

## RECENT WAGE/HOUR DEVELOPMENTS

### **I. Recent Wage/Hour Investigations, Settlements And Decisions Are Costing Employers Millions of Dollars – Make Sure Employees Are Properly Classified And Rules Are Followed.**

Does the idea of a highly compensated financial adviser demanding overtime pay sound strange? What about a manager who runs a retail store? Or a skilled technology worker? Surely all those employees are exempt from overtime requirements, right? The answer is . . . it depends.

#### **A. State law will impact decisions.**

As a preliminary matter remember that in addition to federal wage and hour laws, it is important to review state wage and hour laws. Many states interpret overtime exemptions differently (and more stringently) than the federal regulations.

That is particularly true since the federal overtime law, the Fair Labor Standards Act (FLSA), was amended — with great fanfare — in 2004. While the FLSA amendments generally are seen as easing the burden related to overtime laws, employers remain subject to strict state overtime regulations that parallel or are even more employee-friendly than the federal overtime law was *before* the 2004 amendments. In addition, be aware of the requirements in *all* states where employees are located. Otherwise, state wage and hour laws can lead to unexpected and costly liability.

#### **B. New generation of lawsuits involves financial advisors, retail store managers and technology workers.**

A new generation of overtime lawsuits filed by financial advisers, retail store managers, and technology workers appears to be emerging. The following is a brief list of recent wage and hour settlements:

- **UBS.** An \$89 million settlement covering U.S. financial advisers and trainees was announced February 9, 2006, resolving lawsuits filed in New York, New Jersey, Connecticut, and California.
- **Morgan Stanley.** A \$42.5 million settlement covering an estimated 5,000 California-based financial advisers was announced March 3, 2006.
- **Electronic Arts.** There was a \$15.6 million settlement of a California class action filed by graphics artists.

- **Ann Taylor.** A \$6.5 million settlement covering an estimated 700 to 800 managers in 95 California stores was announced February 28, 2006.
- **Abercrombie & Fitch.** A \$2 million settlement covering more than 250 California-based store managers was approved by the court January 12, 2006.
- **Sears, Roebuck and Co.** A \$15 million settlement covering in-home service technicians was approved July 24, 2006, by a federal court in New Jersey.

### **C. Wage and hour investigations.**

The Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL) is a very small agency (there are fewer than 1,000 investigators nationwide) with a very big impact on employers (in fiscal year (FY) 2006, the agency handled 26,000 complaints and collected more than \$170 million for almost 250,000 employees). Because it is small, the WHD targets certain industries where it believes it can have the biggest impact. Here are some of the areas where activity is expected.

#### **1. Low-wage industries.**

For at least the past 10 years, the WHD has concentrated on “low-wage” industries such as agriculture, construction, health care, and garment manufacturing as well as the fast-food industry, retail establishments, and service industries. The 2006 report shows that the agency conducted more than 11,000 investigations in these industries, resulting in back wages of more than \$50 million. More than 50 percent of the investigations were in the restaurant, security guard, and health care industries. This year’s report also indicates that the WHD will continue to devote substantial resources to this area.

#### **2. White-collar exemptions.**

Now that the revised regulations governing the executive, administrative, professional, and outside sales exemptions from overtime have been in effect for more than two years (since August 2004), investigators are focusing some of their efforts on ensuring that employers are properly applying the tests. Last year’s efforts resulted in 12,000 employees sharing more than \$13 million in back wages. Most violations occurred because an employee did not have a “primary duty of 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.” More than 350 investigations found violations in the application of the administrative exemption and affected some 2,800 employees.

#### **3. Child labor.**

Another high priority for the WHD is ensuring that minors are employed in compliance with the FLSA. There are several areas in various stores where there are potential problems with employing workers younger than 18, including the operation of paper balers, trash compactors,

power-driven meat-processing equipment, and motor vehicles used in delivery. In addition, WHD investigators strictly enforce the work-hour requirements for 14- and 15-year-olds. During the past year, investigators determined that more than 3,700 minors were employed in violation of the FLSA, with more than 60 percent of them working outside the permitted hours.

Employing minors illegally can get very expensive. The WHD can assess a penalty of up to \$11,000 per minor for violations; it assessed almost \$3 million in penalties during the past year. In addition, many states have statutes that track the FLSA closely and provide for criminal penalties against employers for child labor violations.

**D. 2006 enforcement statistics: WHD collections hit close to \$172 million.**

The DOL's Wage and Hour Division collected almost \$172 million in back-pay wages for over 246,000 employees in fiscal year (FY) 2006 under the laws it enforces, including the FLSA and the Family and Medical Leave Act (FMLA). This recovery of back wages represents a 3.1 percent increase from FY 2005 and a 30 percent increase since FY 2001.

