Summer 2013

Features

HR JOURNAL

WEST VIRGINIA CHAMBER

WEST VIRGINIA CHAMBER

MESSAGE FROM THE COMMITTEE CHAIR: Carolyn Wade

> “Tech-savvy workers will find it easier than ever to get the attention of compliance officers and invite them into your workplace.”
>
> \- Carolyn Wade Of Counsel, at Steptoe & Johnson PLLC.

A July 9, 2013 news release from the United States Department of Labor begins by saying that “[a]s part of the 75th anniversary of the Fair Labor Standards Act, the U.S. Department of Labor’s Wage and Hour Division is challenging innovative minds to develop a smartphone application that will transform the way the public is able to use departmental enforcement data. By providing consumers with information at their fingertips concerning which businesses have treated their workers fairly and lawfully, the creator of this application will help empower consumers to make informed choices about where to bring their business.”

The release then says:

“The app we would like to see developed would work with existing social media and would allow consumers to see if an establishment that they want to frequent has been in compliance with federal labor laws . . . The app could also help individuals get in touch with the Labor Department if they have any questions. As we mark 75 years of the job protections afforded by the FLSA, we are looking forward to using new technologies to encourage compliance with the law in the 21st century.”

Submissions will be accepted through October 11th. The release explains that “[t]o facilitate this challenge, the Labor Department recently launched http://developer.dol.gov, a unique website that makes it easier for software developers to incorporate department data into online and mobile applications through published application program interfaces and software development kits.”

Clearly on the move and determined to extend their enforcement initiatives, the DOL is reaching out to all consumers (including complainants) in new ways. Tech-savvy workers will find it easier than ever to get the attention of compliance officers and invite them into your workplace. With a smartphone, the DOL will be only a few keystrokes away!

On a different note, please set aside October 22nd and 23rd for the Chamber’s 2013 HR Conference. Great sessions with lots of valuable information are on the agenda, and we look forward to seeing you there. We’ll also get a chance to enjoy “The Best of West Virginia” as Nikki Bowman presents the “West Virginia Products Showcase.” Popular speaker, Nancye Combs, will be returning to talk to us about the future of the HR professional. Hope you can join us!

Avoiding Common Errors in Calculating and Determining COMPENSATION

By: Connie Weber

The Department of Labor has identified approximately $2 billion in back wages and erroneously withheld overtime payments by employers since 2000. Between the Fair Labor Standards Act (FLSA) and multiple state statutory provisions, employers risk making costly miscalculations in employee compensation. Some of the most common errors involve improper classification of employees, determining actual hours worked and calculating overtime.

Exempt or Non-exempt

To qualify for exemption, employees must meet certain criteria regarding their job duties and must be paid a salary of at least $455 per week. Employees are commonly misclassified, resulting in violations of the overtime and minimum wage laws. Important factors which an employer must consider in determining whether an employee is exempt or non-exempt include:

- The actual duties performed by an employee. An employee's contributions, job title, or the nature of the business itself are irrelevant to determining whether the employee is exempt or non-exempt.

- The employee's salary requirements. Employees may be classified as exempt under a combination of two or more categories, but the salary requirement must still be satisfied.

On or Off the Clock

Nonexempt employees – whether hourly or salaried -- must be paid for all hours worked as part of their employment. This seems simple but in actuality it's where most employers are dinged by the Department of Labor during an audit. Common errors when calculating work hours include:

- Employers cannot request an employee work "off the clock" without compensation. This includes running errands during an employee's lunch hour or dropping a deposit envelope at the bank at the close of business.

- An on-call employee who cannot use on-call time for his or her own purposes is technically working and must be compensated. An employee who merely remains "reachable" while on call, however, is not required to be compensated for this time.

- Employers must be able to provide accurate timekeeping records for hourly employees during an audit. When an employee's time records fails to show time taken for uncompensated meal breaks, employers have been required by the DOL to pay back wages for those hours.

- The DOL has found that an employee should be compensated for preparation, work-related travel (including unique one day assignments), training, mandatory after-hours meetings, and even checking and responding to emails while away from the office.

Avoiding Errors in Deductions and Calculating Overtime

West Virginia continues to follow the "time and a half" overtime standard. Employers need to be very cautious when deducting amounts from an employee's wages and calculating overtime.

- Employers commonly violate state statutory laws when deducting uniform costs, shortages in registers, necessary tools, or damage to company property from an employee's paycheck without the proper authorization. Consents for wage deductions must be in writing, signed by the employee on an annual basis.

- Despite their classification as exempt, certain employees may still be entitled to overtime compensation. In those cases, the rate will likely be calculated at the "50% premium" standard (Hourly Rate X 0.5 = Overtime Rate) rather than the "time and a half" model (Hourly Rate X 1.5 = Overtime Rate).

- Employers, particularly those in the health care field, need to include non-discretionary bonuses and shift differentials when calculating an employee's regular rate. A failure to do so, or a miscalculation of either, could result in owing back wages.

The Department of Labor has the authority to penalize an employer for payroll errors. If the DOL determines that an error was done in good faith then it will likely require the employer to pay unpaid overtime. A willful misclassification, however, may require employers to pay liquidated damages in addition to lost wages and attorney's fees if incurred.

