



jackson | lewis
all we do is work

Presented by:

Daniel D. Barker

Daniel.Barker@jacksonlewis.com

Wage & Hour : Compliance Tips

Goals

- Basic Overview and Requirements of Fair Labor Standards Act (“FLSA”)
 - Payment/Overtime
 - Regular Rate
 - Hours Worked
- Common Exemption Tests
 - Proposed Changes
- Other Hot Topics and DOL Focuses

Why It's Important

- Continued focus by DOL
 - Budget increasing every year
 - Repeat violations = automatic civil money penalties
- Continued focus by plaintiff's attorneys
 - Number of lawsuits increasing every year
- Preparation costs less than the alternative
- Personal liability of owners/decision makers

Applicable Law

● **Fair Labor Standards Act**

- Statute (29 U.S.C. § 201 *et seq.*)
- Regulations (29 C.F.R. 500 *et seq.*)
- Department of Labor Opinion Letters

● **Wisconsin Wage & Hour Law**

- Statute (Wis. Stat. § 103)
- Regulations (Wis. Admin Code DWD 274 *et seq.*)
- Attorney General Opinion Letters

Basic Overview

- All non-exempt employees must be paid at least minimum wage for all hours worked
- Presumption – all employees non-exempt
 - Unless **employer** can prove an exemption
 - “Plainly and unmistakably” is the standard
- All non-exempt employees are paid overtime at the rate of 1 ½ x the “regular rate” of pay for all “hours worked” over forty in one “work week”

Regular Rate Of Pay

- Calculation – Dividing total earnings in workweek by total hours worked in the workweek
- What is Included?
 - Any non-discretionary payment for work
- What is Excluded?
 - Gifts
 - Payments for time not worked (holiday, PTO, etc.)
 - Expense reimbursement, profit sharing or retirement plan payments
 - Discretionary Bonuses

Hours Worked

“Suffered or Permitted”

- Waiting or On-Call Time
- Meal and Rest Periods
- Training Time
- Travel Time

Workweek

- Each workweek stands alone
- Workweek is 7 consecutive 24 hour periods
- Calculate regular rate per workweek
- Compliance is determined by workweek, and each workweek stands by itself

Paying for “Work”

- Non-exempt employees must be paid for “all work suffered or permitted”
 - This means employees must be paid for all work they do whether or not you asked them to do it.
- The **employer** is responsible for keeping accurate time records
- Think about your paper trail
 - Verifications
 - Records of corrections

Paying for “Work”

- Make sure all working time is recorded
 - Emails from home
 - Calls from home
 - Mandatory review of materials
- Add a representation on timesheets that all time worked is recorded
 - Have employees sign time sheet
 - Add question on electronic submissions

Paying for “Work”

- On-Call time is compensable if:
 - Employee must remain in a certain place
 - At work
 - Within a 2 mile radius of home
 - Other restrictions on employee’s activities
- On-Call time is generally not compensable if
 - Employee must be available by phone
- But make sure actual time worked is recorded

Paying for “Work”

- Waiting time is compensable if:
 - Employee was instructed to arrive at a particular time (i.e. required to be at work 10 minutes before shift starts)
 - Employee is waiting for work that may arrive at any time (waiting for delivery of materials)
 - Employee cannot leave job site or is otherwise limited in activities

Paying for “Work”

- Travel time is compensable if:
 - Traveling between jobs for employer
 - Travel between shop and jobs if going to shop first is required
 - Travel between home and “special location” more distant than normal daily commute
 - Wisconsin: All travel time away from home community.
FEDERAL LAW IS DIFFERENT. DO NOT RELY ON IT.
 - Travel to and from home IF preceded or followed by non-de minimis work.

Paying for “Work”

- Break times are compensable if they last less than 30 consecutive minutes.
 - Do not use auto deduct
 - Be careful with interrupted breaks
 - Be careful with breaks that start late
 - Be careful with breaks that end early
 - Avoid “working breaks”

Paying for “Work”

- Trainings and meetings are almost always compensable
 - Learning new product
 - Learning new skill for use at work
 - Studying assigned materials
 - Ask: does it benefit the business?

