

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at Work[®]

The Fine Art of Employment Law: From Compliance to the Courtroom

**The Ancient Arts:
The FLSA in the 21st Century**

Presented by:

John Thompson
Direct: (404) 240-4257
jthompson@laborlawyers.com


Matthew R. Simpson
Direct: (404) 240-4221
msimpson@laborlawyers.com

www.laborlawyers.com

Atlanta • Baltimore • Boston • Charlotte • Chicago • Cleveland • Columbia • Columbus • Dallas • Denver • Fort Lauderdale • Gulfport
Houston • Irvine • Kansas City • Las Vegas • Los Angeles • Louisville • Memphis • New Jersey • New Orleans • Orlando
Philadelphia • Phoenix • Portland • San Antonio • San Diego • San Francisco • Seattle • Tampa • Washington, DC

A Brief History of the FLSA

- The FLSA was enacted in 1938
 - It was created for a depression-era economy with a far-different work environment
 - It was more limited in scope than the current Act
- The last major revisions were in 1966
 - Any efforts to “modernize” the FLSA have become politically contentious



FISHER & PHILLIPS LLP
ATTORNEYS AT LAW
Solutions at Work[®]

© Copyright 2016
All Rights Reserved

www.laborlawyers.com

2

A Brief History of the FLSA

But not much has changed since then,
right???



FISHER & PHILLIPS LLP
ATTORNEYS AT LAW
Solutions at Work[®]

© Copyright 2016
All Rights Reserved

www.laborlawyers.com

3

FLSA Basics

- Minimum Wage
- Premium Pay For Overtime Work
- Recordkeeping, Including Accurate Time Records
- Limitations On The Employment Of Minors Under 18

Minimum Wage

- Federal minimum wage is currently \$7.25 per hour
 - Check additional state law requirements
 - More increases could be on the way
- Most deductions cannot cut into the minimum wage
 - Examples: tools, equipment, supplies, mileage, uniforms, shortages

Overtime

- Non-exempt employees must receive 1.5 times the "regular" rate for over 40 hours
- "Regular" rate is all pay divided by all hours the wages were paid to compensate
 - Includes items such as bonuses, commissions, incentive pay and other types of extra pay
- Most deductions or payments cannot cut into overtime

Recordkeeping

- Maintain accurate records of all time a nonexempt employee works
- Include all time you know or have reason to know employee worked
- USDOL: if you don't want to pay for the work, prevent it from being done!

Testing Your Wage-Hour Knowledge



Hours Worked

Dali likes to start work every morning at 8 a.m., but has a hard time reading his clocks. Dali therefore instructs his staff to report to work at 7:45 a.m., so that he can be sure they are all there and ready to work at 8 a.m. Does the FLSA require the 15-minute difference to be treated as "hours worked"?



- (a) No, because employers can round away up to 15 minutes
- (b) Yes, if staff actually starts work during those 15 minutes
- (c) No, because the 15 minutes is "de minimis"
- (d) Yes, even if staff does not actually do any work during those 15 minutes.

Hours Worked



Nonexempt employees at the Factory are tired of punching in and out for their 30-minute lunch. Supervisor Warhol says that they don't have to, as long as they are OK with the Factory deducting a half-hour from their worktime every workday. The employees say this is fine with them. Is this a wage-hour problem?

- (a) Yes
- (b) Probably yes
- (c) No
- (d) Probably no

Hours Worked

Chris is an assistant to a performance artist. Once a month, Chris is on-call for eight hours a day for each day in a seven-day period in the event that his artist is inspired to create. Chris has to carry a cell phone and must be able to call-in within 30 minutes after being texted. He cannot drink alcoholic beverages while he is on-call, and he cannot leave the Midtown area. On average, Chris receives two texts in a seven-day on-call period and spends a total of two hours on the phone or on a computer dealing with the matters that prompted the texts. Is it likely that the idle time Chris spends on-call will be deemed to be FLSA "hours worked"?

- (a) Yes
- (b) No
- (c) It depends

Hours Worked

Medici Inc. has a policy in its handbook saying that nonexempt employees are not permitted to do any overtime work without advance, written approval. Medici Inc. is careful to apply this policy consistently so as not to discriminate against anyone. If a nonexempt employee performs work in violation of this policy, the work is recorded, but it is not treated as "hours worked" for purposes of meeting the FLSA's minimum-wage or overtime requirements.



- (a) This is proper under some circumstances
- (b) This is always proper where there is a clear, written policy
- (c) This is never proper

Wage Deductions



A Salaried Exempt Manager at the Louvre is cleaning the Venus de Milo when he accidentally knocks the statue over, breaking both of her arms. The Director of the Louvre is furious, and has the Manager sign an agreement whereby he'll pay for the damage done through regular payroll deductions. Are the deductions permissible?

- (a) Yes, because the Manager caused the damage
- (b) Yes, because the Manager signed a written agreement to pay for the damage through payroll deductions
- (c) Probably not

Overtime

Every February 1, The Fisher Phillips Art Gallery pays a bonus to eligible nonexempt employees for the prior year if its performance exceeded certain standards. The standards are based on the Gallery's overall sales. Employees must be employed at year's end to qualify for a full or partial payment. The bonus is set at 2.5% of each employee's base pay for the prior year. The Gallery tells each new employee about the bonus, but it says that management reserves the right to withhold payment if an employee has violated a major company policy. Does the Gallery have to figure FLSA overtime on the bonus payments if the employee worked overtime during the prior year?

- (a) Yes
- (b) No, the bonus is discretionary
- (c) No, the bonus covers an entire year, rather than just a pay period
- (d) No, the bonus is tied to company performance, not individual performance.

What Else Is New?



USDOL's Independent Contractor Guidance

- The misclassification of workers as independent contractors results in less tax revenue to the federal government
- Under the FLSA, where a worker is “economically dependent” upon the company, the worker is most likely not an independent contractor
- USDOL: “In sum, most workers are employees under the FLSA’s broad definitions.”

USDOL's Proposed Overtime Regulations

- USDOL has proposed an increase in the salary basis of \$455 per week (or \$23,660 annualized) for “white collar” exempt employees
 - Proposed salary level would be 40% of earnings for full-time salaried workers
 - USDOL has proposed \$921 per week (\$47,982 annualized)
 - But USDOL “projects” this to be \$970 per week (\$50,440 annualized) by the time the regulations are finalized
 - Annual (and automatic) “updates” in salary level to maintain 40% threshold
- USDOL has proposed an increase in the total-annual-compensation threshold of \$100,000 for “highly compensated” employees
 - Proposed salary level would be 90% of “earnings” for full-time “salaried” workers
 - This is projected to be a threshold of \$122,148 in 2016
 - Annual (and automatic) “updates” in level to maintain 90% threshold

USDOL's Proposed Overtime Regulations

- USDOL is considering whether “nondiscretionary bonuses and some incentive payments” may credit toward the salary level in some way
- USDOL is considering revisions to the “duties” tests
 - A 50% requirement for performing exempt work?
 - Additional examples illustrating how the exemptions apply to particular occupations
- USDOL intends to issue final regulations by July 2016.

Final Questions

FISHER & PHILLIPS
Solutions at Work®

© Copyright 2016
All Rights Reserved

www.laborlawyers.com

19

Thank You!

Presented by:

<p>John Thompson Direct: (404) 240-4257 jthompson@laborlawyers.com</p>	<p>Matthew R. Simpson Direct: (404) 240-4221 msimpson@laborlawyers.com</p>
---------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------

FISHER & PHILLIPS
Solutions at Work®

© Copyright 2016
All Rights Reserved

www.laborlawyers.com

20
