


**AVOIDING COMMON
WAGE & HOUR
MISTAKES**




 **Littler**

Thursday, May 18, 2016

Presented By



Tammy McCutchen
Principal, Littler, Washington D.C.



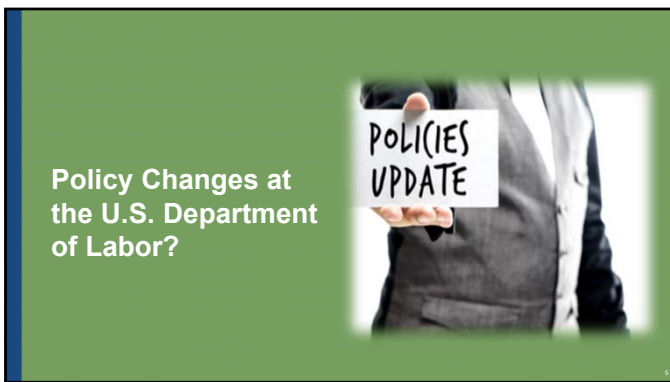
Sean Halloran
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Agenda


- Deductions
- Overtime Calculations
- Hours Worked
- Employee Classifications







Secretary of Labor Alexander Acosta



- Sworn in on Friday, April 28th
- Graduate of Harvard College and Harvard Law
- Law clerk to Justice Alito (Third Circuit)
- Three positions in the Bush Administration:
 - Member, National Labor Relations Board
 - Assistant Attorney General, Department of Justice, Civil Rights Division
 - U.S. Attorney General, Southern District of Florida

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Acting Solicitor Nicholas Geale

- Appointed as Deputy Solicitor by President Trump on February 17, 2017, and became Acting Solicitor immediately under federal law
- Previously served as
 - Member, National Mediation Board
 - Director of Oversight and Investigations on the Senate HELP Committee (Senator Alexander)
 - Counselor to the Deputy Secretary of Labor during the Bush Administration
- Georgetown Law



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Other Key Political Positions Remain Unfilled



- Deputy Secretary
- Wage & Hour Administrator
- BLS Commissioner
- All Assistant Secretary positions, including:
 - Policy
 - ETA
 - EBSA
 - OSHA
- OFCCP and OLMS Directors

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What's Up with Overtime?



Quick Refresh

- Increased minimum salary level from \$455 to \$913 per week
 - \$23,660 to \$47,476 annually
 - But allowed employers to use bonuses and commissions, paid at least quarterly, to meet up to 10% of the new minimum salary level
- Increased highly compensated from \$100,000 to \$134,004
- Provided for automatic increases of the minimum salary and highly compensated levels every three years, beginning January 1, 2020.

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Status of the Litigation **Littler**
Stockton • Lake • Dallas • Houston

District Court (E.D. Texas)

- Preliminary injunction granted November 22, 2016
- Motion for summary judgment is fully briefed
- AFL-CIO has moved to intervene

Appellate Court (5th Circuit)

- DOL appealed preliminary injunction
- December 3 - DOL sought expedited briefing
- January 25 - DOL moves for 30-day extension of time to file brief
- February 22 - DOL moved for another 60-day delay (until May 1st)
- April 17 - DOL moved for a third delay, and their brief is now due June 30

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DOL OPTIONS:

- Withdraw Fifth Circuit appeal
- Stop defending law suit
- Formally delay effective date
- Issue new Proposed Rulemaking
 - Withdraw the 2016 Final Rule?
 - More modest salary increase?
- All of the above?

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Will Enforcement of the FLSA Decrease?

- Refocus enforcement on employee complaints
- Reduce "targeted initiatives"
- End abusive investigation practices

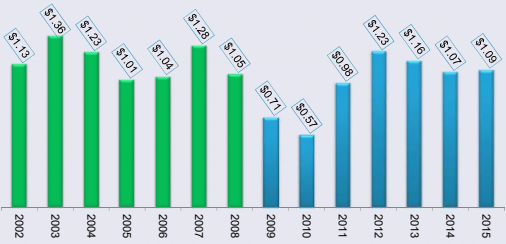


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BW\$ Collected / Budget\$ Spent



Bush Average: \$1.16

Obama Average: \$0.97

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Can We Expect More Compliance Assistance?



