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How To Avoid Costly Wage and Hour Lawsuits and Agency Investigations

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Why Should Businesses Care About Wage and Hour Laws?

- Compliance with wage and hour laws is crucial!
- Department of Labor (DOL) investigations and employee lawsuits can cost businesses a pretty hefty amount.
- Average cost to defend wage and hour lawsuit is approximately \$50,000 to \$100,000 and on the rise.
- More surprise visits from DOL investigators.
- If violations are found, employers may owe back pay, face penalties, and may be required to make changes in their practices in order to avoid future violations.

Highlights of The Fair Labor Standards Act (“FLSA”)

- **Federal Minimum Wage:** \$7.25 as of July 24, 2009
 - Please note that Georgia’s minimum wage is \$5.15 per hour, however, with some limited exceptions, the federal minimum wage rate applies and is recommended.
 - A minimum wage of \$4.25 per hour applies to young workers under the age of 20 during their first 90 consecutive calendar days of employment with an employer. After 90 consecutive days of employment or the employee reaches 20 years of age, whichever comes first, the employee must receive a minimum wage of \$7.25
- **Overtime:** General Rule – 1.5 times regular hourly rate

The Fair Labor Standards Act (Cont'd)

- **Child Labor** - As a general rule, the FLSA sets 14 years of age as the minimum age for employment, and limits the number of hours worked by minors under the age of 16. Employers must determine a minor's age and set his/her job duties and work schedules accordingly and carefully. Also, employers must file minor employee's age certificate, keeping it for as long as minor is employed.
- **Statute of Limitations: Two Years**
 - Willful – 3 years (knew or showed reckless disregard – e.g. failed to become familiar with the law)
- **Recordkeeping:**
 - Must keep payroll records and time records for 3 years for non-exempt employees
 - Must keep payroll data but not actual hours worked for exempt employees
 - Must keep basic time and earning records or sheet for the preceding 2 years
 - Must POST the Department of Labor Notice(s)
- **More Generous State wage/hour laws ALWAYS prevail**

Fair Labor Standards Act (Cont'd)

- Who Is Subject to the FLSA?
- Almost all private and public employers – Two tests:
 - (1) individual coverage → employees engaged in commerce/production of goods for commerce; or
 - (2) enterprise coverage → annual business of \$500,000+, 2 or more employees engaged in interstate commerce/production of goods for interstate commerce
- Exempt v. Non-Exempt Employees
 - Specific types of employees are exempt: bona fide executive, administrative, professional, outside sales, highly compensated
- Independent Contractors not subject to FLSA

Trigger Areas

- Currently certain types of claims are more popular than other types.
- Three key wage and hour law areas that usually get employers in trouble and in fact account for the bulk of wage and hour litigation and agency investigations in this country:
 - Improper classification of employees as independent contractors
 - Improper classification of employees as exempt; and
 - Use of Interns/Volunteers

The Dangers of Misclassification

- Misclassification of employees can lead to substantial liability for employers.
- Two types of worker classifications that are routinely misunderstood:
 - **Exempt v. Non-Exempt under the FLSA**
 - **Employee vs. Independent Contractor**

EXEMPT VS. NON-EXEMPT

- FLSA provides exemptions from both minimum wage and overtime pay for certain employees who meet specific requirements. **Note: Salaried employees are not always exempt...**
- **Requirements – Three Tests**
 - 1) **Salary Basis Test:**
 - The term “salary” has a specific meaning under the FLSA – it doesn’t just mean “not hourly”
 - Employee receives predetermined amount each pay period
 - Salary must be guaranteed, free and clear, and cannot be reduced because of quantity or quality of work
 - Employee must be paid full salary for any week in which employee performs any work. If employee is ready and willing to work, s/he must get entire salary for the week, with very limited exceptions
 - **Practice of making improper deductions from salary will result in loss of exemption**

Exempt vs. Non-Exempt (Cont'd)

2) **Salary Level Test:** At least \$23,600 per year or \$455 per week

3) **Duties Test:**

- Analysis must focus on what employees actually do
- Job titles/descriptions are only some evidence and not conclusive
- Desk audits to determine actual duties are preferred.
- For example, insurance claims adjusters generally meet the duties requirements for the administrative exemption and are not entitled to overtime pay if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.
- The status of an insurance claims adjuster, however, does not rely on the “claims adjuster” job title alone. There must be a case-by-case assessment to determine whether the employee’s duties meet the requirements for exemption.