The number of employees for whom the DOL recovered wages edged from 241,379 in FY 2005 to 245,874 in FY 2006, representing a 2.3 percent increase. The number of employees receiving back wages as a result of the DOL's enforcement efforts has increased by 14 percent since 2001.

Of the \$172 million collected in FY 2006, \$135.7 million was for minimum wage and overtime violations under the FLSA. Of the \$135.7 million, \$120.5 million was for overtime back wages and \$15.2 million was for minimum wage violations. In addition, the DOL assessed employers in violation of the FLSA \$2.9 million in civil penalties.

Of the \$135.7 million recovered for FLSA violations, over \$13.2 million collected was for violations of the revised overtime regulations that took effect in August 2004. According to the DOL, the most frequent violation of the regulations governing exemptions under the FLSA involved the primary-duty test under the administrative exemption. Specifically, in 353 cases involving a total of 2,800 employees, the WHD found that the employee's duty was not the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer's customers.

The types of cases in which the WHD found violations and collected back pay were varied, but two themes continue from FY 2005. Employers that fail to include bonuses, commissions, shift differentials, and other incentive pay in calculating the regular rate of the purpose of overtime payments are at risk for being found in violation of the FLSA's overtime requirements. Failure to properly record and pay employees for travel time between assignments, for meal breaks in which the employee is not truly free from work, and for "preliminary and postliminary" work activities also put employers at high risk for WHD enforcement actions for minimum wage and overtime violations.

**E. Paralegals still are not automatically exempt under new FLSA regulations.**

Lawyers also need to be careful in classifying employees. In a recent wage and hour opinion letter, the DOL considered whether paralegals qualify for the "learned professional exemption" from overtime under the 2004 revisions to the FLSA regulations. The DOL review is set out below.

(1) DOL's opinion.

The administrative and professional exemption sections of the regulations implementing the FLSA were revised in 2004. Recently, the DOL issued guidance emphasizing that paralegals and legal assistants do not, by virtue of their jobs alone, satisfy the professional exemption.

The determination of whether any job meets the professional exemption is twofold. First, there must be standardized academic training for entrance into the profession. Second, the employee must have that level of academic training or on-the-job experience. Credentials are not enough, however. The employee must actually use her specialized training to perform her job.

Although many paralegals hold college degrees, that is not enough to satisfy the requirements of the professional exemption. An advanced specialized degree might satisfy the exemption's requirements if the paralegal applies knowledge specific to that degree when performing her primary duties. The DOL guidance included the example of a law firm hiring a paralegal with an engineering degree to provide expert advice on product liability cases or assist in patent matters. In that example, the paralegal would qualify for the exemption.

The DOL reiterated that paralegals do not satisfy the exemption for management employees, either. That is because they "use skills rather than discretion and independent judgment and . . . their work involves assisting attorneys and not formulating or implementing management policies."

(2) Use the two-pronged test.

Remember, credentials alone do not determine whether a paralegal falls within the professional exemption. To make that determination, first conduct the DOL's two-pronged test. If the job satisfies that test, evaluate whether the employee applies knowledge gained from an advanced degree when fulfilling her everyday duties.

**F. Ninth Circuit defers to DOL, throws out \$52 million judgment on FLSA claims.**

It can be tricky to determine whether particular positions should be treated as exempt from the overtime requirements of the FLSA. In 2004, a federal district court judge in Oregon ruled the

Farmers Insurance Exchange was mistaken in treating all its insurance adjusters as exempt and awarded them nearly \$52.5 million in a class-action suit. The Ninth Circuit recently ruled that the trial judge was wrong because he had ignored FLSA regulations issued by the DOL. To Farmers' undoubted relief, the judgment was overturned.

1. Claims adjuster jobs.

Farmers provides insurance coverage to customers throughout the United States. About half of its 10,000 employees are claims adjusters. They typically work out of their homes, with Farmers providing company cars, phone lines, computer support, printers, and fax machines. Claims adjusters must spend significant time on the road, driving to locations where a loss or accident occurred. They are paid a salary and are supervised by Farmers branch office managers. Farmers has always treated the claims adjusters as exempt from the FLSA's overtime requirements.

Farmers categorizes personal lines claims adjusters as one of five types depending on whether they handle automobile property damage claims, homeowners' claims for property damage, personal injury claims, unique physical damages and personal injury claims, or hybrid claims involving two or more types. They are also classified at one of three levels depending on their experience and performance. Branch office managers set the settlement authority for each claims adjuster.

