

TOUGH ISSUES IN WAGE AND HOUR LAW

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I. WHAT IS “EMPLOYMENT”?

- A. “Employment” includes suffering or permitting an employee to work. Knowledge and toleration of work is sufficient.
- B. Excludes volunteers who work without intending to be compensated.
- C. Excludes independent contractors
 - 1. Uses an “economic realities” test, with focus upon economic independence.
 - 2. Factors include:
 - a. The extent to which the services in question are part of the company’s business;
 - b. The amount of the individual’s investment in the company’s facilities and equipment;
 - c. The nature and degree of control retained by management;
 - d. Individual opportunity for profit or loss;
 - e. The amount of initiative, skill or judgment required; and
 - f. The permanency and duration of the relationship.

II. COMPENSABLE WORKING TIME

- A. Compensable Working Time includes:
 - 1. Time spent in primary work activities;
 - 2. Idle or stand-by time controlled or requested by employer;
 - 3. Time spent by an employee outside normal hours suffered or permitted by employer that benefits the employer.
- B. Unauthorized Working Time
 - 1. Employers must compensate employees for unauthorized work when an employer “suffers or permits” employee to work;
 - 2. An employer suffers or permits an employee to work where the employer knew or had reason to believe the employee was performing work;

3. Employers are free to discipline employees for unauthorized work.

C. Meal Periods

1. Meal periods are considered non-working time if:
 - a. at least 30 minutes in duration; and
 - b. employee completely relieved of duties;
2. Meal periods are compensable, if the employee is frequently interrupted.

D. Rest Periods And Coffee Breaks

1. Rest periods/coffee breaks from 5-20 minutes are compensable working time;
2. Employers are not required by the law to provide rest periods or coffee breaks.

E. Meetings Or Training

1. Time spent in training or meetings is not compensable working time if:
 - a. Attendance is voluntary. However, if non-attendance could have negative impact on employment, attendance is not considered voluntary;
 - b. The training or meeting is not directly related to employee's duties;
 - c. The training occurs outside regular working hours.
2. Time spent by employees voluntarily attending colleges, courses or vocational training, outside regular working hours, is not compensable even if related to current duties.

F. Vacations, Holidays Or Sick Leave

1. Federal Wage and Hour Law does not require an employer to provide employees with paid vacation, holidays or sick leave;

2. Time spent on vacation, holidays or sick leave is not considered as hours worked for purposes of overtime calculations, unless the company has a practice of paying overtime based upon all hours including sick or vacation.

III. RECORDKEEPING NIGHTMARES

1. Starting work before clocking in;
2. Working after clocking out;
3. Unauthorized overtime;
4. Taking work home;
5. Working during lunch;
6. "Free overtime"/volunteers;
7. Working "off the clock."

IV. OVERTIME COMPENSATION

- A. Overtime Rate - Wage and Hour Law requires employers to pay non-exempt employees time-and-one-half their regular hourly rates for each hour of compensable working time they are suffered or permitted to work in excess of 40 hours per week.
- B. Overtime Computation - overtime must generally be computed on a weekly basis.
- C. "Comp Time" - private employers may not provide non-exempt workers with "comp-time" in lieu of overtime unless:
 1. "Comp time" is taken during the same pay period in which it is accrued;
 2. Employee receives 1 ½ hours of comp time for each hour of overtime.
- D. Regular Rate - Overtime rate is calculated on the basis of the regular rate.
 1. Overtime rate is equal to one-and-a-half times an employee's "regular rate;"

2. The regular rate is the same as an employee's hourly rate if the employee is compensated on an hourly basis and does not receive other forms of additional compensation;
 3. The regular rate for salaried employees is computed by dividing the salary by the number of hours which the salary is intended to compensate.
 4. If an employee receives other types of compensation, some of these payments must be included in the regular rate for purposes of calculating overtime due.
- E. Holidays, Sick Leave Or Vacation - employers are not required to include holidays, sick leave or vacation days in their computation of overtime hours.

V. "WHITE COLLAR" OVERTIME EXEMPTIONS

A. "Executive" Employee Exemption

1. The employee's primary duty is the management of the enterprise or a recognized department;
2. The employee regularly supervises the activities of two or more employees.

B. "Administrative" Employee Exemption

1. The employee's primary duty is office or nonmanual work directly related to management of the employer's business;
2. The employee exercises discretion and independent judgment.

C. "Professional" Employee Exemption

1. The primary duty consists of the performance of work either requiring knowledge of an advanced type in a field of science or learning, teaching, or the computer field including work that requires the consistent exercise of discretion and judgment; or
2. The primary duty consists of the performance of work in a recognized field of artistic endeavor, including work that requires invention, imagination or talent.

D. Payment Must Be Made “On A Salary Basis”

This is defined under the regulation to mean that an employee is exempt if he or she:

"regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any work week in which he performs no work."

This section has been interpreted to mean employers cannot dock managerial employees' salary, except as allowed by statute. The specific statutory allowances for docking pay are:

- An employee is absent for one or more days for personal reasons other than sickness or accident;
- An employee is absent for one or more days for sickness or accident and the deduction is in accordance with a bona fide sickness and accident plan, policy or practice;
- An employee is receiving compensation for serving jury or military duty and this amount is deducted from the employee's regular pay;
- Good faith penalties for infractions of safety rules of major significance;
- An employee misses an entire week of work;
- Days not worked during the first or last week of employment; and,
- Intermittent leaves pursuant to the Family and Medical Leave Act ("FMLA"). The FMLA specifically provides that such deductions of pay for intermittent leaves of less than one day will not violate the salary basis test.

