

LEGAL INFORMATION FOR THE CONSTRUCTION INDUSTRY

Inside This Issue: Federal Wage & Hour Investigations: Nuts & Bolts

BEWARE OF OVERTIME CLAIMS

The Department of Labor's Wage and Hour Division (WHD) has doubled its investigative and enforcement staff / budgets for 2011. The construction industry is a main target of its multi industry efforts.

To prevent potential liability, employers should appreciate the scope of the Fair Labor Standards Act (FLSA), WHD investigative procedures and some common industry pit falls.

The FLSA

The FLSA, one of several laws enforced by the WHD, imposes three major requirements on employers.

First, employers must pay all nonexempt employees a minimum wage of at least \$7.31 per hour. (Contractors performing on government-funded construction projects also need to pay "prevailing" wages under the Davis-Bacon Act.)

Second, if a nonexempt employee works overtime (more than 40 hours in a single work week), the employer must pay time and one half the employee's regular rate for all overtime hours. The regular rate includes hourly compensation, salary, contractual bonuses, commissions and other remuneration. Certain limited types of payments need not be included.

Finally, employers must maintain written records of hours worked, rate of pay and other similar information.

WHD

The WHD enforces the FLSA by conducting investigations, which are initiated by complaints or by the WHD.

Initial Conference: To start, investigators usually set up an appointment with an owner or upper-level manager, but they also may stop by unannounced. The investigator can ask about the nature of the business, its size, gross revenues, payment methods and other general questions.

Records Review: The investigator reviews and may copy payroll records, employee records, employment contracts and other relevant documents. Records are the primary means to substantiate compliance and to defend against alleged violations.



Employee Interviews: Investigators interview employees about their job duties, hours worked, wages and other relevant topics. Interviews provide a way to identify issues that are not readily apparent on the records. Most interviews are conducted without the employer or its representative present to protect the integrity of the investigation and prevent employer intimidation. However, this privacy does not extend to upper-level managers, as they can bind the corporation. No wise employer will permit an upper-level manager to be interviewed without the employer or its representative present.

Back Wages: The investigator then calculates back wages, or the employer may be asked to do so. Employers always should ask the investigator to consider vacation time, holidays and other non-working days that could reduce the amount of back wages. In addition, the WHD and courts interpret the FLSA differently in certain parts of the country. Employers should consult with an attorney, as these differences may reduce potential back wages.

Final Conference: Investigators explain their findings and invite the employer to come into compliance at the final conference. If the employer agrees, the investigators will explain the back wages discuss possible civil money penalties and provide instructions for payment. If the employer disputes the findings or back wages, the case may be referred to management for review, or potential litigation.

Construction Industry Violations

Several industry practices almost always result in notice of violations.

Banking Hours: The practice of banking hours occurs when, for example, a nonexempt employee works 45 hours in a week, gets paid for 40 hours, and has the expectation that the additional five hours will be paid later in the form of wages or vacation time. Many employers and employees like this practice because it eases fluctuations in employment costs and supplements wages when little work is available. However, it is not permitted under the FLSA.

The danger here is the corporate officer may not even know of the practice. Often a foreman may receive a directive to reduce labor costs and eliminate overtime. In turn, the foreman requires employees to bank time instead of cutting hours. Alternatively, a nonexempt employee may request that his overtime be banked to provide additional vacation time for a special event or to supplement wages in the winter months. The employer is liable for back wages either way.

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Employers also should be aware that the Internal Revenue Service independent contractor test differs from the FLSA test. While the differences are not significant, employers need to use the tests in the appropriate context.

Pre- and Post-Shift Time: Time spent performing work for the benefit of the employer must be compensated. For example: Regular activities like mandatory safety meetings, loading or unloading work trucks, cleaning or compensable work time. However, many employers fail to compensate employees for these duties. The real danger here is the potential for overtime. Most employers require their employees to work 40 hours per week to maximize their workforce without going into costly overtime. Even an additional 15 minutes per day should be considered overtime, which adds up quickly when it is calculated on a weekly basis for all employees for a two-year period.

In addition, the WHD frequently finds that when an employer fails to compensate an employee for loading a truck or attending an early morning meeting at the central office, it also usually fails to pay the employee for travel to the jobsite. If the employee has engaged in work that benefits the employer or attended a mandatory meeting, then subsequent travel time usually must be compensated as well.

Lunch Time: Time spent at lunch is generally not compensated and may be deducted from the hours worked weekly. However, a specific lunch time policy should be enacted and employees should not be permitted to regularly work through their lunch hour.

Travel Time: Commuting to and from the employers office is not compensable. However, if the non-exempt employee is traveling to and from job sites, the time from when the employee reports to work and then travels to a job site in the employer provided vehicle, may be subject to FLSA and overtime exposure. If the employee drives himself to the job site the commuting to work policy applies and no FLSA exposure is triggered. Specific policies and procedures should be enacted to minimize exposure.

Wage and hour issues are making a stronger impact on the construction industry, even in these difficult economic times. To reduce potential liability, employers should become familiar with the laws involved, review their current policies and, if appropriate, consult with an attorney who has experience with these laws and WHD investigations.



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