Do Nurse Practitioners and Physician Assistants Qualify for Overtime in the Urgent Care Setting?

Urgent message: Physician assistants and nurse practitioners perform many of the same tasks as physicians in urgent care settings, but ambiguity as to the nature of their practice means additional consideration must be given in how their pay is structured.

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The federal Fair Labor Standards Act[1] (FLSA) states that all "nonexempt" employees must receive overtime pay not less than 1½ times their regular rate of pay for every hour over 40 hours worked during a work week.[2,3] Of concern to urgent care owners is whether their nurse practitioner (NP) and physician assistant (PA) employees, known collectively as advanced-practice providers (APPs), qualify for overtime. While much of the evidence supports a conclusion that they are exempt from overtime under the FLSA, some claim that the rules are ambiguous and open for debate.

Discussion

APPs in urgent care facilities are increasingly asked to work independently to care directly for patients. Doing so includes taking a history and physical, evaluating symptoms and consulting medical literature, making a diagnosis, performing many procedures, prescribing medication, and making referrals—the same day-to-day work as a physician.

In some states, APPs are able to now practice independently without physician supervision. And where physician supervision is required, it frequently takes the form of on-call availability and chart reviews rather than direct physical supervision. Our national physician shortage has created a call for PAs and NPs to staff urgent care facilities on their own and for extended hours.

MDs, DOs, and APPs have typically been paid on an hourly basis in urgent cares. This is because of scheduling, as an urgent care center may be open 12-14 hours per day; it's more practical to pay these healthcare professionals based on hours worked instead of a flat salary. The schedule for urgent care can be unpredictable.

Physicians—even when "hourly exempt"—don't qualify for overtime; however, the FLSA has been interpreted in more than one way that supports some urgent care centers paying hourly overtime to APPs.

White-Collar Exemption

Those employees who are in a "bona fide executive, administrative or professional capacity"[4]—commonly referred to as a "white-collar" job—are exempt from the overtime requirements of the FLSA. As a result, an employer isn't required to pay these employees overtime.[5]

The term "employee employed in a bona fide professional capacity" means "[a]ny employee who's the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and is *actually engaged in the practice thereof*...."[6]

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An employee is considered paid on a salary basis if "under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation."[7] However, section 541.3(e) provides that the salary-basis test doesn't apply to bona fide professionals.[8]

Belt v Emcare, Inc.

In a 2006 Fifth Circuit case, PAs and NPs sued their employers, seeking back wages and liquidated damages for alleged violations of the FLSA.[8] The PAs and NPs provided healthcare services and were paid hourly at a flat rate for all hours worked, including overtime. They alleged that the employers violated the FLSA by failing to pay time-and-a-half compensation for overtime, however. The employers argued that the PAs and NPs qualified for the exemption as bona fide professionals under 29 C.F.R. § 541.3(e) because they unambiguously practiced medicine or a branch of medicine within the meaning of the regulation. The only issue was whether NPs and PAs hold a license permitting, and actually engage in, "the practice of...medicine or any of [its] branches."[8]

The Court said if the NPs and PAs "practice medicine" within the meaning of § 541.3(e), they didn't need to satisfy the salary-basis test to qualify for the exemption. As such, the employer could deny additional overtime pay. But if the PAs and NPs don't practice medicine under § 541.3(e), they *are* subject to the salary-basis test, they *don't* fall within the exemption, and they *are* eligible for time-and-a-half compensation.

The Fifth Circuit held that the employers' ambiguity argument was preserved for appeal because a finding that § 541.3 was ambiguous was necessary to the district court's ultimate conclusion. The Court also determined that § 541.3(e) was ambiguous as to whether PAs and NPs practiced medicine or any of its branches. As a result, the Fifth Circuit gave controlling weight to the Department of Labor's opinion letter, the Bureau of Labor Statistics' Occupational Outlook Handbook, and amicus brief, which gave credence to the interpretation that PAs and NPs needed to be paid on a salary basis to be exempt from the FLSA. Thus, PAs and NPs did not fall within the professional exemption.[8]