- Begin issuing Opinion Letters
- Reinstate 14 opinion letters withdrawn in 2009
- Withdraw Administrator's Interpretations on independent contractors and joint employment
- Bring back employer incentives for best practices and voluntary compliance

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The Opportunity

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Employment Law Attorneys

To work more cooperatively with DOL to correct violations and achieve compliance

- Request Opinion Letters
- Conduct Self-Audits
- Ask DOL for assistance in paying back wages




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Back to the Agenda

- Deductions
- Overtime Calculations
- Hours Worked
- Employee Classification





Deductions

Making inappropriate deductions from employee wages

Meal Period Deductions

Risky Practices

- Automatically deducting unpaid meal periods from a non-exempt employee's pay

Best Practices

- Require employees to clock out and back in for meal periods**
- Require employees to certify that they took their meal periods**

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Deductions for Business Expenses

Risky Practices

- Making deductions from non-exempt employee pay for:
 - Tools, equipment, uniforms
 - Travel expenses
 - Cash register shortages
 - Unreturned company property


Best Practices

- Just don't do it in CA**
- Be very, very careful in AK**
- Never issue a paycheck that is below the applicable minimum wage**
- Always obtain employee authorization for any deduction**

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Prohibited Deductions

- Returned customer checks
- Non-payment for goods or services as a result of theft or credit default
- Cash, cash register shortages, or lost, missing or stolen property
 - Unless the employee admits, willingly and in writing, to having personally taken the specific amount of cash or property that is alleged to be missing
- Damage or breakage costs unless clearly due to willful conduct of the employee and the employee has acknowledged responsibility in writing




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Unreturned or Damaged Company Property

- **Employers may not deduct for:**
 - Lost, missing, or stolen property, unless the employee admits willingly and in writing, to having personally taken the specific property alleged to be lost, missing, or stolen
 - Damage or breakage costs unless clearly due to willful conduct of the employee and the employee has acknowledged responsibility in writing.

- **Employers may deduct from a security deposit if:**
 - Based on a written agreement
 - Deposit does not exceed the cost of the item
 - Deduction does not reduce wages below the minimum wage or the 1.5 overtime rate




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Auditing Deductions

- A review of a list of deduction codes can identify:
 - Potential for deductions which could improperly reduce wages below minimum wage
 - Deductions for which a prior authorization from the employee is needed

Deduction Code	Description
ADD	AD&D
WHL	Whole Life
DEN	Dental Post-Tax
MED	Medical Insurance
GAR	Garnishment
LOA	401k Loan
SHO	Shoes ←
ADV	Advance
UNF	Uniform ←
TAX	Tax Levy
CHS	Child Support
UDU	Union Dues
LND	Laundry ←
MIS	Misc ←
GLA	Safety Glasses ←
SAV	US Savings Bond
TLS	Tools ←

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Overtime Calculations

Failure to include “all remuneration” in the “regular rate” of pay

The Regular Rate

All "remuneration for employment" paid to an employee in a workweek divided by all hours worked in the workweek

"All Remuneration"

- Remuneration means wages and other economic benefits that an employee receives for work
- *UNLESS*: The remuneration is explicitly excluded under Section 7(e) of the FLSA
- The regular rate can change every workweek if employee receives compensation in addition to hourly wages or salary



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Compensation Included



- Hourly wages or salary
- Commissions
- Non-discretionary bonuses
- Prizes and awards related to work
- Shift or job differentials
- Location Pay
- On-Call pay


Compensation Excluded



- Employee benefits
- Payments for time not worked
- Business expense reimbursements
- Certain premium pay
- Gifts for Christmas or special occasions
- Discretionary bonuses

Discretionary v. Non-Discretionary

- Discretionary both as to the fact and amount of payment
 - A bonus which is announced to employees in advance is not discretionary as to the fact of payment
 - A bonus payment determined according to any type of formula is not discretionary as to the amount of payment
- A bonus is not discretionary if employees expect to receive such payments regularly
- Very few bonuses are discretionary as defined by the FLSA regulations



Bonuses, Prizes & Awards

<ul style="list-style-type: none"> • Included: <ul style="list-style-type: none"> – Retention bonus – Safety bonus – Bonus to employees based on reaching productivity goals – Value of trip to Hawaii awarded to high performing sales employees 	<ul style="list-style-type: none"> • Excluded: <ul style="list-style-type: none"> – Recruitment bonus, unless employee is a recruiter – Prize for best Halloween costume – Gold watch for 30 years of service – Holiday bonus equal to two weeks wages – Bonus calculated as a percentage of total wages
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Weekly "Extras"

Risky Practices

- Not including weekly "extras" in the overtime calculation:
 - Shift differentials
 - Job differentials
 - On-call pay
 - Prizes and awards

Best Practices

- Add weekly "extras" to other wages to calculate the "regular rate"
- Ensure each pay code in your payroll system is flag as included or not included in the overtime calculation

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Bonuses and Commissions

Risky Practices

- Not paying the additional overtime due on bonuses and commissions
 - The formula: (Bonus \$ / All Hours Worked in the Bonus Period) * 0.5 * Overtime Hours Worked in the Bonus Period.

