PRESENTATION

Avoiding Wage and Hour Liability in 2014

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EXPAND YOUR EXPECTATIONS™

- Wage and Hour Trends
  - Agency Enforcement
  - Private Enforcement

- Top Wage and Hour/Fair Labor Standards Act Mistakes and Claims
  - Overtime Violations
  - Minimum Wage Violations
  - Working Off-The-Clock – the "Pervasive Workplace"
  - Misclassification
  - Calculating Overtime Rate of Pay

- Wage and Hour Tips and Best Practices

Wage and Hour Enforcement

- Over 50,000 FLSA lawsuits filed nationwide since 2000.

- Since 1991 the number of FLSA lawsuits has increased by 514%.

- 8,148 FLSA lawsuits filed in 2012 alone.

- Claims under the FLSA have surpassed race and gender class actions in recent years.

- In 2012 most targeted industries were accommodations and food services, manufacturing, construction, and other services.

- Easy claims for employees and plaintiff's attorneys to bring, but very costly for employers!

By the Numbers…

- Wage and hour settlements for US companies totaled $467 million in 2012, consistent with recent past years.

- Companies, on average, paid $4.8 million in order to resolve a case in 2012, which is slightly higher than the $4.6 million companies paid in 2011.

- The median settlement value for wage and hour cases in 2012 was $1.7 million.

In 2012, Overtime Allegations Remained the Most Common Type
Allegations in Settled Wage and Hour Cases 2012
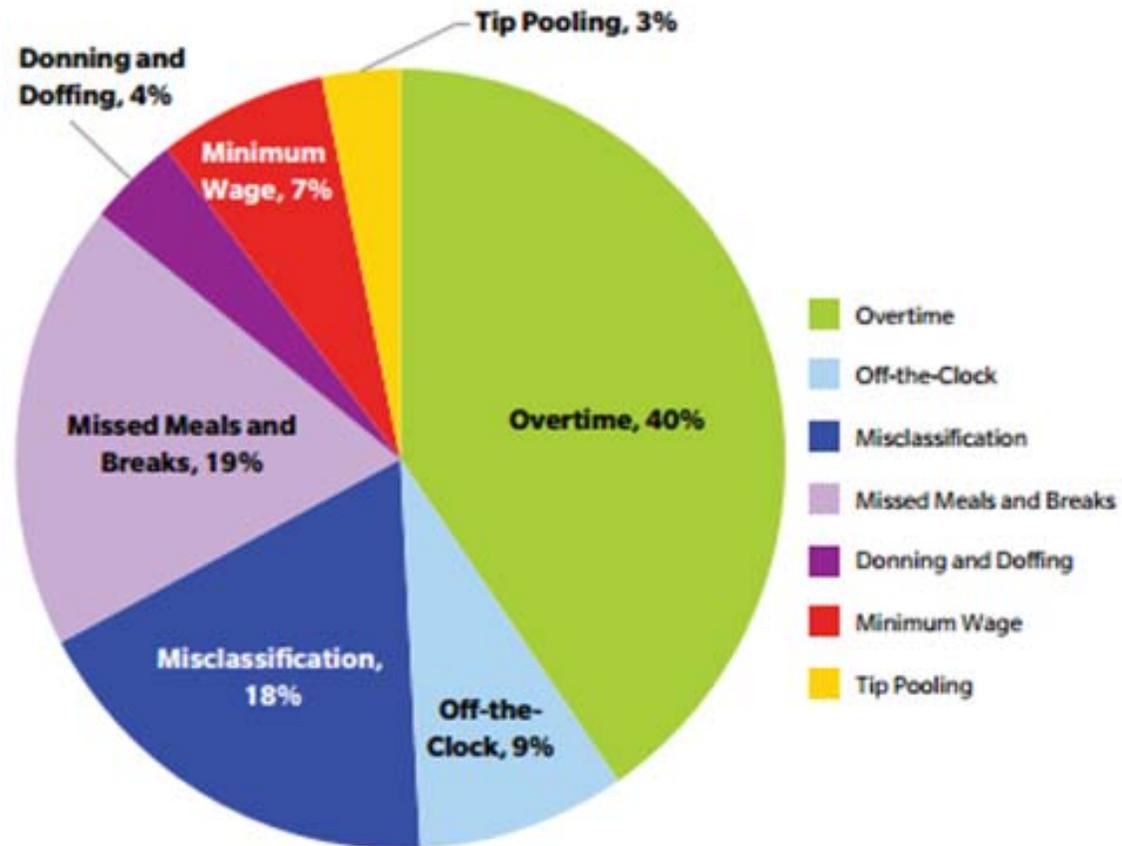
- Source: www.accountingweb.com

Why so prevalent?

