WAGE & HOUR ISSUES: FLSA, COACHES AND CASTLE ROCK

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FLSA AND STATE LAW

FAIR LABOR STANDARDS ACT & MINIMUM WAGE ACT

- FLSA - federal
- Establishes minimum wage, overtime pay, record-keeping, and child labor standards for all workers
- Dep’t of Labor’s regulations amended in 2004; Obama wants to amend again

- MWA - state
- Dep’t of Labor & Industries has no plans to revise our regulations, which still mirror the old federal regulations

FLSA sets minimum standards, but states can provide greater protections to employees
Minimum wage:
- $9.47 per hour in Washington
- Only $7.25 under FLSA
- Must follow Washington’s more protective rule
Overtime pay: workers must receive 1.5 times their regular hourly rate for all hours worked over 40 per week (exemptions for certain types of employees)

Three-year statute of limitations
Double damages for willful violations
Attorneys’ fees and costs to prevailing plaintiffs

Regular rate of pay will be calculated:
- $1000 ÷ 50 hours = $20/hour
Unpaid overtime owed:
- $10 (.5 OT premium) x 10 hours OT = $100/week
For three years = $15,000
Double damages = $30,000
Now multiply by the number of assistant managers in a class action, and add attorneys fees and costs: = $$$$$!!!
COMMON TYPES OF CLAIMS

- Misclassifying employees as exempt
- Improperly “docking” exempt employees’ paychecks or leave banks
- Not paying non-exempt employees for all hours worked
- Miscalculating overtime for non-exempt employees

EXEMPTIONS

- Certain types of workers are exempt from minimum wage and overtime rules:
  - Executive
  - Administrative
  - Professional
  - Computer
  - Outside sales
  - Highly compensated (federal only)
- An employee can qualify for exemption in more than one category

WHY EXEMPT THESE EMPLOYEES?

- Minimum wage almost always exceeded for these “white collar” employees
- Doesn’t make sense to apply overtime rules to the type of work done or the flexibility given to these employees to manage their own schedules
Apply the rule that is most favorable to the employee
- Most favorable = classifies employee as non-exempt, so the employee can have minimum wage and overtime protections
- When there is no State rule . . .

WASHINGTON COURTS GENERALLY LOOK TO DEVELOPMENTS UNDER THE FLSA. **But . . .**
- The Washington Supreme Court has, on occasion, decided to refrain from borrowing developments under the FLSA when refraining to use the FLSA standard favors employees. See e.g., Drinkwitz v. Alliant Tech. Systems, Inc., 140 Wn.2d 291, 996 P.2d 582 (2000) (refusing to adopt FLSA’s window of correction for the Washington Minimum Wage Act).

State rules say... | Federal rules say... | Result
---|---|---
Non-Exempt | Non-Exempt | Non-Exempt
Non-Exempt | Exempt | Non-Exempt
Exempt | Non-Exempt | Non-Exempt
Exempt | Exempt | Exempt
TWO-PART TEST

Employees are exempt if...
1. They are paid a minimum weekly salary **AND**
2. They meet specific job duty requirements

TIPS TO REMEMBER

- Just paying someone a salary instead of paying by the hour does not, by itself, qualify the employee for an exemption. Each employee must meet the "job duties" test as well!
- Job TITLES are not determinative – you must analyze the actual job duties.

EXECUTIVE EXEMPTION

- Minimum weekly salary
  - Paid on a "salary basis"
  - At least $455 per week
EXECUTIVE JOB DUTIES

- Primary duty must be managing an enterprise, or managing a department or subdivision of the enterprise; **AND**
- Must customarily and regularly supervise the work of at least two or more other full-time employees; **AND**
- Must have authority to hire/fire, or suggestions and recommendations about hiring/firing/promotion must be given particular weight.

