

Avoiding Wage and Hour Violations

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Agenda

- Alabama employment laws.
- Fair Labor Standards Act (FLSA).
- Exempt v. non-exempt employees.
- Calculating overtime.
- Reducing off-the-clock exposures.
- Employee v. independent contractor.
- Enforcement initiatives by the U.S. Dept. of Labor.

Alabama employment laws

- Alabama has no specific wage and hour law.
- Employers are subject to the FLSA.

Miscellaneous laws about pay

- Employers can't require employees to pay dues to labor union as condition of employment.
- Employers with 50 or more employees must have at least two pay checks a month.
- Can't pay any longer than 15 days after last pay period.
- Municipal employees can't be required to use direct deposit for their paychecks.

Child Labor Laws

- Need to be careful about hiring children under 18.
- Even more stringent rules apply to 14- and 15-year olds.

Child labor limitations

- Type of work (can't be dangerous).
- Total hours worked.
- When they work (school nights, not during day).
- Permits.
- Posters.
- Record-keeping requirements.

Special Occupations

- Special rules apply to—
 - Serving alcohol.
 - Actors.
 - Models.

Fair Labor Standards Act (FLSA)

- Part of New Deal legislation of 1930s.
- Established the 40-hour work week.
- Established overtime rule that employees have to be paid “time and a half.”
- Established minimum wage (currently \$7.25).
- In terms of lawsuits, wage-and-hour claims are at a two-decade high.

Exempt v. Non-Exempt Employees

- Exempt employee = no overtime pay.
- Non-exempt employee = overtime pay.
- FLSA does not prohibit mandatory overtime, but merely requires payment for overtime to non-exempt employees.

Special categories of employees

- Agricultural workers.
- Employees in the movie industry, including those who work at movie theaters.
- Railroad workers and airline employees.
- Truck drivers are governed by Motor Carriers Act.
- White-collar (WC) workers.

WC workers

- Executives.
- Administrators.
- Professionals.
- Some information-technology employees.
- Outside sales representatives.
- Highly compensated employees.

Requirements for WC exemption

- Must be paid at least \$23,600 a year (\$455 a week).
- Paid on a salary basis.
- Perform exempt job functions.

Salary basis

- Guaranteed minimum amount of pay.
- How pay is computed: annual figure divided by pay periods.
 - Not computed on an hourly basis.
 - May be expressed in terms of an hourly basis.
- May involve individual circumstances.

Salary basis doesn't apply to some even if paid on an hourly basis.

- Doctors.
- Lawyers.
- School teachers.

Duties

- Duties can exempt an employee.
- Three categories:
 1. Executive.
 2. Professional.
 3. Administrative.

Executive Duties

- Regularly supervises two or more employees.
- Has management as primary duty of position.
- Has influence over job status of other employees:
 - Hiring.
 - Firing.
 - Promotions.
 - Job assignments.
- Mere supervision doesn't qualify as management.

Management duties

(in addition to supervision)

- Interviewing, selecting, training employees.
- Setting rates of pay and hours of work.
- Maintaining production or sales records (beyond merely clerical).
- Appraising productivity.
- Handling employee grievances or complaints.
- Disciplining employees.

Management duties

(in addition to supervision)

- Determining work techniques.
- Apportioning work among employees.
- Determining types of equipment used or materials needed.
- Budgeting.
- Monitoring work for legal or regulatory compliance.
- Providing for safety or security of workplace.

Case-by-case determination

- Rule of thumb: person in charge.
- Who would telephone inquiry be directed to if someone asks to speak to “the boss”?
- Thus if sergeant and lieutenant are both present at same time, only lieutenant is “in charge” during that time.

Example: Night manager at fast-food restaurant

- May spend most of time actually preparing or serving food.
- But makes executive decisions when they are required.
- Qualifies as executive.

Professionals (learned professions)

- Lawyers.
- Doctors.
- Dentists.
- Teachers.
- Architects.
- Clergy.
- Registered nurses, but not licensed practical nurses (LPNs).

Professionals (continued)

- Accountants, but not bookkeepers.
- Engineers.
- Actuaries.
- Scientists, but not technicians.
- Pharmacists.
- Other employees requiring advanced knowledge.

Characteristics of professional work

- Predominantly intellectual.
- Requires specialized education.
- Involves discretion and judgment.
- Advanced degrees are good indicator, but not a requirement.

