

GVFHRA PRESENTS...

WAGE & HOUR WOES: OVERTIME? OY VEY!

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“ROADMAP”

- Background/set the HR scene...risk lurking
- “Everyday” issues:
 - Automatic meal deductions
 - Timesheet “editing” (by supervisors)
 - Connectivity work (smartphone, “homework”)
 - Other “off-the-clock” work
 - Bonuses—discretionary/non-discretionary
 - Rounding issues
 - Misclassification (it’s a biggie!)

FLSA IS “HOT”

- Seems to be hottest court issue
- Cottage industry growth (FL, CA)
- Lawsuit nightmare
 - 2010-11 vs. prior yr: 15% increase (7k cases)
 - Up 350% over 10 yrs prior
- “Collective actions” are the “in” filing
 - What is that? “Class action”? (Not exactly)
 - “Similarly situated” = single policy, plan or decision
- Beware: individual executives being sued more (like VP HR)—courts reluctant to dismiss if some policy-setting role

DOL IS OUT OF CONTROL!

- Enforcement³ (goal: finding violations = \$)
- What ever happened to “helping” employers comply?
- 50% increase in investigators since 2008 (2013 budget seeks >1800 investigators)
- More focused on “enterprise-wide” resolutions
 - Used to be able to limit to site visited
 - Now, company-wide investigation usually follows
- Still can negotiate BP, but liquidated damages is “new normal” in audits—yikes!

DOL IS OUT OF CONTROL!

- DOL recovered \$225m in back wages in 2010-11 (almost 30% more than prior yr)
- Target industries (often low wage earners):
 - Construction
 - Hospitality (food/bev, housekeeping)
 - Janitorial
 - Transportation
 - Warehousing/distribution
 - Staffing companies
 - Gentlemen's clubs

EVERYDAY ISSUE: AUTOMATIC MEAL DEDUCTIONS

- Common example: “payment by exception” – assume took lunch unless notified otherwise
- Leads to FLSA collective actions
- Prob: auto-deducted but not actually taken
 - At least that’s the after-the-fact argument
 - No doubt EEs tell DOL that after hearing about the audit
- Key: set policy with QA control (EE sign-off)
 - Meal break assumed; if missed, put in time
 - Ensure EE verification of weekly time data
 - Ideally, you want EEs taking the breaks
 - Funny: old fashioned handwritten timesheets can be best

EVERYDAY ISSUE: SUPERVISOR “EDITING” TIMESHEETS

- Ahh, another splendid collective action event!
- But, hopefully, it can be limited to “rogue” supervisors
- Very dangerous and ugly
- Realistically, best practice is pay and discipline EE for too much time
- Good compliance check for supervisory approval but not unilateral revision

EVERYDAY ISSUE: CONNECTIVITY “WORK”

- “Here a smartphone, there a smartphone, everywhere a smartphone”—OH! McDonald
- “Homework” via VPN/Citrix, proliferation of smartphones and even “paperwork”
- Collective actions starting to pop up
- Hallmark issue: EE review/responds to emails and attachments after shift
- Really, 10 or 15 min at night is a big deal?
 - Legal answer: YEP!
 - Hmm ... 15 min/night, 5 nights/wk for 3 yrs at regular rate of \$10/hr = almost \$3k; class of 100 EEs = \$300k + liquidated damages + atty fees ... YIKES!

EVERYDAY ISSUE: CONNECTIVITY “WORK”

- Advice: Establish clear policy with system in place to require reporting of all hours
 - Then pay for time and manage it (train managers)
 - Stay in touch with the mobile workplace
- Other ideas:
 - Control/limit remote access to network for non-exempt EEs
 - Discipline EEs who violate policy (but pay them!)
 - Suspend email/remote access/telecommuting privilege for violators
 - After-the-fact legal argument: *de minimis*

EVERYDAY ISSUE: OFF-THE-CLOCK WORK

- Beware of:
 - Supervisor practices calling for pre- or post-shift meetings
 - Shift changeover downloading of info
 - Pre- or post-shift planning or set-up time (such as call center EEs required to be in 10-15 min early to log in and open databases so ready for calls)
 - Pre- or post-trip inspections
- Advice: manage it or pay the time

