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Convention Center



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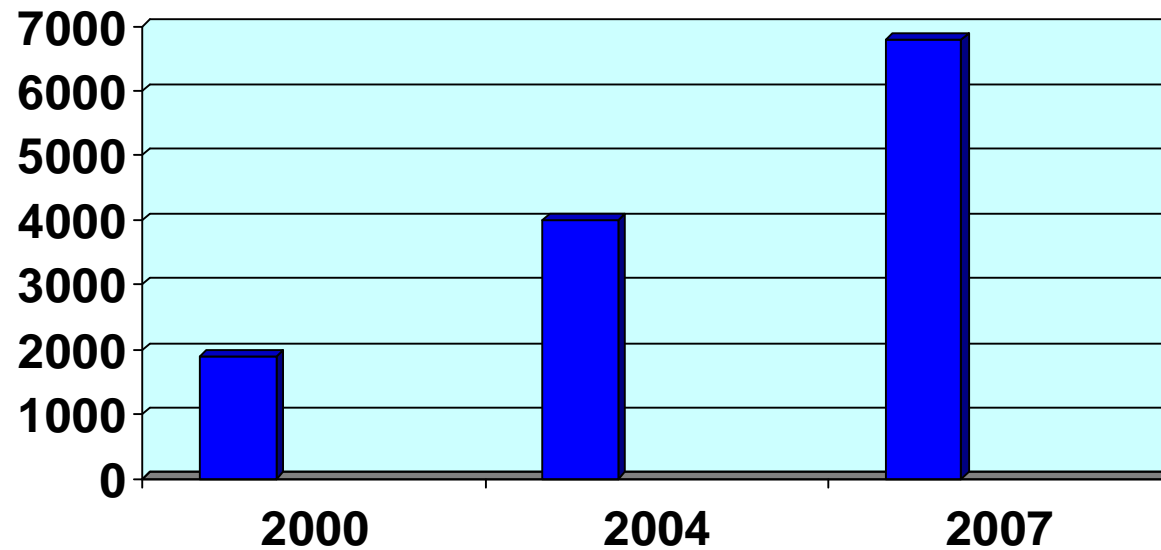
Wage and Hour Compliance:  
Avoiding Lawsuits and Liability  
Robert A. Boonin • June 28, 2010

SHRM® 2010 Annual Conference & Exposition

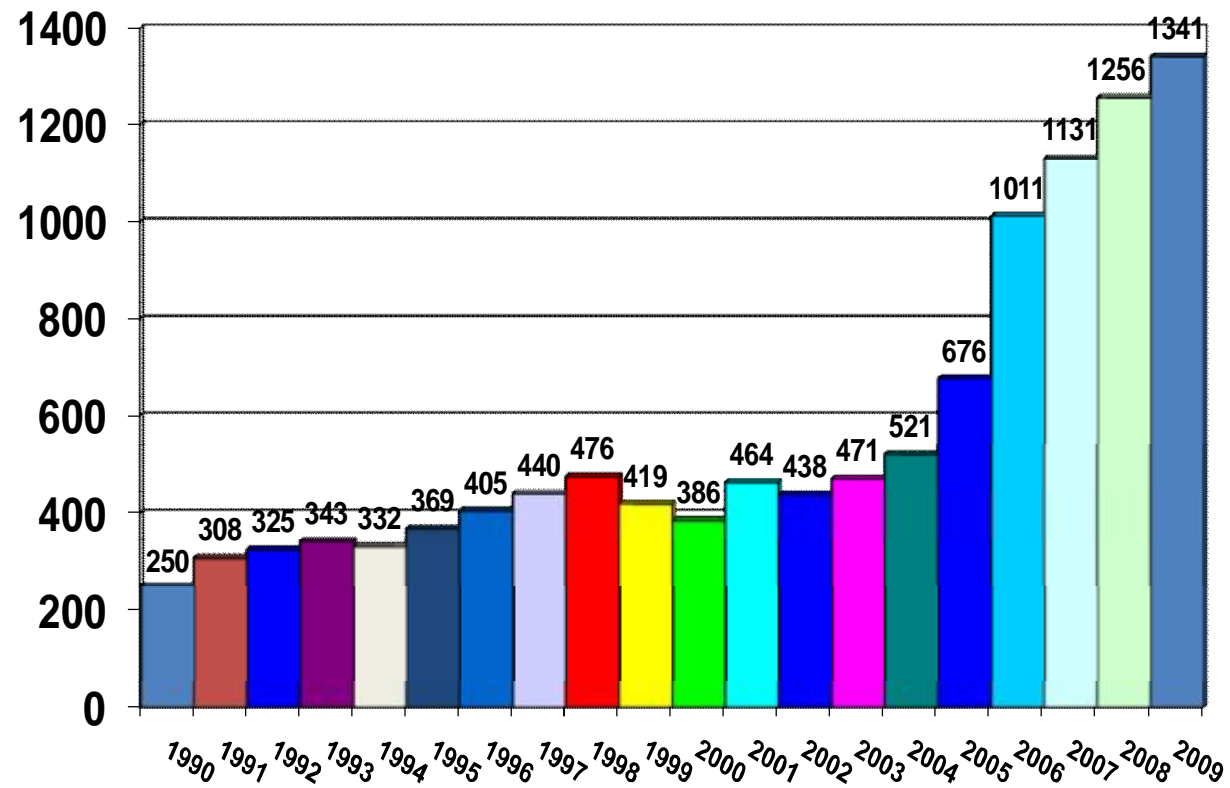
- Last year Congress increased the minimum wage, as follows:
  - > \$7.25, effective July 24, 2009
- 14 states and the District of Columbia have minimum wages greater than the current federal minimum wage of \$7.25 per hour
  - > For a chart summarizing the minimum wages and basic payroll rules of each state, see attached

