Overview
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Topics for today:

• Why wage and hour issues matter
• FLSA basics
• Key wage and hour concerns for 2009 and beyond
• Five rules for managing these issues effectively
Why Wage And Hour Issues Matter
Why Wage And Hour Issues Matter

- FLSA collective actions have increased four fold since 1997, overtaking EEO claims in 2001 as most common class employment cases in federal court
- DOL estimates that approximately 70% of employers are not in compliance
- DOL collected $220.6 million in back wages in FY 2007, and $1.4 billion since 2001
- Ten largest wage and hour settlements in 2008 totaled more than $252 million
Why Wage And Hour Issues Matter

• Attractive cases for plaintiffs’ attorneys
  ➢ Relatively easy to get class certified
  ➢ Employer bears many of the burdens of proof
  ➢ Intent is ordinarily not much of an issue
  ➢ Many employers have not focused sufficiently on compliance
  ➢ Pay practices are often relatively similar throughout an industry
Why Wage And Hour Issues Matter

- Plaintiffs’ bar is focused on wage and hour issues
- Acting ethically does not ensure compliance
- Good faith may have some bearing on how much an employer owes for violating the law, but it ordinarily does not eliminate liability
- Employers need to address these issues before DOL or a private attorney is knocking at the door
Why Wage And Hour Issues Matter

- DOL has recently announced that it is adding 250 new wage and hour investigators, more than a 30% increase.
- The new Administration is much more likely to favor punitive enforcement over compliance assistance.
- Potential legislative and regulatory changes may make it even more challenging to be an employer.
FLSA Basics
FLSA Basics

- Two-year statute of limitations; in some instances, DOL or plaintiffs’ counsel seek tolling agreements
- Where plaintiffs or DOL can establish a “willful” violation, statute of limitations is three years
- Attorneys’ fees and costs for prevailing plaintiff
• Liquidated damages equal to the amount of back wages due, effectively doubling the back wage liability subject to the court’s discretion to award a lesser amount where employer proves good faith

• DOL can issue civil money penalties of $1,100 per violation for repeated or willful violations
Key Wage And Hour Concerns For 2009 And Beyond
Key Wage And Hour Concerns

Big-picture issues:

• Exempt versus non-exempt
• Independent contractor versus employee
• Off-the-clock time
• Disruptions to normal work routine: pandemic flu and furloughs
Key Wage And Hour Concerns

Exempt versus non-exempt:

• Courts construe exemptions narrowly
  “To extend an exemption to other than those *plainly and unmistakably within its terms and spirit* is to abuse the interpretative process and to frustrate the announced will of the people.”

• Be aware of drift in job duties as staffing levels change or business evolves
Key Wage And Hour Concerns

- Administrative employees
  - Primary duty must be “work directly related to the management or general business operations of the employer or the employer’s customers”
  - Must exercise “discretion and independent judgment with respect to matters of significance”
Key Wage And Hour Concerns

• Administrative employees (cont’d)
  ➢ Employees must be responsible for important decisions
  ➢ Production workers ordinarily are not exempt
  ➢ Use this exemption sparingly
  ➢ If there is any doubt, classify the employee as non-exempt
Key Wage And Hour Concerns

• Information technology employees
  ➢ This exemption covers “computer systems analysts, computer programmers, software engineers or other similarly skilled workers”
  ➢ Exempt positions ordinarily involve systems design, programming, or other creative work
  ➢ Not for basic help desk or tech support positions
Key Wage And Hour Concerns

- Executive employees
  - Must supervise other employees of the same employer
  - DOL takes the position that supervising independent contractors is not sufficient
  - Watch out for staffing cuts that bring supervision below 80 hours per week
Key Wage And Hour Concerns

**Independent contractor versus employee:**

- National enforcement priority for DOL
- Misclassification is common in certain industries
  - Construction
  - Janitorial
  - Hospitality
  - Landscaping
  - Delivery
Key Wage And Hour Concerns

- Watch out for potential indicators of misclassification
  - ICs doing same work as employees
  - ICs doing work for which other businesses use employees
  - ICs performing production work
  - ICs without staffing freedom
  - ICs without other customers
Key Wage And Hour Concerns

