

# WAGE & HOUR LAW

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Presented by:

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## Why Are We Here?

- Federal wage & hour laws are administered by U.S. Department of Labor (DOL), Wage & Hour Division (W & H).
- New Secretary of Labor Hilda Solis has committed to aggressively enforcing wage & hour compliance.
- W & H's budget for FY 2010 increased by \$35 million.
- DOL is hiring 250 additional investigators in W & H.

# FLSA COVERAGE

- FLSA Enacted in 1938
  - Minimum Wage
  - Recordkeeping
  - Child Labor
  - Overtime
- I-9 Immigration Forms

# FLSA COVERAGE

- There are two types of coverage under the FLSA:
  - Individual [Interstate commerce]
  - Enterprise [\$500,000 A.D.V.]
  - Independent Contractors are not covered under the FLSA.

# FLSA COVERAGE

- Small businesses with annual gross sales of less than \$500,000 may not be subject to the requirements of the FLSA if their employees are not involved in interstate activities.
- Determine whether or not any part of your business is engaged in interstate commerce. It does not take much contact with interstate commerce to meet this test.

# EMPLOYMENT PRACTICES NOT REGULATED

- vacation, holiday, severance, or sick pay;
- meal or rest periods
- premium pay for weekend or holiday work;
- pay raises or fringe benefits; and
- a discharge notice, reason for discharge, or immediate payment of final wages to terminated employees.

# EMPLOYMENT RELATIONSHIP UNDER FLSA

- Verify that any workers classified as independent contractors qualify under the DOL's analytical model.
- Just because an employer does not withhold taxes or pay benefits does not mean the worker qualifies as an independent contractor.

# FLSA EMPLOYEE TEST

- Employment status based on “Economic Reality” test :
  - Extent to which services rendered by individual are integral part of principal’s business;
  - Permanency of relationship between individual & principal;
  - Amount of investment in facilities & equipment by individual;
  - Opportunities for profit or loss by individual, & method of compensation;
  - Degree of independent business organization & operation by individual;

## FLSA EMPLOYEE TEST (cont'd)

- Degree & nature of control of individual & principal;
- Degree of independent initiative, judgment or foresight exercised by individual who performs services;
- Performance of same or similar services by individual for third parties in addition to principal;
- Comparison or contrast of relationship to other operations of similar nature in industry;
- Right of either party to terminate relationship on short notice without penalty.

# REASSESSMENT OF IC'S

- Proposed budget for 2011 fiscal year
  - Will add 100 new enforcement personnel
- Strategic Plan - addressing misclassification of workers as independent contractors (Obama projects additional \$7B tax revenues over next 10 yrs)

# GENERAL REQUIREMENT FOR MINIMUM WAGE & OVERTIME

- Unless specifically exempted, employees covered by the Act must receive at least the minimum wage & in addition must receive overtime pay of time-and one-half their regular rate of pay for all hours worked in excess of forty in a workweek.

# Minimum Wage

- Current Federal = \$7.25

# DRAMATIC INCREASE IN FLSA CASES

- In recent years, overtime lawsuits have become rampant.
- Wage & Hour suits increased 228% from 2001 to 2007.

# DRAMATIC INCREASE IN FLSA CASES

- Employers guilty of FLSA violations may be assessed not only unpaid wages, but also liquidated damages or double damages equal to the wages due.
- The successful employee can also recover his or her attorney's fees.
- The trend now is for plaintiff's firms to attempt to bring these claims as "collective actions" & target a whole class of similarly situated individuals who are or were employed by the same employer.

# PROACTIVE APPROACH IS CRITICAL

- The FLSA allows for a 3 year window for an employee to file an action.
- Time frame can be reduced to 2 years if employer can show they acted in good faith in trying to be in compliance.
- Employer's good faith efforts may also reduce employer's liability for liquidated (double) damages.

