Fair Labor Standards Act
Wage and Hour Pitfalls
Objectives

- Understand the definitions of exempt and non-exempt
- Understand Safe Harbor
- Know the FLSA recordkeeping requirements for time worked for a non-exempt employee
- Understand minimum wage requirements
- Understand overtime pay requirements
- Understand the definition of an independent contractor
- Avoid penalties
What me worry?

- Litigation explosion
  - Mandatory double damages or triple damages (Federal v. State) plus attorney’s fees in private lawsuits
- DOL targets industries
  - Restaurants, hotels/motels, residential construction, janitorial, moving, landscaping, home health care and retail.
- Massachusetts joint task force on the “underground economy” and misclassification
Exempt Employees

- Meet one of the FLSA exemption tests and who are paid on a fixed salary basis and not entitled to overtime.
  - Executive
  - Administrative
  - Professional
  - Computer Professional
  - Outside sales
  - Highly Compensated Exemption
Executive

- Paid on a salary basis - at least $455 per week
- Primary responsibility is management of the enterprise or customarily recognized department or subdivision
- Customarily and regularly directs the work of two or more other employees
- Has the authority to hire or fire or whose suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status of employees are given particular weight.
Executive - Who might qualify?

- C-level Executives (CEO, COO, CIO, CFO, etc.)
- Department Head
- Manager
- Supervisor
- Store Manager
- Plant Manager
- Construction Project Supervisor

*Title alone is insufficient to establish status
Executive - Who doesn’t qualify?

- Working Foreman
- Relief Supervisor
- Manager who spends only a small part of his/her time on exempt work
Professional

- Salary at least $455 per week
- Primary Responsibility is the performance of work
  - requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or
  - Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor
Professional - Who might qualify?*

- Doctor
- Lawyer
- Engineer
- Accountant
- Teacher
- Insurance Claims Adjuster
- Registered Nurse
- Chef
- Artist
- Music Composer
Professional - Who doesn’t qualify?

- Licensed Practical Nurse
- Nurse’s Aide
- Paramedic
- Paralegal/Legal Assistant
- Engineering Technician
- Cook
Administrative

- Salary is at least $455 per week
- Primary duty is performance of office or non-manual work directly related to the management or general business operations of the employer and customers
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance
Administrative - Who might qualify*

- Insurance Claims Adjuster
- Certain Financial Industry Employees - Auditor, Tax Expert
- Team Leader on a Major Project
- Administrative Assistant to a Senior Executive
- Human Resources Manager
- Purchasing Agent
Administrative - Who doesn’t qualify?

- Administrative Assistant
- Legal Secretary
- Accounting Clerk
- Bookkeeper
- Payroll Clerk
- Loan Officer
- Inspector
- Human Resources Administrator/Clerk
Outside Sales - are exempt if...

- No salary requirement
- 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
- May perform work incidental to sales such as deliveries, collections and reports
Sales - Who doesn’t qualify?

- Inside Sales are non-exempt employees eligible for overtime
  - Unless they qualify for administrative exemption in that:
    - The focus will be on the “exercise of discretion and independent judgment with respect to matters of significance”
Computer Employees

- Salary or fee basis of at least $455 per week or hourly basis at a rate not less than $27.63 per hour
- Apply systems analysis techniques
- Design, document, analyze, create or modify computer systems or programs
Computer Employees - Who might qualify?

- Systems Analyst
- Programmer
- Software Engineer
Computer Employees - Who doesn’t qualify?

- Entry-Level Programmer
- Computer Manufacture or Repair
- CAD Operator
- Help Desk
Motor Carrier Exemption

- Employed by a motor carrier or motor private carrier, as defined in 49 U.S.C. Section 13102
- Drivers, driver’s helpers, loaders, or mechanics whose duties affect the safety of operation of motor vehicles in transportation on public highways in interstate or foreign commerce and
- Not covered by the small vehicle exception (gross vehicle weight of less than 10,001 pounds)
Highly Compensated Exemption

- Perform at least one of the duties of an exempt executive, administrative or professional employee
- Have a total annual compensation of $100,000 or more
Summary of Exempt Employees

- Executive
- Professional
- Administrative
- Outside Sales
  - Not Inside Sales
- Computer
- Motor Vehicle Exemption
- Highly Compensated Employee - $100,000+
Safe Harbor

- Lose of exemption if facts demonstrate that the employer did not intend to pay on a salary basis (there is an actual practice of making improper deductions from exempt employees’ pay as opposed to an isolated or occasional event)

- Making improper deductions in an exempt employee’s pay could jeopardize the exemption. Examples of improper deductions include:
  - A deduction of a partial day’s pay because an employee was sick and arrived late or left early and did not work a full day;
  - A deduction of a day’s pay because the employer was closed due to inclement weather;
  - A deduction for a two-day absence due to a minor illness when the employer does not have a bona fide sick leave plan, policy or practice of providing wage replacement benefits; and
  - A deduction for a partial day absence to attend a parent-teacher conference.
Safe Harbor Policy

- Loss of exemption exposes the employer to overtime claim going back two or three years for all employees affected by the practice. All overtime hours must be paid at time and one-half.

