
**CRITICAL WAGE AND HOUR ISSUES:
GOVERNMENT, EMPLOYEE, & EMPLOYER PERSPECTIVES**

Smith & Downey, P.A.
1 W. Pennsylvania Avenue, Suite 950
Baltimore, Maryland 21204
(410) 321-9000

I. OVERVIEW

The Fair Labor Standards Act (FLSA) establishes the standards for minimum wage, overtime pay, record keeping, wage deductions, child labor, and calculation of hours. The FLSA requires that employers pay time and one-half the employee's regular rate of pay for all hours worked in excess of forty (40) in a single workweek. The "regular rate" is defined as the total remuneration or compensation (including hourly wage, commissions, and most bonuses) divided by the total hours worked.

A. Coverage: FLSA coverage is based on either enterprise or individual coverage. An employer may be covered on an enterprise basis if (1) the employer employs two or more employees who are engaged in interstate commerce and/or who have handled goods that have moved in interstate commerce, and (2) the employer has gross annual revenues of \$500,000 or more.

The FLSA also specifically lists certain types of enterprises that are automatically covered under the law regardless of the number of employees or the gross revenues. These enterprises include hospitals; institutions primarily engaged in the care of the sick, aged, or mentally ill who reside on the premises; schools for gifted, mentally, or physically disabled children, preschools, elementary schools, secondary schools, or institutions of higher education (regardless of whether the hospitals, homes, or schools listed above are private or public). Public agencies are also covered by the FLSA.

Individual coverage may be established where an employee is engaged in interstate commerce, or the production of goods for interstate commerce, including any closely related process or occupation directly essential to such production.

B. Exemptions: The FLSA contains specific exemptions from both the minimum wage and overtime provisions of the Act for certain types of employers, establishments, and employees. The most prominent exemptions are the “white collar” exemptions which include the executive, administrative, and professional exemptions. FLSA exemptions are subject to “strict construction” which means that the courts will resolve any doubts as to the applicability of an exemption in favor of the employee. In other words, the employer has the burden of proving the exemption. Furthermore, job titles alone do not make the employee exempt.

C. Retaliation: The FLSA prohibits discharging or in any other manner discriminating against any employee because such employee has filed a complaint.

II. EMPLOYMENT & INDEPENDENT CONTRACTOR RELATIONSHIP

A. Generally: Before the requirements of the FLSA actually “come into play,” an employer-employee relationship must exist. Applicants and independent contractors are not covered by the FLSA.

1. Employer: Any person acting directly or indirectly in the interest of an employer in relation to an employee. Factors include who hires and fires; set the terms and conditions of employment; authority to control and direct; and responsibility to pay wages.

2. Employee: Any individual employed by an employer and who, as a matter of economic reality is dependent on the business they serve.

B. Independent Contractors: Determining whether an individual is an employee or independent contractor under the FLSA slightly differs from doing so for tax purposes. To determine whether an individual is an employee or independent contractor, the FLSA analyzes the following factors:

1. The extent to which the services in question are an integral part of the employer's business. The more integral the work, the more likely an employment relationship exists.

2. The permanency of the relationship. The longer and more fixed the relationship, the more likely an employment relationship exists.

3. The amount of the alleged contractor's investment in facilities and equipment. The less investment by the contractor, the more likely an employment relationship exists.

4. The nature and degree of control by the principal. The more control, the more likely an employment relationship exists.

5. The alleged contractor's opportunities for profit and loss. The less exposure to fluctuations in the market or business losses, the more likely an employment relationship exists.

6. The amount of initiative, judgment or foresight in open market competition with others required for the success of the claimed independent enterprise. The less initiative, etc., the more likely an employment relationship exists.

III. US DOL & FLSA UPDATES

A. US DOL Enforcement Policy: Despite the significant increase in the resources (i.e., budget) and personnel for the Wage and Hour Division of the United States Department of Labor (US DOL), local offices are still facing a massive backlog of cases that is taxing the current staff. The US DOL is taking dramatic steps to reduce the number of backlogged cases, including performing limited investigations, negotiating back wages, and other means to resolve

these cases more quickly. This may present opportunities to the employer to reduce back wage liability and quickly resolve investigations in some circumstances.

