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Wage and Hour Update: The Changing Landscape

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Federal Wage & Hour Litigation: 2019 Statistics

- Wage and hour cases represent the most significant exposure continues for most employers under workplace laws.
  - The Wage and Hour Division ("WHD") of the U.S. Department of Labor ("DOL") collected $304 million in back wages and liquidated damages in Fiscal Year 2019.
- More than 7,494 FLSA lawsuits were filed in federal district courts in 2019.
  - Almost all were filed as collective actions, with courts granting conditional certification 79% of the time at the initial stage and 48% of the time at the more stringent second stage.

10 Minutes Is All it Takes For Your Company To Be On The Receiving End Of The Next Collective Action

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- John makes $15 per hour
- Not paid for 10 minutes he spends logging in and out of his computer each day
- Math Whiz: this 10 minutes is worth $2.50 each day
- John works 5 days a week about 240 days a year. That adds up to about $600.00 each year.

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- 1,300 employees who work these shifts – $780,000 a year.
- John sees the following advertisement:

Pain-In-The-*!# Law Firm

PROFESSIONAL ASSOCIATION

www.Pain-In-The-*!#.com

OVERTIME PAY

Q: Do you have clients that worked over 40 hours in any week, and have not been paid overtime by their current or past employer(s)?

Common F.L.S.A. / Overtime Issues:

(1) Failing to pay a salaried employee overtime. Salaried employees are entitled to overtime, unless specifically "exempt."
(2) Failing to compensate for work time that was misclassified as either "idle" or "off-the-clock".
(3) Misclassifying certain "White Collar" employees as "Exempt" from overtime.
(4) Improperly "Docking" of exempt employees may cause a loss of their exempt status.
(5) Misclassifying employees as "Independent Contractors."

If misclassified, the employee may be entitled to two (2) times their overtime pay retroactively for up to 3 years, and their case may be brought as a collective action on behalf of similarly situated employees.

Overtime awards may be significant, even under very common circumstances

Common Illustrations:

(1) Employee was salaried at $50,000 per year and received a $2,000 Christmas bonus. He was willfully misclassified as exempt from overtime. He was employed for 3 years and worked an average of 60 hours per week. He could be entitled up to $225,000 plus attorneys fees and court costs, if substantiated.

(2) Employee was hourly at $10 per hour. The employee worked from 8:30 am to 5:30 pm with an hour lunch, 5 days a week. A common situation. However, the employee was required to answer the phone when lunching. She was employed for 4 years. She could be entitled up to $23,400 plus attorneys fees and costs, if substantiated.

UNPAID WAGES

Q: Do you have clients that have been denied their wages, commissions, or salary by their current or past employer, regardless of the amount owed?

Whether owed a dollar of wages or thousands in commissions, your clients have a right to be paid. We never charge a consultation fee for overtime and/or unpaid wage claims and we accept them on a pure contingency fee and cost basis. If there is no recovery, nothing is owed, not even costs.

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Orlando: (407) Pain-In-The-*!#

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We pay the highest referral fees allowable under the Rules of Professional Responsibility.

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10 Minutes Is All it Takes For Your Company To Be On The Receiving End Of The Next Collective Action

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- 3 year statute of limitations for willful violations – about $2.3 million
- Liquidated damages double the amount to $4.6 million
- This does not include attorney's fees.

Not An Implausible Scenario

- **Farmers Insurance Group** **$90 million** verdict
  in California for failing to pay over-time to misclassified claims adjusters
- **Microsoft** **$97 million** settlement
  for improperly classifying employees as “temporary employees”
- **Starbucks** **$18 million** settlement
  for misclassifying store managers and assistant store managers as exempt
- **Radio Shack** **$29.9 million** settlement
  for misclassifying store managers as exempt

Agenda

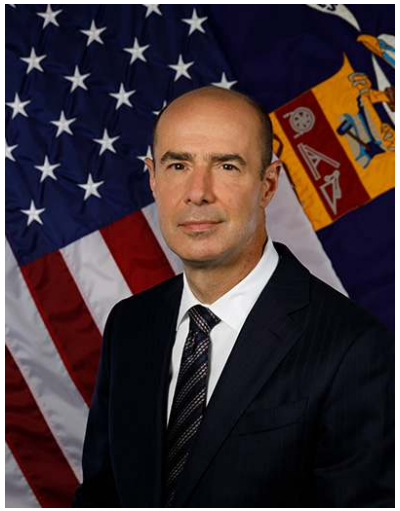
- Trump's DOL
- Updates to the minimum salary test
- Off-the-clock work
- Interns
- DOL's new PAID Program
- Joint employer and independent contractor issues
- Enforceability of class action waivers and arbitration agreements
- Regular rate of pay for overtime calculation
- Minimum wage issues and trends

