

## **WHY WAGE AND HOUR CLAIMS WILL REMAIN AT RECORD HIGHS**

### I. WHY ARE WAGE AND HOUR CLAIMS AT RECORD HIGHS?

- A. Many employees feel cheated since unions and other advocates have created the perception that minimum wage should be set at \$15.00 per hour and many state minimum wage laws are scheduled to increase in the near future;
- B. Many employees are working in excess of 40 hours a week on a \$24,000 salary that do not have exempt duties;
- C. Technological advances have allowed certain employees to perform services outside of working hours and respond to e-mails outside of work; which many employers fail to pay for such time;
- D. New job positions are creating a gray area as to whether the positions are truly exempt positions;
- E. Employees are being charged for business expenses without sufficient reimbursements to satisfy minimum wage laws;
- F. Employees are becoming more familiar with wage and hour laws; and
- G. Employers may be required to pay reasonable attorneys' fees if there is even a nominal wage and hour violation.

### II. WAGE AND HOUR LAW PRIMER

- A. What are the primary laws which regulate payment of wages and fringe benefits in Michigan?

1. Federal Law: Fair Labor Standards Act of 1938 (“FLSA”).
2. Michigan Workforce Opportunity Wage Act, which repealed the Minimum Wage Act of 1964 (“MWOWA”).
3. Michigan Law: Wages and Fringe Benefits Act (“MWFBA”).

B. What is minimum wage?

1. As of January 1, 2017, minimum wage is \$8.90 (\$3.38 for tipped employees).
2. On January 1, 2018, minimum wage will be increased to \$9.25 (\$3.52 for tipped employees).
3. Starting in 2019 and thereafter, any increases to minimum wage will be calculated by the average annual change in the consumer price index for the midwest region for the most recent five-year period.

C. Overtime. Federal law requires employers to pay non-exempt employees overtime wages at a rate not less than 1 1/2 times their regular rate of pay for each hour or fraction of an hour worked by the employee in excess of 40 for any given work week.

D. Postings. Employers are required to post of copy of minimum wage laws and other related employment posters.

E. Other laws. As is common with many employment laws, employers should also be aware of all other related laws that may be applicable and/or overlapping (i.e. the Michigan Sales Representative Act). To minimize other applicable laws, discretionary bonuses are preferred to commissions.

III. WHAT IS AN EMPLOYEE'S REGULAR RATE OF PAY FOR DETERMINING OVERTIME?

A. Various types of compensation (other than actual wages) must be included in calculating an employee's "regular rate" for overtime purposes. These forms of compensation include:

1. Awards or prizes received based on the quality, quantity or efficiency of work performed;
2. Bonuses based on the quality, quantity or efficiency of work performed;
3. Bonuses that depend on hours worked;
4. Commission payments;
5. Payments for meals, lodging and other facilities;
6. Shift differentials or "dirty work" premiums; and
7. Tip credits taken by an employer to fulfill minimum wage requirements.

B. In calculating an employee's regular wage rate, employers do not need to take into account additional compensation consisting of the following:

1. Discretionary bonuses;
2. Gifts and certain employee benefit plan contributions;
3. Employee referral bonuses;
4. Paid leave from work;
5. Severance pay;

6. Subsistence pay;
7. Talent fees; and
8. On-call or call-back pay.

#### IV. EXEMPTIONS FROM MINIMUM WAGE AND OVERTIME REGULATIONS

A. The FLSA provides an exemption from both minimum wage and overtime rules for “any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of an outside salesman.” These are typically called the “white collar” exemptions and are defined by DOL regulations. They do not apply to manual laborers or other “blue collar” workers who perform work involving “repetitive operations with their hands, physical skill and energy.”

#### B. General Rules.

1. For the purpose of the exemptions, “salary basis” means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. If the employee is paid an agreed sum for a single job, regardless of the time required for its completion, the employee will be considered to be paid on a “fee basis.”
2. Deductions from pay are permissible when an exempt employee:
  - a. Is absent from work for one or more full days for personal reasons other than sickness or disability;
  - b. For absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice; or

- c. To offset amounts employees receive as jury or witness fees, for military pay; or for certain workplace penalties.
- 3. The employer will lose an exemption if it has an “actual practice” of making improper deductions from salary (there is, however, a safe haven available to employers).