E. The regulations also provide that "additional compensation besides the

salary is not inconsistent with the salary basis of payment.”

WORKSHOP 1

As the new Director of Human Resources you have decided to conduct a wage-hour self-audit. You start by reviewing whether employees are being properly classified as exempt from the overtime pay requirements of the Fair Labor Standards Act.

You decide to start this task by reviewing the job descriptions that were prepared by the former Personnel Director when the Company was established in 1974. You first eliminate as being exempt from the Fair Labor Standards Act all managers and supervisors. One of the managers is George Fixit, Maintenance Supervisor. George has been with the Company for many years and is very skilled in repairing the ancient boiler and air conditioning system in the Company's home office. His assistant, Tommy Tools, has worked with George for several years and probably will succeed George when he retires. George is paid from the exempt payroll, based on his salary of \$800 per week. Since George has been working at the home office so long, he feels that the equipment is his to watch. Consequently, he often comes in early, stays late and works weekends. Without George, it would be almost impossible to keep the office open.

Finally, your Secretary, Sally Helpful, is paid \$250 per week and is part of the management team. She participates in management meetings, answers employee questions about benefits, assists in employee counseling, schedules appointments and helps to run the Company. She does not receive overtime pay, and can come in early or leave late without being docked. Other employees, however, such as the Field Repair Service Helpers, have been docked for leaving a site early or arriving at a site late. Since the Field Service Repair program is relatively new, you believe that it is important for the Helpers to understand that they must conform to the Company's attendance and lateness policies, even though they only report to the home office once a week.

Questions

1. Is the Maintenance Supervisor paid properly?
2. Is Sally Helpful paid properly?
3. Are the Helpers paid properly?

WORKSHOP 2

The following note appears on your desk from one of the supervisors:

“Please put a good word in Ms. Iwanna Moore’s personnel folder to document her working beyond the call of duty. I could not get anyone to type a report for me over the weekend, so I asked Iwanna to work five hours on Saturday for \$10 per hour. That is the rate normally paid to our secretaries. Iwanna was thrilled because she normally only receives \$6 per hour as a receptionist. I was appreciative because she already worked 40 hours this week.

I was not sure if I would have any corrections to be made on Sunday. Iwanna agreed to come in if necessary, if I gave her \$25 to be on standby. Luckily, I did not need her. Not one typo!

I was so appreciative that I gave her a \$75 bonus on Monday.

By the way, Iwanna insists on being paid as an independent contractor whenever she performs secretarial duties. She volunteered to perform any secretarial work whenever we need her.

Question

What wages should Ms. Moore be paid?

WORKSHOP 3

John Smith is your most cooperative worker. He always comes in early to help you set up work and complete overdue projects. He works during his meal break and stays late to help finish up. John appreciates your giving him this opportunity, and this is his way of repaying your kindness. Since his regular schedule adds up to only 40 hours, you don't pay any overtime to him.

John punches in at the time clock when he arrives at the facility. Since he carools with a friend who works nearby, he arrives at 7:30 A.M., punches in and often goes to the break room for coffee until his shift begins at 8:00 A.M. Although his scheduled work day ends at 4:30 P.M., John sometimes stays around to talk to co-workers in the lunch room until 5:00 P.M., then he punches out and goes home.

Questions

1. Must John Smith be paid for the additional time that he worked voluntarily?
2. Could John's punching in early or punching out late result in liability for the Company?

FLSA QUIZ

1. The FLSA requires all of the following, except:
 - a. Overtime pay.
 - b. Minimum wage.
 - c. Retention of payroll and other records.
 - d. Unpaid break if a non-exempt employee works more than 8 hours in a day.

2. Under the FLSA, overtime generally must be paid:
 - a. After 8 hours in a day.
 - b. After 40 hours in a week.
 - c. After 8 hours in a day or 40 hours in a week.
 - d. After 12 hours in a day or 40 hours in a week.

3. Which of the following statements correctly explains whether paid time off (PTO) benefits are considered "hours worked" for overtime purposes:
 - a. Vacations and holidays are considered "hours worked" for overtime purposes; all other PTO benefits, such as sick days and personal days, are not considered "hours worked" for overtime purposes.
 - b. All PTO benefits are considered as "hours worked" for overtime purposes.
 - c. No PTO benefits are considered as "hours worked" for overtime purposes.
 - d. An employer has full discretion in this area.

4. In determining the employee's "regular rate" for overtime purposes, all of the following must be included, except:
 - a. Percentage bonuses.
 - b. Productivity bonuses.
 - c. Commission on sales.
 - d. Shift differentials.

5. Exempt employees may be suspended without pay as follows:
 - a. There are no restrictions under the FLSA.
 - b. No unpaid suspensions of exempt employees are permissible under the FLSA.
 - c. Suspension of exempt employees must be in full-day increments.

- d. Suspension of exempt employees must be in full-week increments.
6. Exempt employees must be paid at their full salary for any workweek in which they take any of the following forms of leave, if they perform any work for their employer during that week:
- a. Military leave.
 - b. Witness leave.
 - c. FMLA leave
 - d. Jury leave.