

The Ins and Outs of the Fair Labor Standards Act

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About PilieroMazza

PilieroMazza PLLC is a full-service law firm located in Washington, D.C. We are most well known as a government contracting firm and for more than 25 years we have helped our clients navigate the complexities of doing business with the federal government. We also provide a full range of legal services including advice on business, corporate, labor and employment, SBA procurement programs, and litigation matters. Our clients value the diverse array of legal guidance they receive from us and our responsiveness as we guide their growth and secure their success.

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PM Legal Minute – our blog, written by all of PilieroMazza’s attorneys, provides trending insight to small and mid-sized businesses.

Legal Advisor Newsletter – our quarterly publication which addresses current issues that are of concern to federal government contractors and commercial businesses nationwide. The Legal Advisor articles focus on recent legal trends, court decisions, legislative and regulatory rule-making, as well as other newsworthy events.

Weekly Update – an email sent every Friday that provides an up-to-the-minute recap of legislative and regulatory issues affecting small businesses.

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Overview

- Minimum wage
- Overtime pay (covered, non-exempt)
- New regulations
- Strategic decision making
- Recordkeeping
- Breaks for nursing mothers
- Child labor (protect education and health)



What's Not Included

- Vacation, holiday, severance, or sick pay
- Meal or rest periods
- Holidays off
- Vacations
- Premium pay for weekend or holiday work
- Pay raises or fringe benefits
- A discharge notice, reason for discharge
- Wage payment or collection procedures
- Number of hours in a day or days in a week an employee may be required or scheduled to work



Coverage

- Who is covered? Pretty much everyone!
- Enterprise coverage: businesses with...
 - a) Two or more people employed; and
 - b) An annual dollar volume of sales or business done of at least \$500,000
- Individual coverage
 - a) Work regularly involves them in commerce between states (“interstate commerce”)



Minimum Wage

- \$7.25 per hour (July 2009)
- For now...
- Increased by statute
- \$2.13 per hour for tipped workers
- CPI advocacy



Minimum Wage

- States, counties and municipalities also have minimum wage laws that you must take into account
 - As of Oct. 26, 2015, 29 states and DC have minimum wages above the federal minimum wage
 - In 2014, lawmakers in CT, DE, HI, MA, MD, MI, MN, RI, VT, WV, and DC enacted increases during the 2014 session, while voters in AK, AR, NE, and SD approved minimum wage increases through ballot measures
 - Many adjust by CPI



Overtime

- Covered, non-exempt employees
- One and one-half times the regular rate of pay
- Hours worked over 40 per work week
- Not required pay for work on weekends, holidays, or regular days of rest, unless overtime is worked on such days
- Don't forget to check state law (CA and AK)



Overtime

- Defining your workweek
 - Workweek is any fixed and regularly recurring period of 168 hours or seven consecutive 24-hour periods
 - Not the same for all employers, but must be consistent
 - There is no limit on the number of hours employees 16 years or older may work in any workweek
 - **BUT NO COMP TIME FOR PRIVATE SECTOR**



Overtime

- Hours worked: when are employees “working?”
 - Hours worked ordinarily includes all the time during which an employee is required to be on the employer’s premises, on duty, or at a prescribed workplace.



Overtime

- What would DOL do?
 - Employees working at an electronics warehouse are required to go through security procedures when they enter and when they leave the building. Is this time compensable?
 - Employees working in a factory need to put on safety equipment provided for them when they get to work. When does their work time start?



Overtime

- Preliminary and Postliminary Activity
 - Must be “integral and indispensable”
 - Amazon case - the court held that for such activities to be compensable, they must be “an intrinsic element” of the “principal activities that an employee is employed to perform” and “one with which the employee cannot dispense if he is to perform his principal activities.”



Overtime

- What would DOL do?
 - 1) Employees working on an army base are told by the government customer to make sure they arrive 15 minutes before the start of the shift to ensure they are not late for work. Do you have to pay for this time?
 - 2) An employee comes to work, and without being told to start working, begins working. Do you have to pay the employee for this time?



