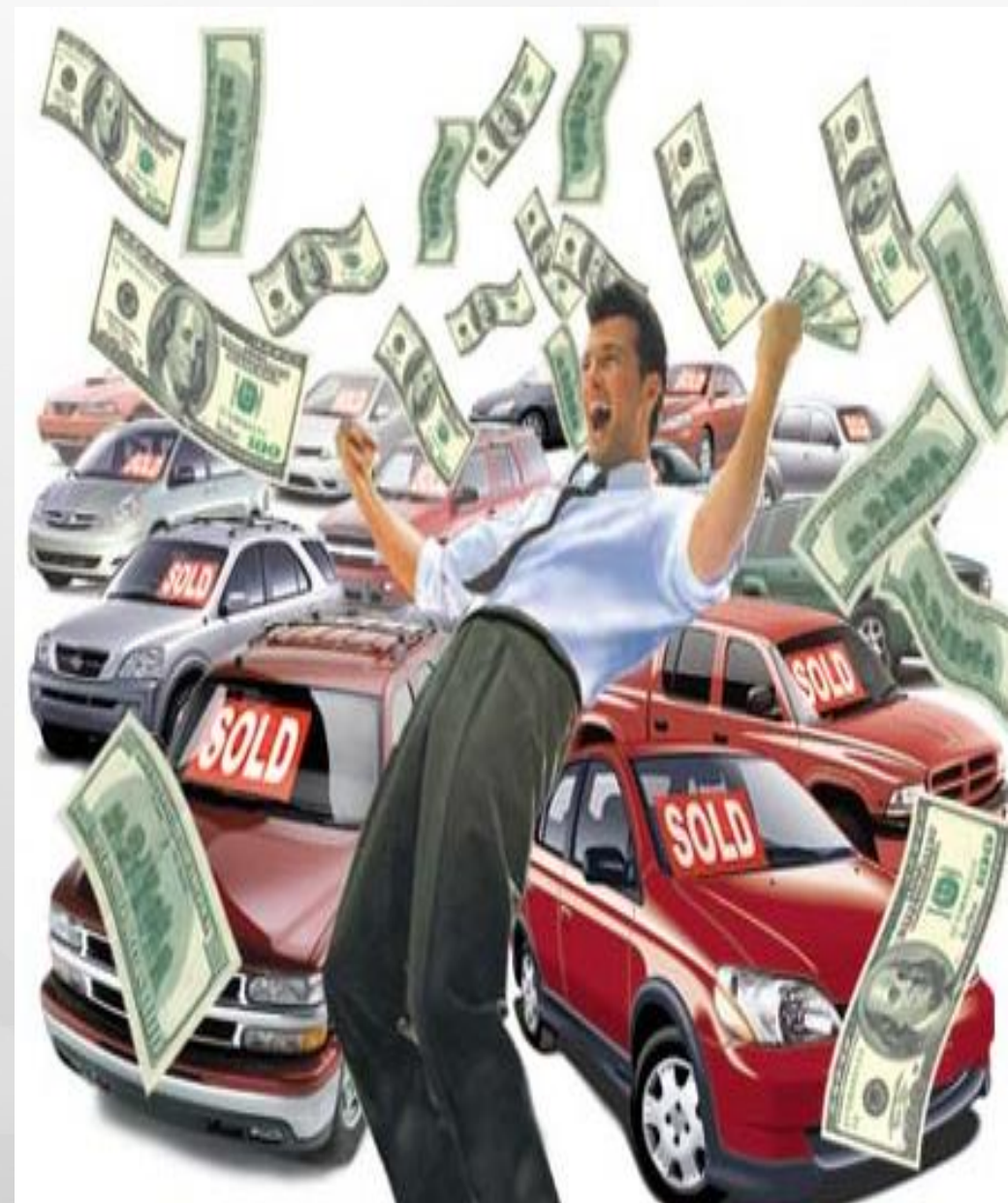


IT'S ALL ABOUT THE MONEY: WAGE AND HOUR COMPLIANCE TIPS FOR THE OLD AND NEW RULES*

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*This Presentation is not and is not intended to be legal advice and is presented for information purposes only.

The FLSA and California law

The Fair Labor Standards Act (“FLSA”) governs how most employers must pay their employees.

The FLSA has 4 main provisions:

- Minimum Wage
- Overtime
- Recordkeeping
- Child Labor

Employers must also check state laws-
California Wage Order 4



The FLSA and California law

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There is no middle ground when it comes to FLSA compliance -- an employer is either 100% compliant with the law or it's out of compliance with the law.

