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Belo Contracts: The Fair Labor Standard Act's Little-Known Timesaver

By Gregory B. Gilmore, Esq.

One of the more common questions employment attorneys receive on wage and hour laws relates to the proper calculation of overtime. And for good reason. Ensuring compliance with overtime laws can be time consuming, especially when your workforce works fluid hours. For example, your on-call servicemen work different hours every week. One week a serviceman may work 32 hours, the next 53 hours, and the week after that 42 hours. But that's just one of your servicemen. Each of your other servicemen has hours that differ from the ones just mentioned, and each time any serviceman goes over 40 hours per week, your payroll department has to calculate overtime so that you don't run afoul of wage and hour laws. The process is time-consuming, and the penalties for mistakes are stiff. Surely, clients ask, there must be a simpler way. In certain circumstances, thanks to the Belo contract, there is.

The Fair Labor Standards Act ("FLSA") mandates that employers pay all employees who are covered by the minimum wage and overtime provisions of the FLSA ("nonexempt employees") at a rate of at least one and one-half times the employee's regular rate of pay for any time the employee works in excess of 40 hours during a single workweek. This pay requirement is colloquially referred to as "time-and-a-half for overtime." An employer who violates this provision of the FLSA by failing to pay a nonexempt employee "time-and-a-half" for any time worked in excess of 40 hours in a workweek subjects itself to a wage and hour claim for any unpaid overtime.

In certain narrow circumstances, however, an employer may utilize what is known as a "Belo contract" to better control the

threat and severity of wage and hour claims for unpaid overtime. "Belo contracts," named after the Supreme Court case authorizing their use, *Walling v. A.H. Belo Co.*, 316 U.S. 624 (1942), and codified by 29 U.S.C. Section 207(f), are exceptions to the "time-and-a-half for overtime" requirements of the FLSA. Section 207(f) reads as follows:

(f) Employment necessitating irregular hours of work

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) of this section if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement

(1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this title (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours in excess of such maximum workweek, and

(2) provides a weekly guarantee of pay for not more than sixty hours based on the rates so specified.

In short, a "Belo contract" permits an employer, in certain limited situations, to pay a nonexempt employee a fixed weekly salary without the necessity of calculating overtime, even if the employee works in excess of 40 hours. To utilize a "Belo contract," however, an employer must strictly adhere to all of the following requirements:

1) The employment must be pursuant to an "individual contract" or a "collective bargaining agreement."

2) The duties of the employee must "necessitate irregular hours of work." In connection with this requirement, the Code of Federal Regulations ("CFR") states that "[t]he nature of the employee's duties must be such that neither he nor his employer can either control or anticipate with any degree of certainty the number of hours he must work from week to week . . . [and that the employee's] duties must necessitate significant variations in weekly hours both below and above the statutory weekly limit on nonovertime hours." The

CFR cites the following jobs as examples of employees whose duties may necessitate irregular hours: "outside buyers, on-call servicemen, insurance adjusters, newspaper reporters and photographers, propmen, script [supervisors] and others engaged in similar work in the motion picture industry, firefighters, troubleshooters and the like."

3) The agreement must specify a regular rate of pay (the "specified regular rate"), which shall not be less than the minimum wage.

4) The agreement must specify that the employee will be paid not less than one and one-half times the specified regular rate for all hours worked in excess of 40 hours (the "specified overtime rate").

5) The agreement must provide for a weekly guarantee of pay for not more than 60 hours, utilizing the specified regular rate and the specified overtime rate. With respect to this requirement, 29 CFR 778.412 notes that "[i]n deciding the amount of the guaranty [the employer and the employee] should not choose a guaranty of pay to cover the maximum number of hours which the employee will be likely to work at any time but should rather select a figure low enough so that it may reasonably be expected that the rate will be operative in a significant number of workweeks."

In a "Belo contract," the employee, in exchange for a guaranteed weekly salary - even in short workweeks - typically agrees to accept a lower hourly rate than if the employee were compensated in a traditional FLSA § 207(a) arrangement, that is, compensated only for the actual hours worked, including time-and-a-half for overtime. In fact, 29 CFR 778.408 states that "[t]here is no requirement . . . that the regular rate specified be equal to the regular rate at which the employee was formerly employed before the contract was entered into."

In practice, a "Belo contract" works as follows: say an employer has an employee whose position requires unpredictable weekly hours, but the employer, from past experience with others it has employed in the position, determines that, for the most part, the employee's weekly hours will vary between 30 and 50. Rather than compensating the employee based on the *actual* hours the employee works in any given week - including "time-and-a-half" for any time the employee works in excess of 40 hours - the employer can instead enter into a "Belo contract" with the employee. To avoid running afoul of the rule set forth in 29 CFR 778.412, the parties could agree in the "Belo contract" that the employee will be paid a guaranteed weekly salary for all hours worked up to and including 50.

To illustrate how weekly compensation is computed utilizing a "Belo contract," assume a hypothetical agreement that specifies a

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regular rate of \$8.00 per hour and a specified overtime rate of \$12.00 per hour (i.e., one and one-half times the regular rate). In this scenario, the employee, whether he or she works 1 hour or 50 hours, would be paid a guaranteed weekly salary of \$440.00, calculated as follows:

Specified regular rate: 40 hours @ \$8.00 = \$320.00

Specified overtime rate: 10 hours @ \$12.00 = \$120.00

Guaranteed weekly salary = \$440.00

If the employee in the above example were to work in excess of 50 hours, however, then the employer, in addition to paying the guaranteed weekly amount of \$440.00, would also be required to pay the employee the specified overtime rate for any hours worked over 50.

As this example shows, when using a "Belo contract," the employee receives a benefit by being able to count on a fixed weekly salary - even in short workweeks - and the employer receives a benefit by enabling it to anticipate and control at least some part of its labor costs. In addition, the use of a "Belo contract" in the foregoing scenario benefits the employer by reducing the risk of a wage and hour claim by the employee, at least with respect to any weeks in which the employee works 50 hours or less. This is so because under the "Belo contract," for any workweeks in which the employee's hours do not exceed 50 hours worked, the employer is only required to pay the employee the guaranteed weekly salary set forth in the "Belo contract." It is, however, important to note that for any workweeks that the employee works greater than 50 hours, the employer must pay the employee "time-and-a-half" for that excess time and would be subject to wage and hour claims if it failed to do so.

While the use of a "Belo contract" is certainly not a panacea for all wage and hour claims and can only be implemented in narrow circumstances, if an employer has employees for which use of a "Belo contract" is permissible, its use may serve to reduce the number and severity of wage and hour claims made by any such employees.

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