

It may be a Lawyer Doing work at a law firm...but don't call it 'Legal Work'

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As e-discovery issues abound, the increased number of contract lawyers combing through massive document productions for privilege and relevance has developed into a cottage industry in the past decade. Companies helping law firms whose clients are embroiled in litigation with huge document productions has spawned new international businesses hiring American lawyers. And like any profitable business innovation, competition follows. Now law firms are bringing these document review lawyers on board and asking them to analyze myriad documents for their clients instead of farming this work to outside companies. But are these document review lawyers performing 'legal work'? The answer may depend on who you ask and why you're asking, but if you ask the Second Circuit Court of Appeals, they will tell you "no."

Last week the Second Circuit resurrected a lawyer's dismissed overtime claim ruling that document review lawyers are not practicing law and therefore not entitled to the 'professional exemption' under the Fair Labor Standards Act's (FLSA) overtime provision. The lawyer, David Lola, who lived in North Carolina and was a member of the California bar, sued Skadden Arps, Slate, Meagher & Flom LLP and Tower Legal Staffing, Inc. in United States District Court for the Southern District of New York claiming that the FLSA's professional attorney exemption did not apply to him because he was not 'actually engaged in the practice of law.' Lola earned \$25 per hour reviewing documents for defendants and worked 45-55 hours per week. Lola argued that he exercised no legal judgment while reviewing documents using predetermined search terms and redacting documents for privilege based on protocols created by defendants. In *Lola v. Skadden, Arps, Slate Meagher & Flom LLP*, the Second Circuit agreed.

A few other courts have wrestled with this issue and that number will surely grow emboldened by Lola's success. For example, in the United States District Court for the Southern District of New York (*Henig v. Quinn Emanuel Urquhart & Sullivan*), the district court recently [dismissed defendants' summary judgment motion](#) on a claim almost identical to Lola's lawsuit and ordered new briefing in light of the decision by the Second Circuit denying the exemption in the *Lola* case. And in the United States District Court for the Southern District of Texas (*Oberc v. BP PLC*), the district court considered a claim filed by Alan Oberc, who was a licensed attorney reviewing and coding documents in connection with the BP Deepwater Horizon oil spill litigation. But contrary to the Second

Circuit's decision in *Lola*, the district court in the *Oberc* case **denied the overtime claim** under the FLSA ruling that he was an exempt professional engaged in the practice of law under the FLSA.

So, like many legal theories in their infancy, there is no consistent answer to whether a lawyer performing document review will be considered exempt under the FLSA. This is further confused by statutory differences in what constitutes the practice of law determined at the state level, which is what courts look to for guidance. What seems clear, however, is that the continued growth of the document review industry fueled by massive productions in big litigation, relatively inexpensive labor and a saturated legal job market will result in overtime claims filed by document review lawyers. And these claims will need to be defended without the possibility of clear guidance on what constitutes the professional exemption under FLSA.

To minimize risk, however, law firms and businesses should carefully review the actual duties of alleged exempt individuals performing routine tasks. Of course, these document review lawyers should be careful about positing arguments that successfully secure overtime pay because they may put themselves out of work if courts agree they are not engaging in the practice of law and their employers find them expendable seeking cheaper labor.

Questions? Contact your Hinshaw employment attorney.

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