

2016 CICBN– WAGE AND HOUR ISSUES

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STATUTORY BACKGROUND

- Fair Labor Standards Act – federal law
- Enacted in 1938 – revisions in 1958, 1961, 1963, 1967, 1970, 1973, 1975, and 2004
- 2014 – President directed DOL to update regulations defining “white collar” and OT standards

STATUTORY BACKGROUND

- Iowa Code Chapter 91D – Iowa law – consistent with federal law

ENFORCEMENT

- Iowa Code Chapter 91A – Wage payment collection law - individual cause of action
- Iowa and U.S. Departments of Labor – agency investigation and enforcement

MINIMUM WAGE/MAXIMUM HOURS

- \$7.25 per hour for hours up to 40 in one work week
- “time and one-half” or 1.5 times regular rate for hours worked over 40 – may increase with labor agreements, contracts, policies, special arrangements like 8/80
- Note: federal contracts and local laws may vary – be sure to check



RECORDS TO MAKE AND KEEP

- No particular format required
- Must show rate, hours worked, pay and deductions
- Advance notice for special arrangements and deductions

RECORDKEEPING PROBLEMS

- Incomplete records
- Inaccurate records
- Employees keeping own records
- Lack of advance notice for pay arrangements and docking
- DOL investigations

NON-WORK TIME

- Time may be paid under policies, labor agreements
- Some time not calculated for overtime – PTO, holiday
- Work at home and “volunteer” time may be compensable if work is done

WORK TIME PROBLEMS

- “suffered or permitted to work” – if employee is working, pay is due
- Work from home
- “Volunteer work”
- Off the clock work
- Breaks

WORK TIME PROBLEMS

- On-call time
 - on-premises living requirements;
 - excessive geographical restrictions on employee movements;
 - frequency of calls;
 - fixed time limit for response;
 - ability to trade on-call responsibilities;
 - use of pager as easing restrictions;
 - actual ability to engage in personal activities.

WORK TIME PROBLEMS

- Travel time

- There is an exception if an employee is called during off hours to travel a substantial distance to service a customer. The DOL has not taken a position on emergency calls. .
- Special one-day work assignments from the point of departure to the point of arrival are compensable.
- Travel as part of a normal workday are compensable
- Travel away from home is compensable if it occurs during the regular work hours. If an employee works 8 a.m. to 5 p.m. Monday through Friday, and travels during the weekend between 8 a.m. and 5 p.m., this time is considered work time.
- If an employee actually works during travel time, the time spent working is compensable.
- The continuous workday rule: time spent donning and doffing protective work gear, walking to and from the production floor, are compensable work activities “integral and indispensable” to the employer’s “principal activity”.



COMP TIME

- Each of the following criteria must be met in order for a comp time policy to satisfy the FLSA requirements:
 1. The employee must be an hourly rate employee;
 2. The wage agreement must provide a fixed number of working hours per week (typically 40);
 3. The employees pay period must be bi-weekly, semi-monthly or monthly (not weekly);
 4. The compensatory time off must equal one and one-half hours for all hours worked over the fixed number of weekly work hours;
 5. The compensatory time off must be taken within the same pay period in which the compensatory time was accrued (an employer cannot expand pay periods or set up special pay period designations in an effort to get around this requirement. Special pay period designations are a clear violation of the FLSA requirements).

“REGULAR RATE” CALCULATION

- What is not added?
- What is added?
- Multiple jobs

EXEMPTIONS

- Salary required - \$455 per week
- Overtime not required
- Docking limited

NOTE: Current proposed rule would increase to \$921/week in 2015, \$970/week in 2016; increase “highly compensated” to \$122,148/year.

EXEMPTIONS - EXECUTIVE

- Primary duty
- Management
- Department or subdivision
- Customarily and regularly
- Supervise two or more other employees
- Factors of particular weight in consideration

EXEMPTIONS - EXECUTIVE

- Factors of particular weight in consideration – are there effective recommendations for supervised employees?
- Comparison: Family Dollar litigation – inconsistent decisions on whether store managers were exempt when performing non-exempt work – case by case analysis

EXEMPTIONS – HIGHLY COMPENSATED

- Total annual compensation of at least \$100,000
- At least \$455 per week paid on a salary or fee basis
- Perform office or non-manual work
- Customarily and regularly perform any one or more of the exempt duties identified in the standard tests for the executive, administrative or professional exemptions (1)



Make-Up Payment & Pro-Rating

- If an employee's total annual compensation does not equal \$100,000 by the end of the year:
 - The employer may, within one month after the end of the year, make one final payment to reach the \$100,000 level; or
 - The employee will be tested for exemption under the standard duties tests
- The \$100,000 may be pro-rated for employees who do not work the full year
- The employer may use any 52-week period as the year (1)



Office or Non-manual Work

- The highly compensated test is not available for
 - Non-management production line workers
 - Non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers
 - Other employees who perform work involving repetitive operations with their hands, physical skill and energy (1)

EXEMPTIONS - ADMINISTRATIVE

- Salary or fee basis - \$455/week
- Office or non-manual work directly related to management or general business operations of employer or customers
- Discretion and independent judgment with respect to matters of significance
- Highly compensated exemption available



EXEMPTIONS - ADMINISTRATIVE

Work “**directly related to management or general business operations**” includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, Internet and database administration; legal and regulatory compliance; and similar activities. ²



