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Two Gateway Center | Pittsburgh, PA 15222 | TEL 412.394.5400 | babstcalland.com

The Fair Labor Standards Act in the 21st Century: Mitigating the Risks of Wage and Hour Litigation

Presented by:

John A. McCreary, Jr.

Mychal S. Schulz

Stephen A. Antonelli

The Current Legal Environment

The Courts are Where the Action Is

The Numbers

- The Federal Judicial Center reported that 8,781 cases charging Fair Labor Standards Act (FLSA) violations were filed in 2015, an 8% increase over 2014.
- FLSA cases have increased nationwide about 450% in the last 15 years.
- At least 140 FLSA cases have been filed in the Western District of Pennsylvania since June, 2014 – 1 every 5 days.

The Numbers

Fair Labor Standards Act Enforcement Statistics					
FY 2015	Cases with Violations	Back Wages	Percent of FLSA Back Wages	Employees Receiving Back Wages(duplicated ¹)	Percent of Employees Receiving FLSA Back Wages
Minimum Wage	10,642	\$37,828,554	22%	86,229	39%
Overtime	10,496	\$137,701,703	78%	173,330	78%
FY 2014	Cases with Violations	Back Wages	Percent of FLSA Back Wages	Employees Receiving Back Wages(duplicated ¹)	Percent of Employees Receiving FLSA Back Wages
Minimum Wage	11,042	\$36,732,407	21%	106,184	46%
Overtime	11,238	\$136,239,001	79%	174,365	76%
FY 2013	Cases with Violations	Back Wages	Percent of FLSA Back Wages	Employees Receiving Back Wages(duplicated ¹)	Percent of Employees Receiving FLSA Back Wages
Minimum Wage	12,403	\$38,470,100	23%	103,671	46%
Overtime	12,108	\$130,703,222	77%	174,197	77%

The Numbers

- ADP reports that 90% of all collective and class actions filed in federal and state courts are brought pursuant to the FLSA and state law analogs.
- The lucrative returns of FLSA litigation have created a specialized plaintiffs' bar that employs an industry specific approach to wage and hour litigation.

Industry Specific Approach

- Many sophisticated plaintiffs' firms have nationwide practices that target specific industries, such as oil and gas, retail, or hospitality.
- Once the first few cases are filed locally by these forerunners, local firms often follow using copycat pleadings.
- Internet advertising, social media and networking sites are used to reach potential plaintiffs.

Industry Specific Approach

OILFIELD WORKERS

Millions of U.S. workers in a number of industries fall victim to employers who fail to comply with federal and state wage and hour laws. Unfortunately, it is particularly common in the oilfield industry.

Oilfield jobs are flourishing across the country, but particularly in Texas and Louisiana, thanks in part to fracking. Since 2002, exploring and natural gas deposits in shale, followed by oil drilling, has created more than 1 million of the 2.7 million new jobs nationally according to Moody's Analytics. And an IHS Global Insight report predicts fracking alone will directly support 600,000 jobs by the end of the decade. Unfortunately, this also means that with the increase in oilfield work comes an increase in the abuse of the Fair Labor Standards Act (FLSA) within the industry.

[Open Litigation for Hourly Oilfield Workers](#)

[Open Litigation for Oilfield Misclassification](#)

Salaried Employees

To avoid paying overtime, sometimes oilfield employers will misclassify workers as salaried employees so they can work more than 40 hours without being compensated. If you work more than 40 hours per week, regardless of whether you are labeled or paid as a salaried employee, you may be eligible for overtime. [Read more here.](#)

Day Rate Employees

Some oilfield companies employ **Daily Rate workers** who commonly work over 80 hours per week, but do not pay these workers overtime. Companies violate overtime pay laws by paying workers a flat day rate, regardless of the amount of overtime worked; or, they pay the workers "straight time" for overtime (they receive their normal hourly rate even for overtime hours). [Read more here.](#)

Independent Contractors

Misclassification as an independent contractor is another disturbing and common practice within the oilfield industry. Employers misclassify workers as independent contractors to skirt paying employees full compensation. [Read more here.](#)

Off-the-Clock Work

Oilfield employees have certain tasks that must be performed before they can begin or finish their job, including driving to the job site, donning, doffing, and/or cleaning safety equipment or gear. Some oilfield employers try to avoid paying wages for this time, claiming that it is "off the clock" or will alter your time sheets, both of which are illegal. [Read more here.](#)