C. Exemptions for Executives.

- 1. An employer is not required to pay overtime wages to "executives." The following test can be used to determine if a particular employee qualifies as an "executive" for this purpose (NOTE: All of the factors must be met):
  - a. The employee's primary duty must be the management of the enterprise or a recognized division or subdivision;
  - b. The employee must customarily and regularly direct two or more other employees;
  - c. The employee must have authority to hire and fire employees or the employee's recommendations as to hiring, firing, promotions, pay or other aspects of the employment status of other employees must be given particular weight; and
  - d. The employee must be paid on a salary basis and earn not less than \$455.00 per week (less if employed in American Samoa).
- 2. The executive employee exemption also applies to any employee who owns at least a 20-percent equity interest in the enterprise in which the employee is employed, and who is actively engaged in its management (irrespective of the other requirements).

D. Exemptions for Administrators.

1. An employer is not required to pay overtime wages to administrative employees. An "administrative" employee is someone who satisfies ALL of the following criteria:
  - a. His or her primary duty is the performance of office or non-manual labor directly related to management policies or the general business operations of his or her employer or the employer's customers. (NOTE: Special definitions and rules apply for persons employed in an administrative capacity by educational institutions which are not addressed in these materials.);
  - b. He or she customarily and regularly exercises discretion and independent judgment; and
  - c. The employee is paid on a salary or fee basis at a rate of not less than \$455.00 per week (less if employed in American Samoa).
2. The phrase "directly related to the management or general business operations" refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished from working on a manufacturing production line or selling a product in a retail or service establishment.
3. The most difficult clause to interpret is that requiring an employee to "exercise discretion and independent judgment." Insurance claim adjusters, tax experts, and employees in the financial services industry are examples of positions that will

generally qualify for the administrative exemption. Those doing ordinary inspection or screening work will generally not qualify.

E. Exemptions for Professionals.

1. Exemptions to the overtime pay laws also exist for employees who are "professionals." An employee may qualify as a "professional" if the following criteria are satisfied:
  - a. The employee's primary duty is either:
    - (i) Performing work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of learning ("learned professionals"); or
    - (ii) Performing original or creative work in an artistic field ("creative professionals").
  - b. The employee receives a salary or fees at a rate of not less than \$455.00 per week (less if employed in American Samoa).
2. This creative professional exemption is generally met by actors, musicians, composers, and sometimes journalists. However, the exemption depends on the extent of the invention, imagination, originality, or talent exercised by the employee.
3. Separately, the rules exempt teachers, as well as licensed attorneys and doctors.

F. Exemption for Highly-Compensated Workers.

1. The regulations contain a separate rule for highly-compensated workers. A highly-compensated employee is deemed exempt if the ALL of the following apply:
  - a. The employee be paid total annual compensation of \$100,000 or more (which must include at least \$455 per week paid on a salary or fee basis);
  - b. The employee performs office or non-manual work; and
  - c. The employee customarily and regularly performs at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.
2. For example, an employee can qualify as an exempt highly-compensated employee if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements for the executive exemption. (NOTE: while the new rule requires only that the employee satisfies one of these duties, the rule demands that the employee customarily and regularly perform these duties.)
3. The regulations include a requirement for those exempt as highly-compensated employees to have a salary of \$100,000 a year or almost \$2,000 per week. Total annual compensation includes salary, commissions, nondiscretionary bonuses, and other nondiscretionary compensation even if not paid out to the employee as due on at least a monthly basis.



G. Computer Employees.

1. Regulations extend the application of the "professional" exemption to certain computer related jobs and fields. To qualify for the computer employee exemption, the following must be met:
  - a. The employee must be compensated either on a salary or fee basis at a rate not less than \$455 per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour; and
  - b. The employee's primary duty consists of one of the following:
    - i. The application of systems analysis techniques and procedures;
    - ii. The design, development, documentation, analysis, or modification of computer systems or programs; or
    - iii. A combination of the aforementioned duties, the performance of which requires the same level of skills.
2. Although job titles are not determinative of the applicability of this exemption, the regulations specifically state that "computer systems analysts, computer programmers, software engineers [and] other similarly skilled workers" are eligible for the exemption.
3. The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment.

H. Exemptions for Outside Salespersons.

1. An exemption from the overtime wage laws also exists for employees who are "outside salespersons." The criteria for determining if an employee qualifies as an "outside salesperson" are as follows:
  - a. The employee's primary duty must be 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; and
  - b. The employee must be customarily and regularly engaged away from the employer's place or places of business.