Administrative Enforcement and Regulatory Trends Before the Trump Administration

- The WHD aimed to ferret out all FLSA violations, whether willful or inadvertent.
- Requests for liquidated damages and three years of back pay, instead of two years, were the norm.
- Many investigations were targeted by the agency.
- Civil money penalties were common, even in initial investigations.
- Remedies and relief were sought on an enterprise-wide basis whenever possible.
- Primary targets for claims:
  - Overtime eligibility
  - Worker classification
  - Joint employer relationships

The Trump Administration – Presidential Appointees

Key Appointees by President Donald J. Trump



- **Secretary of Labor** - Eugene Scalia
  - Former Solicitor of Labor
  - Son of SCOTUS Justice Antonin Scalia
- **Solicitor of Labor** – Kate S. O'Scannlain
  - Former partner at Kirkland & Ellis
  - Serves as the DOL's top attorney

The Trump Administration – Administrator, Wage and Hour Division

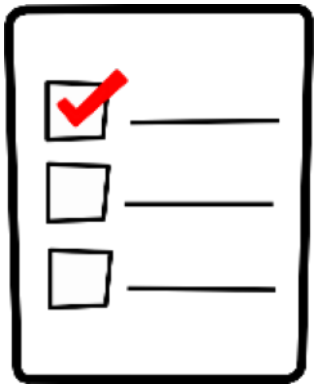
- Cheryl Stanton was nominated by the President in September 2017 and was renominated in January 2019
  - She was sworn in as WHD's Administrator on April 29, 2019.
- Former management side labor and employment attorney; viewed as pro-employer
- Previously was Executive Director of the South Carolina Department of Employment and Workforce, which administers unemployment compensation for the state
- Her nomination languished in the previous Congress; when the current Congress will act on her nomination is unclear.

The Trump Administration's DOL (cont'd)

- What To Expect from the DOL
  - DOL is engaging in more outreach with the employer community.
  - Enforcement protocol, however, in day-to-day investigations has not materially changed.
  - The WHD's approach in and the results of investigations, therefore, remain heavily dependent upon the approach and predilection of the particular investigator.

2018-19 DOL Developments

- The DOL has changed its position on:
  - Issuing Opinion Letters
  - Minimum salary test for white-collar exemptions
  - Interns
  - Tip pooling
  - Joint employment relationships
  - Independent contractors



Issue 1: The Return of Opinion Letters

- DOL opinion letters have historically provided clarification on a variety of laws and regulations.
  - Especially valuable for wage and hour matters because of their detail and fact-specific nature
  - Have often been cited to support an affirmative defense in wage and hour litigation
- But in 2010, the DOL stopped the issuance of opinion letters (after 70 years!) in favor of administrator interpretations, which are more general in nature.
- The DOL recently announced that it would **once again start issuing opinion letters.**
  - Secretary Acosta - "[r]einstating opinion letters will benefit employees and employers, as they provide a means by which both can develop a clearer understanding of the [FLSA] and other statutes."

Issue 1: The Return of Opinion Letters (cont'd)

- Throughout 2018, the Wage and Hour Division issued opinion letters on a variety of topics. A number of these opinion letters were originally signed off on during the final days of the Bush administration, but were withdrawn by the Obama administration "for further consideration by the Wage and Hour Division" and were never officially issued.
- Topics covered in these opinion letters include:
  - Whether an employee is entitled to pay for being "on call"
  - Clarification of how employers can deduct pay from exempt employees who are not working
  - Clarification of the "duties test" for FLSA exemptions
  - Calculation of regular and overtime rates of pay
  - Whether time voluntarily spent by an employee in wellness activities is compensable time

Issue 1: The Return of Opinion Letters (cont'd)

