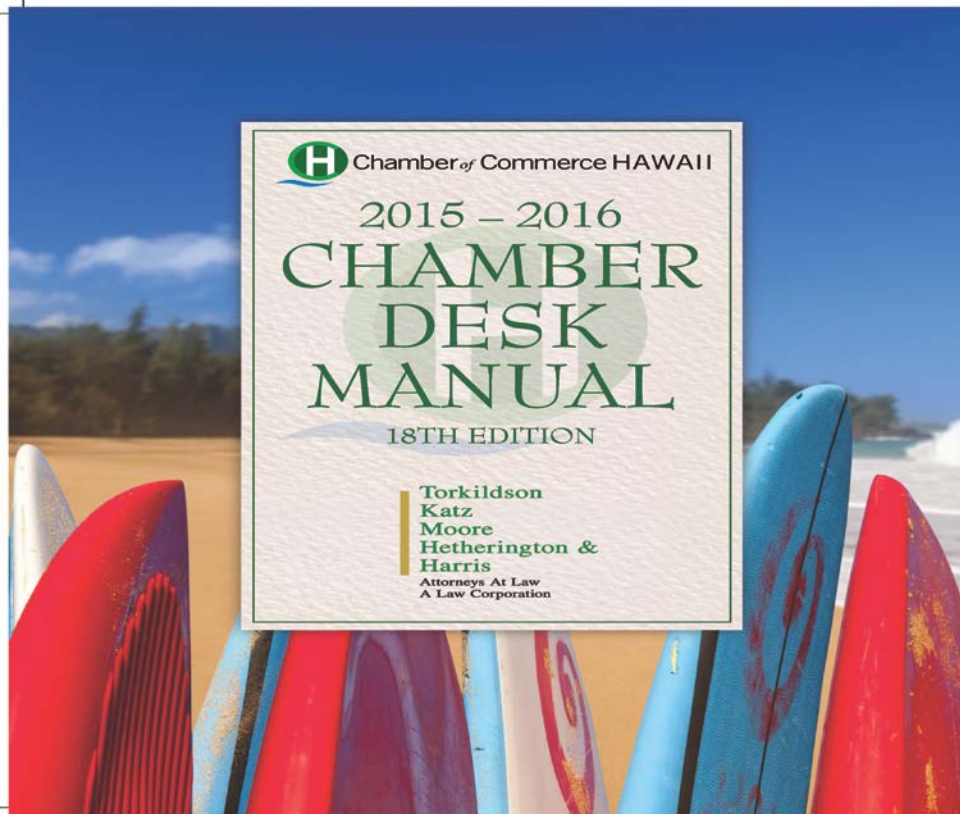


WAGE & HOUR UPDATE: WAGE THEFT & AAP CHANGES

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DOL'S STRATEGIC ENFORCEMENT PRIORITIES

- Renewed emphasis on enforcement
 - Increased audits/prosecutions of minimum wage and overtime law violations
 - Intensified scrutiny of the classification of workers as independent contractors
- Targeted industries – especially “*fissured*” (construction, hospitality, agriculture, home health care)
- Employers of “low wage” employees are always given a high priority

RECORD NUMBER OF FLSA LAW SUITS FILED

➤ 8,086 FLSA Lawsuits Filed in 2014

- (Jan. 1, 2014 – Dec. 31, 2014)
- 2.3% more than in prior year
- More than 19% increase since 2011



➤ Why the large increase?

- More single and multi-plaintiff lawsuits
- More class action lawsuits: FLSA class actions were filed more frequently than all other types of workplace class actions in 2014
- Increased legislative and press focus on wage and hour laws

“ WAGE THEFT”

- Covers a variety of infractions that occur when workers do not receive their legally or contractually promised wages
 - Non-payment of overtime
 - Not giving workers their last paycheck after a worker leaves a job
 - *Not paying for all the hours worked*
 - Not paying minimum wage
 - Not paying a worker at all

CLASSIFYING EMPLOYEES: INDEPENDENT CONTRACTOR OR EMPLOYEE?