Creative professionals

- Actors.
- Musicians.
- Composers.
- Writers.
- Cartoonists.
- Some journalists.
- Work that requires invention, imagination, originality, talent, or unique interpretations.

**Sometimes,
the professional classification
requires very careful analysis.**



Administrative duties

- Office work, not manual work.
- Work directly related to management or general business operations of employer.
- Primary component must involve exercising independent judgment and discretion about matters of significance.

Administrative exemption

- Designed for high-level employees who “keep the business running.”
- Operational, not production employees.
- Staff rather than line employees.
- Not people who make or sell what is sold.

Examples

- Human resources personnel.
- Accounting and tax personnel.
- Records maintenance.
- Marketing and advertising.
- Quality control personnel.
- Publication relations.
- Legal and regulatory compliance.
- Some computer jobs (network and database administration).
- Buyer at department store.

Administrative employees must exercise judgment and discretion in matters of significance

- Could employer experience financial loss as a result of employee's decision?
- Does employee have authority to make independent decisions that may affect business as a whole?
- Can employee deviate from company policy without prior approval?

Not exempt

- Secretaries and clerks.
- Bookkeepers.
- Most employees who operate machines.
- People who routinely order supplies.

Calculating overtime



Define workweek

- Fixed and regularly occurring period of 168 hours.
- Seven consecutive 24-hour periods.
- Doesn't have to coincide with calendar week.
- Can begin on any day, at any hour.
- Doesn't have to apply to all employees.
- Employer must define.
- Can be changed if change to be permanent and not designed to evade overtime.

Determine hours worked

- All time employer permits employee to work.
- Does not include—
 - Paid time off.
 - Vacation time.
 - Paid holidays.
 - Paid sick leave.
 - Unpaid meal or break periods.

Break periods

- Uninterrupted meal and break periods of 30 minutes or more are never considered hours worked.
- Meal and break periods of 20 or less are considered hours worked.
- 20- to 30-minute breaks fall into a gray area.

Determine regular rate

- Regular rate is hourly.
- Divide total remuneration by hours worked during workweek.

Example

- Employee works 50 hours during workweek.
 - Employee is paid \$1,000 (at “straight” time).
 - Regular rate = $\$1,000 \div 50 \text{ hours} = \20 an hour .
 - Multiply hours over 40: $10 \times (\$20 \div 2) = \100 .
 - Total pay owed: $\$1,000 + \$100 = \$1,100$.
-
- More complex examples provided in written course materials.

Reducing off-the-clock exposures

- Employees must be paid for all time worked.
- Issues arise with—
 - Automatic deductions of time for meal periods.
 - Work performed before clocking in.
 - Work performed after clocking out.
 - Improper rounding practices.
 - Special circumstances (training, travel time outside normal workday, on-call time, and so forth).

Example: Call centers

- Employees come in early to turn on computers.
- Sometimes takes 30 minutes for programs to be fully loaded.
- Employees go have coffee with their coworkers while programs load.
- Yes, this is compensable work.
- Employer must establish clear policies about this.

Example: computer clock-in systems

- Employees use a computer to clock in and record the start of their workdays.
- But can't do this when computers have been off and programs have to load.
- This can create an overtime and minimum wage violation.
- May need to adopt a policy of automatically adding time for this activity.

Time Rounding

- Rounding is permitted.
- But must be a system that doesn't benefit only the employer.
- Audit time-keeping system to make sure it benefits only employer.
- Contact legal counsel if you discover problems. You may be able to do something before litigation is started.

Independent contractors

- DOL is serious about stamping out misclassification of workers.
 - \$1 million recently paid by Bowlin Group in Kentucky.
 - \$3.5 million recently paid by several staffing agencies.
 - \$18.3 million recently paid by Halliburton.

What is misclassification?

- Workers can be classified as employees or independent contractors.
- If a worker is an employee, an employer must—
 - Withhold income taxes on the employee's wages.
 - Withhold Social Security taxes (FICA).
 - Withhold Medicare taxes.
 - Transfer the withholding to the IRS
 - Pay unemployment compensation taxes (FUTA)
 - Pay the employer's share of Social Security and Medicare taxes.

Misclassification (continued)

- If a worker is an independent contractor, the employer does **not**—
 - Withhold income tax, Social Security tax, or Medicare tax.
 - Have to pay the employer's share of the Social Security and Medicare taxes.
- In short, it's cheaper to pay an independent contractor than to pay an employee—so long as you don't have to pay a fine for misclassification.