Off-the-clock time:

• Supervisors shaving time or requiring off-the-clock work

• Preliminary / postliminary tasks
  ➢ Donning and doffing?
  ➢ Security checks?
  ➢ Logging onto and off of computer

• Lectures, meetings, and training

• Breaks and meals (including state-law requirements)
Key Wage And Hour Concerns

• Tasks away from the workplace
  ➢ Travel
  ➢ BlackBerry
  ➢ Telephone calls
  ➢ Checking voice mail
  ➢ Paperwork at home
  ➢ Logging onto the network from home
  ➢ On-call time
Disruptions to normal work routine—pandemic flu and furloughs:

- Exempt employees: main concern is compliance with “salary basis” test
  - If an employee performs any work during a workweek, he or she is entitled to the full weekly salary
  - Workplace closures (including for weather) or furloughs for less than a full workweek do not allow employers to pro-rate the weekly salary
Key Wage And Hour Concerns

- Exempt employees (cont’d):
  - Under federal law an employer can have a worker use PTO or other paid leave so long as the worker receives money equal to the weekly salary (check state law)
  - If the workplace is open but a worker elects to stay home as a precaution (e.g., because others may be sick, or due to weather), the employer may pro-rate the salary
Key Wage And Hour Concerns

• Exempt employees (cont’d):
  
  ➢ For full-day absences due to sickness or disability, whether an employer can pro-rate salary depends on whether there is a bona fide plan, policy, or practice of providing compensation for lost salary
  
  ➢ Remember: no salary deductions for partial-day absences unless the absences are pursuant to the Family and Medical Leave Act
Key Wage And Hour Concerns

• Exempt employees (cont’d):
  
  ➢ Be careful about reducing salaries prospectively if work schedule also changes
    
    ✓ Generally permissible so long as salary does not change too often

    ✓ There is some authority suggesting that this is a problem, especially if salary and hours change proportionately
Key Wage And Hour Concerns

• Non-exempt employees: main concern is tracking hours worked
  ➢ Becomes an issue if an employer allows employees to work from home or other remote sites
  ➢ Need to devise policies regarding what tasks workers are authorized to perform remotely, in what quantity, and at what times
Key Wage And Hour Concerns

• Non-exempt employees (cont’d):
  ➢ Need to develop protocols for accurately tracking and recording hours worked remotely
  ➢ Do not rely on exception reporting
  ➢ Require workers to maintain and to report hours worked on a daily basis
  ➢ Monitor working time closely
  ➢ Have a strong policy barring off-the-clock work
Five Rules For Managing These Issues Effectively
1. Adopt a culture of compliance

- Treat wage and hour compliance as an essential component of overall risk management
- These issues are no less a ticking time bomb than pervasive discrimination, occupational safety and health hazards, and other multi-million-dollar contingent liabilities
- Wage and hour concerns need to be on your radar screen every day
Five Rules

2. Know your policies and practices

• Do your corporate-level policies contain non-compliant elements?
• Do you comply with all applicable state laws as well as federal standards, including recent changes?
• What is happening away from the corporate office in the field in terms of local variations and deviations in practice?
3. Watch out for incentives that can lead to off-the-clock work

- Labor budgets, especially declining ones as profit margins tighten and the same work still needs to get done
- Bonuses or other compensation tied to efficient use of labor
- Performance ratings tied to minimizing labor costs, including overtime costs
4. Train everyone regularly

• Managers and supervisors need to understand that their authority to improve profitability does not extend to violating wage and hour rules.

• Workers need to be informed that nobody has the authority to direct them to work off the clock.

• Training at least annually is essential, and perhaps more frequently in high-turnover industries.
5. Automate where possible

- Manually entering time and scheduling information involves a high risk of error
- The fewer technical wage and hour rules managers, supervisors, and hourly workers need to keep in mind, the better
- Computer systems can track overtime standards, child labor restrictions, meal and rest periods, and more
Thank you!

Paul DeCamp
Jackson Lewis LLP
10701 Parkridge Boulevard
Suite 300
Reston, Virginia 20191
(703) 483-8305
DeCampP@jacksonlewis.com
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