

Wage and Hour Issues for the Urgent Care Industry

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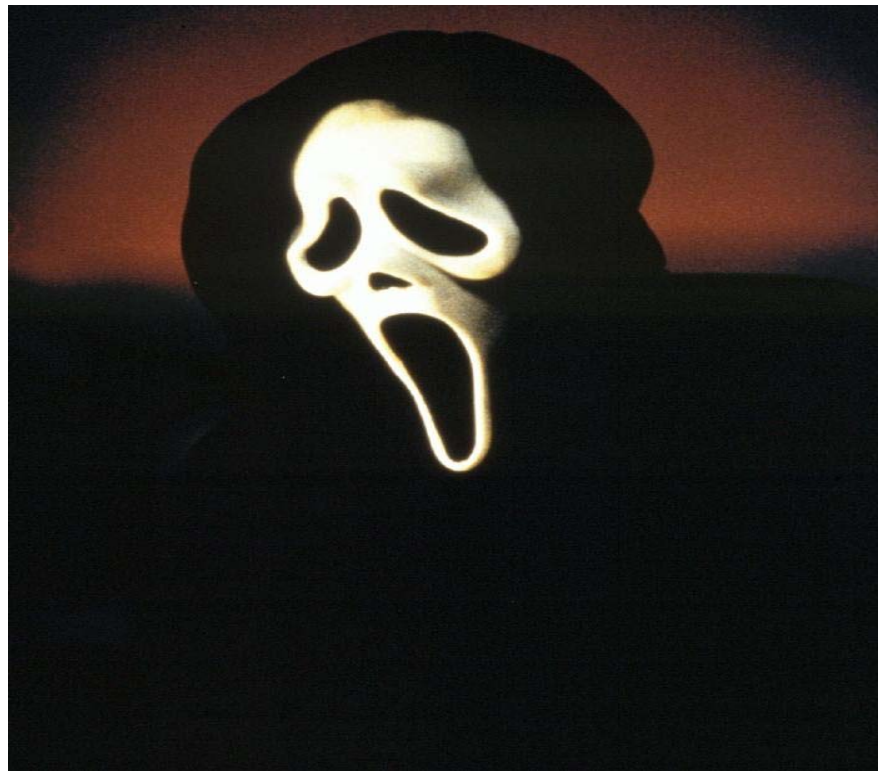
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Scream – The Movie



Road Map

- **Fair Labor Standards Act**
 - What is it?
 - What types of claims are filed?
 - What are the dangers?
 - How can I be proactive?

Fair Labor Standards Act

- Requires payment of the federal minimum wage - \$7.25 per hour
- Many states and a few cities have higher state minimum wage
- Florida – \$7.93
- California: \$8.00
 - San Francisco: \$10.74
 - San Jose: \$10.15

Fair Labor Standards Act

“All employers are required to compensate employees at a rate of one and one-half their regularly rate of pay for any hours over forty that the employees work in a given week.”

29 U.S.C. § 207.

Record Number Filed in 2012

- 2012 – 7,764
- 2011 – 7,064
- 2010 – 7,006
- 2009 – 6,081
- 2008 – 5,644
- 2007 – 5,302

Dangers of FLSA cases

- Pro-employee statute
- Damages are high
- Liquidated damages available
- Two to three year statute of limitations
- Attorneys' fees provision
- Individual liability

What do these types of claims include?

- Misclassification of employees as independent contractors
- Misclassification of employees as exempt
- Regular rate and minimum wage issues
- Meal Periods/Rest Breaks
- Retaliation

Independent Contractor v. Employee

- **Misclassification leads to problems with:**
 - DOL,
 - EEOC,
 - Department of Industrial Relations,
 - IRS, and
 - SSA.

IRS Test

- Does the hiring company pay its regular employees to perform essentially the same duties as the subject worker who is treated as an independent contractor?
- Has that worker previously been paid by the company as an employee to perform essentially the same task?
 - Also looks at instructions, training, integration, services rendered personally, hiring, paying assistants, continuous relationship, set hours of work, full-time, work performed on employer's premises, order or sequence set, oral or written reports, pay by hour, week or month, pays travel expenses, furnishes tools, significant investment, realization of profit or loss, exclusivity, services available to the public, right to discharge or terminate.