Another reason for quickly eliminating backlogged cases is so that the US DOL can focus its resources and efforts on what is called a directed case. Directed cases focus on specific industries with the intent to cause industry-wide change. Directed cases have a greater tendency to result in higher back wages as well.

B. Nursing Mothers Provision: The health care bill passed in 2010 amended §207 of the FLSA. The amendment requires employers to provide reasonable break times to nursing mothers within one year of the birth of a child. The US DOL is currently in the regulatory drafting process.

1. Coverage: Standard FLSA coverage principles (enterprise and individual) apply. The provision does contain a possible undue hardship exception and employees exempt from §207 are not entitled to breaks.

2. Required Breaks: The amendment requires that an employer provide a reasonable break time for an employee to express breast milk for a nursing child.

3. Duration of Entitlement: Employers must allow employee to take breaks for 1 year after the child's birth.

4. Location Requirement: Employers must provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk."

5. Unpaid Breaks: Employers are not required to pay the employee for these breaks. However, general FLSA principles apply. Therefore, if the employer already pays for employee breaks, and the nursing mother uses a paid break to express milk, the employer must

pay the nursing mother the same way the employer compensates other employees. Second, if the employee performs any work during the break, the employee must be compensated.

6. Exemption: Employers with fewer than 50 employees may qualify for an undue hardship exception to this requirement. The burden is on the employer to show it would be an undue hardship, taking into consideration the difficulty or expense of compliance for a specific employer in comparison to the size, financial resources, nature, and structure of the employer's business.

7. Penalties: The US DOL has not determined if civil money penalties will be assessed for violating this provision. At this point, the only possible penalty is back wages.

C. Child Labor: Child labor rules have relatively limited applicability, but violating the rules has serious consequences.

1. Hazardous Occupations: The regulations list a series of hazardous occupations (HOs) in which children are not permitted to work. There are seventeen (17) HOs. Regulations relating to six (6) HOs were amended in July 2010. Changes apply to logging operations, saw mills, power-driven hoisting equipment, meat processing equipment, bakery equipment, balers, compactors, saws, and guillotine shears.

2. Reg 3 Rules: Reg 3 governs employment of 14 & 15 year olds. The July 2010 changes clarified several issues. Only occupational tasks specifically listed are permitted; 3-hour daily limit applies Monday through Friday; and the same workweek is to be used for overtime calculations and for child labor calculations. Going door-to-door and poultry catching and cooping were added to the list of prohibited occupations. Intellectual or artistically creative occupations; lifeguards (only 15 year olds); and wood processing machinery (under specific

conditions) were added to the permitted occupations. Finally, the regulations also established a new Work Study Program.

IV. COMMON ISSUES WITH EXEMPTIONS, PAY, & HOURS

A. Exemptions: There have not been any recent regulatory changes to the white collar exemptions. However, a review of the most common white collar exemptions is worthwhile in light of the significant enforcement policy changes.

1. Executive Exemption: An employee is executive exempt if s/he is compensated on a salary basis at a rate of not less than \$455 per week, whose primary duty is management of the enterprise or a customarily recognized department or subdivision of the enterprise, and who customarily and regularly supervises the equivalent of two other full-time employees, and who has the authority to hire or fire other employees, or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

2. Professional Exemption: The professional exemption is divided into two categories: learned professionals and creative professionals. The general requirements for the exemption are that the employee be compensated on a salary or fee basis at a rate of not less than \$455 per week, whose primary duty is the performance of work requiring advanced knowledge in a field of science or learning, which knowledge was acquired by a prolonged course of specialized intellectual instruction (learned professional); or requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor (creative professional).

3. Administrative Exemption: An employee is administratively exempt if s/he is compensated on a salary or fee basis at a rate of not less than \$455 per week, 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.

