

LEGAL UPDATE

- Wage and Hour Issues
- Class Actions and Collective Actions

Presented by:

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WAGE AND HOUR ISSUES

- Perennial problem area for employers
- Natural target for class action treatment
- Problem areas for transportation companies:
 - ❖ Employee/Independent Contractor Classification
 - ❖ Minimum Wage
 - ❖ Overtime
 - ❖ Recordkeeping

EMPLOYEE/INDEPENDENT CONTRACTOR CLASSIFICATION

- Wage and hour requirements apply to employees
- Applicable test depends on type of claim at issue
 - ❖ FLSA - “Economic Realities”
 - ❖ Indiana – 10-factor test
 - ❖ Control is critical inquiry

MINIMUM WAGE

- Federal vs. State Law
- Regular rate of pay at least \$7.25 per hour effective July, 2009
- Activity-based pay
 - ❖ Wage averaging
 - Total Compensation ÷ Total Hours Worked ≥ \$7.25
 - Handbook should define work covered by activity-based compensation systems

REGULAR RATE OF PAY

- Hours worked
 - ❖ DOT on-duty hours v. FLSA hours worked
 - ❖ Sleeper berth time
- Compensation
 - ❖ Per diem included?
 - Flat amount vs. mileage-based
 - ❖ Business related expenses not included

OVERTIME

- Required to pay overtime for all hours worked over 40 in a workweek unless exempt
- Proper classification of employees as exempt vs. non-exempt
- Relevant exemptions:
 - ❖ Motor Carrier Exemption (drivers, drivers' helpers, loaders, mechanics); and
 - ❖ Administrative Exemption (dispatchers, customer service representatives, load planners)

OVERTIME

➤ Motor Carrier Exemption

❖ Requirements

- Employer subject to jurisdiction of the DOT;
- Employee must engage in activities directly affecting safe operation of a commercial motor vehicle (drivers, drivers' helpers, loaders, mechanics); and
- The commercial motor vehicles must operate on public highways in interstate or foreign commerce.

OVERTIME

➤ Real Issues:

- ❖ Driver operating in interstate commerce
- ❖ DOL Four-Month Rule
- ❖ Small Vehicle Exception

OVERTIME

➤ Administrative Exemption

❖ Requirements:

- Salary of \$455 or more
- Primary duty – office or non-manual work
- Primary duty – exercises discretion and independent judgment

❖ Real Issues:

- Discretion and judgment
- *“With respect to matters of significance”*
- Value of combining roles

RECORDKEEPING

- Retention of DOT logs

FLSA CLAIMS

- **Potential liability**
 - ❖ Unpaid wages, liquidated damages and attorney's fees
 - ❖ Individual liability extends to “any person acting directly or indirectly in the interest of an employer in relation to an employee .” 29 U.S.C. § 203(d)
- **Statute of limitations - 2 or 3 years**
- **Public vs. private settlement**

STATE LAW CLAIMS

- **Types of claims:**
 - ❖ **Unpaid minimum wages and overtime**
 - ❖ **Failure to pay agreed-upon wage**
- **Trebled damages**
 - ❖ **Good faith defense**
- **Attorney's fees and costs**
- **Statute of limitations varies**

STEPS TO AVOID OR MINIMIZE POTENTIAL LIABILITY

- Establish a recordkeeping system to track hours worked each week
- Keep those records for a minimum of 4 years
- Include the hours worked each week on the pay statements

WAGE DEDUCTIONS

- Deductions should be given careful consideration
- Various reasons: uniforms, training costs, equipment damage, loan repayment, escrow accounts, etc.
- Governed by state law
- In all cases, obtain a written authorization
- Dangerous for two reasons:
 - ❖ Statutory remedies
 - ❖ Class action potential

CLASS AND COLLECTIVE ACTIONS

- **Class Actions vs. Collective Actions**
 - ❖ **Different standards for certification**
 - ❖ **Opt-out vs. Opt-in**
 - ❖ **Types of claims**
 - ❖ **Potential liability**

FLSA COLLECTIVE ACTIONS

- **Types of claims**
 - ❖ **Employee/Independent Contractor Misclassification**
 - ❖ **Exemption Misclassification**
 - ❖ **Minimum Wage/Overtime**

CONDITIONAL CERTIFICATION PROCESS

- Two-step process
 - Conditional Certification
 - Decertification
- “Similarly Situated”
- Opt-in plaintiffs

STRATEGY

- Picking off the representative
- Pushing for discovery to avoid conditional certification
- Pushing for discovery of opt-in plaintiffs

CLASS ACTIONS

- Both state and federal claims
 - ❖ Leasing regs Claims
 - ❖ Wage-related claims
 - ❖ Meal-and-rest break and other claims
 - ❖ Breach of contract claims

CLASS CERTIFICATION PROCESS

- One or two-step process
 - ❖ Class certification
 - ❖ Decertification
- Opt-out instead of opt-In
- Higher potential liability

DUKES V. WAL-MART, INC.

- **Landmark decision in 2011**
- **Addressed the “commonality” prong**
- **Common practices and policies**

DUKES V. WAL-MART, INC. – **PREVENTATIVE STEPS**

- Review policies to make sure they comply with law in all states containing operations
- Key questions:
 - ❖ Where do you have locations?
 - ❖ Where are employees hired?
 - ❖ Where do employees report?
 - ❖ Where are employees' supervisors (or other individuals who control employees' work) located?
 - ❖ Where is employees' pay generated?

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Questions?

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