

## FEDERAL WAGE AND HOUR LAW: EMPLOYER OBLIGATIONS

### SUMMARY

Prominent among the federal and state laws regulating workers' compensation and terms of employment is the Fair Labor Standards Act. This Act prescribes minimum wages and requires overtime rates for more than 40 hours of work per week for most blue collar employees. The Secretary of Labor, through the Wage, Hour and Public Contract Division, has broad investigative and enforcement powers and individual employees may also sue for wages due under the standards prescribed by the FLSA. This BMA outlines the principal features of the FLSA. No effort is made here to deal with individual cases and member companies should consult with their counsel if they have specific questions or problems concerning the Act or its administration.

### COVERAGE AND EXEMPTIONS

Until 1961, the FLSA covered only particular employees engaged in interstate commerce, and in the production of goods to be shipped in interstate commerce. In 1961, Congress expanded coverage by introducing the "enterprise coverage" test. Thus, with the exception of certain classes of workers, regardless of the nature of an individual employee's work, this individual was brought under the FLSA if the employer was "an enterprise engaged in commerce or in the production of goods for commerce." Accordingly, before an employee can be subject to the Act, it is essential to consider whether the "enterprise coverage" of the Act.

The Fair Labor Standards Act contains several exemptions from the overtime pay and minimum wage provisions for particular groups of workers. In order to qualify as an "executive" within the white collar exemption, an employee must be paid on a salary basis and have the primary duty (generally 50% or more of his or her time) of managing an enterprise or department. He or she must customarily and regularly direct the work of two or more employees. The executive must customarily and regularly exercise discretionary powers, and non-exempt work performed by executives in retail or service establishments must be less than 40% of their weekly hours. Non-exempt work performed by any other executive may not exceed 20% of his or her weekly hours.

For those executives paid \$250.00 a week or more in salary the test is somewhat modified. As long as a higher paid executive consumes 50% or more of the day managing and regularly directs the work of two or more other employees, this employee then will qualify for the exemption.

To qualify as an administrative employee, an individual must spend 50% or more of his or her time performing office or non-manual work relating to the general business operations of the employer or the employer's customers and be paid on a salary basis. This individual must regularly and directly assist a proprietor or executive or an administrative employee. To retain an exemption, the employee must regularly exercise discretion and independent judgment. Non-exempt work performed by an administrative employee in a retail or service establishment must be less than 40% of the weekly hours. And for such non-exempt work performed by any other administrative employee, the limitation is not more than 20% of his or her weekly hours.

As in the case of an executive, there is a somewhat shorter test for an administrative employee who is paid \$250.00 a week or more. As long as this higher-paid individual spends 50% or more of the day performing office or non-manual work relating to management policies or generate business operations of the employer or the employer's customers, and also exercises discretion and independent judgment, then he or she will satisfy the exemption requirement.

The exemption for a "professional employee" requires that the individual generally spend 50% or more of his or her time performing work in a field requiring scientific or specialized study. Other duties must include the performance of work predominantly intellectual and varied - in other words, not routine or standardized. The individual must consistently exercise discretion and judgment, and non-exempt work is limited to 20% of the professional employee's weekly hours worked. To qualify, the individual must be paid on a salary or fee basis.

There is a shorter test for “professional” employees also, if that individual is paid \$250.00 a week or more, and if he or she has the primary duties as described above, and consistently exercises discretion and independent judgment then the individual will qualify.

Remember that, as a general rule, exemptions from the Fair Labor Standards Act are figured on a work-week basis. An employee who is within the Act’s coverage must be exempt during the whole week, or he or she will have to be paid the statutorily required wages for all of the hours worked, including those devoted to exempt work. Two or more exemptions can be “tacked” together to exempt an employee during an entire work week.

In view of the remedial purposes of the Fair Labor Standards Act, the courts have consistently held that all exemptions from its provisions must be strictly construed. Thus, before an employee may be denied the benefits of the Act, it must be shown that this individual’s activities are squarely within the scope of exemption. The burden of proving exemption status of an employee rests squarely upon the employer, and neither the employee nor the government is required to affirmatively negate the statutory exemptions.

Lastly, it cannot be over stressed that exemptions from the minimum wage, equal pay, overtime and child labor provisions of the Fair Labor Standards Act require the necessary keeping of records prescribed by administrative regulations. Failure to keep them leaves an employer open to an injunction even though the minimum wage, equal pay, overtime pay, or child labor provisions have not been violated. Employers’ records are vital, and it is suggested that you consult with your attorney in order to make sure that all records are being properly maintained.

## **MINIMUM WAGE REQUIREMENTS**

The term “wage” includes the employer’s “reasonable cost” in providing board, lodging or other facilities, unless agreed upon in a union contract that such items will not be part of the statutory minimum wage. Deductions from the employee’s wages for pensions, health and welfare plans which cut into the statutory minimum wage are permitted, if the employees agree and neither the employer nor anyone acting on their behalf derive any benefit from the transaction. Otherwise, deductions are generally not permitted.

## **OVERTIME PAY REQUIREMENTS**

A covered employee working in excess of 40 hours in a work week must be paid one and one-half times the “regular rate” for those hours beyond 40. Overtime pay is figured on a weekly overtime basis. The FLSA does not require daily overtime pay or overtime rates for Saturday, Sunday, or holiday work nor does it require overtime rates for pre-shift, night or sixth - and seventh - day work. If premium pay under these circumstances is required by a collective bargaining agreement or state or other federal laws, the FLSA of course, cannot be used as an excuse for non-payment.

