



Wage and Hour Issues Under The Federal Fair Labor Standards Act

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FLSA Overview

- Minimum Wage under FLSA- \$7.25
- Minimum Wage under Michigan Law- \$7.40
- Overtime Pay- 1.5 times the employee's "regular hourly rate" for "hours worked" over 40 per "work week"
- "Regular hourly rate" is all compensation except authorized exclusions, divided by hours worked that week (e.g. hourly pay, commissions, non-exempt bonuses, shift premiums (etc))
- "Hours worked" includes all time that the employer "suffers or permits" the employee to work.
- "Work week" is any period of seven consecutive 24 hour periods set by the employer
- Enforced by U.S. Department of Labor, Wage and Hour Division ("WHD") or by private lawsuits





FLSA Overview

- FLSA required overtime must be paid currently
- Except for certain public sector employees, "comp time" systems violate the FLSA
- E.g. an employer policy to "bank" overtime and pay it in the future as paid time off is unlawful





FLSA Overview

- The FLSA does not "preempt" state laws that impose greater requirements on employers
- Many states (including Michigan) have higher minimum wages than required under the FLSA
- Some states and cities (not Michigan) have special "overtime rules", such as a requirement to pay overtime pay after 8 hours per day or on the "6th" or "7th" workday in a week (not required by the FLSA)
- Employer must comply with applicable state or municipal law in addition to the FLSA, for employees in that state/city





FLSA Overview

- Nature and scope of the risk has changed.
- Plaintiffs' lawyers have discovered the FLSA
- Democratic WHD is more aggressive, more "pro-employee"
- Possible collective actions and attorney fee provisions make wage-hour cases attractive to plaintiffs' lawyers
- Sea change from WHD enforcement to private litigation over past 15 years
- Private litigation is high risk, difficult to settle
- WHD audit can trigger private class action lawsuit
- Standard Employment Practices Liability Insurance may not cover FLSA claims





FLSA Overview

- Limitation Periods
 - 2 years, or
 - 3 years, for a "willful" violation (basically, a "knew or should have known" standard)
- Damages
 - Back pay, doubled for a "willful" violation ("liquidated damages")
- FLSA violations can only be settled in WHD proceedings or in court, cannot be waived in a standard "severance agreement"





FLSA Overview

- Wage Hour Division
 - Mature, competent agency-- courts respect the WHD
 - Courts give high degree of deference to WHD regulations
- The WHD has an excellent website:
 - <http://www.dol.gov/WHD/>
- Private FLSA litigation
 - No exhaustion of administrative remedies required
 - Attorney fees to prevailing employees





Who is an "Employee"- "Independent Contractors"

- "Independent contractors" may be reclassified as "employees" in FLSA litigation. WHD Standards:
 - The extent to which the services are an integral part of the principal's business
 - The "permanency" of the relationship
 - The amount of the alleged contractor's investment in facilities and equipment
 - The nature and degree of "control" by the principal
 - The alleged contractor's opportunity for profit or loss
 - The amount of initiative, judgment or foresight in open market competition with others required for the success of the alleged contractor
 - The degree of independent business organization and operation (e.g. does the contractor have other customers?)





Who is an "Employee"- Independent Contractors

- If a court rules that an individual classified as an "independent contractor" by the employer is really an "employee", significant liability can result
 - "Employer" probably has no records of "hours worked" and if so the court will base its calculations on the "employee's" records
 - If weekly "fees" divided by "hours worked" is less than the minimum wage, liability for the difference
 - "Employer" has typically not paid overtime, and so is liable for "back overtime pay"
 - Liability for past 2 years, or double back pay for 3 years if the violation is found to be "willful"





"Hours Worked"- Unpaid Time

- Employer must pay for all hours it "suffers or permits" the employee to work
- Hours worked before start of official "shift" or after end of official "shift" must be paid and counted towards overtime if employer directed the work to be done, knew it was being done, or should have known it was being done
- "Break Time" must be paid if the break is less than 20 minutes long (or, for a meal period, "generally" 30 minutes long)





