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RECENT DEVELOPMENTS IN WAGE & HOUR LAW: WHAT EMPLOYERS ARE FACING

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I. Introduction

The Fair Labor Standards Act (“FLSA”) was first enacted in 1938 to ensure employees received a fair wage for a fair day’s work. To that end, the FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments. There are several employment practices that the FLSA does not regulate, such as:

- vacation, holiday, severance, or sick pay;
- meal or rest periods;
- premium pay for weekend or holiday work;
- pay raises or fringe benefits; or
- a discharge notice or immediate payment of final wages to terminated employees.

A. Minimum Wage

Effective July 24, 2009, the federal minimum wage increased to \$7.25 per hour. However, many states also have minimum wage laws. In cases where an employee is subject to both state and federal minimum wage laws, the employee is entitled to the higher minimum wage. Thus, for example, because Colorado’s current minimum wage is \$7.28 per hour, an employee working in Colorado is entitled to the higher state minimum wage.

B. Overtime Pay

Unless specifically exempted, employees covered by the FLSA must receive overtime pay for hours worked in excess of 40 in a workweek and at a rate not less than one and one-half times the hourly rate of pay. Hours that are paid but not worked (e.g., holidays, vacations, sick days) do not count as hours worked under the FLSA. An employee’s regular rate of pay includes all compensation except discretionary bonuses, prizes or gifts. Even if the employee is not authorized to work overtime but does, overtime pay must be given to the employee. Colorado’s Wage Order 25 requires payment of overtime for more than 12 hours worked in a workday or 12 consecutive hours.

II. Terms Used in the FLSA

Workweek - A workweek is a period of 168 hours during 7 consecutive 24-hour periods. It may begin on any day of the week and at any hour of the day established by the employer. Generally, for purposes

of minimum wage and overtime payment, each workweek stands alone; there can be no averaging of 2 or more workweeks. Employee coverage, compliance with wage payment requirements, and the application of most exemptions are determined on a workweek basis.

Hours Worked - Covered employees must be paid for all hours worked in a workweek. In general, “hours worked” includes all time an employee must be on duty, or on the employer’s premises or at any other prescribed place of work, from the beginning of the first principal activity of the work day to the end of the last principal work activity of the workday. Also included is any additional time the employee is allowed (i.e., suffered or permitted) to work.

III. Hours Worked Issues Under the FLSA

A. Definition of “Employ”

By statutory definition the term “employ” includes “to suffer or permit to work.” The workweek ordinarily includes all time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed work place. “Workday”, in general, means the period between the time on any particular day when such employee commences his/her “principal activity” and the time on that day at which he/she ceases such principal activity or activities. The workday may therefore be longer than the employee’s scheduled shift, hours, tour of duty, or production line time.

B. Employees “Suffered or Permitted” to Work

Work not requested but suffered or permitted to be performed is work time that must be paid for by the employer. For example, an employee may voluntarily continue to work at the end of the shift to finish an assigned task or to correct errors. The reason is immaterial. The hours are work time and are compensable.

1. **Waiting Time:** Whether waiting time is hours worked under the Act depends upon the particular circumstances. Generally, the facts may show that the employee was engaged to wait (which is work time) or the facts may show that the employee was waiting to be engaged (which is not work time). For example, a secretary who reads a book while waiting for dictation or a fireman who plays checkers while waiting for an alarm is working during such periods of inactivity. These employees have been “engaged to wait.”
2. **On-Call Time:** An employee who is required to remain on call on the employer’s premises is working while “on call.” An employee who is required to remain on call at home, or who is allowed to leave a message where he/she can be reached, is not working (in most cases) while on call. Additional constraints on the employee’s freedom could require this time to be compensated.
3. **Rest and Meal Periods:** Rest periods of short duration, usually 20 minutes or less, are common in industry (and promote the efficiency of the employee) and are customarily paid for as working time. These short periods must be counted as hours worked. Unauthorized extensions of authorized work breaks need not be counted as hours worked when the employer has expressly and unambiguously

communicated to the employee that the authorized break may only last for a specific length of time, that any extension of the break is contrary to the employer's rules, and any extension of the break will be punished. Bona fide meal periods (typically 30 minutes or more) generally need not be compensated as work time. However, the employee must be completely relieved from duty for the purpose of eating regular meals. The employee is not relieved if he/she is required to perform any duties, whether active or inactive, while eating.

