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Department of Labor Compliance and Avoiding Investigations

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EXPAND YOUR EXPECTATIONS™

ROADMAP

- Why this topic?
- What does the DOL audit?
- Audit Process Overview
- Audit Rules
- What can you do to protect yourself?

Why This Topic?

- In 2009, the GAO was critical of the DOL for failing to thoroughly investigate claims.
- In response, the DOL hired 350 more investigators and sought more money from Congress.
 - April 2010: “We Can Help”
 - Jan 2011: “Bridge to Justice”
- FLSA private litigation → so hot right now

FLSA In the News

- **Wal-Mart:** May 1, 2012, Wal-Mart Stores Inc. has agreed with the DOL to pay \$4,828,442.00 in back wages and damages to more than 4,500 employees nationwide, as well as \$450,000 + in civil money penalties, for misclassification of vision center managers and asset protection coordinators as exempt from FLSA.
- **Chuck E. Cheese:** (*“Where A Kid Can Be A Kid”*) January 2012, fined \$28,000 for violation of FLSA child labor provisions.
- **Mass. Restaurant Industry:** March 2012, ongoing investigation found \$1.3M in back wages due to 478 employees; assessing liquidated damages.

Minor League Ballplayers Sue MLB Over Pay Practices

- Not paid minimum wage
- Not paid overtime
- Uncompensated work (training and promotional events)

Rhea vs. Goliath: Why One Franchisor Is Courageously Suing the U.S. Labor Department

- Consignment franchise business
- Staffed by stay-at-home moms and retired grandmothers
- No pay, but first shot at goods
- DOL classified volunteers as employees
- DOL contacted volunteers and told them they can receive back wages

Snow Pay

- Workers sent home early
- Stranded workers
- Working from home

What to Expect

- DOL more aggressive
- More thorough investigations
- Additional document requests
- Focus on certain industries

What Does The DOL Investigate?

- **Fair Labor Standards Act:** (FLSA)
 - Minimum wage + overtime for non-exempt employees
 - Compensation for all hours worked
 - Proper record-keeping
 - Child labor limitations
- **Other laws:** Immigration/Nationality Act, FMLA, OSHA

Who Is Subject to the FLSA?

- Almost all private and public employers
 - **Two tests:**
 - (1) individual coverage → employees engaged in commerce/production of goods for commerce; or
 - (2) enterprise coverage → annual business of \$500,000+, 2 or more employees engaged in interstate commerce/production of goods for interstate commerce
- Exempt v. Non-Exempt Employees
 - Specific types of employees exempt: bona fide executive, administrative, professional, outside sales, highly compensated

Types of Investigations

- Full investigation of all FLSA issues
- Limited investigation of specific FLSA issues
- Office audit
- Self-audit
- Conciliation/resolution of minor violations by phone

Investigations → Process Overview

1. Selection of Company
2. Initial Contact
3. Document Requests
4. Employee interviews
5. Settlement Conference
6. Litigation?

What Triggers An Audit?

- Complaint
- “Directed investigation”
- Random selection
- Follow-up to previous investigation

NOTE: DOL will not disclose particular trigger

DOL Has Authority To:

- Investigate and gather data concerning wages, hours and other employment practices;
- Enter an employee's premises and inspect their records and workplace; and
- Question employees in their investigation of the employer's compliance with the FLSA's requirements.

The Unannounced Visit

- DOL has the authority to show up without notification
- Cooperate – can signal DOL anticipates trouble
- Have procedure in place for immediate notification of HR and legal departments

Document Review

- Typical requests:
 - Information re: FLSA coverage
 - Payroll
 - Time cards
 - Exemption classifications

Employee Interviews

- The DOL views interviews as their most important investigative tool.
- Testing the accuracy of employer's records
- Considerations:
 - Who will they interview?
 - Purpose of interview?
 - Management presence? (exempt v. non-exempt)
 - Place of interviews?
 - Message to employees?

Ten Potentially Expensive

- Not recording actual time worked, including travel time and on-call time
- A salary does not make an employee exempt
- Having employees work off the clock
- Not paying for breaks or meals
- Improperly classifying as exempt

Ten Potentially Expensive (cont'd)

- The employee agreed to this amount
- The employee works two different jobs
- Making improper deductions from wages
- Calling an employee an independent contractor
- Giving comp time in lieu of paying overtime

1. Perform Regular Self Audits



Self Audit

VS



**FLSA Collective
Action**

2. Regularly Train Your Managers

- Compensable time
- Overtime
- Unpaid meal breaks
- Salaried or hourly employees

3. Include Wage & Hour Policies In Your Handbook

- Prohibit working off the clock
- Prohibit working during unpaid meal breaks
- Employee complaint procedures
- Safe harbor policy

Safe Harbor

- Policy prohibits improper deductions;
- Complaint mechanism;
- Reimbursement for improper deduction; and
- 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.

Sample Safe Harbor Policy

The law requires that the company make certain deductions from every employee's compensation, including, but not limited to, applicable federal, state, and local income taxes. Social Security taxes also must be deducted from each employee's earnings. The company matches the amount of Social Security taxes paid by each employee.

The company offers programs and benefits beyond those required by law. Eligible employees may voluntarily authorize deductions from their paychecks to cover the costs of participation in these programs. Contact your supervisor with questions concerning deductions and how they are calculated.

