

Side-Stepping a Wage Hour Class Action: Top 11 Problematic Practices

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Where Small Mistakes Can Become Big Problems

- ◆ Trend of increased filing of class actions
 - ◆ In 2004, number of wage hour collective actions filed exceeded number of employment discrimination class actions.



Wal-Mart Woes

- ◆ Several class action victories against Wal-Mart for missed meal and rest breaks
 - ◆ 10/06: PA jury awards Wal-Mart workers \$78M for missed meal and rest breaks
 - ◆ 12/05: CA jury awards \$172M to Wal-Mart workers for missed meal breaks (on appeal)
 - ◆ 10/04: WA court grants class certification to 40,000 Wal-Mart employees for missed meal breaks and unpaid overtime (affirmed on appeal).



Recent Developments – Class Actions

- ◆ 10/06: Wells Fargo settles class action lawsuit for \$12.8 million brought on behalf of 4,500 business systems employees under FLSA and California law. Plaintiffs claimed they were improperly classified as exempt.
- ◆ 10/06: Former Wachovia stock brokers file proposed class action under the FLSA for failing to compensate for overtime hours.
- ◆ 10/06: Home Depot workers file class action alleging failure to pay overtime and expectation of off-the-clock work.



#1 – Failing to Comply with BOTH State and Federal Law

- ◆ Never assume that compliance with federal law (FLSA) equals compliance with state law (MWA), and vice versa.
- ◆ Employers covered by both must comply with both
- ◆ In case of a conflict, the law most favorable to the employee controls
- ◆ Washington courts look to the FLSA for guidance but are not bound by FLSA rules or decisions



Differences Between the FLSA and MWA

- ◆ Although the MWA is based on the FLSA, there are differences:
 - ◆ Differences in exemptions
 - ◆ Window of correction more clearly available under the FLSA.
 - ◆ State law class procedures.
 - ◆ Procedures and penalties that apply to employee wage claims



2 – Failing to Properly Classify Employees as Exempt

- ◆ In order to classify an employee as exempt, the employee must meet two requirements:
 1. Duties test – administrative, executive, professional, etc., **and**
 2. Paid on a salaried basis

- ◆ “Salaried employee” **does not equal** “exempt employee”

- ◆ Highly paid sales or technical employees are not exempt if they fail the duties test



Administrative Exemption

- ◆ Must meet these requirements:
 - ◆ Salary basis > \$455/week (\$23,660/year)
 - ◆ Primarily performs office/non-manual work directly related to management or general business operations; and
 - ◆ Primary duty includes exercise of discretion and independent judgment re: matters of significance.
- ◆ MWA similar, but only \$250/week (\$13,000/year)



Farmers Insurance – The Administrative Duties Test

- ◆ Insurance adjusters exempt as their duties satisfy DOL regulation (In re Farmers Ins. Exchange, 2006 WL 3026037 (9th Cir. Oct. 26, 2006)):
 - ◆ Interview witnesses
 - ◆ Make recommendations regarding coverage and value of claims
 - ◆ Determine fault
 - ◆ Negotiate settlements

- ◆ Emphasis on adjusters' use of independent judgment in investigating claims and making recommendations.



Executive Exemption

- ◆ Must meet these requirements:
 - ◆ Salary basis > \$455/week (\$23,660/year)
 - ◆ Primary duty is management of business or department;
 - ◆ Customarily and regularly supervise 2 or more other employees (or their equivalent)
 - ◆ Authority to hire or fire or their suggestions and recommendations as to the hiring, firing, advancement, promotion, etc. given particular weight.
- ◆ MWA similar (does not require authority to hire/fire) except lower salary (\$13,000/year).



Outside Sales Exemption

- ◆ Paid on salary or commission basis

- ◆ Primary duties:
 - ◆ Making sales/obtaining contracts for services

 - ◆ Customarily away from employer's place of business
(sales calls from employee's home does not count!)

 - ◆ No more than 20% of time doing non-exempt work.



Commission-based employees

- ◆ Under FLSA and MWA, commission-based employees of retail or service establishments are exempt from overtime if:
 - ◆ At least 50% of earnings from commissions, and
 - ◆ Paid a regular rate of pay of at least time and one-half of the minimum wage for all hours worked.
- ◆ Gieg v. DDR, Inc., (9th Cir. 2005): Finance and insurance managers of car dealership exempt. Exemption not limited to employees who earn commissions on retail goods or products, but included all commission-earning employees of a retail or service establishment.
- ◆ Stahl v. Delicor of Puget Sound, Inc. (2003) – WA SCT held supplier and operator of food and drink vending machines exempt from overtime under the MWA, since sales from vending machines were “retail sales.”



Federal Computer Professional Exemption

- ◆ \$455/week or \$27.63/hour.

- ◆ Primary Duties:
 - ◆ Application of system analysis to determine hardware, software or system functional specs;
 - ◆ Design, development, documentation, analysis, etc. of computer systems or programs based on user or system design specs;
 - ◆ Design documentation, testing or modification of computer programs related to machine operating systems;
 - ◆ A combination of the above duties.