- Why does this matter?
 - Must be an “employee” of the employer for FLSA minimum wage and overtime provisions to apply to a worker
- What is the test?
 - Supreme Court: no single rule or test/must look to totality of working relationship
 - DOL Guidance (issued 07/15/15)

CLASSIFYING EMPLOYEES: INDEPENDENT CONTRACTOR OR EMPLOYEE?

- **Administrator's Interpretation No. 2015-1:
Examines Economic Realities Test**
 - Is the work an integral part of the employer's business?
 - Does the worker's managerial skill affect his or her opportunity for profit or loss?
 - How does the worker's relative investment compare to the employer's investment?
 - Does the work performed require special skill and initiative?

CLASSIFYING EMPLOYEES: INDEPENDENT CONTRACTOR OR EMPLOYEE?

- Administrator's Interpretation No. 2015-1:
Cont'd
 - Is the relationship between the worker and the employer permanent or indefinite?
 - What is the nature and degree of the employer's control?
- DOL's conclusion: most workers are employees under the FLSA's *broad* definitions

CLASSIFYING EMPLOYEES: INDEPENDENT CONTRACTOR OR EMPLOYEE?

- FedEx Ground Package System, Inc.
 - Thousands of drivers sued FedEx Ground for misclassifying as independent contractors
 - Courts in OR, CA, KS, and MA ruled in favor of drivers
 - Driver Reggie Gray awarded more than \$90,000
 - FedEx to pay \$228m in settlement
- Uber and Lyft: Latest Developments



CLASSIFYING EMPLOYEES: EXEMPT OR NON-EXEMPT?

- Why does this matter?
 - Employees are either “exempt” or “non-exempt” from compliance with the FLSA
 - Non-exempt must receive at least minimum wage and may not be employed for more than 40 hours in a week without receiving at least 1.5 x regular rates of pay for overtime
- To be exempt, an employee’s job duties and salary must meet DOL requirements
 - Salary level
 - Salary basis
 - Job duties

CLASSIFYING EMPLOYEES: EXEMPT OR NON-EXEMPT?

- Job Duties Count!
- Executive Exemption
 - Salary basis test
 - Primary duty = managing the enterprise or department/subdivision of the enterprise
 - Customarily and regularly direct the work of at least two or more full-time employees
 - Authority to hire or fire other employees or the “executive’s” recommendations must be given particular weight

CLASSIFYING EMPLOYEES: EXEMPT OR NON-EXEMPT?

- Job Duties Count!
- Administrative Exemption
 - Salary basis test
 - Primary duty = performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers
 - Must exercise discretion and independent judgment with respect to “matters of significance”

CLASSIFYING EMPLOYEES: EXEMPT OR NON-EXEMPT?

- Job Duties Count!
- Professional Exemption
 - Salary basis test
 - Primary duty = performance of work “requiring advanced knowledge”
 - Advanced knowledge must be in field of science or learning
 - Advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction

CLASSIFYING EMPLOYEES: EXEMPT OR NON-EXEMPT?

- Job Duties Count!
- Creative Professional Exemption
 - Salary basis test
 - Primary duty = the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor

CLASSIFYING EMPLOYEES: EXEMPT OR NON-EXEMPT?

- Job Duties Count!
- Computer Employee Exemption
 - Compensation not less than \$455 per week **or** at a rate not less than \$27.63 per hour
 - Primary duty = application of systems analysis techniques and procedures; the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs; the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or a combination of the above

CLASSIFYING EMPLOYEES: EXEMPT OR NON-EXEMPT?

- Job Duties Count!
- Outside Sales Exemption
 - No salary requirement
 - Primary duty = making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer
 - The employee must be customarily and regularly engaged *away* from the employer's place or places of business

DEPARTMENT OF LABOR PROPOSED RULES

- Issued on 7/6/15 regarding white collar employees
- Why were proposed rules issued?
 - Presidential Memo instructed DOL to look for ways to modernize and simplify the regulations while ensuring that the FLSA's intended overtime protections are fully implemented.

