



Recently, the United States Court of Appeals for the Ninth Circuit [addressed](#) whether staff nurses for the City and County of San Francisco (the City) were entitled to time-and-a-half overtime or whether the method of compensating the nurses satisfies the “salary basis test” in the Fair Labor Standards Act (FLSA), which would exempt the nurses from the overtime requirement as bona fide professional employees.

The Ninth Circuit held that in determining whether the salary basis test is met, courts must “look beyond conclusory language in contracts and similar documents” and “instead analyze how employees are actually paid.” Here, the Ninth Circuit found that there were material factual questions as to whether staff nurses received predetermined amounts of compensation in certain pay periods.

## Background

The FLSA requires employers to pay employees overtime unless an exemption applies. The most common exemption is for employees working in executive, administrative, and professional (EAP) capacities. Among other requirements, the EAP exemption applies where employers meet the salary basis test, which requires employers to guarantee “at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked” and there is a “reasonable relationship” between the employee’s salary and the money actually earned. While private employers are prohibited from making partial-day deductions for their salaried employees, the FLSA allows public employers, under the public accountability principle, to reduce pay for partial-day absences and still meet the salary basis test if the deductions were made according to a pay system established by statute, ordinance, or regulation. At the same time, public employers who fail to provide public workers with an opportunity to earn the predetermined or guaranteed amounts on a weekly or less frequent basis lose the exemption and must pay overtime.

In *Silloway v. City & County of San Francisco*, approximately 350 staff nurses employed by the City opted in to two different lawsuits alleging that the City violated the FLSA by misclassifying the staff nurses as exempt employees under the professional-capacity exemption and failing to pay them overtime. The dispute over whether the professional-capacity exemption applied to the staff nurses hinged on whether the City guaranteed the opportunity to work the number of hours corresponding to their full-time equivalences and, therefore, met the requirements of the salary basis test under the FLSA. The City asserted that staff nurses were paid on a “salary basis” because their annual compensation figures were documented at the start of every year through employment agreements and published salary ordinances. The staff nurses, in contrast, argued that while the published salary ordinances specified the appropriate salaries, the actual practices of the City worked against their opportunities to work the required number of hours.

On cross-motions for summary judgment, the Northern District of California ruled in favor of the City, concluding the City paid staff nurses on a salary basis and were exempt from FLSA overtime requirements based on the “dispositive evidence” of the published salary ordinance. The staff nurses appealed to the Ninth Circuit.

## Holding

The Ninth Circuit reversed the district court’s ruling and remanded the case for further proceedings. Senior Circuit Judge David F. Hamilton, sitting by designation from the Seventh Circuit Court of Appeals, wrote the majority opinion, stating the “City’s compensation test does not necessarily flunk the salary basis test, but material factual questions remain in dispute regarding whether the City satisfied the test as a matter of practice.” The Ninth Circuit found that the district court erred by finding the published salary ordinance was dispositive evidence that the staff nurses were paid on a salary basis. Instead, based on the facts in the record, the court agreed with the nurses that the inquiry should not have ended with the salary ordinance but should have gone further to analyze how the staff nurses were “actually paid.”

In examining whether the City, as a public employer, satisfied this requirement, the court held “[t]he City failed to show beyond reasonable dispute that it guaranteed staff nurses the opportunity to work the number of hours corresponding to their full-time equivalencies during the relevant time period.” Specifically, the expert report submitted by the City revealed at least 72 employee pay periods in which staff nurses worked fewer hours than their full-time shifts, resulting in lower pay. While the court noted there could be permissible reasons for each discrepancy, the City has not provided any evidence of such in the motion. Absent this evidence, because factual questions remain as to whether the staff nurses were paid their predetermined amounts of compensation, summary judgment in favor of the City was reversed and remanded for further proceedings.

# Takeaway

This Ninth Circuit’s decision makes clear that public employers cannot rely solely on salary ordinances and regulations to satisfy the requirement that employees are paid on a salary basis and, thus, take advantage of the professional exemption. Rather, public employers must determine whether their actual pay practices allow covered public employees the opportunity to work the number of hours corresponding to the full-time equivalencies. Deviations from standardized pay practices or evidence that employees were not given the opportunity to work full time can result in loss of the professional exemption. Public employers with questions regarding their pay practices, including whether those practices put the salary basis test at risk, should contact experienced counsel for guidance.

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