Farmers puts significant emphasis on paying exactly what it owes under an insurance policy, "nothing more, nothing less." The company's claims adjusters are provided with written guidelines and training materials to aid them in handling claims. Some of the procedures are mandatory, while others are merely recommendations. To help estimate damage or loss, the claims adjusters are provided with and expected to use estimating software "whenever possible or appropriate." They are subject to periodic audits to determine whether they are observing Farmers' "best practices."

Farmers' claims adjusters are frequently required to work more than 40 hours per week. In 2001 and 2002, a group of current and former adjusters from around the country filed a series of FLSA class actions against Farmers. They claimed that they should have been treated as nonexempt and received overtime pay. The actions were consolidated in federal district court in Oregon.

2. DOL regulations on claims adjusters.

The DOL is responsible for defining which jobs are exempt under the FLSA. Its regulations describe certain "white collar" exemptions for employees paid on a salary basis and having responsibilities requiring the exercise of discretion and independent judgment. Regulations delineate exemptions for professional, executive, and administrative jobs. Historically, the department has deemed insurance adjusters to be covered by the administrative exemption.

In 2004, the DOL issued new regulations, describing them as consistent with existing law on the white-collar exemptions. Among the new regulations was one that specifically provided the following:

Insurance claims adjusters generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.

The regulation was consistent with the DOL's earlier reports and opinion letters on the status of claims adjusters.

3. Evaluating the adjusters' claims.

Rather than following the DOL's 2004 regulations (presumably because they were not in effect when the claims arose), the trial court created its own analysis of whether the Farmers claims adjusters should be treated as exempt under the FLSA. The result was that some were deemed exempt and some were not. A critical factor in the trial court's reasoning was the size of the claim handled by a particular category of adjuster. Thus, the court ruled that Farmers' automobile damage adjusters were nonexempt. For other types of adjusters, the court used a "\$3,000 rule," holding adjusters nonexempt if the claims they handled averaged less than \$3,000. Applying its analysis, the trial court awarded nearly \$52.5 million to a group of slightly more than 1,000 Farmers adjusters.

On Farmers' appeal, the Ninth Circuit rejected the trial court's approach. Not only was the \$3,000 rule difficult to apply, but it also ignored the DOL's 2004 regulations. The Ninth Circuit held that even though the regulations were issued after the claims arose, they were expressly described as "consistent with" earlier regulations on the same subject. Under the circumstances, the court concluded that it was bound by the department's rules.

The DOL regulations contained no threshold dollar amount for claims in order for a claims adjuster to qualify as exempt. Regardless of the dollar value, an adjuster would have to go through the same steps, including interviews, review of the facts, and a determination of the amount to be paid out. Discretion and independent judgment would be required whether the particular claim was large or small. Thus, the Ninth Circuit decision said that "as far as we are concerned, [the regulations say] it all." All of Farmers' claims adjusters were properly categorized as exempt under the FLSA, and the trial court's damages award was overturned.

*Miller v. Farmers Ins. Exch.*, 481 F.3d 1119 (9<sup>th</sup> Cir. 2007).

**G. Employers should consider a wage/hour audit.**

Consider conducting an audit of employee classifications and overtime pay practices to make certain proper decisions are being made. An audit involves gathering and carefully reviewing employees' job descriptions, their exemption status, and overtime pay practices.

Any audit should analyze applicable overtime laws in all states where employees are located and the requirements set forth under federal law.

**H. Ten steps to prevent 'off-the-clock' claims.**

In recent years, the DOL and employees (alone or in groups) have filed suit against large and small employers, alleging that the employers permitted or required employees who were not exempt from the FLSA or state law to work without being paid — that is, “off the clock.” Off-the-clock claims may arise in a variety of circumstances, including, for example, when a supervisor tells her team not to record certain hours worked or a company memo that explains that all employees should perform compensable work before they clock in or after they clock out. Reducing the risk of allegations related to working off-the-clock is good practice. Here are 10 steps you can take right now.

1. Be familiar with federal and state wage and hour laws.

Be familiar with wage and hour laws and how they apply to the business. Most employers are subject to the FLSA and the DOL's wage and hour regulations and opinion letters. The DOL's website, [www.dol.gov](http://www.dol.gov), contains all three of those and lots of other related information. State laws also may be applicable.