On March 24, 2010, the US DOL issued its first Administrator Interpretations letter, which addresses the Administrative Exemption and mortgage loan officers. The US DOL stated that mortgage loan officers were not administratively exempt. The focus of the guidance was on the issue of "work directly related to the management or general business operations of the employer or the employer's customer." The US DOL has acknowledged that the change was a significant departure from past enforcement guidance, and that the change in enforcement policy is not retroactive.

It is unclear whether courts will give deference to the newly issued Administrator Interpretation letter. Courts generally give significant weight to agency interpretations, but deference is diminished where the US DOL has switched its opinion on issues multiple times, where the US DOL has not provided sufficient reasoning, or where the interpretation is plainly erroneous. The issue is currently before the United States District Court of Eastern Michigan in *Henry v. Quicken Loans*.

4. Outside Sales: An employee is exempt as an outside salesperson if the employee's primary duty is making sales within as defined by the FLSA, or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty. No minimum salary is required for this exemption.

Several circuits have recently dealt with this exemption as it relates to pharmaceutical representatives. The Second, Third, Ninth, and a district court within the Seventh Circuit have all dealt with this issue over the course of the last year or so. The courts are split as to whether or not the employees qualify as outside sales exempt employees.

5. Computer: An employee is exempt as a computer employee if s/he is compensated on a salary basis at a rate of not less than \$455 per week or an hourly basis at a rate not less than \$27.63 per hour. The employee's primary duties must include the application of systems analysis techniques and procedures; the design, development, documentation, analysis, creation, testing or modification of computer systems or programs (1) based on and related to user or system design specifications or (2) related to machine operating systems; or a combination of the aforementioned duties.

B. Common Hours Worked Issues – Non-Exempt Employees: Employers often make the same mistakes when compensating non-exempt employees. Some of the most common mistakes include:

1. Pre- & Post-Shift Work Time: Employers must be aware of all work that occurs before and after the employee signs in and out. Any work performed by the employee for the benefit of the employer must be compensated. Several areas of significant concern may include the use of smart phones off the clock, loading and unloading work equipment, mandatory meetings, shift changes, information exchanges, and travel time.

2. Regular Rate Calculations: Overtime is determined by multiplying an employee's regular rate by one and one half. The regular rate includes all remuneration for work performed by the employee. This includes the hourly rate, bonuses, commissions, contractual compensation, etc. Only payments that are excluded by statute or regulation may be excluded

from the calculation of the regular rate. This may include payments that are completely discretionary, paid time off, and similar payments.

3. Volunteer Hours: At times employees perform “voluntary” tasks for the employer. For example, an administrative assistant may volunteer to perform general office tasks for several hours for no pay to help the employer in light of financial difficulties. This is not permitted under the FLSA. These hours are considered hours worked and must be compensated in accordance with the minimum wage and overtime provisions of the law.

V. PENALTIES

A. US DOL Investigation: The primary “penalties” in a US DOL enforcement action are back wages for unpaid minimum wage and overtime. An employer may also be assessed civil money penalties (CMPs) depending on whether there are repeat and/or child labor violations.

B. FLSA §16(b) Lawsuit: Whether a lawsuit filed by the US DOL or an employee, an employee may seek back wages for violations of the FLSA and liquidated damages equal to the amount of back wages due.

VI. ACTION ITEMS

A. Audit Current Policies & Procedures: Employers should take a hard look at their current employment policies and procedures relating to wage and hour laws and regulations. Reviewing employer handbooks and policies will allow an employer to take an honest assessment of its compliance with the law.

B. Understanding Current Practice: Employers should take note of what is actually happening in their workplace. They should review common problem areas including pre- and post-shift time, break time, and others that commonly give rise to back wage liability.

Employers should implement policies that correct any problematic business practices currently in place.

C. Training: Employers should take time to train managers and other supervisory personnel on wage and hour rules. The training should educate managers and supervisors of the role they play in compliance with wage and hour laws and the mitigating effect compliance can have on labor costs and potential back wage liability.