The company prohibits deductions from the salary of a salaried-exempt employee based on the quality or quantity of work performed or any other reason that is inconsistent with pay on a salary basis under federal wage and hour regulations. Subject to certain exceptions, a salaried-exempt employee must receive his or her full salary for any week in which he or she performs any work without regard to the number of days or hours worked. Exceptions to this general rule include the following:

1. The company need not pay the salary of a salaried-exempt employee for any workweek in which the employee performs no work.
2. The company may make deductions from salary for an exempt employee's absence for one or more full days for personal reasons, other than sickness or disability.
3. The company may make deductions from salary for absences of one or more full days occasioned by sickness or disability so long as the company maintains a bona fide leave plan that provides compensation for loss of pay occasioned by such sickness or disability. (Deductions for such full day absences may be made, for instance, before the employee has qualified under the plan or after the employee has exhausted his or her leave under the plan.)
4. The company will not make deductions from salary for absences of an exempt employee occasioned by jury duty, attendance as a witness, or temporary military leave. The company can offset any amounts received by an employee as jury fees, witness fees, or military pay for a particular week against the salary due for that particular week.
5. The company may make deductions from the salary of exempt employees for penalties imposed in good faith for infractions of safety rules of major significance.
6. The company may make deductions from the salary of exempt employees for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules.
7. The company is not required to pay the full salary of a salaried-exempt employee in the initial or terminal week of his or her employment if the employee works a partial week during such week.
8. The company is not required to pay the full salary of a salaried-exempt employee for weeks in which an exempt employee takes unpaid leave under the Family Medical Leave Act.

If a salaried-exempt employee believes that the company has made an improper deduction from his or her salary, he or she should report the alleged improper deduction to _____. An employee may also report an improper salary deduction by _____. The company will in no way retaliate against any employee for making a good faith complaint about any payroll discrepancies or problems.

4. Know What Your Employees are Doing Before They Clock In and After They Clock Out

“Donning/Doffing” Basics – the Buzzwords

- Work
- Principal activity
- Preliminary or postliminary activity
- Integral and indispensable
- De minimis
- Continuous workday

“Donning/Doffing” Basics

- Putting on and taking off required gear is a principal activity if the nature of the job mandates that it take place on the employer’s premises
- Time spent after engaging in the first principal activity/before engaging in the last one is compensable

5. Remove Incentives for Your Managers to Work Employees Off the Clock



6. Beware the Payroll Deduction, such as:

- Variations in the quality or quantity of work performed
- Partial day absences (unless the absences are pursuant to the FMLA)

Permissible Deductions

- Deductions that reflect a proportionate part of an employee's full salary for time actually worked in the first and last weeks of employment
- Deductions for penalties imposed in good faith for violating safety rules of "major significance"
- A workweek in which the employee performs no work.

More Permissible Deductions

- Deductions for absences from work for one or more full days for personal reasons, other than sickness or disability
- Deductions for absences from work for one or more full days due to sickness or disability if the deductions are made pursuant to a bona fide plan, policy, or practice of providing wage replacement benefits for these types of absences

More Permissible Deductions

- Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of workplace conduct rules
- Deductions for leave taken pursuant to the Family and Medical Leave Act

THE EXEMPTIONS – A QUICK REVIEW



The “White Collar” Exemptions

- Executive
- Administrative
- Professional
- Outside salespersons
- Computer-related professions

The Two-Part Test

- Salary basis
- Job duties

The Salary Basis Test

- Minimum salary level required for exemption is \$455.00 per week (\$23,660 per year).
- With certain exceptions, a salary must not be “subject to” deductions

THE DUTIES TESTS

Executive employee:

- Primary duty is management of the enterprise or of a customarily recognized department or subdivision;
- Customarily and regularly directs work of two or more other employees; and
- Authority to hire/fire or suggestions/recommendations afforded great weight

Administrative Employee

- Primary duty is performance of office or non-manual work directly related to management or general business operations of employer or employer's customers; and
- Exercise of discretion and independent judgment on matters of significance.

Human Resources Example

- Human resource managers who formulate, interpret, or implement employment policies generally meet requirements.
- Personnel clerks who “screen” applicants to obtain data regarding minimum qualifications and fitness for employment generally do not.

Learned Professional:

- Primary duty is performance of work requiring advanced knowledge
- Field of science or learning
- Customarily acquired by prolonged course of specialized intellectual instruction

Outside Salesperson:

- Must make sales or obtain orders or contracts for services or for the use of facilities
- Must be customarily and regularly engaged away from employer's place or places of business when making sales or obtaining orders or contracts.

Computer Employee:

- Salary basis, fee basis, or make at least \$27.63 an hour; and
- Primary duties consist of:
 - Application of system analysis techniques/procedures;

And...

- Design, development, documentation, analysis, creation, testing or modification of computer systems/programs (inc. prototypes)
 - based on and related to user or system design specifications; or
 - related to machine operating systems; or
- A combination of all these duties.

7. Don't Rely on Job Descriptions

- Look not at what the description says the employee does but at what the employee actually does on a daily basis



8. Employee Preference Doesn't Matter



9. Industry Custom and History Don't Matter

- Doing something the wrong way for a long time doesn't make it right.



10. Know a Good Wage & Hour Lawyer