## Second, the Number of FLSA Cases Per Year is Booming....

### Number of FLSA Cases Filed (2004-2007)



# Number of Reported FLSA Court Decisions (1990-2009)



- Opinion letters were flowing until recently . . . .
  - > 2004 – 23
  - > 2005 – 54
  - > 2006 – 46
  - > 2007 – 12
  - > 2008 – 19
  - > 2009 – 36 in mid-January (withdrew 18 after inauguration)
    - “Enclosed is the response to your request for an opinion letter signed by the then Acting Wage and Hour Administrator . . . on January 16, 2009. It does not appear that this response was placed in the mail for delivery to you after it was signed. In any event, we have decided to withdraw it for further consideration by the Wage and Hour Division. We will provide a further response in the near future.”
  - > January 20, 2009 to April 29, 2010 - 0

- Instead of “Wage and Hour Opinion Letters” –
  - > Meet “**Administrator Interpretations**”
  - > First one issued on March 24, 2010
  
- Also, there other new enforcement initiatives
  - > 250 New Investigators
  - > Independent Contractors
    - Bills pending in Congress
  - > “Plan/Prepare/Prevent” Initiative
  - > Media Campaigns

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“We can help....”

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“We can help” (cont’d)

- Unpaid interns in for-profit private sector jobs are employees subject to minimum wage and overtime rules
  - > An apparent exception applies to non-profit and public employers
  - > Basis of another media campaign

- For a trainee or intern to be excluded from FLSA's coverage, all of the following criteria must be met:
  - > The internship, even though it includes actual operation of the facilities of the employer, must be similar to training which would be given in an educational environment;
  - > The internship experience is for the benefit of the intern;
  - > The intern does not displace regular employees, but works under close supervision of existing staff;
  - > The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded;
  - > The intern is not necessarily entitled to a job at the conclusion of the internship; and
  - > The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

- Included in the new Patient Protection and Affordable Care Act (aka “Obamacare”)
  - > An amendment to the FLSA
  - > Effective March 23, 2010
- A reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk
- A place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.

## The Amendment also states that...

- Employers are not required to compensate employees receiving reasonable break times for expressing milk
- It's not applicable to employers employing less than 50 employees if complying would –
  - > “impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.”
- It does not supersede state laws providing greater benefits or protections
  - > AR, CA, CO, CT, GA, IL, ME, MN, NM, NY, OK, OR, RI, TN, VT, and the District of Columbia

- Overtime pay is due
  - > To all “non-exempt” employees
  - > For all hours actually “worked” over 40 in a workweek
  - > At the rate of 1.5 times the employee’s “regular hourly rate” of pay



- The broadest exempt group of employees are certain “white collar” employees
  - > Executives
  - > Administrative employees
  - > Professional employees
  - > High level computer-related occupations
    - Provided they are paid a salary of at least \$455 per week or a wage of at least \$27.63 per hour
  - > Outside sales employees

