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Memo on the Application of Overtime Laws to Obama Transition Project Employees

To: Chris Lu
From: Mike Morgan
Subject: Application of Overtime Laws to Obama Transition Project Employees

I. ISSUE

Whether the Obama Transition Project (OTP), which will be incorporated as a nonprofit, tax-exempt organization under 26 U.S.C. § 501(c)(4), will be legally required to pay overtime compensation to any of its employees.

II. SHORT ANSWER

My best assessment of federal and District of Columbia law is as follows: Some, but not all, OTP employees will be covered by the federal overtime provision. All OTP employees will be covered by the District of Columbia overtime provision. Many of these "covered" employees will not be entitled to additional overtime compensation because they will qualify for one of the numerous exemptions listed in the federal and local statutes. But some covered, non-exempt employees will be legally entitled to additional pay for overtime work under federal and/or District of Columbia law.[1]

III. ANALYSIS OF FEDERAL LAW

A. Introduction

The Fair Labor Standards Act (the Act) provides the federal law governing overtime compensation. It states that, with certain exceptions, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1).

The language of § 207(a)(1) creates two ways that an employee may be covered by the federal overtime provision. First, she may work for an employer that is an "enterprise engaged in commerce or in the production of goods for commerce," as those terms are defined by the Act. Every single employee working for such an employer is covered by the overtime provision. This is commonly referred to as "enterprise-based coverage." Second, an employee's individual job duties may meet the definition of "engag[ing] in commerce or in the production of goods for commerce." Such an employee would be covered by the overtime provision even though some of her co-workers with different responsibilities would not. This is commonly referred to as "individual-based coverage." (As I discuss below, a "covered" employee is not necessarily entitled to overtime compensation, because she might qualify for one of the numerous exemptions set out by the Act.)

B. No Relevant Per Se Exceptions

Before I apply the text of the Fair Labor Standards Act to OTP, I want to briefly respond to a threshold question you put to me last week. You asked whether there are any across-the-board exceptions that would release OTP from the standard federal overtime requirements based on its similarity to a political campaign or its nonprofit status. I have found no such exception.

1 I should offer a major caveat at the outset. I have no prior experience in employment law. So I recommend that you seek the opinion of a Washington, D.C.-based employment lawyer before making any final decisions on this issue.

My research did not reveal any per se exception to the overtime provision for political campaigns. I conducted searches of treatises, practice guides, Wage and Hour Division opinion letters, and federal cases. These searches did not yield even a single case or commentary suggesting that the Fair Labor Standards Act gives special treatment to political campaigns (much less to presidential transition organizations.)

Likewise, there is no per se exception to the federal overtime provision for nonprofits. To the contrary, in Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985), the Supreme Court held that a tax-exempt "501(c)(3)" organization[2] was required to pay overtime under the Fair Labor Standards Act notwithstanding its nonprofit status. The Court noted that it had "consistently construed the Act liberally to apply to the furthest reaches consistent with congressional direction." Id. at 296 (quotation marks and citation omitted). It further observed that the Act "contains no express or implied exception for commercial activities conducted by religious or other nonprofit organizations," ibid., and that the legislative history evinced a "broad congressional consensus that ordinary commercial businesses should not be exempted from the Act simply because they happened to be owned by religious or other nonprofit organizations," id. at 298. Thus, OTP is not exempt from the overtime requirement merely by virtue of its status as a § 501(c)(4) organization.

C. Enterprise-Based Overtime Coverage

For OTP to be subject to enterprise-based overtime coverage, which would apply to every single OTP employee, it will have to qualify as an "enterprise" and it will have to "engage[] in commerce or in the production of goods for commerce." 29 U.S.C. § 207(a)(1). The Act provides very specific definitions of these terms of art.