2. Classify the status of each worker with care.

Carefully determine whether each worker is an employee and, if so, whether she is exempt or nonexempt under the FLSA. Incorrectly classifying a worker as an independent contractor when she is really an employee may lead to liability for failure to pay her for hours worked (not to mention the liability for failing to withhold employment taxes). Likewise, incorrectly classifying a nonexempt worker as exempt under the FLSA creates the risk of failure to pay overtime when she works more than 40 hours in a workweek. In either case, the employer typically lacks records of the hours worked, and it is vulnerable to claims for failure to pay for all hours worked. Be familiar with the rules concerning independent contractors and exemptions. Information can be found about independent contractors and white-collar exemptions at the following websites:

- [www.dol.gov/elaws/esa/flsa/scope/ee14.asp](http://www.dol.gov/elaws/esa/flsa/scope/ee14.asp) (DOL fact sheet on independent contractors);

- [www.irs.gov/govt/fslg/article/0,,id=110344,00.html](http://www.irs.gov/govt/fslg/article/0,,id=110344,00.html) (IRS fact sheet on independent contractors); and
- [www.dol.gov/dol/allcfr/ESA/Title29/Part541/SubpartB.htm](http://www.dol.gov/dol/allcfr/ESA/Title29/Part541/SubpartB.htm) (DOL regulations on white-collar exemptions).

3. Pay nonexempt employees for all hours worked.

Ensure that each nonexempt employee is paid for all hours worked. The FLSA does not define “work,” but the U.S. Supreme Court has — work is “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer of his business.” Usually, determining whether an employee is working is not difficult.

Some situations present difficulties, however, because special rules apply. Under the FLSA, those situations include time spent traveling, training, preparing and finishing work, working at home, on call, sleeping, waiting, and for meals. For more information, go to [www.dol.gov/dol/allcfr/ESA/Title29/Part785/SubpartC.htm](http://www.dol.gov/dol/allcfr/ESA/Title29/Part785/SubpartC.htm). Become familiar with those rules to prevent failing to pay when payment should be made and from paying when it is not needed.

4. Pay nonexempt employees the proper rate.

Compensate each nonexempt employee at the proper rate. Under the FLSA, you should pay a nonexempt worker for each of the first 40 hours in a workweek at the regular rate; that is usually (although not always) the hourly wage. For each hour worked in excess of 40 in a workweek, pay nonexempt employees at the overtime rate of 1.5 times the regular rate. Unless a government entity is involved, do not compensate employees with “comp time.”

5. Make sure you have wage and hour policies that are current.

Establish and maintain written policies concerning wages and hours. Affirm that pay is based on qualifications. Describe general hours of operation. Explain to employees that only nonexempt employees are entitled to overtime. Tell them if overtime must be authorized in advance and how to do so. Describe bonus and other compensation programs, if any. Tell employees when they will be paid.

Establish and maintain a simple but meaningful process for expressing concerns about classification as an exempt or nonexempt employee, hours worked, rates of pay, and other wage and hour matters. Do not make it difficult to report problems, and implement a “safe harbor” provision allowing the opportunity to fix mistakes without losing exemptions for whole classes of employees. Encourage and train employees to use that complaint process, and remind them that they will not be retaliated against for raising concerns.

6. Investigate all complaints.

Promptly and thoroughly investigate all complaints. Do not require an employee to make a written complaint. Pay attention to informal complaints about wages and hours, which — like informal complaints about harassment — should trigger a complete investigation. Take appropriate action on the complaint, and inform the employee of the result.

7. Properly enforce rules against unauthorized overtime.

Employers may require overtime to be authorized. If an employee works unauthorized overtime, however, discipline her. Do not withhold from her pay.

8. Review and strengthen recordkeeping policies and practices.

Insist that nonexempt employees completely, accurately, and contemporaneously record hours worked. Require them to affirm in writing the accuracy and completeness of those time records. Require supervisors to check those records weekly for accuracy and to document any changes to them only after discussing the matter with the employee. Maintain all wage and hour records, preferably for seven years. From time to time, consider auditing time records yourself to ensure compliance with the law and your policies. Discipline employees for violations of recordkeeping policies.

9. Train your managers and employees.

Managers feel pressure to keep labor costs down. Train them not to cast a blind eye toward faulty timekeeping, especially if it would result in overtime pay. Affirm that laws are followed and employees are expected to do so also, and let them know the consequences if they do not.

10. Talk to a professional.

Coordinate with counsel who's experienced in handling wage and hour issues. Federal and state wage and hour laws are complex and usually counterintuitive. They have changed substantially during the past several years. A call to an in- house or outside lawyer who is experienced in handling wage and hour matters usually can help avoid bigger problems later.

## **II. DOL Opinions Provide Guidance On Wage Deductions For Exempt Employees.**

Employers that currently fine exempt employees for damaging company equipment or discipline exempt employees for not working a required number of hours per week risk losing the employee's exemption from overtime under the FLSA, according to two recent DOL opinion letters.