- Employers can protect themselves by implementing a Safe Harbor Policy and clearly communicating the policy prohibiting improper deductions, including a complaint mechanism; reimbursing employees for any improper deductions; and making a good faith commitment to comply in the future.

- The Department of Labor has found that such a policy would be considered clearly communicated if it is published in an Employment Handbook or located on the company intranet.
A Non-Exempt Employee is...

- An employee who does not meet one of the FLSA’s exemption tests and is covered by wage and hour laws regarding minimum wage, overtime pay and hours worked.
Are salaried employees always exempt from overtime?

- Just because an employee is paid on a salaried basis does not mean that the employee is not entitled to overtime compensation.
- The nature of the job and/or the type of employer dictates whether or not an employee is eligible for overtime.
FLSA Record Keeping Requirements

- The FLSA requires you keep records of time worked by non-exempt employees:
  - Time and day of week when workweek begins
  - Hours worked each day
  - Total hours worked each workweek
  - Basis on which wages are paid (i.e. per hour, piecework)
Time Worked Records

- Regular hourly pay rate
- Total daily or weekly straight-time earnings
- Total overtime earnings
- Additions to or deductions from wages
- Total wages paid each pay period
- Date of payment and pay period covered by the payment
Time Worked Records

- Employers may use any timekeeping method they choose - time clocks, manual timesheets, electronic timesheets

- Under FLSA, payroll records must be retained for at least three years. Records on which wages were based (time cards, timesheets, computer records) must be retained for at least two years

- Under Mass. law, employee is allowed to inspect his time records
Overtime Pay Requirements

- FLSA requires overtime pay at a rate of not less than one and one-half times the employee’s regular rate of pay after 40 hours in a workweek.

- When an employee is subject to both state and federal overtime laws, the employee is entitled to overtime according to the higher standard (that standard that will provide the higher rate of pay).
Calculating Overtime
$1\frac{1}{2} \times \text{“regular rate”}$

- Hourly rate = “regular rate”
- Salaried non-exempt employees, divide salary by the number of hours for which the salary is intended to compensate.
- Except for outside sales, commissions are payments for hours worked and must be included in the regular rate.
- Include bonuses unless purely discretionary (not earned by formula or goal).
Compensatory ("Comp") Time

Private sector employers must pay non-exempt employees wages equal to one and one-half times their regular hourly rate of pay for all hours worked in excess of 40 in a single workweek.

They **cannot** provide compensatory time off instead of overtime pay.
Authorizing Overtime

- Most companies require that overtime be authorized in advance by an employee’s supervisor.
- If the employee works overtime without prior authorization, it still must be paid.
- Unauthorized overtime is a disciplinary issue, not a compensation issue.
Massachusetts Employers

- Massachusetts minimum wage is $8.00 per hour
- Massachusetts law specifies when employees must be paid. Under Massachusetts law, all non-exempt employees must be paid weekly or bi-weekly (every 2 weeks) and within 6 days of the end of the pay period during which wages were earned.
- Semi-monthly (twice per month) pay periods do not comply with this requirement as such is paid less frequently than every 2 weeks and does not pay wages due within 6 days of the end of a pay period
- Various minimum wage exceptions apply under specific circumstances to workers with disabilities, full-time students, youth under the age of 20 in their first 90 consecutive days of employment, tipped employees and student-learners.
Counting Time Worked

- Time spent outside regular hours counts if the employer knows or has reason to believe that the employee is working.
- Short breaks of 5 - 20 minutes must be counted as hours worked.
- Bona fide meal periods of 30 minutes or more are not work time.
Compensable Time

Meetings and Training

- Time spent attending lectures, meetings and training programs is counted as hours worked unless all of the following conditions are met:
  - The meeting was held outside regular working hours and
  - Attendance was truly voluntary
- And the course, lecture or meeting is not directly related to the employee’s job.
- And the employee does no productive work during the meeting or training.
Compensable Time

Travel Time

- Home-to-work travel is not work time and not compensable.
- Time spent in travel as part of the employee’s principal activity, such as travel from one job site to another job site during the workday is work time and must be paid.
- When a non-exempt employee travels on a one-day assignment to another city, the time spent traveling is work time and must be paid.
- Travel that keeps the employee away from home overnight is work time when it cuts across the employee’s workday. However, time spent traveling to an airport terminal or train station is not treated as hours worked. By contract, all time spent waiting at the terminal until arrival at the destination is compensable.
Compensable Time

On-Call/Carrying a Pager

- Depends on whether “the time is spent predominantly for the employer’s benefit or for the employee.”

