

# Hot Topics In Employment Law

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# Topics Covered

1. The Fair Labor Standards Act
2. Hiring and Termination
3. Recordkeeping and Personnel Files

# The Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) establishes:

- minimum wage,
- overtime pay,
- recordkeeping, and
- child labor standards

The FLSA affects full-time and part-time workers in the private sector and in Federal, State, and local governments.

# Basics of FLSA

- Federal minimum wage is \$7.25/hour
- Generally, non-exempt workers get time and a half for any hours worked over 40 in a week.
- Law makes a distinction between exempt and non-exempt employees.
- Wages required by the FLSA are due on the regular payday for the pay period covered.

# Two Positions: Is Overtime Required?

Your receptionist's regular hours are 8-5pm, M-F. She also works as an occasional delivery driver, on evenings and weekends.

- If she works more than 40 hours in a week between the two positions, do you have to pay her overtime?
- Could you classify her as having two different jobs to avoid overtime?
- Could you classify her time as a deliver driver as an independent contractor?

# Answer

The Fair Labor Standards Act (FLSA) requires that all of a worker's hours, including hours worked at a different location or in a different position, be counted toward when determining overtime pay. Even if an employee is performing two different kinds of work with different pay rates, the hours must be combined for overtime pay purposes.

# Joint Employment

- If two or more companies are both controlling the worker (i.e. they are “joint employers”) the hours worked for all joint employers during the workweek must be counted for overtime purposes.
- According to the Department of Labor, joint employment is most likely to exist when: (1) an employee has two or more separate but related or associated employers; or (2) one employer provides labor to another employer and the workers are economically dependent on both employers.
- This type of joint employer relationship are common in the construction business between General Contractors and subs and/or staffing agencies.

# Minors

- Youths 18 years or older may perform any job, whether hazardous or not, for unlimited hours;
  - Minors 16 and 17 years old may perform any nonhazardous job, for unlimited hours; and
  - Minors 14 and 15 years old may work outside school hours in various nonmanufacturing, nonmining, nonhazardous jobs under the following conditions:
    - no more than 3 hours on a school day,
    - 18 hours in a school week,
    - 8 hours on a non-school day, or
    - 40 hours in a non-school week.
    - Work may not begin before 7 a.m., nor end after 7 p.m., except from June 1 through Labor Day, when evening hours are extended to 9 p.m.
- Note: there are special rules for minors performing farm/agriculture jobs



# The Chipotle Case

- Three year investigation following the complaint of a parent.
- "Routinely" violating child labor laws between 2015 and 2019 at more than 50 Chipotle locations. Teenagers under 18 years old were forced to work without proper work permits, late into the night and for too many hours per day and week, according to the state.
- Chipotle agreed to pay a \$1.3 million fine for more than 13,000 child labor violations at several of its Massachusetts locations.
- The largest child labor penalty in Massachusetts's history.

# Recovering Wages Owed

- Wage and Hour Division of the DOL may supervise payment of back wages.
- The Secretary of Labor may bring suit for back wages and an equal amount as liquidated damages.
- An employee may file a private suit for back pay and an equal amount as liquidated damages, plus attorney's fees and court costs.
- The Secretary of Labor may obtain an injunction to restrain any person from violating the FLSA, including the unlawful withholding of proper minimum wage and overtime pay.
- Statute of Limitations is 2 years unless willful, then 3 years.

# Penalties for OT Violations

- Employers who willfully or repeatedly violate the minimum wage or overtime pay requirements are subject to a **civil money penalty** of up to \$1,000 for each such violation.
- Violators of the child labor provisions are subject to a **civil money penalty** of up to \$10,000 for each young worker who was employed in violation.
- Willful violations of the FLSA may result in **criminal** prosecution and the violator fined up to \$10,000. A second conviction may result in imprisonment.

# Pay Deductions Limitations

- Deductions made from wages for such items as cash or merchandise shortages, employer-required uniforms, and tools of the trade, are NOT legal to the extent that they reduce the wages of employees below the minimum rate required by the FLSA or reduce the amount of overtime pay due under the FLSA.
- Pay deductions must be specifically authorized by the employee in writing for a specific amount (required by NC DOL).
  - Can't use a blanket authorization.
  - Employee can revoke authorization.