1. Whether OTP will qualify as an "enterprise" under the Act

The Act defines "enterprise" as "the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose . . . ." 29 U.S.C. § 203(r)(1). Standing by itself, this definition would probably disqualify OTP as an "enterprise." The cases and regulations construing the term "business purpose" instruct that it requires some type of ordinary commercial activity involving competition with private entrepreneurs.[3] OTP has no plans to engage in such competitive commercial activity, and therefore it will lack the requisite "business purpose" as far as § 203(r)(1) is concerned.

But the Act also specifies that "activities performed . . . in connection with the activities of a public agency, shall be deemed to be activities performed for a business purpose." 29 U.S.C. § 203(r)(2)(C). Based on the plain text[4] of § 203(r)(2)(C) and my understanding of how OTP will operate, it seems quite possible that a court would treat OTP as having a business purpose based on the activities it will perform in "connection with the activities of a public agency." The Act defines "public agency" to include "the Government of the United States" and "any agency of the United States." 29 U.S.C. § 203(x). OTP's raison d'être is to coordinate with the United States Government and its agencies, in order to prepare for an orderly transition of government. OTP will be headquartered in office space owned by the General Services Administration,

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2 See 26 U.S.C. § 501(c)(3).

3 See, e.g., Alamo, 471 U.S. at 297 (business purpose includes "ordinary commercial businesses" operated by nonprofits); Kitchings v. Florida United Methodist Children's Home, Inc., 393 F. Supp. 2d 1282, 1294-95 (M.D. Fla. 2005) (no genuine issue of material fact concerning whether nonprofit residential program had a business purpose under § 203(r)(1), because the plaintiffs "offered no evidence to show how the Children's Home competes with any other private commercial enterprise"); Briggs v. Chesapeake Volunteers in Youth Services, Inc., 68 F. Supp. 2d 711, 715 (E.D. Va. 1999) (nonprofit corporation providing volunteer opportunities for community service did not have a business purpose because there was no evidence that it "in any way compete[d] with other commercial ventures, or charge[d] its clients for services"); Joles v. Johnson County Youth Service Bureau, Inc., 885 F. Supp. 1169, 1175 (S.D. Ind. 1995) (nonprofit corporation providing temporary shelter and care to troubled youths, which "was not engaged in commercial activities in competition with private entrepreneurs," was not engaged in activities performed for a business purpose); 29 C.F.R. § 779.214 (explaining that charitable organizations are treated as having a business purpose when they "engage in ordinary commercial activities, such as operating a printing and publishing plant").

4 There is very little case law interpreting this deeming provision. Up until 2007, it had "never been construed by any court." Jacobs v. New York Foundling Hospital, 483 F. Supp. 2d 251, 261-62 (E.D.N.Y. 2007). Nor are there any relevant regulations or opinion letters from the Wage and Hour Division of the Department of Labor.
The lone case on the subject, Jacobs, is a rather clumsy opinion by a magistrate judge that does not provide much guidance. Jacobs concerned a nonprofit hospital that contracted with a municipal agency to provide foster care, adoption, and other family care services. The magistrate judge held that the hospital was not deemed an "enterprise" under § 203(r)(2)(C), notwithstanding its "extensive connection with municipal public agencies." 485 F. Supp. 2d, at 263. So far as I can tell, her decision turned on the fact that none of the hospital's employees actually worked "within" a public agency, as opposed to merely working "in connection with" such an agency. I think the merits of this dichotomy are questionable in light of the plain text of the statute. But assuming that Jacobs correctly interpreted the statute, its approach suggests that OTP should be deemed an enterprise under § 203(r)(2)(C), because (as discussed in the main text) many of OTP's employees will work within a public agency.

and it will receive communications assistance and other types of support from that agency. The Operations staff informs me that paid employees of OTP will be physically located within numerous federal agencies. In light of these facts, it would be an uncomfortable stretch to claim that OTP's activities are not performed "in connection with" the activities of public agencies.

Thus, OTP probably will have a "business purpose" based on the deeming provision of § 203(r)(2)(C). This will render it an "enterprise" under the Fair Labor Standards Act.