Per Diem with Hourly

Sometimes, employers intentionally fail to compensate hourly oilfield workers for overtime worked, by improperly and illegally paying per diems and truck pay instead of wages. [Read more here.](#)

Underreport Hours

Oilfield companies knowingly underreport hours to avoid paying overtime to oilfield workers. This is illegal and oilfield workers who have fallen victim are entitled to recover an amount equal to their unpaid overtime wages for the last 2-3 years. [Read more here.](#)

SALARIED/HOURLY/DAY RATE OILFIELD WORKERS

For A Free Confidential Consultation

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email *

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SUBMIT

EMPLOYEES WE HELP

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Exempt or Non-Exempt?

Liberal Interpretation

- The FLSA is interpreted liberally to provide its protections to the largest number of employees:
 - “In keeping with the broad statutory definitions of the coverage phrases used, the courts have repeatedly expressed and adhered to the principle that the coverage phrases should receive a ***liberal interpretation***, consonant with the definitions, with the purpose of the Act, and with its character as ***remedial and humanitarian legislation***.” H.R. Rep. No. 1366, 89th Cong., 2d Sess., p. 10 (accompanying the 1966 amendments to the Act).

Classification: Exempt vs. Non-Exempt

- Misclassification is the cause of the vast majority of FLSA litigation.
- Federal and State law may differ in the manner by which they classify employees as Exempt or Non-Exempt from the overtime provisions of the wage laws.
 - States may enact their own rules that differ from federal rules as long as they provide at least the federal minimum. States often use the same criteria as the FLSA, but may apply them differently.

Overtime

- Under the FLSA and all state laws, overtime is due to all non-exempt employees for all hours worked over 40 in a workweek.
- Exemptions from the overtime requirements of state and federal law are construed narrowly and must meet three basic requirements:
 - Salary level test (minimum \$ level);
 - Salary basis test (limited deductions); and
 - Duties test (specific to exemption).

Salary Basis

- Salary basis means guaranteed payment, with only limited ability to deduct for missed work.
 - ***All exempt employees must be paid a salary (or weekly guaranty), but not all salaried employees are exempt!***
- **Effective 12/1/2016, the salary level will require a minimum of \$913/week or \$47,476 per year.**
 - Currently \$455/week or \$23,600 per year
- Duties are specific to the type of exemption: managerial, administrative, professional, or computer.

Salary Basis *cont'd*

- An employee will be considered to be paid on a “salary basis” within the meaning of FLSA if he regularly receives each pay period a predetermined amount constituting all or part of his compensation, ***which amount is not subject to reduction because of variations in the quality or quantity of the work performed.***
 - Effective 12/1/2016, up to 10% of the minimum salary (\$913/week or \$47,476/year) may be satisfied by the payment of ***nondiscretionary*** bonuses, incentives, and commissions, that are paid quarterly or more frequently

Salary Basis *cont'd*

- An exempt employee must receive the full salary for any week in which he performs any work without regard to 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 employee is ready, willing and able to work, deductions may not be made for time when work is not available.***

Salary Basis *cont'd*

- The prohibition against deductions from pay in the salary basis requirement is subject to a number of exceptions, including:
 - Full day absences for reasons personal to the employee, other than sickness or disability, or absences due to sickness where sick time is paid instead;
 - Suspensions for violation of safety or disciplinary rules; and
 - Unpaid leave under the FMLA.

Exemption Eligibility

- Exemptions only apply to certain “white collar” employees.
- ***Unless an employee is paid the minimum salary AND performs job duties specific to an exemption, he must receive overtime for hours worked in excess of 40 in a week.***

Executive Exemption

- “Primary duty” is the management of the enterprise or department or subdivision in which the employee is employed or a customarily recognized department or subdivision thereof;
 - “Primary duty” > 50% of time under FLSA
 - “Primary duty” > 80% under Pennsylvania law – know the law of the state in which your employees are working!
- Customarily and regularly directs ***work of two or more employees; and***
- Has authority to hire or fire other employees ***or*** has meaningful input into decisions related to same.

