FLSA – COMMON PITFALLS – WHAT YOU DON'T KNOW CAN HURT YOU

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I. SUMMARY OF IMPORTANT FLSA DECISIONS SINCE MARCH 2024

A. Burden of Proof.

1. **E.M.D. Sales, Inc. v. Carrera.**

a. Classification case, where outside sales team argued should have been classified as non-exempt.

b. The "default" is that all employees are covered by the FLSA, *i.e.* "Non-exempt" from the statute's overtime requirements.

c. Employer has the burden of "proving" that the employee is exempt.

i. "Preponderance of the evidence" means more than a coin toss or "51%".

ii. "Clear and convincing" is more stringent; some courts say 80-90% burden, just lower than "beyond a reasonable doubt" criminal standard.

2. United States Supreme Court resolved split in the federal courts over the appropriate standard and found that "preponderance of the evidence" is the burden of proof in exemption cases.

a. Why does it matter?

i. Job description supported by some testimony is likely a "preponderance."

ii. "Clear and convincing" likely means most employees in that position supporting employer's side.

b. Applies to all exemption cases, not just sales.

B. Salary Threshold for Executive, Administrative and Professional Exemption.

1. **Plano Chamber of Commerce, et al v. United States Department of Labor.**

a. Executive, administrative and professional employees are exempt.

b. Statute does not contain any description of the specific duties for the EAP exemption or even mention salary thresholds. The only "clue" in the statute is the phrase "*bona fide,"* which means "genuine," and the use of the terms, "executive, administrative and professional."

c. Department of Labor made regulations soon after the statute was passed.

d. You're familiar with them. For "administrative" exemption, "the employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers."

e. Always had a salary component, but the salary component was meant to be a proxy for the duties test and not a "white collar" minimum wage. Historically set at the 10% percentile of average salary in the South (where salaries and wages tend to be lower). In most cases, in the real world, if an employee did not meet the salary threshold, he or she also did not meet the duties test.

f. Rule changed in 2004; the threshold was raised to the 20% percentile. This is likely because the minimum wage had not been adjusted since 1997.

g. Rule changed in 2016 and nearly doubled the salary threshold into the 40% percentile. It also provided for automatic, indexed adjustments every three years. Changed the status of 4.2 million employees.

    i. This was struck down by a federal court as illegitimate because it essentially created a minimum wage for EAP workers.

h. Rule changed in 2019, with a modest increase that stayed within the 20th percentile and no automatic adjustments. This one also challenged, on the ground that ***any*** salary threshold is impermissible because it creates requirements not found in the statute.

    i. The regulation was upheld because the salary threshold was low enough to be a proxy, which is a legitimate exercise of the Department of Labor's powers.

i. Rule changed in 2024. Two-tiered increase in salary threshold from $684 to $844 on July 1, 2024, and to $1,128 on January 1, 2025. This would change the status of 5 million employees. Also included the automatic increases.

    i. This was a challenge to the decision striking down the 2016 rule, a decision that was not appealed because of the change in administration.

    ii. Found that the rule effectively created a white-collar minimum wage and therefore was an invalid use of the power delegated to the Department of Labor.

    iii. Case is pending in the Fifth Circuit Court of Appeals.

II. MISCLASSIFICATION OF EMPLOYEES.

A. Independent Contractor.

1. Rule implemented in 2024, and is a "totality of the circumstances" test, which means that there is no bright line.

2. Relevant factors are:

a. opportunity for profit or loss depending on managerial skill;

b. investments by the worker and the potential employer;

c. degree of permanence of the work relationship;

d. nature and degree of control;

e. extent to which the work performed is an integral part of the potential employer's business; and

f. skill and initiative.

3. Case filed in January 2025 by a salesman who was classified as an "independent contractor" of a company that sold gutter filters.

a. Plaintiff claimed he was "on call" 15 hours per day, 6 days per week.

b. On a Monday night, told to handle a potential sale that was 2.3 hours away from the salesman's home.

c. Salesman decided to take the next day off and vacation near the place of the sales call.

d. Company called and told him to be at a potential sale that evening. When he said he would not take the call, he was "fired."

i. This makes it sound like he was an employee.

B. EAP Exemption.

1. Problem often arises because rules written for manufacturing economy and our economy is a service economy. Regulations clearly state distinguish between those employees who produce the widgets and those employees who "assist with the running or servicing of the business."

