

2012 Hospitality Law Conference

**Are You Sure You Are Paying Your
Employees Correctly Under The FLSA?**

Presenters



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- Represents public and private sector employers on a national, regional and local basis in resolving labor and employment related issues, including employment discrimination, wage and hour claims, family medical leave claims, and disputes arising from trade secret and restrictive covenant obligations.
- Mr. Adler is the author of the Georgia segment of the Defense Research Institute's Compendium of State Employment Laws. Mr. Adler also has been appointed by the EEOC to the EEOC Stakeholders Task Force for Georgia, where he currently sits as a representative for the business community. Additionally, Mr. Adler is a member of the Board of Directors for the Southeastern Chapter of the Professional Liability Underwriting Society.

The Fair Labor Standards Act (FLSA)

- Minimum wage
 - Federal law: \$7.25/hr
- Overtime
 - Time and a half for all hours over 40 in a week
 - Calculated based on employee's "regular rate"
 - *Public* employers may offer comp time in lieu of paying 1 ½ x regular rate for OT hours
- Applies to "non-exempt employees"
- Must check state law!

FLSA Cases On The Rise!

- FLSA cases filed in federal district courts:
 - 2008: 5,210
 - 2009: 6,121
 - 2010: 6,785
 - 2011: nearly 6,000 through the end of November

Source: PACER

DOL Enforcement On The Rise!

- In FY 2008 (last year released), the Wage and Hour Division collected \$185 million in back wages for FLSA violations relating to 228,000 employees
 - \$123.6 million (182,964 employees) collected for overtime violations
 - \$16.6 million (42,199 employees) collected for minimum wage violations
 - \$3.4 million (2,600 employees) of over overtime violations were for exempt status misclassifications
- 300 new investigators being trained

Source: <http://www.dol.gov/whd/statistics/2008FiscalYear.htm>

Why Is There An Upward Trend?

- Employers are unaware of rules
- Complicated laws
- Easy to find plaintiffs
- Liquidated (i.e. double) damages
- Attorneys' fees (employees only)
- Collective actions can produce big \$\$\$\$

Exemptions From FLSA

- Common White Collar Exemptions
 - Administrative Employees
 - Executive Employees
 - Professional Employees
 - Computer

Exemptions From FLSA

Three Prong Test

- Paid on a salary basis
- Earn minimum salary (\$455/week or \$23,660/year)
- Performs exempt duties

Hot Topic Exemption – Outside Sales

- Employee:
 - (1) whose primary duty is (i) making sales; or (ii) obtaining orders or contracts for services; and
 - (2) who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

Hot Topic Exemption – Outside Sales

- **Key**: Must be outside of the office selling at least 80% of their time
- Incidental inside work is ok
 - Examples - writing sales reports, follow-up calls and planning schedule
- There is **NO** salary requirement for this exemption.
- The “Others Are Doing It Too” defense doesn’t work ⇒ E.g. - Mortgage Originators

Hot Topic Exemption – Retail Sales

- Retail Sales, aka Commission Sales
- 3 conditions:
 - (1) the employee must be employed by a retail or service establishment;
 - (2) the employee's regular rate of pay must exceed 1 ½ times the minimum wage; and
 - (3) more than ½ of the employee's total earnings in a representative period (not less than 1 month) must consist of commissions on goods or services.

Hot Topic Exemption – Retail Sales

- Primary Issue: What is retail sales?
 - Average person can purchase
 - Typically open to the public
 - Dated regulations, and case law is inconsistent
- Commission vs. Draw issues
 - Cannot be the same every month, i.e., must actually be earning a commission and not a salary

Hot Topic – Tip Credit

- **Tip Credit** - \$2.13 per hour, and remaining made up by tips
- **Keys:**
 - Only applies to “tipped employees”
 - Customarily and regularly receive more than \$30/month in tips (directly or indirectly from customers)
 - Notice required (put it in writing)
 - DOL says tips are sole property of the tipped employees, even if ER is not using tipped credit
 - No more limits on contributions to tip pools
 - 8th Circuit decision in Applebee’s case (20% rule)
- **Tip Pools – Ok**, but only tipped employees can participate

Claims Trends

- **Booting up claims** ↑
 - Time spent before work actually begins booting up a computer
 - Applies to EEs that log in to a computer to “clock in”
 - Issue is the definition of work time

Claims Trends – Booting up Cont.