# WAGE HOUR INVESTIGATIONS

- Often based on complaint by a former employee
- To determine if company violated Federal Law
  - Minimum Wage
  - Recordkeeping
  - Child Labor
  - Overtime

# WAGE HOUR INVESTIGATIONS

- 4 Steps of Investigation:
  - Initial Conference
  - Records Examination
  - Interviews
  - Final Conference

# UNPAID HOURS

- A potential minimum wage violation exists if an employee works any time that is not reflected on his/her time records and, thus is not paid for that time worked.
- Examples of this include beginning work prior to scheduled start time and/or staying after the end of the shift; attending meetings or training; travel time; & working at home.

# DEDUCTIONS FROM THE WAGES OF HOURLY EMPLOYEES

- Requiring employees to pay for uniforms, tools, cash shortages, damages, lost company supplies, etc. can create a violation of the FLSA if the amount reduces their pay below the applicable minimum wage for a particular workweek.

# OVERTIME REQUIREMENTS

- **Regular Rate** - The hourly rate actually paid to the employee for the normal workweek.
- The general overtime pay standard is that overtime must be paid at a rate not less than one & one-half times the regular rate at which the employee is actually employed for all hours worked in excess of 40 in a given workweek.

# WORKWEEK & PAY CYCLE

- **FLSA workweek: fixed & regularly recurring 7-day period (168 hours)**
  - Employer may choose when workweek begins & ends
  - Does not have to be Sunday through Saturday
  - Different workweeks for different employees are allowed
- **Employees must be paid overtime for all hours over 40 worked within the workweek**

# WORKWEEK & PAY CYCLE

- Employer can choose the pay cycle (bimonthly, every other week, etc.)
- Employer may not average multiple workweeks even within the same pay period

# OVERTIME PAY

- Each workweek stands alone - averaging of hours (“comp time”) between workweeks prohibited for non-exempt employees, except for certain public employees.
- O.T. due at 1½ times an employee’s regular rate for hours worked over 40 in a workweek

## REGULAR RATE (RR) FORMULA

- Step 1: Total Straight Time Earnings Divided By Total Hours Worked = Regular Rate
- Step 2: Regular Rate x .5 = Half Time Premium
- Step 3: Half Time Premium x Overtime Hours = Total Overtime Premium Due

# CALCULATE OVERTIME?

- Total Hours = 48
- Hourly Rate = \$9.00
- Production Bonus = \$10

# OVERTIME CALCULATION

- 48 total hrs x \$9.00 (hourly rate)=\$432.00
- Bonus + 10.00
- Total straight compensation \$442.00
  
- $\$442.00 / 48 \text{ hrs} = \$9.21$  (Regular Rate)
- $\$9.21 \times .5 = \$4.61$  (1/2 Time Rate)
- $\$4.61 \times 8 \text{ hrs} = \$36.88$  (OT Due)

# MULTIPLE RATES

- If an employee, in a workweek, is paid two or more different rates, there are three methods an employer may use to determine the employee's regular rate for purposes of overtime compensation.

## MULTIPLE RATES

- Pay the employee overtime based on the highest of the applicable rates; or
- Pay the employee based on a weighted average of the various rates for the week; or
- Pay the employee based on the established non-overtime rate of pay applicable to the task performed during the overtime hours.

# SALARIED NON-EXEMPT

- Salaried non-exempt employees are required to be paid at time & one-half their regular rate of pay for their overtime hours worked.
- This regular rate of pay is determined by dividing the salary by the number of hours that the salary is intended to compensate.
- Employees qualifying as salaried exempt are not required to be paid overtime.

# BONUSES

- Discretionary Bonuses (Management reserves the right to pay or not to pay)
- Non-Discretionary Bonuses

# NON-DISCRETIONARY BONUSES

- A partial list of bonuses normally found to be non-discretionary include:
  - Production bonuses;
  - Bonuses promised upon hiring;
  - Attendance bonuses;
  - Bonuses for obtaining new business;
  - Bonuses paid when certain types of merchandise are sold through an employee's efforts.

