



By Casey Smith, Vice President

What is the legal basis for disputes?

The Fair Labor Standards Act (FLSA or the Act) governs wage and hour employment matters for employees engaged in interstate commerce. The scope of the Act is broadly interpreted, making most employers subject to the FLSA. Further, state laws provide additional wage and hour regulations. One of the biggest areas of dispute surrounds the exemptions to the Act, notably the “white-collar” overtime exemptions for professional, executive, administrative and computer employees. The burden of proof that an employee is exempt from the Act’s overtime requirements has always fallen squarely and exclusively on the shoulders of the employer. Changes made to the Act in the past decade have broadened the requirements, causing the number of protected workers to expand. The US Department of Labor estimates that a staggering 70% of employers are out of compliance with Wage and Hour laws.

Peter Nohle and David Black, both attorneys with Jackson Lewis LLP explain that employers can get in trouble in a number of key areas:

- **Misclassification of Employees.** Some companies mistakenly believe that paying a salary qualifies an employee as “exempt.” In addition to the salary basis, each “exempt” employee’s job activities must also satisfy the applicable duties test as outlined in the Act, regardless of any written agreement between the parties. Companies who engage in HR practices that inadvertently destroy the salary basis also find they have employees who are misclassified.
- **Independent Contractors.** When an employer exercises too much control over a worker, the worker is more likely to be an employee versus an independent contractor, regardless of any written agreement between the parties. If a wage claim is brought or an audit is triggered, an employer may suddenly discover that all of its independent contractors are deemed employees and \$1,000s in overtime pay, minimum wage and/or back payroll taxes are now due.
- **Off-The-Clock Hours.** Many employers also fall prey to time-keeping practices that inadvertently result in unpaid time. For example, allowing employees to clock in before their shifts begin, but paying for scheduled hours is a common mistake. This is intended for a convenience and to avoid time-clock bottlenecks. However employees may try to work during the ‘clocked hours’ versus the scheduled hours and won’t receive pay for the additional time, if the exception is not reported. This results in liability for the employer.
- **Illegal Distribution of Tips.** The Department of Labor (DOL) opines that tips are for “direct service employees.” Recent court cases in this area indicate that employers run afoul of the regulations by pooling tips and sharing them with employees falling outside this scope, including management or non-service employees, or even with the employer.
- **Payment for Rest and Meal Breaks.** Improperly capturing and compensating employees for rest and meal breaks can also be a costly mistake for employers. Employees are entitled to a 10 minute rest break for every 4 hours of work. If an employee works an eight-hour shift without these breaks, they are entitled to their pay for the full eight hours that they worked, plus the additional 20 minutes of paid breaks that they did not take.

What does this cost?

Peter and David explain that these costs add up quickly. Consider a small firm with 100 employees alleging improper compensation for rest breaks, a 20 minute per day issue per employee:

Number of uncompensated minutes per day, per employee 20 minutes, or 1/3 hour

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| Number of working days per year, per employee | 260 approximately |
| Number of uncompensated hours per year, per employee | 86.67 |
| Hourly Minimum Wage, per employee | \$ 8.55 |
| Unpaid Compensation, per year, per employee | \$ 741.00 |
| Unpaid Compensation, per year, 100 employees | \$ 74,100.00 |
| Unpaid Compensation over three years, 100 employees | \$ 222,300.00 |
| Double-damages for willful violations | \$ 444,600.00 |

This assumes a simple claim with one allegation and minimum wage earners, when in reality these actions cover many employees and many allegations. Consider your demographics and factor in some costs to investigate and defend yourself against these claims.

What kind of insurance do I have for this?

On a basic level, Employment Practices Liability Insurance provides protection for employment related discrimination, harassment/retaliation and wrongful termination. Virtually all standard policies exclude violation of FLSA (except the Equal Pay Act when pay discrimination is asserted). In response to the growing trend of Wage and Hour claims, many insurance companies have drafted policy language to specifically address “Wage and Hour” disputes. Does this language exclude coverage? Are they providing coverage? If they are providing coverage, what does it actually do?

There’s no easy answer; you can’t make any assumptions with this coverage. You’ll need to read your policy and talk to your broker. Some carriers are excluding coverage altogether and claims for wage and hour disputes will be denied.

However, most carriers are providing limited coverage for these disputes, ranging from:

- Coverage for investigative costs - The policy will provide recovery of some of the costs expended to investigate the allegations.
- Coverage for investigation and defense - The insurance policy will provide recovery of the costs to investigate and defend the employer.
- Coverage for investigation, defense and indemnity - The insurance policy will provide recovery for the costs to investigate and defend the employer, as well as any approved settlement or indemnity to the claimants.

Each of these provides a dramatically different level of coverage so it’s important to understand what your policy provides. It’s also important to know how much coverage your policy provides. While you may be purchasing substantial overall policy limits, they won’t necessarily apply to the Wage and Hour coverage provided by your insurer. This coverage is typically sublimited to a fraction of the overall policy limit, oftentimes only \$100,000 to \$250,000 of coverage. This level of coverage is usually provided without a premium charge, although as carriers continue to pay claims, we may see this change.



What can employers do?

The media has educated both the plaintiff's bar and the general public about this area of law. Record verdicts against large employers including Wal-Mart, Starbucks, Lowe's and Washington Mutual have shown how lucrative these actions can be. Defense firms, such as Jackson Lewis LLP are seeing an increase in frequency of the actions and a steady increase in the settlements required to resolve these matters. But there are steps that you can take today to help protect your company.

As Peter and David recommend:

- **Conduct a Classification Audit.** Hire an Employment Lawyer who specializes in Wage and Hour law to conduct an audit of your employees' classifications. HR Consultants are not qualified to apply the law to specific facts. An audit includes a review of your specific classifications and the support for those decisions; a review of your website and job descriptions, as well as interviews with some of your employees to understand what the day-to-day tasks of their jobs involve.
- **Review your Policies/Handbook.** Make sure that you are taking a proactive stance on these issues, create an affirmative culture of compliance and communicate your commitment to your employees. Provide an effective means for your employees to voice their concerns and resolve their dispute before they retain an attorney. Without strong policies that comply with the Act, your company could be vulnerable to allegations of a blatant systemic disregard of the statutes.
- **Document Your Pay Practices.** Ensure that your time clocks and other methods you use to calculate compensable hours are documented. Re-tool your time clock to have the employee confirm their rest/meal breaks when clocking out. Also have them confirm their worked hours versus 'clocked hours' each day.
- **Train Your Employees.** Educate your Human Resources staff and frontline supervisors and managers about classification and exemption requirements and update this training annually. New managers will need to be trained to understand how to comply with the Act; new employees can trigger a review of the job classifications; and if you restructure and/or

re-assign job duties, you should determine if changes are needed to any job classifications. Encourage Line Managers to be aware of rest and meal break regulations as they can be your best enforcement on this front.

Finally, understand what coverage you have and strive to broaden it. Don't settle for coverage that is limited to investigative costs or only defense coverage. Seek insurers who will provide coverage for investigation, defense and indemnity. Find out what resources, tools and education your insurer can provide to your firm to help evaluate and mitigate your risk. Ask for higher limit options and be prepared to pay for it. Consider your demographics and your controls, and purchase the limit that is right for your unique profile.