

McAfee & Taft

EmployerLINC™

LEGAL INFORMATION, NEWS AND COMMENTARY FOR EMPLOYERS

WEBINAR

WAGE & HOUR LAWS

IN COMPLIANCE,
OUT OF TROUBLE

TODAY'S PRESENTERS



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Wage & Hour Division of Department of Labor

- Enforcing the Fair Labor Standards Act
 - Restrictions on employment of minors
 - Minimum wage
 - Overtime
- ✓ W&H's level of activity

New Initiatives

- “We Can Help” Campaign
- Bridge to Justice Program
- Smartphone Timekeeping Application
 - “DOL – Timesheet”



What to Expect During a Wage & Hour Investigation

USDOL Wage & Hour Audits

What to Expect

- Laws Regulated by the USDOL
 - Fair Labor Standards Act
 - Family Medical Leave Act
 - Immigration Reform Act
 - Parts of the Occupational Safety & Health Act
 - Employee Polygraph Protection Act

USDOL Wage & Hour Audits

What to Expect

- Initiation of an audit
 - Employee or ex-employee complaint
 - Random audits
 - Targeted low-wage or at-risk industries
 - Targeted geographies
 - Short notice or no notice at all

USDOL Wage & Hour Audits

What to Expect

1. Review of records
 - Payroll Records
 - Timecards
 - Job Descriptions
 - Policies & Procedures
 - I-9s
2. Questioning of employees
3. Investigation of premises
4. Findings and negotiations
 - Civil penalties for child labor and willful/repeat violations

Collective Actions

- Formal notice provided to all potential class plaintiffs
 - Each must affirmatively "opt-in"
- Could involve hundreds or thousands of small claims aggregated into single court case
- Long, complicated, expensive litigation
- Recovery of unpaid time for the class results in attorney fee award to the plaintiffs counsel

Independent Contractors

- Not obligated to pay overtime
- No obligation to withhold taxes, FICA or pay unemployment
- Announced initiative by Wage & Hour (and the IRS)
 - Focus on workers misclassified as independent contractors

Factors Considered for Independent Contractors

- Level of control exercised
- Opportunity/risk for profit or loss
- Duration of relationship
- Special skills or experience
- Providing similar work to others
- Investments

Joint Employers

- Contracting for specific services
 - Janitorial service
 - Delivery and courier service
 - Cable installer technicians
- ✓Tends to be a subcontracting relationships

Factors

- Who exercises functional control?
 - Scheduling and assignment
 - Project by project supervisor
 - Hiring, firing

Preparation for Work

- Time spent that is not compensable work (default rule)
 - Walking, riding and/or traveling to or from the actual place of primary employment
 - Performing other activities that are preliminary or postliminary to the principal activities the employee performs

Preparation for Work

- Time spent performing pre and post shift activities may be compensable work if it is
 - “Integral and indispensable” to the employee’s principal activities
 - Subject of any agreement by the employer and the employee
 - Performed after the work day begins

Preparation for Work

- Activities that may be compensable work under the default rule and exceptions
 1. Donning / doffing of protective equipment
 - Not uniforms or clothing
 2. Performing inspections
 3. Checking out tools / equipment
 4. Sanitizing
 5. Boot-up / shutdown of computers or other systems
 6. Sorting of inventory / paperwork / silverware
 7. Any other activity that is required by the employer

- ✓ These are fact-intensive, case-specific inquiries, and the results may be different in different jurisdictions

Travel Time

- Default Rule
 - Time spent walking, riding and/or travelling to or from the actual place of primary employment is not compensable
- Ordinary commute time between home and work is not compensable work
- Work performed during a commute may be compensable
 - Including telephone calls and/or work-related errands
- And, once the employee performs a compensable task, his work day has begun and the “continuous work day” rule is implicated

Travel Time Issues

1. Service technicians or other employees who drive directly to a service location from home
 - "Normal commuting area"
 - Dispatch programs
2. One-day travel assignments
 - Travel to and from an airport
 - Time spent at the airport waiting for a flight
 - Time spent flying
3. Overnight travel assignments
 - Time spent by passengers

On-Call Time

- May be compensable work time
- Factors courts consider in determination
 - “Predominate Benefit”
 - Flexibility to employee; allow him to effectively use his time
 - Reasonableness of required response time
 - Use of a pager/cell phone to increase flexibility
 - Employees’ ability to trade on-call shifts
 - Frequency of call-back
 - Location restrictions

Telecommuting



- W&H considerations
 - Access and communication
 - How do you oversee quality and performance?
 - How do you monitor and record hours?

Telecommuting

- Suggestions

- Specific schedule
- Recording and logging in/out protocols
- No overtime without prior authority

✓ Telecommuting only offered to exempt employees?

Retaliation Claims

- Retaliation for exercising FLSA rights
 - Questions or complaints
 - Talked with attorney or DOL
- Can be by employee or co-employee
- Current employees and former employees
 - Not applicants
- Can be an oral complaint

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