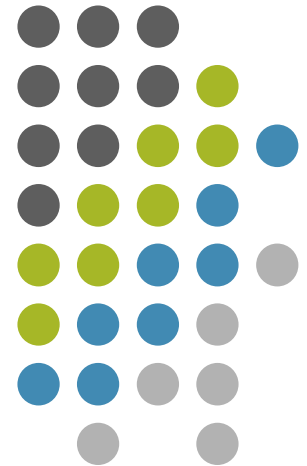


COMMON PAY ISSUES AND MISTAKES

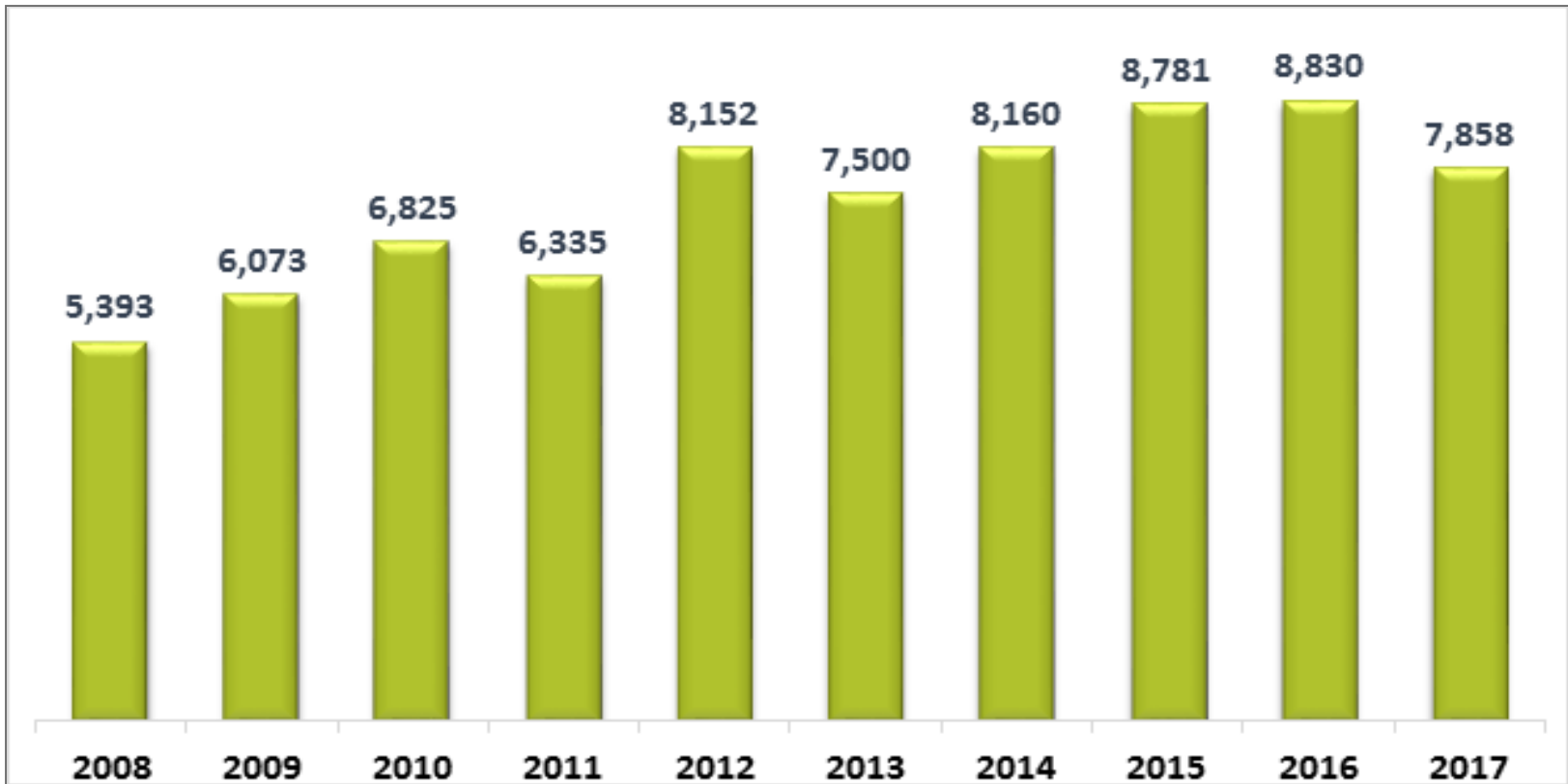
May 23, 2018

Presented by:
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FLSA LAWSUITS FILED IN FEDERAL DISTRICT COURTS PER YEAR ENDING SEPTEMBER 30, 2017



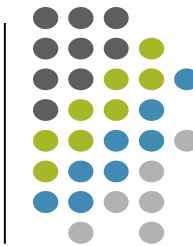
Source: Administrative Office of the U.S. Courts (uscourts.gov)

Note: An FLSA lawsuit may be filed on behalf of an individual worker or multiple workers. Data on the number of workers involved in each lawsuit were not readily available.

