

**ARNSTEIN & LEHR LLP**

**Employment Law for Businesses –  
Easy Steps to Protect Your Business**

**Are You Classifying Your Employees Correctly?  
FLSA Compliance Tips and Strategies**

**April 18, 2012**

# Today's Agenda

- I. Introduction to the FLSA**
- II. What Does the FLSA Require?**
- III. Who Is Exempt From Overtime?**
- IV. Illinois State Wage and Hours Issues**
- V. Insurance Implications**
- VI. Hot FLSA Topics & Case Examples**
- VII. Take Away Strategies & Tips**

# I. Introduction to the FLSA

## *(History Lesson)*

- Enacted in 1938, the FLSA established minimum wage and overtime standards for a large segment of the US workforce.
- Department of Labor's Wage & Hour Division was created to enforce the FLSA.
- Largely unchanged since 1938.



## ***(Coverage Under the FLSA)***

- **All employers that engage in interstate commerce or in the production of goods for interstate commerce.**
- **Only employers who are exempt are those small businesses not engaged in interstate commerce and who have an annual gross revenue under \$500,000.**



# ***(Why Plaintiffs' Attorneys Love Wage and Hour Lawsuit)***

- **Payout is extremely large.**
- **Average federal class action settlement is \$23.5 million.**
- **Attorney's fees are available.**
- **Some of the regular burdens of proof are shifted to the employer.**



- **Individual liability.**

## ***(Government Is Getting Proactive Too)***

- **DOL Wage & Hour Division received 18% budget increase in 2010.**
- **New field investigators have been hired (350).**
- **New smartphone application that helps employees track their time.**



## ***(Explosion of FLSA Cases)***

- **FLSA is now the most popular employment collective action.**
- **FLSA litigation doubled from 2004 to 2007 and becoming more pervasive.**
- **DOL estimates that 80% of employers are out of FLSA compliance.**
- **Some of the states with the largest growth in wage and hour litigation, include California, Florida and Illinois.**



## **II. What Does the FLSA Require?**

# 1. Exempt or non-exempt?



## 2. Accurately and fairly capture and record the hours worked by non-exempt employees.



- 3. Pay at least minimum wage for the first the first 40 hours of work during a work week.**

**Federal Minimum Wage = \$7.25**

**Illinois Minimum Wage = \$8.25**

- 4. Pay at least 1.5 an employee's regular rate of pay for hours worked in excess of 40 hours per work week.**

## 5. Regulates the minimum wage and work hours for minors.



# III. Who Is Exempt For Overtime?

## Threshold Inquiry

- **Must be paid a salary of at least \$455/week (approximately \$23,700 per year).**
- **Must fall into recognized exemption.**



# Most Common FLSA Overtime Exemptions

- **Executive**
- **Administrative**
- **Learned Professional**
- **Computer Professional**
- **Outside Sales**
- **High Compensated Employees**
- **Specific Job Exemptions**

## ***(Executive Exemption)***

- 1. Paid on “salary” basis of at least \$455/week.**
- 2. Primary duty must be management.**
  - interviewing, selecting and training of employees, setting and adjusting their rates of pay and work hours, appraising work productivity and disciplining employees, etc.**
- 3. Must have 2 full-time direct report employees.**
- 4. Must have authority to hire, fire and promote.**

**Reference: WHD’s Fact Sheet #17B**

## ***(Administrative Exemption)***

- 1. Same “salary basis” pay.**
- 2. Primary duty must be to perform office or non-manual work directly related to the management or business operations.**

## ***(Administrative Exemption)***

### **3. Use discretion and independent judgment regarding matters of significance.**

***Examples:*** labor relations/HR employees, payroll and finance directors, public relations personnel, legal and regulatory officers, property managers, insurance claims representative, etc.

**Note:** Duties must be limited to running or servicing the business. Does not include handling day-to-day tasks such as bookkeeping, data tabulation or clerical duties.

