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Business Litigation

DOJ ATTORNEYS SEEK JUSTICE ON OVERTIME PAYMENT ISSUE

SOME OFFICES MAINTAINED TWO SETS OF TIME SHEETS

Debbi Mack

"TO THINK that all along we've been hoodwinked."

Administrative Law Judge James J. Brown, who is one of the plaintiffs seeking overtime pay in a class-action suit against the U.S. Department of Justice, is not alone in feeling this way.

The lawsuit, which requests at least half a billion dollars in damages and was filed in the U.S. Court of Federal Claims last November on behalf of almost 200 current and former Justice Department attorneys, was certified as a class action this summer.

In early September, notices went out to more than 11,000 attorneys asking whether they wish to opt in to the case. Three weeks later, more than 4,000 individuals had elected to join the suit, according to plaintiffs' attorney Robert Van Kirk, an associate with Williams & Connolly Washington, D.C. The opt-in period will close on Dec. 2.

The case essentially boils down to this: The attorneys claim that, under the Federal Employees Pay Act of 1945 (FEPA), all federal employees must be compensated for working more than eight hours per day or 40 hours per week, if the overtime is "officially ordered or approved." Unlike labor laws that govern private employers, attorneys are not exempt from FEPA.

"Overtime that is worked with the knowledge, expectation, encouragement or inducement of supervisory personnel is considered 'ordered or approved' for purposes of the statute," the complaint states.

The interpretation of this language is one of the major issues in the dispute.

Attorneys claim they are or were almost routinely required to put in overtime in order to handle their workload competently. Further, they claim the Justice Department not only knew and approved of the arrangement but chose "to ignore the statutory and regulatory requirement that employees be compensated" for the additional time, according to the

complaint.

"Indeed, the Department has adopted a formal policy of refusing to pay overtime even while admitting that its attorneys must work overtime to perform their jobs competently," the complaint states.

The Justice Department has limited its public response to the statements made in its court filings. According to a brief submitted in May, the Department contends the additional time its attorneys put in is not "ordered or approved." Among other issues, it argues such approval requires conduct by an authorized official. Otherwise, the decision to work the overtime is left impermissibly in the hands of the employee. The Justice Department further argues mere knowledge that overtime is being worked or a tacit expectation an employee will put in extra time is not enough to make it "ordered or approved."

"With some exceptions, the nature and character of the practice of law does not ordinarily require attorneys to respond to emergencies that cause work to be performed beyond normal hours," according to a Justice Department brief. "Unlike a police officer pursuing a fleeing felon, most DOJ attorneys ordinarily can cease working at a particular task at a time convenient to themselves without fear that the pause will jeopardize their ultimate objective."

"YOU JUST DID YOUR JOB"

Brown, who worked at the Justice Department for 17 years and has gone on to become an administrative law judge for the Social Security Administration, would beg to differ.

"If you're in litigation you can't work less than 40 hours a week," he says. While Brown hastens to point out he did not necessarily work overtime every day, he says sometimes he would work 60- to 70-hour weeks during busy times and 40 to 45 hours per week during lighter periods.

Brown remembers becoming involved on short notice in cases that required extensive travel, all-day work sessions and work over the weekend. On one such case, he worked an all-time high of 94 hours in one week. He also put in a couple of 80-hour weeks.

Paul Chassy, another former Justice attorney and named plaintiff in the suit, recalls that, immediately preceding or during a trial, it was not unusual to work 80-to 90-hour weeks. Chassy, who is now retired, says 50- to 65-hour weeks were normal, and it was "highly unusual" to work 40 hours or less.

Professional pride and the need to perform sometimes-complex investigations and trial preparation on high-profile cases motivated much of the additional time worked. Chassy says working overtime also had a direct impact on an attorney's performance evaluation.

As Brown puts it, "No one told you to be there. You just did it."

Not everyone is jumping on the class-action bandwagon. Rory Little, a former federal prosecutor who now teaches at Hastings College of Law in San Francisco, went so far as to write a column for the Sept. 20 issue of "California Law Week," titled, "Why I Won't Join the Class."