"Hours Worked"- Unpaid Time

- Interrupted unpaid meal break must be counted as "hours worked"
 - Actual time worked during break if interruption is not "habitual"
 - Entire break time may be counted as hours worked if interruption is habitual
- If employer does not have records, employee's recollection will control unless rebutted





"Hours Worked"- Unpaid Time

- Prevalence of "time sheets" or "exception based timekeeping" in service industries has fueled many "hours worked" class actions
- WHD knows that in many industries supervisors are under pressure to "avoid overtime", which may result in under-recording of "hours worked"
- WHD is suspicious of "overly consistent" work hours recording- e.g. employee always writes down "8 hours per day, five days per week"
- "Electronic workplace" is causing "hours worked" claims
 - E.g. Employee reviewing and responding to e-mails before or after normal work hours ("Blackberry time")
 - Electronic "homework"





"Hours Worked" – "Doffing and Donning"

- Supreme Court has ruled that if an employee is required to put on or take off "protective gear" or special uniforms at the workplace, this action "starts the workday" and the workday does not end until the employee has removed the gear/special uniform
- Result- employer that does not pay for this time is in violation
- Once the "workday" begins, employer must also pay for "walking time", e.g.
 - walking from locker room or equipment supply room to work station at beginning of workday
 - walking from work station to locker room or equipment supply room at end of workday





"Hours Worked" – "Doffing and Donning"

- WHD takes the position that "any clothes changing on the employer's premises, which is required by law, the employer, or the nature of the work is compensable". WHD Advisory Memorandum No. 2006-2
- WHD takes the enforcement position that if an employee has the option to put on and take off required uniforms and gear at home, time spent doing so is not "hours worked". WHD Advisory Memorandum No. 2006-2





"Hours Worked" – "Doffing and Donning"

- FLSA Section 3(o) creates a special rule for "time spent changing clothes or washing at the beginning or end of each workday" is not "hours worked" IF excluded from compensable time by under "the express terms or by custom and practice" under a collective bargaining agreement
- WHD takes the position that "clothes" does not include "protective gear" required for the job. Administrator's Interpretation No. 2010-2
- Some courts have disagreed, and ruled that "clothes" does include such protective gear. See e.g. Anderson v. Cagle's, Inc (11th Circuit, 2007)
- This issue is unresolved, could result in Supreme Court review





"Hours Worked" – Training Time

- Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:
 - Attendance is outside of the employee's regular working hours;
 - Attendance is in fact voluntary;
 - The course, lecture, or meeting is not directly related to the employee's job; and
 - The employee does not perform any productive work during such attendance.
- 29 C.F.R. 785.27





"Hours Worked" – Training Time

- If an employee voluntarily attends courses at an independent college, school or trade school outside work hours the time will not be considered "hours worked" even if the course is related to the employee's job
- If an employee voluntarily attends a course offered by the employer that "corresponds to courses offered by independent bona fide institutions of learning" the course time outside work hours will not be considered "hours worked" even if the course is related to the employee's job
- Certain apprenticeship training time under a U.S. Department of Labor approved apprenticeship program need not be counted as "hours worked"
- 29 C.F.R. 785.30-.32





"Hours Worked" – Travel Time

- Normal commuting to and from work is not "hours worked"
- Travel from one worksite to another during the workday generally is "hours worked"
- Travel for a "special one day assignment in another city" generally is "hours worked"
- Overnight business travel is not "hours worked" IF it occurs outside the employee's normal work hours (including the same hours on weekends) and the employee is travelling as a passenger
- 29 C.F.R 785.33-.41





Special Rule- Nursing Mothers

- The "Patient Protection and Affordable Care Act" amends FLSA Section 7 to add a requirement that an employer must provide an employee who is not exempt from FLSA overtime pay requirements, and who wishes break time to express milk for her nursing child for one year after the child's birth, with "reasonable breaks" to express milk- there is no maximum number of breaks or break duration
- The employer must provide a break area other than a bathroom "that is shielded from view and free from intrusion from coworkers and the public"
- Employers with less than 50 employees are not covered by the new provision if it would impose an "undue hardship" on the employer
- See WHD Fact Sheet No. 73, "Break Time for Nursing Mothers under the FLSA"





