



Wage and Hour Compliance in the Current Economic and Political Landscape

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The Basics: Compensable Time



- Work time is any time that the employer suffers or permits, even if it is not requested
 - Waiting Time
 - On-Call Time
 - Meal and Rest Periods
 - Training Time
 - Travel Time
 - Sleep Time

Waiting Time



- Waiting time is counted as hours worked when
 - Employee is unable to use the time effectively for his or her own purposes and the time is controlled by the employer
- Waiting time is NOT counted as hours worked when
 - Employee is completely relieved from duty and time is long enough to enable the employee to use it effectively for own purposes

On-Call Time



- On-call time is counted as hours worked when
 - Employee has to stay on the employer's premises or so close to the employer's premises that the employee cannot use that time effectively for his or her own purposes
- On-call time is NOT counted as hours worked simply when
 - Employee is required to carry a pager or is required to leave word at home or with the employer where he or she can be reached

The Basics: Minimum Wage – Compensation Components



- Wages (salary, hourly, piece rate)
- Commissions
- Certain bonuses
- Tips received by eligible tipped employees (up to \$5.12 per hour July 24, 2009)
- Reasonable cost of room, board and other “facilities” provided by the employer for the employee’s benefit

Minimum Wage – Illegal Deductions from Pay



- Deductions from pay are illegal if:
 - Deduction is for item considered primarily for the benefit or convenience of the employer;
 - Deduction reduces employee's earnings below required minimum wage
- Examples – deductions for:
 - Tools used for work
 - Damages to employer's property
 - Cash register shortages

The Basics: Workweek for Overtime Calculation



- Compliance is determined by each workweek
- Each workweek stands by itself
- Workweek is 7 consecutive 24 hour periods (168 hours)
 - Employer can set the beginning and end of the workweek, as long as it stays consistent

Overtime - Regular Rate



- Determined by dividing total earnings in the workweek by the total number of hours worked in the workweek
- May not be less than the applicable minimum wage
- Includes all compensation for work, except a few specified exclusions, including:
 - Gifts
 - Expense reimbursements
 - Discretionary bonuses
 - Profit sharing and retirement plans
 - Overtime premium payments

White Collar Exemptions



- Executive Employees
- Administrative Employees
- Professional Employees
- Outside Sales Employees
- Computer Employees

White Collar Exemptions



- To qualify for an exemption, an employee must meet three basic tests:
 - Salary level
 - Salary basis
 - Job duties

Salary Level



- For most employees, the minimum salary level required for exemption is \$455 per week
- Must be paid “free and clear”
- The \$455 per week may be paid in equivalent amounts for periods longer than one week
 - Biweekly: \$910.00
 - Semimonthly: \$985.83
 - Monthly: \$1,971.66

Salary Basis



- Regular receipt of a predetermined amount of compensation each pay period (on a weekly or less frequent basis)
- The compensation cannot be reduced because of variations in the quality or quantity of the work performed
- Employees must be paid the full salary for *any* week in which the employee performs any work
- Employees need not be paid for any workweek when no work is performed

Salary Basis



- 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

Salary Basis – Deductions



- Permissible deductions that will not impact exempt status:
 - Absence from work for one or more full days for personal reasons, other than sickness or disability
 - 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
 - To offset any amounts received as payment for jury fees, witness fees, or military pay
 - Penalties imposed in good faith for violating safety rules of “major significance”
 - Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of written workplace conduct rules
 - 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 and working for the same managers responsible for the improper deductions
- Isolated or inadvertent improper deductions will not result in the loss of exempt status if the employer reimburses the employee

Fee Basis



- Administrative and professional employees also may be paid on a “fee basis”
- An employee is paid on a “fee basis” if the employee is paid an agreed sum for completing a single job, regardless of the time required to complete the work
- Payment on a “fee basis” is not available for a series of non-unique jobs repeated an indefinite number of times for which payment on an identical basis is made over and over again

Primary Job Duties Test



- The principal, main, major or most important duty that the employee performs
- Factors to consider include, but are not limited to:
 - Relative importance of the exempt duties
 - Amount of time spent performing exempt work
 - Relative freedom from direct supervision
 - Relationship between the employee's salary and the wages paid to other employees for the same kind of nonexempt work