- Most white collar exemptions require the employee to:
  - > Meet the applicable “duties tests” of the exemption
    - If white collar and paid at least \$455 per week salary, and the employee’s total non-discretionary compensation is at least \$100,000 per year, then only one exempt “duty” needs to be met
  - > Be paid at least \$455 per week (the “salary level test”)
  - > Be paid a salary on a “salary basis” (the “salary basis” test)

- Consequence of errors
  - > Amount of unpaid overtime for past 2-3 years (depending on statute of limitation)
  - > Liquidated damages equal to the amount of unpaid overtime
  - > Attorneys fees for prevailing employee's attorneys
  - > Fines, interest and possible criminal sanctions

- In FY 2008, the DOL collected \$123 million in back overtime wages
  - > For 183,000 employees
  - > Which averaged \$672 per employee
  
- Recent major “collective action” outcomes and settlements
  - > Wal-Mart: \$33 million
  - > IBM: \$65 million
  - > Wells Fargo: \$12.5 million
  - > Aegis: \$570,000
  - > Starbucks: \$18 million
  - > Pacific Bell: \$35 million Einstein Bros.: \$500,000
  - > Cingular Wireless: \$5.1 million
  - > T-Mobile: \$4.8 million
  - > Office Depot: \$3.3 million
  - > Farmers Insurance: \$48.5 million
  - > Sears: \$15 million
  - > UBS: \$89 million

## Common Errors



- Administrative Employees
  - > Production vs. Staff
    - Only staff can be exempt administrative employees
  - > Primary duty is performing office or nonmanual work related to the employer's management or general business operations, or those of a customer
  - > As a part of their "primary duties" the employee must exercise "**independent judgment and discretion**" with respect to "**matters of significance**"

- > Problem classifications
  - Mortgage loan originators
    - See first “Administrator Interpretation”
  - Help desk employees
  - Paralegals
  - Customer service representatives
  - Administrative assistants
  - Insurance adjusters

- Professional Employees
  - > Primary duties must be in area requiring specialized higher education and the consistent exercise of discretion and judgment
    - Law
    - Medicine
    - Engineering
    - Teaching
    - Psychology
    - Science
    - Social Work
  - > Problem classifications
    - Accountants
    - Stock brokers
    - Entry level engineers

- Executives
  - > Problem classifications
    - Assistant managers
    - Low level supervisors
  
- Outside Sales Employees
  - > Problem classifications
    - Pharmaceutical sales reps

- In order to be exempt, most white collar employees must be paid at least \$455 per week on a salary basis, i.e., they must be paid a predetermined fixed amount each workweek without regard to the quantity or quality of work performed in the week.
  - > Rule does not apply to:
    - Doctors
    - Lawyers
    - Teachers
    - Employees in highly skilled computer related occupations earning at least \$27.63 per hour

- Permissible Deductions
  - > Personal days of one day or more
  - > Sick days of one day or more, if pursuant to bona fide time off plan
  - > Setoffs for jury, witness or military duty
  - > Suspensions for violating “safety rules of major significance”
  - > Suspensions of one day or more for violating written workplace conduct rules
  - > Prorations for initial or terminal weeks of employment
  - > Time missed due to FMLA leave
  - > Partial days missed by public employees (in certain circumstances)

- NOTE: Under the FLSA, it is permissible to dock PTO and similar leave banks for partial days missed, so long as the employee's pay is not docked for the partial day missed
  - > Some states prohibit this practice as to exempt employees under state law

- **Note:** Exposure to liability for misclassifications can be significantly reduced under the new “safe harbor” rule
  - > Must have written notification to employees as to salary basis obligations
  - > Written complaint procedure
  - > Promise not repeat errors

***“Question of the year....”***

Due to the current economic conditions, we're reducing our production schedule from 5 to 4 days per week. We expect this to last for at least the next two calendar quarters? Without jeopardizing the exempt status of my salaried employees, can I

- A. Cut their pay by 20%?
- B. Cut their pay by 20% and their workweek by one day?
- C. Force them to use their PTO days for the day off per week?
- D. All of the above
- E. None of the above

- Ability to modify salaries prospectively
  - > A bona fide reduction in an employee's salary does not preclude a salary-basis payment as long as the reduction is not designed to circumvent the requirement that the employees be paid their full salary in any week in which they perform work.
  - > *Wage & Hour Opinion Letter*, February 23, 1998
    - But see, *Wage and Hour Opinion Letter*, March 6, 2009

- Failure to pay for all time worked by not properly recording all work time
- Work during meal breaks and rest periods must be counted as work time



## *The donning and doffing problem....*

Employee's shift begins at 8 a.m. Her workday begins when –

- A. At 7:45 when she walks into the plant and puts on safety glasses and hard hat?
- B. At 7:50 when she puts on protective boots and coveralls?
- C. At 8:00 when she gets to her work station?