- Huge settlements, so ask “How long is it really taking?”
 - De minimis defense (hard to calculate?)
- Change clocking in system?
- Improve technology and speed up computers?
- Add time to employee time sheets
 - Be flexible, there is no one right answer

Claims Trends

- **Donning/Doffing claims** ⇒
 - Uniforms at work
 - Required?
 - General or specialized?
 - When do they clock in?
 - Most common in poultry industry, but could apply anywhere there are required uniforms
 - Easy solution, have employees come to work in uniform rather than putting on uniform at work

Claims Trends

- **On-Call Time** ↓
- Whether hours spent on-call is compensable is question of fact decided on case-by-case basis
- While on-call, all time spent responding to calls is hours worked and compensable
- If required to remain at work - Compensable
- Off Premises, but On-Call:
 - # of calls employee receives
 - required response time
 - ability to engage in personal pursuits

MISCELLANEOUS ISSUES THAT YOU
PROBABLY DO NOT KNOW ABOUT,
BUT CAN SAVE YOU MONEY

Employee Benefits

- The FLSA does not require:
 - Vacation, holiday, severance, or sick pay
 - Meal or rest periods
 - Short breaks: breaks between 5-20 minutes are compensable
 - “Bona fide” meal periods lasting 30 minutes or longer are not compensable
 - State law varies!!
 - Premium pay for weekends or holidays
 - Pay raises or fringe benefits

Travel Time

- Ordinary home to work travel not paid unless:
 - Work duties required during travel
 - Emergency call outside normal work hours
 - Random commute to job site substantially further away than normal
- Job site to job site travel during day is paid
 - If required to return to employer premises at end of day, travel from last job site back to premises is compensable
 - If employees goes straight home from last job site, then travel time is not compensable

Travel Time

- Special one day assignment in another city
 - Not regarded as normal home-to-work travel
 - All time is compensable
 - Deductions allowed for meals and home-to-work equivalent
- Overnight travel out of town
 - Compensable when cuts across normal work hours
 - True on regular work days and nonworking days
 - Meal periods not counted
 - As enforcement policy, DOL will not treat time as a passenger as compensable time

Furloughs, Etc.

- **Point:** Only have to pay non-exempt EEs for hours worked, so . . .
- Exempt employees:
 - Yes on **furloughs**, but can't work at all during that week
 - Yes on **reduced salary**
 - Based on reduced schedule/economic conditions
 - Force EEs to use PTO during furlough/reduced workweek
- Remember to check state law

Technology Issues

- PDA/IPAD/Smart Phones
- Logging into work system from home
- Cell phone calls
 - Ex: Oprah employee
 - If non exempt employees are answering emails or phone calls for work at home during non-work hours, it likely is compensable time
- Think carefully about having your non-exempt employees work away from the office

Compensable Time

- Unauthorized hours
 - Arriving early/staying late
 - Working through lunch

- What to do ⇒ *Pay and Punish*
 - Pay for the time
 - Then document and discipline

Off The Clock Policy

- Further, non-exempt employees are not to perform any work that is not recorded by the time system. You must always make sure you record accurately your time using the standard time recording system. If you are asked/instructed by anybody in the Company to perform work “off the clock,” (in other words, perform work without reporting it on the time system) you are directed to refuse. Make sure you record your work time using the standard time recording system. Also, if you are asked to work “off the clock,” you should immediately report the situation by utilizing the Company’s Employee Complaint Procedure, which is contained in this Handbook. Finally, if you contend you have not been paid time for all hours worked, please utilize the Company’s Employee Complaint Procedure.

Collective Actions

- Collection of similarly-situated employees seeking relief for same FLSA violation as part of one lawsuit against the company
- Like a class action, except FLSA plaintiffs “opt in” and certification is relatively easy to obtain
- Costs of a collective action
 - Unpaid wages
 - Liquidated damages
 - Interest
 - Attorney’s fees of the plaintiff
 - Your attorney’s fees

Sample Collective Action

- Bob works for Acme hotels and makes \$15/hour
- He works at customer care call center and claims he and others consistently have been forced to answer calls that come in after clocking out
- Bob now claims he has worked an extra 12 minutes per day everyday for the last 3 years

Sample Collective Action

Individual Action

- 150 weeks (3 years) x 1 OT hours = 150 OT hours
– 150 OT hours x \$22.50 (\$15/hour hourly rate)
= **\$3,375.00 in unpaid wages**

vs.

Collective Action

- 200 current and former call center employees
- 200 x \$3,375 = **\$675,000 in unpaid wages**

- **Add in liquidated damages = \$1,350,000**

Sample Collective Action

ATTORNEY'S FEES

- Winning plaintiffs are entitled to an award of their attorney's fees
- Plaintiffs lawyers know this and will churn up fees if settlement does not occur early in the process
- Fees could be anywhere from \$50,000 - \$500,000.00

Arbitration Agreements -- Is This The End of Collective Actions?

- AT&T Mobility v. Concepcion
 - April 2011: upheld ruling that there is not a right to class wide arbitration unless provided for in the agreement
 - Essentially ruled that arbitration agreements can bar class handling of claims
- Recent Development : NLRB ruled on Jan. 6, 2012 that Arbitration Agreements cannot limit ability to file class action

Session Evaluation



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