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Contract Lawyer May Be Entitled to Overtime

By Whitney R. Brown 8/28/2015

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A contract attorney who performed document review for the law firm of Skadden Arps Slate Meagher & Flom may pursue a Fair Labor Standards Act (FLSA) collective action for overtime pay because he plausibly alleged that he wasn't involved in the practice of law and therefore wasn't FLSA-exempt, the 2nd U.S. Circuit Court of Appeals ruled.

The FLSA requires employees to be paid time-and-a-half for time worked in excess of 40 hours in a workweek. There are several exemptions to this rule, including an exemption for licensed attorneys and doctors who are "actually engaged in the practice" of law or medicine, respectively.

The case was brought by a licensed attorney who argued that this exemption should not have been applied to him because he and others like him weren't actually engaged in the practice of law.

David Lola was hired by staffing agency Tower Legal Staffing, to review documents assigned by attorneys at Skadden Arps Slate Meagher & Flom, for a complex lawsuit that firm was defending. Lola was living and working in North Carolina, and he was licensed to practice law in California. Lola's job at the law firm consisted of looking at documents to see if predetermined search terms were present in those documents, categorizing the documents based on those search terms and drawing black boxes around certain portions of the documents based on predetermined criteria. Lola performed this work for 45-55 hours a week and was paid \$25 an hour. He did not receive time-and-a-half when he worked more than 40 hours in a workweek, just his regular rate of \$25 per hour.


Lola argued that he was not exempt from the overtime pay requirements because this work did not really amount to the practice of law: Everything he was doing was based on predetermined criteria and he wasn't researching, advising, or developing arguments or strategy. Tower Staffing and the Skadden Arps firm argued that Lola was exempt: After all, he was a licensed attorney and had been hired as such.

The trial court in New York found that Lola had been practicing law. In doing so, it looked to a 2008 North Carolina State Bar Ethics Committee opinion regarding the outsourcing of certain services, including document review, which it categorized as “legal support services” as opposed to “administrative support services.”

The 2nd Circuit disagreed with the district judge. The ethics committee opinion had made it clear that it wasn’t the document review itself that was pure legal work, but instead that the true practice of law was shown by the exercise of “independent legal judgment.” The 2nd Circuit noted that setting discretion and independent legal judgment as the key elements of what constituted the practice of law was consistent with decisions of other courts both inside and outside of North Carolina. Thus, if Lola’s work was as tightly controlled as he described, he was not practicing law and did not qualify for the FLSA’s lawyer exemption, and he and others like him would then be entitled to overtime pay (for up to three years), liquidated damages equal to the overtime award and attorneys’ fees.

Lola v. Skadden, Arps, Slate, Meagher & Flom LLP, 2nd Cir., No. 14-3845 (July 23, 2015).

Professional Pointer: Just because an employee has or is required to have an advanced degree, or a certain certificate or training, does not guarantee that he or she will automatically qualify for one of the FLSA exemptions.

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