# Tipped Employees

- The employer may consider tips as part of wages, but the employer must pay at least \$2.13 an hour in direct wages.
- The employer who elects to use the tip credit provision must inform the employee in advance and must be able to show that the employee receives at least the applicable minimum wage when direct wages and the tip credit allowance are combined.
- If an employee's tips combined with the employer's direct wages of at least \$2.13 an hour do not equal the minimum hourly wage, the employer must make up the difference.
- Employees must retain all of their tips, except to the extent that they participate in a valid tip pooling or sharing arrangement.

# Comp Time

Comp time: when an employee is given time off instead of overtime.

- Only applies to government employers, state, local and federal.
- Private employers including non-profits cannot use comp time in lieu of overtime.

# FLSA Does Not Require

- Vacation, holiday, severance, or sick pay;
- Meal or rest periods, holidays off, or vacations;
- Premium pay for weekend or holiday work;
- Pay raises or fringe benefits;
- A discharge notice, reason for discharge, or immediate payment of final wages to terminated employees; and
- Does not limit the number of hours in a day or days in a week an employee may be required or scheduled to work, including overtime hours, if the employee is at least 16 years old.

# Types of Workers

- Exempt vs. Non-Exempt
  - Legally defined
- Independent Contractors
- Full-time, part-time, temporary, seasonal, probationary
  - Largely defined by employer



# Exempt vs. Non-Exempt

- Nonexempt employees are entitled to overtime pay; exempt employees are not.
- For most employees, to be exempt depends on:
  - **how much they are paid (\$684/week or \$35,568/year)**
  - how they are paid (on salary basis), and
  - what kind of work they do (perform exempt job duties)
- 5 categories of exempt employees:
  1. executive,
  2. administrative,
  3. professional,
  4. outside sales employees and
  5. some computer employees

# Executive Exemption

- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

# Administrative Exemption

The administrative exemption is designed for relatively high-level employees whose main job is to "keep the business running."

1. office or nonmanual work,
2. which is directly related to management or general business operations of the employer or the employer's customers, and
3. a primary component of which involves the exercise of independent judgment and discretion
4. about matters of significance.

# Professional Exemption

## 1. Learned Professional:

- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

## 2. Creative Professional:

- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

# Outside Sales Exemption

- The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- The employee must be customarily and regularly engaged away from the employer's place or places of business.

# Computer Based Exemption

The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below.

The employee's primary duty must consist of:

1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
2. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
3. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
4. A combination of the aforementioned duties, the performance of which requires the same level of skills.

# Blue Collar Rule

- The exemptions provided by FLSA apply only to “white-collar” employees who meet the salary and duties tests.
- The exemptions do not apply to manual laborers or other “blue-collar” workers who perform work involving repetitive operations with their hands, physical skill and energy.
- Non-management employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime pay under the FLSA, and are not exempt no matter how highly paid they might be.

# Steady Paycheck?

Terrance, a front office employee who handles mail, answering phones, attending to customer who come through the door and occasionally troubleshooting IT issues, would like to be paid on a salary basis rather than hourly?

1. Is Terrance a non-exempt employee?
2. Can you pay him on a salary basis? If so, how?



# Answer

- Non-exempt employee because does not fit into any of the exceptions including administrative. Not exercising discretion about matters of significance to the company.
- You can't pay him on a salary basis but can pay him a steady amount but still must:
  - Track time every day (in, out, breaks)
  - Pay an hourly wage and overtime if over 40 hours in a week
  - Have clear and consistent policy regarding time off

# Contractor Rules

FLSA applies to employees, not independent contractors

There is no one test for whether someone is an independent contractor but both the DOL and the IRS consider certain factors, including:

- The extent to which the services rendered are an integral part of the principal's business.
- The permanency of the relationship.
- The amount of the alleged contractor's investment in facilities and equipment.
- **The nature and degree of control by the principal.**
- The alleged contractor's opportunities for profit and loss.
- The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
- The degree of independent business organization and operation.