New legislation continues to be enacted and proposed which may help limit the errors made by employers, yet the risk remains that a single error or miscalculation, spread across multiple employees, multiple departments, and in multiple offices can add up very quickly. Employers should consult with counsel on an annual or bi-annual basis to make sure that their job classifications and overtime provisions remain in compliance with state and federal laws.

---

[1] DEP'T OF LABOR, Wage and Hour Compliance Action Data (May 30, 2013, 1:00 PM), http://ogesdw.dol.gov/ data_summary.php.

[2] Desmond v. PNGI Charles Town Gaming, L.L.C., 630 F.3d 351 (4th Cir. 2011). While less costly than the time and a half standard, employees misclassified as exempt may still be entitled to other compensatory damages.

[3] Dep't of Labor, Fact Sheet #54—The Health Care Industry and Calculating Overtime Pay (2009), available at http://www.dol.gov/whd/regs/compliance/whdfs54.pdf.

[4] S.B. 355, 81st Leg., Reg. Sess. (W. Va. 2013).The West Virginia Legislature has approved an amendment to the Wage Payment and Collection statute that no longer requires employers to provide final pay checks to discharged employees within 72 hours after discharge. Instead, employees can wait until the next scheduled pay day

[5] H.R. Res. 1406, 113th Cong. (2013).The Working Families Flexibility Act was recently proposed in the House and aims to extend the ability to provide comp time in lieu of overtime into the private sector.

WAGE PAYMENT

72-Hour Rule Tossed by Legislature

By: Mark A. Carter*

The West Virginia Legislature has scuttled the onerous requirement of the West Virginia Wage Payment and Collection Act requiring employers to pay terminated employees all outstanding compensation within 72 hours of their termination. W.Va. Code §21-5-4(b). Upon execution of the law by the Governor, employers will be required to pay terminated employees on their next scheduled payday, or, within four business days, whichever is earlier.

Many West Virginia employers have been the subject of civil actions because they failed to compensate terminated employees within 72 hours of the termination, but rather, compensated those employees as scheduled on their next pay period. By doing so, they found themselves subject to judgments for the wages due, trebled, and attorneys fees. Even worse, employers subject to these actions found that counsel for the plaintiffs sought extensive discovery to identify and support potential wrongful discharge claims. The WV Chamber has made it a plain and concerted goal to amend this inequitable and hyper-technical statute to simplify the requirements of the law while protecting the rights of employees.

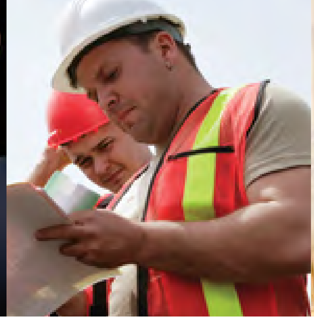
With the full support of the West Virginia Chamber, the Legislature passed Senate Bill 355 to remove the "72 Hour" rule. The amended law will require that terminated employees be paid outstanding wages in full "no later than the next regular payday or four business days, whichever comes first." A business day is defined as "any day that state offices are open for regular business." The employer may pay the employee by mail if the employee requests that, or, it is required to pay the employee through its "regular pay channels."

The Legislature maintained a provision that requires an employer to pay the wages of a terminated employee in full within one day if the employee provides notice to the employer of his or her intention to quit a full pay period or longer before their resignation. However, the Legislature requires that this notice now be "written" to create that obligation.

Under the previous law, an employee who was terminated on a Friday morning at 9:00 a.m. would be entitled to all wages paid in full by 9:00 a.m. on the following Monday. Even employers who were aware of the obligation found compliance with this requirement a great burden. Under the amendment, if an employee was terminated on Friday at 9:00 a.m., and there was no intervening regularly scheduled pay day, they would not be entitled to full pay until four business days after the termination, or the Thursday of the following week in most cases.

The Bill has been signed into law and takes effect on July 12, 2013.

** Mark Carter is the Labor Practice Group Chair of the firm of Dinsmore & Shohl LLP and practices in its Charleston, West Virginia office.*


INDEPENDENT CONTRACTORS

By: Russ Moses

I'm writing this article on Independent Contractors from the perspective of an HR practitioner. I'm not an attorney, I have never played one on TV, and I didn't sleep at a hotel that purports to bestow knowledge on its guests through feather pillow osmosis.

As a Human Resources generalist and business partner, I need to find answers to questions quickly, and this usually means a quick search of Google. This topic, for instance, returned 15,900,000 hits in 0.27 seconds when I searched "independent contractor". However, when it comes to the topic of determining whether a worker is an independent contractor, quicker is not always better.

Misclassifications in this area can be costly for employers, and the federal government has focused on this area of enforcement significantly more over the past 10 years or so.

So, having said all that, this article is not intended to give you a detailed analysis of what constitutes an independent contractor versus an employee, but addresses a few points that HR business partners need to know or be aware of when it comes to independent contractor determinations.

For starters, let's look at what the IRS says about determining independent contractor status. At www.IRS.gov, the IRS lists three common law factors to consider when determining whether a person is an employee or independent contractor. The factors are Behavioral, Financial and Type of Relationship. Many businesses are familiar with the traditional "20-factor test" that the IRS previously used for determining independent contractor status. While this test is still useful as a guide, it is no longer "officially" recognized by the IRS.

