

Are you FLSA Vulnerable?

The new Fair Labor Standards Act (FLSA) regulations, which became effective August 2004, redefined and updated the "white collar exemptions." As a result, companies should have audited their current exempt/nonexempt classifications and practices to ensure they are paying overtime to employees as required. But the new regulations not only changed the exempt tests they also created a lot of publicity, increasing employee awareness of the issue and potentially driving ever more FLSA lawsuits.

Large class action cases have multiplied, increasing from 71 in 2000 to 91 in 2002, to 121 in 2003. Since 2001, the Department of Labor (DOL) has collected over \$600 million in back wages, over \$196 million in 2004 alone. FLSA class actions are now more common than discrimination class actions. If those numbers don't get your attention, take a look at a few plaintiffs' lawyers websites such as: overtimelawyer.com, paymyovertime.com, and overtimepay.com.

Why could the FLSA be considered one of a plaintiff's lawyer best friends?

- Despite the new regulations it's still very complex and difficult to understand, even for seasoned HR professionals.
- It remains fairly archaic. Remember it was enacted in 1938, with not a lot of change since then.
- Many companies, even the most well meaning ones, are in some way violating the Act.
- It's ripe for class actions. A plaintiff's attorney can challenge the exemption classification of a whole group of employees that is entitled to several years of back pay... a potentially lucrative proposition.
- The Department of Labor presumes that employees are nonexempt, requiring employers to make a case otherwise. The DOL construes exempt status very strictly.
- Claims relating to exempt classifications are very fact specific and decided on a case by case basis. A thorough analysis of an employee's duties must be made to determine if an exempt classification can be met.
- State law can impose different or stricter requirements. Multistate employers are particularly burdened.
- It involves one of the most sensitive issues, employee pay.

What are some of the biggest pitfalls for employers?

Plaintiffs' lawyers don't need to look for very technical violations of the FLSA. Basic, "low hanging" violations are more common than you think. The good news is that employers can audit these areas and make adjustments fairly quickly, thereby reducing a lot of risk exposure. Common FLSA mistakes include:

- Failing to pay a nonexempt employee for all "hours worked." "Hours worked" is a technical term that includes much more than most people realize.
- Making or allowing employees to work "off the clock."

- Denying an employee overtime because it wasn't approved.
- Failing to pay overtime in cash. Compensatory time off is basically not allowed in the private sector (except within the workweek). In certain circumstances public employees may be given compensatory time instead of overtime cash.
- Deciding on exempt status based on job title or the fact that a position is well paid. Remember that to be exempt a position must meet specific exemption tests.
- Failing to pay for training or meeting time unless attendance is outside regular working hours, is truly voluntary, is not directly related to the employee's job, and the employee does not perform any work during that time.
- Not paying for meal times when an employee is not completely relieved from duty (e.g., when an employee is interrupted or required to answer the phone during lunch).
- Failing to include short breaks as "hours worked."
- Letting an employee "waive" overtime pay. That's not permitted.
- Failing to keep good records. Remember that courts rely on employees' work hour estimates if an employer can't produce thorough documentation.
- Confusing being salaried with being exempt. Just because someone is paid a salary doesn't mean that he's exempt from overtime.
- Failing to pay exempt employees on a salary basis as required. This can include such things as inappropriately docking exempt employees' pay.
- Neglecting to include "extra pay" such as certain nondiscretionary bonuses (as distinguished from small gifts), shift differentials, and incentives in the regular rate of pay for overtime purposes.
- Not considering certain travel time as "hours worked."
- Failing to train your managers about the FLSA basics so that they can assist with compliance.
- Not establishing a regular auditing program to ensure that your organization complies with the FLSA and that as jobs change they are reclassified as appropriate. Many employers fall out of compliance unintentionally. An audit should include an analysis of every job classification (especially your exempt ones), timekeeping and pay procedures, determinations of "hours worked," calculations regarding regular and overtime rates, treatment of exempt employees, and child labor practices.

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