

# EMPLOYMENT LAW UPDATE

2014

HOLLAND & HART<sup>LLP</sup>



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2014

Wage & Hour: Are Your Pay Practices Compliant?

HOLLAND & HART<sup>LLP</sup>



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# Speakers

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# Agenda

- Wage and Hour Overview
- Misclassification Crackdown
  - Employee vs. Independent Contractor
  - Exempt vs. Non-exempt
- Upcoming Changes in Exemptions
- Deductions From Salary
- State Law Considerations
- Liability for FLSA Violations





(Employee Misclassification)





**(Unpaid Overtime)**





# The Fair Labor Standards Act

## Overview:

- FLSA - Enacted in 1938 - 29 U.S.C. § 201 *et. seq.*
- Federal law:
  - Minimum wage
  - Overtime pay
  - Employment of minors
  - Recordkeeping requirements
- Enforced by the U.S. Department of Labor Wage & Hour Division (WHD)



# Covered Employers Under the FLSA

- Private sector employers with \$500,000 or more in revenue, or 2 or more employees engaged in interstate commerce
- Hospitals and other health care institutions
- Public sector employers
- Schools
- Most non-profits
- Trade associations



## Misclassifying as Independent Contractors

DOL crackdown on employers who misclassify workers as independent contractors who are employees under the law.



# Effect of Misclassification on Workers

- Denied access to legal protections and benefits, such as:
  - Minimum wage and overtime pay
  - Workers' compensation
  - Family and medical leave



## Tests for Independent Contractor Status – Federal & State

- **DOL Economic Realities Test:** is worker truly in business for him/herself or is he/she economically dependent on employer for work?
- **IRS 20-Point Test:** Behavioral Control / Financial Control / Relationship of the Parties
- **State Law Tests:** Workers' Compensation / Unemployment Insurance / State Wage and Hour Laws



# Direction and Control

- Tools, business car
- Separate workplace
- Hires own employees
- Hired for a project/ not by hour
- Sets hours
- Not terminable at will
- Risk on profit or loss of project
- Own clothes, not company uniform
- Reports – medium or long-term basis (not daily or weekly)
- No company benefits, vacation, sick leave, 401(k), health insurance, etc.



# Independent Contractor or Employee?

- Home improvement store hires workers to perform installation services for its customers (*e.g.*, installing carpet, cabinets, garage doors, etc.)
  - Required to wear store's shirts when doing jobs for store
  - Store provides most of the materials for each job
  - Workers are not exclusive to this store – they may install for other companies or on their own
  - Store coordinates scheduling of installation with customer
  - Workers must inform customers that they are employees of store

Are Installers Independent Contractors or Employees?





# Vote

**Are installers independent contractors or employees?**

- A. Independent Contractors**
- B. Employees**





# Consequences of Misclassification

- **Overtime liability**
  - Back pay and liquidated (double) damages
  - Criminal penalties – fines up to \$10,000
  - Willful penalty - \$1,000 violation and imprisonment
- Payroll taxes, withholding, penalties, interest
- IRS and DOL audits
- Liability for medical expenses for work-related injury
- Attorneys' fees and costs
- And other consequences



## Real Case – \$6.5 Million Settlement

- Garage door installer sued Lowe's in California for misclassification as independent contractors
- Class action – involves an estimated 4,000+ installers and about 950 installation companies
- Sought benefits such as health and dental insurance, workers' compensation insurance, paid sick leave, vacation and holiday pay, employee discounts and a matching 401(k) savings plan
- May 2014 – Lowe's agreed to pay \$6.5M to settle but denied they were employees



# Exempt vs. Non-exempt



## Misclassification – Exempt vs. Non-exempt

Some workers are exempt from the FLSA requirement for minimum wage, overtime pay or both

Examples of employees exempt from both:

- “White collar exemptions” - Executive, administrative, professional employees, outside sales employees, and certain computer workers
- Seasonal amusement or recreational establishments
- Small newspapers and switchboard operators of small telephone companies
- Casual babysitters and persons employed as companions to the elderly or infirm



# Misclassification – Exempt vs. Non-exempt

## Examples of employees exempt from the overtime pay requirements only:

- Certain commissioned employees of retail or service establishments
- Auto, truck, trailer, farm implement, boat, or aircraft salespersons, parts-clerks and mechanics
- Railroad and air carrier employees, taxi drivers, certain employees of motor carriers, and seamen on American vessels
- Announcers, news editors, and chief engineers of certain non-metropolitan broadcasting stations
- Domestic service workers who reside in their employers' residences
- Employees of motion picture theaters
- Farmworkers



