Wage and Hour Dos and Don'ts, Tips and Tricks



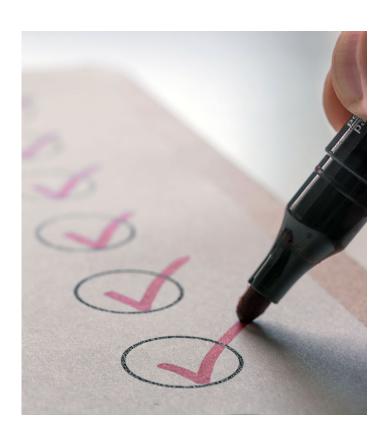
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What We will Cover



- FLSA Basics
- FLSA Overtime Exemptions
- Common Pitfalls
- Wage and Hour Audits
 - DOL
 - Internal
- Bonus Practice Pointers



FLSA Basics

FLSA Basics

- Two wage/hour claims under FLSA
 - Failure to pay minimum wage (\$7.25)
 - Failure to pay overtime (1.5x regular rate)
- Every wage/hour suit under the FLSA is related to one of these claims
- Seems simple, but can be messed up in many ways, almost always accidentally
- Purpose of overtime law?



FLSA Basics

- Basic premise: Every worker in the USA is entitled to minimum wage and overtime...
- UNLESS there is an exemption that applies
- Congress creates exemptions
- DOL "defines and delineates" the exemptions in regulations
- For the last 40 years, courts have generally deferred to DOL and other agencies as subject matter experts ("Chevron deference")

Supreme Court Overturns Chevron

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In June 2024, the Supreme Court changed the standard in a new case (Loper Bright)

 Now, courts, not agencies, are to decide all relevant questions or law and interpret statutory provisions More challenges to agency regulations likely

Already a dispute between Air Force and EPA over clean-up of contaminated drinking water

Looking Ahead

- Courts must exercise independent judgment and may not defer to an agency interpretation because a statute is ambiguous
 - Courts may still consider "interpretations and opinions" of relevant agencies
- Courts in different jurisdictions will likely reach different conclusions regarding agency regulations



Damages Available Under FLSA

- Unpaid wages (minimum wage, OT)
- Liquidated Damages
 - Equal to the unpaid wages owed
 - Nearly always available
- Two or three-year statute of limitations
- Collective actions are common
- Attorney fees are available in both individual and collective actions





State Wage/Hour Laws

Missouri Law

- FLSA <u>does not</u> preempt states from passing laws that give workers more rights than federal law
- Most states, including Missouri, have a higher minimum wage than the federally required \$7.25/hour
 - \$12.30 in 2024
 - \$13.75 in 2025
 - \$15.00 in 2026
 - Government, school districts, ed institutions exempt
 - Voters had approved automatic increases starting in 2027, but this has now been <u>repealed</u> by the legislature.
- MO voters also approved *mandatory paid sick leave* for employers with at least 15 workers that make at least \$500,000/year
 - <u>Repealed</u> as of August 28, 2025, but employers still need to comply until then
- Missouri law provides for liquidated damages at 2x the amount of unpaid wages (as opposed to 1x under the FLSA)



FLSA Overtime Exemptions

Back to Basics...

- Every worker in the USA is entitled to minimum wage and overtime...
- UNLESS there is an exemption that applies
- Most commonly used exemptions are referred to as "white collar" exemptions – executive, administrative, professional
 - DOL Fact Sheet #17A
- Other exemptions exist inside and outside sales, computer professional, agricultural



Requirements for FLSA "White-Collar" Exemptions

Salary basis test

Employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed

Salary level test

The salary paid must meet a minimum amount specified in the regulations

Duties test

Primary duties must involve executive, administrative, or professional duties, as defined in regulations

DOL White-Collar Exemption Final Rule (Phase 1 effective 07/01/2024)

- **04/23/2024** US DOL issued Final OT rule
 - Approximately 4 million workers were to be impacted during first year
 - Would have increased salary threshold from \$35,568/year
 - \$43,888/year staring July 2024
 - \$58,656/year starting January 2025
 - Automatic increases every three years based on inflation
 - Also increased salary threshold for highly compensated employee exemption
 - Employers largely made changes to comply with phase 1 in July 2024
 - November 2024 a federal court threw out the entire rule nationwide
 - Trump Administration unlikely to appeal or attempt more increases

What To Do Now?