Preventing misclassification

- Default and less risky assumption is that worker is an employee.
- DOL will use an economic realities test when evaluating the case:
 - **Is the worker really in business for himself or herself?**
 - **Or is the worker economically dependent on the employer?**

Labor Enforcement Initiatives

- Misclassification of workers.
- Changing “definition” of exempt employees.
- Unpaid interns.

Worker misclassification

- DOL's 2016 budget has \$14 million set aside for misclassification enforcement efforts.
- In 2014, 19 states were awarded \$10.2 million in grants to assist in enforcement.
- 2,000 new investigators hired since 2008.
- Certain industries have been targeted.
- IRS and Ala. Dept. of Revenue are working with DOL.

Targeted industries

- Construction.
- Home health care.
- Janitorial services.
- Nursing.
- Staffing agencies.
- Trucking companies.
- Restaurants.
- Motels.
- Cable installation.
- Oil and gas.
- Landscaping
- Car services.
- Supermarkets.
- Internet service installation.
- Security companies.

Current big misclassification case

- Uber.
 - People working as “taxi drivers” dispatched by cell phones.
 - Use their own cars.
- Workers want class certification as employees to get back pay estimated at \$51 billion.
- So far, some workers can’t be in class because of an arbitration clause.
- Otherwise, stay tuned!

Proposed changes in white-collar overtime exemptions

- Threshold amount for executive, administrative, and professional exemptions to be changed from \$23,660 a year to \$47,892 a year.
- Threshold amount for highly compensated individuals to be changed from \$100,000 a year to \$122,148 a year.
- Trigger amounts to be indexed to inflation.

What to do?

- “Stay tuned!”
- Become informed about what may happen with this issue.
- Plan ahead.

Unpaid interns: Old test

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment.
2. The internship experience is for the benefit of the intern.
3. The intern does not displace regular employees, but works under close supervision of existing staff.

Old test (continued)

4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion, its operations may actually be impeded.
5. The intern is not necessarily entitled to a job at the conclusion of the internship.
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

Old test (continued)

- If any **one** of the elements was missing, the intern had to be paid at least minimum wage and overtime.
- *Based on Walling v. Portland Terminal Co.*
 - 1947 U.S. Supreme Court decision.
 - About railroad company's 1-week program for training workers how to do manual labor in a rail yard.

Unpaid interns: New test

- Two recent U.S. circuit court decisions.
- Both courts have adopted more flexible **primary beneficiary test**.
- Both courts directed the lower court to
 - Consider a non-exhaustive list of seven factors and then—
 - Weigh and balance those factors in determining whether or not an intern is an employee (and therefore required to be paid).

New test

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated course work or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.

New test

5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Unpaid interns: Status of cases

- Cases are now pending before U.S. district courts.
- New seven-point test is not exhaustive.
- Courts are free to take additional evidence about situations.

New York case

- One intern was supposed to be working on a degree in instructional design.
 - Worked in film company's accounting department making copies.
 - Sent to get non-allergenic pillow for director of movie.
- Another intern was working in the publicity department and did publicity-related duties.

Florida case

- Plaintiffs were **student** registered nurse anesthetists (SRNAs).
- Enrolled in a privately owned college to become **certified** registered nurse anesthetists (CRNAs).
- The program results in the successful student receiving a master's degree in nurse anesthesia.

Florida case (continued)

- To receive this degree, SRNAs must have four semesters of clinical training (550 cases each).
- This clinical training is mandated by—
 - Florida law.
 - Council on Accreditation for Nurse Anesthesia Educational Programs.
 - National Board of Certification and Recertification of Nurse Anesthetists.

Florida case (continued)

- But there were some facts that suggested that the employer was reaping a benefit from the SRNAs' labor.
 - CRNAs worked less than they might have otherwise been required to do.
 - Medicare allows the employer to be reimbursed for simultaneously administering anesthesia in two rooms if a single CRNA is assisted by two SRNAs.

Recommendations

- Have **unpaid** interns only through internship programs sponsored by a local college or university—or not have them at all.
- If an employer has interns not in a sponsored internship program, the wisest course may be to **pay them** at least minimum wage and overtime.
- College or university needs to have its legal counsel carefully review the intern programs in light of the more flexible primary beneficiary rule.
- Unpaid interns should not be required to perform tasks that are unrelated to the skills they are supposed to be learning.

Questions?

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