Test – Economic Realities/Common Law

- Do you retain the “right to control” the details of the employee’s work performance – regardless of whether you exercise it?
- Is the employee supervised?
- How long has the employee worked for you?
- How the employee is paid (per job or time)?
- How can the relationship end?
- Benefits: Is annual leave provided? Retirement? Social Security paid?
- Does the employee wear a uniform and do you provide it to him/her?
- Does the employee have to return the tools?
- What is your intent?

Volunteers and Interns

- Should be paid if they are providing consequential economic benefit to the business
- Interns – should be a very defined program.

Most Common Exemptions

- **Executive Exemption**

The executive exemption applies to an employee:

- Who is compensated on a salary basis no less than \$455.00 per week;
- Whose **primary duty** is **management** of the enterprise in which the employee is employed or of a customarily recognized department or subdivision;
- Who customarily and **regularly directs** the work of **two** or more other employees; and
- Who has the **authority to hire or fire** other employees or whose suggestions and **recommendations** on the hiring, firing, advancement, promotion, or any other change of status of other employees are **given particular weight**. 29 U.S.C. § 541.100.

Administrative Exemption

- **Test:**
 - (1) Is he compensated on a salary or fee basis at a rate of not less than \$455.00 per week?
 - (2) Is his **primary duty** 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
 - (3) Does her primary duty include the **exercise of discretion and independent judgment** with respect to **matters of significance**?
- 29 C.F.R. § 541.200.

Computer Professionals

- Compensated on a salary or fee basis at a rate not less than \$455.00 per week exclusive of board, lodging or other facilities, or on an hourly basis at a rate not less than \$27.63 an hour; and
- Whose **primary duty** consists of:
 - The application of **systems analysis** techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; or
 - 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; or
 - The design, documentation, testing, creation or modification of computer programs related to machine operating systems

Professional Exemption

- Test:
 - 1) Is compensated on a salary or fee basis at a rate of not less than \$455 per week and
 - 2) Has a primary duty of the performance of 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
 - Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.
- More education = more likely exempt
- RNs are but not LPNs or other paraprofessionals generally are not
- Registered or certified medical technologists generally can qualify
- Pharmacists qualify

Salaried or Hourly?

- Receptionist – Not Exempt
- Human Resources – Exempt (Administrative Exemption)
- Bookkeepers – Not Usually Exempt
- Medical coders – Not Exempt
- Computer Technician - Depends

8 and 80 Rule

- Special only certain medical providers (including urgent care)
- Can establish a 14 consecutive day pay period to compute overtime if:
 - The employer and the employee agree before work is performed (in writing);
 - The employee works more than 8 hours per day and 80 hours in the 14 day period, he or she is compensated for overtime.
- You can establish the workweek for any hour and any day but it must be a permanent change.

Example #1 – Applying 8 and 80 Rule

Assume the employee is paid \$15 per hour and works 7, 12-hour shifts = 84 hours.	
<u>Wrong way to pay</u>	<u>Correct way to pay</u>
$84 \times \$15 = \$1,260$ $4 \times \$7.50 = 30$ $\$1,260 + \$30 = \$1,290$ $80 \times \$15 = \$1,200 +$ $(4 \times \$22.50 = \$90) = \$1,290$	Employee is entitled to 28 hours of overtime (7 days with 4 hours OT each day) and 4 hours OT for the 14 day period. However, the 4 hours of this OT can be credited to the OT due for the 14-day period.
	$84 \times \$15 = \$1,260$; or $56 \times \$15 = \840
	$28 \text{ hours} \times \$7.50 = \$210$; or $28 \times \$22.50 = \630
	$\$1,260 + \$210 = \$1,470$; or $\$840 + \$630 =$ $\\$1,470$ (\$180.00)
	No additional OT is due for the four hours over 80 as the OT worked in excess of 8 hours a day can be credited to those four hours.

Example #2: I thought I was under the 8 and 80 rule.