**A. Wage and salary deductions for damaged equipment.**

(1) The salary basis requirement and wage deductions.

The FLSA requires that most employees be paid at least the federal minimum wage for all hours worked and overtime pay at one and one-half times the regular rate of pay for all hours worked over 40 hours in a workweek. The FLSA, however, provides for several exemptions from those requirements for employees employed in a bona fide executive, administrative, or professional capacity.

To qualify for an exemption, employees must meet certain primary duty requirements and generally be compensated on a salary or fee basis at a rate not less than \$455 per week. For an employee to be considered paid on a "salary basis," he must be paid a predetermined amount per pay period that's not subject to reduction based on variations in the quantity or quality of work performed. Also, with limited exceptions, exempt employees generally must receive their full salary in any week in which they perform work.

Employers must be very careful making deductions from the salaries of exempt employees because improper deductions can result in the loss of exempt status. Salary deductions are permissible only in very limited circumstances. Specifically, according to FLSA regulations, such deductions are permissible only (1) when an exempt employee is absent from work for one or more full days for personal reasons other than sickness or disability, (2) when an exempt employee is absent for one or more full days because of sickness or disability if the deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation for salary lost because of illness, (3) to offset amounts employees receive as jury or witness fees or for military pay, (4) for penalties imposed in good faith for infractions of safety rules of major significance, or (5) for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions. 29 C.F.R. § 541.602(b).

(2) Facts.

The employer sought the DOL's opinion regarding whether it could make deductions from the salaries of exempt employees if they damaged company-provided equipment like laptop computers or cellular telephones. In the event such deductions are not permissible, the employer also sought advice regarding whether it could require exempt employees to reimburse the company out of pocket for the damage.

(3) Guidance from the DOL.

The DOL recognized that while deductions from the salaries of exempt employees are permissible in very limited circumstances, deductions for the loss, damage, or destruction of

employer property are not permissible and would violate the salary basis requirement. That is true even when exempt employees have signed an agreement with the employer authorizing the deductions. It is also true when an exempt employee is paid her full salary and is then required to make out-of-pocket reimbursements. In either case, the employee would not be receiving the required predetermined salary free and clear as required by the FLSA. Such deductions or required reimbursements are impermissible salary deductions based on the quality of work performed under the terms of the employer's policies, contrary to the Act.

The DOL also addressed the employer's policy that requires nonexempt employees to sign an agreement authorizing the employer to make wage deductions for damage to company property provided to help employees carry out their duties. The agency cautioned that while such a policy may be permissible, it is unlawful to the extent that the authorized deductions reduce an employee's pay below the statutorily required minimum wage or prevent the employee from receiving the full overtime premium due.

(4) Conclusion.

When an employer provides equipment to employees to help them carry out their duties, they may not make salary deductions or require reimbursement from exempt employees for damage to the equipment. For nonexempt employees, employers may require them to authorize deductions for the damage, but deductions cannot be made if they will reduce the employee's wages below the required minimum wage or the employee's full overtime entitlement.

**B. Disciplinary suspensions for exempt employees.**

Deductions from the salaries of exempt employees are permitted only in very limited situations. One such situation is for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions. According to the DOL, a "workplace conduct rule" is a rule that is applicable to all employees regardless of exempt status, and the rule must relate to workplace conduct, not performance or attendance issues.

(1) Facts.

The employer implemented a policy requiring exempt employees to work 45 to 50 hours per week. It also required that exempt employees make up work time lost because of personal absences of less than a full day. Employees who fail to meet either of those requirements would not have their salaries docked but would be subject to discipline, including full-day disciplinary suspensions without pay.

(2) Guidance from the DOL.

The DOL stated that the number of hours worked by an exempt employee is a matter that can be agreed on by the employer and employee. Thus, an employer can require an exempt employee to work more than 40 hours in a week without jeopardizing his exempt status. The employer also can require exempt employees to make up work time lost because of personal absences of less than a full day. The DOL stressed, however, that such rules are not considered "workplace conduct rules" under the FLSA because they do not apply to all employees and they relate to attendance issues, not workplace conduct. Thus, if an exempt employee fails to work the required number of hours or make up the missed time under the employer's policies, it may not impose *unpaid* disciplinary suspensions of one or more full days.

(3) Conclusion.

Employers can require exempt employees to work more than 40 hours per week and make up work time missed because of personal absences of less than a full day, but they may not impose unpaid full-day suspensions for violation of either of those rules. Doing so would jeopardize the employees' exempt status.