Unintentional and intentional violations are both violations.

The only difference between violations is the number of years the claims are included (2 or 3) and whether liquidated damages (double damages) are available; California 4 year SOL.

FLSA is a "floor" of protection.

Attorneys' fees are available in both cases.



The FLSA and California law– Legal Challenges

The United States Department of Labor, Wage and Hour Division enforces the FLSA (and the FMLA) and Ca. Division of Labor Standards Enforcement (DLSE)

The DOL has a website replete with information about the law and offers a timekeeping app.

Employees can file MW and OT complaints with DOL

Misclassification claims are common

The DOL/DLSE can initiate investigations without a complaint (relatively rare)

If the DOL/DLSE finds a problem, the employer can resolve the matter through the DOL



The FLSA/California – Legal Challenges

Employees can file or threaten to file a lawsuit under the FLSA against their employer

The action can be single plaintiff case or a collective/class action (multiple plaintiffs)

Liquidated Damages (double damages) available if plaintiff proves willful violation

Reasonable attorneys' fees available if plaintiff(s) prevail

FLSA/California law allows employees to sue for retaliation if they suffer an adverse employment action for exercising their FLSA rights to complain



Other Potential Legal Challenges

- DOL has brought claims against dealerships for unpaid overtime on behalf of independent contractor's employees under a "joint employment" theory (e.g., detailers)
- Claims alleging breach of contract alleging unlawful deductions and failure to pay according to pay plan have been made and wage theft claims for reducing commissionable gross profit through lot fees, packs, and other charges
- California terminal pay and LC 203 penalties
- Misclassification of employees as independent contractors



The FLSA – The Basics

The starting point for FLSA compliance is that:

- Every employee is entitled to at least ***minimum wage*** for all hours worked
- Every employee is entitled to ***overtime*** pay for all hours worked over 40 in a workweek
- Employer is required to maintain accurate and complete time ***records*** for all employees.
- These rules apply for ***all*** employees who do not qualify for a complete or partial exemption to these rules.