- Assume the employee is paid \$15 per hour and works 6, 12-hour shifts = 72 hours.
- The first week the employee work four 12 hour shifts and the second week works two 12 hour shifts.
- First week = 48 hours
- Second week = 24 hours
- Employer fails to pay 8 hours in overtime or **\$180.00**.
- Don't forget to include shift differentials and bonuses when calculating the regular rate.

Meal Breaks and Rest Periods

- 30 Minutes for a Bona Fide Meal Period – not compensable
- Must be “completely relieved of duties”
- Less than 30 Minutes
 1. The employee has sufficient time "to eat a regular meal at a time of day when meals are normally consumed."
 2. The employer and employee have an agreement that the time given is sufficient to consume a regular meal.
 3. The arrangement does not violate state or local laws.

Rest periods of less than twenty minutes are not compensable.

The FLSA does not require employers to provide meal or rest periods

On-Call Time

- On-call + on premises = \$\$\$
- On-call + off premises
 - Does the wait predominantly benefit the employer?
 - Is the employee able to use the time for his/her own purposes?

Factors:

Required response time;

Use of a pager;

Ability to trade on-call shifts;

Excessive geographical limitations;

The employee's ability to engage in personal activity;

Frequency of the calls.

Collective Actions

- Similarly situated employees “opt-in”
- Two step approach to determine certification
- Potential for huge damage awards
 - 1,700 store managers sued Family Dollar alleging improperly pay as exempt employees. Settled in September of 2012 for \$14 million.
 - Call center employees sued a Xerox affiliate for failure to pay for logging into computers, looking for headsets and waiting for passwords to be reset – settled for \$4.5 million

Damages Calculation

- Misclassified employee is paid a salary of \$50,000.00.
- Employee contends he worked 60 hours per week.
- ($\$50,000.00 / 52 \text{ weeks} / 40 \text{ hours} = \24.04 per hour).
- 20 hours x \$36.06 (time and a half) = \$721.20
- $\$721.20 \times 52 \text{ weeks} = \$37,502.40$
- $\$37,502.40 \times 3 \text{ years} = \$112,507.20$
- $\$112,507.20 \times 2 \text{ (liquidated damages)} = \$225,014.40$
- Plus attorneys' fees

FLSA Retaliation

- **Cannot discharge or “in any manner discriminate” against any employee who:**
 - Has filed a complaint,
 - Caused to be instituted any proceeding,
 - Testified, or
 - Is about to testify about a wage and hour proceeding.

Retaliation – Elements

- “Complaint” – should include something more specific than vague mention of wage and hour laws. *Wolf v. Coca-Cola Co.*
- Causation – Focus on time.
- “In any manner discriminate” includes giving false information about driver’s accident history to new employers. FMSR provides bar except for those who knowingly furnish false information. 49 C.F.R. § 391.23(l)(1) & (2). *Roberts v. RDL Logistics*
- Liquidated damages are not mandatory. *Moore v. Appliance Direct, Inc.* 2013

The New Retaliation Frontier?

- “Zone of Interest”
- Thompson v. North American Stainless, 131 S. Ct. 863 (2011)(fiancee has retaliation claim under Title VII).
- Lard v. Alabama Alcoholic Beverage Control Bd., (M.D. Ala. Nov. 28, 2012)(retaliation complaint could proceed for boyfriend whose girlfriend’s complained of racial discrimination).
- Split in the district courts extending Thompson to the FMLA. Lopez v. Four Dee, Inc., (E.D. N.Y. June 19, 2012)(permitting a claim) but Gilbert v. St. Rita’s Professional Services, LLC, (N.D. Ohio June 20, 2012).
- The FLSA???

FLSA Private Settlements

- Most courts require the DOL or courts to approve a FLSA settlement.
- This requirement is based on a thirty year-old case.
- In August 2012, the Fifth Circuit called this case into question and held that private parties may settle cases involving FLSA issues without approval.
- This is important because employers can keep settlements confidential to discourage copycat filings.



What can I do?

- Adopt a policy.
- Review your job descriptions. Job titles aren't enough.
- Audit your classifications and your payroll practices.
- Keep and maintain records.
- Train your employees.
- If you discover problems, pay and ask for an acknowledgment.

Questions?

