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WAGE AND HOUR REVIEW

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I. PRIMARY SOURCES OF WAGE AND HOUR LAWS.

A. Federal Fair Labor Standards Act ("FLSA"). Addresses minimum wage, overtime pay, equal pay, recordkeeping and child labor. The United States Department of Labor is primarily responsible for the administration and enforcement of the law. The DOL website, http://www.dol.gov/dol/topic/wages/index.htm, is a good starting point for many issues.

B. State Laws. States also have statutes and regulations regarding many wage and hour issues including minimum wage, overtime, recordkeeping, child labor, payroll withholding, frequency of wage payments, wage deductions, garnishments.

C. Local Laws. Municipalities may have certain laws and regulations concerning pay issues, but most of these issues are at the federal or state level.

D. Which Law Applies? Generally speaking, if several laws overlap on a topic, the law that provides the most protection or the greatest benefit to the employee will apply.

II. OVERTIME ISSUES AND EXEMPT/NONEXEMPT STATUS.

A. Review of Overtime Basics.

1. Under federal law, covered employers must pay "non-exempt" employees overtime at a rate not less than one and one-half times the employee's "regular rate of pay" for all hours worked in

excess of 40 in a work week. The regular rate of pay includes several categories of pay above and beyond base pay. https://www.dol.gov/agencies/whd/fact-sheets/56a-regular-rate.

2. Under federal and Wisconsin law, employers are not required to pay overtime for hours in excess of 8 hours per day, or for work on Saturdays or Sundays, or holidays, although they may opt to do so.

3. Employers and employees cannot enter into agreements to waive overtime obligations.

4. Employers are not required to count PTO, vacation, sick leave, or holiday hour toward the 40 hour threshold in a work week, unless a state law requires that.

5. Private sector employers may not grant "compensatory time" in lieu of paying overtime, except in the same workweek in which the overtime was performed (hour for hour) or in the same pay period in which the overtime was performed (at time and one half).

6. Employers may have overtime policies that are more generous than the federal and state laws require.

B. Key Elements of the Overtime Exemptions.

1. Federal law exempts certain employees from overtime requirements. Wisconsin's overtime exemptions are similar to, but not identical to, the FLSA exemptions. When determining whether an employee is exempt from overtime, employers must consider the impact of both state and federal law.

2. In order to be deemed exempt from the overtime requirements, an employee must generally:

   a. Be paid at least the minimum threshold salary;
   b. Be paid on a salary basis; and
   c. Meet a duties test specific to a particular exemption recognized by law.

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3. Employers may not treat an employee as exempt simply because they pay the employee a salary.

C. What is the Minimum Threshold Salary?

1. As of January 1, 2020, the minimum salary an employee must receive in order to qualify as exempt is $684 per week (annualized to $35,568 per year). Payment can be made bi-weekly, semi-monthly or monthly.

2. Employers can employ an exempt employee on a part-time basis, but there is no pro-rated level of the salary threshold for part-time employees. Part-time employees must be paid at least $684 per week in order to be treated as exempt.

3. Employers can include bonuses and incentive compensation toward meeting ten percent of the minimum salary thresholds for executive, administrative, computer and professional employees. Specifically, employers may count non-discretionary bonuses, incentives, and commissions that are paid annually or more frequently. An employer may designate and utilize any 52-week period it chooses for this purpose (e.g., calendar year, fiscal year, anniversary year). If, by the last pay period of the 52-week period, the employee's total compensation (salary plus non-discretionary bonuses, incentive compensation, and commissions) is less than $35,568, the employer may make one final payment to meet this threshold no later than the next pay period following the end of the year. This payment may only be counted toward the prior year's salary threshold and may not also count toward the current year's threshold. If an employer fails to make this catch-up payment, the overtime exemption will be lost for the 52-week period.