FLSA/STATE PAY VIOLATIONS



- DOL data suggests that nearly **80%** of all employers are violating the FLSA in some significant manner
- Among the most common violations are:
 - “Off the Clock” Violations
 - Meal/Rest Periods
 - Misclassifying Employees
 - Exempt/Non-Exempt; Independent Contractors
- While federal wage and hour lawsuits have slowed recently, they have increased **60%** since 2007
- The US DOL collected more than **\$188 Million** in back wages for more than **252,000** employees in 2017



10 TOP WAGE & HOUR VIOLATIONS

COMMON PAY ISSUES & MISTAKES



Exempt or Non-Exempt?

- Job description is often the most critical document to determine if an employee is properly classified as exempt
 - But job description must reflect actual duties performed
- Issue of misclassification is on DOL's radar

EXEMPT OR NON-EXEMPT



Non-Exempt Employees

- May be paid on an hourly, salary, day rate, job rate, piece rate, or commission basis
- Must earn at least minimum wage for all hours worked
- Must be paid the appropriate overtime pay for hours worked over 40 in one workweek

EXEMPT OR NON-EXEMPT



Exempt Employees

- **Salary Basis Test**
 - Employee must be paid a predetermined, fixed salary not subject to reduction due to variations in the quality/quantity of work performed
 - No docking the employee for being late, leaving early, doing poor work
- **Salary Level Test**
 - Amount of salary paid must meet a minimum specified in the regulations
 - Current: \$455/week (\$23,660/year)
- **Duties Test**
 - Primary duties must involve Executive, Administrative, or Professional (EAP) duties, as defined in regulations

STATUS OF US DOL OVERTIME (WHITE COLLAR EXEMPTIONS) RULE



- August 2017 - Obama Administration's OT pay rule (which more than doubled required salary level from **\$23,660** to **\$47,476** for a full-year worker to qualify for FLSA white collar exemptions) was invalidated by a federal court
- Summer 2017 - the DOL submitted a Request for Information ("RFI") seeking public comment on potential revisions of the rule
- The DOL's Notice of Proposed Rulemaking, projected to be issued later this year, will propose an updated salary level for white collar exemptions (expected to be in the low \$30,000 range) and will seek public comment on the salary level and related issues

EXEMPT OR NON-EXEMPT



Deductions from Salary

- An employee is not paid on a salary basis if deductions from the predetermined salary are made for absences occasioned by the employer or by the operating requirements of the business
- If the employee is ready, willing and able to work, deductions may not be made for time when work is not available

PERMISSIBLE DEDUCTIONS UNDER THE FLSA



- Full-day absences for personal reasons, other than sickness or disability
- Full-day absences due to sickness or disability if deductions made under a bona fide plan, policy or practice of providing wage replacement benefits for these types of absences
- First/last weeks of employment, as long as the employee is paid a proportionate share of salary for time actually worked
- Penalties imposed in good faith for violating safety rules of “major significance”
- FMLA-qualifying leave for partial and full day absences
- Offset of salary for monies received for jury fees, witness fees or military pay
- Good faith full-day disciplinary suspensions for violating written workplace conduct rules

THE DUTIES TEST



EXECUTIVE DUTIES

- Primary Duty
 - Management of the enterprise or of a customarily recognized department or subdivision
 - Customarily and regularly directs the work of the equivalent of 2 full-time employees
- Authority to hire or fire other employees or recommendations as to the hiring, firing, advancement, promotion or other change of status of other employees given particular weight

- Management being *a* duty, but not the *primary* one
- Employee's hiring and firing power is purely theoretical
- Employee does not really have much discretion
- Jobs commonly misclassified as exempt executives:
 - Crew Leader or Line Leader
 - Assistant Manager
 - Shift Manager
 - Department Manager
 - Maintenance Supervisor

COMMON ISSUES

EXECUTIVE EXEMPTION



- Primary Duty
 - Performance of office or non-manual work **directly related to the management or general business operations** of the employer or the employer's customers
 - Includes the exercise of discretion and independent judgment with respect to matters of significance
 - **EX:** HR Director vs. HR Clerk