EXEMPTIONS - ADMINISTRATIVE

“General business operations of the employer’s customers” includes advising or consulting with employer’s clients or customers, for instance, as tax experts or financial consultants.²



EXEMPTIONS - ADMINISTRATIVE

Exemption depends on facts

Consider whether the employee has authority to:

- formulate, affect, interpret, or implement management policies or operating practices;
- carries out major assignments;
- perform work that affects business operations to a substantial degree;
- has authority to commit the employer in matters that have significant financial impact;
- whether the employee has authority to waive or deviate from established policies and procedures without prior approval. ²



EXEMPTIONS - ADMINISTRATIVE

“Matters of significance” include importance or consequence of the work performed – not necessarily financial ²



EXEMPTIONS - PROFESSIONAL

- Work requires advanced knowledge
- Science or learning
- Prolonged course of specialized intellectual instruction
- Creative, Teachers, Law, Medicine



EXEMPTIONS - COMPUTER

- Either salary or fee basis - \$455 per week or \$27.63 per hour
- Systems analyst, programmer, software engineer or other similarly skilled work
- Primary duty: systems application, design, development, analysis, etc.
- Not: manufacture or repair of hardware

PROBLEMS WITH EXEMPTIONS

- Improper pay docking
- Actual duties do not qualify
- Impact of loss of exemption

HEALTH CARE EMPLOYEES

- Doctors, technologists with degrees, RNs, PAs qualify as exempt if doing exempt duties
- Technicians, LPNs usually do not qualify
- 8/80 pay plan – may use for health care – must notify employees in advance

INDEPENDENT CONTRACTORS

- Economic reality test: from IRS – 20 factors
- No particular factor controls – degree of control is significant
- IRS and DOL have tightened interpretation on whether someone is truly an independent contractor

CLASSIFICATION PROBLEMS

- Job titles and descriptions are not controlling
- Changes in duties may require reclassification
- Salary payment is not controlling

CLASSIFICATION PROBLEMS

Pay docking

- personal reasons, other than sickness or disability
- bona fide plan, policy or practice of providing wage replacement benefits
- offset jury fees, witness fees, or military pay
- penalty for violating safety rules of “major significance”
- disciplinary suspension of full days for violations of workplace conduct rules, such as rules prohibiting sexual harassment or workplace violence
- first and last weeks of employment
- unpaid leave under the Family and Medical Leave Act.

CLASSIFICATION PROBLEMS

Pay docking

- Deductions for non-working time when work is not made available by the employer
- Deductions for absences from the workplace caused by the employer
- Deductions for absences from work of less than a whole day

PROPOSED RULE CHANGES TO EXEMPTIONS

DOL – July 6, 2015 issued notice of proposed rulemaking

❖ Why? Economy and relative pay changes make current exemptions ineffective relative to original intent

PROPOSED RULE CHANGES TO EXEMPTIONS

Status of rule changes – comment period has passed – changes may occur in 2016 with adoption of final rules



PROPOSED RULE CHANGES TO EXEMPTIONS

1. Increases to 40th percentile of FTE salaried workers
 - Current exempt salary level - \$455/week
\$23,660/year
 - 2015 proposed salary level - \$921/week
\$47,892/year
 - 2016 projected salary level - \$970/week
\$50,440/year

PROPOSED RULE CHANGES TO EXEMPTIONS

- Current highly compensated pay level -
\$100,000/year
- 2015 proposed pay level-
\$121,148/year

PROPOSED RULE CHANGES TO EXEMPTIONS

2. No changes to duties test - consideration of minimum time in exempt duties
3. Bonuses – DOL proposed 10% cap for meeting standard – nothing firm
4. No change to exemptions that do not require salary level – sales, computer, academia, physicians, judges, lawyers

FUTURE CHANGES TO RULES

1. Automatic updates – annual consideration of pay rates
2. Examples in the rules – occupation specific
3. Impact – anticipate 4,646,000 persons by changes in exemptions

IMPACT ON EMPLOYERS

- Need to assess job descriptions, essential functions, exempt functions
- Potential reclassification of jobs
- Establish hourly wage for reclassified positions
- Assess language in policies
- Additional recordkeeping and control of overtime

IMPACT ON EMPLOYEES

- Need to keep track of hours for OT and actual hours worked
- Be careful of “suffered or permitted to work”
- Different policies may apply to exempt and non-exempt employees

ENFORCEMENT

- Iowa and Federal Departments of Labor may enforce – if complaint received or if there is an administrative identification of industry or problem
- Individual employees may also bring suit
- NLRB – may be involved with policies and “concerted activities” of employees who discuss or take action concerning wages

Iowa Code Chapter 91A

Iowa enforcement statute

- General application to all employees
- General application to all forms of compensation and expense reimbursement
- Court may determine employer-employee relationship
- 2 year statute of limitations

Iowa Code Chapter 91A

1. Pay on next regular pay date after termination
2. Deductions are limited - legal requirements, items for benefit of employee – best practice is to notify and get consent
3. Notice and Recordkeeping requirements

Iowa Code Chapter 91A

Damages

- Unpaid compensation and expense reimbursement
- Attorney fees
- Liquidated damages for unpaid wages

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Source Materials

1. U. S. Dept. of Labor, Wage and Hour Division, “The Fair Labor Standards Act: Executive, Administrative and Professional Exemptions”
2. Fact Sheet #17C: Exemption for Administrative Employees under the Fair Labor Standards Act (FLSA), U.S. Wage and Hour Division (Revised July 2008)