
VP on a Forklift: Important Things to Know About Wage & Hour Regulations

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Why Should I Care About Wage & Hour Laws?

- The number of lawsuits filed under the Fair Labor Standards Act (or similar state statutes) has increased dramatically
 - 325% increase in wage & hour lawsuits filed over the last 10 years
 - Of all state and federal class and collective actions being filed in the U.S., 90% are wage and hour claims
- Federal and state wage & hour regulations are complex and can be confusing if you don't understand the basic concepts
- Ignoring these laws could expose your company to liability!

What Is the FLSA?

- The Fair Labor Standards Act (FLSA) is the primary federal statute that establishes minimum wage, overtime pay, equal pay, child labor, and record keeping requirements for covered workers and employers
- Enforced by the Department of Labor, Wage & Hour Division
- Most states have parallel wage & hour laws

Who's Covered by the FLSA?

- Two "buckets" of coverage under the FLSA:
 - *Individual coverage* – individuals whose work affects interstate commerce are covered by the FLSA
 - "Interstate commerce" is defined so broadly that practically anything fits
 - *Enterprise coverage* – businesses that are involved in interstate commerce and have a gross annual business volume of at least \$500,000 are covered by the FLSA, as are all of their employees
- **Bottom Line:** Virtually EVERY employer and employee is covered!
 - But not independent contractors.....

Employee or Independent Contractor?

- Misclassification of workers → very common problem
- You can't just call someone an independent contractor, issue them a 1099, and expect to be in the clear!
- Factors to consider:
 - Control over how work gets done
 - Training
 - Opportunity for profit
 - Payment of expenses
 - Longevity of relationship
 - Ability to work for others
 - Number of hours worked per week
 - Tools/equipment
 - I/C agreement

Minimum Wage

- Federal minimum wage → \$7.25 per hour
- States (and sometimes cities) have their own minimum wage requirements, which may be higher than what federal law requires
- Potential problems:
 - When an employee is paid on a basis other than hourly
 - When an employee is incorrectly classified as exempt and works overtime hours

Overtime Pay

- Overtime must be paid to all employees who don't qualify for any of the exemptions set forth in the FLSA
- ***Overtime = 1 ½ times the regular rate of pay for all hours worked in excess of 40 per work week***
- Certain states (*i.e.*, California) have different rules, so beware!

Overtime Pay

- What does "regular rate of pay" mean?

Regular rate of pay includes:	Regular rate of pay does NOT include:
wages/salary	health plan payments
commissions	pension plan payments
shift differentials	holiday/sick pay
standby compensation	expense reimbursements
meals/lodging	gifts
performance-based bonuses	discretionary bonuses

- What does "work week" mean?
 - Can begin on any day/time (not necessarily Monday morning)
 - You cannot combine weeks or use "comp time"

Overtime Exemptions

- Exemptions are one of the most dangerous areas of wage and hour laws in terms of potential liability
- Liability can be significant!
- Rebuttal of claims can be difficult or even impossible, due to lack of records

"White Collar" Exemptions

- Exemption from both minimum wage and overtime pay for employees who are employed in any of the following bona fide capacities:
 - Executive
 - Administrative
 - Professional
- To qualify, employer must be able to demonstrate that the affected employee can satisfy all of the pertinent tests relating to salary and job duties.

"White Collar" Exemptions: Salary Basis Test

- Threshold requirement for all white collar exemptions → Employee must be compensated on a salary basis
 - Regular payments in a predetermined amount (minimum of \$455 per week)
 - Not subject to reduction because of variations in quality or quantity of work
 - Must be paid the full salary for any week in which the employee performs *any* work
 - Need not be paid for any work week when no work is performed

"White Collar" Exemptions: Salary Basis Test

- Seven scenarios in which pay CAN be docked:
 - 1) Absence from work for one or more full days for personal reasons, other than sickness or disability.
 - 2) Absence from work for one or more full days due to sickness or disability if deductions made under a bona fide plan, policy or practice of providing wage replacement benefits for those types of absences.
 - 3) To offset any amounts received as payment for jury fees, witness fees, or military pay.
 - 4) Penalties imposed in good faith for violating safety rules of "major significance."
 - 5) Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of workplace conduct rules.
 - 6) Proportionate part of an employee's full salary may be paid for time actually worked in the first and last weeks of employment.
 - 7) Unpaid leave taken pursuant to the Family and Medical Leave Act.

"White Collar" Exemptions: Job Duties Test

- ***Executive Employees:***
 - Primary Duty (generally 50% or more of time): Manages an enterprise or department or subdivision thereof;
 - Supervision: Regularly directs work of two or more full-time employees; and
 - Authority to Hire/Fire: Has the authority to hire or fire other employees or whose recommendations for the hiring, firing, advancement, promotion or any other change of status of other employees will be given particular weight.

"White Collar" Exemptions: Job Duties Test

- ***Administrative Employees:***
 - Primary Duty (generally 50% or more of time): Performs office or non-manual work relating to management or general business operations of employer or employer's customers.
 - Discretion: Primary duty includes exercising and independent judgment with respect to matters of significance.
 - Types of Work: Examples include tax, accounting, marketing, research, human resources, public relations, legal and regulatory compliance, etc. Clerical or secretarial services, as well as mechanical, repetitive or routine work, is insufficient to satisfy exempt status.

"White Collar" Exemptions: Job Duties Test

- **Professionals:**

- Primary Duty (generally 50% or more of time): (a) Work requiring knowledge of an advanced type of science or learning acquired by a prolonged course of specialized intellectual instruction, or (b) work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor, or (c) teaching, tutoring, instructing or lecturing in a school system or educational establishment, or (d) the practice of law or medicine; and
- Work Requiring Advanced Knowledge: Work must be predominantly intellectual which includes work requiring the consistent exercise of discretion and judgment (as opposed to routine, mental, manual, mechanical or physical).

"Highly Compensated" Exemption

- ***An employee is also exempt if:***
 - The employee earns \$100,000 or more (including bonuses, commissions, and other non-discretionary compensation earned during a 52-week period, but excluding credit for board and lodging, insurance, contributions to retirement plans and other fringe benefits);
 - The employee's primary duty includes office or non-manual work; and
 - The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

Note: An employee's salary may be prorated and the exemption remain applicable, even if the employee only works part of the year. Under certain circumstances, employers may also retain the exemption while making a single lump-sum payment at the end of the year to make up any short-fall in the employee's salary.

Outside Sales Exemption

- ***Outside Sales Employees:***

- Primary Duty (80% of the time): Engaged away from employer's place of business in –
 - making sales; or
 - obtaining orders or contracts for services or for the use of facilities for which the customer pays.
- Types of Jobs: Examples include door-to-door salespeople; drivers who sell as well as deliver.

Note: Outside sales does not include sales made by mail, telephone or the Internet, unless such contact is used merely as an adjunct to personal calls. Any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not the owner of the property.

Inside Sales: No Exemption!

- **There is no exemption for inside salespeople.**
- **So, unless an inside sales employee meets some other exemption, they must be paid minimum wage and overtime!**