



*Otto Shill - Attorney at Law*

# DOES AG DO OVERTIME?

*By: OTTO SHILL, Attorney - JacksonWhite Law Firm*

During our recent visit at the 2013 ACGA Convention, we talked about whether or not overtime laws apply to agricultural workers. I promised that I would provide a more detailed explanation of the rules than time would allow me during my presentation . . . so here it is:

You may remember that generally the Fair Labor Standards Act (the "Act") requires that every non-exempt employee must receive 1.5 times his or her hourly rate as compensation for hours worked in excess of 40 hours per week. The rule is strictly enforced by the U.S. Department of Labor and the compensation is due if the work is performed, even if the employee was instructed not to work overtime. Failure to comply can bring Department of Labor penalties equal to two times the amount of unpaid compensation and employees may be able to claim treble damages under Arizona wage laws.

Fortunately for most of the Association's members, there is a broad exemption from overtime for agricultural workers. However, the regulations that apply to this exemption are detailed and complex, covering more than 100 pages. Not every employee will qualify for the exemption and courts interpret the exemptions narrowly against the employers seeking to assert them. These paragraphs explain the basic rules that apply to the exemption. However, as with most circumstances, you should consult your own advisors about your specific circumstances.

Section 213(b)(12) of the Act provides

a broad exemption from minimum wage and overtime requirements when it exempts "any employee employed in agriculture." Regulations define "agriculture" as including farming in all its branches and, among other things, includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities, the raising of livestock, bees, furbearing animals, or poultry, and any practices (including forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market, or to carriers for transportation to market. According to the U.S. Supreme Court, whether an activity constitutes "agriculture" depends on whether it is carried on as an integral part of the agricultural function and not as an independent productive activity that provides goods or services to farmers. Thus, a dairy worker who prepares manure to be used as fertilizer for growing the dairy's feed is engaged in agriculture, but the packer at a fertilizer plant is not.

This means that an employee can qualify as an exempt employee either by (i) being engaged directly in the operations described by the statute as "agriculture," whether or not they are employed by a farmer or cattleman, or (ii) by providing support-type services as the direct employee of the farmer or cattleman in the farming operation, even if the activity itself

is not within the statutory definition.

In the case of cattlemen, "agriculture is defined to include the raising of "livestock." Livestock includes cattle, sheep, swine, horses, mules, donkeys, and goats. Other animals are not included but employees working with other animals may be exempt under one of the Act's other provisions. One is engaged in the "raising" of livestock if one is breeding, fattening, feeding, and caring for livestock. It is clear that for those of you engaged in ranching, the majority of your employees will qualify for the exemption. However, not all employees involved with livestock qualify as exempt. For example, feedlot employees are not exempt because the care of cattle held in a feedlot for a few days in anticipation of processing does not qualify as "raising" livestock. With respect to horses, employees engaged in breeding, raising, and training of horses, including race horses, on farms are exempt, whereas those engaged in similar activities away from a farm are not exempt. The common principle in these rules seems to be that to be exempt, one must be engaged in an operation of which the primary business is raising the same group of animals over an extended period of time.

We should note that work at livestock auctions is not exempt work. Even employees of a cattleman who participate in the business of raising the livestock and who also are engaged in auction work for the purpose of selling the cattleman's animals are not engaged in exempt work when they work at the auction. This means that separate rates of pay apply to each activity and exemption for the farming operation depends on the employee being primarily employed by the farmer in the agricultural operation. Remember, when dealing with the government, you have the burden of proving that your employee qualifies for the exemption, so good record keeping of each activity is crucial.

Finally, there are other exemptions that may apply to people who work in businesses related to agriculture or bringing agricultural products to market. If you want to avoid the financial consequences of non-compliance you should examine your operation carefully and consider each employee's activities individually.

So the next time you take your horse or your pickup out to survey the ranch on a quiet Arizona morning, you might think of two things. First, you will probably be glad you are ranching instead of reading regulations for a living. Second, the further your activities get from the ranch or farm, the less likely your employees are to be exempt, and you can save time and money by consulting with an advisor who does that reading for you.

*AS*