

Wage & Hour Investigations: What to Do When the Department of Labor Comes Knocking

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Why Is This Important?

- GROWTH OF COLLECTIVE ACTIONS
- MULTI-MILLION DOLLAR VERDICTS AND SETTLEMENTS

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FLSA Lawsuits Double

Even though reported violations are decreasing, federal lawsuits alleging violations of the Fair Labor Standards Act have more than doubled nationwide in recent years. An increased emphasis on overtime -- along with nonpayment for the work -- is alleged to be a big part of the problem.

By Michael Felton-O'Brien

According to information just released by the Administrative Office of the U.S. Courts, the number of federal lawsuits alleging violations of the Fair Labor Standards Act has exploded, from 1,854 cases in 2000 to 4,389 in 2006.

A large portion of the increase in cases is being widely attributed to low-paid workers in a variety of industries, including landscaping, shop clerks, restaurant workers, warehouse laborers and construction contractors. These workers are seeking thousands of dollars in back wages from employers who they say failed to pay the mandated minimum wage or to provide overtime pay.

And despite their legal status, illegal immigrants are increasingly filing these suits to demand the money they believe is rightfully theirs.

A report by the National Employment Lawyers Association's Wage & Hour Law Committee cites a study that indicates the average number of overtime hours has jumped 48 percent since 1991, and that Americans work 350 more hours each year, or nine more full-time weeks, than Europeans.

Jules Bernstein, an attorney with Bernstein & Lipsett in Washington and a member of NELA's FLSA program committee, is blunt in his assessment of the situation: "I think there is a pandemic of wage and hour violations in this country Employers are just not complying with the law, they miscalculate overtime, and many other kinds of violations."

The NELA report includes information from the Employer Policy Foundation, an employer-supported think tank in Washington, that estimates that "workers would get an additional \$19 billion a year if the overtime rules were observed."

Despite the rising trend of increased hours worked and the increased number of lawsuits, the U.S. Labor Department reports that the number of wage and hour complaints it received last year fell for the second straight year, to 26,256. In 2004, the number was 31,786.

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Family Dollar Loses Store Manager Lawsuit

An Alabama court has ruled against Family Dollar Stores' practice of classifying store managers as salaried workers not entitled to overtime pay.

The company said it would appeal the decision.

"We are confident that the federal appeals court will ultimately find in our favor," said Howard Levine, Chairman and CEO. "Family Dollar Store Managers are critical to the success of our stores. Our store managers work hard to provide our customers with great values in clean, friendly stores, to hire and coach employees and to drive store profitability. They deserve to be recognized and rewarded for the important responsibilities they bear, their hard work, and their dedication to our customers. We believe we are correct in classifying our store managers as salaried managers, and we intend to continue to fight for what we believe is right."

Under the Fair Labor Standards Act (FLSA), salaried employees are exempt from overtime pay if they meet certain criteria. Under the regulations in effect prior to August 2004, these criteria included a minimum weekly pay of \$250, the primary responsibility for managing a business unit, and the supervision of at least two full-time individuals.

Two other federal courts have found that Family Dollar store manager positions meet and exceed these criteria as has the U.S. Department of Labor.

The jury in this particular case found that Family Dollar should have classified a number of its store managers as hourly employees entitled to overtime pay rather than as salaried managers. Based on this finding, the Court has awarded damages in the amount of approximately \$19.1 million, plus an amount to be determined for an award of attorneys' fees to the plaintiffs' counsel. The court will take under submission the issue of the Company's good faith and could double the damage award. As a result, the Company currently expects to recognize between \$25 million and \$45 million, pending the court's decision, as an expense in its second quarter. The recognition of this expense will not have an impact on cash flow while the Company pursues its appellate rights with respect to this judgment. During the appellate process the Company will not be required to pay the amount of the judgment.

Reasons For The Trend

- Common policies and practices lead to collective actions
- Employer bears the burden of proving that an employee is exempt from overtime pay requirements
- Employer bears the burden of refuting allegations of “off-the-clock” work or unpaid overtime if appropriate records are not kept
- Attorneys’ fees are recoverable by prevailing plaintiffs
- Relatively high pay and long hours make the cases involving groups of managers attractive

Example

An assistant manager who makes \$30,000.00 a year and routinely works 70 hours a week. Their claim is worth approximately \$36,000.00 for three years. You multiply that by 100 assistant managers, and you have \$3,600,000.00 in potential liability, plus attorneys' fees and liquidated damages.