**C. Bad weather guidance.**

The DOL recently issued some guidance regarding payroll obligations and rights when bad weather affects employee attendance. The guidance particularly warns employers to exercise caution in docking the pay of exempt employees who miss work because of inclement weather.

1. What happens if weather causes closure?

When bad weather hits it is important to following the rules. For exempt employees, the FLSA prohibits reducing the pay of any exempt employee based on the quantity or quality of his work or when he is ready, willing, and able to work but no work is available. Applying that basic principle, the DOL has taken the position that employers that decide to close because of weather conditions must pay exempt employees their regular salaries for any shutdown that lasts less than one full week.

On the other hand, nothing prohibits requiring employees, including exempt ones, to use accrued vacation time or other time off to cover the missed work. The FLSA does not require an employer to provide vacation or leave time at all, so there is nothing to prevent employers from giving employees vacation or paid time off (PTO) but then requiring them to take it on certain days. A private employer may therefore deduct the period of absence due to bad weather from an employee's remaining vacation or leave time, whether the absence is a full day or a partial day, so long as you pay exempt employees their regular salaries for that time.

The practical problem, of course, is that when bad weather hits, some exempt employees may not have any vacation or leave time left. Or they may have already scheduled to take off — and

received approval to use — whatever vacation or leave time they have remaining. Even if an exempt employee has no time off remaining, she still must be paid her regular salary when the organization is closed because of bad weather for less than a week. The DOL has made it clear that employers must pay employees in those circumstances, even if the employer offers no vacation or PTO benefits at all and even if provided those benefits but the employee has no remaining accrued leave available.

There is no legal prohibition against applying PTO to days missed because of a facility closure and canceling part or all of approved vacation time for exempt employees who have time remaining but have approved plans to use their PTO on other days. One should first consider the inevitable negative effect of that practice on employee morale, however.

2. What if the business is open, but exempt employees do not show up?

When the office or facility is open for business and an exempt employee does not report to work because of bad weather conditions, he is not considered “ready, willing and able” to work — even if his unreadiness is due to conditions beyond his control. Therefore, the basic FLSA rule applies: Exempt employees generally should not have their pay reduced for partial-day absences but may be docked for full-day absences. So if an exempt employee fails to report to work because of inclement weather for an entire business day when you are open for business, he may be docked that day’s pay. As a practical matter, many employers pay anyway or allow employees to use available vacation or PTO to cover the absence.

Nothing in the FLSA requires employers to follow either of those practices, however. According to a DOL opinion letter on the subject:

The Department of Labor considers an absence due to adverse weather conditions, such as when transportation difficulties experienced during a snow emergency cause an employee not to report to work for the day even though the employer is open for business, an absence for personal reasons. Such an absence does not constitute an absence due to sickness or disability. Thus, an employer that remains open for business during a weather emergency may lawfully deduct one full-day’s absence from the salary of an exempt employee who does not report for work for the day due to the adverse weather conditions.

Beware of partial-day absences, however, when an exempt employee arrives late because of weather-related commuting problems or decides to leave early because of weather-related concerns. Under those circumstances, exempt employees must be paid a full regular day’s pay, regardless of whether management agrees that the situation was serious enough to warrant the late arrival or early departure. The DOL has said, “Deductions from salary for less than a full-

day's absence are not permitted for such reasons under the regulations. If an exempt employee is absent for one-and-a-half days due to adverse weather conditions, the employer may deduct only for the one full-day absence and the employee must receive a full-day's pay for the partial day worked."

3. What if there were improper deductions?

An employer must reimburse employees for improper deductions. Improper deductions from exempt employees' pay can cause them to be reclassified as nonexempt, which makes them eligible for overtime pay, including back pay for two or more years. The good news is that the DOL has held that "isolated or inadvertent deductions do not result in loss of the exemption if the employer reimburses the employees for the improper deductions."

The DOL has gone on to say that "if an employer has a clearly communicated policy prohibiting improper deductions that includes a complaint mechanism, reimburses employees for any improper deductions and makes a good faith commitment to comply in the future, the employer will not lose the exemption unless it willfully violates the policy by continuing to make improper deductions after receiving employee complaints." Review your personnel policies to ensure they include that "safe harbor" language to protect against employee reclassification based on honest oversights in applying FLSA provisions.

4. What about hourly employees?

It is up to your organization to decide whether to pay nonexempt employees for snow days because the FLSA does not require employers to pay them for hours they would have worked if severe weather conditions had not caused an office or facility closure or created other problems that led to an absence from work. As with exempt employees, employers may allow or require nonexempt employees to use vacation or PTO to cover the absence, but that is not a requirement.