Washington Computer Professional Exemption

- ◆ \$250/week or \$27.63/hour

- ◆ Same duties as federal law plus:
 - ◆ Must be highly skilled with high degree of knowledge and ability to apply knowledge, and to use discretion and judgment in their duties.

- ◆ Specifically not exempt:
 - ◆ Trainees/entry level employees learning proficiency
 - ◆ Employees that do not work independently and w/out close supervision
 - ◆ Computer operators
 - ◆ Computer repair employees



Properly Determining Salary Basis

- ◆ Paid on a “salary basis” means the employee:
 - ◆ Regularly receives predetermined amount each pay period
 - ◆ Receives full salary for any week in which he/she performs any work
 - ◆ Pay not reduced because of the variations in the quality or quantity of work

- ◆ Beware pay practices that may defeat “salary basis”
 - ◆ Partial day deductions from pay
 - ◆ Employee required to work 40+ hours each week
 - ◆ Unpaid suspensions for less than one week (except major safety violations)
 - ◆ Snow day pitfall: reducing pay



Washington Law on Salary Basis

- ◆ Washington courts may consider factors to weigh against salary basis:
 - ◆ Partial day deductions from employee's pay
 - ◆ Requiring employee to make up missed time
 - ◆ Requiring employee to work fixed, specified shifts

- ◆ Washington law permits:
 - ◆ Requiring exempt employees to record hours worked and submit weekly reports
 - ◆ Calculating salaries using an hourly rate
 - ◆ Providing additional pay for hours worked in excess of 40 hours per week



#3 – Failing to Provide Rest and Meal Breaks

- ◆ Under the FLSA, rest and meal breaks are not required, but are encouraged.

- ◆ Under the MWA, rest and meal breaks are required.
 - ◆ Rest breaks must be counted as hours worked
 - ◆ Meal breaks need not always be paid



Rest Breaks Required Under the MWA

- ◆ Under the MWA:
 - ◆ Paid break of 10 minutes for each 4 hours worked required
 - ◆ Rest breaks may be intermittent when nature of the work allows.
 - ◆ Employee may be on-call during break if, when called to duty during break, allowed to make up remainder of rest break.



Meal Breaks Required Under the MWA

- ◆ Under the MWA:
 - ◆ Meal period of at least 30 minutes within 2 to 5 hours from the beginning of the shift.
 - ◆ Additional meal period if employee works 3 or more hours longer than normal.
 - ◆ Employer should pay for meal break unless worker completely relieved from duty.



Paid Meal Breaks Under the MWA

- ◆ Recent Washington cases discuss requirements when meal breaks are paid.
 - ◆ Salvation Army v. White (2003): If breaks are paid, they do not have to be scheduled and employees can be on call and perform some duties.
 - ◆ Iverson v. Snohomish County (2003): County custody officer not entitled to additional compensation because he was on-call during a paid 30 minute meal break.



Paid Meal Breaks Under the MWA cont.

- ◆ Frese v. Snohomish County (2005): Same type of county custody employee as Iverson.

Court of Appeals affirmed denial of both parties' motions for summary judgment. Court held Iverson does not establish that an employer can require employee to work through entire paid meal period.

Court denied summary judgment to the employees as an issue of fact existed: their activity logs showed times they could have taken a break and supervisor stated that they 'can find time eat' during their shifts.



#4 – Failing to Compensate for On-Call Time When Required

- ◆ FLSA: On-call time may be compensable depending on: (1) degree to which employee is free to engage in personal activities; and (2) agreement between the parties.

- ◆ Court consider whether:
 - ◆ There was an on-premises living requirement
 - ◆ Excessive geographical restrictions on the employee's movements
 - ◆ Frequency of calls unduly restrictive
 - ◆ Fixed time limit for response unduly restrictive
 - ◆ On-call employees can easily trade on-call responsibilities
 - ◆ Use of a pager or two-way radio could ease restrictions
 - ◆ Employee actually engaged in personal activities while on-call



Determining On-Call Time Under Washington Law

- ◆ L&I has not specifically defined on-call time, but follows federal guidelines
- ◆ Washington courts tend to follow the Ninth Circuit's interpretation of the FLSA when interpreting the MWA.
 - ◆ Chelan County Deputy Sheriff's Ass'n v. Chelan County: If an employee does not spend a substantial portion of the individual's overall time on-call, then the time is not compensable.



#5 – Failing to Compensate for Off the Clock Work

- ◆ Preliminary and Postliminary Activities:
- ◆ Time spent traveling to and from the place of primary activity is not compensable
- ◆ Preliminary and postliminary activities that are an integral and indispensable part of the principal activities are compensable. IBP, Inc. v. Alvarez, 126 S.Ct. 514 (2005)
 - ◆ Because donning and doffing protective gear is a principal activity, time spent walking to the primary place of work after donning or doffing protective gear is compensable time.