Administrative Exemption

- “Primary duty” is the performance of ***office or non-manual work*** that is directly related to the management or general business operations of the employer or the employer’s customers;
 - “Primary duty” > 50% of time under FLSA
 - “Primary duty” > 80% under Pennsylvania law; may be different in other states. Know the law of the state in which your employees are working!
- *And* primary duty includes the ***exercise of discretion and independent judgment regarding matters of significance.***

Administrative Exemption

- The exercise of discretion and independent judgment involves “the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered.”
- The term “matters of significance” refers to the level of importance or consequence of the work performed.

Administrative Duties Test

- An employee who exercises “discretion and independent judgment” typically:
 - Has authority to formulate, affect, interpret or implement management policies or operating practices;
 - Carries out major assignments in conducting the operations of the business;
 - Performs work that affects business operations to a substantial degree;
 - Has authority to commit employer in matters that have significant financial impact;
 - Has authority to waive or deviate from established policies and procedures without prior approval;
 - Has authority to negotiate and bind company on significant matters;
 - Provides consultation or expert advice to management;
 - Is involved in planning long- or short-term business objectives;
 - Investigates and resolves matters of significance on behalf of management;
 - Represents the company in handling complaints, arbitrating disputes or resolving grievances.

Special Exemption for Highly Compensated Employees

- As of 12/1/2016, an employee who earns at least \$134,004 annually and is paid a salary or guaranty of at least \$913 per week; **and**
- Whose primary duties include performing *office or non-manual work*; **and**
- Who customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.
 - Note that Pennsylvania law does not recognize this exemption. Other states may also not recognize it. Know the law of the state in which your employees are working!

Calculating Overtime

The “Regular Rate”

The “regular rate”:

- Section 7(e) of the FLSA requires inclusion in the “regular rate” of “all remuneration for employment paid to, or on behalf of, the employee” except payments specifically excluded.
- The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment in any workweek – including bonuses, commissions and other forms of compensation not otherwise excluded – by the total number of hours actually worked by him in that workweek for which such compensation was paid.
 - *The regular rate can and often does change from week to week.*

Calculating Overtime – Hourly Rated Employee

- **§ 778.110 Hourly rate employee.**

- (a) Earnings at hourly rate exclusively.**

If the employee is employed solely on the basis of a single hourly rate, the hourly rate is the “regular rate.” For overtime hours of work the employee must be paid, in addition to the straight time hourly earnings, a sum determined by multiplying one-half the hourly rate by the number of hours worked in excess of 40 in the week. Thus a \$12 hourly rate will bring, for an employee who works 46 hours, a total weekly wage of \$588 (46 hours at \$12 plus 6 at \$6). In other words, the employee is entitled to be paid an amount equal to \$12 an hour for 40 hours and \$18 an hour for the 6 hours of overtime, or a total of \$588.

- (b) Hourly rate and bonus.**

If the employee receives, in addition to the earnings computed at the \$12 hourly rate, a production bonus of \$46 for the week, the regular hourly rate of pay is \$13 an hour (46 hours at \$12 yields \$552; the addition of the \$46 bonus makes a total of \$598; this total divided by 46 hours yields a regular rate of \$13). The employee is then entitled to be paid a total wage of \$637 for 46 hours (46 hours at \$13 plus 6 hours at \$6.50, or 40 hours at \$13 plus 6 hours at \$19.50).

Calculating Overtime – Day Rate

- **§ 778.112 Day rates and job rates.**
 - If the employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and if he receives no other form of compensation for services, his regular rate is determined by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek.

Calculating Overtime – Bonus Payment

§ 778.209 Method of inclusion of bonus in regular rate.

- Bonus payments based on work performance, e.g., production bonuses, are considered a part of the regular rate at which an employee is employed, and must be included in computing his regular hourly rate of pay and overtime compensation.
 - For bonuses paid on a weekly basis the amount of the bonus is merely added to the other earnings of the employee (except statutory exclusions) and the total divided by total hours worked.

Calculating Overtime – Bonus Payment

- Under many bonus plans, however, calculations of the bonus may necessarily be deferred over a period of time longer than a workweek.
 - In such a case the employer may disregard the bonus in computing the regular hourly rate until such time as the amount of the bonus can be ascertained. Until that is done he may pay compensation for overtime at one and one-half times the hourly rate paid by the employee, exclusive of the bonus.
 - When the amount of the bonus can be ascertained, it must be apportioned back over the workweeks of the period during which it may be said to have been earned.