**III. Brief Review Of Overtime Essentials.**

**A. Overtime essentials.**

The law requires employers to pay employees time and a half (1.5 times their base rate) for overtime work (hours worked over 40 in a workweek). Although generally aware of the requirements of the FLSA, not everyone understands what constitutes "hours worked" for which the employee must be compensated. Certain issues, if not properly addressed, can cause employers significant problems.

(1) Employ.

This term includes "to suffer or permit to work." Work not requested but allowed to be performed is time which must be paid. For example, an employee may voluntarily continue to

work at the end of the shift to finish an assigned task or to correct errors. The reason is not important; the hours are work time and are compensable.

(2) Workweek.

An employee's workweek is a fixed and regularly recurring period of 168 hours — seven consecutive 24-hour periods. It need not coincide with the calendar week, but it may begin on any day and at any hour of the day. Different workweeks may be established for different employees or groups of employees. The workweek may not be changed for the purpose of evading the overtime requirements of the FLSA.

(3) Waiting time.

Whether waiting time is time worked under the FLSA depends on the particular circumstances. Generally, the facts may show that the employee was engaged to wait (work time) or was waiting to be engaged (not work time). For example, a secretary who reads a book while waiting for dictation or a firefighter who plays checkers while waiting for an alarm is working during those periods of inactivity. The employees have been "engaged to wait," and the time spent in those activities must be counted when determining the hours they worked.

(4) On-call time.

An employee who is required to remain on call on the employer's premises is working. An employee who is required to remain on call at home, is allowed to leave a message where she can be reached, or carries a pager or phone in most cases is not working while on call. If the restrictions placed on the employee are so severe that she may not use the time for her own benefit, however, the time could be construed to be hours worked.

(5) Rest and meal periods.

Rest periods of short duration, usually 20 minutes or less, are common and must be counted as hours worked. Bona fide meal periods (typically 30 minutes or more) generally need not be considered as work time. The employee must be completely relieved from duty for the purpose of eating regular meals. An employee is not relieved if he/she is required to perform any duties, whether active or inactive, while eating. Although not required, it is good practice for employees to leave their work area while taking a meal break.

(6) Sleeping time and certain other activities.

An employee who is required to be on duty for less than 24 hours is working even though she is permitted to sleep or engage in other personal activities when not busy. An employee required to be on duty for 24 hours or more may agree with the employer to exclude bona fide regularly scheduled sleeping periods of not more than eight hours, provided adequate sleeping facilities are

furnished by the employer and the employee can usually enjoy uninterrupted sleep. No reduction is permitted unless at least five hours of sleep are taken.

(7) Lectures, meetings, and training programs.

Attendance at lectures, meetings, training programs, and similar activities must be counted as working time unless four criteria are met: (1) it is outside normal hours, (2) it is voluntary, (3) it is not job-related, and (4) no other work is concurrently performed.

(8) Travel time.

The principles that apply in determining whether time spent in travel is compensable depend on the nature of the travel:

- **Home-to-work travel.** An employee who travels from home before the regular workday and returns to his home at the end of the workday is engaged in ordinary home-to-work travel, which is not work time.
- **Home to work on a special one-day assignment in another city.** An employee who regularly works at a fixed location in one city is given a special one-day assignment in another city and returns home the same day. The time spent in traveling to and from the other city is work time. The employer, however, may deduct the amount of time the employee normally would spend commuting to the regular work site.
- **Travel that is all in a day's work.** Time an employee spends traveling as part of his principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.
- **Travel away from home community.** Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly working time when it cuts across the employee's workday. The time is work time not only on regular working days during normal working hours but also during corresponding hours on nonworking days. The DOL does not consider as work time the time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.
- **Driving time.** Time an employee spends driving an employer's vehicle is work time. If an employer directs an employee to drive his own vehicle to transport tools, supplies, equipment, or other employees, the time also is considered hours worked.

(9) Conclusion.

Failure to correctly pay for hours worked by an employee can create a substantial liability. The employee not only may recover unpaid wages, but she also can file suit for liquidated damages (an amount equal to the unpaid wages) plus attorneys' fees. In addition, the DOL can assess a penalty of up to \$1,100 per employee for repeated or willful violations of the FLSA.

#### **IV. Employee volunteers: Are they really 'off the clock'?**

Many municipal and state agencies and not-for-profit corporations have employees who volunteer for additional after-hours (and unpaid) tasks from time to time. You are glad to have the extra help, of course, but how can you legally accept volunteer assistance from your employees without running afoul of the FLSA wage and hour and overtime requirements? Recently, the DOL has issued several opinion letters that provide some guidance on this issue.