Physician Assistants

The U.S. Department of Labor (DOL) has stated that the white-collar exemption for medical professions extends to certified physician assistants with 4 years of preprofessional and professional study, and who are graduates from an accredited PA program.[9]

An alternative interpretation of the FLSA endorsed by the American Academy of Physician Assistants (AAPA) contends that urgent care owners may *choose* to pay PAs as hourly wage earners. If an employer chooses to pay PAs hourly, then they don't fall into any exempt category. As a result, the urgent care owner must, by law, pay them at least time-and-one-half for any hours over 40 worked in a week.[10,11]

"Urgent care owners should use caution and consult with experienced legal counsel with expertise in employment law when developing an overtime policy that impacts PAs and NPs. Besides (arguably unclear) federal legislation, there may be state laws to consider."

A question arises as to whether there's a distinction between a PA or NP who is working as the sole provider on a shift and one who is "helping" as the second provider when a physician is also on duty. While this argument may have some merit, some states have closed off this line by enacting legislation. For example, in Pennsylvania, a PA "practices medicine with physician supervision," and "shall be considered the agent of the supervising physician in the performance of all practice-related activities."[12]

In New York, a federal district court has also heard this argument.[13] The Court said that, in most cases, "the practitioners who are expressly included within or have been held to fall within § 541.304 are required to hold doctoral-level medical degrees."[13] Again, the Court emphasized its role of construing the FLSA's exemption provisions narrowly.[13]

Nurse Practitioners

In *Hager v Claiborne Cty. Med. Ctr.*,[14] a nurse practitioner alleged that he was an employee of the defendant and was paid on an hourly basis, and that he worked over 40 hours a week. The NP claimed that the hospital paid him at the regular rate for every hour worked over 40 in any given work week, rather than at time and half.

The Court found that the NP was paid on an hourly basis, so he didn't satisfy the salary-basis test.[14] But the Court noted if the NP holds "a valid license or certificate permitting the practice of...medicine or any of [its] branches and...[was] actually engaged in the practice thereof," he may qualify for the "salary-basis exception" and, therefore, be subject to the professional exemption.[14] Nonetheless, the Court reiterated that the Fifth Circuit has deferred to the DOL's opinion that NPs must be paid on a salary basis to be exempt from the FLSA.[14] In light of this,

the Court found that the NP wasn't paid on a salary basis, and therefore, wasn't subject to the professional exemption.[14]

Learned Professional Exemption

The federal rules also provide an exception for "learned professional employees." To qualify for the exemption, an employee's primary duty must be "the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction."[15] The test includes three elements:

- The employee must perform work requiring advanced knowledge.
- The advanced knowledge must be in a field of science or learning.
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.[15]

The AAPA argues that "[T]his does not mean that PAs must be classified as learned professionals."[16] The organization argues that to be considered a "learned professional," an individual has to meet *all* of the criteria—which PAs do not do. In their view, PAs are learned professionals and are not protected by federal overtime requirements if the employer chooses to pay them a salary.[16]

Analysis

The Fifth Circuit's 2006 decision has not been overruled or distinguished by the U.S. Supreme Court. As a consequence, that Court's deference to the DOL and the Bureau of Labor Statistics appears sound.

That Court in *Belt* explained that, in addition to creating the salary-basis test under 29 C.F.R. § 541.3 (1973), the DOL also issued regulations interpreting the salary-basis test.[17] The Court noted that the DOL has also issued an opinion letter that addresses the application of the salary-basis test to PAs. Further, a DOL handbook also interprets the salary-basis test as it applies to PAs.[17] The Court found that "[t]hese interpretations will be controlling unless they are clearly erroneous." The regulations define and delimit the substance of the overtime exception for those employed in an executive, administrative, or professional capacity.[18]

A Pennsylvania court noted that the DOL "has consistently interpreted the regulations set forth in § 541 to require a PA to satisfy both the duties test and the salary-basis test, as set forth in § 541.300(a)(1)-(2), in order to qualify for an exemption from the FLSA's overtime requirements."[19] It explained that the DOL has refused to extend § 541.304's exception to the salary-basis requirement beyond actual physicians and has "consistently taken the position that the salary-basis exception does not apply to PAs."[19]

More recently, a New York District Court recognized that "[a]lthough there is limited case law interpreting § 541.304 or its predecessor provision, courts have determined that Nurse Practitioners and Physician's [sic] Assistants are not within the exception because, despite the similarity of their duties to those of general practitioners, the Department of Labor considers them to 'service the medical profession.'"[20]

Courts since that time have rejected attempts to broaden the application and scope of the FLSA exemptions.[21,22] Given the current sense of stability and acceptance of this rule, the more prudent approach would be to not treat PAs and NPs as being within the overtime exception.

