

Wage & Hour Issues in the Current Economy: Avoiding Liability

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Fair Labor Standards Act

- Federal & Florida Minimum Wage: \$7.25/hour
(July 24, 2009)
- Overtime: 1-1/2 times the regular rate of pay for all hours over 40 hours in a work week

What Are The Claims?

- Misclassification Claims
- Off The Clock Claims
- Improper Deductions
- Break/Rest Period Claims

Steps to Minimize Exposure

1. Review Suspect Classifications —

- Administrative Assistants
- Assistant Managers
- Advisors (investment, loan, mortgage sales)
- Adjusters
- Loan/Mortgage Officers
- Customer Service Representatives
- Paralegals
- Assistants
- Clerks

“White Collar” Exemptions

- Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees who are employed in a bona fide:
 - Executive;
 - Administrative;
 - Professional; or
 - Outside Sales capacity.
- Certain computer employees may be exempt professionals under Section 13(a)(1) or exempt under Section 13(a)(17) of the FLSA.

Three Tests for Exemption

- Salary Level
- Salary Basis
- Job Duties

Minimum Salary Level: \$455

- For most employees, the minimum salary level required for exemption is \$455 per week

Highly Compensated Test

- Total annual compensation of at least \$100,000
- Perform office or non-manual work
- Customarily and regularly perform any one or more of the exempt duties identified in the standard tests for the executive, administrative or professional exemptions

Executive Exemption

- Primary duty is management of the enterprise or of a customarily recognized department or subdivision;
- Customarily and regularly directs the work of two or more other employees; and
- Authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status of other employees are given particular weight.

Administrative Exemption

- Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Discretion and Independent Judgment

- The comparison and evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered
- Must be exercised with respect to “matters of significance,” which refers to the level of importance or consequence of the work performed
- Decisions and recommendations may be reviewed at a higher level and, upon occasion, revised or reversed

Learned Professional Exemption

- The employee's primary duty must be the performance of work requiring advanced knowledge
- In a field of science or learning
- Customarily acquired by a prolonged course of specialized intellectual instruction

Creative Professional Exemption

The employee's primary duty must be the performance of work requiring *invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.*

Recognized Field of Artistic or Creative Endeavor

- Music
 - Musicians, composers, conductors, soloists
- Writing
 - Essayists, novelists, short-story writers, play writers
 - Screen play writers who choose their own subjects
 - Responsible writing positions in advertising agencies
- Acting
- Graphic Arts
 - Painters, photographers, cartoonists

Skilled Computer Employees Are Exempt Professionals

Examples Include:

Computer System Analysts, Computer Programmers,
and Software Engineers

■ Primary Duty Consists of:

- Application of Systems analysis techniques and procedures;
- Design or development of computer systems or programs;
- Design or testing of computer programs related to machine operating systems; or
- A combination of the aforementioned duties, the performance of which requires the same level of skills.

Outside Sales Exemption

Primary Duty:

- Making Sales; or
- obtaining orders or contracts for services or for the use of facilities for which the client or customer pays

Generally, activities must occur away from employer's place of business

Additional Exemptions

- Agricultural Exemption

- * Stringent requirements
- * First and second meanings of “agriculture” and those activities that fit within their contract.

- Motor Carrier Exemption

- * A driver cannot be subject to regulations of DOL if he/she is governed by the DOT
- * Intrastate deliveries of interstate goods are now generally exempt from FLSA overtime regulations.

See Wage & Hour Opinion Letter, January 11, 2005.

Steps to Minimize Exposure

To Do:

1. Review Job Descriptions
2. Time Spent on Each Task
3. Interview Supervisors
4. Interview Employees
5. Research

Steps to Minimize Exposure

2. State Law Issues —

- Minimum Wage
- Daily Overtime
- Different Exemptions
- Mandatory Breaks

Steps to Minimize Exposure

3. Review Non-Paid Time —

- Training
- Pre-Shift/Post-Shift Activities
- Donning and Doffing
- Travel Time
- Living on Premises
- On-Call Time
- Breaks and Lunch Time

Training Programs/Meetings

Must be paid unless *ALL* of the following are met:

- Outside regular hours
- Voluntary
- No work performed
- Not directly related to employee's job

