

1 **The Proliferation of FLSA Lawsuits:**

Have You Done Your Due Diligence?

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2 **Wage & Hour Division of DOL Enforcement**

3 **FLSA Lawsuits Are On the Rise**

- 2001: 1,961
- 2002: 2,034
- 2003: 4,055
- 2004: 3,426
- 2005: 3,464
- 2006: 4,207
- 2007: 7,310

4 **Why are FLSA Lawsuits on the Rise?**

- **Attorneys**
 - More lucrative than discrimination cases.
 - Instead of representing one plaintiff, they can represent 100s or 1000s.
 - Damages: double damages and attorneys' fees.

5

- **Work off the clock**
 - PA, Wal-Mart: \$78.5million compensatory award and \$62 million punitive damages award for work "off the clock" & during unpaid breaks.
 - MN, Wal-Mart: Seeking \$27 million damages for 56,000 MN employees.
 - MN, Qwest Communications: 6,700 call center employees claim required to work before & after shifts.
 - MN, Qwest Communications ats. Brennan, March 2008. Class action by network technicians who install, maintain, repair & test cable for phones, cable TV & internet service.

6

- TN, Baptist Memorial Hospital ats Frye, May 2008. Twenty nurses claim they work before & after their shifts & during lunch periods & were not compensated.
- AL, Bullock County Hospital ats Brown, April 2008. Class action for all hourly employees claiming hospital deducted 30 minutes of pay for lunch even when they did not take 30 minutes & did not pay them for pre- & post-shift work when they came in early or worked over if the hospital was short staffed.
- MN, BCBS ats Lepage, June 2008. Class action complaining that customer service reps were not paid for booting up their computers, logging on, reviewing emails & logging into their software applications. They allege they spend 20 minutes a day doing work for which they are not paid.

7

- IN-Caesars: Class action by security guards alleging failure to pay for pre-shift meetings & pre- and post-shift activities.
- NY-Domino's, June 2008. Class action by delivery drivers & customer service reps who claim they were not paid for all hours worked.
- MN - Marathon Oil, April 2008. Speedway Convenience Stores collective and class action against parent company claiming they were not paid for all time spent working.
- NY - Best Buy, January 2008. Employees claim failure to pay for security searches and working through unpaid meal & lunch breaks.

8

- **Donning and Doffing**
 - NJ, Tyson Foods: Held: If employer requires employee to wear specialized gear, donning and doffing is

compensable.

- Logansport, IN, May 2008. Tyson Foods, Inc. Four workers claim the company alters time sheets & denies employees earned overtime pay. [This is the 8th FLSA lawsuit of the year]
- MN, Gold'n'Plump: Claims of unpaid donning and doffing.
- United Motor Manufacturing, Inc. (Toyota/GM Joint Venture) June 2008. Settled donning and doffing suit for \$4.65 million.

9 

- WI, Spoerle v. Kraft Foods, May 2008. Class action. Production workers seeking pay for donning and doffing of several items of safety and sanitation equipment required to wear.
- PA, Andrais v. U.S. Steel Corp., May 2008. Class action of production workers in coke manufacturing plant wiring in extreme temps and sanitized environment.
- WI, Kalten v. St. Gobain Performance Plastics Corp., March 2008. Class action for time spent donning and doffing safety gear.
- IL, 3M Co., May 2008. Class action alleging denial of regular & overtime pay for donning & doffing safety gear.
- Alcoa, Inc., December 2007. Collective action by hundreds of workers seeking pay for donning & doffing mandatory safety gear.
- Tower Automotive, Inc., November 2007. Welders seek pay for donning & doffing required safety gear.

10 

- **Misclassifications**
 - IBM settlement for 32,000 technical service professionals & information technology specialists claiming misclassification for \$65 million.
 - Glass v. UBS Financial Services: \$45 million settlement to stockbrokers & trainees.
 - CA, Staples, November 2007. A \$38 million settlement in a class action lawsuit alleging misclassification of assistant store managers as exempt from overtime pay.
 - OH - Salvation Army, May 2008. Collective action alleging denial of overtime wages to some managers and assistant managers.