D. What Does it Mean to be paid on a Salary Basis under the FLSA?

1. An exempt employee must receive a predetermined salary for any week in which he/she performs any work. Pay cannot be reduced due to quantity or quality of work. There are limited exceptions when employers may dock an exempt employee's salary:

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a. The employee is absent for one or more full days for personal reasons, other than for sickness or disability (may use paid leave consistent with employer's policies).

b. The employee is absent for one or more full days for sickness or disability where the pay deduction is made in accordance with a plan or policy that provides compensation to the employee for such absences.

    i. The employer must have a bona fide plan or policy.

    ii. The employer can generally deduct for full days of pay before the employee qualifies under the plan or policy and after the employee exhausts his/her paid leave under the plan or policy.

    iii. If the employer has a single-bucket PTO plan, it must include a number of days that account for sick time.

c. The employer imposes a penalty in good faith for infractions of major safety rules.

d. The employer imposes, in good faith, an unpaid disciplinary suspension of one or more full days for infractions of certain workplace conduct rules. (Not poor performance).

e. The employee takes leave under the Family and Medical Leave Act.

f. The employee is absent the entire workweek and performs no work during an entire workweek.

2. Pay deductions are not permitted for absences caused by the employer or by the operating requirements of the business.

3. Pay deductions are not permitted for absences caused by jury duty, attendance as a witness or temporary military leave. However, if an exempt employee performs no work in the work

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week due to jury duty, etc., then there is no requirement to pay the employee.

4. Employers may make deductions from exempt employees leave banks, even hour-for-hour, without jeopardizing exempt status.

5. Employers may prorate exempt employee pay for initial and terminal weeks of work.

6. Employers can deduct pay from an exempt employee's final paycheck if the employee has used more time off than he/she has accrued, but only for full day absences. This should be spelled out in any applicable policies.

7. Employers may require exempt employees to work set schedules and track their work hours without jeopardizing exempt status.

8. Certain employees can qualify for the overtime exemption without being paid on a salary basis, including physicians, lawyers and teachers, certain computer-related occupations, and outside sales and certain commission sales employees.

9. Improper pay deductions.

    a. Improper deductions from exempt employee pay can result in loss of the exemption and create liability for back overtime if there is a determination that the employer did not intend to pay on a salary basis.

    b. Employers have a "window of correction" to reimburse for isolated or inadvertent improper deductions.

    c. Employers who have a clearly communicated policy prohibiting improper deductions may avoid liability losing exempt status if they have a policy that includes a complaint mechanism, reimburses employees for improper deductions and makes a good faith effort to comply with the salary basis rules in the future. The Department of Labor has a model policy at: http://www.dol.gov/whd/regs/compliance/fairpay/modelPolicy_PF.htm

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III. SELECTED OVERTIME EXEMPTIONS.

A. Highly Compensated Employees.

1. Employees with total annual compensation of at least $107,432 will be deemed exempt if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee and are paid at least $684 per week on a salary or fee basis.

2. This exemption is not recognized under Wisconsin law, so Wisconsin employers cannot rely on it.

B. The Executive Exemption.

1. To meet the executive exemption, the employee must be paid a minimum of $684 per week paid on a salary or fee basis; and

2. The employee must meet the standard duties test:

a. The employee's primary duty must be managing the enterprise or managing a customarily recognized department or subdivision of the enterprise.

i. Primary duty means the main, major, or most important duty the employee performs determined on a case-by-case basis. Generally, if the exempt duties are 50% or more of the employee's duties, the primary duty standard is met. Under Wisconsin's law, the employee must also customarily and regularly exercise discretionary powers and must not devote more than 20% of their hours (40% in a retail or service establishment) in the workweek to tasks that are not directly and closely related to their exempt work.

ii. A department or subdivision must be a permanent unit as opposed to a collection of employees assigned to a specific project on a temporary basis.

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b. The employee must customarily and regularly direct the work of two or more other full-time employees.

c. The employee must have authority to hire or fire, or must have significant input on such decisions.