Breaks and Lunch Hours

- Not required under FLSA, but may be required by State law
- Short breaks, if given, must be paid
- Bona fide meal breaks need not be paid
- Working lunches must be paid
- Employees can be required to stay on premises

Travel Time

- Home-to-work and work-to-home travel need not be paid
- If employees are required to report to a central location from which they are dispatched to specific job sites, then the travel between the central location and the job site is compensable
- Overnight travel out-of-town
 - If the travel is within the employee's regular work hours (even if on the weekend), the time is compensable

Preliminary/Postliminary Activities

- Custom or Practice
- Essential to Job
- Required by Law

Examples:

- Protective Clothing
- Showering
- Shift Change Discussions

Steps to Minimize Exposure

4. Review All Deductions —
 - Loss of Exemption
 - Tip Issues

Deductions From Salary

- An employee is not paid on a salary basis if deductions from the predetermined salary are made for absences occasioned by the employer or by the operating requirements of the businesses
- If the employee is ready, willing and able to work, deductions may not be made for time when work is not available

Permitted Salary Deductions

Seven exceptions from the “no pay-docking” rule:

1. Absence from work for one or more full days for personal reasons, other than sickness or disability.
2. Absence from work for one or more full days due to sickness or disability if deductions made under a bona fide plan, policy or practice of providing wage replacement benefits for these types of absences.
3. To offset any amounts received as payment for jury fees, witness fees, or military pay.
4. Penalties imposed in good faith for violating safety rules of “major significance.”

Permitted Salary Deductions (Cont'd.)

5. Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of workplace conduct rules.
6. Proportionate part of an employee's full salary may be paid for time actually worked in the first and last weeks of employment.
7. Unpaid leave taken pursuant to the Family and Medical Leave Act.

Effect of Improper Deductions

- An actual practice of making improper deductions from salary will result in the loss of the exemption:
 - During the time period in which improper deductions were made
 - For employees in the same job classifications
 - Working for the same managers responsible for the actual improper deductions
- Isolated or inadvertent improper deductions; however, will not result in the loss of exempt status if the employer reimburses the employee.

Safe Harbor

- The exemption will not be lost if the employer:
 - Has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism;
 - Reimburses employees for any improper deductions; and
 - Makes a good faith commitment to comply in the future.
- *Unless* the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints.

Safe Harbor (Cont'd.)

Example of Safe Harbor Policy (29 C.F.R. § 541.603(d)
(Provided to each employee upon hiring and published in handbook,
on internet and/or in the office.)

Deductions from Wages – Salaried Employees

FLSA does not permit improper or unauthorized deductions from exempt employees' salaries unless (1) the deduction is in compliance with federal and/or state FLSA laws, (2) the employee has authorized the deduction, or (3) the deduction is specifically permitted by the Fair Labor Standards Act. Any exempt employee who believes that his salary has been improperly reduced or subject to improper deductions should notify Employer's Administrator. Employer will promptly investigate any complaint; if the deduction was improper, Employer will reimburse the employee for the improper deduction. In addition, Employer will, in good faith, take all reasonable steps necessary to ensure that no such improper deductions are made in the future.

Tip Pooling

- Sub-minimum wage allowed
- All tips received pooled and split
- Traditionally tipped employees

Steps to Minimize Exposure

5. Review Bonus Plans —

- Nondiscretionary
- No Overtime Consideration

Steps to Minimize Exposure

6. Create Policies to Prohibit Improper Practices —

- Approval by Employee
- Complaint Mechanism

Steps to Minimize Exposure

7. Enforce in the Field —

- No good if only Corporate Headquarters complies

Steps to Minimize Exposure

8. Correct Mistakes —

- Prospective
- Retroactive

Employer Liability

- 2 years of back pay
- 3 years of “willful”
- Liquidated damages
- Attorneys’ fees for private litigants

Retaliation (Whistleblower)

- Unlawful to retaliate for filing a complaint or testifying
- Threat to file action may be sufficient
- Any adverse employment action is prohibited



Settlement and Releases

- Private Settlement or Release from FLSA Liability is Prohibited
- Need DOL Supervision or Judicial Approval

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