

Wage & Hour Compliance

Victor O. Cardwell, Esq.

cardwell@woodsrogers.com

Woods Rogers PLC
10 S. Jefferson Street
Wachovia Tower, Suite 1400
Roanoke, Virginia

540.983.7529

540.983.7711 (Facsimile)

www.woodsrogers.com

***2014 Northern Employer Conference
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Abbott & Costello

“Give Me The Money”



Recent Developments

The White House/Office of the Press Secretary - February 12, 2014
Executive Order - - Minimum Wage for Contractors

Establishing A Minimum Wage for Contractors

- To promote economy and efficiency
- Seeks to increase efficiency/cost savings
- **\$10.10/hr. (*Jan. 1, 2015*)**
- **Beginning *Jan. 1, 2016* and annually thereafter an amount determined by Secretary of Labor**
 - *increased by annual percentage in Consumer Price Index*
 - *rounded to nearest multiple of \$0.05*

Recent Developments

Bloomberg BNA – March 18, 2014
Daily Labor Report

President Obama to Direct FLSA Overtime Expansion to Promote Administration's Wage Agenda

- Instruct Labor Department to make overtime pay available for “millions” of workers
 - narrowing FLSA’s “white-collar” exemption
- Tightening qualifications for workers classifications as *bona fide*:
 - Executive
 - Administrative
 - Professional
 - Outside Sales

Recent Developments

Bloomberg BNA – March 18, 2014
Daily Labor Report

President Obama to Direct FLSA Overtime Expansion to Promote Administration's Wage Agenda

- **“Part of larger agenda to increase workers’ wages”**
(Quote: Labor Secretary Seth Harris)
 - raising minimum wage
 - improving job training programs
 - creating jobs through significant improvements in infrastructure

Recent Developments

The White House/Office of the Press Secretary – March 13, 2014
Presidential Memorandum for the Secretary of Labor

Updating and Modernizing Overtime Regulations

“Therefore, I hereby direct you to propose revisions to modernize and streamline the existing overtime regulations. In doing so, you shall consider how the regulations could be revised to update existing protections consistent with the intent of the Act; address the changing nature of the workplace; and simplify the regulations to make them easier for both workers and businesses to understand and apply.”

Fair Labor Standards Act

- Federal Minimum Wage
- Overtime Compensation
- Child Labor

What is Minimum wage?

The Fair Minimum Wage Act of 2007 created phased increases:

- Work prior to July 24, 2007: \$5.15
- Work from July 24, 2007 to July 23, 2008: \$5.85
- Work from July 24, 2008 to July 23, 2009: \$6.55
- Work on or after July 24, 2009: \$7.25

What is Overtime?

- General rule..... $\frac{1}{2}$ times the regular rate of pay for all hours worked over 40 hours in a workweek
- Law enforcement treated a little differently.

What is child labor?

- Protect rights of those under 18
- Limitations on hours of work
- Limitations on type of work

“White Collar” Exemptions

- Executive
- Administrative
- Professional
- Outside Sales capacity
- Certain computer employees

Three Tests for Exemption

- Salary Level
- Salary Basis
- Job Duties

Minimum Salary Level: \$455

- For most employees, the minimum is \$455 per week
- For periods longer than one week:
 - Biweekly: \$910
 - Semimonthly: \$985.83
 - Monthly: \$1,971.66
 - Annual: \$23,660.00

Highly Compensated Test

- Total annual compensation of at least \$100,000
- At least \$455 per week
- Office or non-manual work
- Customarily and regularly perform one or more exempt duties for executive, administrative or professional exemptions

Salary Basis Test

- Regularly receives predetermined amount of compensation each pay period
- Compensation not be reduced because of variations in quality or quantity of work performed
- Must be paid full salary for any week in which employee performs *any* work
- Need not be paid for any workweek when no work is performed

Deductions From Salary

- Employee not paid on a salary basis if deductions are made for absences occasioned by employer or by operating requirements of businesses
- If employee ready, willing and able to work, deductions may not be made for time when work not available

Permitted Salary Deductions

Seven exceptions from “no docking” rule:

1. Full-day absence for personal reasons, other than sickness or disability
2. Full-day absence due to sickness or disability if deductions made under a bona fide plan, policy or practice of providing wage replacement benefits for these types of absences
3. To offset amounts received as payment for jury fees, witness fees, or military pay

Permitted Salary Deductions

Seven exceptions from “no pay-docking” rule:

4. Penalties imposed in good faith for violating safety rules of “major significance”
5. Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of workplace conduct rules
6. Proportionate part of employee’s full salary may be paid for time actually worked in first and last weeks of employment
7. Unpaid leave taken pursuant to FMLA

Improper Deductions - Examples

- Partial-day absence to attend parent-teacher conference
- Partial or full-day absence because employer was closed due to inclement weather
- Deduction because employee absent from work for jury duty, rather than offsetting jury duty pay
- Deduction for absence due to minor illness when employer does not provide wage replacement benefits for such absences