V. LEARN WHAT TO EXPECT UNDER TRUMP ADMINISTRATION

A. Alex Acosta is now the United States Secretary of Labor.

1. On June 7, 2017, the Department of Labor announced that it was rolling back 2015 and 2016 informal guidance that expanded the "joint employer" doctrine and made it harder to classify workers as independent contractors.
2. Prior to 2015, the joint employer doctrine only applied when a company had direct control over another company's workplace.
3. He also withdrew the 2016 independent contractor informal guidance.

B. Court has yet to rule on the December 1, 2016 Overtime Rule.

1. The Overtime Rule would require:

- a. The annual salary level for exempt employees to be increased from \$23,660 to \$47,476 and remain at the 40% beginning in 2020. Up to 10% of the salary amounts could be satisfied by non-discretionary payments on a quarterly basis (such as bonuses and commissions).
    - b. The annual salary level for highly compensated employees (minimal duties test) to be increased from \$100,000 to \$134,004 and remain at the 90% beginning in 2020 (the base annual salary could be at \$47,476 so long as the overall compensation reaches \$134,004).
  2. The Overtime Rule may be:
    - a. Pursued by the Department of Labor;
    - b. Withdrawn by the Department of Labor to propose a new version; or
    - c. Congress may propose different salary amounts.
  3. On June 7, 2017, a class action lawsuit was filed against Chipotle claiming that the overtime rule is in effect since:
    - a. The injunction does not apply to private companies; and
    - b. The overtime rule is in effect until the court issues a final ruling.
- C. Proposed 2017 budget cut of 5% (\$676 Million) at the Department of Labor.

- D. Proposed 2018 budget cut of 20% (\$2.4 Billion). However, the proposal plans to include 6 weeks of paid family leave to new mothers and fathers.
- E. Focus on training versus searching for violations.

VI. MILLION DOLLAR LESSONS LEARNED FROM 2016-2017 CASE LAW

- A. Misclassifying certain assistant store managers as exempt resulted in a \$13.5 million settlement.
- B. Failing to pay for off-the-clock duties resulted in a \$9.5 million settlement.
- C. Time spent waiting for managers to close/open stores or provide breaks resulting in class action lawsuit settlement of \$8.5 million for a retail store.
- D. Failing to pay for time spent booting up and shutting down computers resulted in a \$6.2 million dollar settlement involving call center nurses.
- E. Misclassifying independent contractors and failing to pay overtime resulted in a \$1.1 million dollar settlement in the manufacturing industry.

VII. JOINT EMPLOYER LIABILITY

- A. Vertical joint employment includes relationships with staffing agencies, subcontractors and others that provide services.
- B. Horizontal joint employment includes separate employers that have a relationship with each other and receive services from the same employee.

## VIII. INTERNS

- A. There is a 6 factor test identified in the Department of Labor's Fact Sheet #71.
1. 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;
  2. The internship experience is for the benefit of the intern;
  3. The intern does not displace regular employees, but works under close supervision of existing staff;
  4. 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;
  5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
  6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

## IX. COMPENSABLE TIME FOR NON-EXEMPT EMPLOYEES

- A. Suffer or permit to work. This means that even prohibited work must be paid for.
- B. Lunch breaks under 30 minutes and regular breaks under 20 minutes must be paid.
- C. Time worked remotely must be paid.
- D. On-call time is compensable if the employer imposes restrictions on the employee's use of that time.

X. DAMAGES

- A. Back pay for all unpaid overtime (typically going back two years...which may be extended to three years if the violation was willful).
- B. Double the amount of back pay. This is the rule rather than the exception.
- C. Attorneys' fees.
- D. Employees may recover emotional distress damages in a retaliation claim asserted under FLSA.

XI. SETTLEMENTS

- A. It is unlawful for employees to waive their right to receive overtime for all hours worked.
- B. Most settlement agreements will not be valid unless approved by a judge, investor and/or sophisticated attorneys.

XII. TRAINING EMPLOYEES AND MANAGEMENT ABOUT COMPLIANCE AND ENFORCEMENT

- A. Job descriptions need to be updated to identify exemptions, if applicable.
- B. If hourly employees are permitted to work remotely, procedures need to be put in place to track time.
- C. Training needs to be done on at least an annual basis to minimize exposure.