Federal and New York Wage & Hour Laws

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**Governing Law**

- **Fair Labor Standards Act ("FLSA")**
  - Federal wage and hour law that requires employers to pay employees overtime (generally time and one-half the regular rate of pay) for hours worked over 40 hours in a work week. The FLSA also requires employers to pay employees at least minimum wage and to keep detailed records of employees’ working hours.
  - **New York Labor Law (the “Labor Law”)**
    - Broad worker protection laws, including overtime and minimum wage provisions.
Basic Tests for Exemption to Apply

• Salary Level, Salary Basis, and Duties Tests

• Salary Level
  – Federal: $455 per week
  – New York: $543.75 per week*

• Salary Basis
  – Employee receives a predetermined amount each pay period.
  – Cannot be reduced because of variations in quality or quantity of work.
  – Paid full salary for any week in which any work is performed.

*$900 per week for certain provisions of the Labor Law
Deductions to Salary Can Jeopardize Exemption

• Improper deductions from an employee’s predetermined wage have the potential to destroy an employee’s exemption from receiving overtime.

• The FLSA’s regulations provide, however, that employers may make pay deductions for suspensions of one or more full days for violations of the employer’s workplace conduct rules, such as violations of the employer’s sexual harassment policy.

• In addition, the regulations create a “safe harbor” for improper deductions. If the employer has a written policy regarding improper deductions, including a complaint mechanism, notifies the employees of the policy, and reimburses employees for improper deductions, the exemption will not be lost unless the employer repeatedly and willfully violates the overtime rules.
**Duties Test**

- **Categories:**
  - Executive
    - The employee’s primary duty must be management of the enterprise, or a recognized department or subdivision thereof. In addition, the employee must (1) customarily and regularly direct the work of two or more employees, and (2) possess the authority to hire or fire other employees, or have his/her recommendations on employment status decisions given particular weight.
  - Professional
    - The employee’s primary duty must require advanced knowledge in a field of science or learning customarily acquired in a prolonged course of specialized intellectual instruction (unless the employee meets the standard of a creative professional, such as an artist).
Duties Test

- Administrative
  - The employee’s primary duty must (1) be performing office or non-manual work directly related to the management or general business operations of either the employer or its customers, and (2) include the exercise of discretion and independent judgment with respect to matters of significance.

- Highly Compensated
  - The employee must be guaranteed $100,000 in total annual compensation (including non-discretionary bonuses, but excluding payments for insurance or contributions to retirement plans) and perform any one—rather than all—of the standard duties that are required for classification as an exempt executive, administrative or professional employee.
  - Thus, a highly compensated employee will be exempt, for example, if he or she customarily and regularly directs the work of two or more employees or customarily and regularly performs office work directly related to business operations.
The federal regulations provide specific rules and examples for two types of employees of an “educational establishment” who are eligible for exemption from the overtime laws.

An “educational establishment” is defined as an elementary or secondary school, an institution of higher education or other educational establishment. The regulations make no distinction between public or private schools, or between those that are operated for profit or not-for-profit. Whether nursery or kindergarten programs are covered depends on the scope of State laws. “Other educational establishments” can include classes for disabled or gifted children. Whether post-secondary programs qualify as “other educational establishments” depends on whether the programs are licensed by the State or accredited by a nationally recognized career school accrediting organization.
Academic Administrative Employees

- To qualify for this administrative exemption, the employee must receive a minimum of either (i) $455 per week ($543.75 in NY), excluding board, lodging or other facilities, or (ii) a salary at least equal to the entrance salary for teachers where s/he is employed.

- His/her primary duty must be performing administrative functions directly related to academic instruction or training in an educational establishment (or department or subdivision thereof). The regulations provide the following examples of such employees:
  - Head of a school (i.e., headmaster), and any assistants, “responsible for administration of such matters as curriculum . . . and other aspects of the teaching program.”
  - Department heads in institutions of higher education (i.e., Dean of the Mathematics Department).
  - Academic counselors.
  - Specifically excluded are jobs relating to such things as building management, health of students, psychologists, and lunch room managers -- although such jobs may be exempt under different tests.
Teachers

• Most significantly, the regulations provide that the salary level ($455 per week minimum; $543.75 in NY) and the salary basis tests, generally applicable to all other exemptions, are inapplicable to teachers because they are recognized as professionals.

• The professional employee exemption includes a teacher employed by an educational establishment with a primary duty of “teaching, tutoring, instructing or lecturing in an activity of imparting knowledge.”

• The regulations provide the following examples of such exempt professionals:
  – Regular academic teachers
  – Teachers of kindergarten or nursery pupils
  – Teachers of gifted or disabled children
  – Teachers of skilled and semiskilled trades
  – Teachers engaged in automobile driving instruction
  – Home economics teachers
  – Vocal or instrumental music instructors
The regulations specifically provide that faculty members who are engaged as teachers but also spend a considerable amount of their time in extracurricular activities such as coaching athletic teams or acting as moderators or advisors in such areas as drama … are engaged in teaching.

