

WAGE & HOUR – AVOIDING COMMON MISSTEPS

34th Annual Labor & Employment Law Conference

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WAGE & HOUR LAW UPDATES AND TRENDS

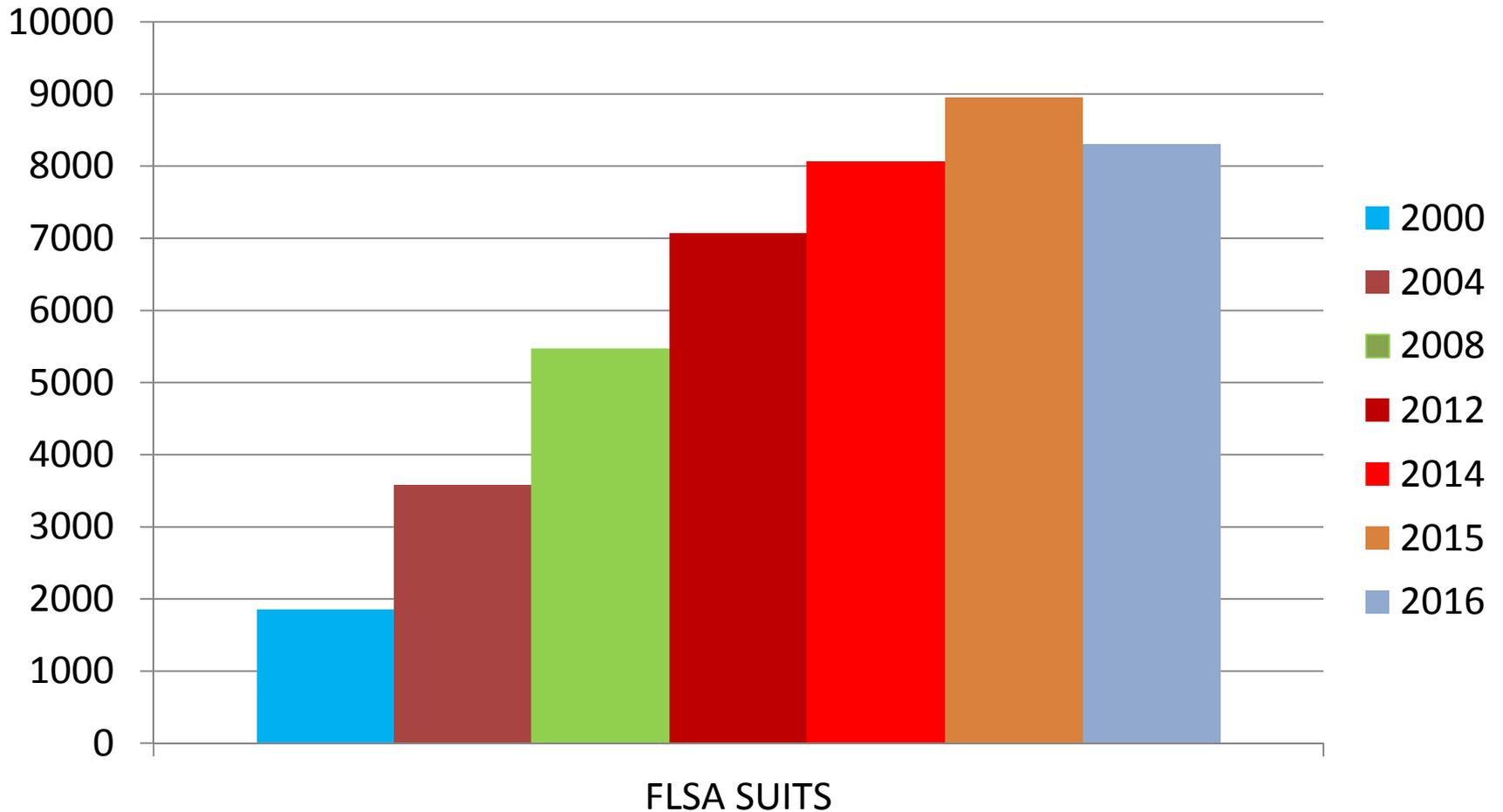
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MICHIGAN MINIMUM WAGE