DOL PROPOSED RULES

- DOL proposed the following changes:
- (1) Set the standard salary level to 40th percentile of weekly earnings for full-time salaried employees
 - Increase weekly salary from \$455 a week to \$970 a week (\$50,440 a year) in 2016
- (2) Set the highly compensated employees (HCEs) to the annualized value of 90th percentile of weekly earnings for full-time salaried employees
 - Increase minimum annual salary from \$100,000 to \$122,148
- (3) Automatic updating of salary levels every year

Tips in Anticipation of DOL Changes

- Conduct preliminary evaluation of all exempt employees
 - Increase salary to satisfy new guidelines?
- IF NO....
- For HCEs, evaluate whether employee will qualify as executive, admin, or professional
- For executive, admin or professional – which employees work OT?
- For those that work OT, convert to hourly and monitor hours?

CLASSIFYING EMPLOYEES: EXEMPT OR NON-EXEMPT?

- *Velazquez v. Costco Wholesale Corp. (9th Cir. 2015)*
 - Discount store managerial employees are **not** exempt executives under CA Labor Code.
 - Employer denied opportunity to present what it claimed employees should be doing.
 - Consideration of how employees actually spent their time and what duties performed rather than expectations of what employees should do in their jobs

CLASSIFYING EMPLOYEES: EXEMPT OR NON-EXEMPT?

- *Kloster v. Goodwill Indus. of Central Iowa, Inc.*
(S.D. Iowa 2014)
 - Held: Manager was executive exempt employee given that she routinely directed activities of subordinates, made hiring recommendations and recommendations regarding discharge, conducted employee interviews, and provided employees with performance feedback
 - Although these activities = only 50% of her work,
 - Manager was relatively free from supervision

Missed lunch breaks

- **An unpaid lunch break must be paid when the break is not taken**
- **If a lunch break is interrupted – the entire lunch break is compensable**
 - Cleveland Clinic workers were routinely called away from their lunches to respond to questions and treat patients.
 - Amazon warehouse employees routinely required to complete tasks during scheduled lunchtime leaving 18 minutes or less to eat lunch.

COMPENSATING EMPLOYEES: SERVICE CHARGE

- *Villon v. Marriott Hotel Svcs., Inc.* (2013)
 - **Hawaii Supreme Court** held that when a hotel or restaurant applying a service charge for the sale of food or beverage services allegedly violates HRS § 481B–14 (1) by not distributing the full service charge directly to its employees as “tip income” and (2) by failing to disclose this practice to the purchaser of the services, the employees may bring an action under HRS § § 388-6, 10, and 11 to enforce the employees' rights and seek remedies.
 - **Hawaii Federal District Court** granted payment for lost wages to the employees

COMPENSATING EMPLOYEES: SERVICE CHARGE

➤ Four Seasons Hotel Ltd.

- Agreed in 2013 to pay \$4 million to settle a class action in Hawaii Federal District Court over service charge claims similar to those in *Marriott*
- Employees alleged that they were being stiffed on automatic gratuity fees often levied on bills for large events such as weddings and parties

➤ Ritz-Carlton Hotel Co. LLC

- Agreed in 2014 to pay \$1.8 million settlement for service charges

SB 1009

(Passed – sent to Governor)

- Added “hotel” to restaurants required to disclose to consumer service charges for food or beverage service
- Added requirement that any Hotel that applies a service charge for porterage services must disclose;
- porterage means the act of moving luggage, bags, or parcels between a guest room and a lobby, front desk, or any area with vehicular access at a hotel, hotel-condominium, or condominium-hotel.

COMPENSATING EMPLOYEES: TIP CREDIT

➤ How Does the DOL Regulate Tip Retention Through the FLSA?

- Tips are considered part of wages when an employer takes a tip credit.
- Section 3(m) of the FLSA defines the term “wage” and allows an employer to take a tip credit to meet the minimum wage rate specified in Section 6(a).

