

# Wage and Hour Compliance Check

Jackson Walker LLP

Scott McElhaney

[smcelhaney@jw.com](mailto:smcelhaney@jw.com)

214-953-6147

# The FLSA After 80 Years

- The FLSA was enacted in 1938, and over the past 80 years, it has had a dramatic impact on U.S. employees by ensuring that most receive at least a minimum wage for all hours worked and an overtime premium for hours worked in excess of 40 hours in a workweek.
- The FLSA, however, is rather technical in many respects, and companies should regularly survey their pay practices to ensure that they are meeting the Act's requirements.



# The FLSA After 80 Years

- Overview of the FLSA:
  - Covered employers must pay *Non-Exempt* employees:
    - Minimum wage
    - Overtime for all hours worked over 40 in a workweek
  - The Act sets out *exemptions* from the minimum wage and overtime pay requirements for certain white-collar employees who are paid on a salary basis.

# The FLSA After 80 Years

- Key challenges for compliance for *Non-Exempt* Employees include:
  - Ensuring that the Minimum Wage is paid for all hours worked
  - Ensuring that Overtime is correctly calculated

# The FLSA After 80 Years

- Key challenges for compliance for *Exempt* Employees include:
  - Meeting one of the FLSA's exemptions
  - Not losing an exemption because of a pay practice – Deductions

# Non-Exempt Employee Issues

- Ensuring Minimum Wage is Paid for All Hours Worked
  - Deductions from pay are not allowed if:
    - Items are primarily for the benefit or convenience of employer
      - The FLSA does not allow uniform costs , or other items considered to be primarily for the benefit or convenience of the employer, to be included as wages. Thus, an employer may not take credit for (i.e., deduct the cost of) such items in meeting his/her obligations toward paying the minimum wage
  - A deduction reduces employee earnings below required minimum wage
    - Examples of illegal deductions: deductions for tools, damages to property, cash register shortages

# Non-Exempt Employee Issues

- Ensuring Minimum Wage is Paid for All Hours Worked
  - Hours worked may include:
    - Time spent engaged to wait, on-call, in training, or travelling, as well as sleep time.
    - Work not requested but “suffered or permitted”
      - Off the clock work
      - Unapproved overtime

# Non-Exempt Employee Issues

- Ensuring Minimum Wage is Paid for All Hours Worked
  - Waiting Time:
    - Waiting time is work time if employee is unable to use the “waiting time” effectively for his or her own purposes
    - Waiting time is controlled by the employer
  - Time does not count as paid waiting time if:
    - The employee is completely relieved of duty
    - Break time is long enough for employees to use it for their own purpose



# Non-Exempt Employee Issues

- Ensuring Minimum Wage is Paid for All Hours Worked
  - On Call Time:
    - On Call Time is time worked if the employee must stay on premises, or be so close that the time cannot effectively be used for own purposes
    - On Call Time is not time worked if the employee merely has to provide contact information and the employee can use the time for his or her own purposes

# Non-Exempt Employee Issues

- Ensuring Minimum Wage is Paid for All Hours Worked
  - Breaks:
    - Short rest breaks (20 minutes or less) are work time
    - Meal periods (30 minutes or more) are not work time, but the employee must be completely relieved of duty

# Non-Exempt Employee Issues

- Ensuring Minimum Wage is Paid for All Hours Worked
    - Training time:
      - But training time is not work time if it is
        - Outside regular work hours
        - Voluntary
        - Not job related
- AND
- Does not involve productive work

# Non-Exempt Employee Issues

- Ensuring Minimum Wage is Paid for All Hours Worked
  - Travel time:
    - Ordinary commuting is not work time
    - Travel between job sites during normal work day is work time
    - Out of town travel has special rules

# Non-Exempt Employee Issues

- Ensuring that Overtime is Correctly Calculated
  - The Regular Rate is calculated based on all compensation paid in or for a workweek.
  - Compensation includes:
    - Wages (salary, hourly and piece rates)
    - Commissions
    - Certain bonuses
    - Tips received by eligible employees up to \$5.12 per hour (where the employer takes a tip credit)
    - Reasonable cost of room, board, other “facilities” provided by the employer for the employee’s benefit

# Non-Exempt Employee Issues

- Ensuring that Overtime is Correctly Calculated
  - The Regular Rate is calculated based on all compensation paid in or for a workweek.
  - Exclusions from the Regular Rate:
    - Gifts, discretionary bonuses
    - Payments for time not worked
    - Reimbursements for expenses
    - Profit sharing plans, stock options
    - Retirement and insurance plan contributions
    - Overtime premium payments

# Exempt Employee Issues

- Meeting One of the FLSA's Exemptions
  - To be exempt under the FLSA:
    - Salary Test: Employee must be paid a predetermined and fixed minimum salary that is not subject to reduction because of quality or quantity of work performed
    - Duties Test: Employee's job duties must primarily involve executive, administrative, professional or certain other duties as defined by the regulations

# Exempt Employee Issues

- Meeting One of the FLSA's Exemptions
  - To be exempt under the FLSA:
    - To be an exempt highly-compensated employee:
      - Employee is paid more than \$100,000 (current) per year
      - Employee performs office or nonmanual work
      - Employee customarily and regularly performs one identifiable executive, administrative or professional duty.



