

Wage and Hour Hot Topics: How to Avoid Striking Out!



Presented By:
Whitney M. Harmon, Esq.
Baker Donelson Bearman Caldwell & Berkowitz
Wharmon@bakerdonelson.com

Line-up!

- Wage and Hour Threats
 - Agency Enforcement
 - Private Enforcement
- Wage and Hour/Fair Labor Standards Act Traps and How to Avoid Them
 - Misclassifications
 - Working Off-The-Clock – the “Pervasive Workplace”
 - Calculating Time Worked and Regular Rate of Pay for the purpose of overtime calculations
 - Deductions from Compensation
 - Recordkeeping
- Wage and Hour Tips and Best Practices

Wage and Hour Enforcement

- Over 50,000 FLSA lawsuits filed nationwide since 2000.
- Claims under the FLSA have surpassed race and gender class actions in recent years.
- Easy claims for employees and plaintiff's attorneys to bring, but very costly for employers!



Plaintiff's lawyer's homerun!

“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

- 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



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 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!



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?



Calculating Time Worked



- What is included in “time worked”?
 - Any time “suffered or permitted” by the employer.
- What about: on-call time, sleep time, preliminary/postliminary time, idle time, commuting time, travel time?

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.



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.

Recordkeeping

- Time clocks
- Time sheets
- Changes to time entries
- Certification of time entries
- Primary records must be kept for 3 years
- Secondary records must be kept for 2 years
- Records must be made available to DOL within 72 hours of request
- Notice and Posting requirements



Recordkeeping – Changes coming!

- DOL's "Right-to-Know" Proposal
 - The Department of Labor proposes to update the recordkeeping regulations under the Fair Labor Standards Act in order to enhance the transparency and disclosure to workers of their status as the employer's employee or some other status, such as an independent contractor, and if an employee, how their pay is computed.



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???



Thank you for your time!

Whitney M. Harmon, Esq.
Baker Donelson Bearman Caldwell & Berkowitz
Wharmon@bakerdonelson.com