

Wage & Hour: Back to the Basics

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What if . . .

- Discharged employee sues the Company claiming he worked through lunch every day and did not get paid. If it is true, what is your exposure?

Things to consider

- Maine law – employee who works for 6 or more hours is entitled to a rest ½ hour rest (meal) break
- State and Federal law both require non-exempt employees to be paid for all “hours worked”
- Understanding the difficulties defending wage and hour cases
- Importance of clear policies regarding meal breaks and reporting when breaks are missed
- Importance of policies requiring employees to accurately record their time
- Importance of good documentation – e.g., examples of employees reporting missing a meal period, reporting it and getting paid for the time

What if . . .

- Employee is non-exempt and entitled to receive overtime.
- Employee knows your budget is tight and therefore works past five without putting down all of her time.
- Or the employee does not like leaving a messy desk and wants to get everything squared away even if that means leaving late.
- You do not say a word . . .

Things to Consider

- An employer who permits an employee to work off the clock is just as guilty as an employer who tells an employee to work off the clock
- The Fair Labor Standards Act does not allow employees
 - To waive their rights under the law, or
 - To consent to the Employer not complying with its obligations under the law

Child Labor Laws

- Make sure you understand the law
- Makes sure you have systems in place to ensure compliance with the law
 - Supervisor training
 - Color codes
- <http://www.state.me.us/labor/bls/minorsguide.pdf>

Exemptions Under the Fair Labor Standards Act

Salary Test

- Minimum salary under federal law is \$684 per week BUT it is **\$700.97** under Maine Law

Understanding Exempt Classifications

- Critical Element -- Salary basis
 - Pay cannot vary based on amount of work
 - If exempt employee works any part of the day, must receive salary for that day – no exceptions
 - Raises complex issues when most exempt employees can access their work e-mail on their phone

Salary Basis

- If an exempt employee works at all during the workweek, **MUST** receive full salary
 - Exceptions for full day absences for personal time, sick time (pursuant to bona fide policy), suspension for serious safety violations
 - Exception also for full day suspensions for violations of written and consistently applied policies regarding misconduct (e.g., harassment)
 - Suspensions for the full workweek for any reason are fine

Salary Basis

- No deductions can be made
 - for jury duty, witness leave, military leave if employee works during the work week
 - but can offset supplemental pay
- Will exempt status be forfeited if:
 - Employee is paid an additional amount for doing extra work? No it won't.
 - A half day absence results in a reduction in Earned Benefit Time? Not a problem.
 - Part of week not worked at the start or end of employment? Not a problem.

What if you make a mistake?

- May avoid liability if inadvertent
- Correct the problem
- Put a policy in place that prohibits improper pay deductions and have a grievance mechanism available to employees.

Understanding Exempt Classifications – True or False?

- Paying an employee a salary makes the employee exempt.

The Correct Answer is . . .

- False
 - Paying a salary is only one required factor

Executive Exemption

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

- The employee must be compensated on a salary basis
- 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**.

Executive Exemption

- What is “Primary Duty”?
 - Main or most important duty
 - Typically means more than 50%
- What is “Managing”?
 - Hiring, determining rates of pay, directing employees, evaluating employees, maintaining records, setting work and production standards, planning and assigning work, handling grievances, attending to equipment and supply needs, safety compliance, disciplining and terminating employees, etc.

Executive Exemption

- What is “particular weight”?
 - Whether making recommendations is part of job duties
 - Whether recommendations are actually made, and how often
 - Whether recommendations are relied upon
 - Still may be exempt if senior manager’s recommendations are given more weight

Administrative Exemption

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
- 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***.

Administrative Exemption

- What is Primary Duty?
 - Same as above
- What is directly related to management or general business operations?
 - Running or servicing the business as opposed to producing the product
 - Tax, finance, accounting, marketing, human resources, legal compliance, auditing, purchasing, safety, public relations, administration, etc.

Administrative Exemption

- What is “Discretion and Independent Judgement”?
 - Ability to make (or effectively recommend) decisions on matters of importance
 - Analyzing information and drawing conclusions
 - Comparing alternatives solutions and deciding a course of action

Administrative Exemption

- What is not “Discretion and Independent Judgment”?
 - It is not following prescribed procedures
 - It is not simply reporting results
 - Someone else should not be redoing the employee’s work
- What are “matters of significance?”
 - High financial implications does not, by itself, mean the exemption applies
 - Can involve issues of public relations and employee morale

Outside Sales Exemption

- The following tests must be met:
 - Employee's primary duty must be making sales or obtaining orders or contracts for services
 - Employee must be customarily and regularly engaged away from the employer's place of business.
 - Salary requirement does not apply; outside sales also often commission based
 - Driver's who sell – issue is whether primary duty is making the sales

This is an opportunity . . .

- Employers should audit their work force
 - Confirm proper classification
 - Confirm job description supports classification
 - Much more likely to reclassify those who are exempt to non-exempt
 - What do you say to someone who you have to re-classify?

Ten Most Common Problem Areas

1. Exempt Status
2. Working Off the Clock
3. Meal Breaks
4. Child Labor Violations
5. Unclear Commission and Bonus Payment terms

Ten Most Common Mistakes

6. Misunderstanding “comp time”
7. Not Factoring Bonus Payments into calculation of “hours worked”
8. On Call Payments – how they factor into overtime and regular rate calculations
9. Not making payments in a timely manner
10. Misclassification of Independent Contractors

Independent Contractor Status

My “Short Test”

- Does the worker perform services that are the essence of the business?
- Does the business have the right to direct and control?
- Are the worker’s services not really available to the general public?

Red Flag if the answer is “yes” to one or more of these questions!

Critical Points To Remember

- Exempt Positions/Job Descriptions should be reviewed to ensure classification is appropriate
- Compensation, Commission and Bonus plans should have clearly defined terms in writing
- Maintain Records of efforts to comply with the Wage & Hour laws
- Train Supervisors and Audit their performance

Questions?

Thank you

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