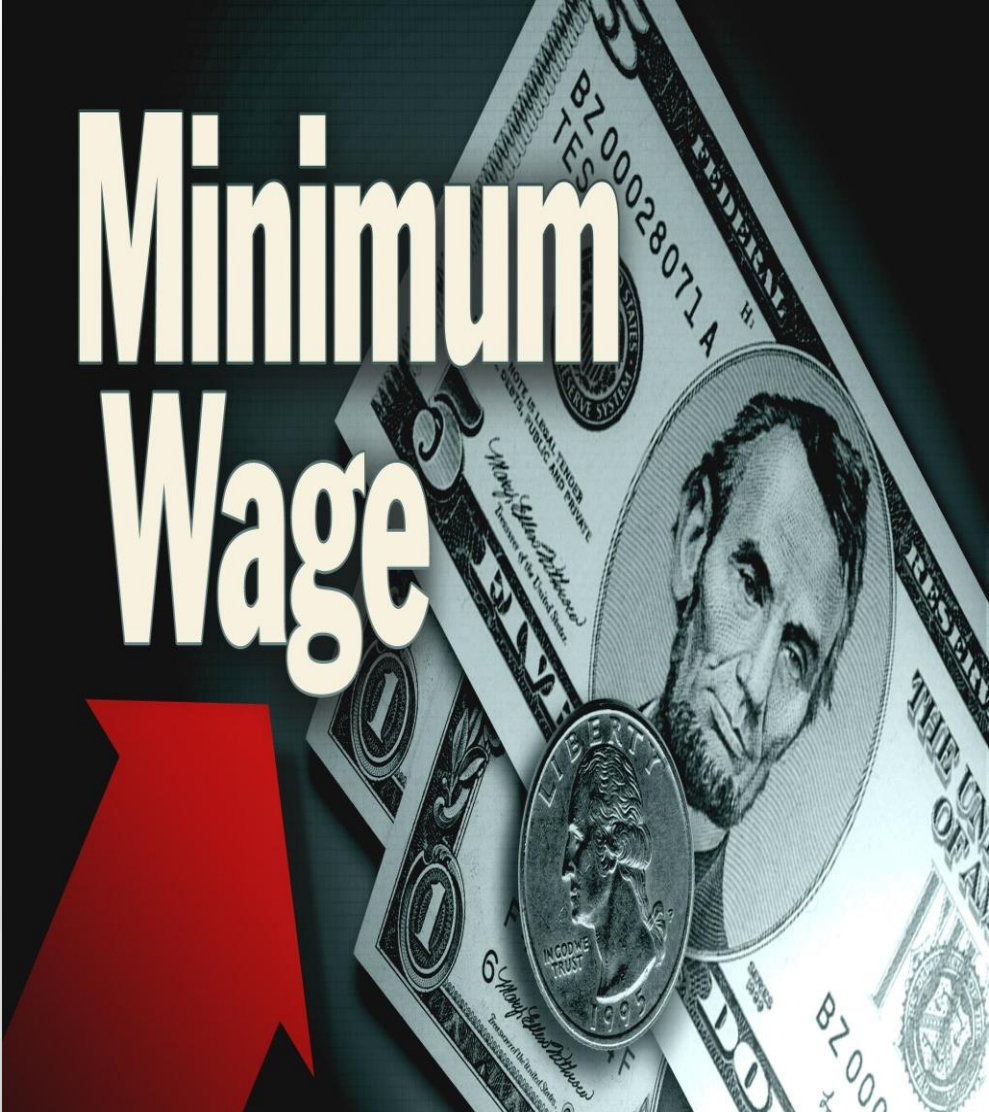
The FLSA – Recordkeeping

- The Basic Obligation: To keep accurate records of all time a nonexempt employee works each workday and each workweek
- This includes all time the employer knows or has reason to know the employee worked
- U.S. DOL's view: Don't want to pay for the work – then *prevent it from being done!*
- Typical Trouble Spots: meals, breaks, on-call time, training/meetings, early/late work, work at home, travel
- Salespersons, techs, advisors, finance managers, parts, among those for whom accurate time records required



The FLSA/California – Minimum Wage

- Current federal Minimum Wage (MW) is \$7.25 per hour (CA - \$10.00)
- **Non-exempt** employees must receive at least MW for all hours worked each workday and each workweek.
- Some dealership employees may be nonexempt for MW and recordkeeping purposes but exempt for OT purposes.
 - Example: inside salespersons



Minimum
Wage

The FLSA – Minimum Wage

Potential Problem Areas:

- Treating employees as independent contractors
- Deductions for:
 - Broken or damaged property or equipment
 - Unreturned property
 - Cash shortages
 - Unpaid debts for repairs, parts, etc.
- Off the clock work
- Not capturing all hours worked including time spent on short breaks, at home work, travel



The FLSA – Overtime

Employers must pay employees who are not overtime exempt at the rate of time and one half the employee's "regular rate" for all hours worked in excess of 40 in a workweek

Not measured in terms of pay periods

Regular rate - all forms of nondiscretionary pay

- Hourly rate +
- Bonuses +
- Spiffs +
- Commissions and other forms of comp
 - Divided by hours worked in the work week = regular rate



The FLSA – Overtime

Potential Problem Areas:

Treating employees as independent contractors

Treating employees as exempt who are not exempt (misclassification)

Not paying exempt employees on a “salary basis” where required

Not calculating OT correctly

Not capturing all hours worked, including off the clock work, working “lunches”



Overtime Requirements in California

Overtime:

- Over 40 hours in a week,
- Over 8 hours in a day, AND
- First 8 hours on the 7th day

Record keeping:
meal periods, hours
worked

Double time:

- Over 12 hours in a day, AND
- After 8 hours on the 7th day

Calculating the Regular Rate for Overtime

- What is the “regular rate of pay?”
 - Hourly Rate.
 - Commissions.
 - Non-discretionary v. discretionary bonuses.
- Must consider when the compensation was earned and when the overtime was worked.

California - Compensation on a Piece-Rate Basis

- *Gonzalez v. Downtown LA Motors, LP*
 - The court held that class members were entitled to separate hourly compensation for time spent waiting for repair work or performing other non-repair tasks directed by employer during work shifts.
 - Dramatic effect for piece rate and commission employees.

California - Compensation on a Piece-Rate Basis

- Resulted in AB1513 – Effective January 1, 2016
 - Adds Section 226.2 to California Labor Code
 - Establishes compensation and wage statement requirements for rest and recovery periods and “other nonproductive time” for piece-rate employees

The FLSA/California – The Exemptions

Under the FLSA:

Some employees may be completely exempt from the MW, OT and Recordkeeping rules: FLSA and CA differ!

Some employees may be OT exempt only

Exemption is not based on salaried-paid status, job title, job description, industry standard or practice or employee preference

“Primary” duties and pay method determine exempt status

Employer’s burden to prove exemption applies

Exemptions determined on an employee by employee basis

No middle ground – either exempt or not



The FLSA – Sales Exemption

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1. The employee is employed at an automotive dealership; and
2. The employee's primary duty is to sell cars or trucks to customers.
3. Exemption is from OT obligation only
4. Employer must pay at least MW for all hours worked and maintain accurate records of hours worked.



