



Three **Hot** Wage & Hour Topics *in 30 Minutes*

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Wage & Hour Overview

- Fair Labor Standards Act (FLSA) and state equivalents:
 - Minimum wage
 - Overtime
 - Meal and rest breaks
 - Recordkeeping
- Failure to comply can lead to
 - Back wages
 - Double damages and other penalties
 - Attorneys' fees
 - Three year statute of limitations if willful
- Ripe for litigation and particularly class/collective action cases



Exponential Growth in Wage & Hour Litigation

Federal Judicial Center Report:

- FLSA filings **up 10%** for period 4/1/13 – 3/31/14
 - 7,882 collective action suits filed
 - Dramatic jump from 1% increase in same period last year
 - Up approximately 400% from 2000
- In contrast, discrimination class action filings dropped from 14,260 to 12,311 in same period last year
- State filings likely follow this trend



Exponential Growth

Why the Increase?

- FLSA is outdated - easy to make mistakes and easy to exploit
- Collective action certification standard is low
- Class action certification standards arguably much higher post-*Dukes*
- Slowly improving economy
- Social media
- \$\$\$

Three **Hot** Areas in Wage & Hour Litigation

- Misclassification
- “Off-the-clock” work by nonexempt employees
- Unpaid interns



Hot Topic #1: Misclassification Cases

- Not new - just *more*
- Two key areas:
 - Misclassifying employees as exempt from FLSA
 - Misclassifying employees as independent contractors



Misclassification Cases

“White Collar” Exemptions

- Executive
- Administrative
- Learned professional
- Creative professional
- Outside sales
- Computer employee
- Highly compensated employee



Misclassification Cases

Exemption Tests



- Example: Administrative Exemption
 - Primary duty is performance of office or nonmanual work directly related to the management or general business operations
 - Includes the exercise of **discretion** and **independent judgment** with respect to **matters of significance**
- It's not just you

Misclassification Cases Changes on the Horizon



- President Obama's March 2014 memorandum: millions of Americans lack the protections of overtime and the right to the minimum wage
- Directs DOL to simplify regulations to make them easier to understand and apply
- Rulemaking process likely to take 12 to 18 months

Misclassification Cases – Exemptions Minimizing Risk

- Conduct *privileged* audit
 - What are the current job duties?
 - Are exempt duties the primary duties of the position?
 - Do job descriptions and position titles reflect exempt status?
 - When in doubt: nonexempt



Misclassification Cases Independent Contractors

- Independent contractors are not employees, so:
 - No tax withholding (income tax, Social Security, Medicare, unemployment funds)
 - No benefits
 - Limitations on *employment*-related litigation
- Risk of misclassifying:
 - Tax penalties
 - Failure to provide benefits
 - Liability for employment-related litigation



Misclassification Cases – Independent Contractors

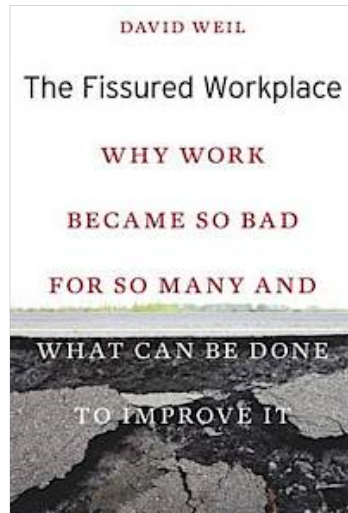
Various Tests

- Numerous tests are used:
 - Common law (master-servant) test
 - IRS 20-factor test
 - Economic realities test
 - DOL 7-factor test
 - Unemployment compensation test
- Central issue: right to control how the work is performed
- Always fact-specific



