

# WAGE AND HOUR

LESSONS FROM 30 YEARS OF  
EXPERIENCE

LGA SOUTHWEST REGIONAL CONFERENCE  
JUNE, 2011

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## THE PLAINTIFFS' BAR IS ACTIVE

- Albemarle County settled with its firefighters and police officers in 2010 for "gap time" pay (\$360,000 paid out)
- In late March 2011 Chesterfield County firefighters and law enforcement officers filed suit seeking an estimated \$5 million in back pay and over \$350,000 in punitive damages.

## PLAINTIFF'S ATTORNEYS ADVERTISE THEMSELVES WELL

- "Overtime pay can add up to hundreds of extra dollars in your paycheck."
- "The reality is that many employers misunderstand or misapply overtime laws. Other employers willfully violate the laws to earn more money at the expense of their employees."
- "Contact knowledgeable employment law attorneys ... Our phones are answered 24 hours a day, 7 days a week."

## WE WILL COVER

- Record Keeping
- Exemptions Are Few
- Computing and Compensating for Overtime
- Save on Overtime – Understand "Salary Basis"
- Public Safety Issues
- Non-paid Workers
- Independent Contractors
- Payment of Wages

## RECORD KEEPING

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## EMPLOYER HAS DUTY TO KEEP RECORDS

- Can not delegate to employee
- Employees can keep their time, but if not kept accurately by employee, employer is responsible
- Even if employees certify that time records are correct, the employer is still liable if they are not accurate
- Failure to keep records is a separate violation of the FLSA

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## RECORD ALL OVERTIME HOURS

- All hours worked must be recorded
- If employee works overtime and employer knows it, the hours must be recorded
- Can require employees not to work overtime unless “approved” but if directive is disobeyed, hours worked must be recorded
- **It is unlawful to refuse to pay for “unauthorized overtime”**

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## GENERAL PAY RECORD KEEPING

- 29 CFR § 516.2(a):
  - Time of day/day of week workweek begins
  - Regular rate of pay for any week overtime compensation is due
  - Basis of pay – per hour, day or week
  - Total hours worked each workday and each workweek
  - Straight time earnings
  - Premium pay

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## SIMPLIFIED RECORD KEEPING FOR SALARIED EMPLOYEES

- Employees on fixed work schedules do not have to record time day by day, but can simply check that schedule was followed
- Weeks when deviations in schedule, must record time hour for hour each day

## PAY RECORDS FOR WHITE COLLAR EMPLOYEES

- 29 CFR §516.3:
  - Time of day/day of week of workweek
  - Total wages paid each pay period
  - Date wages are paid
  - Basis on which wages are paid

## OTHER PAY RECORD INFORMATION

- Date of birth if under 19 years of age
- Sex and occupation of each employee
- Must keep records in central location for three years (some other information for two years)
- Records to be kept in central location at place of employment
- Employees have no right to see records

## THE FAILURE TO KEEP RECORDS HAS CONSEQUENCES

- Employee only has to provide a “reasonable inference” that the employee worked a certain number of hours
- Without records to rebut, employee wins
- Willful failure to keep the required records or falsification of records is a **criminal offense**

## EXEMPTIONS UNDER THE FLSA

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## FLSA EXCEPTIONS BOTH TO MINIMUM WAGE AND TO OVERTIME

- Seasonal employees
- Commissioned retail sales
- Outside sales
- Teachers
- Political appointees
- Legislative employees
- Agricultural workers
- White collar workers
- Hospital workers

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## BLUE COLLAR WORKERS ARE NEVER EXEMPT

Non-management employees in production, maintenance, construction, including carpenters, electricians, mechanics, plumbers, iron workers, craftsmen and engineers, are entitled to minimum wage and overtime, no matter how highly compensated.