# White Collar Exemptions

## 1. Salary Basis

- Generally \$455 per week or \$23,660 per year

## 2. Primary Duty

- Definition does not strictly require 50% of time
- Primary = principal, main, major or most important



# Executive Exemption

- Primary duty - management of a recognized separate department or subdivision; and
- Customarily and regularly supervises two or more full-time employees or equivalent; and
- Has authority to hire or fire employees or recommends as to hiring, firing, advancement, promotion, etc., and is given “particular weight”
- Standalone: business owner - 20% or more equity interest in business and actively engaged in management





# Administrative Exemption

- Primary duty - office/non-manual work “directly” related to management or general business operations of employer or employer’s customers/clients
- Primary duty includes exercise of discretion and independent judgment “with respect to matters of significance”
- Examples: typically applies to claims adjusting, financial services, HR, auditing, tax, marketing, and quality control employees





# Learned Professional Exemption

- Primary Duty - performance of work requiring an advanced type of knowledge
  - Predominantly intellectual in character
  - “Consistent” exercise of discretion and judgment in science or learning
  - “Prolonged” course in specialized intellectual instruction (B.A. or B.S., or beyond)
  - Examples: Accounting, law, education, medicine, engineering, theology, architecture, etc.



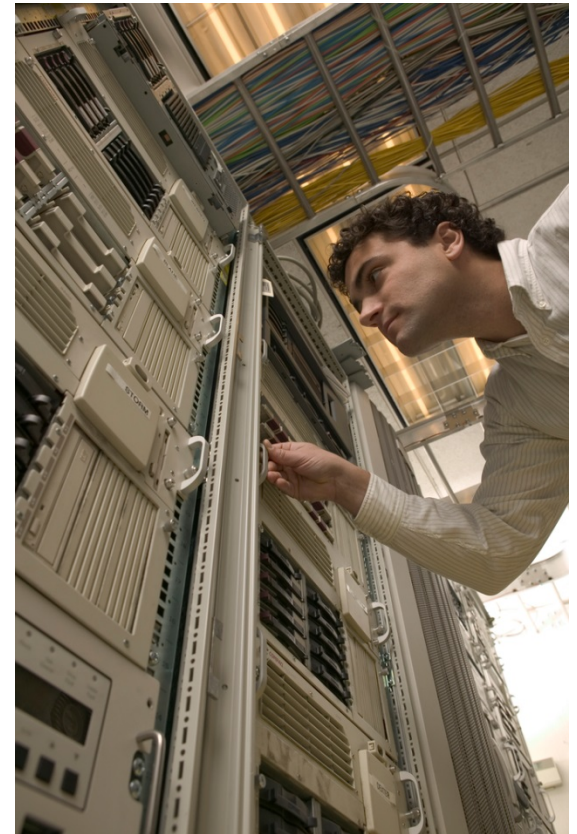
# Creative Professional Exemption

- Primary Duty - the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor
- Music, writing, acting, graphic arts
- Case by case basis determination depending on how much own creativity



# Computer Professional Exemption

- Employee paid \$455 per week salary or \$27.63 per hour or more
- Employee's Primary Duty:
  - The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications
  - The design of computer systems based on and related to user or system design specifications
  - The creation or modification of computer programs related to machine operating systems



# Outside Sales Exemption

- Primary Duty - making sales or obtaining orders for services or for use of facilities, and
- Employee customarily and regularly engages in work away from the employer's place of business
- No salary requirement or particular salary level
- Regulations explicitly exclude from the exemption "Inside Sales"





# Highly Compensated Employees

- **\$100,000 or more –**
  - Exempt if they meet any one of the criteria of the executive, administrative, or professional duties
  - Office or non-manual work
  - Significantly higher than \$65,000 in proposed regulations
  - \$100,000 = Salary, Commissions and Non-Discretionary Bonuses



# Is This Employee Exempt?

## Sushi chef at restaurant

- Supervised by head (No.1) chef
- Paid on salary basis (above \$455/wk)
- Not required to have a degree in culinary arts but is continually instructed at the restaurant in a classroom setting
- Required to have 5-10 years of experience
- Oversees the work of less experienced sushi chefs
- Does not hire, fire, promote or discipline lower level chefs



