Snell & Wilmer L.L.P.

THE WORKPLACE WORD

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# FLSA Issues

If your company is engaged in a business affecting commerce – and chances are, it is – your company is subject to the provisions of the Fair Labor Standards Act ("FLSA"). Among other things, the FLSA dictates who is entitled to overtime pay (those employees referred to as "non-exempt") and how such time must be calculated and paid. Failure to comply with the FLSA and state wage and hour laws could result in serious financial consequences for your company, including unpaid wages, and double damages (in some cases damages can be tripled under state law) attorney's fees to defend against a lawsuit and (if you are unsuccessful) the employee's attorney's fees. As such, it is essential to both understand the basics about the FLSA and to follow up with counsel regarding your questions to ensure that you are in compliance with the FLSA.

### Determining Who is "Exempt" or "Non-Exempt"

First, it is important to understand who qualifies for overtime ("non-exempt employees") under the FLSA. Non-exempt employees must be provided premium compensation (usually time and one-half of their hourly rate) if they work more than 40 hours per workweek. A workweek is defined as "a fixed and regularly recurring period of 168 hours" that may begin at any hour, on any day. It need not coincide with the calendar week. Some states have additional restrictions. For example, in California, non-exempt employees must be provided a premium wage if they work more than 8 hours in any given workday.

Employees are considered "exempt" – and thus not entitled to overtime payments – if they satisfy certain criteria outlined in the FLSA. Exempt status is determined by an employee's duties, ***not*** by how the employee is paid. One common mistake many employers make is not paying an employee overtime because they pay the employee a salary. Paying an employee on a salary basis, rather than on a per hour basis, does not mean that an employee is "exempt." Instead, an analysis of each employee's job duties must be analyzed to determine whether they are "exempt" under the FLSA.

Some of the more common exempt job duties include executive, administrative, learned professional, creative professional, outside sales, certain computer-related tasks, and highly compensated employees. Some employers make the mistake of not conducting an appropriate classification audit and simply assuming that employees are exempt under the FLSA. The issue of whether the duties performed by an employee satisfy one or more of the exemptions of the FLSA is often at the heart of FLSA litigation.

### Compliance with Overtime Requirements

Employees covered by the FLSA must be paid 1.5 times the regular rate of pay for each hour worked in excess of 40 in a particular workweek (again, some states, such as California, have their own way of determining when an employee is entitled to overtime). With very few exceptions, the FLSA prohibits an employer from averaging an employee's number of hours worked over two or more workweeks, and, rather, requires that if an employee works more than 40 hours in any workweek, the employee is entitled to overtime pay. It should also be noted that a company may not avoid paying overtime by invoking "authorized overtime only" provisions in employment agreements / handbooks, as employees cannot waive their rights to overtime under the FLSA. In other words, whether authorized or not, if non-exempt employees work overtime, they are entitled to the premium pay.

### The Importance of Accurate Timekeeping

The FLSA requires your company to keep records for non-exempt employees. You must keep payroll records containing, among other things, the time of day and day of the week on which the workweek begins, the employee's regular hourly rate, basis for payment of wages, and the number of hours worked each workday and workweek. The records should also contain the total daily or weekly straight-time earnings, weekly premium pay for overtime hours worked, additions to or deductions from wages paid, total wages paid each pay period, and the date of payment. Payroll records must be kept for three years from the date of the last entry. Time and earnings cards should be kept for two years. In certain circumstances, employers may "round off" the employee's time worked but must ensure the employee is compensated for all time actually worked.

One pitfall that employers often face is not keeping an accurate record of the time an employee worked and not having an employee sign or verify such time. For example, if your company does not utilize a time clock but requires its employees to submit a weekly time sheet, the time sheet may not be entirely accurate if it simply provides that employee worked: 8:00 am to 5:00 pm and took a 1 hour lunch each and every day. It may be better to have the employee write down the exact time he or she starts and ends work and lunch periods. The company's failure to keep accurate records may lead to a presumption in favor of the employee. For instance, if you do not have an employee keep a verified, accurate record of the time she worked and a year later that employee states that she worked 5 hours of overtime each week, unless your company can establish that the employee did not work those hours, the company may be liable for the overtime. Companies should also note that, for some jobs, the workday may begin earlier than the employee's shift begins. This may occur if an employee is required to dress in protective clothing required of a job, or when an employee begins responding to work-related emails or phone calls before his or her actual shift begins. In some instances, employees must be compensated for such time.

Another common mistake employers make occurs when an employee has not been approved for overtime, but works more than 40 hours in a workweek. In this situation, the answer is ***not*** to ignore the overtime worked, but instead, the employer must pay the employee all overtime worked but may also discipline the employee (for example, with a written warning) for failing to comply with company policies regarding pre-approval of overtime. On a similar note, employers may not tell employees not to report overtime.

### Damages in FLSA Litigation

An FLSA case brought against your company can be extremely costly. If your company violates the FLSA, it may be liable for a variety of damages, including the payment of unpaid wages and overtime, double or even triple damages, reimbursement to the employee for his or her reasonable attorney's fees, interest, and other costs.

### The Bottom Line: Know Who's Non-Exempt and Keep Accurate Records

As an employer, you must take responsibility to carefully analyze which employees are non-exempt and, therefore, subject to overtime under the FLSA. Further, you should keep detailed, accurate records of all time worked and correctly compensate employees adequately for hours worked.

We are happy to help your company work through these and other FLSA issues.

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