COMPENSATING EMPLOYEES: TIP CREDIT

- Define Tip Credit: The hourly wage of a tipped employee may be deemed to be increased on account of tips if the employee is paid not less than 50 cents below the minimum wage by the employer AND the combined amount the employee receives from the employer *and* in tips is at least \$7 more than the \$7.75 minimum wage (effective Jan. 1, 2015). HRS § 387-2.
- Translate: You can pay a “tipped employee” \$7.25 per hour as long as that employee ultimately receives at least \$14.75 per hour after tips.

COMPENSATING EMPLOYEES: TIP CREDIT

➤ What Is Required to Take a Tip Credit?

- You can only take a tip credit for “tipped employees.”
 - Tipped employees are those who *customarily and regularly receive* more than \$30 per month in tips, are not exempt from the overtime provisions of the FLSA, and do not meet the requirements of salaried employees.
 - (1) servers; (2) counter personnel who serve customers; (3) busboys/girls; (4) bartenders; and (5) barbacks
 - Some courts say that host/hostesses are tipped employees, but there is no clear consensus.
- Written notice to employees at their time of hire:
 - FLSA’s tip provisions
 - You will be claiming a tip credit

COMPENSATING EMPLOYEES: TIP POOL

➤ Voluntary Tip Sharing

- Occurs when a employee voluntarily decides to share his tips with other employees
- Not addressed by the FLSA
- Need to show that employees were not coerced to share tips
 - If an employer's actions "might well" dissuade a reasonable employee from not sharing tips, then not free from coercion

➤ Mandatory Tip Pool

- Occurs when employees are required by their employer to pool their tips together, and the pooled money is then divided and redistributed according to a system
- Tip pools allow employees who do not typically receive as many tips directly from customers to share in the benefits of good service.

COMPENSATING EMPLOYEES: TIP POOL

- What Is Required for a Mandatory Tip Pool?
 - *If the employer takes a tip credit* (for “tipped employees”), it may not include “non-tipped employees” or managers in the tip pool
 - Employers must give advance notice of the tip pooling arrangement and of any required tip pool contribution amount
 - No requirement that the notice must be in writing under federal or state law, but it is advisable

COMPENSATING EMPLOYEES: TIP POOL

➤ Disagreement: Who Can Be Included In the Mandatory Tip Pool?

- Section 3(m) states that *when an employer takes a tip credit*, an employer must give employees notice of this, and all tips received by the employees must have been retained by the employees, *but* an employer may have a mandatory tip pool for “tipped employees.”
- There is disagreement between the DOL and the Ninth Circuit regarding whether this means that *when an employer does not take a tip credit*, it can include any employees it chooses in the tip pool.
- *Or. Rest. & Lodging v. Solis* (D. Or. 2013)

COMPENSATING EMPLOYEES: TIP POOL

➤ What Is the Liability?

- An employer may be liable for refunding back wages for the tip credit taken and possibly tips put into an invalid tip pool
- An employer may also be liable for liquidated damages in an amount equal to the amount of actual damages unless it can show that it acted in good faith and under the reasonable belief that it was in compliance with the FLSA.

Travel Rules



- Time spent traveling during normal work hours is *compensable* work time.
- Home-to-work travel in an employer-provided vehicle, or in activities performed by an employee that are incidental to the use of the vehicle for commuting, generally is not *compensable* time.
- Applies only if the travel is within the normal commuting area for the employer's business

Recordkeeping

- Payroll records must be kept for 3 years and the time cards and wage computation records must be kept for 2 years (for DOL)
- An accurate record of **the hours worked for each day and the total hours worked each week** is critical to avoiding hours worked problems
- Supervisors should not change time records – must pay the employee, but should reprimand for failure to follow directives

Recording Time Increments

- De Minimis Rule
 - 29 CFR 785.47
 - Less than 10 minutes
- The district should establish “rounding” procedures and should ensure to “round down”, but also “round up” consistently

Timekeeping Rules

- Employer has obligation to maintain accurate records of “[h]ours worked each workday” by requiring its employees to record the start and end times. *See* 29 C.F.R. § 516.2(a)(7).
- Employers are obligated to pay for all hours employees are suffered or permitted to work if “the employer knows or has reason to believe that the work is being performed.” 29 C.F.R. § 785.12.