# Vote

**Is this employee exempt?**

- A. Exempt under Executive Exemption**
- B. Exempt under Professional Exemption**
- C. Exempt under Administrative Exemption**
- D. Non-Exempt**



## Real Case

- **D. Non-Exempt**
- **Not exempt under Executive exemption – no evidence that mid-level chef made suggestions or recommendations as to hiring, firing, promotion, etc. of lower level chefs**
- **Not exempt under Learned Professional exemption – did not require academic degree**

*Solis v. Suroc*, No. 1:12 CV 2107 (N.D. Ohio 2014)





# Crackdown on Overtime Pay

All Non-Exempt Employees MUST be paid overtime pay at one and one-half times the regular rate of pay for all hours worked over 40 hours in a week



# Cost of Misclassification

- Jim is an assistant manager at Widget Works, Inc.
- Jim has no supervisory authority and does not manage others (he is not exempt)
- Jim has been treated as an exempt employee
- His pay over the last three years has been at a rate of \$15 per hour
- Jim now claims he has worked 45 hours/week the last three years



# ***It Will Cost You!***

## **Cost of Misclassification:**

Number of hours > 40 x 1.5 Regular Rate  
x 2 years (not willful) or 3 years (willful)  
x 2 (Liquidated Damages)  
x Employees  
+ Attorney Fees (Employer and Plaintiff)  
+ Costs of Litigation + Costs of Employees  
Participating in Litigation



# Unpaid Wages

- **Individual Action**

- 150 weeks (for the three years) x 5 hours per week = 750 overtime hours
- 750 overtime hours x \$22.50 ( $\$15 \times 1.5$ ) = \$ 16,875 in unpaid wages
- Liquidated damages :  $\$16,875 \times 2 = \$33,750$

vs.

- **Collective Action**

- 100 current and former assistant managers join the collective action
- $100 \times \$16,875 = \$1,687,500$  in unpaid wages
- Liquidated damages:  $\$1,687,500 \times 2 = \$3,375,000$



# Attorney's Fees And Costs

- Under the FLSA, prevailing plaintiffs are entitled to an award of their attorneys' fees
- Plus you have to add in your own fees in defense of the case



## Revision to White Collar Exemptions in the Works!

- March 2014 – President ordered DOL to revise the white collar exemptions to reflect the “modern economy”
- DOL expects to release proposed changes in November 2014
- Likely changes:
  - Raise the minimum salary level (some speculate the amount may double to \$46,800/year)
  - Change the duties tests to add in a quantitative test (*e.g.*, more than 50% of time spent on supervising employees)
  - Raise the minimum salary level for the highly compensated worker exemption





## Senate Bill

Following President's lead, Senate Democrats introduced "Restoring Overtime Pay for Working Americans Act" to:

- Raise minimum salary for white collar exemptions to \$1,090 per week (\$56,680 per year) – phased in
- Raise highly compensated employee minimum to \$125,000 per year
- Restore 50% threshold for "primary" duties



# What Should You Do?

**New rules will take effect in 12-18 months:**

- Identify “white-collar” exempt employees whose salary is in the \$455 - \$1000 / week range
- Determine what percentage of time is spent on exempt duties (can you reallocate duties)
- Review and update job descriptions
- Identify cost of losing exemption (is it cheaper to lose the exemption or increase salary)





# Exempt Employee Salary Deductions

- Generally, exempt employees must be paid their full salary for all weeks in which they perform any work, regardless of quantity or quality
- Beware of the “fake salary!”
- Can lose the exemption for all employees in the same job and the same affected department!

223 - John R. Doe - Pay Period 06/02/06 to 06/15/06				Required Deductions		
<b>Earnings</b>				Federal Income Tax	00.00	00.00
Hours	Rate	This Period	YTD	FICA - Medicare	00.00	12.18
SD	0.00	450.00	900.00	WI State Income Tax	00.00	00.00
<b>Gross Pay</b>		450.00	900.00	FICA - Social Security	22.50	51.84
				<b>Other Deductions</b>		
				Health Insurance	00.00	00.00
				401k	00.00	00.00
				Parking	00.00	00.00
				<b>NET PAY</b>	<b>\$418.00</b>	<b>\$836.00</b>

