

# MEMORANDUM

## State of Alaska Department of Law

TO: The Honorable Joseph L. Perkins  
Commissioner  
Department of Transportation  
and Public Facilities

DATE: June 13, 1997

FILE NO: 663-98-0165

TEL. NO: 465-3600

SUBJECT: Memorandum of Advice Re:  
Engineer Is and Overtime  
Eligibility When Acting as  
Project Engineers

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We have been asked to review the status-eligibility of Engineer Is (EIs) for purposes of overtime entitlement under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (FLSA).<sup>1</sup> The FLSA is a federal law, applicable to the state as an employer, that sets minimum wage, overtime pay, equal pay, record keeping, and child labor standards for workers who are covered by and not exempt from the Act. As to overtime, the FLSA requires that covered, non-exempt employees be paid time-and-a-half for each hour worked in excess of 40 hours per week.<sup>2</sup>

The issue with regard to EIs, as we understand it, is whether they are entitled to overtime under the FLSA when they work as project engineers during the construction season. One question is whether project engineer work is “professional” as that term is used under the FLSA to describe an exemption to the overtime requirements. It has also been suggested that an arbitrator’s decision rendered in July of 1993 requires overtime to be paid to EIs under these circumstances, and that the state is not complying with this award. This arbitrator’s decision will be referred to as the *Corbett* award (copy attached).

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<sup>1</sup> This memorandum of advice discusses whether overtime is *required* to be paid to these employees by law. Agreements for overtime pay where the law does not mandate the payment of overtime are not the focus of this memorandum, and we express no opinion on such agreements other than to note that they may violate the salary basis test and lead to unintended results.

<sup>2</sup> The FLSA itself does not require payment for overtime until after 40 hours of work during the work week. In most of the collective bargaining agreements covering state employees, the FLSA is adopted as the source for overtime eligibility, but a 37½ hour cut-off is substituted so that for FLSA-covered state employees, overtime kicks in after 37½ hours in the work week.

Our advice is that EIs are professional employees as that term is defined under the FLSA<sup>3</sup> and, therefore, are exempt from the overtime requirements of the FLSA. The state is not in violation of the law or the *Corbett* award in not paying overtime to these employees.

The basis for our advice can, perhaps, be most clearly outlined in the context of the *Corbett* award dealing with this very issue. As Arbitrator Corbett recognized, EIs are exempt as “professional employees” under the FLSA if they meet the duties test for this exemption and are paid on a salary basis. *Both* these tests must be met in order for the overtime exemption to be maintained. Arbitrator Corbett concluded that EIs were professional employees under the duties test even while acting as project engineers.<sup>4</sup> The arbitrator also concluded, however, that under the circumstances as they existed at that time, these employees were not being paid on a salary basis. Therefore, his ultimate conclusion was that, although EIs were performing exempt professional duties as project engineers, they had to be paid overtime because the state was violating the salary basis of payment for these employees.

The salary basis of payment under the FLSA requires that the employee regularly receive, each pay period, a predetermined amount constituting all or part of compensation, and that this amount not be subject to reduction because of variations in the quality or quantity of the work performed. 29 C.F.R. § 541.118. Arbitrator Corbett found that this test was not being complied with for, essentially, two reasons: 1) the EIs *were* being paid for overtime pursuant to a side agreement and a prior arbitrator’s decision continuing this agreement in effect; and 2) the employer had the authority to discipline an EI (or any other employee) by suspension without pay for less than one week for violations of rule or policy whether or not related to safety.<sup>5</sup>

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<sup>3</sup> The FLSA exempts executive, administrative, and professional employees from its overtime mandate. 29 U.S.C. § 213. These “white-collar” or “EAP” exemptions are defined by regulation 29 C.F.R. § 541. Admittedly, these regulatory definitions are complex and, in some cases, confusing.

<sup>4</sup> Arbitrator Corbett analyzed project engineer duties in detail and concluded that engineers who acted as project engineers were still acting in a professional capacity as the term is defined under the pertinent federal regulations. 29 C.F.R. § 541.300-541.315. No significant changes in these duties, that we are aware of, have been documented since the *Corbett* award. It should be noted that the fact that non-engineers can also perform project engineer duties is not determinative under the FLSA. This situation is analogous to the trained paralegal who has, through experience, learned to do legal research and draft legal pleadings: the paralegal doing this work is entitled to overtime; an attorney is not.

<sup>5</sup> Arbitrator Corbett also, apparently, considered time record-keeping requirements to be problematical for exempt employees. It is, however, quite clear that personnel policies that require employees to work specific hours, record the number of hours worked, and obtain permission before taking time off for work are not in violation of the salary basis test. Wage and Hour Opinion letter date July 1, 1993.

Since Arbitrator Corbett's award, the state has taken steps to shore-up the salary basis of payment for FLSA-exempt employees. No agreements for the payment of overtime to EI employees are now in effect. Thus, no extra compensation is being paid to these employees by a side agreement. The state has also made clear that disciplinary suspensions of less than one week for exempt employees are only appropriate when major safety violations are involved. *See* FLSA Exempt Discipline Policy dated October 20, 1993, attached. The primary reasons for the arbitrator ruling as he did with respect to the salary basis issue have, then, been addressed. These shortcomings in meeting the salary basis test have been remedied and would, we believe, lead an arbitrator or court to now conclude that the payment of overtime is not required under the FLSA for EIs performing project engineer duties.

PJG:clh:blw

Attachments