**Reference:** WHD's Fact Sheet #17C

## *(Learned Professional Exemption)*

1. Same “salary basis” pay.
2. Employee’s work requires higher education to perform the job and must have academic training or degree.

*Examples:* RNs, doctors, attorneys, accountants, engineers, etc.

Reference: WHD’s Fact Sheet #17D



## ***(Creative Professional Exemption)***

- 1. Same “salary basis” pay.**
- 2. Employee’s work requires invention, imagination, originality, or talent in a recognized artistic or creative profession.**

***Examples:*** actors, musicians, composers, soloist, certain painters, writers, cartoonists, novelists, etc.



**Reference: WHD’s Fact Sheet #17D**

## ***(Computer Professional Exemption)***

- 1. Must be paid on a fee or salary basis of at least \$455/week (or hourly rate of \$27.63/hour).**



## ***(Computer Professional Exemption)***

- 2. Must be a systems analyst, programmer, software engineer or similarly skilled worker whose primary duties consist of:**
  - **using systems analysis techniques and procedures to determine hardware, software or system functional specifications;**
  - **designing, developing, documenting, analyzing, creating, testing or modifying computer systems or programs based on user or system design specifications;**
  - **designing, documenting, testing, creating or modifying computer programs related to machine operating systems; or**
  - **combination of these duties.**



# ***(Computer Professional Exemption)***

**General Rule of Thumb: The employee must be writing code versus repairing hardware or troubleshooting.**



## *(Outside Sales Exemption)*

1. **No salary threshold.**
2. **Primary duty is “making sales” or obtaining orders.**
3. **Customarily engaged away from employer’s place of business.**



## ***(Who is Not Exempt No Matter What)***

- 1. Manual laborers such as plumbers, mechanics, carpenters.**
- 2. Fire fighters, police and other first responders.**
- 3. Those paid hourly – not receiving a salary.**
- 4. Those receiving a salary below \$455/week.**

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## **IV. Illinois State Law**

### **Wage and Hour Issues**

# **Illinois Minimum Wage Law – 820 ILCS 105/1-16**

- **Covers all Illinois employers with 4 or more employees.**
- **Family members are not included in sole proprietorships but are covered in corporations.**

# New Minimum Wage Rates

- As of July 1, 2010, Illinois minimum wage increased to \$8.25 per hour.
- The new rate makes IL the 3<sup>rd</sup> highest minimum wage paid in the nation.



# Overtime

- Time and one half of the employee's regular rate must be paid for all hours worked in excess of 40 hours of actual work.
- *Per work week.*
  - defined as 168 consecutive hours fixed and permanently determined by the employer.

# Overtime

- **Hours actually worked (not required for vacation, sick time, holidays).**
- **Cannot average two weeks (not over 80 hours in two weeks).**



# **Exemptions From Both Minimum Wage & Overtime**

- **Drivers, driver's helpers, loaders and mechanics subject to the Secretary of Transportation**
- **Outside salesmen**
- **Domestic workers**
- **Certain agricultural workers**
- **Members of religious corporations**
- **Certain college students under work study programs**

# Overtime Exemptions

- **Salesmen and mechanics *selling* and *servicing* automobiles, trucks or farm implements in retail establishments (example – car dealerships salesmen & mechanics exempt however office staff, parts personnel and secretaries are not).**
- **Salesmen primarily engaged in *selling* trailers, boats, or aircraft.**

# Overtime Exemptions

- **Executive, administrative and professional employees as defined in the FLSA but compensated at a guaranteed salary rate of \$455.00 per week or higher.**

# Overtime Exemptions

- **Certain commissioned employees employed in retail or service establishments as described in paragraph 7(I) of the FLSA.**
- **Must have bona fide commission plan.**
- **More than half of wages must come from commissions.**
- **Average hourly rate must be more than 1½ times the federal minimum wage (\$7.75 x 1.5 = \$11.63) for representative period of 1 to 6 months.**

# Overtime Exemptions

- Certain employees of not-for-profit education or residential child care institutions.