Effect of Improper Deductions

- Practice of making improper deductions will result in loss of exemption:
 - During time period in which improper deductions were made
 - For employees in same job classifications
 - Working for same managers responsible for improper deductions
- Isolated or inadvertent improper deductions will not result in loss of exempt status if employer reimburses employee

Payroll Practices That Do Not Violate the Salary Basis Test

- Deductions from exempt employees' accrued leave accounts
- Requiring exempt employees to track and record hours worked
- Requiring exempt employees to work specified schedule
- Implementing bona fide, across-board schedule changes

Additional Compensation

- Employer may provide compensation beyond \$455 weekly salary, such as:
 - Commissions
 - Bonuses
 - Additional pay based on hours worked beyond normal workweek



Executive Duties

Executive Duties

- Primary duty is management of enterprise or customarily recognized department or subdivision;
- Customarily and regularly directs work of two or more other employees; and
- Authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status of other employees are given particular weight.

Primary Duty

- Employees who spend more than 50% of their time performing exempt work generally satisfy primary duty requirement
- Regulations do not *require* that exempt employees spend more than 50% of time performing exempt work

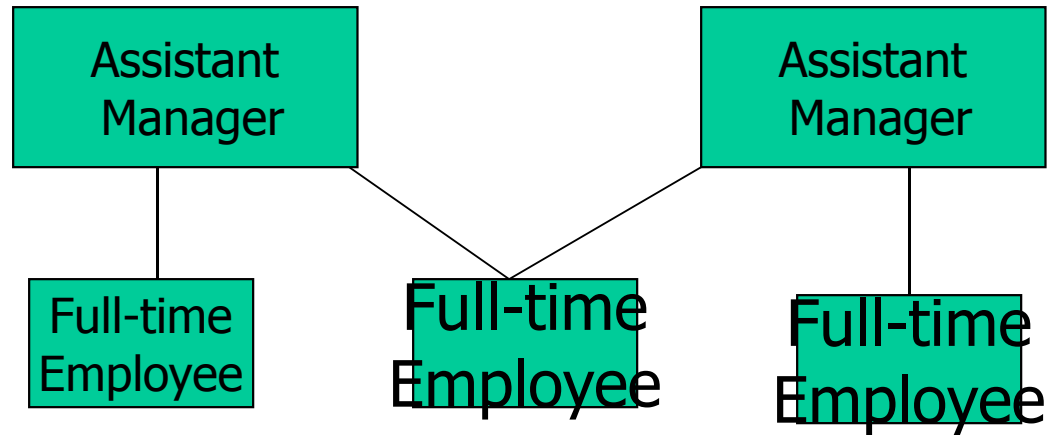
Management

- Interviewing, selecting, and training employees
- Setting and adjusting pay and hours
- Maintaining production or sales records
- Appraising employee productivity and efficiency
- Handling employee complaints and grievances
- Disciplining employees
- Planning and apportioning work

Two or More

- Two full-time employees or the equivalent
- Full-time generally means 40 hours per week
- Supervision of same employees can be distributed among two or more exempt executives, but hours worked by employee cannot be credited more than once

Staffing Does Not Meet the “Two or more” Requirement



Concurrent Duties

- Concurrent performance of exempt and nonexempt work does not automatically disqualify
- Exempt executives generally decide when to perform nonexempt duties and remain responsible for success/failure of operations
- Nonexempt employees generally are directed by a supervisor to perform exempt work for defined periods



Administrative Duties

Administrative Duties

- Primary duty is performance of office or non-manual work directly related to management or general business operations of employer or employer's customers; and
- Primary duty includes exercise of discretion and independent judgment with respect to matters of significance.

Management or General Business Operations

- Tax
- Finance
- Accounting
- Budgeting
- Auditing
- Insurance
- Quality Control
- Purchasing
- Procurement
- Advertising
- Marketing
- Research
- Safety and Health
- Human Resources
- Employee Benefits
- Labor Relations
- Public and Government Relations
- Legal and Regulatory Compliance
- Computer Network, Internet and Database Administration

Discretion and Independent Judgment

- Evaluation of possible courses of conduct, and acting after various possibilities considered
- Must be exercised with respect to “matters of significance”
- Recommendations may be reviewed at a higher level and, upon occasion, revised or reversed

Discretion and Independent Judgment

- Factors include:
 - Authority to formulate, interpret, or implement policies or practices
 - Carries out major assignments in conducting operations
 - Performs work that affects operations to a substantial degree, even if employee's assignments are related to operation of particular segment of business

Discretion and Independent Judgment

- Factors include:
 - Authority to commit employer in matters that have significant financial impact
 - Authority to waive or deviate from established policies and procedures without prior approval
 - Authority to negotiate and bind company on significant matters
 - Provides consultation or expert advice to management

Discretion and Independent Judgment

- Factors include:
 - Involved in planning long- or short-term business objectives
 - Investigates and resolves matters of significance on behalf of management
 - Represents company in handling complaints, arbitrating disputes or resolving grievances

Discretion and Independent Judgment

- *Does not* include:
 - Applying well-established techniques, procedures or specific standards described in manuals or other sources
 - Clerical or secretarial work
 - Recording or tabulating data
 - Performing mechanical, repetitive, recurrent or routine work



