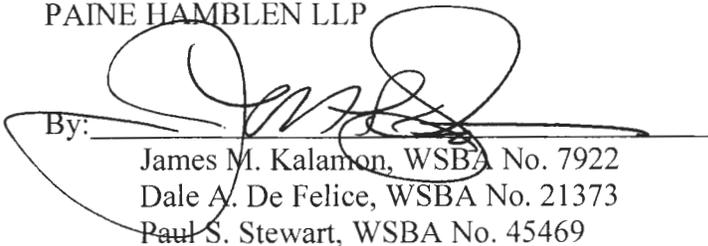
But this disclaimer language does not negate, or create a factual issue as to the existence of, an “agreement or understanding” between Plaintiffs and Riverview. Under *Thompson*, Riverview has the right and ability to unilaterally modify its employment policies. There is no evidence that Riverview has modified its policies regarding overtime compensation. In fact, Riverview’s overtime compensation policy has remained unchanged since at least 2003. CP at 15. As discussed *supra*, an “agreement or understanding” does not require the parties’ mutual consent. Likewise, the fact that Riverview may, at some point in time, alter or revoke its overtime policy does not mean that its employees are unable to “understand” the policy that is in place. The trial court erred in denying Riverview’s Motion for Partial Summary Judgment based on the existence of disclaimer language contained in Riverview’s Personnel Manual.

VI. CONCLUSION

For the foregoing reasons, Riverview respectfully requests that this Court reverse the trial court's denial of Riverview's Motion for Partial Summary Judgment, enter judgment in favor of Riverview declaring that its 8/80 overtime policy is valid as a matter of law, and dismiss Plaintiffs' claim for failure to pay overtime compensation.

DATED this 16th day of January, 2018.

PAINE HAMBLEN LLP

By: 

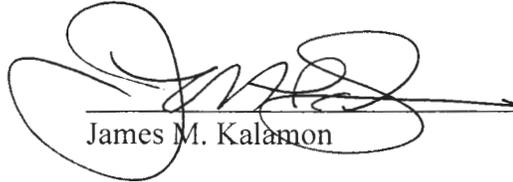
James M. Kalamon, WSBA No. 7922
Dale A. De Felice, WSBA No. 21373
Paul S. Stewart, WSBA No. 45469

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 2018, I caused to be served a true and correct copy of the foregoing, APPELLANTS RIVERVIEW'S OPENING BRIEF, by Hand Delivery and addressed to the following:

Kammi Mencke Smith
Benjamin H. Rascoff
Winston & Cashatt Lawyers
1900 Bank of America Financial Center
601 West Riverside Avenue
Spokane, WA 99201

Dated this 16th day of January, 2018 at Spokane, Washington.


James M. Kalamon

APPENDIX

Statute/Regulation	Pages
29 U.S.C. § 207	1-11
29 C.F.R. § 778.114	12-13

29 U.S.C. § 207(j) Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966--

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) Employment pursuant to collective bargaining agreement; employment by independently owned and controlled local enterprise engaged in distribution of petroleum products

No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed--

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be

employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty-hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if--

(A) the annual gross volume of sales of such enterprise is less than \$1,000,000 exclusive of excise taxes,

(B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale,

and such employee receives compensation for employment in excess of forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to him under section 206 of this title,

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c), (d) Repealed. Pub.L. 93-259, § 19(e), Apr. 8, 1974, 88 Stat. 66

(e) "Regular rate" defined

As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the

furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) Sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a)), where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek; or

(8) any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (1) through (7) if--

(A) grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee's participation in the program or at the time of the grant;

(B) in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death, disability, retirement, or a change in corporate ownership, or other circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

(C) exercise of any grant or right is voluntary; and

(D) any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are--

(i) made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or

(ii) made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.

(f) Employment necessitating irregular hours of work

No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this title (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

(g) Employment at piece rates

No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection—

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided*, That the rate so established shall be authorized by regulation by the Administrator as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

(h) Credit toward minimum wage or overtime compensation of amounts excluded from regular rate

(1) Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) shall not be creditable toward wages required under section 206 of this title or overtime compensation required under this section.

(2) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) shall be creditable toward overtime compensation payable pursuant to this section.

(i) Employment by retail or service establishment

No employer shall be deemed to have violated subsection (a) by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

(j) Employment in hospital or establishment engaged in care of sick, aged or mentally ill

No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who

reside on the premises shall be deemed to have violated subsection (a) if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(k) Employment by public agency engaged in fire protection or law enforcement activities

No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if--

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days, compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(l) Employment in domestic service in one or more households

No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a).