Misclassification Cases

Focus on Enforcement

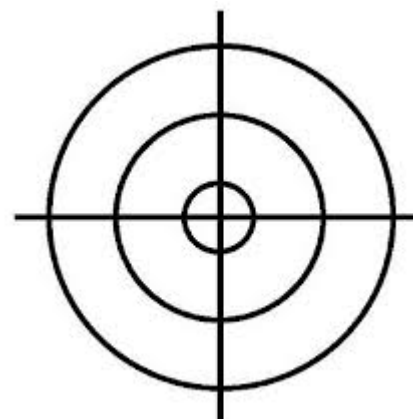


- Wage and Hour Division (WHD) has signed cooperative agreements with the IRS and 15 states to fight misclassification
- David Weil as new head of WHD – no question this is primary focus

Misclassification Cases

Weil's Targeted Industries

- Targeted industries:
 - Agriculture
 - Construction
 - Grocery Stores
 - Health Care
 - Home Health Care
 - Hospitality
 - Janitorial
 - Landscaping
 - Moving Companies
 - Restaurants
 - Retail



Misclassification Cases – Independent Contractors

Minimizing Risk

- Privileged audit
- Written agreement before work begins
- No required reports
- No set work hours or schedule
- No set work location
- Limit duration (term)
- Differentiate from employees (badges, emails, meetings)
- Red flags:
 - Former employees retained as contractors
 - Same job, different label



Hot Topic #2: “Off-the-Clock” Litigation

- Increase in “off-the-clock” work claims by nonexempt employees:
 - Donning and doffing
 - Security line
 - Computer boot-up/login
 - Rest and meal periods
- Abundance of data makes it easy:
 - Badge swipes
 - Mobile devices
 - Computer logins



De Minimis Time

- Limited exception to rule that all time worked is compensable
- “Insubstantial and insignificant” amounts of time
- A few seconds or minutes
- Courts may consider:
 - Administrative difficulty of recording the time
 - Aggregate size of the claim
 - Regularity of claimants’ performance of the work

Busk v. Integrity Staffing Solutions, Inc.



- Employees seek back pay for time spent passing through security screenings at the end of their shifts
- But not just employees
- Ninth Circuit: plaintiffs' class claims could proceed
- Supreme Court granted certiorari
- Copycat suits

“Off-the-Clock” Cases Minimizing Risk

- Review timekeeping policies and training
 - Expressly prohibit any “off-the-clock” work
 - Require employees to track own hours
 - Require employees to certify recorded time is correct
 - Prohibit supervisor alterations without consent
 - Require authorization for overtime
 - Provide avenues to report pay errors
 - Discipline for failure to comply

- Look at the data you keep from a plaintiff lawyer’s lens

- Consider data retention periods and policies

Hot Topic #3: The Unpaid Intern



- Interns claim that they are employees
- Interns seek to recover wages for all hours worked and any overtime

Internships

Recent Cases

- **Trending in media, entertainment and fashion industries:**
 - *Glatt v. Fox Searchlight Pictures Inc.*
 - *Wang v. The Hearst Corp.*
 - *Ballinger v. Advance Magazine Publishers, Inc.* (Condé Nast)
 - *Moore v. NBC Universal, Inc.*
 - Other companies under attack: Warner Music Group, Atlantic Records, Gawker Media, Viacom, Sony, Universal Music Group, Bad Boy Entertainment, and Donna Karan



Unpaid Interns – The FLSA Test

- **The FLSA Test for Intern Status – all six must be satisfied:**
 1. Similar to training in an educational environment;
 2. For the **benefit of the intern**;
 3. Does not displace regular employee;
 4. Company derives no immediate advantage and operations may actually be impeded;
 5. No entitlement to job at the conclusion of the internship;
 6. Understanding of no wages.



Unpaid Interns – Minimizing Risk

- Ensure postings do not suggest internship is or will lead to a job
- Provide a clear offer letter: highlight educational opportunities and unpaid status
- Tailor the internship and train supervisors
- Ensure that the intern does not replace regular staff
- Verify academic credit
- Pay minimum wage?