# Exempt Employee Issues

- Meeting One of the FLSA's Exemptions
  - Salary Test:
    - Currently \$455 per week (which equals \$23,660/yr)
    - Rule change to raise that level to \$913 per week (\$47,476/yr) and provide for automatic updating was enjoined by a federal court
    - DOL is undertaking rulemaking to revise the salary test standard; most assume it will go up

# Exempt Employee Issues

- Not Losing the Exemption Because of a Pay Practice
  - The Salary Test requires payment of exempt employees on a “Salary Basis”
    - Regularly receives a predetermined amount of compensation each pay period
    - The compensation cannot be reduced because of variations in the quality or quantity of work performed
    - Need not be paid for any workweek when no work done

# Exempt Employee Issues

- Not Losing the Exemption Because of a Pay Practice
  - The Salary Basis – Deductions from Salary
    - Deductions in salary are not allowed for absences occasioned by the employer or operating requirements of the business
    - If employee is ready, willing, and able to work, deductions not allowed if work not available

# Exempt Employee Issues

- Not Losing the Exemption Because of a Pay Practice
  - The Salary Basis – Deductions Allowed for
    - Absence for full day or days for personal reasons
    - Absence for full day or days for sickness if made under a bona fide plan of providing wage replacement for such absences
    - Unpaid absence for FMLA leave
    - Offsets for jury fees, witness fees, military pay

# Exempt Employee Issues

- Not Losing the Exemption Because of a Pay Practice
  - The Salary Basis – Deductions Allowed for
    - Good faith penalty for violating safety rule of “major significance”
    - Unpaid disciplinary suspension for full day missed for violation of workplace conduct rule
    - May only pay proportional part of salary for time worked in first or last week of employment

# Exempt Employee Issues

- Not Losing the Exemption Because of a Pay Practice
  - The Salary Basis – Examples of Improper Deductions:
    - Partial day absence for parent-teacher conference
    - Day deduction when closed for inclement weather
    - Deduction of full salary for absence for jury duty
    - Deduction for two days for illness if no sick pay plan

# Exempt Employee Issues

- Meeting One of the FLSA's Exemptions
  - Duties Test:
    - An employee may be exempt if, in addition to being paid on a salary basis, he or she also meets the Duties Test
    - Tests exist for Executive, Administrative, Professional, and Outside Sales, as well as for certain computer employees

# Exempt Employee Issues

- Meeting One of the FLSA's Exemptions
  - Duties Test:
    - Executive
      - Primary duty is management of enterprise or customarily recognized department or subdivision
      - Customarily and regularly directs work of two or more employees
      - Authority to hire, or fire employees; or, recommendations as to hiring, firing, advancement, promotion, change of status, given particular weight
      - (Also applies to a 20% owner actively engaged in management)



# Exempt Employee Issues

- Meeting One of the FLSA's Exemptions
  - Duties Test:
    - Administrative
      - Primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
      - Primary duty include the exercise of discretion and independent judgment in matters of significance.
        - Includes activities such as analysis, making determinations, setting prices, assessing risk, committing company resources, negotiating, and similar tasks

# Exempt Employee Issues

- Meeting One of the FLSA's Exemptions
  - Duties Test:
    - Professional – Learned and Creative Professionals
      - Primary duty must be the performance of work requiring advanced knowledge in field of science or learning customarily acquired by a prolonged course of specialized instruction; or
      - Performance of work requiring invention, imagination, originality, or talent in recognized artistic or creative field.

# Exempt Employee Issues

- Meeting One of the FLSA's Exemptions
  - Duties Test:
    - Outside Sales
      - Primary duty is making sales or
      - Obtaining orders or contracts for services for the use of facilities paid by the customer and
      - Customarily and regularly working away from employer's place of business
    - There are no salary basis and salary level tests for the outside sales exemption

# Exempt Employee Issues

- Meeting One of the FLSA's Exemptions
  - Duties Test:
    - Computer Employees (Additional \$27.63/hr pay requirement)
      - Primary duty entails:
        - Application of systems analysis techniques and procedures, including consultation with users about hardware, software, or system function specifications;
        - Design, development, documentation, analysis, creation, testing, or modification of computer systems or programs related to user or system design specifications;
        - Design, documentation, testing creation, or modification of machine operating systems; or
        - Combination of above duties requiring equal skill level

# Exempt Employee Issues

- Meeting One of the FLSA's Exemptions
  - Exemption for Employees Paid Commissions by Retail Business
    - Employee is exempt from overtime pay if:
      - Employed by a retail or service establishment;
      - More than half employee's total earnings in representative period are commissions on goods, services; and
      - Total compensation divided by number of hours worked, or regular rate, exceeds one and one-half times the minimum wage
    - If all conditions are not met, exemption does not apply

# What Next for the FLSA?

- What's next?
  - FLSA violations continue to be a target. FLSA litigation continues at a high pace even though the number of cases filed under the FLSA dropped in 2017 to 8,375 from an all-time high of 9,041 in 2016
  - The FLSA is 80 years old, and changes to the economy and workforce have led to calls for modernization of the law.
    - Independent contractor-employee, operator, or provider status?
    - Revamp duties test?
    - Workweek flexibility?

# Thank You!

Jackson Walker LLP  
Scott McElhaney  
smcelhaney@jw.com  
214-953-6147