

First Circuit Analyzes Whether Employees' Fluctuating pay Meets FLSA's Salary Test

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A recent First Circuit decision demonstrates how, in determining whether employees meet the FLSA's salary requirement, courts can look at how the employees are actually paid rather than any theoretical payment plan in determining whether employees meet the salary requirement of the exemption tests. In the case, two employees who worked as project managers for Saint Consulting claimed that were misclassified as exempt employees because the way in which they were paid did not meet the minimum salary test required for an exemption under the FLSA.

The case, *Litz v. Saint Consulting Group, Inc.*, 2014 WL 5573352 (1st Cir. Nov. 4, 2014), involved two project managers who each earned well over \$100,000 per year. Their earnings were usually calculated by multiplying the number of hours they billed to clients times an hourly rate between \$40 and \$60. Additionally, Saint Consulting's compensation plan provided that project managers were guaranteed a minimum weekly salary of \$1,000 whether they billed any hours or not. Therefore, if a project manager's number of hours and hourly rate for a week exceeded \$1,000, the project manager would be paid the total of their billed hours times the hourly rate; however, if the total hours times hourly rate did not equal at least \$1,000, the project manager would still receive at least \$1,000 in compensation. It was undisputed that Saint Consulting always paid the \$1,000 stipend when the value of a project manager's billed hours did not exceed \$1,000.

The plaintiffs conceded that they always performed exempt duties and received at least \$100,000 in total annual compensation, and therefore the only issue was whether the \$1,000 stipend paid to satisfied the requirement that an exempt employee be paid at least \$455 per week "paid on a salary basis." The Court noted that three requirements are necessary for a payment to constitute a salary, which is that the compensation must be: (1) "a predetermined amount," (2) "constituting all or part of the employee's compensation," and (3) "not subject to reduction because of variation's in the quality or quantity of the work performed." The plaintiffs admitted that the stipend met the first two requirements, but claimed that their payment was subject to reduction due to a variation in the quantity or quality of work performed.

The trial court and appeals court both rejected the plaintiffs' argument. In so doing, the court found that because the evidence established that in practice the company had never paid any project manager less than \$1,000 for a week, certain communications from the company that implied that the stipend could be reduced below \$1,000 in theory did not negate the exemption. Specifically, **the court of appeals found** that without any evidence that Saint Consulting had an actual practice of reducing the \$1,000 stipend for any project manager, and with an undisputed record showing no project manager was paid less than the stipend amount, there was no evidence that the plaintiffs' pay was actually subject to improper deductions.

Additionally, the court rejected the argument that the fact that the company's paystubs showed hours times hourly rate but did not contain any express reference to hourly pay negated the exemption, because to so hold would elevate "form over substance, and simply ignore[] the economic reality of the guarantee." Moreover, just because the project managers were usually paid more than the minimum guarantee did not mean that the guarantee was not "part of the employee's compensation," and there was no reason to express the pay in a more complex formula when the project managers always received the requisite pay. Therefore, the Court concluded that the stipend constituted pay that was "predetermined" and "not subject to reduction because of variation's in the quality or quantity of the work performed," and consequently qualified as a payment on a "salary basis," which meant that the project managers were exempt as highly compensated employees under the FLSA.

As stated above, his case establishes that in determining whether employees meet the salary requirement, courts should, and hopefully will if they follow the lead of the First Circuit, look at how the employees are actually paid rather than any theoretical payment plan in determining whether employees meet the salary requirement of the exemption tests. However, in order to maintain the exemption, employees must, therefore, be paid in practice a minimum amount each week that meets the minimum salary requirement and that is not subject to deductions below that amount, although they can receive additional compensation on top of that minimum.

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