The three common law factors are based on the degree of control and independence that the worker exercises over the work arrangement. Each of these three factors has multiple subset factors that should be used to determine whether the person is an employee or independent contractor. However, there is no "magic" number of factors that has to be met. The IRS website advises that "[t]he keys are to look at the entire relationship, consider the degree or extent of the right to direct and control, and finally, to document each of the factors used in coming up with the determination." By the way, the IRS usually presumes that the person is an employee, and the employer has to make the case that he/she is not an employee.

If the above test is does not clear things up for you, the IRS gives you the opportunity to ask them for help in making the determination by submitting form SS-8 "Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding". This form asks a series of questions about each of the above three factors for the worker in question. You can then submit this form to the IRS and have them make the determination. However, this can take up to six months. So if you need an expedited answer or review, this may not be the route to go, but if you are in a business that frequently hires independent contractors, it may be worth your while to take this approach on having your positions reviewed. Just one other note on this form - it can be filed by either the company or the affected worker. This form is available at http://www.irs.gov/pub/irs-pdf/fss8.pdf.

You also need to be aware that the IRS is not the only government agency that has an interest in how you classify a worker. Another player in this arena is the Department of Labor. While the IRS focuses on this issue due to the potential loss of tax revenue from employers who improperly classify workers, the DOL focuses on the issue because· independent contactors are not subject to the Fair Labor Standards Act (FLSA), and are not entitled to minimum wage or overtime.

Like the IRS, the DOL has no single rule or test to determine whether a worker is an independent contractor. The DOL relies primarily on a Supreme Court ruling that states the following factors are significant when determining whether a worker is an independent contractor under the FLSA:

- whether the worker's services are an integral part of your company's business (this points to employee status)
- the permanency of the relationship (the more permanent the relationship, the more likely it is that the worker is an employee)
- whether the worker has invested in facilities and equipment (if so, this points to independent contractor status)
- how much control your company has over the worker (the more control, the more likely it is that the worker is an employee)
- whether the worker has opportunities to make a profit or suffer a loss (employees typically earn a set amount of money no matter what happens, unlike an independent contractor)
- whether the worker competes in the open market (if so, this points to independent contractor status)
- the extent to which the worker operates a truly independent business (the more independence, the more likely the worker is an independent contractor).

You can find more about the Department of Labor's test at their website – www.DOL.gov – under the Wage and Hour section.

Lastly, you need to be aware that your individual state has a stake as well in the determination, so it is always good to review your state Workers' Compensation, State Tax Department and State Labor Department tests or guidelines on independent contractors. Why the Workers' Compensation involvement, you ask? If you determine that your worker is an independent contractor, then you as an employer are not responsible for providing workers' compensation coverage for that worker. That obviously is not true of employees.

As you probably know, there have been debates for years over how workers are classified. One of the biggest cases was filed against one of the biggest household names in industry – Microsoft -- in 1998. As a practitioner, it is good to keep your general knowledge of employment law issues current, and we all have websites we probably use for different topics. One site I found helpful when reviewing the independent contractor issue is www.independentcontractorcompliance.com. It obviously does not replace advice from your attorney, but contains good information on classifying independent contractors.

As you can see, this is not a straightforward issue. As an HR professional, the issue can be very confusing. The old test of "if it walks like a duck, and quacks like duck" wasn't used by either the IRS or the Department of Labor, so it's clearly a complicated subject. Making determinations about independent contractor status can be tricky indeed. My advice as an HR professional on this issue - be aware, be informed, but most importantly, consult your attorney.

Oil & Gas Workers:

PAY THEM NOW OR PAY THEM MORE LATER

By: Carolyn Wade

On May 20, 2013, Law 360 reported a class action suit against Superior Energy Services in Pennsylvania. The suit alleges that Superior misclassified over 1000 employees as exempt and failed to pay them overtime wages. According to Law 360, the Superior companies “told workers that they weren’t entitled to the protections of the federal FLSA... because they fell under the so-called motor carrier exemption, which applies to all workers for whom the U. S. Department of Transportation can apply qualification standards and work-hour limits.” However, the complaint alleges that “[m]ost of the vehicles the plaintiffs use in their duties are outside of the DOT’s jurisdiction.”

On May 16, 2013, the Department of Labor announced that Rigid Oil Field Services in Hydro, Oklahoma paid more that $51,000 in overtime back wages following one of their investigations. In this case, the DOL concluded that laborers at Rigid were employees and not independent contractors, as the company claimed. One of the regional administrators said that “[t]he workers were not only denied their proper overtime compensation, but they were cheated out of other required worker protections, such as unemployment insurance and workers’ compensation.”

On December 19, 2012, John DuMont, director of the Pittsburgh Wage & Hour Division announced that Exton, PA-based Groundwater and Environmental Services (GES) paid more than $187,000 in back wages to 69 of its workers in the Marcellus region. This included employees in Cranberry Township, PA and Fairmont, WV. The DOL’s investigation determined that GES was improperly classifying non-exempt employees, such as junior environmental engineers and junior baseline samplers, as exempt professionals and not paying them overtime. GES also failed to keep accurate records of hours worked for these employees. DuMont said:

“These violations reflect one of the problems we’ve found in the oil and gas extraction industry – employees are improperly classified as exempt from the FLSA and are not paid the proper wages in accordance with federal law.”

DuMont also noted that this investigation was part of an enforcement initiative focused on vendors who perform various phases of the oil and gas fracking process in the Marcellus Shale formation located beneath West Virginia and Pennsylvania. Initiative efforts in the industry include businesses engaged in tree clearing, quarries, road construction, paving, masonry, water and stone haulage, and other types of ancillary or support services.