Special Rule- Nursing Mothers

- The "Nursing Mothers" requirements expressly provide that break time to express milk need not be paid for by the employer, or counted towards overtime hours
- However, the requirements also specifically provide that they do not preempt state laws that may require payment for such breaks
- Michigan law is not clear on this point,
 - Michigan Minimum Wage Law generally does not apply to employers covered by FLSA
 - Payment of Wages and Fringe Benefits Act may apply if employer's policy calls for overtime hours worked over 40 in a week since Michigan Department of Labor's position is that breaks of less than 15 minutes must be paid and counted toward hours worked; longer breaks must be paid and counted if employer has a written policy stating that they will be or if the employee is not completely relieved of duty





Compensation That Must be Counted in Computing the "Regular Hourly Rate"

- All compensation must be counted towards computing the "regular hourly rate" for overtime pay except compensation that is exempt under WHD Regulations
- Exempt compensation includes (29 CFR 785.200 et seq)
 - Paid time off such as holiday, vacation or sick pay (unless voluntarily counted by the employer)
 - Health insurance and other fringe benefit contributions
 - Overtime after specified daily hours (e.g. over 8 hours per day) (these premiums can also be counted towards satisfaction of the FLSA overtime pay requirement)
 - Overtime for work on specified days (e.g. Saturday or Sunday) if paid at least 1.5 times the regular rate (these premiums can also be counted towards FLSA overtime pay requirement)





Compensation That Must be Counted in Computing the "Regular Hourly Rate"

- Examples of Compensation That is not Exempt and must be counted in computing the "regular rate"
 - Shift premiums
 - Commissions
 - Piecework pay
 - Non-exempt "bonuses"





Special Rules for Bonuses

- Bonuses must be included in computing the regular rate unless exempt
 - Attendance bonuses must be included
 - Productivity bonuses must be included
- Certain "discretionary" bonuses are exempt
 - Statutory Requirement for Exemption: "both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly"





Special Rules for Bonuses

- Certain "Christmas" or similar bonuses are exempt
 - Statutory requirement: "sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency" . 20 C.F.R. 785.200 et seq.
- Certain "profit sharing" bonuses are exempt. 29 C.F.R. Part 549
 - Bonus must be paid solely from profits of the business or a portion of the business, all non-exempt employees of the business or that portion of the business must be eligible, and there must be a formula for allocation of the bonus (e.g., straight-time earnings, total earnings, base rate of pay, straight-time hours or total hours worked by employees, length of service) or distribution may be made on a per capita basis





“White Collar” Exemptions 29 C.F.R. Part 541

- “White Collar Exempt” employees are exempt from the minimum wage and overtime pay requirements of the FLSA if ALL requirements of the WHD’s regulations are met
 - Executive Employees
 - Administrative Employees
 - Learned Professional Employees
 - Creative Professional Employees
 - Outside Sales Employees
 - Exempt “Computer” Employees
- Courts have ruled that the white collar exemptions are to be narrowly construed– meaning that if there is any doubt under the facts it is to be resolved against granting the exemption.





Salary Requirement

- White Collar exempt employees must generally be paid a salary of at least \$455 per week (or equivalent “fees” for certain administrative and professional employees)
 - Or must be paid at least \$100,000 per year and “customarily and regularly” perform exempt duties
- Exceptions:
 - Salary requirement does not apply to “Outside Sales” employees
 - Salary requirement does not apply to lawyers, doctors or teachers
 - Salary requirements does not apply to an exempt Computer Employee paid an hourly rate of at least \$27.63





Only Limited Deductions Allowed From Guaranteed Salary of \$455 Per Week

- Seven exceptions from the “no pay-docking” rule:
 - Absence from work for one or more full days for personal reasons, other than sickness or disability
 - Absence from work for one or more full days due to sickness or disability if deductions made under a bona fide plan, policy or practice of providing wage replacement benefits for these types of absences
 - To offset any amounts received as payment for jury fees, witness fees, or military pay
 - Penalties imposed in good faith for violating safety rules of “major significance”