# How Are Complaints/Audits Initiated?

- **Private Complaints (most are anonymous)**
- **Random Audits**

# **V. Insurance Implications**

# **Why You Need Employment Practices Liability**

- 1. A private company is more likely to have an employment related claim than a property or general liability claim.**
- 2. 3 out of 5 employers are sued by former employees.**
- 3. Over 40% of all Employment Practices claims are brought against firms with less than 100 employees.**



- 4. The median cost of an EEOC lawsuit in 2006 exceeded \$200,000.**
- 5. Since 1997, wage and hour litigation has tripled. More wage and hour collective/class actions have been filed in recent years than any other types of employment class actions combined.**

# What Is Employment Practices Liability Coverage?

EPL covers not only actual but also alleged acts of discrimination, harassment, retaliation, wrongful termination and other similar acts. Some policies are now including defense coverage for FLSA claims. United States Liability Insurance Group is now offering a policy that includes \$100,000 sublimit for defense costs and loss.

# **What are the most common FLSA pitfalls for small businesses?**

- 1. Not paying overtime for time worked over 40 hours.**
- 2. Misclassifying managers and assistant managers.**
- 3. Paying lump sum amounts for overtime hours worked vs. paying 1.5 times the normal hourly rate.**
- 4. Not paying for overtime since it had not been approved.**
- 5. Allowing employees to “waive” their rights under the FLSA.**

# What do the claims look like?

- 1. A mortgage company was sued by 54 of its loan officers for over \$220K in unpaid overtime. The owner was under the impression that FLSA did not apply to highly compensated employees. Many of his staff members earned well over \$150K per year with an average being 105K. This is an exception to the FLSA law for highly compensated individuals earning at 100K per year or more, but the exception states that a minimum of \$455 per week must be paid. These employees were not paid during the weeks they did not close loans.**

- 2. A small concrete company paid \$12.9K in settlement and \$20K in attorney fees for paying non-exempt workers a lump sum amount for overtime rather than time and half for the hours worked over 40.**

**3. Retail Clothing Store Manager was misclassified as exempt as he spent more than half his time engaged in non-exempt, non-managerial activities. Plaintiff awarded \$38K in back overtime pay and \$62K in attorney's fees.**

# VI. Hot FLSA Topics & Case Examples

- **Improper Deductions From Exempt Salary.**
  - very limited situations where you can dock and employee's salary.
  - absence for **full day** or more for personal reasons other than illness or disability.
  - violation of major safety rule.
  - absence for **full day** or more for sickness in accordance with bona fide plan , policy or practice.



- **Problems With After Hours Work.**
  - “work suffered or permitted to be performed is work time.”
  - be careful when issuing non-exempt employees Blackberry or smartphones.
  - “catching up” on emails at home can be compensable.

- **“On Call” Time.**
  - “engaged to wait” (generally compensable) vs. “waiting to be engaged” (generally not compensable).

***Example: on call every 3<sup>rd</sup> Saturday, cannot drink, need to be within 10 minutes of work.***

# **VII. Take Away Strategies & Tips**

- **Know and Pay Minimum Wage.**
- **Pay Overtime.**
- **Double Check Your Exempt vs. Non-Exempt Classifications.**
- **Do Not Rely on Titles for Classification.**
- **Duties, not Titles, Matter.**
- **Ensure Time and Pay Records Are Properly Kept.**

- **Be Careful About Independent Contractors.**
- **Know Proper Deductions for Exempt Employees.**
- **Ensure You Follow State Wage and Hour Laws.**
- **Implement FLSA Safe Harbor Policies and Procedures.**
  - prohibit improper deductions, off the clock work and complaint procedures.
- **If Ever In Doubt, Treat Employee as Non-Exempt (and call your attorney).**

# Questions?

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