



HR Specialist Summit

September 10-11 | 1:00-5:00 p.m. Eastern

Wage and Hour Compliance

Carrie Hoffman
Foley & Lardner



HR Specialist Summit

Risks of Wage and Hour Claims

2024:

- Courts issued 172 certification rulings.
- Plaintiffs have a success rate at this stage of 80%

How is Wage and Hour Advice Different?

- A much different risk assessment and degree of risk than discrimination or harassment cases
- As a remedial statute, clients never get the proverbial “benefit of the doubt”
- Burden of proof - Almost always on the employer and effectively a higher standard

How is Wage and Hour Advice Different

- Exemptions construed against company (can't rely on "Business Judgment" – and beware of relying on industry norms – even if "everyone is doing it")
- If non-exempt, Company is responsible to track time (lack of employee cooperation will not generally count for much)
- Actual duties trump job descriptions (testimony from employees usually wins regarding duties or time worked)
- Individual liability for supervisors, managers, or owners

How To Avoid Wage and Hour Claims

- One Word – COMPLIANCE
- Easier said than done – FLSA sometimes defies logic
- We are going to talk about compliance strategies

Biggest Compliance Issues

Contractor Status

- Misclassification of Employees

Misclassification as exempt

Overtime Calculation

- Bonuses
- Off the Clock

Contractor v. Employee

Big Compliance Issue

Not about the Label

- Degree of control
- Investment of employee and employer
- Employee's opportunity for profit/loss
- Skill and initiative of the job
- Permanency of relationship



Contractor v. Employee

- Multi-factor test
- Labels and agreements not dispositive – but they will not hurt
- Key factors: supervision/control over work; equipment use/provision; permanence of relationship; profit/loss risk allocation; does IC provide service exclusively to company or open to public
- Consider tax and other consequences
- Again, not this simple – lots to consider, standards can vary, and assess risk based on dollars and number of people and positions involved
- Other feedback?

Exempt vs. Non-exempt

- **Non-exempt**: not exempt from overtime and recordkeeping (i.e. most workers!)
- **Exempt**: exempt from overtime and recordkeeping (determined by job duties and most exemptions also require salary basis of pay)

Misclassification of Exempt

Executive - must manage enterprise, department or division; supervise at least two FTEs; and has authority/input re: hiring, firing, promotion or change of status of others

Administrative - office or non-manual work; directly related to management or general business operations; exercise discretion and independent judgment on matters of significance

Professional - learned or creative professionals (i.e. lawyers, doctors, accountants, and architects, some designers, etc.)

Computer Employee - salary basis or at least \$27.63 an hour and much more than a “Help Desk” employee, does not include employees that repair or manufacture computer hardware

Outside Sales making sales or obtaining orders; regularly away from employer’s premises/business (salary basis not required)

Highly Compensated - \$132,964 annual compensation plus regularly perform one of the duties of executive, administrative, or professional

Misclassification as Exempt

- Duties performed must fit within an exemption (typically executive, administrative, professional, computer, outside sales); job descriptions and titles not enough
- Being a “salaried” employee is not enough
- Some states follow federal guidelines, but they rely on DOL regulations prior to amendments (2004) (e.g., Illinois). And some states have their own requirements (e.g., California)

Misclassification as Exempt

Common Misclassifications:

- Entry Level (pay attention to actual authority or expertise at time of entry)
- Sales Positions (unless outside sales or commission paid retail exemption applies)
- Leadership management development program
- Assistant Managers
- General overuse of administrative exemption (can process/decision making be flow-charted)

Administrative Exemption

Primary duty of office/*non-manual* work related to management of general business operations of employer or customer

Must exercise discretion and independent judgment as to matters of significance
“directly related to management or general business operations” v. production or sales

Proper Overtime Calculation

Must include ALL forms of compensation unless specifically excluded - 29 CFR 778.200, et seq.

May exclude (look up before excluding)

- Premium payments for work outside of normal work periods
- Bonuses that are discretionary
- Gifts (Christmas, special occasion)
- Payments to benefit plans
- Reimbursement for expenses (not for hours worked)

Proceed with Extreme Caution

- Premium pay for workloads on special days
- Bonuses that are % of total earnings

Pointers

- Shift differential - COUNTS
- Production bonus - COUNTS
- Safety/attendance award - COUNTS
- Timing of applying - over period when earned
- “Easier” method will always overpay – allocate over time period, using standard work week (such as 40 hours, increases regular rate because denominator is smaller than if OT hours used)

Bonus for CBA approval – case says can exclude

- Suggestion bonus
- Sign on Bonus
- Hiring referral

Common Issues with Hours Worked

- Preliminary and postliminary work activities
- Donning and doffing preparation time (e.g., arriving early to dress or log in)
- Using comp time to offset overtime (more than one work week)
- Meal breaks may be unpaid if done correctly (interruptions or too short are both problems)
- Automatic meal deductions
- Rest break may be required to be paid
- Training/travel/on-call time
- “Off the clock” or after hours/remote work (personal device or home computer)
- Working time includes time “suffered or permitted” to work
- Rounding time entries/Reliance on time clocks (manufacturing/call centers)
- Other issues/ideas?



Waiting Time

Counted as hours worked when:

- Employee is unable to use the time effectively for his/her own purposes; and time is controlled by the employer

Not counted as hours worked when:

- Employee is completely relieved from duty; and
- Time is long enough to enable the employee to use it effectively own purposes

On Call Time

Determination of on-call time generally not as employee friendly – my two cents

- Counted as hours worked if so restrictive that employees cannot make use of time (e.g., employee has to stay on employer's premises or so close to premises that employee cannot use the time effectively for his/her purposes)

Facts to consider:

- Time/geographic restrictions
- Activity restrictions
- Frequency of interruptions

Not counted as hours worked simply because

Employee is required to carry a pager

Employee is required to provide contact information

Meal and Rest Breaks

No requirement under FLSA to provide break or meal periods

Breaks

- If provided, breaks of short duration (normally 5 to 20 minutes) are counted as hours worked and must be paid

Meal Periods

- If provided, not counted as hours worked if the employee is relieved of duties for the purpose of eating a meal
- Okay to restrict to premises if otherwise freed from all duties
- Easily can become compensable time if, for example, employees works through the meal period or performs work related tasks during the meal period

Automatic deductions or not?

- STATE LAW



Travel Time

- Ordinary home to work travel is not counted as hours worked
- Travel between job sites during the normal work day is counted as hours worked (e.g., employee must report to main office for further directions; once at office, time is compensable)

Travel away from home – special rules apply

- Normal work hours are compensable regardless of day of week (i.e., 8 am – 5 pm excluding meal break, even if on Saturday, Sunday or holiday)
- Time as a passenger not included unless work was done
- Employee chooses to drive own vehicle – no additional time is compensable

How to Correct

- Consider ability to just correct going forward (versus back pay)
- If going forward change, probably do not want affirmation
- Try to associate with other changes (less attention)
- If back pay, probably want affirmation and reminder of how to raise other issues

Thank you!

Carrie Hoffman

(214) 999-4262

choffman@foley.com