##### **A. 'Time' for a brief review.**

The FLSA — and all its underlying requirements — applies only when there is an employer-employee relationship. Under 29 C.F.R. 553.101(a) of the Act's regulations, a person who "performs hours of service for a public agency for civic, charitable or humanitarian reasons, without promise, expectation or receipt of compensation for the services rendered, is considered to be a volunteer during those hours." That sounds like an easy standard to meet. But as we will see below, Congress also has implemented several requirements. Under those requirements, employees:

- Must serve as volunteers for civic, charitable, or humanitarian reasons without promise, expectation, or receipt of compensation (although expenses, reasonable benefits, or a nominal fee may be provided);
- Must offer their service freely and without coercion, direct or implied, by the employer; and
- Cannot be otherwise employed by the same employer to provide the same services for which they volunteer.

Below see how these requirements apply to four different situations.

##### **B. Year-round volunteer, weeklong employee.**

Even with Congress' instructions, there are some occasions when a volunteer may be employed for a short period of time, even doing the same type of work, and not lose the volunteer status for his regular volunteer activities. In a September 2005 letter issued by the DOL, a county asked for guidance regarding its volunteer reserve deputy sheriffs. The volunteer sheriffs normally performed duties for the sheriff throughout the year without pay, but for one week a year, they were paid for performing security services during the state fair. The county asked whether the volunteers could be paid for that security duty without losing their status as volunteers for the rest of the year.

The DOL focused on the part of the federal regulations that state that "[t]he term *occasional or sporadic* means infrequent, irregular, or occurring in scattered instances." The agency explained

that employing the volunteer sheriffs for one week a year to perform security services constituted "occasional or sporadic" work.

The DOL concluded that the county may employ the volunteer sheriffs for the weeklong state fair, terminate their employment at the end of the fair, and return them to volunteer status. Not surprisingly, though, the decision was subject to some limitations. The decision (1) applied so long as the county did not convert the sheriffs to volunteer status to avoid the FLSA's minimum wage or overtime provisions, and (2) complies with the three general restrictions listed above.

**C. The employee as volunteer?**

What about the volunteer who is performing the work during his normal working hours? The DOL had an answer for that question, too. In another September 2005 opinion letter, the specific question was whether a university could use employees to work at an annual 5K and 10K run it hosted. Those activities were completely separate from the normal duties performed by the employees, but in some cases, the work was performed during normal work hours.

The DOL said that if the work was performed during normal work hours or was similar to the employee's regular duties, the employee had to be paid. If, however, the employees at the race were performing duties not similar to their regular ones and were performing those duties *after* their normal working hours, those volunteer activities are not considered "hours worked" for the purposes of the FLSA.

**D. The 'thank you' payment.**

What happens if the employer wants to pay the employee a small token for the extra work, but does not want her to be considered as working overtime? That was the experience of a school district that paid stipends to nonteaching, nonexempt school employees who volunteered as coaches and advisors for the school's teams and clubs. The coaches and other volunteers did so freely, and the school wanted to pay them a nominal fee.

In addition to the general regulations to determine whether a person is volunteering or working, the DOL looked at several factors to determine whether the school could pay its coaches as volunteers without having to consider them employees. First, the fee had to be nominal. To decide what was nominal, the agency applied an economic- realities test. It looked at what the school paid the volunteer and what it would otherwise pay a coach for the same services on the open market. It concluded that if the district was paying a fee that was not more than 20 percent of what it otherwise would pay, the fee generally would be considered nominal and the worker was therefore a volunteer.

**E. 'Borrowing' employees to use as volunteers.**

Finally, the DOL considered a situation in which a group of peer reviewers, who worked for other companies, provided on-site accreditation evaluations for other not-for-profit institutions. The peer reviewers were paid by the companies for which they worked, and they did not expect the organization for which they conducted the evaluations to pay them.

In this circumstance, the DOL took the logical position that the peer reviewers were employees of the companies for which they worked, not for the organization conducting the evaluations. Thus, since the FLSA applies only to the employee-employer relationship, they did not have to be paid by the organization conducting the evaluations as well as by their employer companies.

**F. Conclusion.**

In all these cases, the DOL emphasized two things. First, that the FLSA recognizes the generosity and public benefits of volunteering and does not want to pose unnecessary obstacles to true volunteer efforts for charitable and public purposes. Second, as always, calculating "hours worked" for purposes of paying overtime applies only to nonexempt employees. Employers that want to use employees as volunteers also should keep the three basic requirements listed above in mind.