White Collar Exemptions: Basic Rules

● **Employees can be non-exempt or exempt**

○ **Non-Exempt Employees**

- Paid by the hour
- Get overtime
- Can reduce pay for partial day/week absences

○ **Exempt Employees**

- Get a fixed salary
- Do not get overtime
- Cannot reduce pay for partial day/week absences
(except in special circumstances)

White Collar Exemptions: Basic Rules

● Exempt employees must meet:

1. The “salary basis” test
2. A “job duties” test

Salary Basis Test

● Salary Basis Test

- This amount will likely change to \$970 per week (\$50,544/year) with COLA adjustment
- Must be paid a pre-determined amount each pay period
- Cannot be paid more often than weekly

Salary Basis Test

- **Have a plan for handling the likely change**
 - Know which exempt jobs fall short of the \$913/week (\$47,476) annual salary
 - Decide whether to raise pay (one time bump) or change job status
 - Keep in mind that there is a proposed COLA adjustment to minimum annual salary
 - Review exempt positions annually

Salary Basis Test

● Deductions from pay destroy salary basis

- Deduction for absence less than a week long
- Deduction for suspension less than a week long unless in a whole day increment and it is for violation of a written safety/conduct policy applicable to all employees
- Deduction for lost/destroyed equipment
- Deduction for jury duty
- Unpaid furlough due to lack of work

● Deductions for FMLA are ok



Common Exemptions

● Common exemptions

- Executive
- Administrative
- Professional
- Motor Carrier Act Exemption

Common Exemptions

● Executive Exemption

- Primary job duty is to manage the enterprise, or a customarily recognized department or subdivision
- Customarily and regularly directs the work of two or more other employees AND
- Has the authority to hire/fire employees OR
- Recommendations as to hiring/firing, promotion and other changes of status are given particular weight

Common Exemptions

● Executive Exemption -- cautions

- “Primary Job Duty” - based on importance of job duties and time spent
- **80%** of work must be executive in nature, unless you are primarily a retail or service business. Then **60%** of work must be executive. (WI law)
- If employee does not have authority to hire and fire without review, how often is the recommendation overridden?
- The “working supervisor” can be a trouble spot

Common Exemptions

● Administrative Exemption

- Primary job duty is to perform office or non-manual work directly related to the management of the business, general business operations, or the employee's customers AND
- Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance

Common Exemptions

“Directly Related to Management, General Operations or Customers”

tax

database administration

finance

legal/regulatory compliance

accounting

advertising/marketing

budgeting

personnel management

auditing

human resources

quality control

public relations

purchasing

safety & health

Common Exemptions

● Administrative Exemption -- cautions

- “Primary Job Duty” - based on importance of job duties and time spent
- **80%** of work must be executive in nature, unless you are primarily a retail or service business. Then **60%** of work must be executive. (WI law)
- Exercise of judgment and discretion is key (repetitive, mechanical work does not count)
- Location of work (i.e. office) is not dispositive

Common Exemptions

● Professional Exemption

- Primary duty is performing work requiring advanced knowledge
 - in a field of science or learning
 - customarily acquired by a prolonged course of specialized intellectual instruction

Common Exemptions

● Professional Exemption -- cautions

- Usually requires a 4-year advanced degree
- Having a 4 year degree is not enough - must use it in job duties and it must be a job requirement
- Routine physical, manual or even mental work does not count

Common Exemptions

● Motor Carrier Act Exemption

- Truck weighs over 10,000 lbs
 - Any work on a vehicle 10,000 pounds or less destroys the exemption.
- Employee works for a motor carrier that is subject to regulation by the Secretary of Transportation
- Employee is engaged in activities that directly affect the operational safety of commercial vehicles
- Vehicle transports passengers or property in interstate commerce or foreign commerce

Common Exemptions

- Outside sales. Federal Law: Primary duty is obtaining sales away from a fixed location. Don't confuse with an employee who works at home. Telephone sales are not "outside."
- Wisconsin law: 80% of the work must be outside sales.
- Other less-common exemptions: There is a laundry list.
 - Auto dealer exemptions
 - Agriculture
 - Recreational Enterprises

Trends to Watch

- New DOL regulations
- Focus on Wisconsin's 80% requirement
 - more stringent than federal law, but federal law may move in WI's direction
- Erosion of Executive Exemption
 - working supervisors
 - team lead

Thank You!

● Questions?