## NONEXEMPT EMPLOYEES

- Generally wage (hourly rate) but could be salaried
- Pay can be deducted (“docked”) based on quantity or quality of work
- Overall hourly rate, including deductions, may not fall below minimum wage for any work period
- Any time over 40 hours (overtime) is paid at 1.5 times the hourly rate

## “WHITE COLLAR” EXEMPTIONS

- In order to qualify for a “white collar” exemption, an employee must meet the requirements of one of the six “exempt” categories.
  - Executive
  - Administrative
  - Professional
  - Computer
  - Highly compensated employees

## THREE CRITERIA TO MEET THE WHITE COLLAR EXEMPTION

- **Salary Level** - \$455 per 7-day work period (\$23,660 per year) excluding board and lodging
- **Salary Basis** – guaranteed weekly amount of base pay which can not be reduced based on quality or quantity of work performed
- **Primary Duty** – the employee’s principal, main, major, or most important duty.

## DO NOT DEFEAT THE EXEMPTION BY TAKING DEDUCTIONS FROM SALARY

- Taking deductions from an employee's salary can convert an exempt position into a non-exempt position
- This will result in the employee being entitled to overtime compensation, no matter whether he or she is the CEO or not

## PERMITTED DEDUCTIONS FOR EXEMPT EMPLOYEES

- Can deduct from salary for
  - A partial day deduction for sickness, disability, FMLA
  - Compensation for service on a jury, witness fees, and military pay by the amount of payment an employee receives in the form of jury fees, witness fees, or military pay
  - Penalty for a violation of a major safety rule
  - Full day suspension for a violation of a workplace rule
  - Pro-rated salary adjustments for less than 40 hours worked on first or last week of employment

## CERTAIN EMPLOYEES CAN BE PAID A FEE RATHER THAN SALARY

- When a single “unique” job is involved (not on-going work), an employee can be paid a fixed sum for the job and still fall within the White Collar exemption
- This applies only to administrative, professional and computer employees
- The fee still must meet the minimum salary requirement of at least \$455 per week

## PRIMARY DUTY INCLUDES THE ...

- Importance to the business of the exempt duties
- Time spent on performing exempt duties
- Employee’s freedom from supervision in the exercise of the exempt duties
- Employee’s salary compared with the compensation paid to nonexempt employees

## EXECUTIVE EMPLOYEE: PRIMARY DUTY

- Management of the enterprise or a recognized department or subdivision of the enterprise
  - Must customarily and regularly direct the work of two or more full-time employees/equivalents
  - Authority to hire/fire or make recommendations of significant weight on such personnel actions
- Management activities must be more than “mere supervision”

## ADMINISTRATIVE EMPLOYEE: PRIMARY DUTY

- Performance of office or non-manual work directly related to the management or general business operations (of employer/employer’s customers)
- Must exercise discretion and independent judgment with respect to matters of significance related to business operations

## PROFESSIONAL EMPLOYEE: PRIMARY DUTY

- Performance of work requiring “advanced knowledge” in a “field of science or learning” and “customarily acquired by prolonged course of specialized instruction”
- Non-manual artistic endeavor requiring “invention, imagination, originality or talent”
- Lawyer, doctor, registered nurse, physician assistant, theologian, chef, artist

## COMPUTER PROFESSIONAL: PRIMARY DUTY

- Salary – Weekly (\$455) or hourly (\$25.63)
- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications
- The 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
- The design, documentation, testing, creation, or modification of computer programs related to machine operating systems
- A combination of the aforementioned duties, the performance of which requires the same level of skills

## HIGHLY COMPENSATED EMPLOYEES

- Performs office or non-manual work
- Total compensation of \$100,000 or more, but salary of at least \$455/week
- Customarily and regularly perform at least one duty of exempt executive, administrative or professional employee
- Not for people who “perform work involving repetitive operations with their hands, physical skill and energy”

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## LESSONS FROM FAMILY DOLLAR LITIGATION

- Multi-jurisdictional litigation
- Store Managers challenged their exempt status
- Basis of challenge – majority of time spent on non-exempt activities

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## COMPENSABLE TIME

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## COMPENSATION MYTHS

- Myth: Must pay a premium for working night or weekends
- Myth: Employee cannot work more than 12 hours a day
- Myth: Must give meal or other breaks
- Myth: Must offer sick leave, vacation leave and holiday pay
- Myth: "Part-time" is 20 hours/week

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