

FLSA UPDATE

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Joan M. Andrews
Fabian & Clendenin, P.C.
215 S. State Street, 12th Floor
Salt Lake City, Utah
(801) 323-2263
jandrews@fabianlaw.com

A. OVERVIEW

1. FLSA's Main Elements (29 U.S.C. § 201 et. seq.)

The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector as well as workers in federal, state, and local government.

- a. Minimum Wage (29 U.S.C. § 206)
 - i. \$5.85 per hour effective July 24, 2007;
 - ii. \$6.55 per hour effective July 24, 2008;
 - iii. \$7.25 per hour effective July 24, 2009.

- b. Overtime (29 U.S.C. § 207)
 - i. Non-exempt employees must be paid overtime at a rate of not less than 1½ times the regular rate of pay after 40 hours of work in a workweek;
 - ii. Workweek is a consecutive 7-day period set by employer.

- c. Record Keeping (29 C.F.R. Part 516)
 - i. Failure to keep proper records will always be construed against the employer;
 - ii. Payroll records showing hours worked, workweek, rates of pay, etc. must be kept for 3 years;
 - iii. If records are kept at central location other than where employees are employed, they must be made available to DOL within 72 hours.

- d. Child Labor (29 U.S.C. § 203/29 C.F.R. Part 570)
 - i. Statutory text leaves it to DOL to issue regulations governing workers between 14-16 and hazardous occupations;
 - ii. Violations usually relate to workers under age 16 working too many hours, too late at night, or too early in the morning. Problems may also arise with respect to employment in hazardous occupations. Often is not the primary act being investigated;
 - iii. Watch out for issuance of new regulations per April 17, 2007 Notice of Proposed Rule-Making.
 - iv. For additional guidance see www.youthrules.dol.gov

2. Trends

- a. DOL Wage and Hour Division Investigations and Enforcement Actions

In FY2007, the DOL's Wage and Hour Division collected ~\$220 million in back wages and overtime, exceeding the record levels collected in 2003 by 3.8 percent. While the overall number of registered complaints declined for the third consecutive year, DOL says this arises

from more thorough complaint intake strategies to ensure an issue is within WHD's enforcement jurisdiction.

DOL investigations typically involve one of four main types of FLSA violations: (1) misclassification of a nonexempt employee as exempt (or wrongfully designating an employee as an "independent contractor"); (2) improperly "docking" an exempt employee's wages; (3) not paying nonexempt employees for all hours worked; and (4) miscalculating overtime for nonexempt employees.

The following nine low-wage industries accounted for 40% of WHD enforcement resources in 2007: (1) agriculture; (2) day care; (3) restaurants; (4) garment manufacturing; (5) guard services; (6) health care; (7) hotels and motels; (8) janitorial services; (9) temporary help.

b. Collective Actions

Recent years have seen an explosion in FLSA collective actions—the FLSA's version of a class action, as allowed by 29 U.S.C. § 216(b). For the last several years wage-hour actions have outnumbered employment discrimination class actions. In 2007, FLSA collective actions pursued in federal court produced more rulings than did class actions for employment discrimination or ERISA. The U.S. District Courts for the southern and middle districts of Florida experienced more wage and hour filings than any other federal jurisdiction. Unlike the DOL the Plaintiffs' bar is not necessarily focused on low-wage industries.

B. EXEMPT EMPLOYEES

1. "White Collar" Exemptions — Set forth in section 13(a)(1) of the FLSA; revised regulations of 29 C.F.R. Part 541 went into effect August 23, 2004.

a. Executive

- i. Compensated on salary basis at rate of not less than \$455/week;
- ii. Primary duty is management of the enterprise or a recognized department or subdivision of the enterprise;
- iii. Customarily and regularly directs the work of two or more other employees;
- iv. Has the authority to hire or fire, or recommendations/suggestions regarding hiring, firing, advancement, promotion or other changes of status are given particular weight.

b. Administrative

- i. Compensated on salary basis at rate of not less than \$455/week;
- ii. Primary duty is performance of office or non-manual work directly related to the management or general business operations of the employer or employer's customers;
- iii. Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

- c. Professional
 - i. Compensated on salary basis at rate of not less than \$455/week;
 - ii. Primary duty is work:
 - a. Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; OR
 - b. Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

- d. Computer — Available under 13(a)(1) and 13(a)(17); Job titles not determinative but exemption contemplates systems analysts, programmers, engineers.
 - i. Compensated on salary basis at rate of not less than \$455/week for 13(a)(1) exemption OR hourly basis of \$27.63 for 13(a)(17) exemption;
 - ii. Primary duty must consist of:
 - a. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
 - b. 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;
 - c. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
 - d. A combination of the aforementioned duties, the performance of which requires the same level of skills.