Takeaway

Only a handful of federal courts have looked at this issue. Notably, the *Belt* case from the Fifth Circuit (encompassing the Eastern District of Louisiana, the Middle District and Western District of Louisiana, the Northern District and Southern District of Mississippi, and the Eastern District, Northern District, Southern District, and Western District of Texas) has thoroughly examined the issue of overtime for APPs. Those courts that have heard the issue have chosen not to disregard or distinguish the *Belt* decision.

With that said, urgent care owners should use caution and consult with experienced legal counsel with expertise in employment law when developing an overtime policy that impacts PAs and NPs. In addition to this arguably unclear federal legislation, there also may be state laws to consider. ■

References

1. 29 U.S.C. § 201, *et seq.*
2. 29 U.S.C. § 207(e)(6).
3. Duran A. Employers: understand how to manage overtime regulations in the healthcare industry. *Swipeclock.* May 8, 2018. Available at: https://www3.swipeclock.com/blog/employers-understand-how-to-manage-overtime-regulations-in-the-healthcare-industry/. Accessed March 28, 2019.
4. 29 U.S.C. § 213(a)(1).
5. *Donovan v Nekton, Inc.,* 703 F.2d 1148, 1151 (9th Cir. 1983).
6. 29 C.F.R. § 541.304(a)(1) (emphasis added).
7. 29 C.F.R. § 541.118(a).
8. *Belt v. Emcare, Inc.,* 444 F.3d 403, 407 (5th Cir. 2006).
9. 29 C.F.R. § 541.301(e)(4).
10. American Academy of PAs. PAs and the Fair Labor Standards Act. December 2016. Available at: https://www.aapa.org/advocacy-central/federal-advocacy/pas-and-the-fair-labor-standards-act/. Accessed March 28, 2019.
11. *Cuttic v Crozer-Chester Med. Ctr.,* 760 F. Supp. 2d 513, 519 (E.D. Pa. 2011).
12. 49 Pa. Code § 18.151(a).
13. *Luo v L&S Acupuncture, P.C.,* 2015 U.S. Dist. LEXIS 33102, at *13-14 (E.D.N.Y. Jan. 23, 2015).
14. *Hager v Claiborne Cty. Med. Ctr.,* No. 5:14-CV-106-KS-MTP, 2016 U.S. Dist. LEXIS 5419, at *1 (S.D. Miss. Jan. 15, 2016).
15. 29 C.F.R. § 541.301(a).
16. United States Department of Labor. Wage and Hour Division. Fact Sheet #17D: Exemption for Professional Employees Under the Fair Labor Standards Act (FLSA). Revised July 2008. Available at: https://www.dol.gov/whd/overtime/fs17d_professional.htm. Accessed March 28, 2019.
17. *Belt v Emcare Inc.,* at 627 n.2, citing 29 C.F.R. § 541.99-.602 (1973).
18. 29 C.F.R. §§ 541.0-541.52.
19. *Cuttic v Crozer-Chester Med. Ctr.,* 760 F. Supp. 2d 513, 518-19 (E.D. Pa. 2011).
20. *Luo v. L&S Acupuncture, P.C.,* 2015 U.S. Dist. LEXIS 33102, at *11 (E.D.N.Y. Jan. 23, 2015) (Citing *Belt*).
21. See *Cuttic v Crozer-Chester Med. Ctr.,* 806 F. Supp. 2d 796, 799 (E.D. Pa. 2011).
22. *Lucas v Noypi, Inc.,* No. H-11-1940, 2012 U.S. Dist. LEXIS 143889, at *8-9 n.20 (S.D. Tex. Oct. 3, 2012).