# MINIMUM WAGE: NON- HOURLY BASIS OF PAY

- All workers must receive at least minimum wage regardless of method of payment
- Includes employees paid by piece rate & commission
- To determine if an employee is earning minimum wage, divide total earnings for that week by number of hours worked that week

# OVERTIME WORKED MUST BE PAID

- When nonexempt employees work overtime, you have to pay them for it even if:
  - They voluntarily work extra hours for no extra pay
  - They sign a waiver that they agree not to be paid for overtime
  - They are not authorized to work overtime
  - You specifically prohibit them from working overtime
- Employees may not waive their right to overtime under the FLSA

# TIPS FOR DEALING WITH UNAUTHORIZED OVERTIME

- Have a clear, consistently enforced policy prohibiting unauthorized overtime
- Consider prohibiting:
  - Working before hours, after hours, & during lunch
  - Eating & drinking at workstations (might even require employees to leave premises during meal breaks or eat in a break room)
  - Working at home without permission

## TIPS FOR DEALING WITH UNAUTHORIZED OVERTIME (cont'd)

- Closely monitor employees' hours & enforce overtime policy
- Enforce a disciplinary procedure to address unauthorized overtime
- Do not refuse to pay overtime, even when unauthorized

# COMPENSATORY TIME IN LIEU OF OVERTIME

- Employers may rearrange an employee's schedule within the workweek to avoid overtime
- But private employers are not allowed to give nonexempt employees comp time in lieu of overtime
  - Even if authorized or requested by employee
  - Generally OK to give comp time to exempt employees

# PENALTIES - STATUTE OF LIMITATIONS

- **TWO YEARS**
  - Standard time period applied
  - Civil Money Penalties = \$1100 for each violation
  - Back Wages = M.W. & OT due
  - Liquidated Damages = Amount equal to back wages due

# PENALTIES - STATUTE OF LIMITATIONS (cont'd)

- **THREE YEARS**
  - Repeated and/or Willful
  - Same penalties (but for 3 yrs)
  - Criminal prosecution - \$10,000 fine & imprisonment
  - “Hot Goods” Provision (FLSA prohibits shipment in interstate commerce of any goods produced in violation of the FLSA’s minimum wage or overtime provisions)

# WHAT'S THE WORST THAT CAN HAPPEN?

- Three years back pay
- Liquidated damages equal to backpay amount
- \$1,100 per violation
- Attorney fees (yours & their's)
- Criminal charges
- Awful publicity

# RECORDKEEPING REQUIREMENTS OF THE F.L.S.A

- Basic employment & earnings. . .
  - time cards, similar records of daily start & stop time
  - daily, weekly, or pay period work records where amount of work affects earnings
- Wage rate tables
- Worktime schedules
- Individual order, shipping, billing records

# RECORDING WORKING TIME

- Differences between clock hours & hours actually worked
- Rounding practices
- De Minimis Principle

# POSTING OF NOTICES

- Wage & Hour requires that employers post, & keep posted, a notice explaining the FLSA.
- A copy of DOL's federal minimum wage poster may be downloaded at [www.dol.gov](http://www.dol.gov).
- Poster should be in a conspicuous location.

# RETALIATION

- It is unlawful to discharge or discriminate against an employee because employee filed a complaint or instituted a proceeding under the FLSA.
- May apply to internal complaints.

# CHILD LABOR RESTRICTIONS UNDER FLSA

- Employees 18 & over - no restrictions
- Separate standards applicable to agriculture
- Be sure to review each individual state's child labor laws (sometimes more restrictive than FLSA)

# SALARIED WHITE-COLLAR EXEMPTIONS

- Major “White Collar” Exemptions
  - Executive
  - Administrative
  - Professional
  - Certain Computer Employees
  - Outside Sales