Minimum Hourly Wage Rate			
Effective Date	Minimum Hourly Wage Rate	Tipped Employee Minimum Hourly Rate (Provided Tips Per Hour At Least \$5.73)	Age 16 – 17 Rate (85% of Min. Wage)
January 1, 2018	\$9.25	\$3.52	\$7.86

A training wage of \$4.25 per hour may be paid to employees 16 to 19 years of age for the first 90 days of employment.

FEDERAL STATISTICS AND TRENDS



RECENT NOTABLE WAGE AND HOUR CASES

Amount	Organization	Reason
\$2.54 Million	Burberry	Failing to pay overtime. – July 2017
\$17.7 Million	City of Lexington	Failing to pay firefighters overtime and related pension fund contributions. – March 2017
\$19.1 Million	TGI Fridays	Failing to pay overtime, forcing tipped workers to share wages with non-tipped workers, failing to keep proper wage and hour records. – September 2017
\$187 million	Wal-Mart Stores	Failure to pay for off-the-clock work and missed rest breaks. – April 2016
\$227 million	FedEx	Misclassification of drivers as independent contractors. – May 2017

DOL OVERTIME RULE STATUS

- May 23, 2016 – DOL Issue Final Rule increasing salary-level test from \$455/week (\$23,660/yr) to \$913/week (\$47,476/yr)
- Sept. 20, 2016 – Lawsuit file to block Final Rule
- Aug. 31, 2017 – Court held that the Final Rule was invalid
- Oct. 30, 2017 – DOL appealed to the Fifth Circuit
- Nov. 6, 2017 – Fifth Circuit granted DOL's motion to hold appeal in abeyance while the DOL undertakes further rulemaking to determine what the salary level should be
- October 2018 – DOL plans to issue new rule

OPINION LETTERS REINSTATED

- Purpose – Provide guidance on specific wage and hour issues, in response to specific questions submitted by employers/employees. Compliance with letter serves as affirmative defense for employers.
- Obama Administration – Practice of issuing opinion letters ceased. Letters issued in final days of Bush administration withdrawn or not issued.
- Trump Administration – Practice of issuing opinion letters resumed. Letters withdrawn by Obama Administration reissued.

OPINION LETTERS REINSTATED

- What counts as work time under the FLSA when employees travel for work (See FLSA2018-18)
 - Time spent inside of normal working hours is compensable. If not set schedule, employer and employee can agree.
 - Hotel to work travel is normal commuting time and not compensable
- Whether 15-minute rest breaks required every hour by an employee's serious health condition must be paid or may be uncompensated (See FLSA2018-19)
 - If an employer typically allows two 15-minute paid breaks per day, the employee taking FMLA breaks every hour should be paid for two breaks. The remaining six breaks would be unpaid.
- Whether certain payments from employers to employees are considered "earnings" for garnishment purposes under Title III of the Consumer Credit Protection Act (See CCPA22018-1NA)
 - Lump-sum payments for workers' compensation, insurance settlements for wrongful termination, and buybacks of company shares do not constitute "earnings" under the CCPA

TIP CREDIT BULLETIN

- Field Assistance Bulletin No. 2018-3
 - Employers who pay the full FLSA minimum wage are no longer prohibited from allowing employees who are not customarily and regularly tipped—such as cooks and dishwashers—to participate in tip pools. The Act prohibits managers and supervisors from participating in tip pools, however, as the Act equates such participation with the employer’s keeping the tips.

