

PROGRESS REPORT IN YOUNG
(AS OF 8/25/00)

First I would like to thank all of my clients who have been waiting patiently to read this update and content to simply be told that we are trying to make progress on the case and would issue an update as soon as possible.

The good news is that as a result of a decision by Judge Lipscomb, we were able to prevail on 95 percent of what we wanted in the Notice and cover letter that will go out to the 15,000 potential claimants in this case. A copy of them is posted on this site. If the State had prevailed in what it wanted the judge to use, the Notice would have been virtually unreadable, and claimants would have had to have read to the third page of it before recognizing that they have the right to submit a claim, and there has already been a ruling that the State will owe overtime to employees who can prove that they did work overtime.

Just because that hurdle is over does not mean that the parties moved closer to reaching an agreement on how the claims process is to occur, how much OSRL should do during the survey, how hours of work are to be computed, and what is, or is not to be, counted or discounted in a work day or work week.

The State has taken the position that because ORS 279.340 is a “stand alone” statute, that the rules which the State Bureau of Labor has adopted for how to compute hours of work for hourly employees based on other State statutes, do not apply in this case. The State has decided that it will rely upon the Federal Fair Labor Standards Act for providing the guidance to the parties. While this would appear to be acceptable, the State is hoping to convince the Court that a provision in the Fair Labor Standards Act of how one can compute overtime liability for employees who were mistakenly classified as exempt from overtime should be utilized in this case. Pursuant to this Federal rule, if an employer mistakenly thought employees’ duties were such that they were exempt from overtime, and the employer is later determined to be wrong, as long as the employer otherwise treated these employees as “salaried” employees, which means that the

employer did not hold them accountable for their exact hours of work and did not make partial deductions from their pay when they left work early, that the employer would have been deemed to have paid these employees straight time for every hour that they worked, and it would only owe them an additional “half time” for each hour they worked over 40 in a workweek. An hourly rate would have to be computed for each workweek, depending upon the hours the employee actually worked. In practice, this would yield one quarter of the normal damages that would result from a straight time and a half for hours worked over 40 in a week.

It is my cynical opinion that the State is attempting to latch on to a provision of the FLSA that has no application to a State statute that clearly holds that for any hours over 40 in a workweek, an employee must be paid time and a half. I am optimistic that Judge Lipscomb will also so rule. If Judge Lipscomb adopts the State’s theory, then I will pursue a pre-trial appeal on behalf of the plaintiff class. At this point, I will also urge the Court to allow damages to be computed in the alternative, so that those of you who make claims, may at least get a reduced amount of overtime payment, with hopefully, an additional check coming your way within a couple of years after the appeal is over.

Other significant issues continue to divide the parties. One of them is how to insure that the whole plaintiff class is notified of the claims process. While the State is willing to pay for a mail-out Notice to the class, the State is unwilling to pay for the expense of tracking those plaintiffs who have left the State employ, and for whom there is no forwarding address. The State is also not willing to pay for a follow-up call to insure that those employees whose mailing has not been returned actually did receive the Notice and are able to respond in a timely fashion. On behalf of the plaintiffs, I will take the position that OSRL should make at least one follow up call to insure that plaintiffs did receive the Notice in a timely fashion and should utilize the World Wide Webb to engage in tracking procedures to see if the plaintiffs who moved without forwarding addresses can still be located. If the State doesn’t pay for this, then I will offer to pay for this on behalf of plaintiffs.

Another issue is whether every plaintiff will have to pay their postage to mail back the claim package or the opt out forms, or whether the State will be required to use postage pre-paid business envelopes. This is an issue driven by OSRL. I am not

prepared to argue on behalf of plaintiffs who will make a claim that the State should pay the 95 cent estimated postage. However, Professor Gwartney, the Director of OSRL, is convinced that the State will actually save money by having the postage prepaid as opposed to paying for OSRL employees to deal with packets that come back because of insufficient postage. If one would accept Professor Gwartney's expertise, then the State's attitude is one of biting off its nose to spite its face. The State is going to pay for OSRL's efforts on a time and materials basis and would rather pay OSRL more money than to simply prepay the postage.

Judge Lipscomb also ruled that the "penalty pay" provisions of Oregon law, which apply for the willful failure of an employer to pay employees their correct amount of wages that are due when an employee leaves, will apply to all employees who left the employ of the State after the official "mandate" came down from the Appellate Court to the Circuit Court reversing this case. That would be January 28, 2000. However, the State still does not believe that Judge Lipscomb's order says what it appears to say on the face and is asking for clarification. The State's position is that it will not owe any plaintiff penalty pay. Penalty pay for those employees who are eligible for it will be an extra 30 days pay at their regular hourly rate.

The last major issue that separates the parties is when interest should accrue on the monies that are owed to plaintiffs. ORS 82.010(1)(a) indicates that after money becomes "due" then interest will accrue on it at the "legal rate" which is 9 per cent. The key question in this case is when did the money become "due." It is the position of the plaintiffs that it became due every pay period when the overtime should have been paid by the State. It is the position of the State that the money doesn't become due until an actual amount of it is ascertained from each plaintiff, i.e., when the plaintiff affidavit's is finalized. Obviously, as much as five years of interest on an overtime claim is a significant amount of money. The statute provides no guidance as to when the overtime amount is "due", and court decisions based on this statute are not on point for this unique set of facts. It has been my recommendation to lead plaintiffs with whom I've discussed this issue that a reasonable compromise on this matter would be in the best interest of both parties given the significant amount of risk that is involved with this issue.

However, it appears that this issue will not be settled, but will be presented to Judge Lipscomb to be resolved.

Needless to say, all the disagreements that separate the parties have not sped up processing of the case. In an attempt to do so, the parties agreed that they would crystallize the issues that separate them by the 22nd of August. That has occurred and this progress report indicates which issues separate the parties. If we're lucky, we'll still settle some of them, but hope is not springing eternal.

This is not to say that some agreements have not been reached. The State requested 45 days instead of the previously agreed upon 30 to evaluate each plaintiff's claim. In return it agreed not to challenge a claim without an objective basis to do so. Also, it agreed that all plaintiffs will have six (6) weeks to submit their claim or opt out of the case.

The parties will file their initial briefs on the issues that separate them on the 31st of August, will file rebuttal briefs on the 13th of September, and have a Court appearance to argue these matters in front of Judge Lipscomb at 9:30 a.m. on the 25th of September. If the Court feels comfortable ruling immediately, it is hopeful that OSRL will be able to get out the Notice and claim forms by mid-October, and that the hearing, that is currently scheduled for December 1st to approve the resolution of this case, will still remain as scheduled.

Previously, I had optimistically indicated to some plaintiffs that a payout could occur on this case this year. Subsequent events have proven me to be mistaken. The earliest I expect a payout to occur would be early next year. What the State wants to do after it decides not to contest affidavits, is that once a month a list of the plaintiffs' and the amounts to which they are owed will be presented to Judge Lipscomb to enter as a judgment. Then the State would have to pay that judgment as it would any other judgment. What this will do is protect plaintiffs' by insuring that these claims are properly paid and are enforceable under the law.

Depending on how many initiatives are passed in November that limit State spending, payment of these claims may or may not be painful for the State. However, they should occur in the early part of next year.

If any plaintiff has questions regarding the progress of this case, or wants more details about any aspect of it, please do not hesitate to contact me.

Sincerely,

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The Law Office of John Hoag, P.C.

JH:kp