Your Employer 1234 Some Street Millsboro, WI ZIPCODE	Check Number: 000000 Pay Date: 06/15/06
PAY *****Four hundred eighteen dollars and 00 cents*****\$418.00	
To the Order of John R. Doe 100 Some Street Millsboro, WI ZIP CODE	



# Exempt Employee Pay Deductions

You can deduct for:

1. Absence from work for one or more full days for personal reasons, other than sickness or disability;
2. Absences due to sickness/disability of a full day if the deductions are made under a *bona fide* plan, policy or practice of providing replacement pay for these types of absences;
3. No deductions, only offsets, for jury fees, witness fees, or military pay;



## Exempt Employee Pay Deductions continued

4. Deductions of any type may be 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 (*e.g.*, sexual harassment, workplace violence);
6. Proportional rate of full salary for time actually worked in the first and last weeks of employment; and
7. Any unpaid leave taken pursuant to the Family and Medical Leave Act.



# Loss of the Exemption?

## General store manager

- Required to work a minimum of 50 hours/week and minimum 5 days/week
- Paid a salary of \$625/week
- One week, manager was unable to work 50 hours during the week and was docked \$31.20 off her weekly salary
- A month later, company reimbursed her after receiving notice of the allegedly improper deduction
- Company's employee handbook included a policy prohibiting improper deductions from an exempt, salaried employee's pay



# Vote

**Does this deduction result in loss of the exemption?**

- A. Exemption Lost**
- B. Exemption Not Lost**



## Real Case

### Company did not lose exemption:

- Written handbook policy expresses intent not to make improper deductions
- Pay deduction occurred only once – isolated instance
- No policy or practice of treating as hourly
- Company reimbursed her

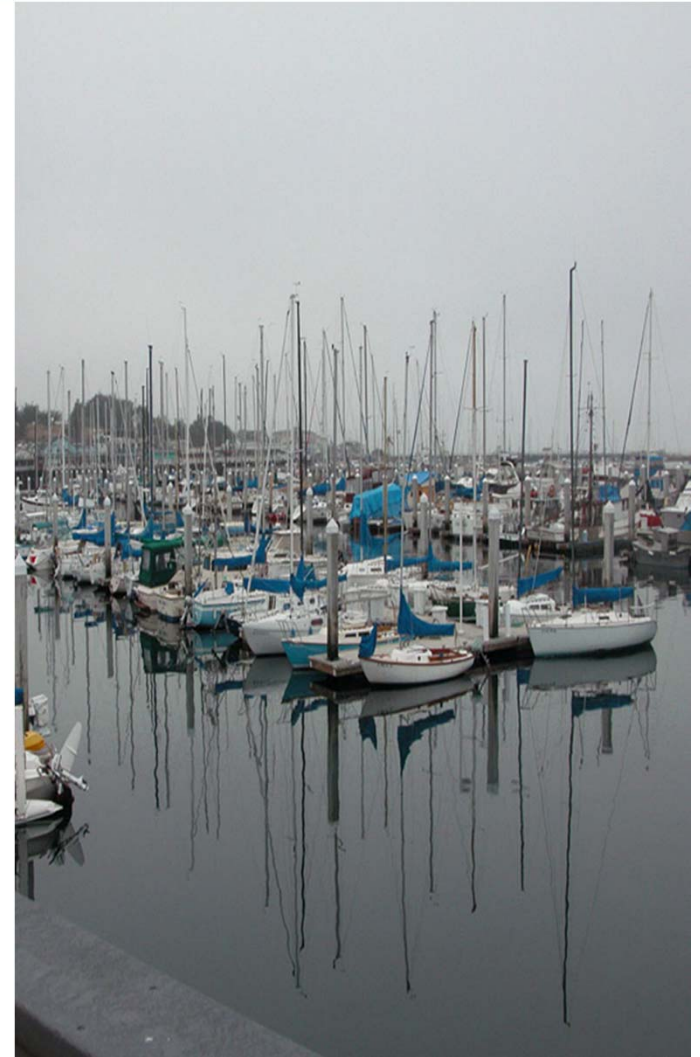
*Ellis v. J.R.'s Country Stores, Inc.*, No. 12-cv-01916 (D.Colo. July 12, 2013)





# Safe Harbor for Pay Deductions

- Safe harbor for inadvertent and isolated improper deductions if:
  - Written policy concerning deductions
  - Written notice of policy given to employees
  - Policy contains complaint procedure
  - Employer responds and rectifies errors
  - Full reimbursement made