Calculating Overtime – Bonus Payment

- Once the bonus is calculated, the employee must then receive an additional amount of compensation for each workweek that he worked overtime during the period equal to one-half of the hourly rate of pay allocable to the bonus for that week multiplied by the number of statutory overtime hours worked during the week.
- If it is impossible to allocate the bonus among the workweeks of the period in proportion to the amount of the bonus actually earned each week, some other reasonable and equitable method of allocation must be adopted.

Enforcement

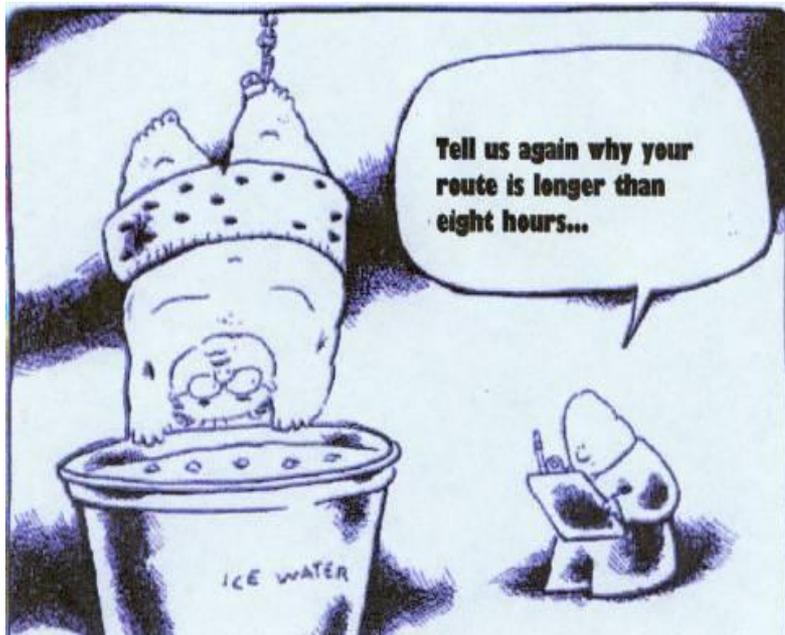


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TO HELP**

Enforcement – WHD Investigation

Department of Labor - Wage & Hour Division (WHD)

- The WHD conducts FLSA compliance investigations.



- WHD does not typically disclose the reason for an investigation. Many are initiated by confidential complaints.

Enforcement – WHD Investigation

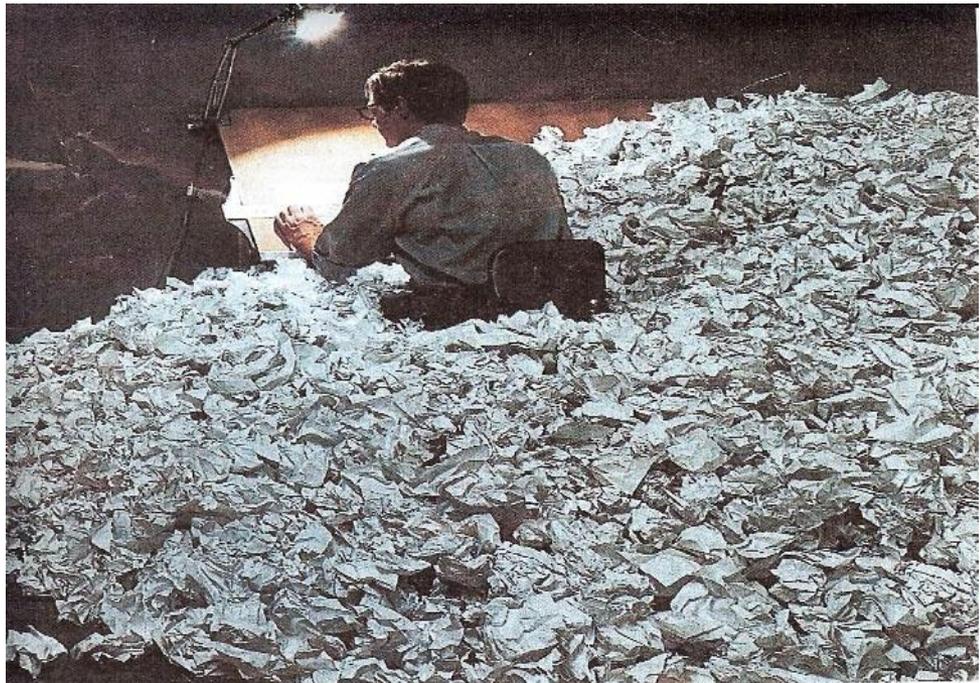
- In addition to complaints, WHD selects certain types of businesses or industries for investigation. The WHD targets low-wage industries, for example, because of high rates of violations or egregious violations, the employment of vulnerable workers, or rapid changes in an industry such as growth or decline.