"I love wage-hour cases. For the most part it is just math, not difficult he-said, she-said. Usually I write a letter and get a check. One employer decided to fight me on a single-plaintiff case, and I had to go to court – the employee got her $15,000, and I got over $200,000 in attorneys' fees."

Wage and Hour Enforcement At The Agency Level

- The DOL hired over 350 new investigators for the Wage and Hour Division.

- New investigators – not much experience

- "We Can Help" program

- MOUs with IRS

- DOL aggressively pursuing enforcement

- Happy to use adverse publicity

Top Wage and Hour Claim – Overtime Violations

- What leads to overtime violations?

    - Automatic Rounding

    - Automatic Deductions for Meal and Rest Breaks

    - Improper exempt classification

    - Failure to pay unapproved overtime

Calculating Time Worked

- What is included in "time worked"?
  - Any time "suffered or permitted" by the employer.

- What about: training, on-call time, sleep time, preliminary/postliminary time, idle time, commuting time, travel time?

Second Highest Claim – Minimum Wage Violations

- ## Federal Min Wage

- ## State Minimum Wage

- ## New OFCCP Minimum Wage!

State	New Rate (per hour)	Effective Date
NY	$8.00	Dec. 31, 2013
AZ	$7.90	Jan. 1, 2014
CO	$8.00	Jan. 1, 2014
CT	$8.75	Jan. 1, 2014
FL	$7.93	Jan. 1, 2014
MO	$7.50	Jan. 1, 2014
MT	$7.90	Jan. 1, 2014
NJ	$8.25	Jan. 1, 2014
OH	$7.95	Jan. 1, 2014
OR	$9.10	Jan. 1, 2014
RI	$8.00	Jan. 1, 2014
VT	$8.73	Jan. 1, 2014
WA	$9.32	Jan. 1, 2014
CA	$9.00	July 1, 2014

Deductions

- Non-exempt Employees: Employers cannot generally make deductions which bring an employee's pay below minimum wage.

- This includes, but is not limited to, the following: fines/disciplinary penalties, repayment for shortages, repayment for theft (unless convicted), repayment of loan with interest if employer is the lender.

- Certain deductions are permissible, even if they bring pay below minimum wage.

- These include: taxes, reasonable cost of board and lodging, union dues, insurance premium payments, wage attachments and garnishments.

Third - Working Off-The-Clock – the "Pervasive Workplace"

This applies to your non-exempt employees.

- The Pervasive Workplace is the ability to work anywhere, anytime. Made possible by smart phones, PDAs, and other technology.

- Are employees "working" during breaks/meals?
  - Sitting at worksite
  - Answering calls
  - Responding to emails

- Are employees "working" when they are outside the workplace?
  - Emails, calls, etc.

- How are employees tracking their time?

Fourth Violation
Wage and Hour Traps – Who is an "employee"???

- Misclassifications – Major DOL Initiative!
  - Why? Misclassification of workers as "independent contractors" costs the government billions in taxes.

- MOUs regarding sharing information with IRS and state governments.
  - The IRS promised 6,000 random audits over a 3 year period.

- Who is an employee, who is an independent contractor?
  - Different tests for different agencies.

- A good start - "Economic Realities" – Is the worker dependent upon alleged employer for his or her livelihood?

Exempt vs. Non-Exempt Employees

- Misclassification problems include exempt and non-exempt classifications.

- Every employee must be paid minimum wage and overtime unless clearly exempt!

- "White Collar" exemptions include – executive, administrative, professional, computer professional, outside sales, and highly compensated.

- Employer has the burden to prove exempt status.

- Detailed criteria from the federal regulations must be met. You CANNOT rely on titles, agreements with the employee, or basis of pay alone!

Exempt vs. Non-Exempt Employees

- There are many other FLSA exemptions, but they are strictly interpreted.

- The general rule for exempt employees: employee must receive a predetermined amount of pay for every work week in which he/she performs any work.

- Exempt employees are paid for the quality not quantity of their work.

