



Recent Developments in Wage & Hour Law

***Greater Pensacola SHRM
2018 Legal Conference***

Reminder about the FLSA

The Fair Labor Standards Act of 1938 (“FLSA”) is the federal law that generally imposes:

- minimum wage requirements
- overtime compensation rules
- child labor regulations
- recordkeeping rules



Why is it important?

- Continued increase in FLSA litigation due to low investment costs and high rate of return for plaintiffs' lawyers
- Increase in DOL investigations and enforcement suits
 - DOL recovered more than \$1.6 billion in back wages in last 5 years (\$270+ million in FY 2017 alone)
- Potential for individual liability
 - Liberal approach in defining individual owners and managers as “employers”
- Significant monetary penalties, damages, and/or settlements

Recent DOL Settlements



- November 2017 – Roanoke Area Restaurants and Owners Pay \$3 Million in back wages and damages
- November 2017 – Massachusetts restaurant pays \$282,264 in back wages and damages
- October 2017 – Philadelphia restaurant to pay employees nearly \$400,000.

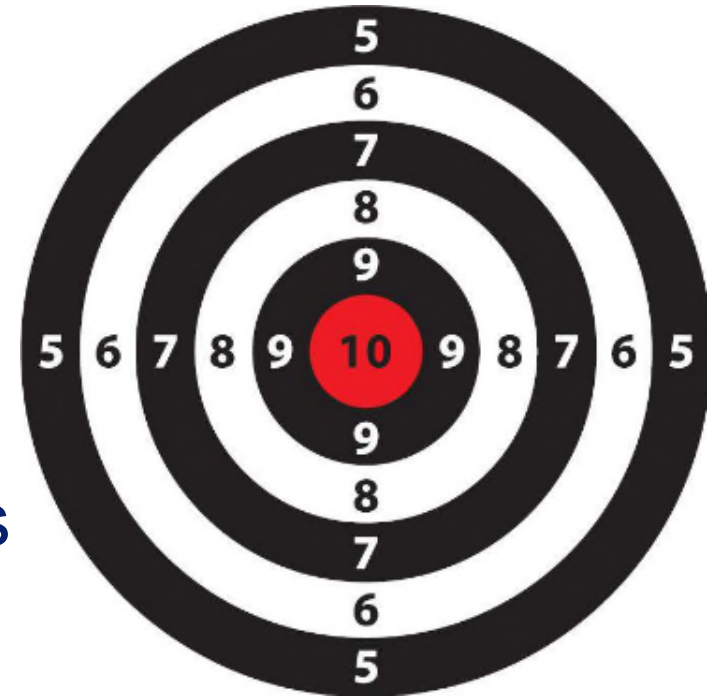
DOL Frequently Investigates . . .

- Agriculture
- Amusement
- Apparel
Manufacturing
- Auto Repair
- Child Care Services
- Construction
- Food Services
- Guard Services
- Hair, Nail & Skin Care
Services
- Health Care
- Hotels and Motels
- Janitorial Services
- Landscaping Services
- Retail
- Temporary Help

Low Wages/High Violations Industries

Frequent Lawsuit Targets

- Restaurant/hospitality industry
- Nurses who are not RNs
- Financial industry
- Exotic dancers
- Oil and gas industry
- Police and correctional officers
- Commercial drivers
- Construction industry



Common Reasons for Overtime Suits

- Failure to pay or compensate employees for
 - training time
 - short breaks
 - working during lunch or meal breaks
 - “off the clock” work
 - so-called “voluntary” work
- Failure to include extra compensation in overtime pay calculations
- Misclassification of employees as “exempt” and not paying overtime

Exempt or Non-Exempt? *That is the Question*



- The FLSA presumes that **all employees are eligible** for overtime pay, regardless of how the employee is paid or what the employee does in the job.
- An employee will almost always be eligible for overtime pay unless the position comes under one of about 30 overtime exemptions.
- **The employer must prove the employee is exempt.**

Common Exemptions Based on Job Duties

- Executive Exemption
- Administrative Exemption
- Professional Exemptions
 - Learned Professionals
 - Creative Professionals
- Outside Sales Exemption
- Commissioned Sales Exemption
- Computer Employee Exemption

Other Overtime Exemptions

Aircraft salespeople
Airline employees
Amusement/recreational employees in national parks/forests/Wildlife Refuge System
Auto sales/service workers
Babysitters on a casual basis
Boat salespeople
Buyers of agricultural products
Companions for the elderly
Country elevator workers
Domestic employees who live-in
Farm implement salespeople
Federal criminal investigators

Firefighters of small fire departments (less than 5 firefighters)
Police officers of small departments (less than 5 officers)
Fishing
Forestry employees of small firms (less than 9 employees)
Fruit & vegetable transportation employees
Homeworkers making wreaths
Houseparents in non-profit educational institutions-
Livestock auction workers
Local delivery drivers and helpers
Lumber operations employees of small firms (less than 9 workers)
Motion picture theater employees

Newspaper delivery
Newspaper employees of limited circulation newspapers
Radio station employees in small markets
Railroad employees
Seamen
Sugar processing employees
Switchboard operators
Taxicab drivers
Television station employees in small markets
Truck and trailer salespeople

Encino Motorcars LLC vs. Navarro



“Fair Reading” of FLSA Exemptions

- Rejected the “narrow construction” principle “as a useful guidepost for interpreting the FLSA.”
- “The narrow-construction principle relies on the flawed premise that the FLSA ‘pursues’ its remedial purpose ‘at all costs.’”
- The “exemptions are as much a part of the FLSA’s purpose as the overtime-pay requirement.”
- “We thus have no license to give the exemption anything but a fair reading.”