## WHITE COLLAR EXEMPTION TESTS

- Salary basis
- Salary level
- Job Duties



# SALARY BASIS TEST

- Predetermined, fixed amount
- No reductions based on quality or quantity of work
- Full salary if work at all during workweek
- No salary if don't work at all during workweek
- Partial workweeks when hired or termed

# SALARY LEVEL TEST

- Minimum \$455 weekly
- Super Salary Test: perform office or non-manual work, \$100K, at least \$455/week & perform 1 or more of exempt duties

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# DUTIES TEST

# EXECUTIVE DUTIES TEST

- Primary duty = management of enterprise or dept or subdivision
- Routinely directs 2 or more other full time employees or their equivalent
- Authority to hire or fire OR
- Authority to recommended changes in status
- Recommendations must be given particular weight

# EXECUTIVE DUTIES TEST

- “Management” includes:
  - Interviewing
  - Selection
  - Training
  - Setting & adjust pay & hours worked
  - Directing work
  - Appraising productivity

# EXECUTIVE DUTIES TEST

- “Recommendations must be given particular weight”
  - Are these recommendations part of the employee's job duties?
  - What is the frequency with which such recommendation are made, requested, & relied upon?
  - Are the suggestions occasional?

# ADMINISTRATIVE DUTIES TEST

- Primary duty = office or non-manual work
- Directly related to management or general business operations
- Exercise independent judgment & discretion on **matters of significance**

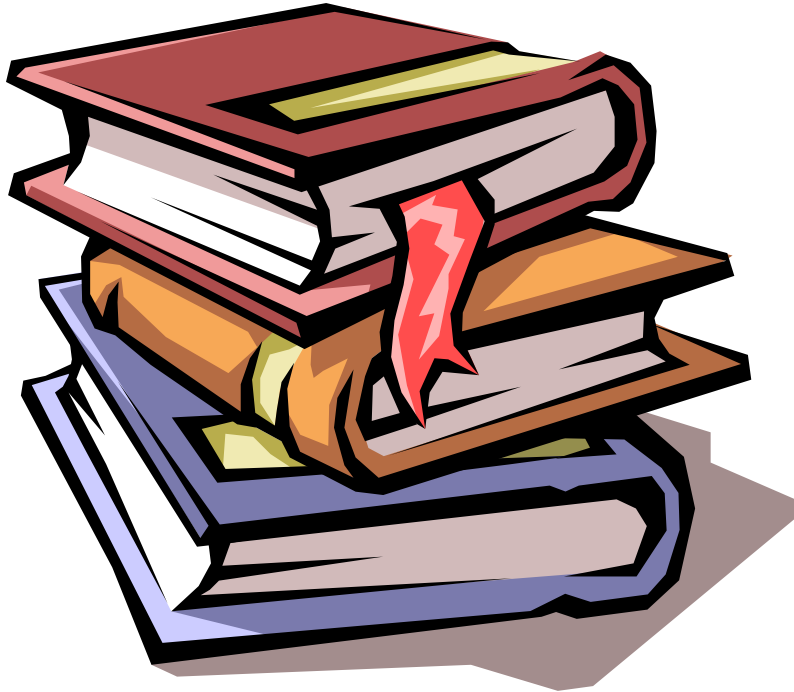
# ADMINISTRATIVE DUTIES TEST

- “Directly related to management of general business operations”
  - Labor relations
  - Finance
  - Accounting
  - Budgeting
  - Advertising

# ADMINISTRATIVE DUTIES TEST

- “Discretion & Independent Judgment”
  - Involves the comparison & evaluation of possible courses of conduct & acting or making a decision after the various possibilities have been considered
  - Does employee have authority to commit the employer it matters that have significant financial impact
  - Does the employee have authority to waiver or deviate from established policies & procedures without prior approval

# PROFESSIONAL DUTIES TEST



- Advanced knowledge in field of science or learning.
- Obtained by prolonged course of intellectual instruction.

