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## Ninth Circuit Finds Auto 'Service Advisors' Not Exempt Under FLSA

By Michael Warren and Benjamin Emmert

In *Navarro v. Encino Motorcars, LLC* (9th Cir. Mar. 24 2015), the U.S. Court of Appeals for the Ninth Circuit addressed an issue of first impression in the Circuit: whether individuals who worked for automobile dealerships as "service advisors" were exempt from the Fair Labor Standards Act's ("FLSA") overtime premium pay requirements. In reversing the district court's decision, the *Navarro* court held the FLSA's exemption for automobile dealership salesman, partsman, and mechanics did not apply to service advisors.

This decision is significant because, in holding the exemption was inapplicable to service advisors, the Ninth Circuit declined to follow the lead of the Fourth and Fifth Circuits, which previously ruled auto dealership service advisors were exempt from the FLSA's overtime requirements in *Walton v. Greenbrier Ford Inc.*, 370 F.3d 446 (4th Cir. 2004) and *Brennan v. Deel Motors, Inc.*, 475 F.2d 1095 (5th Cir. 1973). By creating a split between the Circuits, the decision introduced a new level of uncertainty as to how other Circuits may decide the issue. In the short term, however, auto dealerships in the Ninth Circuit using this exemption should review their pay practices to make sure they comply with this decision.

### The Facts of the Case

The defendant in *Navarro* was a dealership that sold and serviced new and used automobiles. The plaintiffs worked for the defendant as service advisors who were responsible for meeting and greeting vehicle owners as they entered the dealership's service area. They would evaluate the service and/or repairs the vehicle needed based on the vehicle owner's requests/complaints and recommend the dealership perform certain repair work. They would also suggest supplemental service at an additional cost for the vehicle in addition to the work related to the customer's complaints. They would then write up the repair estimate. Once the estimate was written, the vehicle would be turned over to a mechanic who would perform the actual repair/service work. While the mechanic was working on the vehicle, or shortly thereafter, the service advisor would call the vehicle owner and again suggest additional work for the vehicle at additional costs. It was undisputed that the plaintiffs did not sell vehicles; procure, stock, or deliver parts; or work on vehicles.

The service advisors were paid on a commission basis only. They did not receive an hourly wage or a salary. They were also not paid overtime, although they claimed they worked more than 40 hours in a work week.

## The *Navarro* Court's Decision

The issue before the *Navarro* court was whether the plaintiff service advisors, who did not sell vehicles; procure, stock, or deliver parts; or perform repair/service work, were nevertheless subject to 29 U.S.C. section 213(B)(10)(A)'s exemption from the FLSA's overtime premium pay requirement. The court started its analysis by considering whether the section's language, which exempts "salesman, partsman, or mechanic[s]" from the FLSA's overtime requirements, was ambiguous in that it was reasonably subject to more than one interpretation.

The court found Section 213(B)(10)(A) was ambiguous because the court could not conclude that service advisors, such as the plaintiffs, were persons "plainly and unmistakably within [the FLSA's] terms and spirit." The court's conclusion was based on its holding that the statute could be read broadly by connecting the term "salesman" and the term "servicing automobiles" so the exemption applied to "salesman . . . primarily engaged in . . . servicing automobiles," such as the plaintiffs. The court, however, also noted the statute could be read narrowly and applied only to salesman—those employees who sell cars; partsman—those employees who requisition, stock, and dispense parts; and mechanics—employees who perform mechanical work on cars. Because both statutory interpretations were reasonable, the court held it was appropriate to refer and rely on the regulations interpreting the exemption issued by the U.S. Department of Labor (DOL).

The DOL interpreted Section 13(B)(10)(A) in 29 C.F.R. section 779.372 as being a narrow and specific exemption that only applies to "salesman, partsman, and mechanic[s]" as defined as follows:

- (1) Salesman. A salesman is an employee employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the automobiles, trucks, or farm implements the establishment is primarily engaged in selling.
- (2) Partsman. A partsman is any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts.
- (3) Mechanic. A mechanic is any employee primarily engaged in doing mechanical work (such as get ready mechanics, automotive, truck, or farm implement mechanics, used car reconditioning mechanics, and wrecker mechanics) in the servicing of an automobile, truck or farm implement for its use and operation as such.

While the defendant conceded the plaintiffs did not meet the regulatory definition of a salesman, partsman, or mechanic for this exemption, it nevertheless argued the court should not defer to the regulation because it was unduly restrictive. The defendant argued the court should find the service advisors were exempt under the statute's broader terms. The court declined to do so, holding the DOL's interpretation was reasonable in light of the statute's ambiguous language and the presumption that the FLSA's exemptions are to be narrowly construed. Because the plaintiff "service advisors" did not meet the DOL's definition of a "salesman, partsman, or mechanic," it found they were not subject to the exemption and were therefore entitled to overtime premium pay for all hours they worked in excess of 40 in a week under the FLSA.

The court acknowledged its decision conflicted with the Fourth Circuit's decision in *Walton v. Greenbrier Ford, Inc.* and the Fifth Circuit's decision in *Brennan v. Deel Motors, Inc.*, and several district courts that followed these earlier cases. The *Navarro* court stated it disagreed with the *Deel Motors* court's conclusion that service advisors, such as the plaintiffs in *Navarro*, performed job duties that were "functionally similar" to those of a salesman, partsman, and mechanic, and therefore were covered by the exemption. The *Navarro* court rejected this "functionally similar" analysis because it believed that nothing in the statutory text suggested that Congress meant to exempt employees who performed "functionally similar" job duties to those performed by salesmen, partsman, and mechanics from the FLSA's overtime premium pay requirements under Section 13(b)(10)(A). Rather, the court held the statute's plain text exempted only "certain salesmen, partsman, and mechanic[s]."

The *Navarro* court also refused to follow the Fourth Circuit's *Walton* decision that the DOL's interpretation of Section 13(B)(10)(A) was unduly restrictive. The *Navarro* court believed the Fourth Circuit improperly analyzed the DOL's interpretation of the exemption in the abstract rather than in the context of an automobile dealership. As applied to individuals employed as service advisors in automobile dealerships, and against the backdrop that FLSA's exemptions are to be narrowly construed, the *Navarro* court believed the DOL's interpretation was reasonable and not unduly restrictive. Accordingly, the *Navarro* court believed it was obligated to defer to the DOL's interpretation and hold that service advisors were not exempt from the FLSA's overtime premium pay requirements.

## What Does This Mean for Employers?

The *Navarro* court limited the FLSA's exemption for overtime premium pay under 29 U.S.C. section 213(B)(10)(A) in the Ninth Circuit, so it applies only to individuals employed as "salesman, partsman, or mechanic[s]" as that term is defined in the exemption's regulations. Accordingly, automobile dealerships in the Ninth Circuit should review their pay practices if they have relied on Section 213(B)(10)(A)'s exemption for employees who were neither hired for nor perform the following primary job duties: (1) making sales or obtaining orders or contracts for the sale of automobiles, trucks, or farm implements the establishment is primarily engaged in selling; (2) requisitioning, stocking, and dispensing parts; or (3) performing mechanical work in the servicing of an automobile, truck, or farm implement for its use and operation as such. The *Navarro* decision also shows the Ninth Circuit may interpret other specific exemptions narrowly and may not apply them to employees whose job duties fall outside the four corners of the statutory/regulatory definition of the exemption.

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