Take-away for Employers

- *Encino Motorcars* will mostly help you with the legal argument **after** you've been sued over an exemption classification or decision.
- But to ultimately prevail, employer must have the **facts** to support the exemption.
- Does the employee engage in exempt job duties or perform exempt work?
- Is the employee paid in the manner required by the particular exemption, i.e., salary, fees, or commissions?

Potential FLSA Self-Audit Topics

- policies concerning employee time-keeping responsibilities and when overtime work is permitted
- supervisory practices concerning overtime work requirements and time-keeping
- job descriptions of all employees not paid on an hourly basis and actual work done
- payroll deductions from salary, fees, or commissions

Potential FLSA Self-Audit Topics

- notices provided to tipped employees of how wages are calculated
- policies and practices about “tip pooling” or “tip sharing”
- policies and practices about pay deductions for uniforms or other items
- policies and practices on how employees might internally report payroll issues

We're from the government ...

. . . and we're here to help!

In March 2018, the DOL rolled out its Payroll Audit Independent Determination (PAID) program.

- DOL wants to quickly resolve potential overtime and minimum wage violations without litigation.
- DOL encourages self-audits and voluntary disclosure.



PAID Eligible Employers

- Covered by the FLSA
- Seeking to resolve inadvertent FLSA minimum wage and overtime violations
- Willing to meet program requirements
- Acting in “good faith”
- Willing to commit to future compliance
- Not currently under DOL investigation or involved in litigation for the same issues

PAID Process

- If a self-audit reveals potential violations, the employer contacts DOL asking to participate in the PAID process.
- Employer and DOL investigator will identify the specific potential violation, the affected employees, and the timeframe/"backpay period" for the remedy.
- Employer must calculate overtime or minimum wages due.

PAID Process

- Employer must provide to DOL:
 - names, addresses, and phone numbers of all affected employees (both current and former);
 - back wage calculations along with supporting evidence and methodology used for the calculations;
 - payroll records and any other relevant evidence;
 - records demonstrating hours of work of each affected employee during the at-issue time
 - records showing a correction of the compensation practice for future compliance

PAID Process

- DOL will:
 - review back wage computations
 - issue a summary of unpaid wages
 - issue claims forms describing settlement for each employee
- Employer must pay all back wages within time period required by DOL.
- Employer must provide proof of payment to DOL and any unclaimed funds.

Why involve the DOL?

FLSA claims cannot be privately settled!

If an employer pays back wages to employees **without supervision** by the DOL (or a court), the employees **will not have waived their rights** to pursue a private FLSA lawsuit against the employer.

PAID Program Employer Benefits

- Engage DOL in a cooperative, stream-lined process rather than in an adversarial way to resolve potential violations
- Reduce the risk of litigation with its expense and delay in resolution
- Avoid liquidated damages or civil penalties
- Avoid paying attorneys' fees to employees' lawyers

Potential Downsides

- Participation in the PAID program does not waive DOL's right to conduct any future investigations of the employer.
- Employee participation in the program is not mandatory.
- Employees may reject offered payments and retain all of their rights to sue.
- Being offered backpay might prompt some employees to contact a lawyer to file suit.

“Tip-Pooling” Developments

Background

- Employers can pay a special \$2.13/hour wage to “tipped employees” and take a “tip credit” to make up the \$5.12/hour difference from the usual minimum wage, if employees keep their tips.
- Some employers required tipped employees to “pool” or “share” tips with other workers.

“Tip-Pooling” Developments

- DOL regulations allowed employers to require “tip-pooling” or “tip-sharing” with other workers who customarily interact with customers and often receive tips (such as bussers, food runners, bartenders, and hostesses).
- DOL regulations **prohibited** tip-pooling with management and other employees who are not customarily tipped (“back of the house” workers like cooks, dishwashers, janitors).

“Tip-Pooling” Developments

- In 2011, the DOL issued regulations prohibiting employers from “back of the house” tip-pooling even if the employer **paid the full minimum wage** and **did not** take the tip-credit.
- Many courts pushed back and rejected the DOL’s new rule as unfounded.
- In 2017, the DOL reversed the 2011 regulations, but failed to prevent tips from going to managers or even to employers.

“Tip-Pooling” Developments

- The **Consolidated Appropriations Act 2018**, signed into law March 27, 2018, expressly rescinded the 2011 DOL regulations prohibiting “back of the house” tip-pooling even if the employer did not take the tip-credit and paid the full minimum wage.
- The new law also said: “An employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees’ tips, regardless of whether or not the employer takes a tip credit.”

“Tip-Pooling” Developments

- DOL issued Field Assistance Bulletin 2018-3 to explain that it will define the terms “supervisor” and “manager” in the new law by using the duties test of the “executive employee” overtime exemption.
- The new law also created a new remedy - the disgorgement of tips improperly kept by the employer – which applies whether or not the employer uses the tip credit.

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