C. The Administrative Exemption.

1. To meet the administrative exemption, the employee must be paid a minimum of $684 per week paid on a salary or fee basis; and

2. The employee must meet the standard duties test:

a. The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers.

b. The employee's primary duty must include the exercise of discretion and independent judgment on matters of significance.

c. The Wisconsin rule varies slightly from the federal rule and the 20%/40% standard applies.

3. To determine whether duties relate to "the management or general business operations" of the employer, you must determine whether the employee assists with running or servicing the business vs. producing or selling the business's product.

4. Functions that are generally considered to fall within the administrative exemption are:

a. Human resources.

b. Tax, accounting, finance.

c. Advertising and marketing.

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d. Budgeting and auditing.

e. Insurance.

f. Quality control.

5. Examples of exercising discretion and independent judgment on matters of significance are formulating, affecting, interpreting, or implementing management policies or operating procedures, carrying out major assignments, having authority to commit the employer in matters that have significant financial impact, having authority to deviate from established policies, negotiating for the business on significant matters, providing expert advice to management, being involved in planning business objectives.

6. The exercise of "discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures, or specific standards described in manuals or other sources."

7. Specific examples of employees who likely meet the administrative exemption.

   a. Insurance claims adjusters generally will meet the administrative duty requirements if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.

   b. Financial services industry employees generally meet the administrative exemption if their work involves collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing, or promoting the employer's financial products.

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c. Project leaders assigned to complete major projects for the employer (such as purchasing, selling or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements) generally meet the duties requirement for the administrative exemption even if the employee does not have direct supervisory responsibility over team members.

d. An executive or administrative assistant to a business owner or senior executive of a large business generally meets the duties requirements for the administrative exemption if the employee, without specific instructions or prescribed procedures, has been delegated authority regarding *matters of significance*.

e. Human Resource Managers who formulate, interpret or implement employment policies and management consultants who study the operations of a business and propose changes in organization generally meet the administrative exemption standard.

f. Purchasing agents with authority to bind the company on significant purchases generally will be administratively exempt even if they must consult with top management officials when making a purchase commitment for raw materials in excess of the contemplated plant needs.

g. Retail buyers who evaluate reports of competitive pricing in order to set the employer's prices generally meet the duties requirements for the administrative exemption.

8. Specific examples of employees who likely do not meet the administrative exemption duties test.

a. Personnel clerks who screen applicants to obtain data regarding minimum qualifications.

b. Inspectors conducting ordinary inspection of product along standardized lines involving well-established

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techniques and procedures will generally not be administratively exempt.

c. Lumber graders who compare products within established standards are not administratively exempt.

d. Comparison shoppers for retail establishments who report to buyers the prices at a competitor's store are not administratively exempt.

e. Public sector inspectors or investigators, such as fire prevention or safety, building or construction, health or sanitation, environmental or soil specialists and similar employees, generally do not meet the administrative exemption.

D. The Learned Professional Exemption.

1. To meet the learned professional exemption, the employee must be paid a minimum of $684 per week paid on a salary or fee basis; and

2. The employee must meet the standard duties test:

a. The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment.

b. Advanced knowledge must be in a "field of science or learning," as distinguished from the "mechanical arts or skilled trades."

c. Advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. The threshold is generally assumed to be a 4-year undergraduate degree.

d. Employees meeting the professional exemption must also customarily and regularly exercise discretion and judgment.

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e. Under Wisconsin law, the employee may not devote more than 20% of their hours worked in the workweek to activities which are not an essential part of and necessarily incidental to their exempt work.

E. The Creative Professional Exemption.

1. To meet the learned professional exemption, the employee must be paid a minimum of $684 per week paid on a salary or fee basis; and

2. The employee must meet the standard duties test:

a. Primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized filed of artistic or creative endeavor.

b. Exemption does not apply to work that can be produced by a person with general manual or intellectual ability and training.

c. Under Wisconsin law, the employee may not devote more than 20% of their hours worked in the workweek to activities which are not an essential part of and necessarily incidental to their exempt work.

