

Wage and Hour Law Update

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FLSA Collective Action Filings

- 8,304 FLSA collective actions filed in 2016 according to a recent report. Slightly below the 8,954 filings in 2015, but still a very high amount.
- # of 2015 filings was the highest amount since tracking began in 2004 and 2016 was the second highest total.
- Top 10 wage and hour settlements reached in 2016 totaled \$695.5 million.

Basics

- Fair Labor Standards Act (FLSA) and Missouri Minimum Wage Law (MMWL) generally require covered employers to pay at least minimum wage and overtime
- Federal Minimum Wage: \$7.25
- Missouri Minimum Wage: \$7.70
- Overtime: 1 ½ times the regular rate of pay for all hours over 40 hours in a work week

Federal and State Minimum Wages

- It appears that an increase in the current federal minimum wage, if any, will be moderate.
- Trump said on the campaign trail that he supported raising the federal minimum wage to \$10 per hour.
- Missouri Minimum Wage yearly changes are based on a consumer price index, which is intended to raise the wage rate along with inflation.
- Missouri recently enacted a law preventing cities and municipalities from implementing a minimum wage higher than the state minimum wage.

Regulatory Changes On Hold

- For executive, administrative, and professional exemptions, minimum salary threshold would have increased from \$455 per week (\$23,660 for a full-year employee) to \$913 per week (\$47,476 for a full-year employee) if the regulations ever became effective.
- The current DOL is exploring options for changes to the salary threshold, including whether there should be a threshold at all, and recently received comments from the public on the issue. There is reason to believe that any proposed increase will not be nearly as high as the increase in the regulations enacted during the Obama administration.

Executive Exemption

- To qualify for executive exemption, the following tests must be met:
 - Employee is compensated on a salary basis at a rate not less than \$455 per week;
 - Primary duty must be managing the enterprise or managing a customarily recognized subdivision or department or subdivision of the enterprise;
 - The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
 - The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Administrative Exemption

- To qualify for administrative exemption, the following tests must be met:
 - Employee is compensated on a salary basis at a rate not less than \$455 per week;
 - The employee's 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; and
 - The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Professional Exemption

- To qualify for professional exemption, the following tests must be met:
 - Employee is compensated on a salary basis at a rate not less than \$455 per week;
 - The employee's 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; and
 - The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Payment of Exempt Employees

- The exempt employee's pay cannot be reduced because of variations in the quality or quantity of the employee's work.
- Subject to limited exceptions, an exempt employee must receive the full salary for any week in which he/she performs any work, regardless of the number of days or hours worked.
- If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

Permitted Salary Deductions

Seven exceptions from the exempt employee “no pay-docking” rule:

1. Absence from work for one or more full days for personal reasons, other than sickness and disability.
2. Absence from work for one or more full days due to sickness or disability if deductions made under a bona fide plan, policy, or practice of providing wage replacement benefits for these types of absences.
3. Penalties imposed in good faith for violating safety rules of “major significance.”

Permitted Salary Deductions (cont.)

4. To offset any amounts received as payment for jury fees, witness fees, or military pay.
5. Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of written workplace conduct rule.
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.

Work Week and Hours Worked

- Make sure an adequate system is in place for keeping track of an employee's hours worked.
- Clearly define when the work week begins and ends.
- Employers must pay an employee for hours worked that are brought to their attention in some manner even if the hours are not properly recorded. However, employees can be subject to discipline for violating an employer's time reporting policies.

Meal and Rest Periods

- Meal periods of 30 minutes or more are not hours worked when the non-exempt employee is relieved of duties for the purpose of eating a meal.
- Rest periods of short duration (normally 5 to 20 minutes) are counted as hours worked and must be paid for non-exempt employees

Avoiding Exposure

- Develop a policy regarding meals and breaks
- Specify what is and is not allowed in your handbook
- Be clear whether employees can elect to work through mealtimes without permission, as that can result in more overtime
- Avoid auto deductions for meal periods
- Establish that violations will result in disciplinary action

Travel Time

- Ordinary home to work travel at beginning and end of work day is not work time for non-exempt employees.
- Travel between job sites during the normal work day is work time.
- Lack of clarity in the law with respect to travel time for a non-exempt employee working two shifts during one day that are separated by two or more hours.

Training Time

Time non-exempt employees spend in meetings, lectures, or training is considered hours worked and must be paid, unless

- Attendance is outside regular working hours.
- Attendance is voluntary.
- The course, lecture, or meeting is not job related.
- The employee does not perform any productive work during attendance.

On-Call

- Time spent on-call at the job site is generally compensable and counts towards overtime
- Time spent at or near home while not engaged in work-related activities generally is not compensable as long as employee has significant freedom to spend the time as he/she desires
- Placing restrictions on how on-call time can be spent could make it compensable
- Consider a different pay scale for on-call time if it is a major feature of the job

Overtime Rate Calculation: Bonuses

- Non-discretionary bonuses need to be factored into the “regular rate” for purposes of calculation of overtime pay owed.
- Discretionary bonuses do not need to be considered for purposes of determining rate.
- Discretionary bonuses should not be tied to any specific factor such as production or attendance.

Recalculating Overtime Wages when Bonus was Earned During a Calendar Quarter:

If an employee is paid an hourly rate of \$10.00/per hour, worked 570 hours during a quarter (thirteen weeks), and earned a \$1000.00 bonus during that quarter, recalculation of overtime would be as follows:

$\$1,000.00 \div 13 \text{ weeks} = \76.92 weekly increase in wages

New hourly rate determined by dividing \$76.92 by total hours in overtime week.

For instance, if the employee worked 50 hours in a workweek, new hourly rate would be:

$\$76.92 \div 50 \text{ hours} = \$1.54 + \$10.00 = \11.54 new hourly rate.