WASHINGTON’S RULES

- Long test: contains additional factors
- Short test:
  - Primary duty is management
  - Supervises other employees
  - But doesn’t include the federal requirement of hiring/firing authority

*The federal test exempts fewer employees than Washington’s short test, so use the federal rule!* 

ADMINISTRATIVE EXEMPTION

- Minimum weekly salary
  - Paid on a “salary basis” OR a “fee basis”
  - At least $455 per week
**Administrative Job Duties**

- Primary duty must be the performance of office or non-manual work related to the management or general business operations of the employer or employer’s customers; **AND**
- Primary duty must include the exercise of discretion and independent judgment on matters of significance

**Washington’s Rules**

- Long test: adds a few additional factors to federal test
- Short test: identical to federal rule and should be followed

**Examples**

- Federal rules say probably YES
  - Insurance claims adjusters
  - Financial services industry employee
  - Non-supervisory project team leader
  - Executive or administrative assistant
  - HR manager
  - Purchasing agent
  - Retail buyer who evaluates reports on competitors’ prices

- Federal rules say probably NO
  - Selling financial products
  - Personnel clerk who screens job applications
  - Inspection work or quality assurance
  - Public sector safety inspectors

*Why? Follows a set of prescribed standards rather than exercising independent judgment*
**PROFESSIONAL EXEMPTION**

- Minimum weekly salary
  - Paid on a “salary basis”
  - Or a “fee basis”
  - At least $455 per week

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**PROFESSIONAL EXEMPTION**

- Two categories:
  - Learned professionals
  - Creative professionals

*Washington’s rule is basically the same*

- Special federal rules for journalists, teachers, doctors, and lawyers

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**LEARNED PROFESSIONAL JOB DUTIES**

- Primary duty must be work requiring advanced knowledge and consistent exercise of discretion and judgment; AND
- Advanced knowledge must be in field of science or learning; AND
- Advanced knowledge must be customarily acquired by prolonged course of specialized intellectual instruction.
### Federal rules say probably YES
- Certified medical technologists
- Registered nurses
- Medical/dental assistants
- CPAs
- Professional chefs
- Fitness trainers
- Funeral directors

### Federal rules say probably NO
- Licensed nurse practitioners
- Line cooks or prep cooks

**Why? Jobs don’t require advanced, specialized academic degree or certification**

### Creative Professionals: Job Duties

Primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

### Creative Professionals

<table>
<thead>
<tr>
<th>Federal rules say probably YES</th>
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<tbody>
<tr>
<td>Actors</td>
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<td>Musicians</td>
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<td>Composers</td>
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<td>Conductors</td>
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<td>Vocal soloists</td>
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<td>Painters</td>
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<table>
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<tr>
<th>Federal rules say probably NO</th>
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<tbody>
<tr>
<td>Copyist</td>
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<tr>
<td>Cartoon colorist or animator</td>
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<td>Photograph retoucher</td>
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**Why? Another employee has primarily done the creative work**
COMPUTER EXEMPTION

Minimum weekly salary:
- Washington’s rule: at least $27.63/hour ($55,260/year)

More protective than the federal standard (which gives employers the choice of using this hourly rate or the lower $455/week salary/fee test), so it must be applied.

COVERED EMPLOYEES

- Washington’s rule is similar to the federal rule, but more detailed and thus probably more restrictive.
  
  Apply Washington’s rule

- Covers computer systems analysts, computer programmers, software developers or engineers, or other similarly skilled workers in the computer field

COMPUTER EMPLOYEES’ JOB DUTIES

- Analyzing systems to determine hardware, software, or functional specifications; OR
- Designing or testing any computer system, application, or program, including prototypes; OR
- Designing or testing machine operating systems; OR
- Any combination of the above
Additional Washington Requirements

- Possess high degree of theoretical knowledge
- Apply that knowledge to highly specialized computer fields
- Generally attained skills through combination of education and experience (no college degree required)
- Consistently exercise discretion and judgment
- Work is predominately intellectual and varied, not routinely manual or mechanical

Washington’s Rules, continued

- Washington’s exemption does not apply to:
  - Trainees or entry level positions
  - Employees who cannot yet work independently and without close supervision
  - Employees who merely operate computers
  - Employees who manufacture, repair, or maintain computers
  - Employees covered by a CBA