That amount can increase three to four times if the evidence shows the salary was only intended to compensate the assistant manager for 40 hours and not for all hours worked.

General Rule on Compensability

Any employer must pay non-exempt employees for all hours that an employee “suffer[s]” or is “permitted to work.” Such time includes, among other things:

- Time that an employee works off the clock when the employer has reason to know of the employee working off the clock; and
- Time that an employer has reason to know an employee is working beyond regular hours and permits such work.

Recent Settlements and Verdicts

- Family Dollar
- Computer Science Corporation - \$24 million settlement with technical staff
- Albertson's - \$53.3 million for off-the-clock work
- IBM - \$65 million for overtime for technical staff
- Financial service institutions - \$37 to \$98 million to brokers for alleged overtime and improper deductions

What Is and Is Not Time Worked?

- Actual time “suffered or permitted” to work
- Not paid vacations, sick leave, jury duty leave, paid lunch hour

Dangers For Employers Under The FLSA

- Misclassifying employees as exempt from overtime (*e.g.*, Family Dollar)
 - Primarily in retail industry
 - Assistant managers and managers
- Working “off the clock”
 - Attending meetings before clocking in
 - Donning and doffing cases
 - Employee arrives early to prepare for work
 - Employee stays late to close up
- Failure to pay minimum wage

Proper Classification

The Salary Test and Duties Test

- To be exempt from receiving overtime, most employees must meet at two-part test:
 - They must be paid a minimum per week salary;
and
 - They must perform certain job duties.

The Salary Basis Test

-- The Amount of the Salary --

- The new minimum salary level required for exemption is \$455.00 per week.
- Such amount may be paid in equivalent amounts for periods longer than one week, such as payment bi-weekly or semi-monthly.

The Salary Basis Test

-- Salary Basis Defined --

- Salary means a predetermined amount paid for every week in which the employee performs any work and that is not subject to reduction because of variations in the quality or quantity of work performed.
- With certain exceptions, a salary must not be “subject to” deductions.

Permissible Salary Deductions

- Deductions for 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 workplace conduct rules

Salary Basis

- Not hourly – paid whether work or not, with no variations due to quantity or quality
- General rule: do not have to pay for any work week in which no work is performed
- No overtime pay (inconsistent with salary basis)
- No deductions for absences occasioned by employer
- No disciplinary deductions – unless for violation of major safety rule

Salary Basis (cont'd)

- Deduction for a day or longer allowed if:
 - a. Personal reason
 - b. Sickness – if before qualifying or after exhausting benefits under paid leave policy or when receiving benefits paid by insurance
 - No deductions for military leave unless absent for full week
 - Can deduct unpaid FMLA leave

Effect of Improper Deductions

- An actual practice of making improper deductions from salary will result in the loss of 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 for the improper deductions.

Safe Harbor

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

The Duties Tests

Executive Duties

- An executive employee is one
 - Whose **primary duty** is **management** of the enterprise or of a customarily recognized department or subdivision;
 - Who **customarily and regularly** directs the work of **two or more other employees**; and
 - Who has **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**.

The Exemption For Executives

Other Factors

- 50 percent rule of thumb
- Importance of managerial duties as compared to other duties
- Frequency of exercising discretion
- Freedom from supervision
- Relation of salary to wages paid to other employees
- Customary and regular direction of two or more full-time employees (rules out working foreman)

Administrative Duties

- An administrative employee is one:
 - 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 high level and, upon occasion, revised or reversed

Discretion and Independent Judgment (cont'd)

- Discretion and independent judgment *does not* include:
 - Applying well-established techniques, procedures or specific standards described in manuals or other sources
 - Clerical or secretarial work
 - Recording or tabulating data
 - Performing mechanical, repetitive, recurrent or routine work

The Administrative Exemption

Examples:

- Administrative Assistant
- Buyer
- Executive Assistant
- Credit Manager
- Purchasing Agent
- Personnel Director
- Safety Director

The Administrative Exemption

Examples: (cont'd)

- Investment Consultant
- Tax Consultant
- Human Resources Manager
- Comptroller/CFO

Learned Professional

- A learned professional is one:
 - Whose primary duty is the performance of work requiring advanced knowledge
 - In a field of science or learning
 - Customarily acquired by a prolonged course of specialized intellectual instruction

Highly Compensated Employees

- Highly compensated employees may be exempt if the following requirements are met:
 - Total annual compensation of at least \$100,000
 - At least \$455 per week paid on a salary or fee basis
 - 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

Outside Salespersons

- To be exempt as an outside salesperson, the employee must meet the following requirements:
 - The employee must be making sales or obtaining orders or contracts for services or for the use of facilities
 - The employee must be customarily and regularly engaged away from the employer's place or places of business when making sales or obtaining orders or contracts.