# PROFESSIONAL Duties Test

- “Fields of Science or Learning”
  - Law
  - Medicine
  - Accounting
  - Engineering
  - Teaching

# COMPUTER EMPLOYEES

- New & separate computer related exemption
- New section consolidates all provisions from current regulations, interpretive guidance, & legislative enactments
- New Rules increases minimum salary requirement to \$455 per week, or an hourly basis, requires payment of not less than \$27.63 an hour

# COMPUTER EMPLOYEES

- Duties -
  - Primary duty of:
    - Application of systems analysis techniques & procedures, including consulting with users, to determine hardware, software or system functional applications; or...

# COMPUTER EMPLOYEES (con't)

- Design, development, documentation, analysis, creation, testing, or modification of computer systems or programs including prototypes, based on & related to user or system design specifications; or...
- Design, documentation, testing, creation or modification of computer programs related to machine operating systems; or...

## COMPUTER EMPLOYEES (cont'd)

- A combination of all the duties just described, the performance of which requires the same level of skills
- Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field

# OUTSIDE SALES DUTIES TEST

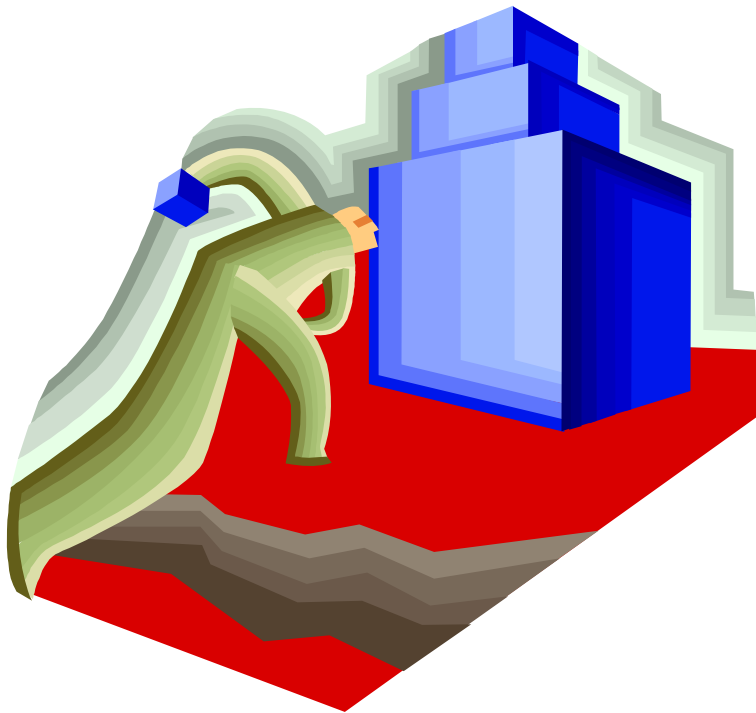
- Primary duty is making sales or
- Obtaining orders or contracts for services or use of facilities for which customers pay
- Routinely works away from employer's places of business

# OUTSIDE SALES DUTIES TEST

## (cont'd)

- “Away from Employer’s Place of Business”
  - Makes sales at the customer’s place of business
  - Does NOT include sales made by mail, telephone or Internet unless such contact is merely as an adjunct to personal calls
  - Any fixed site, whether home or office, used by a salesperson as headquarters or for telephonic solicitation of sales is considered one of the employer’s places of business

# OUTSIDE SALES EXEMPTION



- No salary, fee, or hourly basis test
- No pay level test
- Just duties test

# DEDUCTIONS FROM SALARY

- An employee is not paid on a salary basis if deductions from predetermined salary are made for absences occasioned by employer or by operating requirements of the business
- If employee is ready, willing & able to work, deductions may not be made for time when work is not available

# EFFECT OF IMPROPER DEDUCTIONS

- An actual practice of making improper deductions will result in loss of exemption
  - During time period for which improper deductions were made;
  - For employees in same job classification;
  - 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.