The FLSA – Mechanic Exemption

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1. The employee is employed at an automotive dealership; and
2. The employee's primary duty is performing skilled mechanical or body repair work on a car or truck.
3. Exemption is from OT obligation only
4. Employer must pay at least MW for all hours worked and maintain accurate records of hours worked.



The FLSA – Parts Exemption

1. The employee is employed at an automotive dealership; and
2. The employee's primary duty is stocking, issuing, requisitioning, or selling parts.
3. Exemption is from OT obligation only
4. Employer must pay at least MW for all hours worked and maintain accurate records of hours worked.



The FLSA – Service Advisors

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1. The employee is employed at an automotive dealership; and
2. The employee sells service to external customers
3. “Sales exemption” applies to advisors **for now**
4. Exemption is from OT obligation only
5. Employer must pay at least MW for all hours worked and maintain accurate records of hours worked.
6. Advisors primarily writing ***internal*** tickets only not exempt under this exemption



The FLSA/California – Commission-paid Exemption

1. Employment at a “retail” establishment; and
2. More than 50% of compensation is “commissions” during “representative period” and
3. The employee receives at least more than time and one-half the federal (CA) minimum wage (\$10.89) (\$15.00 CA) for all hours worked in an overtime week.
4. Test is over as a designated “representative period”
5. Must maintain accurate records of hours worked.
6. Exemption from OT only

This is not the sales exemption.



The FLSA – Exemptions

THE GOOD NEWS:

- The upcoming changes to the law do **NOT** impact or change the exemptions we just discussed.
- If your employees in those positions are properly classified and paid, no changes needed.
- This is a great time to make sure you're good.



The FLSA – Exemptions

THE NEWS:

The upcoming changes impact **ONLY** those employees who are exempt under one the following exemptions:

- Executive
- Administrative
- Professional
- Computer professional
- Highly compensated employee



The FLSA/California– The Exemptions

Executive Exemption:

1. The employee's primary duty is the management of a department or sub-department of the dealership; and
2. Supervises the work of two or more full-time employees or their equivalent; and
3. Hires/Fires, or makes suggestions about that or about other status changes that carry particular weight
4. Is paid a predetermined salary of at least \$455 per workweek or \$23,660 annually (for now) that is not subject to deductions based on quantity or quality of work

Examples: Dealer. Department managers, office manager, controller (assuming all requirements met)



The FLSA/California – The Exemptions

Administrative Exemption:

1. The employee's primary duty is non-manual office work directly related to management policies or general business operations; and
2. Exercises ***discretion*** and ***independent judgment*** on ***matters of significance***; and
3. Is paid a predetermined salary of at least \$455 per workweek or \$23,660 annually (for now). that is not subject to deductions based on quantity or quality of work.

Examples: Human Resources Manager, Used Car Buyer, Controller (assuming all requirements met).



The FLSA/California – The Exemptions

Professional Exemption:

1. The employee's work requires advanced knowledge, invention, imagination or talent; and
2. The employee exercises discretion and independent judgment on matters of significance; and
3. Is paid a predetermined salary of at least \$455 per workweek (for now). that is not subject to deductions based on quantity or quality of work.

Examples: Accountant, Attorney (assuming all requirements met.)



The FLSA – What's Changing

Effective **December 1, 2016:**

- Minimum salary threshold for “white collar” exemptions increases from \$455 to \$913 per week (paid on a "salary basis")
- Annualizes salary from \$23,660 to \$47,476
 - California: currently \$41,600
- Thresholds will be "updated" every three years, with 150 days' notice



The FLSA – What’s Changing

Guarantee of at least \$913 per week may be in form of salary, draw or commissions as long as amount is guaranteed and paid

Employers will be able to satisfy up to 10% of the salary threshold from “nondiscretionary bonuses and incentive payments”

Can include commissions if paid quarterly or more frequently



The FLSA/California – Your Options

- Increase the salary amount for those impacted to satisfy salary threshold requirement
- Treat employee as non-exempt, pay an hourly rate and pay overtime premium when owed
- Make employee salary, non-exempt but pay overtime premium when owed
- Treat employee as commission-paid (inside sales) employee if all requirements met
- Consider other available exemptions



The FLSA – Your Plan

1. Consider an audit of your compliance
2. Review time and recordkeeping procedures
3. Review pay plans
4. Review Handbook policies and procedures
5. Review Third-Party Agreements for Indemnification
6. Consider Arbitration agreements and class action waivers



Final Questions



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