4. **Sleeping Time and Certain Other Activities:** An employee who is required to be on duty for less than 24 hours is working even though he/she is permitted to sleep or engage in other personal activities when not busy. An employee required to be on duty for 24 hours or more may agree with the employer to exclude from hours worked bona fide regularly scheduled sleeping periods of not more than 8 hours, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. No reduction is permitted unless at least 5 hours of sleep is taken.
5. **Lectures, Meetings and Training Programs:** Attendance at lectures, meetings, training programs and similar activities need not be counted as working time only if four criteria are met, namely: it is outside normal hours, it is voluntary, not job related, and no other work is concurrently performed.
6. **Travel Time:** The principles which apply in determining whether time spent in travel is compensable time depends upon the kind of travel involved.
7. **Home to Work Travel:** An employee who travels from home before the regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel, which is not work time. However, an employee who regularly works at a fixed location in one city is given a special one day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that the employer may deduct/not count that time the employee would normally spend commuting to the regular work site. Additionally, time spent by an employee in travel as part of their principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.

IV. Exemptions From Minimum Wage and Overtime Provisions

There are a number of exemptions to the FLSA. Some exemptions apply just to overtime pay while other exemptions apply to both overtime pay and minimum wage. However, these exemptions are narrowly construed.

A. Exemptions from Both Minimum Wage and Overtime Provisions

The following employees are exempt from both the FLSA's minimum wage and overtime requirements (commonly referred to as the "White Collar Exemptions"):

1. Executive Personnel

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis¹ (as defined in the regulations) at a rate not less than \$455 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

2. Administrative Personnel

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
- The employee's primary duty must be 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
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

3. Professional Personnel

To qualify for the "learned professional employee" exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

¹ Being paid on a "salary basis" means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work. Subject to exceptions listed below, an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked. Exempt employees do not need to be paid for any workweek in which they perform no work. If the employer makes deductions from an employee's predetermined salary, i.e., because of the operating requirements of the business, that employee is not paid on a "salary basis." If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

To qualify for the “creative professional employee” exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
- The employee’s primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

4. Computer Personnel

To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated **either** on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week **or**, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- The employee’s primary duty must consist of:
 - 1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
 - 2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
 - 3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
 - 4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

5. Outside Sales Personnel

To qualify for the outside sales employee exemption, all of the following tests must be met:

- The employee’s primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- The employee must be customarily and regularly engaged away from the employer’s place or places of business.

B. Circumstances in Which the Employer May Make Deductions from Pay for Exempt Employees

Deductions from pay are permissible when an exempt employee:

- is absent from work for one or more full days for personal reasons other than sickness or disability;
- for absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness;

- to offset amounts employees receive as jury or witness fees, or for military pay;
 - for penalties imposed in good faith for infractions of safety rules of major significance;
- or
- for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions.

Also, an employer is not required to pay the full salary in the initial or terminal week of employment, or for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act.

C. Effect of Improper Deductions from Salary

The employer will lose the exemption if it has an “actual practice” of making improper deductions from salary. Factors to consider when determining whether an employer has an actual practice of making improper deductions include, but are not limited to:

- the number of improper deductions, particularly as compared to the number of employee infractions warranting deductions;
- the time period during which the employer made improper deductions;
- the number and geographic location of both the employees whose salary was improperly reduced and the managers responsible; and
- whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.

If an “actual practice” is found, the exemption is lost during the time period of the deductions for employees in the same job classification working for the same managers responsible for the improper deductions. However, isolated or inadvertent improper deductions will not result in loss of the exemption if the employer reimburses the employee for the improper deductions.

