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FLSA Trends (cont'd)

- 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

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But.....

- 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
 - > Plus.....

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Plan, Prevent, Protect Initiative

- DOL intends to establish a comprehensive set of regulations requiring employers to
 - > Establish formal compliance plans with respect to the various laws administered by the Department
 - > Document training with respect to those plans, and
 - > Document how they are complying with their legal obligations
- Failure to have such a plan and properly administering it will be deemed to be a penalty.
- Employers are to be more proactive in their compliance, in lieu of what the DOL perceives to be a "catch me if you can" mind-set.

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The Wage and Hour Division's
Media Campaign

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WWD

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"We can help" (cont'd)

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"We can help" (cont'd)

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The latest DOL contribution....



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"Bridge to Justice"

- Collaboration between the DOL and ABA
- Launched December 10, 2010
- Referrals of cases not to be pursued by DOL

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New FLSA Amendment!

- Included in the new Patient Protection and Affordable Care Act
 - > 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.

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The Amendment also states that...

- Employers are not required to compensate employees receiving reasonable break times for expressing milk
- It does not supersede state laws providing greater benefits or protections
 - > AR, CA, CO, CT, GA, HI, IL, IN, ME, MN, MT, NM, NY, ND, OK, OR, RI, TN, VT and the District of Columbia
- www.dol.gov/whd/nursingmothers/

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Rules are forthcoming....

- Request for Information Published December 21, 2010
 - > Should nursing mothers receive compensation for break time of 20 minutes or less?
 - > What is considered a "reasonable break time"?
 - > What "space provided to the nursing mother for expressing breast milk" is adequate and meets the requirements of the statute?
 - > What would be considered "reasonable notice" to the employer of an employee's intent to take breaks to express milk?

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Other wage and hour rules on the horizon....


- "Right to Know Under the Fair Labor Standards Act."
 - > Proposed rules expected to be published in April 2011.
 - > Under the proposal, it is anticipated that
 - Employers will be required to provide greater disclosure for each pay on how each employee's pay is computed (including deductions); and
 - Employers will be required to create, maintain and make available to the DOL a "classification analysis" for each person classified as either
 - An exempt employee under the FLSA, or
 - An independent contractor

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FLSA Overview

- 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



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FLSA Overview (cont'd)

- 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

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FLSA Overview (cont'd)

- 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)

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FLSA Overview (cont'd)

- 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

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Some recent judgments and settlements

- Charter Communications
 - > \$18m for off-the-clock work
- Wells Fargo
 - > \$6.6m for misclassifying loan processors
- Raceway Petroleum (700 employees)
 - > \$4.0m gas station employees for unpaid overtime
- Kaiser Hospitals
 - > \$2.9m for misclassifying IT employees
- Teleperformance USA (15,862 employees)
 - > \$2m for off-the-clock work
- Tyson Foods (3,000 employees)
 - > \$500k for off-the-clock work

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Major trends in litigation . . .

- Misclassifications
- Off-the-Clock Time
- Retaliation


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Wage and Hour Compliance Under the FLSA*

Common Errors

*Many states have overtime rules which are more strict than those under the FLSA. For a "State-by-State Summary of wage and hour rules, see June 2011 publication at <http://wfdi.fltcounsel.org/publications.htm>



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1. Misclassifying Employees as Exempt

Barry Hardatwork works for Loans-R-Us as an exempt customer loan advisor. He meets with customers seeking mortgages and finds mortgage products suitable to the customers' needs, helps them with the paperwork, and if they're approved, has a colleague handle the closing process. He's paid a base of \$500 per week, plus a commission, averaging \$100k/year. He's laid-off and he goes to sueurboss.com. Sueurboss sues for unpaid overtime. Does Loans-R-Us:

- A. Win because Barry is an exempt commissioned sales employee;
- B. Win because Barry is an exempt administrative employee;
- C. Win because of both a and b, above;
- D. Lose.

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Misclassifying Employees (cont'd)

- 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**"

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Misclassifying Employees (cont'd)

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

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Misclassifying Employees (cont'd)

- 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

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Misclassifying Employees (cont'd)

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

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2. Violating the "Salary Basis" Rule

- 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

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Salary Basis Rule (cont'd)

- 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)

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Salary Basis Rule (cont'd)

- 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

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Salary Basis Rule (cont'd)

- **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

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Salary Basis Rule (cont'd)

"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

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Wage and Hour Compliance


- 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

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3. Off-Clock Time

- 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



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Off-Clock Time (cont'd)

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?

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Off-Clock Time (cont'd)

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?

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Off-Clock Time (cont'd)

- 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

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Off-Clock Time (cont'd)

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

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4. Compensatory 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

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5. Miscounting Travel Time

- 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
- What about travel to and from "meet" location?

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6. Miscounting Training Time


- 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

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7. Miscalculating the Regular Rate of Pay

- 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



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Regular Rate of Pay (cont'd)

- 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


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Regular Rate of Pay (cont'd)

> Nondiscretionary bonuses generally include:

- Productivity bonuses
- Attendance bonuses
- Longevity bonuses



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Regular Rate of Pay (cont'd)

- 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

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Recalculation Hypothetical

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

<p>Straight Time:</p> <p>520 hrs. x \$10 = \$5,200</p> <p>OT: 90 hrs. x \$15 = \$1,350</p> <p>Total hours = 610</p> <p>Total base comp = \$6,550</p>	<p>Calculation of additional pay due:</p> <p>\$500 bonus (or commission) ÷ 610 hours = \$0.82 increase to hourly rate for all hours worked</p> <p>\$0.41 is due per overtime hour: \$0.41 x 90 hrs. = \$36.90</p>
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Regular Rate of Pay (cont'd)

Is this a problem lurking over the horizon?

Lotto earns 10 vacation and 5 sick days per year and uses none. Employer cashes out unused days at year end. By doing so, the Employer has to:

- A. Recalculate regular rate of pay based on vacation cash-out;
- B. Recalculate regular rate of pay based on sick day cash-out;
- C. Recalculate regular rate of pay based on vacation and sick day cash-out; or
- D. Do no recalculation.


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Thank You

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