# Misclassification Liability

## If unintentional

- A \$50 fee for each W-2 that was not filed
- 1.5% of the employee's wages, plus interest
- 40% of the employee's FICA (Social Security and Medicare) contributions

## If intentional

- 100% of the employer's matching FICA contributions
- 20% of all employee wages paid
- 100% of FICA contributions for both employee and employer
- Up to \$1,000 in criminal penalties per misclassified employee
- Up to 1 year in prison
- Individual liability

# Hiring

A single bad hire  
can cost an  
employer more  
than \$50,000

- Create consistent interview process and stick with it.
  - Don't just hire a warm body
- Ask the Right Questions within the confines of the law.
- Start with an accurate, clear job description.
- Make sure your interview process looks for a “cultural fit.”
- Be sure to check references and former employers.

# Do NOT Ask About

- Age
- Arrest Record
- Children/Family
- Marital Status
- Credit Rating/Financial Data
- Disability
- Physical Data
- Gender
- Race/Ancestry/National Origin/Religion
- English Language Skills
- Type of Military Discharge
- Affiliation in Organizations

# Interview Questions

- Limit questions to those essential for determining if a person is qualified for the job; information regarding race, sex, national origin, age, and religion are irrelevant in such determinations.
- The ADA prohibits making pre-offer inquiries about disability.
- Avoid questions that may indicate an applicant's race, sex, national origin, disability status, age, religion, color or ancestry if answered, such as club affiliations, and societies.
- Employers should not ask for a photograph of an applicant. If needed for identification purposes, a photograph may be obtained after an offer of employment is made and accepted.
- Questions about marital status and number and ages of children are frequently used to discriminate against women and may violate Title VII if used to deny or limit employment opportunities.

# Clear and Accurate Job Descriptions

- Include skills, training and education that are needed
- Address all aspects of the position
- Use job description to assess and document employee performance
- Job descriptions are used for both ADA and FMLA

# Performance: Treat Every Infraction as Important

- Performance review system
- Correction plans for performance improvement
- Address issues that arise immediately
- Don't be afraid to be honest-be direct and don't sugarcoat issues
- Document all performance issues
  - Important for regular employee reviews/feedback
  - Key in government investigations or lawsuits



# Termination Considerations

- Confirm employment is at-will
  - Can be modified by contract, offer letter or law
- Is employee a member of a protected class?
  - Examine termination patterns
- Does employee have an outstanding complaint? What about retaliation?
- Share only enough to terminate; limit long explanations
- Consider offering employee the option to resign
- Consider separation agreement and release of claims

# Return of Company Property

- The employer should take care to ensure that the employee has returned all confidential information and company property\*, and has not downloaded confidential and sensitive information.
- Employers may, for example, wish to consider disabling the employee's access to its computer systems and other property just as the termination is being implemented.

Note: Does employer have authority to deduct from employee's paycheck?

# Documentation/Files

- Personal files
- Confidential files
- Medical Files
- FLSA

# Personnel Files

- Recruiting/screening documents: applications, resumes and educational transcripts
- Employee offer letters and contracts
- Job Description
- Performance Reviews
- Disciplinary Issues and Improvement Plans
- Records relating to job offers, promotion, demotion, transfer and layoffs
- Pay and compensation information
- Handbook and policy acknowledgments
- Termination notice and documentation

# Confidential File

- Drug testing/screening
- Requests for employment/payroll verification
- Workplace investigation records
- Litigation documents
- Child support/garnishments
- Background checks
- Reference checks

# Medical File

- ADA and FMLA paperwork
- Medical records (medical questionnaires, benefit claims, doctor's notes, accommodation requests, medical leave records, workers' compensation claims)

Note: Immigration (I-9) should be in an Immigration file

# FLSA Required Recordkeeping

- Personal information, including employee's name, home address, occupation, sex, and birth date if employee is under 19 years of age;
- Hour and day when workweek begins;
- Total hours worked each workday and each workweek;
- Total daily or weekly straight-time earnings;
- Regular hourly pay rate for any week when overtime is worked;
- Total overtime pay for the workweek;
- Deductions from or additions to wages;
- Total wages paid each pay period; and
- Date of payment and pay period covered.

# Contact Information

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