# SAFE HARBOR RULE



- Improper deductions isolated & inadvertent
- Written policy w/complaint proc
- Reimbursement
- Comply in future

# PERMISSIBLE DEDUCTIONS

- Absences of one or more full days for personal reasons other than illness or disability;
- One or more full days for sickness or disability (if the deduction is made in accordance with a bona fide sickness or disability plan of providing compensation for loss of salary occasioned by such sickness or disability).

# PERMISSIBLE DEDUCTIONS

- Offsets for pay for jury duty, service as a witness, or military duty
- While the employer cannot deduct the employee's salary for absences caused by jury duty, service as a witness, or temporary military leave of less than a week, it may offset any amounts received by the employee for such duty or service against the salary due for the week of the service or duty.

# PERMISSIBLE DEDUCTIONS

- Penalties for infractions of safety rules of major significance;
- Initial or terminal weeks of employment; and
- Intermittent leave under the FMLA.

# MISCELLANEOUS EXEMPTIONS

## SECTION 7(i) OF THE FLSA

- Commissioned employees of retail or service establishments. Employee must:
  - be employed by a retail or service establishment
  - have a regular rate of pay that exceeds one & one-half times the minimum wage for all hours worked
  - more than half of the employee's compensation must represent commissions

# MISCELLANEOUS EXEMPTIONS

## SECTION 7(i) OF THE FLSA

- All three conditions must be met for the Exemption to be applicable
- If they are not, overtime pay must be paid for all hours worked over 40 in a workweek
- The representative period for determining if enough commissions have been paid may be as short as one month, but not greater than 1 year
- The Employer must select a representative period in order to determine if the condition has been met & to determine if the employee is paid principally by commissions

# MISCELLANEOUS EXEMPTIONS

## SECTION 7(i) OF THE FLSA

- If Employee is paid entirely by commissions or draws & commissions the “greater than 50% commissions” condition will have been met
- If Employee is not paid in this manner, the employer must separately total the employee’s commissions & other compensation during the representative period. The total commissions paid must exceed the total of other compensation paid for the “greater than 50% commissions” condition to be met

# MISCELLANEOUS EXEMPTIONS

## SECTION 7(i) OF THE FLSA

- To determine if an employer has met the “more than one & one half times the applicable minimum wage” condition:
  - Divide the employee's total earnings attributed to the pay period by the employee’s total hours worked during such pay period
  - If the result is greater than time & one half the minimum wage ( $7.25 \times 1.5 = 10.88$ ) this condition has been met

# MISCELLANEOUS EXEMPTIONS

## SECTION 7(i) OF THE FLSA

- Employers must maintain accurate records of hours worked each workday & workweek & the earnings & wages paid
- Without accurate hours worked & earnings records the employer will be unable to establish that the conditions of the exemption have been met

# MISCELLANEOUS EXEMPTIONS

## SECTION 7(i) OF THE FLSA

- Tips paid to service employees by customers may never be considered commissions for the purposes of this exemption

# MISCELLANEOUS EXEMPTIONS

## SECTION 7(i) OF THE FLSA

- Hotels, motels, & restaurants may levy mandatory service charges on customers which represent a percentage of amounts charged customers for services.
- If part or all of the service charges are paid to service employees, that payment may be considered commissions
- If the other conditions of the exemption are met, the service employees may be exempt from the overtime premium pay

# HOURS WORKED UNDER THE FLSA

- Includes . . .
  - time employee “required, suffered or permitted to work”
  - work performed for employer away from the premises, job site or even at home
  - off-duty or on-call time if employee cannot use time effectively for own purposes

# SUFFERED OR PERMITTED

- If employer knows or has reason to know work is being performed, the time worked is compensable even if it has not been authorized or requested & even if employee volunteered to work for free.

# WAITING/ON CALL TIME

- “Hours Worked” when
  - Employee is unable to use time effectively for own purposes; &
  - Time is controlled by employer.
- Not “Hours Worked” when
  - Employee is completely relieved from duty; &
  - Time is long enough to enable employee to use it effectively for own purposes.