Additional Tips

- Job titles vary widely and the industry changes rapidly, so look at each position on a case-by-case basis
- Many computer employees might also qualify for the executive or administrative exemptions (e.g., senior or lead programmer might have supervisory duties)
OUTSIDE SALES EXEMPTION

- No minimum weekly salary requirement
- Job duties
  - Primary duty must be making sales or obtaining orders
  - Must work regularly on the road, away from employer’s place of business
  - Washington retains 20% rule
  - Federal rule doesn’t allow for product demonstrators

HIGHLY COMPENSATED EMPLOYEES

- Since high level of compensation is strong indicator of exempt status, no need to analyze job duties

  L&I does not recognize this new exemption, so it does not apply in Washington!
  But other exemptions may (Administrative, Executive)

- Total annual compensation of $100,000 or more (can’t include some fringe benefits);
  - AND
  - Primary duty is office or non-manual work;
  - AND
  - Regularly performs at least one of the duties or responsibilities of an exempt executive, administrative or professional employee
**SALARY BASIS**

- Being paid on a “salary basis” means employee regularly receives a predetermined amount of compensation each week regardless of the number of hours worked.

**MINIMUM SALARY REQUIREMENTS**

- The $455 minimum salary requirement does not apply to:
  - Federal: doctors, lawyers, teachers, and outside sales employees.
  - Washington: doctors, lawyers, dentists, and outside sales employees.
- It is more beneficial to apply a minimum salary requirement if possible, because it usually makes it harder for employee to qualify for exemption.
- Remember that computer employees must be paid the equivalent of $27.63/hour.

**FEE BASIS**

- Administrative and professional employees can be paid on a “fee basis” under state or federal law.
- Agreed sum for single unique job or task, regardless of amount of time it takes (calculate whether amount paid for the time the task took equals minimum salary level).
- Not for a series of repeated jobs for which identical payments are made.
- Because the fee must equal the same as the minimum salary level, it is equally protective of these employees to pay on either a salary basis or a fee basis.
QUESTIONS ABOUT SALARY BASIS TEST

- Uncertain aspect of the salary basis test is the "partial day docking" rule: employers may not dock the salaries of exempt employees who are absent from work for less than one full day.
- What about partial day docking of sick leave account if an exempt employee is absent for 4 hours one day?
- Under federal law, benefits are not considered "compensation," so partial day docking of leave banks does not violate the "salary basis" test.

WASHINGTON STATE REGULATIONS

- WAC 296-128-532
- Allows employers to raise "window of corrections" defense
- Provides comprehensive lists of permissible and impermissible deductions from salary and leave banks

PERMISSIBLE DEDUCTIONS FROM SALARY IN WASHINGTON

- Employee performs no work in one week – deduct whole week’s pay
- Employee takes whole day off for personal reasons other than sickness or accident – deduct whole day’s pay
- Deduction for full-day sickness or disability leave allowed if pursuant to a bona fide paid sickness or disability leave program
PERMISSIBLE DEDUCTIONS, CONTINUED...

- Deductions can be made for partial day absences if pursuant to FMLA
- In first and final week of employment, can prorate pay
- Deductions allowed for disciplinary absences that are imposed for violations of safety rules of major significance (this includes rules related to preventing serious danger or hazards)

DIFFERENT FEDERAL RULE

- Federal regulation on safety violations is the same as in Washington
- Federal regulations also allow salary deductions for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules, like a sexual harassment or workplace violence policy

We probably cannot make this type of deduction in Washington, since our regulation doesn’t mention it

IMPERMISSIBLE DEDUCTIONS FROM SALARY IN WASHINGTON

- Not allowed for partial days of work, except for FMLA leave
- Not allowed for lack of work for any amount of time less than a full week
- Not permitted when employee participates in jury duty, as a witness, or for military leave if employee performs any work that week. Can deduct collateral sources of payment (jury pay, military pay)
PERMISSIBLE DEDUCTIONS FROM LEAVE BANKS IN WASHINGTON

- Deductions may be taken from compensatory time banks in any increment.
- Deductions may be taken from bona fide leave banks in partial or full day amounts.
- Partial day deductions are only allowed on the employee’s express or implied request.