Best Practices

- Audit your payroll system to ensure:
 - Bonus and commission pay codes are flagged as includable
 - Tied to the workweeks over which it was earned

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Regular Rate Violations Are Obvious to DOL

Earnings	rate	hours	this period
Regular	16.2200	48.00	778.56
Overtime Prem	8.1100	8.00	64.88
Incentive Bonus			62.65
Shift Prem - 4			21.60
Doubletime			
Holiday			
Vacation			
Gross Pay			\$927.69

Total ST Pay = \$778.56 + \$62.65 + \$21.60 = \$862.81
 Regular Rate = \$862.81 / 48 hours = \$17.98
 Overtime Due = (\$17.98 * 0.5) = \$8.99 * 8 hours = \$71.92

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Auditing Earning Codes

A review of your company's earnings codes is often the best and quickest way to identify compensation being improperly excluded from the regular rate

Earnings Code	Description
1	REG HRLY
2	OT HRLY
3	DT HRLY
4	SALARY
6	SAFETY
7	INCENTIVE
10	VACATION
11	SICK PAY
12	HOLIDAY
20	BONUS
25	SHIFT PREMIUM
30	S/T DISABILITY
40	HEALTH INS PRE TAX
47	HSA - PRETAX
50	401(k)
61	AUTO ALLOW
63	OPERATOR INCENTIVE
68	PER DIEM

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Hours Worked



Timekeeping practices that fail to capture all hours worked

Timekeeping Practices

Risky Practices

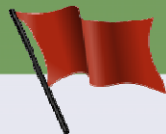
- Paying employees based on their scheduled shift
- "Exception" time reporting – defaulting the timekeeping record to an employee's scheduled work hours unless the employee reports working more or fewer hours

Best Practices

- **Electronic timekeeping**
- **Require employees to punch in and out when they begin and stop working**
- **Pay to the punch, without rounding**
- **Require employees to certify their work hours**

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Time Record Red Flags




- Same in and out times for almost every day
- Same out/in time for meal periods every day
- No out/in times for meal periods
- Time punches are always at the exact time that the shift begins
- Time punches for all or most employees are at almost the same exact time

Risky Time Records

DAY and NIGHT	MORNING		AFTERNOON		EVENING		Total Hours
	Start	Stop	Start	Stop	Start	Stop	
SUNDAY							
MONDAY	h o l i d a y						8
TUESDAY	7:45	1:20	2:00	8:30			8
WEDNESDAY							8
THURSDAY							8
FRIDAY							8
SATURDAY							
TOTAL HOURS THIS WEEK							40

Risky Time Records

DATE	IN	OUT	IN	OUT	IN	OUT	IN	OUT	IN	OUT	IN	OUT	IN	OUT	IN	OUT	IN	OUT	IN	OUT	IN	OUT	IN	OUT	
12-7	10-5																								
12-7	10-5																								
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Classification

Misclassification of employees as independent contractors or exempt from overtime

Independent Contractors

Risky Practices


- Misclassifying an employee as an independent contractor

Best Practices

- Establish a process to pre-approve contractors**
- Analyze IC status under:**
 - *IRS 20-factor test*
 - *FLSA economic reality test*
 - *Federal common law*
 - *State laws*
- Beware of the red flags**

Red Flags for IC Misclassification

- Work performed by IC is a core function of the business
- IC is a former employee
- IC performs same type of work as employees
- IC does not perform work for any other company
- IC is paid by the hour
- IC does not have a separate business establishment
- IC uses SSN as tax identification number
- Company controls how, when or where IC performs work
- Company provides training
- Company provides or pays for tools or equipment



Overtime Exemptions

Risky Practices

- Assuming all salaried employees are exempt
- Failing to analyze whether an employee's job duties qualify for exemption
- Making deductions of exempt employees' salary

Best Practices

- **Establish a process to review the duties for new and changing jobs**
- **Audit all jobs in lowest two pay grades at least every other year**
- **Adopt a "safe harbor" policy for salary deductions**

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Improper Deductions from Exempt Salary

- An exempt employee must be paid her full salary for any week in which she performs any work – even if only a few minutes or hours of work
- Improper deductions lead to loss of exemption
 - Poor work performance
 - Failure to work 40 or more hours
 - Weather-related closure
 - Cash register shortages, inventory shrinkages
 - Lost or damaged company property (security badge)

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Job Duty Requirements for Exemptions

- Executive – supervise a total of 80 work hours/week
- Administrative – authority to make independent decisions on significant matters
- Learned professionals – a four-year college degree in a scientific, engineering or professional field
- Computer – design, develop or create computer systems or programs
- Outside Sales – cannot sell out of a home or office, or by using the telephone or internet

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