EVERYDAY ISSUE: BONUSES

- Issue: Potential impact on OT calculations
- Regulations: “Non-discretionary” bonuses must be included in OT calculations (but not if “discretionary”)
- Ahh, but what is “discretionary”?
 - Discretion as to *fact* of bonus
 - Discretion as to *amount* of bonus
 - Discretion retained *right up to the end*
 - Can't be pursuant to any contract or promise

EVERYDAY ISSUE: BONUSES

- “Discretionary Bonus”? Hmm...
- Example 1: Co announces on Jan. 1st that yr-end bonus will be paid but it’s not sure how much it will be
- Example 2: Co announces \$1 bonus per item sold/produced whenever, in its discretion, it can afford such a bonus

EVERYDAY ISSUE: BONUSES

- Talk about a perfect unifying “policy, plan or decision” for a collective action!
- Advice:
 - Be sure you have complete discretion if you don’t want to include the bonus in OT calculations—put language clearly in any bonus plan; or
 - Create a “percentage bonus” that pays out as a % of total earnings (both straight time and OT); or
 - Do the right math (OT calculation that includes bonus as allocated to work week)

EVERYDAY ISSUE: ROUNDING

- Rounding is “OK” under the law, but...
- You can’t round to hurt the EE—it must average out over time
- Rounding up and rounding down must occur so that EEs are not disadvantaged
- OK to use 5-min, tenth or quarter hour increments
- You’d be surprised what really happens (or maybe not)!

EVERYDAY ISSUE: MISCLASSIFICATION MAYHEM

- Big Problem: Exempt vs. Non-Exempt Status
- Maybe Bigger Problem: Independent Contractor vs. Employee
- Bull's eyes for the DOL and plaintiffs' attorneys

MISCLASSIFICATION: WHO IS “EXEMPT”?

- “White Collar” Exemptions
 - Executive (supervise 2+ FTEs, hire/fire)
 - Administrative (“independent judgment & discretion”)
 - Professional (specialized degree)
 - Outside Sales (really, “outside”)
 - Computer? (Not in PA)
- Remember, must be all 3:
 - Salary > \$455/week (except outside sales)
 - Paid on a “salary basis”
 - Perform the “primary duty” required

REAL ISSUE: IF MISCLASSIFIED, THEN WHAT?

- Big decisions to make...
- Fix it prospectively = no brainer!
- But, how do you “explain” it?
- Possible “reasons”:
 - Blamed regulation changes (2004!)
 - Employee handbook update
 - Re-evaluation of roles/responsibilities
 - Better alignment of compensation practice with amount of work performed

REAL ISSUE: IF MISCLASSIFIED, THEN WHAT?

- Fix retrospectively/retroactively = brain freeze!
- Reconstruct/estimate back pay potential
- Affordable?
 - If so, easier to “explain” change in status—the truth is always easier
 - If not (or don’t want to pay), liability continues but slowly disappears each day (after correction)
 - Remember:
 - “Willful” violations (you “knew”) = 3 years
 - Not “good faith” = liquidated damages
- IBM reclassified 7k salaried (\$77k) tech support EEs, settled class action, cut salaries 15% to account for OT costs

MISCLASSIFICATION: INDEPENDENT CONTRACTOR VS. EMPLOYEE

- DOL sweet spot – not new (ask Microsoft) but ramped up enforcement
- Why? Let me count the ways...
 - Money: back state/federal/local taxes
 - More \$: UC taxes and WC premiums
 - W&H laws apply (MW & OT to collect)
 - Protect EEs (Title VII, ADA, ADEA, FMLA, ERISA)
 - May owe benefits too
- DOL has agreements with 13 states to collaborate (not PA/NJ yet)
- DOL 2011 deal with IRS to cross-pollinate
- DOL's "Plan/Prevent/Protect" initiative