Only Limited Deductions Allowed From Guaranteed Salary of \$455 Per Week

- Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of workplace conduct rules
- Proportionate part of an employee's full salary may be paid for time actually worked in the first and last weeks of employment
- Deductions may be made for unpaid leave taken pursuant to the Family and Medical Leave Act





Only Limited Deductions Allowed From Guaranteed Salary of \$455 Per Week

- Deductions for "partial day" absences are generally not allowed except for unpaid FMLA leave
- However, if an employee has available paid time off and employer policy requires use of PTO for part-day absence, PTO may be paid instead of salary for the time missed
 - This only applies as long as current PTO is available to cover the absence





"Executive" Employees

- 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
- 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





Executive Employee "Problems"

- Employee does not supervise two or more full-time equivalents
- Employee's "primary duty" is not "management"
 - E.g an "Assistant Supervisor" whose principal duty is production work
- "Primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole





"Administrative" Employees

- 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
- The employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance





Administrative Employee "Problems"

- The "Administrative" exemption is the least clear and the most litigated of the White Collar Exemptions
- Some employers erroneously classify "white collar clerical" employees as "administrative exempt" employees
- WHD has recently ruled that "mortgage loan officers" who do not qualify for the "Outside Sales" exemption also cannot qualify for the "administrative" exemption, because "selling" and related activities are not exempt "administrative" work. Administrator's Interpretation No. 2010-1.
 - This ruling has potentially broad application to disqualify from the administrative exemption all "inside sales" employees
 - However, the issue will continue to be litigated as to inside sales employees who have strong product expertise and make recommendations to customers based on this expertise





“Learned Professional” Exemption

- 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
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction





Learned Professional “Problems”

- Some employers classify anyone with a 4-year degree as an “exempt learned professional”
- That is not correct. The education must be in a recognized field of “science or learning”
- This includes the “professionals” such as doctors, lawyers, engineers, accountants, engineers, pharmacists, selected medical professions such as RN’s, others determined case by case
- The DOL publishes lists of “accepted” professions in its Regulations and Opinion Letters
 - Decisions are made case by case- e.g. “licensed funeral directors” are exempt
- If in doubt, check the WHD Regulations and Opinion Letters or consult counsel





“Creative Professional” Exemption

- 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
- Examples include music, writing, acting and the graphic arts





“Outside Sales” Exemption

- 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
- The employee must be customarily and regularly engaged away from the employer’s place or places of business (“home office” will be considered part of the employer’s place of business)





Outside Sales “Problems”

- Inside sales employees are not covered by this exemption
 - To be exempt, employee must be “regularly and customarily” engaged in making sales away from the employer’s place of business
 - WHD regulations provide that sales made by mail, over the internet or telephone do not count as “outside sales”
 - WHD regulations provide that sales made from a “fixed site”, including the sales representative’s home, do not qualify as “outside sales”
 - WHD has recently ruled that “mortgage loan officers” are not exempt “outside sales” employees where they conduct most of their sales activities within the employer’s offices. Administrator’s Interpretation No. 2010-1.





Outside Sales “Problems”

- Courts have ruled that actual sales are required. In In re Novartis Wage & Hour Litigation, the 2d Circuit Court of Appeals recently ruled that “drug sales representatives” who called on physicians to persuade them to prescribe the company’s drugs are not exempt “outside sales” employees because they do not actually sell the drugs





"Computer Employee" Exemption

- The employee must be 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
 - The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications
 - 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
 - The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
 - A combination of the above duties, the performance of which requires the same level of skills





Computer Employee "Problems"

- Many employers have "Information System Technicians" whose principal function is to trouble-shoot problems with computer settings- so-called "help-desk" personnel
- Courts and the DOL have ruled that "help-desk" technicians are not exempt "Computer Employees" unless they actually and regularly engage in the specific duties specified in the statute and regulations
- In Martin v. Indiana Michigan Power Co. the 6th Circuit ruled that a "computer trouble shooter" employee who assisted other employees with computer problems, including trouble shooting software applications, was not an exempt "Computer Employee"