- e. Outside Sales
 - i. Primary duty is making sales OR obtaining orders or contracts for services for the use of facilities for which a consideration will be paid by the client or customer; AND
 - ii. Is customarily and regularly engaged away from the employer's place of business in performing the primary duty.
 - a. Other work incidental to outside sales and solicitations, or that furthers the employee's sales efforts is also exempt— includes incidental deliveries and collections, writing sales reports, updating or revising sales or display catalog, planning itineraries, attending sales conferences;
 - iii. Salary requirements do not apply.

- f. Other Exemptions – Motor Carrier Exemption, other specified industries

C. DETERMINING HOURS WORKED

FLSA does not define “work.” “Work” is defined by DOL regulations and case law. What is compensable “worktime” continues to be one of the most hotly debated issues in FLSA litigation.

1. Donning/Doffing
2. Off-the-clock work/preparatory work
3. Meal/Rest Periods
4. Unauthorized overtime

D. DAMAGES

1. What’s at Risk? (29 U.S.C. § 216)

The potential exposure in FLSA actions can be substantial, particularly where companies have large numbers of relatively well-paid employees.

- a. Double the amount of unpaid wages and overtime for two year period preceding date of suit;
- b. If willful violation, damages go back 3 years; willful violations may also result in civil fines up to \$1,000 per violation, criminal fines of up to \$10,000 per violation and even imprisonment for repeat offenders;
- c. If retaliation – additional compensatory and punitive damages;
- d. Attorneys’ fees to prevailing plaintiff.

E. INTERPLAY WITH STATE OVERTIME LAWS

1. FLSA is a Floor

If state law provides for a higher minimum wage or more generous overtime, it— not the FLSA—controls. Don’t forget to ask where the company’s employees are located and examine relevant state statutes for conflicting and/or different requirements.

- i. Idaho, Wyoming: Separate overtime statute applies only to state employees;
- ii. Nevada: Statute requires overtime pay in most instances when an individual works over eight hours in a day or over 40 hours in a workweek;
- iii. Colorado: Overtime pay required for hours in excess of 12 in a workday (including 12 consecutive hours spanning two workdays) or 40 in workweek.

F. COLLECTIVE ACTIONS

1. Collective Action vs. Class Action
 - a. Employees must opt in to join collective action (29 U.S.C. § 216(b));
 - b. Employees must only be “similarly situated” and need not satisfy the more stringent requirements of Rule 23;
 - c. Filing does not toll the statute of limitations—only filing a consent to participate or “opt in” tolls the statute.

An action to recover the liability prescribed in either of the preceding sentences may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

2. Notable Recent Cases and Settlements

- a. Caribou Coffee. Recently agreed to pay \$2.7 million. Suit was initiated in 2005 by 3 former employees who alleged the company misclassified retail coffeehouse managers as exempt. Suit was eventually expanded to class status covering current and former managers.
- b. Starbucks. \$18 million settlement to coffeehouse managers. Another suit is on-going.
- c. Farmers Insurance. \$200 million settlement for not paying overtime to claims agents.
- d. Eckerd's. \$8 million for improperly docking the pay of “exempt” employees.
- e. Cingular Wireless. \$5.1 million to call center customer service representatives.

G. COMPLIANCE TIPS

1. Don't get lax about compliance! Keep abreast of changes in the law and regularly review job classifications, titles, descriptions, and payroll practices. Fix small problems before they become big ones.
2. In challenging economic conditions do not be tempted to push the limits on determining who is exempt – courts will always construe exemptions narrowly and against the employer.
3. Beware the urge to call employees “independent contractors.”
4. Remember, just because somebody makes a lot of money and is paid on a salary basis, doesn't mean she is exempt; the other criteria must always be satisfied.