

Department of Labor Gets Busy Time for a Wage and Hour Review

By Jillian Barron

The Department of Labor (DOL) spent much of its time and resources in 2004 preparing and advocating for a revised set of “white-collar” exemptions to the Fair Labor Standards Act’s (FLSA) overtime requirements. The new rules went into effect on August 23, 2004. With those revisions in place, DOL has begun interpreting their application in specific circumstances. In addition, DOL has turned its attention to enforcement of wage and hour rules, with a particular focus on low-wage workers. A survey of the issues involved in some of DOL’s recent enforcement actions and opinion letters provides a good reminder for employers to review and update their wage and hour policies to reduce the risk of a DOL audit and possible legal action.

Enforcement Actions Focus on Low-Wage Workers. In 2004, DOL collected about \$165 million in back wages under the FLSA. A substantial portion of DOL’s enforcement resources was focused on low-wage workers in industries such as health care, hotels and motels, agriculture, day care, garment manufacturing, and janitorial services and its recovery for low-wage workers increased significantly during the year. DOL also expanded its low-wage focus to include “new economy” workers in the computer and call-center industries. In many call centers, employers reportedly are paid only for the period from their first through their last calls, even though they are responsible for tasks before and after those times. Recently, DOL obtained two substantial settlements for call center employees who were not being compensated for “off-the-clock” time spent logging onto computers, reading updates, and preparing to make or take calls. DOL plans to continue its enforcement activities in this sector in 2005.

Bonus Plans for Nonexempt Employees Rejected. As a general rule, FLSA regulations require that incentive bonuses—e.g., bonuses offered in advance for increased production—be included with other earnings to determine the hourly rate of pay on which overtime is then calculated. Further, with only limited exceptions, bonuses or premiums cannot be applied to satisfy overtime obligations. In several recent letters, DOL found that specific incentive bonus plans violate these rules. In one case, an employer sought to satisfy its overtime obligations with a bonus consisting of a lump sum based on the volume of an employee’s overtime deliveries. DOL determined the bonus could not be applied to overtime at all, because it did not take into account the number of hours of overtime worked. In another case, DOL rejected a flat \$3 per hour production bonus that applied to both regular and overtime hours, because it failed to reflect that overtime must be one and one-half times the regular hourly rate. In these instances, despite having paid bonuses, the employers remained responsible for unpaid overtime.

Findings for Nonexempt Status. DOL has issued opinion letters rejecting exempt status for two categories of employees, paralegals and junior claims adjusters. With regard to the former, DOL concluded that because most paralegal training programs are only two years, paralegal positions ordinarily do not meet one of the parameters for the professional exemption, *i.e.*, requiring advanced knowledge “customarily acquired by a prolonged course of specialized intellectual instruction.” Even where a paralegal has obtained a four-year degree, the professional exemption will apply only if the degree is in *another* professional field for which it is standard prerequisite, and the paralegal applies advanced knowledge from that *other* field in his/her paralegal duties. As to claim adjusters, although the updated white-collar rules state that adjusters generally meet the duty requirements for the administrative exemption, DOL determined that where those employees perform at a junior, less responsible level, they are not covered by that exemption. Factors DOL found weighing against exempt status were the adjusters’ lack of discretion and independent judgment, as evidenced by: a requirement to strictly follow established investigation policies and procedures;

lack of authority to determine issues such as negligence, comparative fault, coverage, and liability; very limited monetary authority for approving payments; and the requirements of supervisory approval whenever there is a question as to the appropriateness of payments. DOL noted that its decision regarding the adjusters was based on the specific facts presented to it, and that exempt status, in general, requires a case-by-case assessment.

Wage and Hour Problem Areas and Enforcement Risks. DOL’s recent activities highlight a few of the areas in which wage and hour errors are commonly made. These include:

- ✓ Mistaken attribution of exempt status, with consequent failure to pay overtime
- ✓ Failure to properly include non-discretionary bonuses in calculation of regular pay, with consequent failure to pay sufficient overtime
- ✓ Failure to pay for necessary work-related activities at beginnings and ends of shifts.

DOL or the employees involved may initiate legal action to recover unpaid wages in such cases. If violations have occurred, the employer may be liable for double damages and attorney’s fees. Wages can be recovered for two years back from when the suit is filed, or three years if the employer’s violation is found to have been willful. Similar damages are available under Washington State wage laws, which have a three-year statute of limitations regardless of whether the violation is willful.

Take Time to Evaluate Wage and Hour Practices. Given the potential risks of enforcement, and DOL’s active pursuit of unpaid wages, employers should periodically review their wage and hour practices to ensure they meet both federal and state requirements. If you have any questions in this area, employment counsel can assist you in evaluating your situation and ensuring your practices are legally compliant.

This Employment Law Note is written to inform our clients and friends of developments in labor and employment relations law. It is not intended nor should it be used as a substitute for specific legal advice or opinions since legal counsel may be given only in response to inquiries regarding particular factual situations.



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