Overtime

- What can you do to minimize risk?
 - The problem of DOL “strict liability”
 - A CLEAR and ENFORCED overtime and timekeeping policy
 - Handbook



Overtime

- Example:
 - You just hired a new assistant and you know your files are a bit backed up and there is a lot of work to do. You tell him that you will approve overtime if he needs it, but he must get it approved so that you can help distribute work, if needed. He doesn't say anything to you and you think everything is fine. A month later, you noticed that the assistant emailed you at 11 p.m. Saturday night. What should you do?
 - One year later you are audited by DOL. DOL says that despite your records, their interviews lead DOL to believe that the assistant worked overtime in the amount of 3 hours per week on average. What are your options?



Exemptions from Overtime

- Exemptions from Overtime Pay Only
 - certain **commissioned employees**
 - auto, truck, trailer, farm implement, boat, or aircraft **sales-workers**; or parts-clerks and mechanics servicing autos, trucks, or farm implements, who are employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers
 - **employees of railroads and air carriers**, taxi drivers, certain employees of motor carriers, seamen on American vessels, and local delivery employees paid on approved trip rate plans
 - Announcers, news editors, and chief engineers of certain non-metropolitan **broadcasting** stations
 - Domestic service workers living in the employer's residence
 - **Employees of motion picture theaters**
 - **Farmworkers**



Exemptions from Overtime

- Exemptions from both Minimum Wage and Overtime Pay
 - **Executive, administrative, and professional employees**
 - **Outside sales employees**
 - **Employees in certain computer-related occupations**
 - Employees of certain **seasonal** amusement or recreational establishments, employees of certain small newspapers, seamen employed on foreign vessels, employees engaged in fishing operations, and employees engaged in newspaper delivery
 - **Farm workers** employed by anyone who used no more than 500 “man-days” of farm labor in any calendar quarter of the preceding calendar year
 - Casual babysitters and persons employed as companions to the elderly or infirm



Executive, Administrative, and Professional Exemption

- Job duties test
- Paid on salary basis
- Meeting the minimum thresholds
- Job titles/descriptions do not determine exempt status



Executive Duties Test

- Regularly supervises two or more other full-time employees
- Management as the primary duty of the position
- Genuine input into the job status of other employees (such as hiring, firing, promotions, or assignments)
- Management duties may include:
 - interviewing, selecting, and training employees
 - setting rates of pay and hours of work
 - maintaining production or sales records (beyond the merely clerical)
 - appraising productivity
 - handling employee complaints, or disciplining employees
 - determining work techniques; planning the work; apportioning work
 - determining the types of equipment or materials to be used
 - planning budgets for work
 - providing for safety and security of the workplace



Administrative Duties Test

- Office or non-manual work
- Directly related to management or general business operations of the employer or the employer's customers, and
- Exercise of independent judgment and discretion about matters of significance
- Example: Operational v. production employees
 - Human resources
 - Payroll
 - Quality Control
 - Public Relations
 - Marketing



Example

- An employer hires an office manager. The position requires that the person order supplies, answer telephones, proof read documents for the president, and ensure that the office runs smoothly. There are only two other employees who work in the office and they are high level executives
 - How should this employee be classified?
 - What other information might you want to know?



Professional Duties Test

- Work that is predominantly intellectual, requires specialized education, and involves exercise of discretion and independent judgement
- Advanced degree or perform the same work
- Position not the person
- Examples:
 - Lawyers
 - Doctors
 - Architects
 - Engineers
 - Accountants (not bookkeepers)
 - Actuaries



Example

- An employer hires architects at various sites in the United States. There are a couple of architects who have all of the requisite degrees, but require more management than the others.
 - Are these architects requiring additional management exempt or non-exempt?
 - What other information might you want to know?



Salary Basis Test

- Employees must be paid a salary that cannot fluctuate based on hours worked
- If the employee is ready, willing, and able to work, deductions may not be made for time when work is not available
- Permissible deductions from pay
 - a) If the company is open for business, an employer may make deductions, in full-day increments, from the salary of exempt employees who do not come to work due to personal reasons other than sickness or disability (inclement weather, disasters, etc.)
 - b) Leave for sickness and/or disability if there is a plan providing for paid sick or disability leave in full day increments
 - c) Suspension or disciplinary action
 - d) Partial weeks at hire or termination
 - e) You can require the employee to use accrued paid leave, either in partial-day or full-day increments