- Of particular note to hospitality-industry employers, the Wage and Hour Division has eliminated the "80-20 rule." Under the 80-20 rule, employers were prohibited from paying the lower cash wage to "tipped employees" who spent more than 20% of their time in a particular workweek performing work that itself did not generate tips.
  - The DOL stated that "[w]e do not intend to place a limitation on the amount of duties related to a tip-producing occupation that must be performed, so long as they are performed contemporaneously with direct customer-service duties and all other requirements of the Act are met."
  - Going forward from the date of the Opinion Letter's issuance, November 8, 2018, employers are entitled to rely upon the Opinion Letter as a defense if employees institute litigation based upon the performance of non-tipped work.
  - Litigation concerning the 80-20 rule and the performance of non-tipped work has continued. Earlier this month, U.S. District Court Judge Stephen Bough in the Western District of Missouri refused to follow the recently-issued opinion letter, describing it as "unpersuasive and unworthy." *Cope v. Let's Eat Out*, (W.D.Mo. Jan. 2, 2019).
    - As always, employers must review state law to determine the full scope of their compliance obligations and risks.

Issue 2: The Minimum Salary Test for Exemption

- The FLSA provides for exemptions from its minimum wage and overtime requirements for certain administrative, professional, executive, outside sales, and computer professional employees. To be considered "exempt," employees must generally satisfy all three of the following tests:
  - **Salary-level test**: Employees must earn a weekly salary that meets the minimum requirements. Until January 1, 2020, the minimum salary requirement was $455 per week
  - **Salary-basis test**: With very limited exceptions, the employer must pay employees their full salary in any week they perform work, regardless of the quality or quantity of the work.
  - **Duties test**: The employee's primary job duties must meet certain criteria.
- The WHD recently propounded new regulations that among other things, will set the salary threshold under the FLSA for the executive, administrative, and professional exemptions.
- The 2020 minimum salary threshold is now $**684** per week ($35,568 annually)

Issue 3: “Off-the-Clock” Work

- Working before or after a shift
- Working through meal periods
- Maintaining or starting up/shutting down work-related equipment
- Completing required orientation or training during unpaid meal periods or outside of regular work hours
- Making and responding to job-related telephone calls
- Writing and responding to job-related e-mails
- Donning and doffing uniforms
- Walking to/from time clocks

Issue 3: "Off-the-Clock" Work in the Virtual Workplace

- Can you hear me now? Employee smart phone, tablet and computer use
- The proliferation of smartphones has extended the work environment beyond the office to car, home, and anywhere with the ability to connect.
- There is pressure for employee productivity.
- Nonexempt employees performing work on a PDA during non-work time generally must be paid.

Issue 4: Interns - The DOL's New View

- Previously, the DOL had used a six-factor test to determine whether interns are employees under the FLSA.
- On January 5, 2018, the DOL announced that it was **abandoning the six-factor test** and adopting a "primary beneficiary" test
  - This new test is favored by several U.S. courts of appeal
  - The test focuses on the economic realities of the relationship and examines, among other factors, whether the intern or the employer is the primary beneficiary of the relationship

Issue 4: Interns - The DOL's New View (cont'd)

- The "Primary Beneficiary" test is a totality of the circumstances seven-factor test that analyzes the following:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee — and vice versa.
2. The extent to which the internship provides training similar to that in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Issue 5: DOL's New "PAID" Program

- In 2018, the DOL announced its pilot Payroll Audit Independent Determination (PAID) program.
- PAID provides an opportunity for employers to self-report FLSA violations and reach a settlement without the need of litigation and court approval.
- This is one example of a compliance-focused approach by the DOL.
  - The stated goal is to "resolve . . . claims expeditiously and without litigation, to improve employers' compliance with overtime and minimum wage obligations, and to ensure that more employees receive the back wages they are owed – faster."

Issue 5: DOL's Pilot "PAID" Program

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- Benefits for employees
  - Recovery of full wages with no attorneys fees
  - Narrow release of claims covering only the specific violation
  - Prompt payment of wages
  - Employees decide whether to accept

Issue 4: DOL's Pilot "PAID" Program (cont'd)

- Benefits to employers
  - Resolves claims without need for litigation, but will not preclude state-law claims
    - Can only be used once for a certain type of claim
  - Allows proactive resolution of inadvertent wage and hour violations
  - No liquidated damages or other penalties
  - Claims cannot be subject to DOL investigation, litigation or after employee attorney sends demand letter
  - Program will be reassessed after April, 2020

Issue 6: Joint Employer and Independent Contractor Status under the FLSA

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- The DOL has rescinded Obama-era interpretations discussing the existence of joint employer and independent contractor relationships.
- The elimination of these interpretations has not been accompanied by the promulgation of proposed regulations or across-the-spectrum guidance for employers.
- In the interim, FLSA case law issued by a particular court of appeals governs the FLSA in a particular jurisdiction.

