

## **Provider Faces Class Action by Managers for Overtime Pay**

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Sixteen employees - clinic managers, assistant managers and technicians - will proceed in a class action for overtime pay against a nationwide provider of aesthetic skin treatments. The managers and assistant managers assert that despite their titles, they were actually “glorified sales counselors” and not exempt from federal overtime requirements.

On August 24, 2009, a federal district judge in Michigan conditionally certified three class actions against American Laser Centers (ALC) for overtime violations involving current and former similarly situated full-time employees. ALC, a Farmington Hills, Michigan corporation, is recognized as the largest laser hair removal, skin rejuvenation and cellulite reduction therapy provider in the country with more than 220 locations in several states. This class action may result in identifying additional managers, assistant managers, and technicians claiming back overtime pay from ALC.

A class action is a type of legal action whereby a large number of persons who are similarly situated may proceed in a single lawsuit against a defendant for damages. Once the class is certified, the defendant typically must provide the plaintiffs with names of other persons similarly situated who may be included in the action against the defendant.

The Federal Rules of Civil Procedure (FRCP) set forth rules for class actions. However, the Fair Labor Standards Act (FLSA) contains special provisions that permit any one or more employees to proceed against an employer on behalf of themselves and other employees similarly situated. The FLSA requires employees to give their consent in writing before they may be included in the action.

Federal courts within the Sixth Circuit (which includes Michigan, Ohio, Kentucky and Tennessee) have held the existence of questions of fact concerning potential plaintiffs who are similarly situated to the plaintiffs who brought the legal action does not preclude them from being included in an FLSA class action, even if it would under the more stringent standard set forth by the FRCP.

In his order granting conditional class action certification, the judge categorized the three classes as the “Non-Exempt Class” (clinic technicians and assistant technicians working for ALC at anytime between February 13, 2005 and February 13, 2008); the “Exempt Assistant Managers Class” (assistant managers working for ALC during the period from February 13, 2006 to February 13, 2008); and the “Managers Class” (clinic managers working for ALC from February 13, 2006 to February 13, 2008). The judge conditioned the certification upon resolution of any potential conflicts between the non-exempt and exempt classes.

The exempt classes, which include clinic managers and assistant clinic managers, allege that ALC unlawfully claimed them as being exempt from overtime. The exempt classes contend that they did not fall within any exemption under the FLSA, including either the executive or managerial exemption. They assert that the majority of their work time was devoted to non-management functions of selling cosmetic skin treatments and products. They also allege that they did not supervise two or more full-time employees and did not have the authority to hire, fire or make recommendations regarding decisions affecting employment of others.

The FLSA requires employers covered by the FLSA to pay employees at least the minimum wage (which as of this date is \$7.25 per hour) and overtime pay at a rate of one and a half times their regular rate of pay for all hours worked over 40 hours in a workweek, unless an exception applies. In general, two tests (the salary basis test and the duties test) must be satisfied for the specific type of exemption claimed in order to avoid the overtime requirement. Employees who fall within the executive exemption are exempt from overtime pay requirements under the FLSA. It is noted that state laws may have provisions which are more stringent than the FLSA requirements. Therefore, providers must ensure they comply with both the federal and state law requirements applicable to their practice.

In order to qualify an employee for the executive exemption, providers must ensure that the employee is compensated with a salary of at least \$455 per week and the actual duties performed by the employee satisfy the duties test for this exemption. Those duties must include the following: (1) the primary duty of managing the practice/enterprise or a customarily recognized department or subdivision of it;

(2) customarily supervising at least two full-time employees or the equivalent; (3) the authority to hire, fire or promote employees or their recommendations concerning such matters is given particular weight by the provider. All three elements of the duties test must be satisfied to qualify for this exemption.

Providers must not assume that giving an employee the title of manager or assistant manager confers the overtime exemption. It does not. It is recommended that providers ensure that the job announcements for exempt new hires and the job descriptions for existing exempt employees clearly specify the duties which make their work exempt from overtime. However, this is not enough. Providers must also ensure that the actual work performed also satisfies the exemption.

The allegations against ALC remain to be proven. However, this action signals a warning to providers to re-examine the work of those employees for whom they claim an overtime exemption to ensure each employee's work satisfies both the salary basis test and the duties test. Do not assume that because an employee holds the title of manager or assistant manager that they are exempt from overtime. Instead, focus on ensuring that both salary basis and duties tests are satisfied.

*Matthews v. ALC Partner, Inc., d/b/a American Laser Centers*, No. 2:08-CV-10636 (E.D. Mich. Aug 24, 2009)

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