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SHRM

SOCIETY FOR HUMAN  
RESOURCE MANAGEMENT

Wage and Hour Compliance:  
Common Misconceptions and Errors  
Robert A. Boonin • June 29, 2009

SHRM 61st Annual Conference & Exposition

- Last year Congress increased the minimum wage, as follows:
  - > \$6.55, effective July 24, 2008
  - > \$7.25, effective July 24, 2009
- More than ½ of the states have minimum wages greater than the current federal minimum wage of \$6.55 per hour
  - > For a chart summarizing the minimum wages and basic payroll rules of each state, go to [www.butzel.com/prind.cfm?l\\_ID=9](http://www.butzel.com/prind.cfm?l_ID=9)

- 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

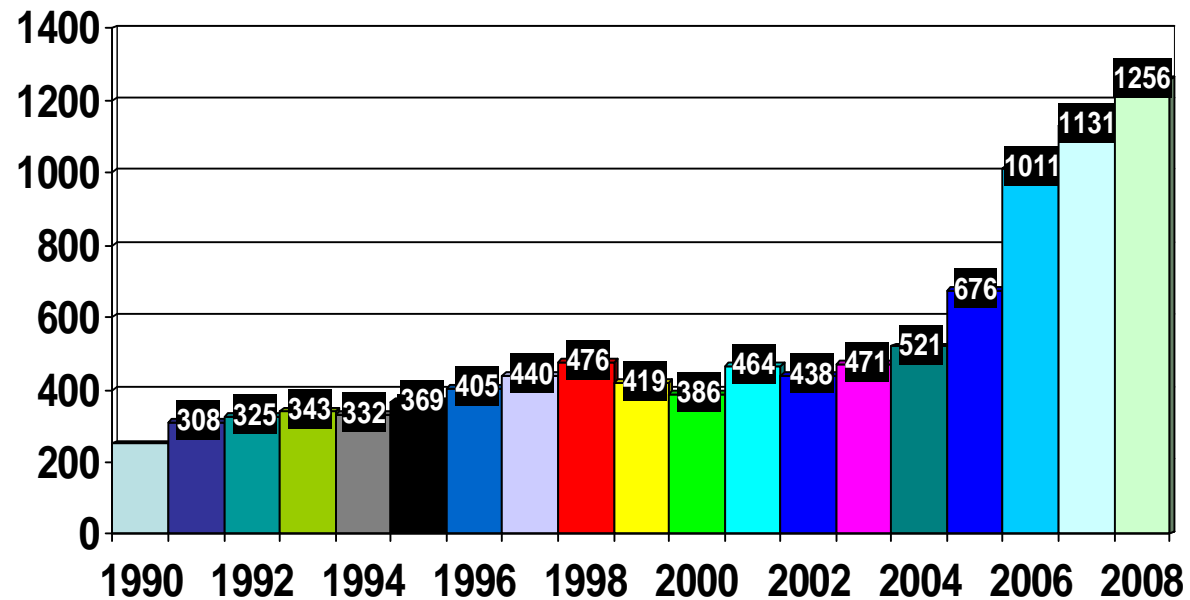


- The broadest exempt group of employees are certain “white collar” employees
  - > Executives
  - > Administrative employees
  - > Professional employees
  - > High level computer-related occupations
    - Provided they are paid a salary of at least \$455 per week or a wage of at least \$27.63 per hour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

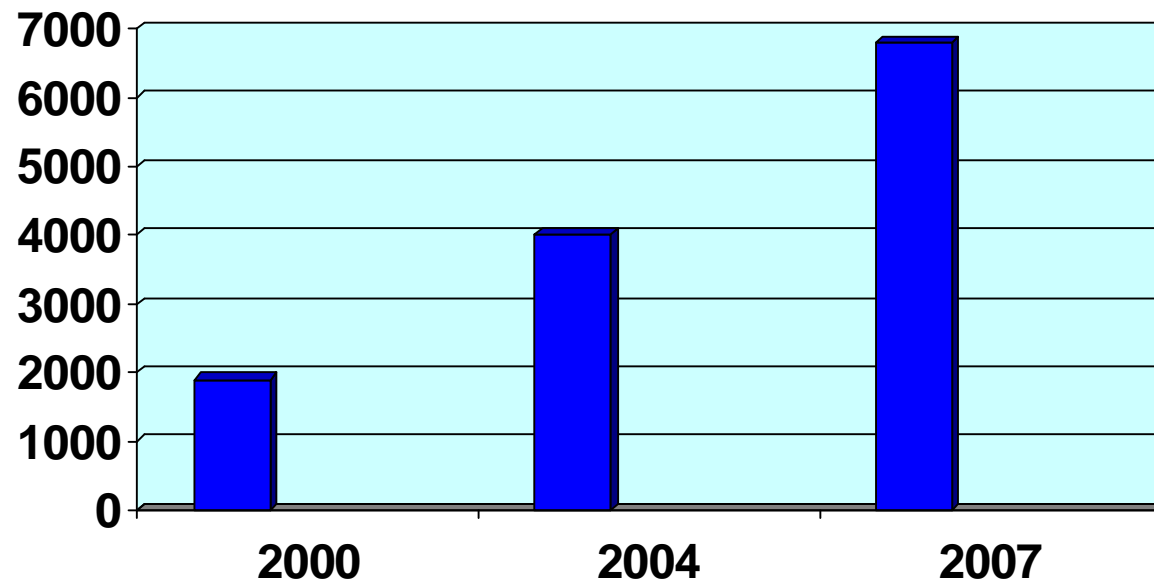
- Most white collar exemptions require the employee to:
  - > Meet the applicable “duties tests” of the exemption
    - If white collar and paid at least \$455 per week salary, and the employee’s total non-discretionary compensation is at least \$100,000 per year, then only one exempt “duty” needs to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

## Number of Reported FLSA Court Decisions (1990-2008)



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





- 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
  - 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

- 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

- The FLSA exempts from its overtime pay requirements “any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of [the Motor Carrier Act (MCA).]”
- Due to 2005 statute amending the MCA, drivers of vehicles under 10,001 pounds subject to federal regulation.
  - > Result of the “Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users”
    - a/k/a “SAFETEA-LU
  - > Therefore these drivers are no longer exempt from being paid overtime premiums

- 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
- A. 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
- A. 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
- A. None of the above

**Thank you.**



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