- The objective of targeted investigations is to improve compliance with the laws in those businesses, industries, or localities.

Enforcement – WHD Investigation

- Section 11(a) of the FLSA authorizes WHD to investigate and gather data concerning wages, hours, and other employment practices; enter and inspect an employer's premises and records; and question employees to determine whether any person has violated any provision of the FLSA.
- The practice of WHD is to provide very little notice (often less than one week) to prepare for the site audit.



Enforcement – WHD Investigation

- A site audit investigation consists of the following steps:
 - Examination of records to determine which laws or exemptions apply. These records include, for example, those showing the employer's annual dollar volume of business transactions, involvement in interstate commerce, and work on government contracts. Information from an employer's records will not be revealed to unauthorized persons.
 - Examination of payroll and time records, and taking notes or making transcriptions or photocopies essential to the investigation.



Enforcement – WHD Investigation

- Interviews with non-managerial employees are private. The purpose of these interviews is to verify the employer's payroll and time records, to identify workers' particular duties in sufficient detail to decide which exemptions apply, if any, and to confirm that minors are legally employed. Interviews are normally conducted on the employer's premises. In some instances, present and former employees, or those who are absent or unavailable, may be interviewed at their homes or by mail or telephone.



Enforcement – WHD Investigation

- When all the fact-finding steps have been completed, the investigator will ask to meet with the employer and/or a representative of the firm *who has authority to reach decisions and commit the employer to corrective actions* if violations have occurred. The employer will be told whether violations have occurred and, if so, what they are and how to correct them. If back wages are owed to employees because of minimum wage or overtime violations, the investigator will request payment of back wages and may ask the employer to compute the amounts due.

Enforcement – WHD Investigation



Slowly but surely, they saw each other's point of view.

WHD encourages voluntary settlement to resolve compliance issues administratively. If appropriate, WHD may litigate and/or recommend criminal prosecution.

Enforcement – DOL Administrative Procedure

- **Administrative procedures:** WHD is authorized to supervise the payment of unpaid minimum wages and/or unpaid overtime compensation owed to any employee(s). WHD may seek back wages, liquidated damages, and civil money penalties, if applicable, through settlements with employers.

Enforcement – DOL Civil Litigation

Litigation procedures:

- WHD may file a lawsuit in U.S. District Court on behalf of employees for back wages and an equal amount in liquidated damages. Other remedies may include:
 - injunctions to restrain violations of the law, including the unlawful withholding of proper minimum wage and overtime pay, failure to keep proper records, and retaliation against employees who file complaints and/or cooperate with WHD
 - an order for payment of civil money penalties from a U.S. Department of Labor Administrative Law Judge where appropriate.

Enforcement – Private Litigation

- Section 216(b) of the FLSA provides that:

“An action to recover the liability [for unpaid overtime] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees ***for and in behalf of himself or themselves and other employees similarly situated.***

No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.”



Enforcement – Private Litigation

- **Section 216(b) of the FLSA provides that:**
“Any employer who violates the provisions of [the FLSA] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, ***and in an additional equal amount as liquidated damages.***”

“The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.”



Enforcement – “Good Faith” Defense



Enforcement - Defense to Liquidated Damages: “Good Faith”

- The Portal-to-Portal Act amendments to FLSA, 29 USC § 260, introduced an affirmative defense of “good faith” defense to liquidated damages:
 - “if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA], the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.”

