

Fair Labor Standards Act: Non-Compliance Is Costly

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The federal Fair Labor Standards Act (FLSA) requires payment of the federal minimum wage and also requires overtime pay at 1.5 times an employee's "regular hourly rate" for work by "non-exempt" employees in excess of 40 hours per week. If employees establish that they were not paid as required by the FLSA, they can recover unpaid wages going back two years. If the employer's violation is "willful," the back-pay period is 3 years and the recovery is doubled as "liquidated damages."

For many years, the FLSA was enforced by the Wage and Hour Division (WHD) of the U.S. Department of Labor. Once it received a complaint from an employee or former employee, the WHD would conduct a "wall-to-wall audit" of the employer, and cite any FLSA violations. Most cases settled because the WHD will typically waive the "willful" violation penalties, and settle for two years of back wages.

Non-Compliance

In recent years, though, FLSA cases have become very attractive to plaintiffs' employment lawyers. They began filing lawsuits after realizing that many employers are in violation of the FLSA. These can be expensive class actions. The FLSA allows a successful plaintiff to recover not only back pay and "liquidated damages," but also actual attorney fees.

The two recurring areas of non-compliance targeted in FLSA lawsuits pertain to hours worked and improper exemptions.

Hours Worked

Hours Worked claims assert that the employer failed to pay employees for all time worked. These cases typically involve interrupted lunch periods or work completed before or after scheduled hours. Because many employers have moved away from a time-clock system there is more room for employees to fudge their time, sometimes at the request of a supervisor who is under pressure to avoid overtime.

Improper Exemptions

The FLSA includes "white collar exemptions" from its minimum wage and overtime provisions. The WHD has issued interpretive regulations defining these exemptions.

- The "executive" exemption covers those who manage part of the business and directly supervise two or more full-time equivalents, and who hire and fire employees or whose

recommendations regarding hiring and firing are given significant weight. An exempt executive must be paid at least \$455 a week.

- The "administrative" exemption covers employees who perform office or non-manual work directly related to the business operation and who exercise independent judgment with respect to matters of significance. An exempt administrator must be paid at least \$455 a week.
- The "learned professional" exemption covers employees who are required to use their advanced knowledge, which is predominantly intellectual in character. These employees consistently exercise discretion and judgment. The employee must be paid at least \$455 a week.
- The "creative professional" exemption covers employees who perform work requiring invention, originality or talent of an artistic or creative nature. The employee must be paid at least \$455 a week.
- The "computer employee" exemption applies to an employee who is a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field. The employee must be paid at least \$455 a week.
- The "outside sales" exemption covers an employee whose primary duty is making sales or obtaining orders away from the employer's place of business.

Court Cases

Areas of exemption that have been recently targeted for litigation pertain to employees involved in sales and those with computer-related responsibilities.

In the *Novartis* case, for example, the Second Circuit Court of Appeals recently found "no applicable exemption" for drug company representatives whose principal duties are visiting physicians to introduce the company's prescription drugs and persuade the physicians to prescribe them.

The court ruled that the drug representatives are not exempt "outside sales" employees because the employees were making recommendations, not actual sales. The court also ruled that the drug representatives' duties did not involve sufficient "discretion and independent judgment" to qualify for the administrative exemption.

The *Novartis* case illustrates that employees who make recommendations to customers but are not actually involved in sales will not qualify for the outside sales exemption. The ruling raises serious issues relating to "customer service representatives" and others who perform sales-related functions, but do not actually sell.

Also, WHD opined in a recent administrative interpretation that mortgage loan officers were primarily engaged in "selling" mortgages, but did not meet the outside sales exemption because they were not customarily and regularly engaged in making sales "away from the employer's place of business." The Administrator opined that an employee who is primarily engaged in making sales at the employer's place of business, or at a "home office" cannot qualify for the outside sales exemption. The ruling also said that "inside sales" work could not qualify for the administrative exemption.

This ruling illustrates that employees who are primarily engaged in making sales but are not "customarily and regularly" doing so away from the employer's place of business, will not qualify for the outside sales or administrative exemption. In other words, "inside sales" employees do not meet the requirements for exemption, according to the WHD.

In several cases, the WHD and the courts also have ruled that employees whose principal function is computer trouble-shooting or help-desk activities, cannot meet the requirements for the computer employee exemption, because they are not performing the specific advanced computer-related duties outlined above.

The Democratic WHD is likely to continue to narrowly construe the white collar exemptions. That makes now a good time to review your "exempt" job classifications.