2. Whether OTP will "engage[] in commerce" under the Act

Even if OTP meets the definition of an "enterprise" under the Act, however, it will not be subject to enterprise-based overtime coverage unless it also "engage[s] in commerce or in the production of goods for commerce." 29 U.S.C. § 207(a)(1). In relevant part, the Act defines this term as follows:

> (1) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise that—
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> (A)
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> i. has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and
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> ii. is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level that are separately stated); [or] . . .
>
> (C) is an activity of a public agency.

29 U.S.C. § 203(s).

OTP will not satisfy the definition set out in § 203(s)(1)(A) because it will never have an "annual gross volume of sales made or business done" of $500,000. By regulation, "the gross volume of sales made or business done means the gross dollar volume (not limited to income) derived from all sales and business transactions including, for example, gross receipts from service, credit, or other similar charges." 29 C.F.R. § 779.259(a).[5] OTP does not intend to have any receipts from sales or other business transactions. To be sure, it will receive several million dollars in funding. But that funding will come from only two sources: private contributions and an appropriation from the federal government. I have found no authority indicating that those receipts should be treated as "sales made or business done" for purposes of § 207(a)(1). And opinion letters from the Wage and Hour Division of the Department of Labor suggest the opposite. The letters state that

> [c]ontributions, pledges, [and] donations . . . that are used in the furtherance of the educational, eleemosynary and religious activities of a nonprofit organization are not included in computing the annual dollar volume of business done of the enterprise.

Opinion Letter, United States Department of Labor, Wage and Hour Division (Jan. 9, 1998); see also Opinion Letter, United States Department of Labor, Wage and Hour Division (Jan. 29, 1999) (same). It stands to reason that government and private contributions used in furtherance of the civic-minded activities of OTP would receive the same treatment.

I also doubt that OTP will satisfy the alternative definition set out in § 203(s)(1)(C) for enterprises that are "an activity of a public agency." I found only one published opinion construing § 203(s)(1)(C), in a case where the plaintiff argued that a local museum was an activity of a state agency. See Powell v. Tucson Air Museum Foundation of Pima County, 771 F. 2d 1309 (9th Cir. 1985). In rejecting that argument, the Ninth Circuit concluded that "[t]he key factors in determining whether a private party should be considered a public agency are whether the entity is directly responsible to public officials or to the general public, and whether the parties' contracts designated them as independent contractors, not state agencies." Id. at 1311-12. Because the state agency at issue was unable to hire and fire the employees of the museum, and had no power of appointment or removal over the museum's board of directors, the Ninth Circuit held that the museum was not "an activity of a public agency" under § 203(s)(1)(C). See also Doughty v. Regional Aids

5 The same regulation explains that the "annual gross volume of sales made or business done of an enterprise consists of its gross receipts from all types of sales made and business done during a 12-month period." 29 C.F.R. § 779.259(a).

Interfaith Network, 2005 WL 1185546 (W.D. Mo., Apr. 20, 2005) (holding that interfaith network with no relationship with the state beyond receiving grants is not a state agency for purposes of § 203(s)).

In light of the rule in Powell, OTP has a strong argument that it is not "an activity of a public agency" under § 203(s)(1)(C). It is true that OTP will receive substantial funding from the government and will work closely with government agencies. But it will never be "directly responsible" to a public agency in the way Powell uses the phrase. No public official will be able to hire and fire OTP employees, or appoint and remove OTP board members. And OTP will not be designated as a public agency in any of its contracts, at least so far as I know. (Of course, from an ethical and philosophical standpoint, OTP and its employees will be "directly responsible" to the general public and its government. This is not, however, the type of responsibility that Powell seems to have in mind.)

3. Summary

To sum up, while OTP will probably qualify as an "enterprise" for purposes of the Fair Labor Standards Act, I think it will not qualify as an "enterprise engaged in commerce or in the production of goods for commerce." If those conclusions are correct, OTP will not be subject to enterprise-based overtime coverage under 29 U.S.C. § 207(a)(1).