11 

- NY - Starbucks, March 2008. Confidential settlement with 356 assistant store managers in several states who were not paid for overtime hours worked.
- FL, MasTec, Inc.: Agreed to pay \$12.5 million for service technicians in 10 states alleging misclassification as exempt.
- Large insurance companies have settled claims of misclassification of adjusters & customer service reps claiming misclassification as administrative exempt.
- VA investment bank settled 2 class actions alleging that loan officers, loan processors & account managers were misclassified as exempt.

12 

Exempt v. Non-Exempt?

- Classifying employees is neither exact nor easy.
- Classification decision should not be based solely on the job title or manner in which employee is paid (i.e., hourly or salaried).
- Proper classification requires review of job duties associated with each position (up-to-date job description is a good point of reference).

13 

Section 13(a)(1)--The "White Collar Exemptions"

- Executive Exemption;
- Administrative Exemption;
- Professional Exemption;
- Outside Sales Exemption;
- (Section 13(a)(17) exemption for computer-related areas).

14 

White Collar Exemption Test

- Salary Level;
- Salary Basis;
- Job Duties;
- Salary Basis tests do not apply to doctors, lawyers, teachers, certain computer related occupations, or outside sales employees.

15 

Executive Exemption

- Salary basis of \$455/week min.;
- Primary duty is management of enterprise, recognized department or subdivision;
- Employee directs work of two or more;
- Authority to hire, fire, promote (or employee's suggestions regarding such decisions are given particular weight).
- Note: Owner employees (min 20% ownership) are exempt if actively engaged in management, and salary basis does not apply.

16  **Administrative Exemption**

- Salary or fee basis of \$455/week min.;
- Primary duty is performance of office or non-manual work directly related to management or business operations of employer;
- Primary duty includes exercise of discretion and independent judgment related to matters of significance.

17  **Professional Exemption**

- Salary or fee basis of \$455/week min.;
- Primary duty is performance of work requiring advanced knowledge (predominantly intellectual in character – requiring consistent exercise of discretion and judgment);
- Field of science/learning acquired by prolonged course of specialized instruction.
- Special exemption for “creative professional”: Employee’s work requires invention, creativity, imagination, origination, etc.

18  **Creative Professionals Exemption**

- In addition to criteria for Professional Exemption, creative professional must demonstrate primary duty is performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor (i.e. music, writing, acting and the graphic arts).

19  **Computer Software Professionals**

- Salary basis of \$455/week min. or min. wage of \$27.63/hour;
- Primary duty is application of systems analysis techniques and procedures (hardware, software, system functional specifications);
- Primary duty may include design, development, creation, testing or modification of systems or programs.

20  **Outside Sales Personnel**

- No salary level or salary basis requirement;
- Primary duty includes sale of tangible or intangible items, and regularly and customarily working away from employer’s place of business.

21  **Highly Compensated Employees**

- Total annual compensation of \geq \$100,000 (must include min. \$455/week paid on a salary or fee basis);
- Primary duty is performance of non-manual work, including at least one duty of an exempt executive, administrative or professional employee identified in the standard tests for such exemption.
- Total annual compensation doesn’t include credit for board, lodging, medical or life insurance benefits, or contributions to retirement or fringe benefit plans.

22  **What if you hire “Independent Contractors” to avoid overtime?**

Employee is distinguished from an independent contractor through evaluation of several factors:

1. Extent of control exercised by employer over details of work;
2. Whether or not employee is engaged in a distinct occupation or business;
3. Type of occupation (with reference to whether customary for work to be performed without supervision);

23 

4. Skills required to perform work;
5. Whether employer or workman supplies tools, equipment, etc.;
6. Length of employment;
7. Method of payment;
8. Whether work is part of regular business of employer;
9. Whether parties believe they are involved in master/servant relationship; and
10. Whether the principal is or is not in business.

