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NEWSLETTER

# Seventh Circuit Rules That Term "Similar" in Policy Exclusion Is Not Vague

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The United States Court of Appeals for the Seventh Circuit, applying Illinois law, has held that an exclusion in an employment practices liability policy applying to "any actual or alleged violation of the Fair Labor Standards Act [FLSA] . . . . [or] other similar provisions of any federal, state or local statutory or common law" barred coverage for a class action lawsuit seeking overtime pay under the Illinois Minimum Wage Law, 820 ILCS 105/4a(1). *Farmers Auto. Ins. Assoc. v. St. Paul Mercury Ins. Co.*, 2007 WL 1052822 (7th Cir. April 10, 2007).

The court rejected the insured's (in this case, an insurer) assertion that the term "similar" is "so hopelessly vague" that it is without effect in the policy. Although the court noted that, "[s]tanding alone, the word 'similar' partakes of the vagueness of other verbal signifiers of matters of degree," it found that "context can give it a precise meaning, as this case illustrates." The court observed that both federal and Illinois law contain the same requirements for overtime pay, and though they differ in scope, that difference is unrelated to the purpose of the exclusion, which is the prevention of moral hazard arising from the "temptation of an insured to precipitate the event insured against." The court added that "similar," an undefined term, should not be interpreted according to the average person's understanding, but rather according to "the understanding of the intended readership"—employers who know about the FLSA and state counterparts.

The court also rejected the insured's contention that the use of "similar" made policy coverage illusory. While acknowledging that there could be a reading of "similar" that would have that effect, the court noted that no such construction was being advocated by the insurer. It also reasoned that, in any event, "an interpretation of 'similar' that nullified the policy would be as silly as an interpretation that nullified the 'similar' exclusion."