Salary Basis Test

New Regulations

Current	Effective December 1, 2016
\$455 per week	\$913 per week
\$23,660 per year	\$47,476 per year
No automatic increase	Automatic increase to 40 th wage percentile every 3 years
Bonuses not included	May include non-discretionary bonuses for up to 10% paid quarterly



Highly Compensated Employees

- Exemption from overtime and minimum wage
- Don't have to meet requirements of the typical "duties test" if:
 - primary duty is performing non-manual work
 - regularly performing one of the exempt duties; and
 - meet the compensation threshold
- Currently, \$100,000 per year
- Effective December 1, 2016: \$134,004
- May consist of commissions and non-discretionary bonuses



Assessment and Audit

- Evaluate impact on workforce
- How much overtime do your exempt employees work?
- What other policies will be affected? Email, recording time?
- What training will you need to complete?
- Are employees currently classified correctly under duties test?
- Will this affect your benefit plans?



Strategic Planning

- Raising wage rates vs. converting to hourly
- Non-monetary considerations
- Reducing base pay
- Non-discretionary commissions and bonuses
- Effect on remote workers
- Communication campaign



Private vs. Federal Contracts

- Effect on pricing
- For federal contractors, impact on bottom line
- Contract language
- Future costs associated with automatic increase
- Prevailing wage laws (Service Contract Act)



Complaints

- Complaints by Employees to the Company
 - Retaliation Prohibited
 - Investigate (independently, if appropriate)
 - Get help
 - Address concern
 - Is the issue, if any, systemic?



Complaints

- When DOL Becomes Involved
 - Investigation phase
 - Two years back
 - Seek counsel
 - If you can't resolve at the investigation phase, then...



Fair Labor Standards Act

- Recordkeeping
- Poster
- Employee Information
 - Full name and social security number
 - Address, including zip code
 - Birth date, if younger than 19
 - Sex and occupation
 - Time and day of week when employee's workweek begins
 - Hours worked each day
 - Total hours worked each workweek
 - Basis on which employee's wages are paid (e.g. "\$9 per hour," "\$440 a week," "piecework")
 - Total daily or weekly straight-time earnings
 - Total overtime earnings for the workweek
 - All additions to or deductions from the employee's wages
 - Total wages paid each pay period
 - Date of payment and the pay period covered by the payment



Recordkeeping

- How long should records be retained?
 - Three years: payroll records, collective bargaining agreements, sales, purchase records
 - Two years: records on which wage computations are based, i.e. time cards and piece work tickets, wage rate tables, work and time schedules, and records of additions to or deductions from wages



Lactation Breaks

- Recently added by the PPACA
- Non-exempt employees
- Fewer than 50 employees are not subject to the FLSA break time requirement if compliance would impose an undue hardship (difficulty and/or expense when compared to size, financial resources, nature, and structure of the employer's business) "reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk."
- Provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk."
- Does not preempt state laws that provide greater protections to employees (for example, providing compensated break time, providing break time for exempt employees, or providing break time beyond 1 year after the child's birth)



Youth at Work

- Children of any age generally can work for businesses entirely owned by their parents
- Those under 16 may not be employed in mining or manufacturing
- No one under 18 may be employed in any occupation the Secretary of Labor has designated as prohibited
- 14- and 15- year-olds may be employed in restaurants and quick-service establishments outside school hours in a variety of jobs for limited periods of time and under specified conditions
- Children under 14 years of age may not be employed in non-agricultural occupations covered by the FLSA. Permissible employment for such children is limited to work that is exempt from the FLSA (such as delivering newspapers to the consumer and acting). Children may also perform work not covered by the FLSA such as completing minor chores around private homes or casual baby-sitting



Fair Labor Standards Act

- Best practices
 - Clear and enforced policies
 - Audit yourself
 - a) Ask employees what their jobs entail
 - b) Question employees about overtime
 - c) Check email and phone use
 - d) Review exemptions annually and at contract renewal
 - e) Have the actual job responsibilities changed?
 - f) What does the contract require? Does it expose you to liability?



In Conclusion...

- Keep a good handbook and ethics manual
- Enforce the rules
- Evaluate strategic goals
- Evaluate opportunities
- Audit yourself



Questions?

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