The most important factor in overtime computation is determining an employee’s regular rate, which is, in simplest

form, the average of the employee’s hourly earnings over the work week. The difficulty arises when an employee, during a single work week, works on different jobs or different shifts which have different wage rates, or when the employee receives such benefits as bonuses or awards. Generally, the regular rate is derived by adding all compensation for the week and dividing that amount by total hours worked. Pay for holidays, vacations or the premium paid for working extra time such as weekends, and pay for bonuses which are not promised and which are not tied to productivity or attendance can be excluded.

Specific questions on overtime pay and varying pay plans should be referred to your attorney.

## **ADMINISTRATION AND ENFORCEMENT**

**Coverage.** The Wage and Hour Division of the Department of Labor, headed by the Wage and Hour Administrator, is charged with enforcement and administrative responsibilities under the FLSA. The Division conducts inspections and investigations to determine compliance with the Act, and issues regulations and interpretations implementing the Act.

Four types of legal proceedings are involved in the enforcement of the Act: 1) employee suits for back wages; 2) suits by the Secretary of Labor for back wages on behalf of employees; 3) suits by the Secretary seeking to enjoin shipment of goods in interstate commerce that have been produced by an employee violating the Act; and 4) criminal actions by the Department of Justice against willful violation.

**Inspection.** The Wage and Hour Division is empowered to investigate and collect data on wages, hours, and working conditions for covered employees in any company subject to the Act. Inspectors may gain access to places of business and to records. They may also question employees, and generally look into anything relevant in determining whether the law has been violated.

Investigations may generate from an Administrator’s own initiative or in response to complaints from practically any source. Names of complaining parties are not revealed, and inspectors may not discuss a situation in one plant with the personnel of another plant.

Should a company refuse the inspectors access to records, the Administrator may issue a subpoena ordering the company to produce the records, and if this is refused, the subpoena may be enforced by a federal district court. The Administrator need not prove that the particular company is covered by the Act in order to obtain enforcement.

**Injunction Actions.** Upon finding what is believed to be a violation, the Wage and Hour Division often attempts to negotiate a settlement with the employer for payment of back wages and an assurance of future compliance with the Act. The settlement may be entirely informal, or it may be embodied in a consent judgment approved by the court. A consent judgment has the same effect as an injunction. In either case, the Administrator has considerable leverage because of the “hot goods” section of the Act, which prohibits shipment in interstate commerce of goods produced by workers paid less than the required minimum wage or overtime compensation. In return for the restitution of back wages and a promise of future

compliance, the Administrator may agree not to enforce the “hot goods” ban and tie up the company’s goods.

To obtain an injunction, the Administrator must show that, without it, the alleged violations will probably continue. The danger of an injunction is that it continues in effect indefinitely. Once a wage-hour consent judgment has been entered, or an injunction has been rendered by a court, the company may be found guilty of contempt of court if it again violates the Act in any of the ways prohibited by the consent judgment or injunction order. If contempt is found, damages and back wages may be awarded back to the date of the first violation.

**Wage Suits.** The Secretary of Labor has authority to bring wage suits under the Act on behalf of employees. The liability of an employer in such a suit is for unpaid wages but an equal additional amount as liquidated damages may be obtained in some cases.

An employee who has not received wages prescribed by the Act might sue and recover these wages, plus liquidated damages in an equal amount and attorneys’ fees. In order to be able to collect from the employer, an employee must prove that the amount of back-pay is actually owed him or her by the company. The number of suits brought either by the Secretary of Labor or by employees is relatively small, since most violations are inadvertent and are generally worked out administratively.

The statute of limitations on back wages is two years or, if the violations are willful, three years.

## **RECORD-KEEPING REQUIREMENTS OF THE ACT**

Every employer who is subject to provisions of the Fair Labor Standards Act is required to make and preserve records concerning employees - their wages, hours, and other terms and practices of the employment setup. Although no particular form of records is actually prescribed by the regulations,

it is important that all employers keep adequate wage-hour records, for these are not only required by the Act as part of its enforcement pattern, but these records would also serve to protect the employer against employees’ frivolous suits. An employer whose workers are covered by the minimum wage provisions, or by both the minimum wage and overtime provisions of the Act, must maintain and preserve records which show for each employee the following:

- Name in full as used for social security records, and number or identifying symbol, if such is used in place of the employee’s name, on any time work or payroll records.
- Home address including zip code.
- Date of birth if the employee is under 19 years of age.
- Sex and occupation in which employed.
- Time and day of week on which the employee’s work week begins.
- The regular hourly rate of pay. The basis on which wages are paid and regular rate exclusions.
- Hours worked each work day and total hours worked each work week.
- Total daily or weekly straight time earnings or wages.
- Total weekly overtime excess compensation.
- Total additions to, or deductions from, wages paid each pay period.
- Total wages paid each payday.
- Date of payment and the pay period covered by payment.
- Retroactive wage payment under government supervision.

**This BMA was prepared by NTMA Labor Relations Counsel, Alan Berger, Partner; McMahon, Berger, Hanna, Linihan, Cody & McCarthy, St. Louis, MO.**