Common Exemptions

- **White Collar Exemptions**
 - **Executive**: management, authority to hire/fire or make recommendations , supervise 2 or more employees
 - **Administrative**: office or non-manual work, discretion, independent judgment
 - **Learned Professional**: Advanced knowledge, discretion and judgment, intellectual, invention, originality
 - **Creative Professional**
- **Computer Employee Exemption**: must be paid salary of at least \$455 or hourly rate of at least \$27.63 (programmer, engineer, analyst)
- **Highly Compensated Exemption**: \$100,000 and over, plus one of white-collar duties above.
- **Outside Sales Exemption**: commission, customarily and regularly engaged away from office (e.g. pharmaceutical sales reps, mortgage brokers etc.)
- **Commission Sales Exemption**: commission salespersons in retail or service establishments are exempt if 1) regular rate of pay is more than 1.5 times the applicable minimum wage; 2) more than half of employee's wages for a representative period of not less than 1 month represents commissions (does not include internet, mail or telephone sales)

EMPLOYEE VS. INDEPENDENT CONTRACTOR

- A Department of Labor (DOL) study says up to 30% of employers misclassify workers. The IRS claims lost revenue of billions annually.
- Needless to say, misclassification of employees as independent contractors is an increasingly active IRS and DOL target and top enforcement priority, so it's an issue that employers can't ignore, especially since the cost of getting it wrong is so high.
- Properly classify your workforce or face DOL and/or IRS audits.
- It may be less expensive to engage contractors instead of hiring employees, but the cost of misclassifying workers isn't worth the risk if you get slapped with payroll tax violations, back taxes, hefty legal penalties, costly fines and tremendous litigation exposure down the road.

Defining Independent Contractor

- **Unfortunately there is no bright line test. Instead the determination requires a balancing number of factors. Agencies have different tests: the DOL uses a 7-criteria test, the IRS uses a 20-factor test.**
- **Both tests essentially require:** independent judgment, autonomy, freedom from control or direction over the performance of services, worker's investment in facilities and equipment
- **What can you do? We recommend the following:**
 - Consider contracting only with contractors who have incorporated or have established business structure; have multiple workers, have a business address
 - Do not have contractors fill out applications or other new hire paperwork; do not create personnel files
 - Do not issue employee handbooks or policies re benefits, attendance
 - Do not provide benefits including paid leave or vacation
 - Avoid excessive integration of contractors with employees: doing same work, working side by side, etc
 - Do not have contractors supervising employees or vice versa
 - Do not pay contractors via payroll services

Interns – Paid or Unpaid?

- What criteria must an internship meet to qualify for “unpaid internship”?
- The FLSA defines the term “employ” very broadly as including to “suffer or permit to work.” Covered and non-exempt individuals who are “suffered or permitted” to work must be paid under the law for the services they perform for an employer.
- Interns in the private sector will most often be viewed as employees, unless they meet the requirements for trainees. Interns who qualify as employees rather than trainees typically must be paid at least the minimum wage and overtime compensation for any hours worked over forty in a workweek.

Intern = Trainee

- The determination of whether an intern/trainee is subject to the FLSA and should be paid depends upon the totality of the facts and circumstances. The following six criteria must be considered when making this determination:
 - The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
 - The internship experience is for the benefit of the intern;
 - The intern does not displace regular employees, but works under close supervision of existing staff;
 - The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
 - The intern is not necessarily entitled to a job at the conclusion of the internship; and
 - The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.
- If all of the criteria listed above are met, an employment relationship does not exist under the FLSA, and the Act's minimum wage and overtime provisions do not apply to the intern.

Scenarios

- 1. Stella, a hard-working administrative assistant, helps with filing, telephone calls and other miscellaneous tasks around the office as needed. She is paid a weekly salary of \$500. Is she exempt from overtime pay requirements?
- 2. Company X has signed agreements with most of his workers explicitly saying they are independent contractors, not employees. Those workers also want to be independent contractors. Does that mean they are definitely contractors?
- 3. Company Y has a clear policy against working overtime without permission. John Wayne, a machinist, worked an extra hour every day the week before Valentine's Day without his supervisor's consent because he wanted to make extra money to buy his girlfriend, Maureen, something special for Valentine's day. Does Company Y have to pay for overtime hours worked without permission?

Answers

- 1. No. Her duties do not qualify for any exemption. It doesn't matter if you pay workers a weekly salary. What really matters is what they do for you.
- 2. No. It's not that simple, a number of factors are assessed in determining whether an individual is an employee or independent contractor. Even if an employee demands to work under the label of independent contractor rather than employee, that's not a defense to potential misclassification claims.
- 3. Yes, Company Y has to pay John Wayne for overtime hours. This is another common misconception about overtime pay. You can discipline, and you should, but you still have to pay an employee for any hours worked.

Preventing Problems And Staying Out of Federal Agencies' Sight

- Take the time to understand your obligations under the FLSA
- Ensure employees properly record their time worked
- Ensure that overtime is properly calculated
- Ensure managerial employees have training required to properly implement pay practices
- Audit exemption classifications, pay practices and procedures
- Respond immediately and seriously to any wage and hour complaints
- Thoroughly explain pay practices and procedures to employees
- Pay your interns, unless they meet the trainee test. Check with employment counsel before implementing or changing a pay practice
- Engage employment counsel promptly before making important employment decisions
- **Remember: Wage and Hour Law violations are like termites – where there is one, there are almost always more...**

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