- DOL Opinion Letters also have held that coaches are eligible for the exemption for teachers if the coaches are primarily engaged in the instruction of student athletes.

No State-issued teacher’s certificate is required for this exemption to apply. The regulations, however, note that “teachers who possess a teaching certificate qualify for the exemption regardless of the terminology (e.g., permanent, conditional, standard, provisional, temporary, emergency or unlimited) used by the State to refer to different kinds of certificates.
Penalties

- Potential for class or collective action suits.
- If a successful claim is brought against an employer for violating the FLSA’s requirements, penalties that may be awarded to the plaintiff(s) include: (i) back pay (i.e., for unpaid overtime); (ii) liquidated damages in an amount equal to the back pay liability; (iii) attorneys’ fees and costs; and (iv) interest. In addition, the Secretary of Labor may obtain injunctive relief to require the employer to change its overtime practices.
- Generally, the statute of limitations for a claim under the FLSA is two years; thus, a successful plaintiff may only recover up to two years of back pay. When an employer’s violation of the FLSA is deemed “willful,” however, the statute of limitations is three years. A willful violation exists when the employer knew or recklessly disregarded the fact that its conduct violated the FLSA.
Penalties

• Note that it is the employer’s burden to disprove a plaintiff’s claimed hours worked in the absence of records which the employer is required to keep for all non-exempt employees, and New York courts have held that a failure to keep the records required by the Department of Labor regulations for non-exempt employees may permit a finding of willfulness.

• A plaintiff who brings a wage and hour claim under New York law (i.e., in addition to a federal FLSA claim), receives the benefit of a six-year statute of limitations and the ability to recover six years of back pay.
Wage Deductions

- Improper deductions from pay of an exempt employee can result in loss of the exemption, thereby entitling an employer’s executive, professional, administrative, and other exempt-eligible employees to overtime pay. As discussed above, the FLSA has a safe harbor to allow employers to correct inadvertent deductions and maintain applicable exemptions.
- The FLSA does not allow uniforms or other items which are considered to be primarily for the benefit or convenience of the employer, to be included as wages. Thus, an employer may not take credit for such items in meeting its obligation toward paying minimum wage or overtime.
  - If an employer requires the employer to bear the cost, it may not reduce the employee’s wages below the minimum wage or reduce overtime pay.
- The New York State Department of Labor has taken the position that most deductions from pay are unlawful under the Labor Law. Under this interpretation of the law, many deductions that employers take from an employee’s wages, such as deductions for overpayments, repayment of loans, salary advances and costs for an employee’s personal use of the employer’s property (e.g., phones, copiers, cafeteria purchases, etc.), and other similar deductions should be discontinued.
Volunteers & Interns

- Employees who volunteer after regular work hours for charitable or extracurricular activities sponsored by their non-for-profit employers:
  - Can be considered volunteers, and thus fall outside of the FLSA, if the event the employee is participating in occurs outside the usual workday and they are not performing the kind of work they are paid to regularly perform.
- An exception under the FLSA exists for trainees/interns. The following six factors must be present:
  - The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
  - The internship experience is for the benefit of the intern;
  - The intern does not displace regular employees, but works under close supervision of existing staff;
  - The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
  - The intern is not necessarily entitled to a job at the conclusion of the internship; and
  - The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.
Independent Contractors

- A similar hot button issue is the misclassification of employees as independent contractors. This has also become a major focus of the Internal Revenue Service, as well as state taxation and labor agencies because it deprives workers of benefits such as overtime pay, unemployment compensation, and Social Security benefits, and deprives federal, state and local governments from tax and insurance revenues. There has been a new focus in Congress on pending legislation that would, among other things, penalize employers that misclassify employees as independent contractors.

- It is difficult to assess an individual's employment status, as there is no universal standard. State and federal agencies often use somewhat different criteria in making a determination.
The Wage Theft Prevention Act

- The Wage and Theft Prevention Act (the “Act”) applies to all private sector employers in New York.
- Notice Requirements
- The Act substantially increases employer notice requirements. Beginning on April 9, 2011, employers will be required to notify employees in writing at the time of their hire, and by February 1st of each subsequent year of employment, of the employee’s (1) regular and overtime rates of pay; (2) basis of pay (whether by hour, shift, day, week, salary, piece, commission, or other); (3) any allowances the employer intends to claim against the minimum wage (i.e., tips, meals, lodging allowances, etc.); (4) the regular pay day; and (5) the employer’s name (including “doing business as” names), main office address or principal place of business, and telephone number.
Wage Theft Prevention Act

- The notice must be provided in both English and the employee’s primary designated language. The notice must include an affirmation that the employee accurately identified his or her primary language.
- Employers must notify employees in writing of any changes to this information at least seven days prior to the time of such changes, unless the changes are reflected on the employee’s wage statement. Employers must maintain these notices for a minimum of six years.
- The Commissioner of the New York State Department of Labor has prepared templates in English, Spanish, Chinese and Korean (available online).
  - Recommended employers use model notices.
- Increased penalties, including criminal sanctions.
- New anti-retaliation protections.
- Public display of violations of the Act.
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