# Comp Time

- For private employers, all wages must be paid for the pay period at issue and “make-up time” cannot be extended outside the work week
- For public employees, “compensatory time” can be accrued up to specific limits, must be reasonably available for use, and must be paid out on termination



## Acceptable Make-Up Time?

- **Scott and Dean are non-exempt employees for a private employer. They want to take off early on Friday because Dean is struggling with finding a birthday gift for his wife, and Scott offered his help in the shopping. To make it up, they propose to work 10 hours the following Monday. You're fine with the plan, but don't want to pay them overtime.**
- **Do you have to?**



# Vote

**Do you have to pay them overtime?**

- A. Yes, you must pay their full wages this week and pay overtime next week**
- B. Yes, you must pay overtime next week but you may deduct the hours missed this Friday**
- C. No, they agree to make-up the time off so no overtime is triggered**
- D. I don't know**



# Answer

**B is correct.**

**Overtime for non-exempt employees is calculated on a per work week basis.**



# What is Compensable Work Time?

- If employee is “on duty” he/she must be paid, even if idle
- Machinery breakdown
- Necessary supplies not available
- Weather conditions prevent working
- Is employee waiting to be engaged, being engaged to wait?
- Idle time during travel may be treated differently





## Must This Time Be Paid?

- Mark performs maintenance on office equipment for customers on their premises.
- He has an 8:00 a.m. appointment but when he arrives, the customer's office is closed.
- While waiting, the customer calls to let him know that she is stuck in traffic and won't be able to let him in until 9:00. That does not give him enough time to go on in to the office and return, so he goes to a café for pancakes instead.
- Should Mark's employer pay him for the hour during which he was waiting for the customer to show up?



## Vote

**Should Mark's employer pay him for the hour during which he was waiting for the customer to show up?**

- A. No, Mark ate pancakes instead of working so no pay is required**
- B. No, Mark's workday began at 9:00am when the client arrived so no need to pay from 8:00am**
- C. Yes, Mark was waiting for the customer and couldn't do other work so needs to be paid for wait time**
- D. I don't know**



# Answer

## Close call

- What time did Mark's workday begin? He was required to be at the customer's office, ready to work, at 8:00 a.m., so that is when his workday began.
- Was he was "being engaged to wait" or "waiting to be engaged?" Best answer is being engaged to wait because he was not able to use his time for other purposes.
- Mark should be paid for the hour during which he waited for the customer to show up



# Intern or Employee?

- College students agree to provide unpaid services to a company
- Students perform low-level tasks, such as answering phones, making deliveries, picking up paychecks for other employees, etc.
- Company provides training on how to perform these tasks but not on overall business
- Students receive academic credit
- No expectation of receiving a job at conclusion of service



# Vote

**Are the students interns or employees?**

- A. Unpaid interns - they receive academic credit**
- B. Unpaid interns - they agreed they won't be paid for their services**
- C. Employees – they performed work that other employees would have to do**
- D. I don't know**



## Real Case

- **Similar to Fox Searchlight intern case**
- **Employees - work did not primarily benefit interns, company did not provide training on the operational aspects of the business, and other employees would have had to perform these tasks**
- **Workers cannot waive FLSA coverage**
- **Case is on appeal so stay tuned**

*Glatt v. Fox Searchlight Pictures, Inc.*, No. 11 civ 6784 (S.D.N.Y. June 11, 2013)





# State and Local Wage & Hour Issues

- Minimum wage – higher than federal
- Overtime exemptions – defined differently than under FLSA
- Meal and break periods
  - Are meals and breaks required
  - Paid or unpaid?
- Wage payment laws
  - How often must workers be paid
  - When must final paycheck be made
  - What must be included in itemized wage statement





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# Liability For FLSA Violations

- “Any person acting directly or indirectly in the interest of the employer in relation to the employee” ...
  - Power to hire and fire
  - Control over schedule of work or conditions of employment
  - Maintenance of records
  - Control over method or rate of payment
  - Control over business enterprise (more than one business for common purpose)
- Possible criminal penalties too



# Take-Aways

- DOL is cracking down on FLSA violations
- Private FLSA lawsuits on the rise
- Misclassifications and other FLSA violations are costly!
- Perform regular audits to ensure compliance:
  - Employee vs. independent contractors
  - Exempt vs. non-exempt
  - Pay deductions
  - Interns
  - Proper record-keeping



**Thank You!**

**QUESTIONS?**