PAYROLL AUDIT INDEPENDENT DETERMINATION ("PAID") PROGRAM

- New pilot program of the WHD
- Facilitates resolution of potential overtime and minimum wage violations by:
 - Encouraging employers to conduct audits and, if they discover violations, to self-report those violations.
 - Employers may then work in good faith with the WHD to correct their mistakes and quickly provide 100% of the back wages due to their affected employees.
- For more information on how to participate, visit www.dol.gov/whd/paid and/or contact Clark Hill PLC



CASE LAW UPDATE – EXEMPTIONS

- April 2, 2018 – U.S. Supreme Court held that FLSA exemptions should be construed broadly, not narrowly
- Practical Effect: More workers will be considered exempt from the FLSA's requirements

COMMON WAGE & HOUR MISSTEPS

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WAGE & HOUR MISTAKE #1

Misclassification of a job as exempt under the “white-collar” (executive/administrative/professional) exemptions

- Three tests must be met:
 - Salary basis
 - Salary level
 - Exempt duties
- Salary basis = regularly receives a predetermined amount of compensation
- Salary level = no less than \$455 per week

WAGE & HOUR MISTAKE #1 (CONT.)

- Exempt Duties (Executive)
 - Primary duty must be managing the enterprise or a department or division of it
 - Must customarily and regularly direct the work of 2+ full-time employees or their equivalent
 - Must have the authority to hire/fire employees or make suggestions regarding hiring/firing or changes in employment status which are given particular weight

WAGE & HOUR MISTAKE #1 (CONT.)

- Exempt Duties (Administrative)
 - 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
 - Primary duty must include the exercise of discretion and independent judgment with respect to matters of significance
- Exempt Duties (Professional)
 - 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

EXECUTIVE ASSISTANT

Company hired an EXECUTIVE administrative assistant. She has the DISCRETION to schedule appointments for her supervisors and uses Outlook to keep all the executives' schedules straight. Whenever management decides that Company needs materials, supplies, or equipment, she completes the order. She has the INDEPENDENT JUDGMENT and DISCRETION to order from any of the many pre-approved suppliers according to purchasing policies and procedures provided to her by Company. All of the other non-executive administrative assistants go to her for advice and training. She works a lot of overtime ordering supplies and MANAGING the executives' calendars.

Is she exempt from the FLSA overtime requirements?

- A. Yes
- B. No

WAGE & HOUR MISTAKE #2

Classifying employees as independent contractors

- General Rule: An individual is an independent contractor if the payer has the right to control or direct only the result of the work and not what will be done and how it will be done
- Six-Factor Economic Realities Test
 - Degree of control exercised by the principal over the alleged contractor
 - The alleged contractor's opportunity for profit or loss
 - The alleged contractor's investment in facilities and equipment for his/her business
 - Whether the work requires special skill and initiative
 - The permanency of the relationship
 - The extent to which the services provided are an integral part of the principal's business

INDEPENDENT CONTRACTORS

To save money, ABC decides that it is going to hire independent contractors instead of employees to help them with some PROJECTS. These workers sign INDEPENDENT CONTRACTOR AGREEMENTS, use their OWN TOOLS in ABC's facility, are paid a FLAT FEE for each day worked, are required to report to the facility by 8am Monday through Friday, are SCHEDULED to work 11 hours a day, and work under the direct SUPERVISION of ABC's manufacturing supervisor. They are not contracted for a set term (e.g., they are AT-WILL).

The Department of Labor calls and advises that they will be conducting an audit of ABC's Detroit facility in one week and would like to review all payroll information as well as all information, documents and data concerning independent contractors.

INDEPENDENT CONTRACTORS (CONT.)

Will the DOL find ABC in compliance with wage and hour laws with respect to its independent contractors?

- A. Yes, because the independent contractors signed independent contractor agreements and do not receive W-2s
- B. Yes, because the independent contractors had their own tools, were not contracted for a set term and were paid a flat fee
- C. No, because ABC controls the alleged independent contractors' work

WAGE & HOUR MISTAKE #3

Failing to include all includable forms of pay in the “Regular Rate”

- Rule: Overtime must be paid at 1.5 x Regular Rate
- Regular Rate = *All* earnings, including shift differentials, non-discretionary bonuses, and non-cash wages such as meals and housing
- Regular Rate generally must be determined for each workweek in which overtime work is performed

WORKWEEKS AVERAGED OR STAND ALONE?

