

Commission Or Piece-Rate? The Distinction Is Significant For FLSA Purposes

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The Fair Labor Standards Act (FLSA) generally requires employers to pay employees at one-and-a-half times their hourly rate for every hour that they worked per week in excess of 40 hours. There are exceptions, though, and an Illinois federal court recently handed down a decision which illustrates one of them: Employees that are paid commissions on goods or services sold are exempt from overtime pay – if certain criteria are met – whereas employees who are paid piece-rate are not.

At first blush, the distinction is not an easy one to make. In both cases, the employee's compensation appears to depend on his or her output. The former is not earned, however, until a sale is actually made. That's the rub, and it was demonstrated in *Alvarado v. Corporate Cleaning Services*. There, a group of window washers sued their employer for violating the FLSA. They claimed that they were paid piece-rate for their work – effectively for the number of windows that they washed. But the U.S. District Court for the Northern District of Illinois disagreed. It explained:

Here, the abundance of window-washer work at CCS does tend to obscure that window-washer pay is still dependent on sales. But the only reason that there is a regular workflow is because CCS is such a big player in the industry and is extremely successful. Part of this success is based on the company's compensation system, which incentivizes window washers to work efficiently and, in turn, to increase the number of sales that CCS can make and complete. Thus window washers' work is still dependent on sales.

If you're an employer that pays by commission ask yourself whether your employees earn their "commissions" for each item made or service performed or whether their "commissions" depend upon a sale. The distinction is an important one, and it may allow you to take advantage of the *Alvarado* exemption.

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