Enforcement - The Illusory Defense to Liquidated Damages: “Good Faith”

- “The good faith requirement is a subjective one that ***‘requires that the employer have an honest intention to ascertain and follow the dictates of the Act.’*** . . . The reasonableness requirement imposes an objective standard by which to judge the employer's conduct. ***Ignorance alone will not exonerate the employer under the objective reasonableness test . . .***”

Enforcement - The Illusory Defense to Liquidated Damages: “Good Faith”

- Subjective good faith is a determination that that the employer had an honest intention to ascertain and follow the dictates of the FLSA.
- The reasonableness of an employer's conduct is determined by an objective standard: “the employer must act as a reasonably prudent man would have acted under the same circumstances.”
- Hence, an employer's ignorance alone is not sufficient in meeting the objective test.
- ***Thus, the employer who doesn't know that it may be violating the law won't inquire about the applicability of the law, and will therefore lack “good faith.”***

Enforcement - Limitations Periods

- There are two limitations periods set forth in the FLSA:
 - Two years in the case of “normal” violations.
 - Three years in the case of “willful” violations.
29 U.S.C. § 255(a).
 - A “willful” violation is one in which “the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.”

Enforcement - Settlement

- Unlike most private litigation, employees are not permitted to settle their claims privately.
 - WHD can supervise and approve settlements of FLSA claims, and thereby relieve employers from further liability.
 - Private actions, whether individual or collective, must be approved by the presiding judge.

Enforcement - Conclusion



Joint Employer Issues

Additional Traps for the Unwary

Joint Employer Issues

- The Wage and Hour Division issued enforcement guidance on joint employment under the FLSA in January, 2016.
- The guidance addresses the enforcement issues raised by employers “sharing employees or using third-party management companies, independent contractors, staffing agencies or labor providers.”

Joint Employer Issues

- Under the FLSA, to “employ” is “to suffer or permit to work.”
- The FLSA’s definition of “employer” is “the broadest definition that has ever been included in any one act.” *U.S. v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945).
- Under the FLSA, and “economic realities” test is used to determine who are employees of the employer

Joint Employer Issues

- “Horizontal joint employment”:
 - Joint employment may exist when two (or more) employers each separately employ an employee and are sufficiently associated with or related to each other with respect to the employee.
 - All of the employee’s work for all of the joint employers during the workweek is considered as one employment for purposes of the Act.

Joint Employer Issues

- Among the factors that may be relevant in determining horizontal joint employers are:
 - Who owns the potential joint employers (i.e., does one employer own part or all of the other or do they have any common owners)?
 - Do the potential joint employers have any overlapping officers, directors, executives, or managers?
 - Do the potential joint employers share control over operations (e.g., hiring, firing, payroll, advertising, overhead costs)?
 - Are the potential joint employers' operations inter-mingled (for example, is there one administrative operation for both employers, or does the same person schedule and pay the employees regardless of which employer they work for)?

Joint Employer Issues

- Among the factors that may be relevant in determining horizontal joint employers are:
 - Does one potential joint employer supervise the work of the other?
 - Do the potential joint employers share supervisory authority for the employee?
 - Do the potential joint employers treat the employees as a pool of employees available to both of them?
 - Do the potential joint employers share clients or customers?
 - Are there any agreements between the potential joint employers?

Joint Employer Issues

- “Vertical joint employment”
 - The analysis focuses on “the economic realities of the relationships” between two nominally separate employers “to determine whether the employees are economically dependent on those potential joint employers and are thus their employees.”
 - It is intended to capture both parties in the traditional “temp agency” model.

Joint Employer Issues

- Seven factor analysis for vertical joint employment:
 1. Directing, Controlling, or Supervising the Work Performed – To the extent the work performed by the employee is controlled or supervised by the potential joint employer beyond a reasonable degree of contract performance oversight, such control suggests that the employee is economically dependent on the potential joint employer.
 2. Controlling Employment Conditions – To the extent that the potential joint employer has the power to hire or fire the employee, modify employment conditions, or determine the rate or method of pay, such control indicates that the employee is economically dependent on the potential joint employer.

Joint Employer Issues

- Seven factor analysis for vertical joint employment:
 3. Permanency and Duration of Relationship – An indefinite, permanent, full-time, or long-term relationship by the employee with the potential joint employer suggests economic dependence.
 4. Repetitive and Rote Nature of Work – To the extent that the employee’s work for the potential joint employer is repetitive and rote, is relatively unskilled, and/or requires little or no training, those facts indicate that the employee is economically dependent on the potential joint employer.