THE DUTIES TEST

ADMINISTRATIVE DUTIES

COMMON ISSUES



ADMINISTRATIVE EXEMPTION

- An employee with a bachelor's degree plus an office job is not necessarily exempt
- Not “directly related to” management or general operations; production, not management
- Independent judgment and discretion
 - Evaluating and choosing among different courses of action
 - Not mere application of skill—even if it's a *great* skill
- Jobs commonly misclassified as exempt:
 - People who report to someone who fits this exemption, such as low-level marketing, accounting, IT employees
 - Administrative assistants

- Primary Duty
 - Performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction

OR

- Performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor

THE DUTIES TEST

PROFESSIONAL DUTIES



- Degree not “advanced” enough
- Discretion and judgment (a recurring theme)
- Jobs commonly misclassified as exempt professionals:
 - Junior accountants
 - Junior engineers
 - Social workers
 - Paralegals

COMMON ISSUES



PROFESSIONAL EXEMPTION

- Computer-Related Occupations
- Outside Sales

THE DUTIES TEST



OTHER EXEMPTIONS

POP QUIZ



Can these jobs be classified as exempt?

- Manager of 10-employee operation in factory
- Assistant manager of a large retail store
- Insurance claims adjuster
- Accounts payable manager
- Accountant at “Big 4” firm with 3 years’ experience

ANSWER: MAYBE



- None of them is a slam dunk to be exempt
- Many are the subject of massive collective/class actions

MISCLASSIFICATION OF EMPLOYEES



PRACTICAL TIP

Just because other employers in your industry are treating a certain classification of employee as exempt or non-exempt does not mean that you should

MISCLASSIFICATION OF WORKERS: INDEPENDENT CONTRACTORS



- Major issue is “degree of control”
 - Who determines manner in which work is performed/how it is performed
 - Who supplies the tools/ equipment
 - Where is work performed
- Other factors:
 - How is remuneration paid
 - Can tasks can be delegated?
 - Are employees performing the same functions as contractors?
 - How long are contractor assignments?
 - Who is “hiring” the contractors?
 - Who are the contractors and do they have their own business?

INDEPENDENT CONTRACTORS



- Just calling a service provider an independent contractor does not make the service provider an independent contractor
- Right of control
- Control also includes economic dependence
- With misclassification, liabilities extend far beyond wage and hour – i.e., statutory benefits, plan benefits, tax issues

INDEPENDENT CONTRACTORS



“Red Flags” That May Alert Government to Contractor Misclassification:

- So-called “independent contractors” performing the same kind of work performed by the company’s employees
- So-called “independent contractors” performing work for which other businesses in the same industry use employees
- So-called “independent contractors” performing work that is essential to the production work of the business
- Arrangements that preclude the purported independent contractor from selecting his/her own personnel and allow only for performance by one specific person
- Arrangements where the purported independent contractor may not, or as a practical matter does not, perform similar services for other businesses

INDEPENDENT CONTRACTOR TESTS



- Departments of Labor (state and federal), IRS, and other state agencies (e.g., NH Department of Employment Security), all have their own lists of criteria

BEST PRACTICES



To avoid risk of misclassifying a worker

- Enter into specific independent contractor agreement
- Have individual provide employer ID number
- Request individual submit invoice for services
- Have individual use own resources when possible
- Use Form 1099 rather than W-2 to report income to individual
- Classify similarly situated persons in the same manner
- Direct only result of work and not methods by which result is obtained



- Written policy that no one may work overtime without supervisor’s permission is a good starting place, but...
 - If an employee violates this policy and works overtime, they are owed for the hours worked
 - You can discipline the employee, but you must pay overtime due
- Train managers and supervisors to recognize and report “off-the-clock” work

EX.1 Devoted assistant who works overtime but doesn’t want to report it

EX. 2 Receptionist who eats lunch at desk and responds to work calls and e-mails during lunch

EX. 3 Coordinator who takes work home over the weekend

“OFF-THE-CLOCK” TIME



Particular Issues with Use of Mobile Devices

- Time worked outside the office or regularly scheduled hours or shifts - ***even on employee's personal device*** - still considered time worked
 - Non-exempt employees need to properly record and be paid for this time
 - Includes responding to emails, text or voicemail messages
 - Other work activities outside scheduled work hours
- Off-duty work can increase hours for non-exempt employees → OT pay
- Even work that is not requested but is "suffered or permitted" to be performed is work time that ***must be paid***
 - Even if employees ***volunteer*** to check in or continue work after the end of their shift, the time spent doing work-related tasks is compensable