Not only has DOL enforcement skyrocketed over the past couple of years; wage and hour litigation is at an all-time high as well. There are a bunch of law firms trolling for workers who have potential wage and hour claims against their employers. These suits can be very lucrative for the lawyers bringing these lawsuits. Between the DOL and the plaintiffs’ bar, companies who pay their employees incorrectly are increasingly vulnerable to legal action, particularly in areas of the country where shale plays are happening.

So what are the primary issues resulting in judgments against O&G employers? There are four:

- **Misclassification: independent contractors**
- **Misclassification: professional exemption**
- **Misclassification: motor carrier exemption**
- **Improper application of day rate**

The resolution of a misclassification case is always very fact-intensive. Job titles alone are meaningless; it’s what the employees actually do, and how their jobs fit into the company’s overall structure, that matter. Before we focus on the misclassification issues, let’s examine what may be the most common problem in the industry: improper application of the day rate.

Day Rate

Paying non-exempt employees a day rate, in and of itself, is not a problem. To the contrary, the FLSA rules specifically allow it. The problem is that many employers who are using a day rate for their workers’ pay thinks it exempts them from paying overtime, which simply is not true. Paying a day rate, no matter how high the rate, does not eliminate the requirement to pay overtime to which the worker is entitled. Paying non-exempt employees on a day rate basis does not get the employer out of having to track their time and make sure they are paid the appropriate overtime premium.

Calculation of overtime for a day rate employee is a little different than for a normal hourly worker. If a day rate employee receives no other compensation for his or her services, his or her “regular rate” for overtime purposes is determined by totaling all the sums received in the workweek at the day rate and dividing by the total hours actually worked. As long as the day rate keeps the employee at or above minimum wage, this form of day rate compensation is permissible. But the employer must track the employee’s hours, calculate his or her “regular rate” for the workweek, and pay overtime for each hour beyond 40 that he or she works in a workweek. The employee is entitled to extra half-time pay at his or her regular rate for all hours he or she works in excess of 40 in the workweek. It is this overtime requirement that often trips up employers who use a day rate to compensate workers.

For example, let’s say that an employee works a 50-hour week over five days, and his day rate compensation is $352 per day. His total straight-time compensation for the week would be $1,760 ($352 x 5). His regular rate for the week would be $35.20 per hour ($1,760/50). He would then be entitled to overtime at the half-time rate for the 10 hours he worked beyond 40 in the workweek ($35.20/2 x 10 = $176). His total compensation for the week including the overtime premium would be $1,936 ($1,760 + $176).

Exempt Professionals

There is an overtime exemption for learned professionals. Too often, employers focus on the term “professional” without appreciating the significance of the word “learned”. The learned professional is a fairly limited exemption, and is only intended to apply to persons who have completed a formal education or training in a recognized discipline. To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee’s primary duty must be the

performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;

- The advanced knowledge must be in a field of science or learning; and

- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

For example:

(1) A degreed engineer, particularly if licensed as a P. E., is exempt; a technician usually is not, even if the technician is certified and has completed some classroom training. Refinery inspectors were found to be non-exempt because their duties were deemed routine mechanical and physical skills, as opposed to intellectual or thinking skills. Similarly, inspectors who flew helicopters and inspected line sites, sprayed brush and took aerial photos were deemed to be highly trained technicians, and not professionals.

(2) An architect is an exempt professional. A draftsman, no matter how experienced, probably is not.

The fact that an employee is in a position of sufficient responsibility to cost a company millions of dollars or to insure the health and safety of workers or the public is not enough to make him or her a professional. Nor is it enough that he or she has a lot of training – the training has to be in a recognized discipline, and lead to the performance of duties requiring high level thinking. An employee can be a vitally important, intelligent and skilled individual – but that does not make him a professional under the FLSA.

Drivers

As the Superior Energy Services case shows, the mere fact that an employee drives a truck does not make him exempt. The kind of truck matters greatly for purposes of claiming the motor carrier exemption. The following information from the DOL's Fact Sheet #19 explains that the Motor Carrier Exemption applies to employees who are:

1. Employed by a motor carrier or motor private carrier, as defined in 49 U.S.C. Section 13102;

2. Drivers, driver's helpers, loaders, or mechanics whose duties affect the safety of operation of motor vehicles in transportation on public highways in interstate or foreign commerce; and

3. Not covered by the small vehicle exception.

Employer Requirements

- Motor Carriers are persons providing motor vehicle transportation for compensation;

- Motor Private Carriers are persons other than motor carriers transporting property by motor vehicle if the person is the owner, lessee, or bailee of the property being transported, and the property is being transported for sale, lease, rent, or bailment, or to further a commercial enterprise.

Employee Duties

- The employee's duties must include the performance, either regularly or from time to time, of safety-affecting activities on a motor vehicle used in transportation on public highways in interstate or foreign commerce. Employees must perform such duties as a driver, driver's helper, loader, or mechanic. Employees performing such duties meet the duties requirement of the exemption regardless of the proportion of "safety affecting activities" performed, except where the continuing duties have no substantial direct effect on "safety of operation," or where such safety affecting activities are so trivial, casual, and insignificant as to be de minimis (so long as there is no change in the duties).

- Transportation involved in the employee's duties must be in interstate commerce (across State or international lines) or connect with an intrastate terminal (rail, air, water, or land) to continue an interstate journey of goods that have not come to rest at a final destination.