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
- Authority to hire or fire other employees or recommendations as to the hiring, firing, advancement, promotion or other change of status of other employees given particular weight

Executive Exemption



- A “customarily recognized department or subdivision” must have a permanent status and continuing function, but need not be physically within the employer’s establishment, and may move from place to place
- Two or more employees refers to full-time equivalent employees
- Particular weight considers whether it is part of the employee's job duties to make recommendations and the frequency with which recommendations are made
 - Does not need to have ultimate authority, but must make more than occasional suggestion

Administrative Exemption



- 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
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance

Administrative Exemption – Discretion and Independent Judgment Factors



- Whether the employee:
 - has authority to formulate, affect, interpret, or implement management policies or operating practices
 - Carries out major assignments in conducting the operations of the business
 - Performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business
 - Has authority to commit the employer in matters that have significant financial impact
 - Has authority to waive or deviate from established policies and procedures without prior approval
 - Has authority to negotiate and bind the company on significant matters
 - Provides consultation or expert advice to management

Administratively Exempt Positions



- Tax
- Finance
- Accounting
- Budgeting
- Auditing
- Insurance
- Quality Control
- Purchasing
- Procurement
- Advertising
- Marketing
- Research
- Safety and Health
- Human Resources
- Employee Benefits
- Labor Relations
- Public and Government Relations
- Computer Network, Internet, and Database Administration

Professional Exemption



- Primary duty is the performance of either:
 - work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, or
 - work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor
 - ◆ Lawyer
 - ◆ Accountant
 - ◆ Architect
 - ◆ Engineer
 - ◆ Medical professional

Computer Professional Exemption



- Primary duty is:
 - The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications
 - The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
 - The design, documentation, testing, creation, or modification of computer programs related to machine operating systems

Computer Professional Exemption



- The employee must also receive either
 - A guaranteed salary or fee of \$455 per week or more, or
 - An hourly rate of not less than \$27.63 per hour

Outside Sales Exemption



- Primary duty is making sales or obtaining orders or contracts for services
- Employee must customarily and regularly work away from the employer's place of business
- There is no minimum salary test

Commissioned Retail Salesperson Exemption



- Retail employees may be exempt from the overtime pay requirements of the FLSA, if:
 - The employee is employed by a retail or service establishment
 - More than half the employee's total earnings in a representative period represent commissions on goods or services
 - Employee's total compensation divided by number of hours worked or regular rate exceeds one and one-half times the minimum wage

Retail Establishment



- Retail and service establishments are defined as establishments:
 - 75% of whose annual dollar volume of sales of goods or services (or of both) is not for resale
 - Which are recognized as retail sales or services in the particular industry

The FLSA Does Not Require



- Vacation, holiday, severance, or sick pay
- Meal or rest periods, holidays off, or vacations
- Premium pay for weekend or holiday work
- A discharge notice, reason for discharge, or immediate payment of final wages to terminated employees
- Any limit on the number of hours in a day or days in a week an employee at least 16 years old may be required or scheduled to work
- Pay raises or fringe benefits

Independent Contractor Issues



- Under the FLSA, the Courts must make a legal finding of whether a person is an employee or an independent contractor.
 - *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1045 (5th Cir. 1987), cert. denied, 484 U.S. 924 (1987).
- Courts focus on the "economic reality" of the relationship between the plaintiffs and the alleged employer.
 - *Secretary of Labor, U.S. Dept. of Labor v. Lauritzen*, 835 F.2d 1529, 1534 (7th Cir. 1987), cert. denied, 488 U.S. 898 (1988).

Independent Contractor vs. Employee



- The degree to which the alleged employee's opportunity for profit or loss is determined by the alleged employer;
- The extent of the relative investments of the worker and the alleged employee;
- The skill and initiative required in performing the job;
- The degree of permanency of the working relationship; and
- The extent to which the service rendered is an integral part of the alleged employer's business.

Independent Contractor vs. Employee



- The fact that a contract document designates a person as an independent contractor is a relevant factor when it mirrors economic reality. The mere existence of a contract that categorizes a person as an independent contractor does not determine the outcome of the economic reality test.
 - *Thibault*, 612 F.3d at 845-46 & 849.