#5 – Failing to Compensate for Off the Clock Work

- ◆ Lindow v. United States (9th Cir. 1984): Employer not liable for employees arriving 15 minutes early to review log books and exchange information because employees reported early for their own convenience, could have performed work during their shift, and employer issued letter stating its policy that employees not required to arrive early to review log book.

But, instructions not enough, if employer still requires work that requires overtime.

- ◆ Under regs, employer must “make every effort” to enforce overtime rules.



#6 – Failing to Compensate for Travel Time When Required

Travel time: What counts and what doesn't count.

◆ What Counts:

- ◆ Travel to a one day work assignment
- ◆ Overnight travel requiring the employee to drive
- ◆ Travel that is part of the principal work activity
- ◆ Travel from home to job site and from job site to job site when vehicle is supplied by employer (WA)
- ◆ Travel time when the employer requires the employee to take the employer's vehicle home (WA)



Failing to Compensate for Travel Time When Required (cont.)

- ◆ Doesn't Count:
 - ◆ Regular travel between home and work
 - ◆ Anderson v. Dept. of Social and Health Servs. (Wa Ct. App):
Time spent by DSHS employee traveling to and from McNeil Island by ferry was not compensable time.
 - ◆ Passenger travel outside regular working hours
(whether by airplane, train, boat, bus, or automobile)



#7 – Failing to Compensate for Meeting and Training Time

- ◆ Time at employer sponsored meetings and training programs usually compensable

- ◆ Training, etc. not compensable when:
 - ◆ Attendance outside employee's regular working hours
 - ◆ Attendance voluntary
 - ◆ Not directly related to the employee's job
 - ◆ No productive work performed during attendance at the course or training.



Failing to Compensate for Training (cont.)

- ◆ SPEEA v. The Boeing Co.: WA SCT Supreme held Boeing employees entitled to compensation for time spent in “preemployment” orientation sessions.
 - ◆ Sessions required; during session employees filled out payroll forms, signed tax forms, viewed orientation videos, obtained photo security badges, and other such activities.



#8 – Failing to Properly Account for Bonuses When Calculating Overtime

- ◆ Overtime is based on regular rate of pay
- ◆ Regular rate of pay includes bonuses
- ◆ Only exception: purely discretionary bonuses
 - ◆ Regular rate of pay for the relevant period must be recalculated and overtime pay adjusted.
 - ◆ Bonus is discretionary when:
 - ◆ Employer retains discretion over **both** the availability of the bonus and its amount.
 - ◆ Bonus must not be paid pursuant to any contract, agreement or promise which causes employee to expect such payment.



#9 – Failing to Compensate When the Employee Performs Non-Requested Work

- ◆ Employers may need to compensate employees for work that the employer did not request or authorize, and may even have to pay overtime to the employees.



#10 – Failing to Properly Keep and Maintain Employee Records

- ◆ FLSA requires employers to maintain records of hours worked each workday and total hours each workweek for all non-exempt employees.
 - ◆ Time clock or time sheet completed and signed by employee;
 - ◆ Employee, not employer, should record hours worked.

- ◆ MWA requires employers to keep records on all employees who are subject to the Act, including:
 - ◆ Name, address and occupation of each employee
 - ◆ Rate of pay
 - ◆ Amount paid each pay period to each employee
 - ◆ Hours worked each day and each week by employee



#10 – Failing to Properly Keep and Maintain Employee Records

- ◆ Some Records must be kept for 3 years:
 - ◆ Payroll records, certificates
 - ◆ Collective bargaining agreements and individual contracts
 - ◆ Sales and purchase records

- ◆ Some records must be kept for 2 years:
 - ◆ Basic employment earnings
 - ◆ Wage rate tables
 - ◆ Order, shipping and billing records
 - ◆ Records of additions to or deductions from wages paid



Recordkeeping - Rounding

- ◆ Under FLSA, rounding practices (rounding to the nearest 5 min., 1/10 of an hour, or 1/4 of an hour) may be acceptable if:
 - ◆ They are administratively necessary
 - ◆ They are not used to systematically deny employees extra compensation

- ◆ Rounding up and rounding down must occur so that employees are not disadvantaged over time.



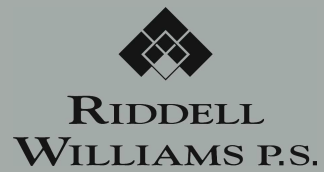
#11 – Working the Enforcement Agencies

- ◆ Tips for responding when DOL or DL&I call
 - ◆ Be prompt
 - ◆ Be cooperative
 - ◆ Involve your legal counsel
 - ◆ Review what you produce before you produce it
 - ◆ Don't sweat the small stuff
 - ◆ Remember that the more you do to make the agency look good, the better off you will be.



Helpful Resources

- ◆ Federal Law, Regulations, Questions and Answers:
<http://www.dol.gov/esa/whd/flsa/>
- ◆ Washington Laws and Regulations:
<http://www.lni.wa.gov/WorkplaceRights/>



Questions?

Please contact us any time with additional questions.

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