**PROFESSIONAL
DUTIES**

Learned Professional

- Primary duty must be performance of work requiring advanced knowledge
- In field of science or learning
- Customarily acquired by prolonged course of specialized intellectual instruction

Advanced Knowledge

- Predominately intellectual in character
- Work requiring the consistent exercise of discretion and judgment
- Advanced knowledge generally used to analyze, interpret or make deductions from varying facts or circumstances
- *Not* work involving routine mental, manual, mechanical, or physical work
- *Cannot* be attained at high school level

Field of Science or Learning

Occupations with recognized professional status, as distinguished from mechanical arts or skilled trades:

Law

Accounting

Actuarial Computation

Theology

Teaching

Physical Sciences

Medicine

Architecture

Chemical Sciences

Pharmacy

Engineering

Biological Sciences

Prolonged Course of Specialized Intellectual Instruction

- Specialized academic training is a prerequisite for entering profession
- Best evidence that an employee meets this requirement is possession of appropriate academic degree

Prolonged Course of Specialized Intellectual Instruction

- Exemption *not* available for occupations that may be performed with:
 - Only general knowledge acquired by academic degree in any field
 - Knowledge acquired through an apprenticeship
 - Training in performance of routine mental, manual, mechanical or physical processes
- Exemption also *does not* apply to occupations in which most employees acquire skill by experience

Customarily

- Exemption also available to employees in learned professions who:
 - Have substantially same knowledge level and
 - Perform substantially same work as degreed professionals,
 - But attained advanced knowledge through combination of work experience and intellectual instruction
- Examples:
 - Lawyer who did not attend law school
 - Chemist who does not have a chemistry degree

Other Exempt Professions

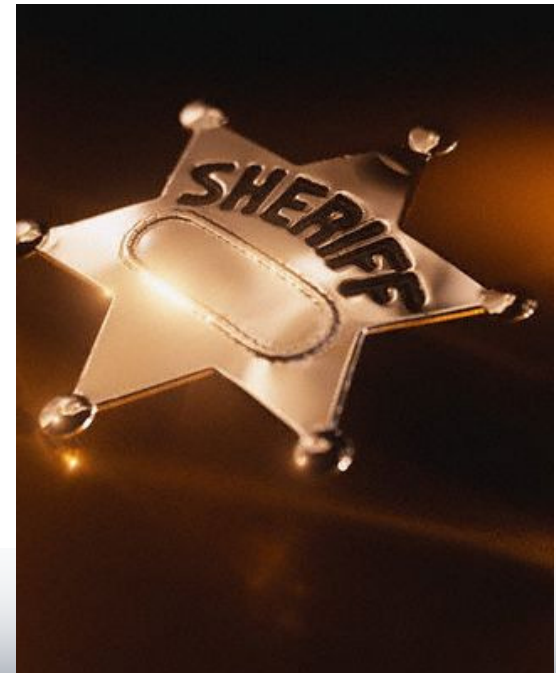
- Lawyers
- Teachers
- Accountants
- Pharmacists
- Engineers
- Actuaries
- Chefs
- Athletic trainers
- Licensed funeral directors or embalmers

Other Nonexempt Professions

- Accounting clerks and bookkeepers who normally perform great deal of routine work
- Cooks who perform predominantly routine mental, manual, mechanical or physical work
- Paralegals and legal assistants
- Engineering technicians

Public employees – the rules are different

- Partial overtime exemption for fire protection and law enforcement activities



Public employees – the rules are different

- Section 207(k)
 - Law enforcement
 - May establish work periods from 7 to 28 days
 - May require law enforcement officers to work from 43 to 171 hours
 - Public agency employer must “declare” a work period that is not less than 7 consecutive days and not more than 28

Public employees – the rules are different

- Emerging Issues for Law Enforcement
 - Gap Time
 - Policy vs. Contract vs. Ordinance
 - “Blackberry Overtime”
 - K-9 Car
 - Donning/Doffing

Public employees – the rules are different

- Compensatory time -
Substitute for cash
 - Public employers may
use compensatory
time (“comp time”) –
29 U.S.C. § 207(o)
 - Prior agreement



CODE OF VIRGINIA AND THE FLSA

- §9.1-701. Overtime compensation rate.
- §9.1-702. Work period.
- §9.1-703. Hours of work.

**Richmond
Times-Dispatch**

Published Article by Reed Williams dated 03/21/12

“Federal Judge Could Rule by Friday on Richmond Police OT Pay”



Cuccinelli has intervened in the case in defense of the 2005 Virginia law he sponsored as a state senator. The law says localities employing at least 100 law enforcement officers must pay them overtime at a rate of at least 1½ times their regular rate for the hours during the gap time.

Public Employers

- Salary basis - disciplinary deduction and public accountability
 - Public sector
 - Pay deductions for less than full day absences as long as the deductions are made pursuant to a pay system
 - “established by statute, ordinance or regulation - 29 C.F.R. § 541.5(d)

Public and private employers



- Private suits
- Government suits
- Criminal actions

Liabilities – the big payback

- Wages
- Overtime compensation
- Liquidated damages
- Criminal penalties



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