An employer schedules employees to work seven 10-hour days in a row, and then the employees have seven days off, for a total of 70 hours in a two-week period (an average of 35 hours per week). Since the employees work on average less than 40 hours per week, the employer does not need to pay any overtime.

- A. Agree
- B. Disagree
- C. Need more information

TWO DIFFERENT JOBS WITH TWO DIFFERENT RATES AT SAME EMPLOYER

Phil is a cook and a janitor for a restaurant. He earns \$12 per hour as a cook and \$10 per hour as a janitor. Each workweek, Phil works 30 hours as a cook and 32 hours as a janitor.

What is Phil's regular rate for overtime purposes?

- A. The weighted average of his regular rates as a cook and as a janitor. Regular Rate = $((30 \text{ hours} \times \$12/\text{hour}) + (32 \text{ hours} \times \$10/\text{hour})) / (30 \text{ hours} + 32 \text{ hours}) = \$10.97/\text{hour}$
- B. The regular rate for the job he is performing during the overtime hours
- C. Either A or B

WAGE & HOUR MISTAKE #4

Failing to pay for all hours worked

- Problems arise when employers fail to recognize and count certain hours worked as compensable hours. For example, an employee who remains at his/her desk while eating lunch and regularly answers the telephone and refers callers is working. This time must be counted and paid as compensable hours worked because the employee has not been completely relieved from duty.
- Types of potentially compensable time often overlooked
 - Waiting time
 - On-call time
 - Rest and meal periods
 - Sleeping time
 - Training time
 - Travel time

WAITING TIME

Sally is a firefighter. While on-call, Sally watches television at her home. The time Sally spent watching television while on-call is compensable time.

- A. Agree
- B. Disagree
- C. Need more information

BREAK TIME

Hank is given 30 uninterrupted minutes to eat lunch. His employer does not need to compensate him for this time.

A. Agree

B. Disagree

TRAINING TIME

As mandated by his employer, Clark attends a seminar designed to improve his work performance. The employer does not need to pay Clark for this training time.

- A. Agree
- B. Disagree
- C. Need more information

WAGE & HOUR MISTAKE #5

Comp time in lieu of overtime

- Traditional comp time is not available to non-exempt employees for private sector employers
- Time-off plans are permitted for private employers if:
 - The employee gets time off at time and one-half for all hours over 40 worked in a week
 - The employee must take the compensatory time off during the same pay period in which it was accrued
- Example: If an employee works 50 hours (40 regular hours + 10 overtime hours) in the first week of the pay period, he/she could take 15 hours off during the second week and not be entitled to overtime. If the 50-hour week occurs during the second week of the pay period, then the overtime must be paid.

COMP TIME

A non-exempt employee of a retail store who does not normally work overtime works 44 hours in a workweek for ACB Corp. Employee goes to employer and says he does not want to be paid overtime for the four hours, but instead would like to take four hours of “comp time” next month. Employee explains that he has exhausted his PTO and needs to leave early next month to attend a wedding.

Is such an agreement lawful?

- A. Yes
- B. No
- C. Need more information

WAGE & HOUR MISTAKES

Honorable mentions

- Unpaid internships
 - The FLSA requires “for-profit” employers to pay employees for their work. Whether an intern is an “employee” will depend on whether the employer or the intern is the “primary beneficiary” of the relationship.

- Deductions from salaried exempt employee’s compensation
 - Deductions from a salaried employee’s compensation for certain reasons could jeopardize their exempt status because certain deduction means the employee is not truly paid on a salary basis
 - Isolated or inadvertent improper deductions will not result in loss of the exemption if the employer reimburses the employee for the improper deductions

QUESTIONS?



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THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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