D. Individual-Based Overtime Coverage

The next question is whether any employees of OTP will trigger federal overtime coverage on an individual basis because they will "engage in commerce" in the course of fulfilling their OTP duties. 29 U.S.C. § 207(a)(1). The Act defines "commerce" broadly, as "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." 29 U.S.C. § 203(b). (Significantly, the District of Columbia is treated as a State for purposes of this definition. See 29 C.F.R. § 776.8.) The Department of Labor regulations take a similarly expansive approach.[6] As discussed in the following paragraphs, these regulations make it fairly clear that some OTP employees will be individually covered by the overtime provisions of the Act.

First, the regulations establish that an employee who uses "the interstate mails, telegraph, telephone or similar instrumentalities for communication . . . in obtaining or communicating information or in sending or receiving written reports or messages, or orders for goods or services, or plans or other documents across State lines" qualifies as engaging in commerce under the Act. 29 C.F.R. § 776.10(b). Such an employee will be covered by the overtime provision so long as these communication activities occur on a "regular and recurring" basis—even if they are "small in amount." 29 C.F.R. § 776.3. Surely there will be many OTP employees who will engage in commerce on this basis. This will include any clerical employees who regularly answer telephone calls from outside the District of Columbia, open out-of-state mail or electronic messages, or help ship or mail materials to recipients in other states. It will also include higher-level staff whose duties require them to routinely telephone or e-mail persons in other states and countries (say, to respond to press calls by reporters in New York, to coordinate economic policy with state officials, or to plan foreign policy with overseas diplomats).[7]

Second, the regulations establish that "employees who are regularly engaged in traveling across State lines in the performance of their duties (as distinguished from merely going to and from their homes or lodgings in commuting to a work place) are engaged in commerce and covered by the Act." 29 C.F.R. § 776.12. I assume that most OTP staff will remain in the District of Columbia for the duration of the transition, and thus will not be covered by the Act on this basis. But I expect that some of the more senior staff will regularly travel outside of the District for work purposes. For example, press staffers will need to travel with Sen. Obama between Chicago and Washington. Policy staffers working on state-federal programs such as Medicaid might have to travel to state capitals; those working on foreign policy might have to travel abroad. These employees will be covered by the Act so long as their trips occur on a regular basis between November and January.

Although it is clear that the day-to-day duties of some OTP employees will trigger individual-based overtime coverage, the task of determining precisely which employees will be covered is a notoriously

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6 See, e.g., 29 C.F.R. § 776.8 ("[T]he term commerce is very broadly defined."); cf. Brennan v. Wilson Building, Inc., 478 F. 2d 1090, 1094 (5th Cir. 1974) (the phrase "engaged in commerce" within the meaning of Section 203 of the FLSA is to be given a broad, liberal construction).

7 *Cf. Stout v. Smolar,* 2007 WL 2765519, *4 (N.D. Ga., Sept. 18, 2007) (holding that the Director of Investigations at law firm who "made numerous phone calls outside the state of Georgia . . . satisfied the 'engaged in commerce' prong").

difficult one. Justice Frankfurter once quipped that the "search for a dependable touchstone by which to determine whether employees are 'engaged in commerce or the production of goods for commerce' is as rewarding as an attempt to square the circle." A. B. Kirschbaum Co. v. Walling, 316 U.S. 517, 520 (1942). Guidance documents from the Department of Labor are extremely vague. For this reason, a prominent practice guide advises "that individual coverage should be withheld only if the time consumed by the employee doing covered work is so infrequent and out-of-pattern that it would be unrealistic to assert coverage." L. SCHNEIDER & J. STINE, WAGE AND HOUR LAW: COMPLIANCE AND PRACTICE § 4.2.