(m) Employment in tobacco industry

For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if such employee--

(1) is employed by such employer--

(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco,

(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

(2) receives for--

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.

(n) Employment by street, suburban or interurban electric railway, or local trolley or motorbus carrier

In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment.

(o) Compensatory time

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only--

(A) pursuant to--

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than--

(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) the final regular rate received by such employee, whichever is higher

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency--

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time,

shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) The hours an employee of a public agency performs court reporting transcript preparation duties shall not be considered as hours worked for the purposes of subsection (a) if--

(A) such employee is paid at a per-page rate which is not less than--

(i) the maximum rate established by State law or local ordinance for the jurisdiction of such public agency,

(ii) the maximum rate otherwise established by a judicial or administrative officer and in effect on July 1, 1995, or

(iii) the rate freely negotiated between the employee and the party requesting the transcript, other than the judge who presided over the proceedings being transcribed, and

(B) the hours spent performing such duties are outside of the hours such employee performs other work (including hours for which the agency requires the employee's attendance) pursuant to the employment relationship with such public agency.

For purposes of this section, the amount paid such employee in accordance with subparagraph (A) for the performance of court reporting transcript preparation duties, shall not be considered in the calculation of the regular rate at which such employee is employed.

(7) For purposes of this subsection--

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the terms "compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

(p) Special detail work for fire protection and law enforcement employees; occasional or sporadic employment; substitution

(1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the

calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency--

(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,

(B) facilitates the employment of such employees by a separate and independent employer, or

(C) otherwise affects the condition of employment of such employees by a separate and independent employer.

(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(3) If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(q) Maximum hour exemption for employees receiving remedial education

Any employer may employ any employee for a period or periods of not more than 10 hours in the aggregate in any workweek in excess of the maximum workweek specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if during such period or periods the employee is receiving remedial education that is--

(1) provided to employees who lack a high school diploma or educational attainment at the eighth grade level;

(2) designed to provide reading and other basic skills at an eighth grade level or below; and

(3) does not include job specific training.

(r) Reasonable break time for nursing mothers

(1) An employer shall provide--

(A) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk; and

(B) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.

(2) An employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose.

(3) An employer that employs less than 50 employees shall not be subject to the requirements of this subsection, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.

(4) Nothing in this subsection shall preempt a State law that provides greater protections to employees than the protections provided for under this subsection.

CREDIT(S)

(June 25, 1938, c. 676, § 7, 52 Stat. 1063; Oct. 29, 1941, c. 461, 55 Stat. 756; July 20, 1949, c. 352, § 1, 63 Stat. 446; Oct. 26, 1949, c. 736, § 7, 63 Stat. 912; Pub.L. 87-30, § 6, May 5, 1961, 75 Stat. 69; Pub.L. 89-601, Title II, §§ 204(c), (d), 212(b), Title IV, §§ 401 to 403, Sept. 23, 1966, 80 Stat. 835, 837, 841, 842; Pub.L. 93-259, §§ 6(c)(1), 7(b)(2), 9(a), 12(b), 19, 21(a), Apr. 8, 1974, 88 Stat. 60, 62, 64, 66, 68; Pub.L. 99-150, §§ 2(a), 3(a) to (c)(1), Nov. 13, 1985, 99 Stat. 787, 789; Pub.L. 101-157, § 7, Nov. 17, 1989, 103 Stat. 944; Pub.L. 104-26, § 2, Sept. 6, 1995, 109 Stat. 264; Pub.L. 106-202, § 2(a), (b), May 18, 2000, 114 Stat. 308; Pub.L. 111-148, Title IV, § 4207, Mar. 23, 2010, 124 Stat. 577.)

29 C.F.R. § 778.114 Fixed salary for fluctuating hours

(a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

(b) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose total weekly hours of work never exceed 50 hours in a workweek, and whose salary of \$600 a week is paid with the understanding that it constitutes the employee's compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 37.5, 50, and 48 hours, the regular hourly rate of pay in each of these weeks is \$15.00, \$16.00, \$12.00, and \$12.50, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid \$600; for the second week \$600.00; for the third week \$660 (\$600 plus 10 hours at \$6.00 or 40 hours at \$12.00 plus 10 hours at \$18.00); for the fourth week \$650 (\$600 plus 8 hours at \$6.25, or 40 hours at \$12.50 plus 8 hours at \$18.75).

(c) The “fluctuating workweek” method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the “fluctuating workweek” method of overtime payment are present, the Act, in requiring that “not less than” the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours,

compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.

CREDITS

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7310, Jan. 23, 1981; 76 FR 18857, April 5, 2011]

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