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WAGE & HOUR RAGING SOUR: COMMON FICTIONS & FACTS ABOUT THE FLSA

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WAGE AND HOUR RAGING SOUR:
COMMON FICTIONS AND FACTS ABOUT THE FLSA

There are common myths about the Fair Labor Standards Act ("FLSA"). This article explores and discusses the more common myths.

1. FICTION

"The FLSA doesn't apply to my small business–I have less than 15 employees."

a. Fact

While many employment laws have threshold limits regarding the number of employees an employer must have before the law applies, the FLSA does not. Even if a company only has one employee, the FLSA may apply.

b. Why

The FLSA casts a wide net. In general, its provisions apply to all employers and cover all employees who are not specifically exempt and who are either:

(1) who engage in interstate commerce,

(2) produce goods for interstate commerce, or

(3) handle, sell, or work on goods or materials that have been moved in or produced for interstate commerce.

For most companies, the test is $500,000 or more in annual dollar volume of business (*i.e.*, the Act does not cover enterprises with less than this amount of business). 29 U.S.C. § 203(s)(1). The FLSA also covers the following industries regardless of their dollar volume of business:

(1) hospitals; institutions primarily engaged in the care of the sick, aged, mentally ill, or disabled who reside on the premises;

(2) schools for children who are mentally, or physically disabled or gifted;

(3) preschools, elementary, and secondary schools, and institutions of higher education; and federal, state, and local government agencies. 29 U.S.C. § 203(r)(2)(a).

2. FICTION

"If I pay all my employees on salary then I can avoid having to pay them overtime."

a. Fact

This is perhaps the biggest misconception of employers. The *way* employees are paid—whether on a salary or hourly basis *alone*—has nothing to do with whether they are exempt or non-exempt for purposes of the FLSA. How an employer classifies an employee for overtime purposes under the FLSA is based on the employee's: (1) weekly or annual salary; and (2) job duties, functions, and responsibilities.

b. Why

The categories of exempt employees are: (1) executive; (2) administrative; (3) professional; (4) professional; (5) computer professional; and (6) outside sales. The Department of Labor (DOL") Wage and Hour administration website provides fact sheets guiding employers in the requirements of these

exemptions. While those fact sheets are helpful, they are no substitute for developing accurate job descriptions and seeking legal counsel to help you determine whether employees should be classified as exempt or non-exempt. The DOL's website is: www.dol.gov.

Many employees, although non-exempt, still prefer to be paid by salary and that is permissible. But if those employees work overtime, the employer must divide that weekly salary by 40 hours to create an hourly rate and pay 1.5 times the hourly rate for overtime. So, if an employer has a non-exempt employee who strongly favors being paid on a salary, they would be wise to start the salary at a lower level than normal.

3. FICTION

"The U.S. Constitution guarantees me a right to a break (ANY BREAK)."

a. Fact

The FLSA does not require that employers give their employees meal or rest periods, regardless of the number of consecutive hours they work. The only exception is that employers must provide reasonable break times for an employee to express breast milk for her nursing child for one year after the child's birth each time such employee has need to express the milk.

b. Why

Regarding breastfeeding, employers are also required to provide a place, other than a bathroom, which is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk. The break time requirement became effective when the Affordable Care Act was signed into law on March 23, 2010. The DOL Fact Sheet #73: Break Time for Nursing Mothers under the FLSA and the Frequently Asked Questions (FAQs) provides basic information about the law.

Regarding mealtimes, many employers worry that giving an employee a meal period after five hours rather than four hours of work, for example, would violate the Act. Under the FLSA, this is not a concern. However, giving employees some sort of meal break during the workday typically is part of an employer's standard practice.

Mealtimes—and the timing of such breaks—may also be covered in employee collective bar-gaming agreements. Federal agencies—such as the DOT or OSHA—may require break periods for industries like the trucking or nuclear industries. Also, it is important to note that many states, *e.g.*, California have specific laws regarding breaks and meal periods. It is important to check the states laws which may impose more stringent break time regulations than the FLSA.

Although the FLSA does not mandate meal or break time, it does address the compensability of such time. The FLSA's implementing regulations provide that an employee's mealtime must generally be counted as compensable hours worked unless the break is at least 30 minutes long and the employee is relieved of all duties (29 C.F.R. §785.19). The worker must also be able to leave his or her post (although consent to leave the premises is not required). The regulations add that generally, break periods of five to 20 minutes in duration should be counted as hours worked (29 C.F.R. §785.18). Be cautious of some time-keeping systems that automatically deduct time for meal breaks and whether the employees are completely relieved of their duties during that time.

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