# REST & MEAL PERIODS

- Rest periods. . .
  - not required by FLSA
  - periods of 5-20 minutes, must be included as work time
  - state law may require rest period for employees or minors
  - Health Care Reform Law Amendment - Employers with 50 or more employees must provide reasonable break time for nursing mothers to express milk for one year after child's birth (unpaid).

# REST & MEAL PERIODS

- Meal periods...
  - not required by FLSA
  - 30 minute meal period is not compensable if employee is relieved from duty
  - state law may require meal period for employees or minors

# TRAVEL TIME

- Travel from the employee's home to the initial worksite & from work to home usually is not considered working time.

# TRAVEL TIME

- Travel time may be converted to work time if an employee is required to report to a particular location before traveling to the actual worksite

# TRAVEL TIME

- Ordinary home to work travel is not work time.
- Travel between job sites during normal work day = work time.
- Travel time for one-day assignment in another community (no overnight stay) = work time regardless of whether during regular work hours.

## TRAVEL TIME (cont'd)

- If overnight stay, travel away from home during employee's regular work hours (even during nonscheduled workdays such as Saturday or Sunday) = work time.
- If driver, ALL travel time is compensable.

# LECTURES, MEETINGS, TRAINING PROGRAMS

- Not counted as hours worked IF...
  - attendance outside of regular working hours
  - attendance is voluntary
  - course, lecture, or meeting not directly related to the employee's job
  - employee does not perform any productive work during attendance

# LECTURES, MEETINGS, TRAINING PROGRAMS

- Employers often require their employees to attend certain training sessions & time spent in attendance will always be counted as hours worked.
- A more commonly encountered issue concerns company parties & other “social” type functions.

# LECTURES, MEETINGS, TRAINING PROGRAMS

- Strong “encouragement” to attend by company management may be enough to transform otherwise voluntary attendance into an involuntary situation & thereby make the time spent at the function compensable.

# LECTURES, MEETINGS, TRAINING PROGRAMS

- Care should be taken with respect to these types of functions to make it clear to employees that attendance is entirely voluntarily.

# TRAINEES & INTERNS

- No Compensation Required When:
  - The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
  - The training is for the benefit of the trainees;
  - The trainees do not displace regular employees, but work under their close observation;

# TRAINEES & INTERNS

- The employer derives no immediate advantage from the activities of the trainees; & on occasion operations may actually be impeded;
- The trainees are not entitled to a job at the conclusion of the training period; and
- The trainees understand they are not entitled to wages for the time spent in training.

# COMMON VIOLATIONS

- Misclassifying employees as non-exempt.
- Improper “docking” of exempt salaries.
- Prohibiting payment of overtime (illegal) versus prohibiting working overtime (legal).
- Not counting commissions, shift differentials, & most bonuses in computing regular rate for overtime.

## COMMON VIOLATIONS (cont'd)

- Not counting employee-paid uniform, tools, etc. toward minimum wage.
- Allowing employees to clock-in early or late.
- Providing “comp time” to non-exempt employees (private sector).
- Poor time keeping systems.
- Not counting homework as time worked.
- Not counting certain travel time.

# RECOMMENDATIONS

- Review all executive, administrative, professional, computer & outside sales exempt positions to ensure they meet salary basis test
- Review to ensure they meet applicable minimum pay level test.
- Review to ensure they meet duties test.
- Interview Supervisors/ Employees to Determine Actual Duties.

## RECOMMENDATIONS (cont'd)

- Consider written policy on salary basis test (no Improper Deductions, Complaint Procedure) to take advantage of safe harbor rule.
- Consider written policy on suspensions for misconduct to enable suspensions of exempt employees without pay.

## RECOMMENDATIONS (cont'd)

- Review Job Descriptions
  - Postings
  - Training Manuals
  - Written Procedures.
- Make sure employees sign off on any changes to time records.
- Train supervisors on basic wage & hour issues.

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# QUESTIONS & ANSWERS

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