F. The Computer Employee Exemption.

1. Under the federal law, to meet the computer employee exemption, the employee must be paid a minimum of $684 per week paid on a salary or fee basis or paid at least $27.63 per hour for all hours worked; and

2. Must be employed as a high level skilled worker in the computer field. Such positions may include systems analysts, computer programmers, software engineers, network administrators or managers, or other similarly skilled worker in the computer field performing exempt duties.

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3. Primary duty must consist of:

   a. Application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications.

   b. Design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications.

   c. The design, documentation, testing, creation or modification of programs related to machine operating systems.

   d. A combination of i-iii, the performance of which requires the same level of skills.

4. Computer manufacture and repair work is not exempt.

5. Computer employees may qualify under the executive or administrative exemption as well.

6. Under Wisconsin law, exempt computer employees must be paid at least $27.63 for all hours worked.

IV. WHAT CONSTITUTES "HOURS WORKED"?

A. General Definition of "Hours Worked".

1. "Hours worked" generally includes all time an employee is required to be on duty or on the employer's premises or at a prescribed workplace and all times when an employee is "suffered or permitted" to work for the employer. Work off premises and performed must generally be compensated.

2. If an employer suffers or permits an employee to work overtime hours, the employer must pay the overtime. If an employee works unauthorized overtime in violation of a directive or your policy, the appropriate way to handle that is discipline, not failing to pay them the overtime. It is the employer's duty to manage work hours it wants and does not want worked.

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B. Waiting Time.

1. On duty time an employee spends waiting on the job where waiting time is an integral part of the job is generally compensable work time.

2. Periods during which the employee is completely relieved from duties and which are long enough to enable the employee to use the time effectively for his/her own purposes are not hours worked. Employees are not effectively relieved from duties unless they are definitively told in advance that they may leave the job and that they will not have to commence work until a specified hour has arrived.

C. Meal and Rest Periods.

1. Under federal law, non-exempt employees can generally be required to punch out for breaks of 20 minutes or longer.

2. Employers in Wisconsin are not required to provide meal periods for employees over the age of 18 but are encouraged to do so.

3. Under Wisconsin law, rest periods or breaks ranging up to 30 minutes in length are "hours worked" and must be paid.

   a. A meal period need not be paid time if it is at least 30 minutes in length and the employee is completely relieved of work duties. In addition, the employee must be allowed to leave the premises in order to have a meal period treated as unpaid non-work time. Where there is evidence that an employer had a clear policy on taking full 30 minute unpaid lunch breaks and an employee has manipulated their lunchbreaks to increase their pay, the employer may not be liable for unpaid time.

   b. There are stricter restrictions regarding required meal periods for employers who employ minors. The DWD website is helpful on these issues.

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c. With regard to pumping breaks, the safest approach is to pay for such breaks unless they are 30 or more minutes long.

D. Training and Seminar Time.

1. In order to be regarded as non-work time, meeting, training and/or seminar time must meet all of the following criteria:

a. Attendance must be outside of the employee's regular working hours;

b. Attendance must be truly voluntary;

c. The course, lecture or meeting must not be directly related to the employee's job; and

d. The employee must not perform any productive work during such attendance.

2. Where employees, on their own initiative, attend independent schooling after hours, the time is not hours worked for the employer even if the courses are related to their jobs and the employer pays the tuition.

3. Time spent in introductory orientation and training, as well as time devoted to subsequent training in revised procedures, products, and processes will generally be compensable hours worked.

E. Travel Time.

1. Normal travel from home to work at the beginning of the day and from work to home at the end of the day (commute time) is not work time.

2. Travel that occurs within an employee's workday is always considered work time. (Remote and hybrid work arrangements—you may have to pay for travel time if you require in-office attendance for an event—you should work with counsel to structure your remote work policy to minimize such situations).

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3. When an employee takes a one-day assignment outside of the employee's normal work location, all travel time is considered time worked. The employee's normal commuting time may be deducted from the travel time on that day.