Joint Employer Issues

- Seven factor analysis for vertical joint employment:
 5. Integral to Business – If the employee’s work is an integral part of the potential joint employer’s business, that fact indicates that the employee is economically dependent on the potential joint employer.
 6. Work Performed on Premises – The employee’s performance of the work on premises owned or controlled by the potential joint employer indicates that the employee is economically dependent on the potential joint employer. The potential joint employer’s leasing as opposed to owning the premises where the work is performed is immaterial because the potential joint employer, as the lessee, controls the premises.

Joint Employer Issues

- Seven factor analysis for vertical joint employment:
 7. Performing Administrative Functions Commonly Performed by Employers – To the extent that the potential joint employer performs administrative functions for the employee, such as handling payroll, providing workers' compensation insurance, providing necessary facilities and safety equipment, housing, or transportation, or providing tools and materials required for the work, those facts indicate economic dependence by the employee on the potential joint employer.

Joint Employer Issues

- In joint employer situations, all hours worked for both employers must be counted for purposes of overtime, and “all of the joint employers are jointly and severally liable for compliance with the FLSA”
 - Thus, where WHD finds joint employers, an employee of both may be entitled to overtime compensation even though the employee did not work more than 40 hours in a week for either of them.

Joint Employer Issues

- Wage Hour Division's Enforcement Policy:
“WHD will continue to consider the possibility of joint employment to ensure that all responsible employers are aware of their obligations and to ensure compliance with the FLSA As with all aspects of the employment relationship under the FLSA ..., the expansive definition of “employ” as including “to suffer or permit to work” must be considered when determining joint employment, so as to further the statutes’ remedial purposes.”

Mitigating Risk

Wage/Hour Self Audit – Employee Classifications

- Review all jobs (not just their descriptions) presently classified as exempt to ensure:
 - Compliance with salary level (\$) test: \$913/wk or \$47,476 annually on 12/1/2016
 - Compliance with the salary basis test: improper deductions?
 - Compliance with the applicable duties tests:
 - Executive – supervise 2 or more
 - Administrative – exercise meaningful discretion
 - Highly compensated – paid at least \$134,004 and perform one exempt duty

Wage/Hour Self Audit – Employee Classifications

- Review all personnel classified as contractors to ensure proper classification
 - Consider applicability of DOL Joint Employer enforcement guidelines to contracted personnel
 - Review contract documents for appropriate description of responsibilities and consider revising or adopting indemnity provisions.

Payroll Practice Self Audit

- Ensure that all required compensation is included in the “regular rate” calculation for non-exempt employees:
 - Day or job rates
 - Production and other non-discretionary bonuses
 - Shift premiums
 - Commissions
 - Other, e.g., cash payments from § 125 cafeteria plans

Payroll Practice Self Audit

- Preliminary and Postliminary Activities
 - Preparatory activities are generally not compensable under the FLSA, unless they are an “integral and indispensable part of the employee’s principal duties” or required by the employer.
 - Identify any “integral and indispensable” preliminary or postliminary activities for which compensation may be owed.

Payroll Practice Self Audit

- Travel Time
 - Regular commuting to and from work is not compensable; after this general rule, it becomes complicated.
 - Generally, travel required for work, *e.g.*, between job sites, and travel that occurs during normal working hours, is required to be paid.
 - There are special rules for out-of-town travel and lengthy commutes.

Payroll Practice Self Audit

- Ensure that all hours actually worked are accurately recorded:
 - *E.g.*, break times of less than 20 minutes must be paid. During meal periods, employees must be *completely* relieved of duties. State law must also be consulted.
 - Review time keeping and record keeping policies to capture work “suffered or permitted”: “off the clock” work.
 - Review assignment of authority/responsibility to “correct” employee time records.

Payroll Practice Self Audit

- All overtime compensation must be paid in the pay period in which it was earned, or in the case of bonus earnings, no later than the pay period immediately following when it is capable of being calculated.
- “Comp time” is illegal, unless you are a government agency?

State Wage Hour Law Review

- Examine compliance with state and local laws where employees/contractors are employed.
 - State laws, while similar in many ways to the FLSA, are not identical. Compliance with FLSA does not guaranty compliance with state or local regulations.
 - *E.g.* \$15/hour minimum wage in some jurisdictions.
 - Differences in tests for overtime exemptions.

Wage and Hour Self-Audit

- If the self-audit reveals problems, consult with counsel for methods of remediation.



Thank you!

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