- Allowable deductions are limited.
  - whole day missed for personal reasons
  - whole days missed due to sickness or injury, if there is a sick-pay plan
  - first and last weeks of employment
  - a few other…but be careful about deductions for exempt employees. You can easily lose exemption!

Common Misconceptions about FLSA Exemptions

- If an employee receives a salary he/she is exempt.

- If an employee has a title of manager, supervisor, or administrator he/she is exempt.

- if an employee is highly compensated he/she is exempt.

- If an employee is college-educated and performs white-collar office work, he/she is exempt.

- If an employee has an advanced degree he/she is exempt.

- If an employee asks to be paid on a salary and does not want to record time it is okay to pay him/her as exempt.

- My favorite: Everyone else in my industry classifies this position as exempt, so it is okay!

Finally, Determining Employee's Regular Rate of Pay

- Regular rate of pay must be based on "all remuneration for employment, paid to, or on behalf of" the employee.

- Amounts other than hourly pay, salary, day rate, etc.

- Payments which must be included: commissions, non-discretionary bonuses, on-call pay, etc.

- Amounts which may be excluded include: paid leave, reimbursement for mileage, discretionary bonuses or gifts.

What costs can you expect?

- Back pay

- Liquidated damages

- Civil money penalties

- Attorneys' fees

- Criminal penalties

- Time and disruption of operations

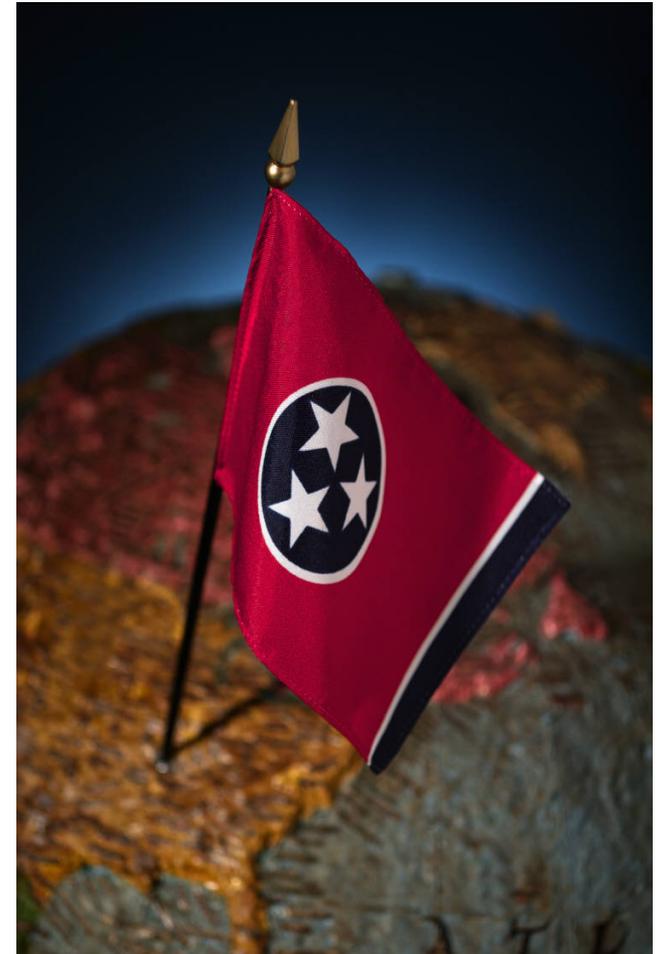- Reputation

Wage and Hour Tips and Best Practices

- Managing overtime must be done by using the discipline process and not by compensation. Make sure your supervisors are trained!

- With deductions, ask yourself if it is for the employer's benefit, if it is authorized by the employee, and/or if it is required by law.

- If time records are altered be sure to have employee and supervisor sign off on changes.

- Check state laws in relation to meal and rest periods. Employees must be paid for breaks of less than 30 minutes.

- Private employers are NOT PERMITTED to let employees bank comp time in lieu of overtime – even if authorized or requested by employees.

Wage and Hour Tips and Best Practices

- Review and update wage and hour related policies. Make sure you have a safe harbor policy!

- Review and update job descriptions. Make sure job descriptions accurately reflect how employees in the positions spend their time.

- Perform a self audit.

Remember, the FLSA Does NOT Cover…

- Paid leave

- Rest periods

- Premium pay or shift differentials

- Reimbursement for mileage & expenses

- Pay raises

- Benefits

- Limitation on hours

But state laws do!

Questions???