2. What happens when the business ***is*** services and not production.

3. A "Move-In Coordinator" for a retirement home claimed to be non-exempt in a recent suit. Employer noted that she had considerable discretion over what work needed to be done to

prepare a unit and employee argued that she did not have actual decision-making authority, but was a go-between acting within parameters set by employer.

4. A "Logistics Coordinator" found to be non-exempt. The employer provided "middleman" services between a common carriers and customers. Court found that employees were essentially "production" employees and not administrators assisting with the "running or servicing of the business."

5. These employers hire consultants to frame the job so that it will be exempt. This may matter in finding that the employer acted in good faith, but it does not impact the test.

III. DEDUCTIONS FROM SALARIES

A. The EAP Exemption/Salary Basis.

1. Even if the duties and salary threshold tests are met, the exemption only applies if the employee is paid on a "salary basis."

2. This means the employee is paid "predetermined amount" each pay period, which represents all of her compensation, and which does not vary because of the "quality or quantity of the work performed."

3. Employer may not dock pay, if the employee is "ready, willing and able" to work that week.

4. May deduct if employee does not work and does not make use of available PTO.

5. Occasional docking will likely not impact exempt status. Employer must have an "actual practice" of docking.

B. "Uncontrollable Absence."

1. What if employee cannot make it in because of inclement weather?

2. Leave docking vs. salary docking.

IV. OFF-THE-CLOCK WORK

A. Must pay for all time "suffered or permitted" to work.

B. Does not have to authorize or know about it. Employee does not have to report overtime for the employer to be obligated to pay overtime.

1. Case out of New York where paramedics were required to perform safety checks before and after shifts.

2. Only paid for shifts.

a. Employer had written policy that required employees to report overtime.

b. The failure of employees not to report overtime found not to be a defense, where there was evidence that employers knew of the safety checks.

C. Cannot divide preparatory or wind-down activities into "incremental" tasks to avoid this rule within the *de minimis* rule.

1. Recent case filed by shift managers of Little Caesars corporate stores. The employees received work-related calls and text messages they had to respond to on a regular basis, regarding scheduling, ordering, inventory and similar matters.

2. Another recent case where employees were expected to "receive directions" and "inspect equipment" as part of shift transfer, but before they clocked it.

D. How to avoid unauthorized "off the clock" work.

1. Clear policy that the company does not permit employees to work off the clock. Provide examples of what working off the clock means to avoid misinterpretations.

2. Make sure employees take lunches and breaks ***away from their desk***.

3. Do not allow hourly employees to access their email remotely.

4. Train managers and supervisors to make sure that employees don't stay late to finish work and are clocked in for every minute they work.

5. While you can discourage employees from working outside scheduled work hours, they cannot refuse to pay employees for any time worked.

E. Probationary employees must be paid.

1. Case filed in January on behalf of someone who was not paid for the two days he worked as a "screen test" for whether he would be hired.

2. He was "working."

V. BONUSES AND OVERTIME CALCULATIONS

A. Shift premiums.

1. Add and average.

B. Non-discretionary bonuses.

1. This must be included in determining “regular rate of pay”.

2. Mileage does not have to be included. It’s considered reimbursement of business expense.

C. Employer cannot reduce wage as a way to avoid actual overtime.

1. Home healthcare worker reduced wages for weeks when employee worked overtime, which had the effect of paying the employee straight time for the extra hours.

2. Reductions are permissible, as long as they are not tied to the number of hours worked.

VI. BREAKS

A. Issues arise when employer does not pay for meal breaks and automatically deducts for meal breaks.

1. Such policies are not *per se* unlawful.

2. Employers have deducted meal break time from paychecks, on the assumption that employees took mandatory meal breaks.

3. Must have a way for employee to notify employer that they worked through the meal break, and time therefore should be compensated.

B. Even if employees are required to notify employer when they don’t use meal break, the employees can come back and sue later for unpaid wages.

C. But employee has to show that she ***worked*** during meal break; not just that she was on the work site during meal break.

VII. TRAVEL TIME

A. Do not have to compensate for:

1. Commuting to and from work.

2. If employee works two shifts, the commute home in between shifts is not paid work.

B. Do have to compensate for:

1. Mandatory travel between work locations.

2. Mandatory return to site at end of shift.

a. To load or unload

b. Safety checks.