

# Wage and Hour Law Update

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# 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: \$7.85
- Illinois Minimum Wage: \$8.25
- Overtime: 1 ½ times the regular rate of pay for all hours over 40 hours in a work week worked by non-exempt employees.
- FLSA claims are often asserted in collective actions while MMWL claims are often asserted in class actions.
- The state and federal DOL can also open an investigation file to determine if there has been any violation of wage and hour laws.

# Federal and State Minimum Wages

- No changes in the federal minimum wage are expected in the near future.
- Missouri Minimum Wage yearly changes are based on a consumer price index, which is intended to raise the wage rate along with inflation.
- Missouri law now prevents cities and municipalities from implementing a minimum wage higher than the state minimum wage, but in some states, such as Illinois, the minimum wage can vary significantly from city to city (Chicago Min. Wage is currently \$12 per hour) or county or county (Cook County is currently \$11 per hour).

# FLSA Overtime Exemptions

- 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 DOL very recently held “public listening sessions” to help determine what changes, if any, should be made to federal regulations related to the overtime exemptions. The DOL has indicated it intends to update the overtime regulations.

# 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

# Allen v. City of Chicago, 865 F.3d 936, 946 (7th Cir. 2017)

- Members of the Chicago Police Dept's Organized Crime Bureau filed class action against employer for unpaid overtime spent working on Department issued blackberries outside of normal work hours.
- Although it was determined the work performed was compensable under FLSA, employer was not liable as a reasonable mechanism for reporting overtime was in place but was not utilized by the employees.
- When determining whether an employer used reasonable diligence to discover worked overtime, the standard is "what the employer *should* have known" not "what the employer *could* have known".

# 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 and Commissions

- Non-discretionary bonuses and commissions 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.

# DOL Position re Independent Contractors

- Main theme of DOL July 2015 memo is an extremely expansive interpretation of “employ” through which most individuals would be considered employees under the FLSA.
- Current DOL has rejected the interpretations that were issued in 2015 and 2016 regarding independent contractor status and joint employment relationships with an apparent shift back to a less aggressive interpretation of the “economic realities” test used for FLSA purposes.

# Independent Contractor Memo

## (Continued)

- Economic realities test examines whether individual is truly in business for himself/herself or whether the individual is economically dependent upon an employer.
- Factors typically considered under the economic realities test include: (a) the extent to which the work performed is an integral part of the employer's business; (b) whether the work performed requires special skills and initiative; and (c) the extent of the relative investments of the employer and the worker.

# DOL Test for Unpaid Interns

DOL during Obama Administration indicated employment relationship under FLSA does not exist if each of the below 6 factors were met.

1. Internship is similar to training given in an educational environment.
2. Internship experience is for the benefit of the intern.
3. Intern does not displace regular employees, but works under close supervision of existing staff.
4. Employer that provides the training derives no immediate advantage from the activities of the intern and on occasion its operations may actually be impeded.
5. Intern is not necessarily entitled to a job at the conclusion of the internship.
6. Employer and intern understand that the intern is not entitled to wages for the time spent in the internship.

DOL indicated earlier this year that it is moving back to the more flexible primary beneficiary test that has been approved by some courts. The test is focused on determining whether the intern or the company is the primary beneficiary of the relationship.

# DOL Opinion Letters

- DOL stopped providing opinion letters on various FLSA topics during the Obama administration
- Opinion letters are back and accessible through the DOL website
- Recent topics addressed in opinion letters include compensability of travel time, compensability of frequent, short rest breaks required due to a serious health condition, the appropriate way to calculate salary deductions, and the compensability of time spent voluntarily participating in wellness activities and benefits fairs