

A Glimmer of Hope for the Energy Industry? Navigating Your Way Out of the Overtime Abyss

By Andrea 'AJ' Johnson and Robert L. Rickman
– (Feb. 29, 2016) – By now, it is no secret that the energy industry has been ravaged. Every street corner with a gas station displays a reminder of sagging oil prices. And if \$30 per barrel oil was not bad enough, energy companies have another woe to add to the list—opportunistic plaintiff's attorneys that have focused their cross hairs squarely on oilfield pay practices.

One has to look no further than a recent article in *The Texas Lawbook* to see the spike in lawsuits filed against employers in the energy industry. And the exposure can, in some cases, be colossal. Especially when it comes to overtime lawsuits filed under the Fair Labor Standards Act (FLSA). But there are some powerful arrows that oil and gas companies can put in their quivers to combat the slew of lawsuits being filed.

WHY THE SEIGE?

What has plaintiff's attorneys so intently focused on oilfield companies as targets of their overtime lawsuits? A combination of three factors: (1) industry practice of paying oilfield workers on a salaried basis regardless of job duties, (2) relatively high wage earners working long hours, and (3) laid off workers desperate for income. Those factors have created the perfect storm at a time when oil and gas companies can least afford it.

Companies across all industries often make the mistake of assuming that if someone is paid a salary, they do not need to be paid overtime. The FLSA, however, only exempts employees from overtime based upon the employee's job duties, not how they were paid. But oilfield companies that were desperate to recruit, hire, and retain workers to handle the backlog of jobs in 2012-2014 were simply copying what others did in the industry. So if others were paying

salary plus bonuses, then that is what you needed to do to match or beat your competitors.

Employees in the oilfield would commonly be paid a salary in the range of \$45,000 to \$65,000 per year, with daily bonuses for successful or safe completion of a job in the range of \$200-\$500 per day. During the boom when there was more than enough work than could be accomplished, many of these workers would work 14+ days straight, often working 12-18 hours per day. Combine all of those together and what you have are high wage earners working long hours...which can equate to extremely large damage models when it comes to unpaid overtime.

Many of these workers wound up earning well in excess of \$100,000, sometimes even more than \$150,000. When one takes the total compensation earned and divides it by the number of hours worked, the effective hourly rate can end up around \$50-75, which can equate to a time-and-a-half overtime rate of \$75-\$100. Couple that hourly overtime rate with 50 hours of overtime in one workweek, and the numbers get really large, really fast. The significant exposure is illustrated by Halliburton's recent \$18.3 million payment to resolve a pre-suit unpaid overtime dispute with the U.S. Department of Labor.

But all is not lost. There are some legitimate defenses that oil and gas companies can assert to potentially defeat these claims.

HOW TO COMBAT THE SEIGE

As always, the Executive exemption may apply. The two biggest thresholds to meet under the Executive exemption are being paid a salary of at least \$455 per week (although this may increase to the \$900/week range later this year) and regularly supervising two or more full-time employees. Many companies, however, >

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dispatch their employees to job sites in crews of one or two men, negating the applicability of the Executive exemption. But if there is a crew leader and at least two other full-time employees on the jobsite that the crew leader supervises, the Executive exemption may be a viable defense to these claims.

Many workers also drive commercial trucks that weigh in excess of 10,000 pounds, which would subject the company and employee to Department of Transportation regulations under the Motor Carrier Act. If driving these types of commercial vehicles is a meaningful part of their job duties and the employee does not also operate trucks less than 10,000 pounds as part of their job duties, then the Motor Carrier exemption may apply and thereby relieve an employer from any overtime obligations.

Another defense available to companies that handsomely paid their field employees is the Highly Compensated Worker exemption. After all, wage-and-hour laws are there primarily to protect unscrupulous employers from taking advantage of under paid employees, right? If an employee's total compensation was more than \$100,000 (with at least \$455/week coming in the form of guaranteed salary), the primary duties performed were not manual labor, and the employee regularly performs one of the exempt job duties of the professional, executive, or administrative exemption, then the Highly Compensated Worker exemption will apply. Meeting one of the exempt job duties can be established by showing that the employee regularly exercises independent judgment and discretion on matters of significance, supervising two or more employees, or having authority or influence over hiring, firing, and promotion decisions. The applicability of this defense will often come down to what type of job duties the worker was performing in the oilfield and whether or not such duties will be considered manual labor.

MUD MEN: PRODUCERS, MANAGERS OR CONSULTANTS?

Finally, there is growing traction for the applicability of the administrative exemption in the oilfield. Just last week, Judge Melinda Harmon in the Southern District of Texas (Houston) granted summary judgment dismissing a collective action overtime lawsuit brought by mud men on the basis that the employees were exempt from the overtime requirements under the Administrative exemption.

The administrative exemption generally deals with non-manual labor work which must involve the "running or servicing" of a business. The work cannot be considered "production," but rather work directly related to the management policies or general business operations of the employer and its customers. And the work has to include the exercise of discretion and independent judgment related to "significant" issues.

The court found that the mud men in this case engaged in the following activities that qualified them for exemption:

- While they used a plan from an engineer, plaintiffs were expected to exercise discretion with respect to the additives needed for particular conditions at a site or any deviations from the engineer's plan.
- They tested the mud.
- They acted as key intermediaries with customers and other jobsite personnel regarding drilling operations.
- They would provide recommendations (often accepted) for the mud mix and use.
- They wrote reports for their companies about each assignment.

Focusing on the administrative exemption, the court's opinion likened the mud engineers >

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to “advisors or consultants.” Judge Harmon focused on the vital importance of drilling mud, and she noted that the workers were out in the field without any other company personnel or supervisors, dealing with company men and others, and providing their often-relied-upon recommendations that were necessary for a successful and safe drilling operation.

ONE BULLET DODGED BUT THE BATTLE CONTINUES

Granting the summary judgment, the Court, after an exceedingly lengthy decision, concluded that the evidence supported the employer’s claim that the plaintiffs were administratively exempt and their primary duty was the management of mud systems to improve drilling performance. Just like that, the case was over and the employer had dodged a potentially seven- or eight-figure award. While an appeal is sure to follow, the decision is carefully reasoned.

Fundamentally, today, it provides the industry a specific, much-needed weapon in the overtime battle. The rationale applied in this opinion can apply to many oilfield situations and positions because the same factors cited by Judge Harmon can apply to MWDs, DDs, pipe inspectors, operators, and many others bringing overtime lawsuits.

While overtime class actions represent a very real and very significant risk to all employers, there are defenses that can be asserted to defeat or mitigate these risks. Every case and every position has its own nuanced set of facts that will determine whether or not an exemption applies, but energy companies can take solace in the fact that it is not all doom-and-gloom when it comes to beating this additional challenge during a precarious and turbulent time.

ABOUT THE AUTHORS



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