E. Exemption from Overtime under the Fair Labor Standards Act

Even if individual employees are "covered" by the overtime provisions of the Fair Labor Standards Act, it does not necessarily mean that they are entitled to additional compensation for overtime work. The Act contains numerous exemptions for certain types of employees. For example, "an employee employed in a bona fide executive, administrative, or professional capacity" is generally exempted from the overtime requirements of the Act, provided that she meets certain tests regarding her job duties and weekly salary. 29 U.S.C. § 213(a)(1); see generally 29 C.F.R. § 541.

I will not explore these exemptions in any detail here. (I would be happy to supplement this memo with a lengthier discussion of the topic if it would be helpful). My sense is that most of the senior-level OTP employees who will be covered by the Act on an individual basis would easily qualify for one or more exemptions. The more troubling issue is lower-level OTP employees, who will be covered by the Act because they open the mail, answer phones, respond to e-mails, etc. I suspect that those employees will not qualify for an exemption in most instances.

F. Summary of Federal Law Conclusions

OTP probably qualifies as an "enterprise" under the Fair Labor Standards Act. But because its activities will not amount to "engag[ing] in commerce or in the production of goods for commerce," it will not be subject to enterprise-based coverage that would extend to every OTP employee. Some OTP employees, however, will be covered by the Act's overtime provision based on their individual job duties. Of these "covered" employees, many will not be entitled to overtime pay because they will qualify for a statutory exemption; the balance will be entitled to receive 150 percent of their normal hourly rate for any work done beyond the standard, 40-hour work week.

IV. ANALYSIS OF DISTRICT OF COLUMBIA LAW

The District of Columbia has adopted its own overtime statute, which is considerably broader than the federal law. The statute provides that

[n]o employer shall employ any employee for a workweek that is longer than 40 hours, unless the employee receives compensation for employment in excess of 40 hours at a rate not less than 1 1/2 times the regular rate at which the employee is employed.

D.C. CODE § 32-1003(c). The term "employer" is defined expansively. It "includes any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee, but shall not include the United States or the District of Columbia." D.C. CODE § 32-1002(3).

There is not much in the way of case law or treatises interpreting the District of Columbia statute. But based on the text, it seems to me that OTP will probably qualify as an "employer" under the statute. And like its federal counterpart, the District of Columbia statute contains no exceptions for nonprofits, political campaigns, or other organizations that are analogous to OTP.[8] If I am correct that OTP will be an "employer" under § 32-1002(3), then every OTP employee is covered by the District of Columbia overtime provision.

The District of Columbia statute includes numerous exemptions which largely mirror the federal exemptions discussed above.[9] Most OTP employees will qualify for one or more of these exemptions, and therefore will not be

8 It would be futile for OTP to argue that it is not an employer because it is "the United States": For one thing, as discussed above, the facts do not support this theory. For another, if OTP claimed that it was the United States government for purposes of avoiding District of Columbia overtime law, this would virtually assure that its employees would be covered by the overtime provisions of the Fair Labor Standards Act.

9 See, e.g., D.C. CODE § 32-1004(a) ("The minimum wage and overtime provisions of § 32-1003 shall not apply with respect to[a]ny employee employed in a bona fide executive, administrative, or professional capacity, or in the capacity of outside salesman (as these terms are defined by the Secretary of Labor under 201 et seq. of the Fair Labor Standards Act) . . . .").

entitled to overtime compensation under District of Columbia law. Still, I expect that a substantial number of lower-level OTP employees will not meet the exemption requirements, and will be entitled to extra pay for overtime work under § 32-1003(c).

IV. SUMMARY

In summary, OTP will probably not be subject to enterprise-based overtime coverage under the Fair Labor Standards Act, but some OTP employees will be covered by the federal overtime provision on an individual basis as a result of their day-to-day responsibilities. With respect to District of Columbia law, it appears that all OTP employees will be covered by the District's overtime provision. While many (perhaps most) of the OTP employees covered under federal and District of Columbia overtime law will qualify for an exemption based on their job responsibilities, others will not.