- Safety affecting employees who have not

made an actual interstate trip may still meet the duties requirement of the exemption if:

a) The employer is shown to have an involvement in interstate commerce; and

b) The employee could, in the regular course of employment, reasonably have been expected to make an interstate journey or could have worked on the motor vehicle in such a way as to be safety-affecting.

- The Secretary of Transportation will assert jurisdiction over employees for a four-month period beginning with the date they could have been called upon to, or actually did, engage in the carrier's interstate activities. Thus, such employees would satisfy the duties requirement of the Section 13(b)(1) exemption for the same four-month period, notwithstanding references to the contrary in 29 C.F.R. § 782.2.

Small Vehicle Exception

Notwithstanding the Section 13(b)(1) exemption, the overtime provisions of Section 7 of the FLSA shall apply to an employee of a motor carrier or motor private carrier in any work week that:

1. The employee's work, in whole or in part, is that of a driver, driver's helper, loader or mechanic affecting the safety of operation of motor vehicles weighing 10,000 pounds or less in transportation on public highways in interstate or foreign commerce, except vehicles:

(a) Designed or used to transport more than 8 passengers, including the driver, for compensation; or

(b) Designed or used to transport more than 15 passengers, including the driver, and not used to transport passengers for compensation; or

(c) Used in transporting hazardous material, requiring placarding under regulations prescribed by the Secretary of Transportation; and

2. The employee performs duties on motor vehicles weighing 10,000 pounds or less.

The Section 13(b)(1) exemption does not apply to an employee in such work weeks even though the employee's duties may also affect the safety of operation of motor vehicles weighing greater than 10,000 pounds, or other vehicles listed in subsections (a), (b) and (c) above, in the same work week.

Typical Problems

The Section 13(b)(1) overtime exemption does not apply to employees not engaged in "safety affecting activities", such as dispatchers, office personnel, those who unload vehicles, or those who load but are not responsible for the proper loading of the vehicle. Only drivers, drivers' helpers, loaders who are responsible for proper loading, and mechanics working directly on motor vehicles that are to be used in transportation of passengers or property in interstate commerce can be exempt from the overtime provisions of the FLSA under Section 13(b)(1).

The Section 13(b)(1) overtime exemption does not apply to employees of non-carriers such as commercial garages, firms engaged in the business of maintaining and repairing motor vehicles owned and operated by carriers, or firms engaged in the leasing and renting of motor vehicles to carriers.

Independent Contractors

Lest you think the DOL's crackdown on the misclassification of independent contractors is abating, think again: on June 3, 2013, it was reported that Honghua America LLC paid $687,469 in overtime back wages to 133 employees after an investigation by the Wage and Hour Division. The investigation, conducted by the division's Houston District Office, found that Honghua improperly labeled workers employed as roughnecks and crane operators as independent contractors.

Several multi-factor tests have been developed for distinguishing between employees and independent contractors, and in many cases, it requires a very fact-intensive analysis of those factors to make that determination. In a nutshell, however, the factors have to do with degree of control, economic independence, and the nature of the relationship between the company and the contractor/employee.

Control: If the company exerts more than nominal direction or control over the performance of the work, as opposed to simply contracting for a result, then the worker is likely an employee.

Economics: If the company supplies the equipment and insurance; the worker has no real investment other than his time, and the worker does not have a genuine opportunity to make a profit or loss, then the worker is likely an employee and not an independent contractor.

Relationship: If the worker hires out to multiple entities, does not have a permanent or semi-permanent relationship with the company, and performs services that are not an integral part of the company's regular business, then the worker is likely an independent contractor. But if the relationship is long-term, exclusive, and the worker is performing duties frequently performed in connection with the normal course of business, then the worker is probably an employee.

While it sometimes takes a careful analysis of the relevant factors, there is one kiss of death that will doom a company's attempt to characterize a worker as an independent contractor: when it has employees working alongside "contractors" performing identical work. Just calling someone a contractor and paying them differently matters little: it's the economic and practical realities that govern, and the DOL (and IRS) are going to opt for employee coverage every time there's a genuine issue.

In Conclusion . . .

EVERYBODY DOES IT is not a defense. Even if an employer's pay practices are modeled on Big-International-Company-and-Industry-Leader A, who pays its employees that way, the employer needs to be wary. Even if the smaller employer thinks "there's no way those guys would be doing it wrong," the employer may be mistaken. Just because a company happens to be a major player in an industry doesn't mean it always knows how to navigate the complexities of the FLSA. If an employer runs afoul of the FLSA's mandates, it can try the old EVERYBODY DOES IT defense. But here's a promise: the fact that other employers in your industry are doing the exact same thing will not matter to a court or the DOL. The whole industry is under scrutiny, and the big and little guys are being targeted.

WEST VIRGINIA CHAMBER

Getting the Job Done!

Effective Government

Business Tax Reductions

Workforce Readiness

Workers' Compensation Reform

Workplace Safety Improvements

Legal Fairness

Regulatory Streamlining

wvchamber.com

Wage and Hour Division Survey Signals Reinvigoration of "Right To Know" Proposal Under Fair Labor Standards Act

By Joy Einstein and Erin Magee, Jackson Kelly PLLC

On January 11, 2013, the Wage and Hour Division (WHD) of the Department of Labor (DOL) announced it would be seeking public comments on a proposed survey about issues related to employee classification. The survey is designed to gauge how many workers are: (1) classified as employees, independent contractors or some other type of employee, and (2) whether employees generally know the rights they are guaranteed under the Fair Labor Standards Act (FLSA). Because of the subject matter of the survey, many have taken this as a clear signal that the DOL intends to reinvigorate its "Right to Know" proposal.