Issue 7: "Regular Rate" of Pay for Overtime Calculation

- Requirements: nonexempt employees receive overtime pay at 1 ½ times the employee's "regular rate of pay" for all hours worked over 40 in a workweek (or over 8 in a workday in California).

- The regular rate is determined by adding together the employee's pay for the workweek and all other earnings and dividing the total by the number of hours the employee worked in that week.

Issue 7: "Regular Rate" of Pay for Overtime Calculation (cont'd)

- Examples of compensation that must be included:
  - Commissions
  - Shift differentials
  - Attendance awards
  - Production bonuses
  - Cost-of-living bonuses
  - Incentive bonuses

Issue 7: "Regular Rate" of Pay for Overtime Calculation (cont'd)

- Examples of compensation that can be excluded:
  - Purely discretionary bonuses
    - Must be determined at sole discretion of the employer and cannot be made pursuant to any contract, agreement or promise.
  - Payments to employees pursuant to bona fide profit-sharing plans or trusts
  - Payments in the nature of gifts
    - Cannot be made pursuant to contract.
    - If paid on special occasions such as Christmas, payment can be excluded from the regular rate even if paid from year-to-year and amounts vary among employees.

Issue 7: "Regular Rate" of Pay for Overtime Calculation (cont'd)

- What about piece-rate workers?
  - Regular rate = total earnings for week from piece rates and all other sources and sums paid for waiting time or other hours worked/number of hours worked in the week
  - Example: An employee worked 50 hours and earned $491 at piece rates for 46 hours of productive work and in addition was paid at $8.00 an hour for 4 hours of waiting time, for total comp of $523.00. The $523 must be divided by the total hours of work, 50, to arrive at the regular rate of pay - $10.46. For the 10 hours of overtime, the employee is paid an additional $52.30 (10 hours at $5.23)
  - Remember – the employee already received straight time for all hours, so the employer only needs to pay .5 the regular rate for the 10 overtime hours.

Issue 7: "Regular Rate" of Pay for Overtime Calculation (cont'd)

- What about salaried non-exempt employees?
  - Divide the salary by the number of hours the salary is intended to compensate.
  - If the salary covers more than a week, it must be reduced to its workweek equivalent.
  - As an example, an employee is hired to work 45 hour workweeks for a weekly salary of $405. The regular rate = $405/45 = $9.00. The employee is then due additional weekly overtime of $22.50 ($4.50 x 5).
  - **Important** - A fixed salary for workweeks longer than 40 does not discharge FLSA overtime obligations.

Issue 8: Enforceability of Class Action Waivers and Arbitration Agreements in a Post-*Epic Systems* World

- *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018): Seventh and Ninth Circuits previously held that an arbitration agreement precluding collective arbitration or class actions violates Section 7 of the NLRA and was unenforceable under the Federal Arbitration Act (FAA).
  - Other circuits held that FAA's policy of favoring arbitration overrides any concerted activity rights employees have to class or collective remedies.
- Supreme Court in *Epic* held that such agreements "must be enforced as written"
- The Court concluded that the NLRA **does not** contain a class action right that overrides the FAA.

Subsequent Cases

- Courts have generally followed *Epic Systems*
  - But some arguments against enforceability lingered.
- *Gaffers v. Kelly Servs.,* 900 F.3d 293, 295 (6th Cir. 2018): Plaintiff claimed that employer failed to credit call center employees for time to log in and out of computer network each day. Sought to bring a collective action under the FLSA for unpaid overtime.
  - 1,600 workers opted in. Half had signed arbitration agreements with class action waivers.
  - Employer moved to compel arbitration. Employees argued this violated the FLSA – specifically, because Section 16(b) of the FLSA created a mechanism for pursuing a collective action, FLSA collective actions should be exempt from arbitration either because (1) this language could not be reconciled with the FAA; or (2) on public policy grounds.
- The Sixth Circuit dismissed this argument, noting that the Supreme Court had already held that claims under the Age Discrimination in Employment Act (ADEA), which has the same enforcement provisions, are subject to arbitration.