- Can you revert to the prior salary threshold?
 - For now, yes but make sure you comply with any applicable state laws
- Can you re-re-classify people back to exempt?
 - Again, yes, but be sure to comply with any applicable state laws
- You should <u>always</u> be reviewing exempt/non-exempt status of employees to make sure there is a basis to claim any exemption

Reminder: Some states have their own, higher minimum salary levels for their white-collar exemptions – <u>but not Missouri</u>

Note: In a helpful development for employers, the Supreme Court in a 9-0 decision in January 2025 made it a bit easier for employers to prove that their use of exemptions is proper ("preponderance" standard of evidence instead of "clear and convincing" evidence)



Common Wage and Hour Mistakes/Pitfalls

Allowing "Off the Clock" Work

- Non-exempt (hourly) employees cannot "volunteer" to work off the clock
- For non-exempt workers, employers must track time and maintain accurate records of hours worked
- Best practice: Require hourly employees to clock in and out on computer, app or other electronic system
- During meal breaks when employees are clocked out, they must be "completely relieved of duties"
 - Otherwise, they may be entitled to pay for the entire break
- Big issue when employee is treated as exempt but then later claims they should have been treated as hourly non-exempt
 - Can lead to both minimum wage and (more commonly) overtime claims
- If no records exist, burden is on employer to show hours (not) worked employee's testimony is often key

Osborn v. JAB Management – Jan. 2025

- Terminated employee, classified as exempt, normally worked 8:00 a.m. to 5:00 *remotely*
- Claimed she should have been classified as non-exempt, and that she worked 10 hours per weekday, 55 hours per week (incl. weekends)
- No time entry because classified as exempt
- Trial judge granted summary judgment <u>for the employer</u> -Osborn failed to prove her "amount and extent of work as a matter of just and reasonable inference"



Osborn v. JAB Management – Jan. 2025

- 7th Circuit Court of Appeals agreed, affirming summary judgment for employer
- Osborn: "I figure I work at least 10 hours a day and on the weekends, it was pretty easy to come up with that, a norm."
- What did she do? "Customer issues, the database, the reports, it's very labor intensive."
- She said other coworkers could testify as to her amount of work, but she did <u>not</u> offer their sworn testimony.
- 7th Circuit said this evidence was "too vague and conclusory" to allow a jury to find that Osborn was entitled to overtime pay at all.

Applying Exemptions



- Most common mistake on exemptions is failing to apply the job duties test correctly
- Each exemption requires certain job duties
- Must apply test based on <u>actual</u> duties

- Titles and job descriptions are not determinative
- Different employees with the same job title and same job description could have a different result
- Many, many employers are doing something wrong here with respect to exemptions

What is Included in the "Regular Rate"?

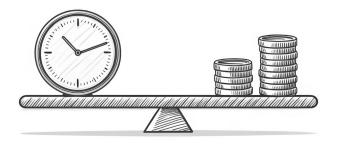
- *Nondiscretionary* bonuses and other pay must be included in the "regular rate of pay" for purposes of calculating overtime
 - This includes <u>shift differential pay</u>
- Any bonuses based on calculable metrics are non-discretionary
 - Attendance
 - Measurable performance standards
 - Safety (free from accidents)
- Only bonuses that are <u>truly discretionary</u> may be excluded holiday bonus, performance bonuses that the company may choose not to award, etc.

Tip Credit

- Tipped employees may be paid a lower minimum wage (\$2.13/hour) if done correctly
- Notice must be given in writing
- Missouri: tipped minimum wage is ½ the "normal" amount – currently \$6.88
- Tips must be tracked; employee must be paid full minimum wage including tips
 - If not, employer must "true up" the difference
- Managers may not share in tips
- Danger in having employees perform too much "non-tipped work"



What is "Compensable Time"?



- Minimum wage and overtime are due based on "all hours worked"
- Common issues:
 - Waiting Time security screenings
 - Donning and Doffing
 - Travel time
 - Often depends when the travel is occurring, whether the employee is a driver or passenger, and whether work is being performed
 - Regulations are very detailed

Employee vs. Independent Contractor

- DOL test often goes back and forth based on control of presidency
- Biden admin made it more difficult for companies to treat workers as independent contractors
- Trump admin has signaled shift back to more business-friendly standard (more people can be treated as independent contractors)
- Who controls the details of the work?
- Does the worker have multiple clients?
- Employees must be paid minimum wage and overtime;
 independent contractors do not have these rights



Wage and Hour Audits

DOL Audits

- DOL conducts wage and hour audits
 - Random/industry based
 - Complaint driven
- Business receives a notice
 - DOL will be visiting the business at a certain date wants records, interviews
 - DO NOT try to handle this without counsel
 - 70-80% of businesses are doing something wrong, almost always by accident
 - Like the rest of federal government, DOL is cutting staff
 - Expect more compliance-oriented DOL rather than enforcement focus (lawsuits, fines, settlements with press releases)
- Counsel can help identify issues, and usually get the DOL visit postponed briefly to gather records

Internal/Counsel Audits

- Helps preempt problems with DOL
- Cost on front end could avoid penalties, liquidated damages, admin headache
- Analyze job descriptions, but also make sure job duties are consistent with them
- Make sure accurate time records exist
- Make sure bonuses and other nondiscretionary "extra" pay are appropriately included in workers' "regular rate of pay"



Bonus Practice Pointers

Other FLSA/WHD Enforcement

- <u>Child Labor</u> violations
 - Major point of emphasis to this point, has been asked about by DOL regularly in W&H investigations
 - Pay attention to scheduling requirements and hazardous occupations ("HO"s) for all workers under age 18
 - Mandatory fines if violations are found
- PUMP Act (lactation rights) and FMLA are also enforced by Wage and Hour Division
- Be prepared for DOL to ask questions and investigate compliance with these statutes during any audit/compliance visit - *current posters*



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