Little wrote, "I am happy to have had the job, which former prosecutors uniformly describe as 'the best job of my life.' I took it with eyes wide open, knowing exactly how little I would be paid, how hard I would work--and how much I wanted it over higher-paying jobs [at law firms] downtown."

To a great degree, the case will turn on factual questions, according to attorneys who practice labor and employment law.

Peter Broida, a sole practitioner in Arlington, Va., who often represents federal government employees and unions, says disputes in these cases often center on "who's directing whom to do what and how."

He says sometimes people read more into a supervisor's remark than was intended. "That's where the big problems come," Broida says. "With the clarity of the instruction."

Most attorneys would agree litigation is highly demanding of one's time and usually involves the need to put in extra hours without explicit instruction from supervisors.

However, Chassy says at the Justice Department "it was clear from the very beginning that not only did you have to work overtime, but you wouldn't get paid for it."

Brown echoes these sentiments. He remembers working alongside attorneys from other agencies who were getting paid overtime. However, he did not think about the discrepancy at the time. "You just did your job," he says.

ATTORNEYS FROM OTHER AGENCIES FILE SUIT

One significant question in the case is the degree to which supervisory knowledge and encouragement of overtime makes it officially ordered or approved. The complaint points out one indication the Justice Department is aware of the additional time its attorneys work on cases is the practice of maintaining two sets of time records.

One is used for pay purposes and indicates the attorneys worked no more than eight hours per day and 40 hours per week, regardless of the amount of time they actually worked.

The other time sheet, required by some Justice Department offices, is a detailed record kept by the attorney that shows the actual number of hours worked on each case. Among other things, the latter time record is used for "internal personnel decisions, formulation of congressional budget requests or as the basis for seeking an award of attorney's fees in litigation with private parties," according to the complaint.

The Justice Department may also have some explaining to do about the various memoranda that have come to light during discovery in the case. Those memoranda acknowledge attorneys are not exempt from the law and suggest there is the risk a court would not find in their favor in a lawsuit brought for overtime.

One memorandum, written by a high-ranking Justice attorney and issued several weeks before the suit was filed, states, "Generally, my impression is that any time one of our attorneys sues under [FEPA], [Justice Management Division] negotiates a quick settlement."

The memo states further, "I believe that it is problematic (some might use the term unconscionable) for the Department to continue to not pay its attorneys overtime knowing full well that the overtime statute applies."

Another internal memo, dated April 21, 1980, indicates the "traditional denial by the Department of Justice of overtime compensation to its attorneys does not rest on statutory grounds." The memo explains "the general policy of the Department not to order overtime for attorney personnel" is based on an internal order, which "apparently goes back to an early interpretation of the statutory overtime provisions to the effect that overtime must be officially ordered and approved."

After acknowledging early interpretations of FEPA were narrow, the memo goes on to discuss intervening decisions that suggest "it is very likely that the court will disregard a departmental order establishing a policy not to 'order' overtime for work performed by a class of employees who are within the statutory coverage. Moreover, the court is likely to conclude that much overtime performed by attorneys, especially work required to meet short deadlines, has been 'induced.'"

The Justice Department is not the only agency under fire for possible overtime pay violations. In early September, a class action suit was filed on behalf of attorneys employed by the Office of Chief Counsel and the regional and district counsel offices for the Internal Revenue Service. Like the Justice Department suit, the IRS lawsuit alleges its attorneys are "induced, encouraged and expected to work uncompensated overtime hours...Even though management is well aware that attorneys are often required to work overtime to complete their assignments in a timely and responsible manner, it continues to assign more work to them, which exacerbates the need to work overtime."

Gregory O'Duden, general counsel for the National Treasury Employees Union, which is representing the IRS attorneys in this lawsuit, says, "I think there's been an evolution in the way the Claims Court has interpreted FEPA."

In the past, the court required overtime authorization to be "very explicit." Now O'Duden says it is more inclined to find authorization in situations where attorneys have been less than expressly ordered to do it.

Still, Chassy finds it particularly ironic that such a suit should be pending against one of the nation's most prestigious law enforcement agencies. "For them to absolve themselves besmirches DOJ's credibility," he says. "The Department of Justice should have the integrity to do what's right."

"It was a privilege to be a Justice Department attorney," Brown says. "But it came with rights, including the right to be paid."