EFFECT OF IMPROPER DEDUCTIONS

- Exemption lost if “actual practice” of making improper deductions from an exempt employee’s salary
- Isolated or inadvertent improper deductions okay if prompt reimbursement made
- “Safe harbor” rule – policy and complaint mechanism, prompt reimbursement
- Minimum salary plus extras

NEW FLSA OVERTIME REGULATIONS

- Announced June 30, 2015
- Increases current weekly salary requirement from $455 ($23,660 annually) to $970/week ($50,440 annually)
- Regulations in the comment period with expected effective date in 2016
Integrity Staffing Solutions v. Busk

Warehouse workers required to go through 25 minute security screening after work

Security screening not “integral” part of job duties, so not compensable working time

If “primary duty” is exempt, the employee is exempt – must pay salary

If paid hourly and/or primary duty is non-exempt, the employee is non-exempt

All hours worked count toward 40 in the week

Overtime is paid at a blended rate (i.e., weighted average)

FLSA exception for public employees

Example: Coach Joe

- Works 10 hours/week as coach, at $15/hour (10 hours x $15/hours = $150)
- Works 40 hours/week as a janitor, at $12/hour (40 hours x $12/hour = $480)
  - $150 + $480 = $630 (straight time)
  - $630/50 hours worked = $12.60/hour (blended rate)
  - $12.60/ x .5 = $6.30/hour (overtime premium)
  - $6.30/hour x 10 hours OT = $63.00 (overtime pay)
  - $630 + $63 = $693 (total pay)
**FLSA RULES FOR SCHOOLS**

- Minimum wage does not apply to volunteers
- Teachers are exempt from the salary basis requirement (still subject to salary requirements of State law, but at a lower level: $250/week)
- Special rule for dual function employees (29 C.F.R. §553.30)
- Special rule for “administrative” employees of educational institutions (29 C.F.R. §541.204)

**FLSA EXCEPTION FOR DUAL FUNCTION EMPLOYEES**

- For employees who
  - voluntarily, and
  - “occasionally or sporadically”
  - work additional hours in a “different capacity”
  - for a public employer
- The employer does not have to combine hours worked for purposes of calculating overtime liability

**NO BLENDED RATE**

- Example Coach Joan
  - Works 10 hours/week as coach, at $15/hour (10 hours x $15/hour = $150)
  - Works 40 hours/week as a janitor, at $12/hour (40 hours x $12/hour = $480)
  - Doesn’t work overtime!
  - Total Pay = $150 + $480 = $630 (straight time)
**FLSA ACADEMIC ADMINISTRATORS**

- School specific rule; in addition to regular administrative exemption
- Weekly salary of $455 or at least equal to entry level salary for teachers
- Primary duty (1) performing administrative functions (2) directly related to (3) academic instruction or training (4) in an educational establishment

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**DO FLSA'S SPECIAL RULES FOR SCHOOLS APPLY IN WASHINGTON STATE?**

**NO WASHINGTON RULE**

Washington courts sometimes apply FLSA, but may not, in favor of more protective rule

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**COACHES COMPARED**

**No exception:**
- Coach Joan
- Janitor/Coach
- $12/$15
- 40 hours/10 hours
- Eligible for overtime with blended rate
- Total pay = $693

**FLSA exception:**
- Coach Joe
- Janitor/Coach
- $12/$15
- 40 hours/10 hours
- No eligible for overtime
- Total pay = $630
Under FLSA, head "coaches" in schools are teachers

Under Washington *labor law* they are not:
- Only jobs that require certification are covered under Ch. 41.59 RCW (non-supervisory, certificated employees)
- Other school district jobs, including coaches, are covered under Ch. 41.56 RCW (public employees)