## ***The continuous workday problem....***

Employee logs in and checks emails at 7:30, then drives 1 hour to work, and gets to his desk at 8:30, his normal starting time. His workday begins:

- A. At home, when he checks emails, and his commute counts as work?
- B. At home, when he checks emails, but his commute does not count?
- C. When he starts working at 8:30, at his desk?

- The workday includes....
  - > “The period between the commencement and completion on the same workday of an employee’s principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period.”
  - > “A principal activity is one that’s *integral and indispensable* to the job.”
- Pre- and post-shift activities which are integral to employee’s principal job constitute compensable work time
  - > These are “preparatory” and “concluding” activities
    - As distinguished from “preliminary” and “postliminary” activities, which are not compensable
- Work during meal breaks and rest periods must be counted as work time

## Warning!!

- Problems abound regarding compensation for employees checking e-mails or logging in from home
  - > This is “work time”, if not *de minimus*
  - > This may also cause what would otherwise be a noncompensable commute into a compensable commute
- Bottom line....
  - > Too often employers fail to pay for all time worked by not properly recording all work time

- Practice is to allow employees working overtime in one workweek to take 1.5 times that time off in other workweek(s)
- This practice is not permissible as to nonexempt employees in the private sector
- Comp time is permissible on a limited basis in the public sector
  - > 240 hours for non-public safety employees
  - > 480 hours for public safety employees

- General rule
  - > All time traveling in the course of a day of work is compensable (other than normal commute)
  
- Exception
  - > Only applies to travel entailing an overnight stay if
    - No work is performed while traveling, and
    - The traveling occurs during non-normal work hours, even on days normally not working

- Attendance at training programs during or outside normal working hours is compensable, unless:
  - > Time is outside of normal working hours;
  - > Attendance is absolutely voluntary;
  - > Program is not directly related to job; **and**
  - > No productive work is performed during the training

- Employers must roll-into base rate most pay premiums **before** calculating overtime rate.
- Therefore, the regular rate includes extra pay such as:
  - > Shift premiums
  - > Lead employee premiums
  - > Dirty work premiums
  - > Non-discretionary bonuses
  - > Commissions
  - > Piece rate payments



- Non-discretionary bonuses, commissions, and other occasional payments must be rolled-into the regular rate of pay for the period applicable to the payment, even if paid monthly, quarterly, annually, etc.
  - > A bonus is “discretionary” if both the fact that a payment will be made and the amount of payment is determined at or near end of the period, in the employer’s sole discretion

- > Nondiscretionary bonuses generally include:
  - Productivity bonuses
  - Attendance bonuses
  - Longevity bonuses



- Retroactive recalculation of regular rate of pay must occur upon the making of each such payment unless the payment is a percent of **all** compensation provided during the period

## \$500 Bonus (or Commission) for Quarter....

Straight Time:

$$520 \text{ hrs.} \times \$10 = \$5,200$$

OT:

$$90 \text{ hrs.} \times \$15 = \$1,350$$

Total hours = 610

Total base comp = \$6,550

Calculation of additional pay  
due:

\$500 bonus (or commission)  
÷ 610 hours = \$0.82 increase  
to hourly rate for all hours  
worked

\$0.41 is due per overtime  
hour:  $\$0.41 \times 90 \text{ hrs.} =$   
\$36.90

## Is this a problem lurking over the horizon?

At the end of each year, we cash out all accrued but unused vacation days and sick days.

- A. The employees' regular rates of pay have to be recalculated for the value of the vacation days and sick days, and the employees are entitled to more overtime pay for the OT worked during the year
- B. The employees' regular rates of pay have to be recalculated for the vacation days, only, and the employees are to be entitled to more overtime pay for the OT worked during the year
- C. The employees' regular rates of pay have to be recalculated for the sick days, only, and the employees are to be entitled to more overtime pay for the OT worked during the year
- D. None of the above

**Thank you.**



**Robert A. Boonin**  
**Butzel Long**  
350 S. Main Street, Ste. 300  
Ann Arbor, MI 48104  
  
**(734) 213-3601**  
**[boonin@butzel.com](mailto:boonin@butzel.com)**