Independent Contractor Factor Analysis



- Temporary and non-exclusive nature of work.
 - *Talbert v. American Risk Ins. Co.*, 405 Fed. Appx. 848, 855-56 (5th Cir. 2010)(Unpublished)(temporary and non-exclusive nature of insurance adjuster assignment of four months led to affirming of finding that assisting claims adjuster was independent contractor).
- The setting of a person's work schedule alone may not be sufficient to establish employer-employee relationship.
 - *Estate of Suskovich*, 553 F.3d at 566 ("Nor is the fact that a person is required to be at a given place at a given time or assigned project work sufficient to establish an employer-employee relationship.").

Recent Developments



- Interns' Collective and Class Actions: Unpaid interns have come under increasing scrutiny as some companies push random tasks unrelated to an intern's role to gain training and experience in a field of work.
 - MTV was tagged in a collective action in which unpaid interns claimed that the company had a common policy of replacing regularly paid employees with free help. The conditionally certified class exceeded 1,000 current and former interns.
 - Oscar de la Renta faces the same claims from interns who assert they were making jewelry, running for coffee and playing deliveryman. Approximately 40 interns are expected to join that case.
 - ◆ Source: *Law 360*, April 4, 2014 & Sept. 3, 2014, *Ojeda v. Viacom*, 1:13-cv-05658 (S.D.N.Y. 2013); *Ramirez v. Oscar de la Renta LLC*, 158578 (N.Y. Sup.Ct. 2014).

Recent Developments



- Employees do not have to be compensated for post-shift security checks.
 - Principal activities are those activities that are an integral and indispensable part of the principal activities, and those without which an employee cannot perform his principal duties. Must be integral and indispensable to the productive work that the employee is employed to perform.
 - Security screenings are not the principal activity which the employee is employed to perform, which is to retrieve and package products for shipment, and are not integral and indispensable to duties as warehouse workers because the employees can perform their duties as a warehouse worker without the security screening.
 - The fact that the employer required the activity is not the test for compensability.
 - The time spent waiting for security checks was not compensable, as postliminary activity.
 - *Integrity Staffing Solutions, Inc. v. Busk*, No. 13-433 (U.S. S.C. December 9, 2014)

Recent Developments – Administrative Exemption



- Insurance claims adjusters
 - Exempt status depends on actual job duties
 - May be exempt if duties include: investigating through witness interviews and site inspections, evaluating and making covering recommendations, determining liability for and the value of a claim

- Financial services professionals
 - May be exempt if duties include: collecting and analyzing customer income data, advising clients regarding different financial products and evaluating products against customer need
 - Employee who primarily sells financial products is not exempt

Change to Home Health Workers – Effective January 1, 2015



- Previously had been exempt from overtime
- Limits exempt duties to those related to fellowship and protection
 - But allows for 20% of time to be spent on related care duties
- If worker performs tasks typically performed by medical staff (RN, LPN, CAN) during workweek, there is no exemption for that week
- Employers like home health agencies must pay overtime and can no longer claim exemption even if employee jointly working for another person, such as a family
 - DOL will not enforce for six months, but individuals can

New Minimum Wage for Government Contract Workers



- By executive order, minimum wage raised to \$10.10 for all workers on Federal construction and service contracts
- Applies to new contracts and replacements for expiring contracts with the federal government that result from solicitations issued on or after Jan. 1, 2015, and to contracts that are awarded outside the solicitation process on or after Jan. 1, 2015
- Applies to all contracts for construction covered by the Davis-Bacon Act; contracts for services covered by the Service Contract Act; concessions contracts, such as contracts to furnish food, lodging, automobile fuel, souvenirs, newspaper stands and recreational equipment; and contracts to provide services, such as child care or dry cleaning, on federal property for federal employees or the general public
- Applies to the following categories of workers performing on covered contracts:
 - Employees who are entitled to the FLSA minimum wage;
 - Service employees who are entitled to prevailing wages under the SCA; and
 - Laborers and mechanics who are entitled to prevailing wages under the DBA.

Proposed White Collar Exemption Changes



- Raise minimum salary required for an exemption to apply
- Add a qualitative test for exempt duties (must perform at least 50% of work time)
- Further limit what duties qualify as exempt
- Rule issuance delayed until February 2015 (was due in November 2014)



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