4. Travel "away from the home community," defined as travel that keeps the employee away from home overnight is work time under Wisconsin law. Under the federal law, this category of travel time need only be compensated when it cuts across the employee's regular work day.

5. Any work performed while traveling is considered work time. An employee who is required to drive a vehicle is considered working while driving. If an employee is offered public transportation but requests permission to drive his or her personal vehicle instead, the employer may count as hours worked either the time spent driving or the time it would take to use public transportation.

6. When an employee travels for an event that will require an overnight stay, generally the employee must be compensated until he or she is settled into a hotel and may use the time for his or her own purposes.

7. Tricky issues can arise when the employee is "expected" as a job-related duty to be at happy hours or event-related dinners.

F. Special Considerations for Today's Technological World and Remote Work.

1. Time employees spend outside of normal work hours checking and responding to email and similar activities is generally compensable work time.

2. "De minimus" amounts of time need not be counted as hours worked, but that concept does not generally apply to things like checking and responding to emails. The de minimus rule excludes from work time insubstantial or insignificant period of time outside normal work hours but only where such time is seconds or a few minutes and where the failure to count such time is due to considerations justified by industrial realities. Other factors in determining whether time is de minimus are:

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a. Practical difficulty of tracking the time.

b. The amount of overall time spent.

c. Whether the work performed on a regular basis.

3. Key is to establish clear expectations and require accurate recording of work time.

4. With remote work, some helpful keys (especially for non-exempt employees) are:

a. Require a defined worked schedule.

b. Require accurate tracking of break time, meal time and total hours worked.

5. Realize that if you do not require exempt employees to track time, if they ever sue for back overtime and challenge their exempt status, you will not have records to counter what they claim to have worked. (many computer log in systems solve this problem—but do not solve all possible issues).

V. INTERNS AND VOLUNTEERS/VOLUNTEERING.

A. We often encourage employees to volunteer at company-sponsored events to raise the company's profile and reputation in the community. If such opportunities are not truly voluntary and are instead pressed as expectations or may impact performance reviews, bonuses, etc., then they may fall into the bucket of compensable work time. In addition, there are very rare circumstances where "interns" can work but not be paid. They generally must be paid. Fact sheets on these matters are at:

https://www.dol.gov/agencies/whd/fact-sheets/71-flsa-internships

https://webapps.dol.gov/elaws/whd/flsa/docs/volunteers.asp

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VI. RECORDKEEPING.

A. Employers must maintain specific records under the FLSA.

https://www.dol.gov/agencies/whd/fact-sheets/21-flsa-recordkeeping

B. We are also seeing increased allegations of Equal Pay Act and gender discrimination in pay. Very generally, an employee claiming gender-based pay discrimination must show that they are being paid less than someone of a different gender for equal work on jobs the performance of which requires equal skill, effort and responsibility and performed under the similar working conditions.

C. After a plaintiff makes a *prima facie* case of pay discrimination, the employer bears the burden of showing that the pay disparity is due to: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or **(iv) a differential based on any other factor other than sex**."

D. The federal courts are split on what factors are legitimate factors other than sex. You will want to retain documentation to support your legitimate and non-sex-based factors in setting pay.

VII. MAKING WRONGFUL DEDUCTIONS FROM WAGES.

A. Wis. Stat. § 103.455 provides that employers may not deduct from wages for the following, unless they obtain the employee's contemporaneous authorization to deduct wages:

1. Defective or faulty workmanship;

2. Lost or stolen property; or

3. Damage to property.

    a. Authorization must be obtained *after* the incident of loss and before the deduction. Blanket authorizations at the start of employment are not acceptable.

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b. Deductions for overpayment of wages are not covered and thus employers may make deductions for overpayments without obtaining prior authorization.

c. Employers need to use caution if it chooses to deduct from earned commissions for situations, for instance, where a client does not pay their account. If not handled correctly, such a practice could be a wrongful deduction for loss under Wisconsin law.

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