MISCLASSIFICATION: IC VS. EE

- Remember: an “EE” is someone the ER “suffers or permits to work” (FLSA)
- Ideally, ICs are business entities that control own EEs and bid for work
- Sure, there is a competitive advantage to using (or classifying workers as) ICs:
 - Reduce costs and expenses
 - Permits staffing flexibility and efficiency
 - Reduces potential of ER liability under federal/state laws

MISCLASSIFICATION: IC VS. EE

- Traditional FLSA test: “Economic Reality Test”
- But there are lots of tests:
 - IRS old “20 factor” test now reduced to “3 prongs”
 - ERISA “12 factor” test
 - UC “ABCs Test”
- Key is “control” (usually over the method and manner of work)
 - IC decides when, where and how to do the work
 - IC’s client (not “ER”) sets expectations for end-product
 - Idea is to “lose control”

IC VS. EE: THINGS TO CONSIDER

- Are services performed an integral part of business? (If so, risk)
- Is there profit/loss potential for IC? (No = risk)
- Is there investment in tools/equip for job?
- Is there competition with others for the work?
- How “permanent” is the relationship?
- Is there special skill required to do the work?
- Can/does the IC work for others too?

IF YOU GO “IC,” HAVE AN AGREEMENT!

- Be explicit: “You are an IC”
- Call it an “IC Agreement” and don’t use words sounding anything like “employee”
- Can have specifications included but not “when, where and how” to do the work
- State IC’s right to hire own EEs, duty to supervise/pay them
- Don’t set hours/schedule
- Limit service to specific term or project
- Say IC not covered by insurance/benefits and no PTO
- Specify IC will pay employment taxes, UC and WC insurance (include indemnification provision)
- Ideally, agreement is with an “entity”

IC GUIDANCE: THE “DON'TS” (MORE = BETTER)

- Treat EEs and ICs the same (a la Microsoft)
- Retain former EEs as ICs
- Allow ICs to perform core business functions
- Prevent/prohibit from working with others
- Provide ICs with the EE Handbook—only policies that relate (e.g., harassment, workplace violence), not attendance/performance
- Conduct formal/informal performance reviews
- Provide training/development opportunities
- Open participation in Company EE events (holiday party, social events, training meetings) to ICs

SO, WHERE DOES THAT LEAVE US?

- Don't ignore/overlook these issues—stay alert (to all issues: also on-call, interns, trainees, etc.)
- Enact policies to protect against FLSA suits
 - No OT without authorization (else discipline, but paid)
 - All hours worked must be reported—no “off-the-clock” work allowed (can limit collective action scope)
 - No deductions from exempt salaries/safe harbor
 - Train supervisors/managers to be alert and monitor
- Listen to EEs and take any complaint seriously
 - What's a “complaint”?
 - Just like harassment/union organizing—keep internal

REMEMBER “ATTACK DOG” DOL

- Focus is on enforcement (not education and compliance assistance) – “gotcha” game
- Believes most ERs don’t care about compliance
- Since insufficient resources to catch all violators, resorted to “Bridge to Justice” prog.
 - If DOL doesn’t pursue a claim, it refers the EE to a plaintiff’s attorney AND gives info about DOL’s findings and calculations (but not to ER)
 - Referrals done through ABA lawyer referral comm.

HANDLING THE DOL AUDIT

- “Appear” fully cooperative from start to finish
- Convey desire to be in compliance, fix issues
- Remember: DOL investigator is like a highway patrol officer
- Don’t engender ill-will if (better yet, for as long as) possible
- You’re fighting the gov’t, which spends our \$
 - So, you can’t outspend DOL
 - Can’t use litigation tactic of driving cost up to get resolution
 - DOL will complete the audit

HANDLING THE DOL AUDIT

- Your focus: manage scope of process
 - Set the scene—describe business/ops, workforce, processes, records so DOL understands
 - Show commitment to cooperate—docs/info ready
 - Always, always go thru docs 1st! (things end up in strange places)
 - Show DOL “face” of ER w/managers who present well
 - Offer to schedule interviews to avoid disrupting work
 - When investigator agrees, confirm in email
 - Offer to help (self-audit whenever possible)

QUESTIONS?