Subsequent Cases – Independent Contractor Issues

- *McGrew v. VCG Holding Corp*., 735 Fed. Appx. 210, 211 (6th Cir. 2018): Plaintiffs were "exotic dancers" working at a "gentlemen's club." Club treated the dancers as independent contractors.
  - Dancers contended that they were employees entitled to compensation under the FLSA
  - Plaintiffs had signed arbitration agreements → the district court dismissed the action, compelled arbitration
- Sixth Circuit found the matter was governed by *Epic Systems* and *Gaffers*
  - Rejected plaintiffs' arguments that the agreements violated the NLRA and FLSA.
  - Rejected the contention that the court must first decide whether plaintiffs were covered by the FLSA before referring the matter to the arbitrator to make any further determinations.
  - Suggests IC's covered by *Epic Systems* and the FAA

Subsequent Cases – Independent Contractor Issues

- Hot off the press: *New Prime Inc. v. Olivera*
- On January 8, 2019, SCOTUS unanimously ruled that trucking company New Prime Inc. could not compel arbitration in a class action alleging it failed to pay IC truck-driver apprentices the proper minimum wage.
- Court reasoned that transportation workers engaged in interstate commerce, including those classified as IC's, are exempt from the FAA.
  - Clarifies that FAA exemption for interstate transportation workers applies to all workers whether they are employees or IC's

Issue 9: Changing Minimum Wage

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- The minimum wage rose in 19 states as of 2019. These increases range from scheduled incremental increases in Florida to complex wage rate systems adopted in New York and California involving state and municipal rates.

Don’t Forget About California

- The Ninth Circuit requested the California Supreme Court respond to certified questions about California’s labor code’s application to workers who temporarily perform services in the state.
- The issue, which could effect companies across the country, is whether Delta and United pilots and flight attendants, who enter the state temporarily, would be subject to the California Labor Code.

2020 Minimum Wage Rates

- **Alabama** : $7.25
- **Alaska**: $10.19
- **Arizona**: $12.00
- **Arkansas**: $10.00
- **California**: $13.00
- **Colorado**: $12.00
- **Connecticut**: $11.00
- **Delaware**: $9.25
- **Washington D.C**:$14.00
- **Florida**: $8.46
- **Georgia**: $7.25
- **Hawaii**: $10.10
- **Idaho**: $7.25
- **Illinois**: $9.25
- **Indiana**: $7.25
- **Iowa**: $7.25
- **Kansas**: $7.25
- **Kentucky**: $7.25
- **Louisiana**: $7.25
- **Maine**: $12.00
- **Maryland**: $11.00
- **Massachusetts**:$12.75
- **Michigan**: $9.65
- **Minnesota**: $10.00
- **Mississippi**: $7.25
- **Missouri**: $9.45
- **Montana**: $8.65
- **Nebraska**: $9.00
- **Nevada**: $7.25
- **New Hampshire**: $7.25
- **New Jersey**: $11.00

2020 Minimum Wage Rates (cont.)

- **New Mexico:** $9.00
- **New York:** $11.80
- **North Carolina:** $7.25
- **North Dakota:** $7.25
- **Ohio:** $8.70
- **Oklahoma:** $7.25
- **Oregon:** $11.25
- **Pennsylvania:** $7.25
- **Rhode Island:** $10.50
- **South Carolina:** $7.25
- **South Dakota:** $9.30
- **Tennessee:** $7.25
- **Texas:** $7.25
- **Utah:** $7.25
- **Vermont:** $10.96
- **Virginia:** $7.25
- **Washington:** $13.50
- **West Virginia:** $8.75
- **Wisconsin:** $7.25
- **Wyoming:** $7.25

How Do You "Stop the Clock" On Wage and Hour Collective Actions

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- Know the law on overtime and exemptions
- Ensure that employees are properly recording, and the company is paying, for all time worked
- Ensure that overtime is being calculated correctly
- Provide a way for employees to complain if they think there is a problem
- Respond immediately and seriously to complaints
- Periodically spot-check or audit exemption classifications, pay practices, and paperwork
- Make sure the company's general compensation policy meets the new FLSA requirements

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