

HUSCH BLACKWELL

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



**Tim Hilton, Partner**

Husch Blackwell, LLP | Kansas City  
816.983.8294 |  
tim.hilton@huschblackwell.com



**Kyle Russell, Partner**

Husch Blackwell, LLP | Kansas City  
816-983-8135 |  
kyle.russell@huschblackwell.com

# What We will Cover



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



# FLSA

## Fair Labor Standards Act

# 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



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



A spiral-bound notebook with lined pages is open on a dark wooden surface. The words "WORKERS" and "COMPENSATION" are written in large, bold, black capital letters on the left page. On the right page, three US dollar bills are rolled up and tied with a piece of twine. A silver pen with a gold-colored tip and clip lies vertically to the right of the notebook.

# **WORKERS COMPENSATION**

# **State Wage/Hour Laws**

# Missouri Law

- FLSA does not 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 repealed 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
  - Repealed 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 starting 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 always 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 – but not Missouri

**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 for the employer - 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 not 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 actual 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 shift differential pay
- Any bonuses based on calculable metrics are non-discretionary
  - Attendance
  - Measurable performance standards
  - Safety (free from accidents)
- Only bonuses that are truly discretionary 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 1/2 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

- Child Labor 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\*

Questions?

The image features a solid blue background with a pattern of thin, white, wavy lines that create a sense of motion and depth. The lines are more densely packed in some areas, particularly towards the bottom right, where they form a bright, curved highlight. Centered in the image is the text "HUSCH BLACKWELL" in a bold, white, sans-serif font.

**HUSCH BLACKWELL**