- An employee who is required to remain on call on the employer’s premises is working while “on call” and the time is compensable.

- An employee who is required to remain on call at home or carry a pager, or who is allowed to leave a message where s/he can be reached, is not working (in most cases) while on call and the time is not compensable.

- Additional constraints to the employee’s freedom could require this time to be compensated.
Compensable Time

Changing Clothes and Preparing for Work

- Time spent by employees changing clothes or preparing for work, such as washing up at the beginning or end of the workday, is considered part of an employee’s “principal activities” whenever the changing or preparing for work is required by the nature of the worker’s job. These activities would be compensable time.

- Exception in unionized workplaces under the terms of collective bargaining.
Compensable Time

Compensable time spent traveling for business, attending meetings and training, on paid breaks, on on-call duty, and changing clothes and preparing for working are counted as any other time worked and may result in overtime.
Independent Contractors

- Mass. law more restrictive than Federal
- “Three prong” test under G.L. c.149, §148B
- To qualify as independent contractor, must:
  - Be free from control and direction in connection with the performance of services and
  - Perform services outside the usual course of the business of the employer and
  - Customarily engage in an independently established trade, occupation, profession or business
Free from control and direction

- Does the company supervise the means and methods utilized in the performance of work?

- Per the AG advisory, activities and duties must be carried out with minimal instruction
  
- Example: an independent contractor completes the job using his or her own approach with little direction and dictates the hours that he or she will work on the job.
Outside usual course of the business

- Is the service necessary to the business of the employing unit or merely incidental?

- Per the AG’s advisory:
  - Violation- Drywall company classifies an individual who is installing drywall as an independent contractor. Individual installing the drywall is performing an essential part of the employer’s business.
  - Violation- Company in the business of providing motor vehicle appraisals classifies an individual appraiser as an independent contractor. Appraiser is performing an essential part of the appraisal company’s business.
  - No violation- Accounting firm hires an individual to move office furniture. Moving of furniture is incidental to the accounting firm’s business.
Independently established trade, occupation, profession or business

- Is contractor capable of performing the service for anyone wishing to avail themselves of it or does the nature of the business make the contractor dependent on a single employer?
- Is the contractor an entrepreneur operating an independently established business?
- Even a franchisee can be an employee, if not truly an independent trade/business
Employee or independent contractor?

- #1 Real estate salespersons
- #2 FedEx ground delivery driver
- #3 Exotic dancer
- #4 Janitorial service franchisee
Employee or independent contractor?

- #1 Real estate salespersons
  - Real estate salesperson cannot satisfy the independent contractor statute and the applicable real estate laws simultaneously. G.L.c. 149, § 148B does not control and therefore a claim based on a violation of the independent contractor statute must fail. Monell v. Boston Pads, LLC, 2013 WL 5433347 (Mass. Super. 7/19/13)
Employee or independent contractor?

- #2 FedEx ground delivery driver
  - FedEx fails to raise a genuine issue of material fact as to whether plaintiffs' pickup and delivery services were performed outside of FedEx's usual course of business. Plaintiffs were employees of FedEx under Massachusetts law. Schwann v. FedEx Ground Package Sys., Inc., 2013 WL 3353776 (D. Mass. 7/3/13)
Employee or independent contractor?

- #3 Exotic dancer
  - Establishment that provides a venue for exotic dancers is in the business of providing adult entertainment. The exotic dancers perform their services in the usual course of that business. Therefore, Centerfolds has misclassified its exotic dancers as independent contractors in violation of § 148B. Monteiro v. PJD Entertainment of Worcester, Inc., 2011 WL 7090703 (Mass. Super. Nov. 23, 2011)
Employee or independent contractor?

- #4 Janitorial service franchisee
  - Claimant was required to allow Coverall to negotiate contracts and pricing directly with clients, bill clients, and provide a daily cleaning plan to which the claimant was required to adhere. Claimant was compelled to rely heavily on Coverall. Growth of claimant's business inevitably expanded Coverall's clientele. Claimant’s business ended once Coverall “discharged” her. Coverall failed to satisfy its burden of establishing that the claimant’s business was independent. Coverall N. Am., Inc. v. Com’r of Div. of Unemployment Assistance, 447 Mass. 852 (2006)
Avoid Penalties

- Correctly classify all jobs as exempt or non-exempt.
- Have a written contract with Independent Contractors and make sure they qualify
- Maintain payroll records as required by law
- Have an up-to-date Employee Handbook - Review annually
- Have written Job Descriptions - Review annually
- Seek advice from experts
Questions

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