In 2010, the DOL first began considering a proposed rule entitled the "Right to Known Under the Fair Labor Standards Act," which included proposed updates to employer recordkeeping regulations under the FLSA. These recordkeeping updates would have changed the scope and manner of records employers are required to keep in order to demonstrate compliance with minimum wage, overtime and child labor requirements, in addition to the records employers must keep to demonstrate how they classify their employees, as exempt or non-exempt from the FLSA's overtime provisions, or how they classify employees v. independent contractors, for example. Specifically, the original proposal would have required employers to provide each worker with an analysis of his or her classification, the basis upon which he or she was classified as such, and an outline of each employee's benefits and protections. However, the DOL experienced political pushback and decided not to pursue the so-called Right to Know initiative.

Proponents of the Right to Know proposal believe it will benefit employers, employees, and the government. By curbing misclassification of employees, workers should receive the protections, benefits and compensation they are due, so employees will benefit. The initiative does also stand to benefit employers in a way. If enacted, those employers who do comply with regulations will not be disadvantaged by other employers who intentionally misclassify workers to gain an advantage. However, the government presumably will be the biggest winner if the Right to Know proposal takes effect. In addition to being able to tout greater transparency, the government will also be able to collect taxes on appropriately classified employees. As of now, the Government Accountability Office (GAO) estimates that more than two billion dollars in social security and income taxes are left unpaid every year because of employee misclassification. This proposal would help close that gap.

However, this re-apparition of the Right to Know proposal could signal big changes for employers, not all of which will necessarily be positive. Under the current regulations, employers are not required to send any notice or analysis to workers of their work statuses, nor are they required to provide information to employees about how their pay is calculated. However, all of this would change under this initiative. First, if employers are required to write analyses for each employee related to his or her classification, DOL enforcement officers could request these analyses and use them to initiate investigations, which are time-consuming and costly to employers. Presumably DOL officers will be particularly interested in analyses related to low-level support staff classifications and the "administrative" exemption.

On August 23, 2004, changes to the FLSA's definition of an "exempt" employee went effect, causing many lower-level employees, particularly administrative support staff, to be reclassified as non-exempt. The 2004 amendment required that job function rather than job title was the predicate for an exemption, meaning that employees whose job descriptions did not include managerial functions suddenly became non-exempt. Accordingly, it seems likely the DOL will be particularly focused on these classifications.

It also seems likely that the DOL will apply a negative presumption against any employer who fails to comply by not drafting a written analysis of each employee's classification. Accordingly, if an investigation does tip off, the DOL will assume the employee is a covered employee and will place the punitive burden of proof on the employer to demonstrate otherwise.

Secondly, creating written analyses will be a time-consuming process for employers with large numbers of exempt employees, and this process will place a great burden on human resources staff. In addition, these analyses may have to be updated each year, meaning that burden will be a continuous one. Finally, even if the DOL opts not to investigate an employer, a claimant can still bring a civil suit, and these notices could have the effect of increasing worker classification litigation. Additionally, these analyses will be disclosed during the discovery phase of litigation, and this in turn gives rise to attorney-client privilege concerns for those employers who sought legal advice concerning the classification of employees, and those employers who are hesitant to disclose their internal decision-making processes. Moreover, the analyses will be used as evidence at trial and construed strictly against employer/drafters.

In order to avoid the possible negative implications of the Right to Know proposal, employers can take a few simple precautionary measures. First, employers can perform their own internal audits of employee classifications, which would include a thorough review of job descriptions. Second, employers should review pay policies, bonuses and deductions to make sure that nothing improper has been done that might invalidate an exemption.

"DONNING AND DOFFING:"

THE INS AND OUTS OF "WORKING" TIME UNDER THE FLSA

By: Anna M. Dailey, Dinsmore & Shohl, LLP and Samuel Long, J.D. Candidate 2015, University of Richmond School of Law

Working safely is a goal of all employers and requiring employees to don their personal protective equipment (PPE) is critical to meeting this goal. But is the simple act of putting on steel-toed boots or safety glasses compensable working time? What about self-contained self-rescuers (SCSR's)? When must employers start the pay clock ticking? Since donning and doffing time often occurs before one actually begins work, this additional time can often result in more than 40 hours spent at work. This issue can quickly lead to unexpected overtime violations of the Fair Labor Standards Act (FLSA). This article will explain recent court rulings on this issue and advise employers on how to avoid the potentially costly problem of not properly compensating for what becomes "working time".

The FLSA, 29 U.S.C. §§ 206-207 established wage and overtime pay requirements, making all work time compensable. In 1947, Congress enacted the Portal-to-Portal Act, 29 U.S.C. § 251-262 amending the FLSA. Under the Portal-to-Portal Act, employers are not obligated to compensate employees for "walking, riding, or traveling to or from the actual place of performance of the principal activity or activities which such employee is employed to perform" as well as "activities which are preliminary to or postliminary to said activity or activities, where such "traveling" or "activities" "occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. §254(a). This provision raises the question of what is "preliminary" or "postliminary" activity, and therefore excludable, and what is part of the compensable "principal activity" being performed at work. In short, is donning and doffing PPE principal activity or preliminary and postliminary activity? The answer is a mixed question of law and fact, and courts have diverged on how to handle this issue. However, there is useful guidance, if no definitive answers.