Computer Employees

- To be eligible for the exemption applicable to computer employees, the following requirements must be met:
 - The employer must pay the computer employee on a salary basis, fee basis, or at least \$27.63 an hour.

The Primary Duty Of the Computer Employee Consists Of:

- The application of systems analysis techniques and procedures;
- 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; or
- A combination of all of these duties.

Computer-Related Occupations Exemptions

- *E.g.*, Systems Analysts, Programmers, Software Engineers
- Application of highly specialized knowledge
- Primary duties:
 - Determining hardware or software specifications,
 - Designing or developing systems or programs based on user or system design specifications, or
 - Designing or creating programs related to machine operating systems

Pitfalls For Hourly Employees

Current Minimum Wage

- The current minimum wage rate is \$7.25 per hour.
- Tipped employees \$2.13 per hour.
- States may have the same or higher wage rates – www.dol.gov
- Example: Florida - \$7.67 per hour.

What Is Compensable Time?

- Waiting Time
 - Unless Employee is completely relieved from duty or
 - Employee is relieved until a definite time long enough to use as Employee sees fit
 - Is Employee engaged to wait or waiting to be engaged?
- On-call Time
 - If Employee must remain on premises
 - Not if Employee can come and go as Employee pleases

What Is Compensable Time? (cont'd)

- Rest Periods
 - Compensable if 20 minutes or less
- Meal Time not Compensable if:
 - At least 30 minutes
 - Employee is relieved of all duties, including telephone answering
 - Employee is free to leave duty post
- Sleeping Time
 - If duty time is less than 24 hours
 - If more than 24 hours and allow five hours of sleep, then up to eight hours can be deducted

What Is Compensable Time? (cont'd)

- Travel Time
 - Emergency travel outside of working hours is compensable
 - Employee driving self outside of town
 - Travel by common carrier during normal working hours

Overtime

In General

- The FLSA requires overtime to be paid if an employee works in excess of a specified number of hours during a workweek. It does not require overtime pay for hours worked in excess of any daily number, or for work done on weekends, holiday, or before or after regular working hours. However, state law may impose more stringent requirements.

Overtime

- Overtime pay is figured on a workweek basis, whether an employee is paid daily, weekly, biweekly, monthly, or on a piecework basis.
- Each workweek stands alone - employers may not offset overtime hours worked in one week against non-overtime hours worked in another week.
- Overtime must be calculated on a weekly basis, but may be paid to the employee on his regular pay schedule.

Issues Ripe For Collective Action

- Working during lunch periods
- Time shaving cases
- Employees working from home
- Employees locked in at work
- Employee told/pressured to do it
- Job required it to be done (*i.e.*, the loyal employee problem)

Issues Ripe For Collective Action (cont'd)

- Failing to pay overtime to non-exempt employees, including overtime not approved in advance

Issues Ripe For Collective Action (cont'd)

- Automatic wage deductions
 - From exempt employees' salaries for partial-day absence
 - From non-exempt employees for meal breaks not taken

Issues Ripe For Collective Action (cont'd)

- Miscalculation of overtime pay
 - Not including bonuses, shift premiums
 - Piece rate calculation

Issues Ripe For Collective Action (cont'd)

- Failure to pay overtime for independent contractor when they qualify for employee status

Top Five Expensive Misconceptions

1. The employee agreed to this amount.

Top Five Expensive Misconceptions (cont'd)

2. The employee works two different jobs.

Top Five Expensive Misconceptions (cont'd)

3. I call her a manager/supervisor.

Top Five Expensive Misconceptions (cont'd)

4. I don't make my employees punch a time clock (living in fools' paradise).

Top Five Expensive Misconceptions (cont'd)

5. Oh, I give them comp time in lieu of paying overtime.

How to Avoid

1. Objectively evaluate position – review your job descriptions.

How to Avoid (cont'd)

2. Policy prohibiting unauthorized deductions

How to Avoid (cont'd)

3. Policy prohibiting off-the-clock work

How to Avoid (cont'd)

4. Complaint procedure for reporting working hours abuse and improper deductions

How to Avoid (cont'd)

5. Train managers

How to Avoid (cont'd)

6. Meal Time Policy