7

EQUAL PAY ACT



Rizo v. Yovino (April 2018)

- The 9th Circuit Court of Appeals held that prior salary alone, or in combination with other factors, cannot justify a wage differential between male and female employees under the Equal Pay Act (EPA).
- Case involved a pay scale that expressly took into account prior salary used by the County's Office of Education.
- The County argued that the wage differential resulted from the employee's prior wages and the pay scale was lawful under an exception in the EPA: "a differential based on any other factor than sex."
- The court rejected this argument, stating "to accept the County's argument would be to perpetuate rather than eliminate the pervasive discrimination at which the Act was aimed."
- The court also held that the "'any other factor other than sex' is limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance."



FAILURE TO KEEP ACCURATE RECORDS OF ALL HOURS WORKED



Employer's Responsibility to Keep Accurate Record of All Hours Worked

- Meal periods – punching in/out
 - Mandatory 30-minute (unpaid) meal period after 5 consecutive hours (NH)/6 consecutive hours (MA & ME) worked in a work day
 - Employers should not automatically deduct for meal periods
 - If employees work through the meal period, they should be paid
 - NH - meal period waivers are acceptable but must be voluntary, agreed-to in writing, may be revoked by employee at any time
- Changes to employee time cards (manager manually inputting a lunch break period or correcting missed employee punches) must be acknowledged and approved by employee
- Employers may not unilaterally make any changes to employee time cards
- Work breaks of less than 20 minutes' duration must be counted as hours worked

“HOURS WORKED” UNDER THE FLSA



Other Examples of “Hours Worked” for Which Employees Must be Paid:

- Getting ready to work prior to the start of the shift, donning
- Clean up work after the end of a shift, doffing
- The entire meal period, if the employee is not completely relieved from all duties and responsibilities
- Transporting or delivering materials or equipment to a job site prior to the start of the workday
- Working from home
- Training time
- Travel time to and from trainings may be compensable if it is not “regular commuting time”
- Travel from job site to job site is compensable

5

USING VOLUNTEERS AS EMPLOYEES



- U.S. DOL follows Supreme Court judicial guidance regarding unpaid volunteers:
 - Individuals who volunteer/donate their services, usually part-time, for **non-profit** public service/religious/humanitarian objectives, without contemplation of pay, **are not** considered employees of the organizations that receive their service
 - They typically don't displace regular employees or perform work that would otherwise be performed by regular employees
 - **EX:** men's organization sending members to nursing homes to provide personal services for the elderly; parents assisting in a school library to maintain effective services for their children
 - Individuals may volunteer to, e.g., drive vehicles or fold bandages for the Red Cross; work with disadvantaged youth; help in youth programs as camp counselors, scoutmasters, den mothers; solicit contributions or participate in benefit programs for such organizations; volunteer other services needed to carry out the charitable/educational/religious programs
 - Individuals generally **may not** volunteer in commercial activities run by a non-profit, such as a hospital gift shop
- Under the FLSA, individuals **may not** volunteer services to **for-profit** private sector employers

4

FAILURE TO PAY REPORTING/MINIMUM PAY A/K/A THE "SHOW-UP RULE"



- Employees who report to work and whose services aren't required, must be paid a minimum of 2 hours' pay (NH) or 3 hours' pay (MA) for reporting to work OR employer may put employees to work and pay for hours actually worked
 - Maine has no comparable law
 - *Exceptions:* (NH) When employee's job requires less than 2 hours of work that day, employee only needs to be paid for time worked - but arrangement must be in writing in advance; (MA) Applies if employee is scheduled to work 3 or more hours that day
- Employers should notify hourly/non-exempt employees when they are not needed to work, e.g., because of a plant closure related to weather, equipment malfunction
- Recent discussions with NH DOL - Employees must be paid a minimum of 2 hours' pay for attending a work meeting when they are not otherwise scheduled to work
- "On-call" employees (NH) - Must receive minimum 2 hours' pay even if work performed on call is less than 2 hours
- *Exception:* Employees who leave work before completing 2 hours of work due to, e.g., illness, family emergency, are not entitled to 2 hours of minimum pay – but employers must obtain something in writing from employee recording the reason for leaving early

3

FAILURE TO PROVIDE WRITTEN NOTICE REGARDING PAY AT TIME OF HIRE (NH)