24 

Donning and Doffing

- Long history of litigation on whether employers must pay employees for the time it takes to prepare for work and get ready to leave work.
- *IBP v. Alvarez* brought issue to forefront however.
- Identified it as a an issue ripe for class action litigation.

25 

IBP v. Alvarez

- ISSUE: Must employers pay for time spent and walking to and from place where protective equipment is put on and taken off?
- HELD: YES
- ISSUE: Must employers pay for time spent waiting to put on protective equipment?
- HELD: NO (at least as to these facts)

26 

Donning and Doffing

- Since *Alvarez*, significant upswing in litigation over allegedly unpaid compensation.
- Understandably high stakes litigation.

27 

- Under FLSA, as amended by the Portal-to-Portal Act, an employee must be compensated for the time their employer requires them to spend donning and doffing protective gear.

28 

Portal Act's Amendment

- Act removed an employers' obligation to compensate employees for two categories of activities performed outside the workday:
 1. walking, riding, or traveling to and from the actual place of performance of the principal activity,
 2. activities which are preliminary or postliminary to said principal activity or activities.

29 

- Compensable "workday" is the time between the start and end of an employee's "principal activity or activities."
- "Principal activity or activities" covers all functions which are an integral and indispensable part of the principal activities.
- If deemed integral and indispensable part of employees' principal activities, then donning and doffing of equipment / protective gear is compensable.

30 

Except . . .

- 29 USC section 203(o) excepts from working time hours spent in “changing clothes” or washing at the beginning or end of each workday which was excluded from measured working time by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

31  **Also Exempt**

- De Minimis time: rule of thumb is 10 minutes or less does not qualify for compensation.

32  **DOL Advisory Opinion (2006-2)**

- DOL Advisory Memorandum: no matter how minimal, the time spent donning and doffing required gear is within the continuous workday only when the employer or the nature of the job mandates that it take place on the employer’s premises.

33  **Jordan v. IBP, Inc. and Tyson Foods, Inc. (USDC, M.D. TENN.)(3/31/08)**

- SJ granted on employees' claim that the donning and doffing of sanitary frocks was compensable under FLSA.
- Motion denied as to whether the time that the employees spent engaging in such activities was de minimis.

34 

- Brought by employees of beef and pork processing plant.
- Production floor employees are required to wear company-issued sanitary frocks while they are on the production floor.
- Prior to work, they retrieve clean frocks from their assigned lockers and hard hats, hair and beard nets, and ear protection.

35 

- Some are also required to wear certain specialized gear.
- Employees who use knives must wear or use special cut-resistant gloves, belly guards, protective sleeves, forearm guards, scabbards, steels, meat hooks, and hook holders.

36 

- After donning gear, all employees wash their hands, wait for supervisors to open the production floor doors, and walk through a sanitizing foot bath onto the production floor.
- Employees obtain, sanitize and don rubber or latex gloves before beginning work on the production line.
- Knife users sanitize and don their specialized gear and straighten the edge of their knives before reporting to their work stations.

37 

- Plaintiffs: 20-30 minutes per day.
- Defendants: no more than seven minutes.

- Court's holding: Activities are integral to performing the jobs and consequently should be considered "hours worked" under FLSA.
- HOWEVER: denied SJ on whether the time spent was *de minimis* and therefore non-compensable.

38  **Off-the-Clock: New York Times Report**

- New Orleans hairstylist where business was slow and profits weak.
- To keep costs down, her manager often ordered her and the two other stylists to clock out.
- She'd spend 40 hours in the salon, but was told to clock out while waiting for customers to show up. During the off-the-clock periods, she was told to clean up and stock merchandise during the unpaid stretches.
- Her paycheck? Often came to just \$200 for two weeks, even after 80 hours at work. That worked out to \$2.50 an hour, less than half of the federal minimum wage.