When the Supreme Court handed down its highly anticipated decision in IBP, Inc. v. Alvarez, 546 U.S. 21 (2005), plaintiff lawyers across the country applauded the result and sensed the potential for large judgments against employers. In Alvarez, the Court found that time spent by meat processing plant employees donning and doffing protective gear was "integral and indispensable" to the employees' principal activity and therefore was compensable time. The employees, many of whom used knives, were required to also wear chain link metal aprons, vests, plexiglass armguards, and special gloves. The Court, however, excluded the time spent waiting to don the protective gear because it was merely preliminary to the principal activity. From this decision, it is clear that the time spent donning and doffing necessary protective gear that is unique to a job task can function as an exception to the Portal-to-Portal Act's limitations on compensable working time.

Since Alvarez, courts have not treated the donning and doffing of all protective gear the same. In Gorman v. The Consolidated Edison Corp., 488 F.2d 586 (2d Cir. 2007), the Second Circuit court ruled that the donning and doffing of generic safety gear such as steel-toed boots, safety glasses, and a helmet was only preliminary to beginning the principal activity for which they were hired. Consequently, that donning and doffing time was excludable from compensable time.

These decisions provide useful guidance as to the type of protective gear used determines whether the time spent donning and doffing the gear is compensable. For example, in our state's coal mines, donning steel-toed boots and safety glasses would not be compensable. However, coal company employers would be wise to ensure they are compensating for the time spent donning and doffing helmet lamps and SCSR's prior to employees going underground.

These recent rulings also have potential application to the oil and gas industry as well. When operating hydraulic fracturing wells, commonly referred to as "fracking," employees must wear protective face masks to avoid

breathing in airborne particles of sand that are released in the fracking process and flame-resistant suits that prevent potential fires when handling flammable extracts. The protective gear worn while conducting fracking activity is likely unique enough to be considered "integral and indispensable" to the principal work activity, and therefore compensable time.

Since employees often don equipment as soon as they get to work and then may socialize over coffee before traveling to a worksite, employers need to evaluate their work place procedures. In particular, employers in at least the coal and gas industries should evaluate workplace procedures that take into consideration where donning and doffing activities occur vis-à-vis the employees' travel or walking time to their work stations, as well as taking care to ensure that donning and doffing time is properly compensated.

Across all industries, employers should be attentive to the rising trend of donning and doffing lawsuits. Courts have been liberal in certifying class actions in these cases, making employers potentially liable for overtime pay to an entire class of employees. Clearly, the potential for large judgments is menacing. Employers should take a careful look at their workplace procedures and consult knowledgeable labor and employment counsel to evaluate the facts unique to their industry's PPE and whether putting on critical safety equipment is a compensable activity or simply preliminary and no pay is required.

FLSA COLLECTIVE ACTIONS
What Employers Need To Know

by Jill E. Hall

The number of wage and hour lawsuits filed by current and former employees pursuant to the Fair Labor Standards Act (FLSA) has risen dramatically over the past decade and a half. In fact, between 2000 and 2011, FLSA collective actions - wage and hour lawsuits filed on behalf of a group of employees who are similarly situated - rose a whopping 400 percent. The increase may be attributed to the attractive damages associated with collective actions. FLSA collective actions may involve a large group of employees, creating the potential for significant exposure to employers and large recoveries for plaintiffs and their attorneys. Current and former employees who sue under the FLSA can recover liquidated damages twice the amount of actual damages and attorneys' fees. With so much at stake, employers need to be proactive to prevent wage and hour violations that might lead to collective actions.

Collective actions under the FLSA often are mistaken for class actions brought under Rule 23 of the Federal Rules of Civil Procedure. The two differ significantly though, most notably because the FLSA requires all employees to affirmatively consent in writing to join a collective action. Employees who do not consent neither are bound by, nor benefit from, the collective action. On the other hand, members of a class action are parties to the action and bound by the judgment unless they opt out by formally withdrawing from the lawsuit. Also, unlike with class actions, the statute of limitations in collective actions continues to run until a claimant has filed a consent to opt in to the action. An action is not commenced for limitations purposes until the employee opting in files his or her written consent to join the action. Despite these differences, both class actions and FLSA collective actions are costly, burdensome and often protracted.

Claims made in collective actions are the same as those made in FLSA actions seeking individual relief. The most common collective actions typically involve one or more of the following alleged violations: (1) misclassifying non-exempt employees as exempt; (2) making improper deductions from exempt employees' salaries; (3) failing to pay non-exempt employees for all hours worked (e.g. allowing employees to work "off the clock"); and/or (4) failing to pay or miscalculating overtime for non-exempt employees.

Employers can and should take steps to reduce the odds of becoming the target of a collective action. Following the tips below will help minimize the risk of being forced to defend such an action.

1. Properly classify employees and conduct regular classification audits.

If an employee is non-exempt, the FLSA's minimum wage and overtime provisions apply. Employers may not merely choose to classify employees as exempt if the FLSA's salary basis and job duties tests are not satisfied. The law, and not the employer, makes this determination. After the initial classification is made, employers should regularly audit the classification by analyzing the employees' actual primary job duties (as opposed to assuming the duties remain unchanged or simply reviewing job descriptions) to determine whether the exemption still applies.