- Mandatory written notice to employees at time of hiring:
 - Employee's wage rate
 - Pay period
 - Pay date
 - General description of fringe benefits
- Any change – written notice to employee, before change takes place
 - Includes promotions and demotions
- Employees need to sign an acknowledgment of receipt of these notices
- Keep signed notices in employee's personnel file

2

MISCALCULATING “REGULAR RATE OF PAY”



- Non-exempt employees are entitled to OT rate of 1½ their **regular rate of pay** for hours worked in excess of 40 in a given workweek
- “Regular rate of pay” is calculated by dividing total earnings in workweek by total hours worked in workweek
- What is included? Any **non-discretionary** payment for work, including:
 - Hours, quality- or quantity-based bonuses or incentive payments
 - Commission payments
 - Shift differentials
 - Lump sum on-call payments
 - Reasonable cost of employer-provided meals, lodgings and facilities
- What is excluded?
 - Gifts
 - Payments for time not worked (holidays, PTO, sick time, etc.)
 - Expense reimbursements, profit sharing or retirement plan payments
 - **Discretionary** bonuses

BEST PRACTICE FOR CALCULATING “REGULAR RATE OF PAY”



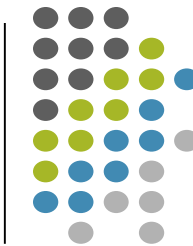
- Carefully review all compensation provided to non-exempt employees
- Analyze whether, as appropriate, such remuneration is being included in regular rate of pay

1

UNAUTHORIZED/IMPROPER EMPLOYMENT OF WORKERS UNDER AGE 18



- Secure proper work permits/parental consents before the minor begins employment
- Minors must be restricted in the number of hours, days of work and types of work established under state (and federal) law
- Occupations, hours of work, days of work and working conditions are particularly limited for 15- and 16-year olds



SURVIVING DEPARTMENT OF LABOR AUDITS COMMON PAY ISSUES & MISTAKES

WHY DO THEY ARISE?



- Vast majority occur due to current or former employee complaints
- Even if only one employee complains, the DOL will inspect the records of all employees for a period of 2 - 3 years
- Occasionally, various industries are targeted for audits or investigations

WHAT HAPPENS DURING AN AUDIT?



- An inspector may or may not first contact the employer to schedule a time to review payroll, time and other records
- Often the inspector simply arrives at the workplace and asks to inspect the records
- If an inspector arrives at the workplace asking to review records, respectfully request a postponement to produce records for a few days so you can obtain advice from counsel
 - Contact counsel **immediately**

WHAT HAPPENS DURING AN AUDIT?



- Counsel may advise the employer to request permission to perform a self-audit or may suggest postponing the initial meeting with inspector
- US DOL may request that the employer conduct a self-audit

PAYROLL AUDIT INDEPENDENT DETERMINATION ("PAID") PROGRAM



- March 2018 – WHD rolls out 6-month pilot PAID Program
 - Employers can self-report potential wage violations to WHD without additional risk of penalties or liquidated damages
 - WHD may agree with employer’s wage calculations or may arrive at its own
 - WHD will submit determination to employee who may – **but is not obligated to** - sign an agreement and receive payment
- Risks to employers:
 - Employees may reject the determination and consult counsel – which would likely lead to litigation
 - Risk significantly increases if violations pertain to a large number of employees - potential collective/class action
 - Settlement is limited to potential wage violations/timeframe at issue - employer will not have opportunity to obtain general waiver and release as part of settlement

STEPS TO TAKE



- Do a self-audit of time records to ensure all non-exempt employees are tracking actual hours worked
- Do a self-audit of payroll records to ensure all non-exempt employees have been paid for all actual hours worked – including OT
 - Discuss any discrepancies with employee & supervisor
 - If errors exist, document them and steps taken to correct them – including back-wage payments

STEPS TO TAKE



- Ensure proper accurate timekeeping policies/procedures are in place
 - Including policy on whether OT is authorized or not
 - Should contain procedure to report errors/complaints
 - Ensure all employees have received copies
- If any discrepancies in timekeeping/pay system contact L&E attorney – demonstrates good faith

ONCE THE AUDIT COMMENCES



- Once audit commences, be courteous and cooperative
- Do not volunteer any information
- Do not sign any agreements, including waivers of statute of limitations
- Consider allowing the investigator to interview employees at the workplace

AFTER THE AUDIT IS COMPLETED



- Inspector will advise employer of findings, amount of wages owed to employees, amount of penalties, if any
- Check inspector's mathematical calculations

QUESTIONS?



ABOUT DEBRA WEISS FORD



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