39  **NYT**

- Practice prevalent at hair salons, supermarkets, restaurants, discount stores, call centers, and car washes.
- Also reported on common practice of some companies to require employees to show up 15 minutes before their reported starting time—or to record 8 hours on their time cards even if they worked more than that.
- If you are doing this, you are a target.

40  **If Your Employees Carry their Work Home, Must You Pay for the Commute?**

- *Singh v. City of New York* (2nd Cir., 4/29/08)
- Plaintiffs are Fire Alarm Inspectors for New York City.
- On Friday mornings, inspectors report to FAIU headquarters to return completed inspection files and pick up new inspection files for the coming week.
- They are responsible for keeping the files safe from the time they pick them up on Friday morning until the time they return them on the following Friday.

41 

- Files weigh fifteen to twenty pounds and inspectors carry them without pay in a City-provided briefcase during their commutes from home to work and back.
- Mere carrying of inspection documents without any other active employment-related responsibilities while commuting was not work under the FLSA.
- Court concluded that though the city benefited by the employees' carrying the documents during the commute, their use of their commuting time was materially unaltered.
- Any increase in the commuting time was *de minimis* as a matter of law and thus not compensable under the FLSA.

42 

- **Deductions from salaried exempt employees' wages:**
 - Cannot deduct because of variations in quantity or quality of work
 - Must be paid full salary for any week in which employee performs any work
 - Need not be paid for work when no work is performed in the week

43  **7 Permissible Salary Deductions**

1. Absence from work for one or more full days for personal reasons, other than sickness or disability (deduct in full day increments only)
2. Absence from work for one or more full days due to sickness or disability (including worker's compensation) if deductions made under a bona fide plan, policy or practice of providing wage replacement benefits for these types of absences
3. To offset any amounts received as payment for jury fees, witness fees, or military pay

44  **7 Permissible Salary Deductions**

4. Penalties imposed in good faith for violating safety rules of "major significance"

5. Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of workplace conduct rules (must be pursuant to written policy applicable to all employees)
6. Proportionate part of an employee's full salary may be paid for time actually worked in the first and last weeks of employment
7. Unpaid leave taken pursuant to the Family and Medical Leave Act

45  **Improper Deductions: 541.603**

- Employer shall lose the exemption if the facts demonstrate a pattern or practice of not paying employees on a salary basis

46  **Implement Improper Deductions Policy**

- Under 29 C.F.R. 541.603, a safe harbor exists. The exemption will not be lost if you:
 - Have a clearly communicated policy prohibiting improper deductions and including a complaint mechanism;
 - Reimburse employees for any improper deductions; and
 - Make a good faith commitment to comply in the future.

47  **Top 5 Tips to Avoid Problems with FLSA Issues**

1. How to handle employee complaints.
2. How to handle government investigations.
3. How to handle attorney contacts.
4. Pro-active measures.
5. Implement improper deductions policy.

48  **1.What to do if an employee complains re pay**

- Take the complaint seriously.
- Investigate the complaint.
- If the employee has been misclassified or not paid appropriately, resolve the complaint by making appropriate back pay and reclassifying the employee so that the problem does not resurface.
- When in doubt, confer with counsel.

49  **2.What to do if the government comes calling**

- Cooperate with the investigator.
 - Through counsel, contact investigator to determine exactly what issues are being investigated and what documents the investigator is seeking.
 - During this discussion, counsel may be able to narrow the scope of the investigator's request.

50  **3.What to do if an employee's lawyer contacts you to discuss pay**

- Take the complaint seriously.
- Contact your counsel to investigate the complaint and communicate with opposing counsel.

51  **4.How to avoid being involved in wage/hour lawsuits**

- Internal audit of wage/hour practices:
 - A. Off the clock work.
 - B. Donning and Doffing.
 - C. Misclassifications.
 - D. Deductions from pay of salaried exempt employees.

52  **ACKNOWLEDGMENT & DISCLAIMER**

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53 

Thank You For Attending!
The End!