Time Recording - Rounding



- **Rounding is lawful under federal and state law.**
- **Recording and computing time to the nearest five minutes, or the nearest one tenth or quarter of an hour, will be accepted**
- **provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked -29 CFR § 785.48(b).**

Working Off-the-Clock

➤ Wal-Mart Class Actions



Dec. 2014: The Pennsylvania Supreme Court Walmart to pay \$188 million to employees who had sued the retailer for failing to compensate them for rest breaks and all hours worked.

- Wal-Mart Stores Inc agreed to pay as much as \$86 million to settle a class-action lawsuit accusing it of failing to pay vacation, overtime and other wages to thousands of former workers in California.
- About 232,000 people will share in the settlement

De Minimus Time



- Whether compensable time is *de minimus*, the 9th Circuit considers:
 - (1) the practical administrative difficulty of recording the additional time;
 - (2) the aggregate amount of compensable time; and
 - (3) the regularity of the additional work.
- What is *de minimus* time?
 - Few seconds or minutes of work beyond the scheduled working hours.
 - See 29 CFR § 785.47
- Tip: New technology (i.e. Blackberries) may need to create or refine company policies.



Tips to Avoid These Costly Violations



- ▶ **Pay employees for all off-the-clock work performed –**
 - **But discipline for unauthorized work**
- ▶ **Employees should not be working during unpaid breaks**
- ▶ **Keep *accurate* records of all breaks taken by employees**

Transition Year Obligations under the new OFCCP Regulations implementing Section 503 and VEVRAA

- New P.O. language
- New Tag Line
- New Data Collection
- By end of year:
- Survey all employees for disability
- Analyze data toward goal and benchmark of 7%

P.O. Language

This contractor and subcontractor shall abide by the requirements of 41 CFR 60-1.4(a), 60-300.5(a) and 60-741.5(a). These regulations prohibit discrimination against qualified individuals based on their status as protected veterans or individuals with disabilities, and prohibit discrimination against all individuals based on their race, color, religion, sex, sexual orientation, gender identity or national origin. Moreover, these regulations require that covered prime contractors and subcontractors take affirmative action to employ and advance in employment individuals without regard to race, color, religion, sex, sexual orientation, gender identity, national origin, disability or veteran status.

TAG LINE

Equal Opportunity Employer

Female/Minority/Disabled/Veteran/Sexual
Orientation/Gender Identity

....OR....

Equal Opportunity Employer

EXECUTIVE ORDER 13658

- Minimum Wage for all **new** federal contracts:
 - (i) \$10.10 per hour beginning January 1, 2015; and
 - (ii) beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary of Labor.
- (A) not less than the amount in effect on the date of such determination; (B) increased from such amount by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (United States city average, all items, not seasonally adjusted), or its successor rounded to the nearest multiple of \$0.05.

Executive Order 13665

- **Prohibits federal contractors and subcontractors from discharging or otherwise discriminating against their employees and job applicants for discussing, disclosing or inquiring about compensation.**

➤ -

- On July 9 OFCCP sent its final regulations implementing the Pay Transparency Executive Order to OMB for approval.
- Final approval is expected from OMB sometime later this summer.

Fair Pay and Safe Workplaces

Executive Order 13673

- Often called the “Blacklisting” or “Bad Actors” executive order
- Requires government contractors to report workplace law violations found by agencies, courts, and arbitrators.
- Government would consider violations when deciding whether to award future contracts, cancel existing contracts, and potentially demand remedial action to address a pattern of violations.

Fair Pay and Safe Workplaces Executive Order 13673

- The Department of Labor has extended the public comment period for the proposed DOL guidance and Federal Acquisition Regulatory (“FAR”) regulations to August 11, 2015.
- A group of Congressional Chairs submitted a request to the U.S. Department of Labor and the Federal Acquisition Regulatory Council requesting the agencies withdraw their pending proposed guidance and rule.

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QUESTIONS?

MAHALO!