D. Exemptions from Overtime Provisions Only

The following personnel are exempt from being paid overtime:

1. Certain commissioned employees of retail or service establishments
2. Auto, truck, trailer, farm implement, boat, or aircraft sales-workers
3. Parts clerks and mechanics servicing autos, trucks, or farm implements, who are employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers
4. Employees of railroads and air carriers
5. Taxi drivers
6. Domestic service workers living in the employer’s residence
7. Employees of motion picture theaters

V. Recordkeeping Requirements

The FLSA requires employers to keep records on wages, hours, and other items, as specified in Department of Labor (“DOL”) recordkeeping regulations. Most of the information is of the kind generally maintained by employers in ordinary business practice and in compliance with other laws and regulations. The records do not have to be kept in any particular form and time clocks need not be used.

VI. Common Mistakes

A. Incorrectly Classifying Employees as Exempt

The following are common misconceptions that may lead to misclassification of a position as exempt:

- Paying an employee on a salary basis does not assure exempt status.
- An employee's title (e.g., manager, supervisor or administrator) does not assure exempt status.
- A high level of compensation does not assure exempt status.
- A college degree or an advanced degree does not assure exempt status.
- An employee's agreement not to be paid overtime is probably unenforceable.
- A manager who fills in for an absent worker may lose his exempt status.

B. Off-the-Clock Work

"Off-the-clock" work occurs when the employee, either independently or at the direction of their employer, performs work off the clock and without pay, thereby depriving the employee of pay or overtime to which he/she would otherwise be entitled. For example, an employee who remains at his/her desk while eating lunch and regularly answers the telephone and refers callers is working. This time must be counted and paid as compensable hours worked because the employee has not been completely relieved from duty.

C. Incorrect Deductions from Salaried Employees

By way of example, problems can arise when:

- (1) A minimum wage employee working as a cashier is illegally required to reimburse the employer for a cash drawer shortage.
- (2) An employer improperly requires tipped employees to pay for customers who walk out without paying their bills or for incorrectly totaled bills.
- (3) An employer furnishes elaborate uniforms to employees and makes them responsible for having the uniforms cleaned.
- (4) An employee driving the employer's vehicle causes a wreck, and the employer holds the employee responsible for the repairs, thereby reducing the employee's wages below the minimum wage.
- (5) A security guard is required to purchase a gun for the job, and the cost causes him/her to not earn the minimum wage.
- (6) The cost of an employer-required physical examination cuts into an employee's minimum wage or overtime compensation.

VII. Enforcement

Enforcement of the FLSA is done by U.S. Department of Labor (“DOL”) investigators stationed across the country who conduct investigations and gather data on wages, hours, and other employment conditions or practices, in order to determine compliance with the law. Where violations are found, they also may recommend changes in employment practices to bring an employer into compliance. It is a violation to fire or in any other manner discriminate against an employee for filing a complaint or for participating in a legal proceeding under FLSA.

VIII. Remedies and Damages

Below are methods by which the FLSA provides for recovering unpaid minimum and/or overtime wages:

- (1) The DOL may supervise payment of back wages where the employer agrees back wages are owed.
- (2) The DOL may bring suit for back wages and an equal amount as liquidated damages.
- (3) An employee may file a private suit for back pay and an equal amount as liquidated damages, plus attorney’s fees and court costs.
- (4) The DOL may obtain an injunction to restrain any person from violating FLSA, including the unlawful withholding of proper minimum wage and overtime pay.

An employee may not bring suit if he or she has accepted back wages under the supervision of the DOL or if the DOL has already filed suit to recover the wages.

Statute of Limitations: A 2-year statute of limitations applies to the recovery of back pay, except in the case of a willful violation, in which case a 3-year statute applies.

Attorney’s Fees: If the DOL brings a lawsuit on behalf of the employee, the DOL may not recover attorney’s fees even if the employer intentionally violated the FLSA. However, if the court determined the employer acted in bad faith during the litigation, it may award attorney’s fees against the employer.

If an employee brings a private action and prevails, the court **must** award a reasonable attorney’s fee to be paid by the employer. On the other hand, an employer is **not** entitled to attorney’s fees, even if it is the prevailing party, unless the employee acted in bad faith.

For more information about the FLSA, please contact Larry Stone, Chris Hammond or Dave Furgason at Dufford & Brown, P.C., 1700 Broadway, Suite 2100, Denver, CO 80290-2101, phone 303-861-8013, fax 303-832-3804, or e-mail at @duffordbrown.com, @duffordbrown.com or duffordbrown.com.