2. Conduct regular payroll audits.

The FLSA permits deductions from exempt employees' pay only in limited circumstances. Employers should conduct regular payroll audits to ensure that improper deductions are not being made from exempt employees' pay, as improper deductions may result in loss of exempt status.

3. Regularly monitor timekeeping processes.

Employers should conduct regular audits of timekeeping processes to ensure that all non-exempt employees are properly recording and verifying time spent working. Non-exempt employees must be compensated for all time spent working, and employers should be aware of and prohibit "off the clock" work.

4. Ensure overtime is properly calculated.

The FLSA requires payment for overtime at one and one-half times an employee's "regular rate" of pay. This does not necessarily mean one and one-half times the base hourly rate of pay. Other forms of compensation may have to be included in the calculation. Employers very commonly and inadvertently commit errors in this area.

5. Train all supervisors and employees on wage and hour laws.

Proper training can reduce the costs associated with defending an FLSA action. Managers who are properly trained are less likely to commit violations, and the FLSA treats honest mistakes differently than willful violations. Employees should be trained on their responsibilities and informed where to go with questions.

Early assessment and action are key to resolving wage and hour claims. Taking the proactive steps listed above will help ensure compliance with wage and hour laws and help to avoid costly and burdensome collective actions under the FLSA.

WEST VIRGINIA CHAMBER

DON'T MISS THESE CHAMBER EVENTS

HR CONFERENCE WEST VIRGINIA CHAMBER

HUMAN RESOURCES CONFERENCE

OCTOBER 22-23, 2013

CHARLESTON MARRIOTT-TOWN CENTER

Hundreds of HR professionals from around West Virginia learn about the latest updates and best practices to keep your company protected.

DC FLY-IN

OCTOBER 28-30, 2013

WASHINGTON, DC

Make your voice heard! Meet with West Virginia's members of Congress. Discuss issues important to your business.

LEGISLATIVE KICK-OFF

JANUARY 2014

CHARLESTON MARRIOTT-TOWN CENTER

Join business leaders from across the state on the eve of the legislative session.

ENVIRONMENTAL CONFERENCE

MAY 2014

CHARLESTON MARRIOTT-TOWN CENTER

Developed to help you find the latest information on West Virginia and federal environmental policies and regulations, as well as information on new environmental compliance mandates.

78th ANNUAL MEETING and BUSINESS SUMMIT

AUGUST 2014

THE GREENBRIER

WEST VIRGINIA CHAMBER

DINSMORE & SHOHL LLP | LEGAL COUNSEL | LABOR & EMPLOYMENT

RESPONSIBLE ATTORNEY: JOHN F. HUSSELL, IV

In the workplace. In the hearing room.

See the BIGGER picture.

The Employer's Toolkit: Best Practices for Your Workplace helps West Virginia HR professionals get a more in-depth view of evolving laws and regulations. Join Dinsmore attorneys for live and on-demand webinars packed with updates and best practices to help you minimize workplace disruptions, strengthen your procedures — and your people. Learn more at dinsmore.com/le_education or scan this code with your mobile device.

Let's *Accomplish* more.℠ Together.

CHARLESTON | 304.357.0900
LEWISBURG | 304.645.5360
MORGANTOWN | 304.296.1100
WHEELING | 304.230.1700

Dinsmore

Top Ranked in
Labor & Employment Law

Bowles Rice is a full-service law firm with a dedicated Labor & Employment Practice Group that provides representation to employers in every aspect of the employer-employee relationship. We have assembled an experienced team of more than 25 lawyers to provide sound advice and counsel to clients in matters involving:

- Labor & Employment Law
- Workers' Compensation
- Deliberate Intent and Employers' Liability (Workplace Injury)
- Employee Benefits, Executive Compensation and ERISA

Bowles Rice and the attorneys practicing in the Labor & Employment Practice Group are honored to be recognized by the leading peer review organizations in the legal profession, including:

- U.S. News & World Report's *2013 Best Law Firms* – ranked "First-Tier" in Employment Law - Management and Litigation - Labor and Employment
- Named a "Go-To All-Star Law Firm for the Top 500 Companies" in 2013 by American Lawyer Media in *Fortune Magazine*
- *Best Lawyers in America*
- Chambers USA: *America's Leading Lawyers for Business* – Bowles Rice listed as "Top Ranked" in Employment Law
- *Super Lawyers*
- LexisNexis Martindale-Hubbell, including the highest level AV Preeminent rating

For more information about the top ranked Labor and Employment Practice Group at Bowles Rice, contact attorney **Mark Dellinger** in the firm's Charleston office, at **304-347-1178**.

Bowles Rice
ATTORNEYS AT LAW
www.bowlesrice.com

CHARLESTON, WV MARTINSBURG, WV MORGANTOWN, WV MOUNDSVILLE, WV PARKERSBURG, WV LEXINGTON, KY SOUTHPOINTE, PA WINCHESTER, VA

HR JOURNAL

West Virginia Chamber

Call Jane Thomas
at 304-342-1115
for your copy.

Call Brenda Harper
at 304-414-2499
for questions or suggestions
about upcoming articles.

1624 Kanawh Blvd. East
Charleston, WV 25311
wv**chamber**.com

West Virginia Chamber