

OUTLINE FOR LABOR AND EMPLOYMENT LAW SEMINAR: September 20, 2002

91A AND FLSA ISSUES

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INTRODUCTION:

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Overview:

The Fair Labor Standards Act (FLSA) is a federal law that was passed by Congress in 1938. The FLSA's main objectives were to regulate minimum wages, overtime pay, equal pay, and child labor standards in employment. The FLSA has been amended on several occasions, to maintain and establish minimum standards necessary for the health, efficiency and general well-being of the workers. Most states have additional wage and hour laws that may provide employees with greater benefits than federal law. Whichever law most benefits the employees, state or federal, is the law that governs. According to the Administrative Office of the U.S. Courts, in recent years the number of lawsuits alleging violation of overtime laws has risen sharply. Between 1998 and 2000, the number of suits filed under the FLSA increased by almost 25 percent. One of the main issues in these FLSA suits is determining whether or not employers have misclassified employees as exempt. The employees' duties, and not their title or job description determine their status, and plaintiffs argue that their duties do not correspond with their job titles. Plaintiffs are seeking back pay to compensate them for the overtime they should have been paid. In a recent Iowa Supreme Court decision it was held that federally mandated payments such as overtime wages can also be collected under Iowa Code Chapter 91A. Anthony v. State, 632 N.W.2d 897 (Iowa 2001).

A. Fair Labor Standards Act

1. The Fair Labor Standards Act (FLSA) is codified at 29 U.S.C § 201.
2. The Federal minimum wage is \$5.15 beginning September 1, 1997. 29 U.S.C. § 206.

¹ Outline prepared with the assistance of JoAnn Stone, Attorney at Law, and Aaron Ginkens, Law Clerk.

3. Maximum hour limitation: 29 U.S.C § 207 provides:
“No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.” A “workweek” is defined as seven (7) consecutive twenty-four (24) hour periods (216 hours). A “workweek” need not coincide with the calendar week, but once established it must be fixed and regularly recurring. 29 C.F.R. §778.105.
The exceptions to §207 are numerous.
 - i. Health care workers, hospital workers, or workers in an institution engaged in the care of the sick, the aged or the mentally ill or defective do not have to be paid overtime unless they work in excess of eighty (80) hours in a fourteen (14) day period. 29 U.S.C. § 207(j).
 - ii. Fire protection do not need to be paid at an overtime rate unless they work in excess of two hundred twelve (212) hours in a twenty eight (28) day time period and law enforcement do not need to be paid at an overtime rate unless they work in excess of one hundred seventy-one (171) hours in a twenty eight (28) day time period. 29 U.S.C. §207(k). 29 C.F.R 553.230 sets forth the procedure for determining the maximum hour standard when the work period is less than 28 days but more that 7 days. The ratio of 212 hours to 28 days for employees engaged in fire protection activities is 7.57 hours per day (rounded) and the ratio of 171 hours to 28 days for employees engaged in law enforcement activities is 6.11 hours per day (rounded). Accordingly, overtime compensation (in premium pay or compensatory time) is required for all hours worked in excess of the following maximum hours standards (rounded to the nearest whole hour).
 - iii. Public employees of the state or local government can be paid compensatory time for those hours worked in excess of forty (40). 29 U.S.C. § 207(o). Under § 207(o) each hour of overtime worked must be credited as one and one-half hours of compensatory time off.
4. Exemptions to the minimum wage requirement: 29 U.S.C. § 213(a) provides: Minimum wage and maximum hour requirements...shall not apply with respect to:

- i. Any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools)” 29 U.S.C. §213(a)(1).
 - a. Bona fide executive employee: the worker must be paid on a salary basis, have a primary duty of management, and supervise two or more employees
 - b. Bona fide administrative employee: the worker must be paid a salary, have the primary duty of performing nonmanual work directly related to the management policies or general business operations of the employer or the employers’ customers, and perform work requiring the exercise of discretion and independent judgment. 29 C.F.R. § 541.2.
 - c. Bona fide professional employee: The professional employee must perform work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study requiring the consistent exercise of discretion and judgment. The professional employee generally must be paid on a salary or fee basis. 29 C.F.R. §§ 541.3, 541.118, 541.301-541.315.
- ii. “Any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer’s immediate family.” 29 U.S.C. § 213(a)(6).
- iii. “Any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is:
 - a. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
 - b. The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

- c. The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
- d. A combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills, and who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than \$27.63 an hour.” 29 U.S.C. § 213(a)(17).

5. FLSA Enforcement and Remedies:

- i. Criminal Sanctions: 29 U.S.C. § 216 provides for fines up to \$10,000 and imprisonment up to six (6) months for persons who commit willful violations.
- ii. Injunctive Relief:
 - a. Discrimination and Retaliation: 29 U.S.C. § 215(a)(3) prohibits any person from discharging or in any other manner discriminating against any employee because the employee has filed a complaint with the Secretary of Labor or has testified or is about to testify in a proceeding under the FLSA.
 - b. “Hot Goods” 29 U.S.C. § 15(a)(1) prohibits shipment of “hot goods” in interstate commerce. “Hot goods” are items that were produced by an employee who was not paid the minimum wage or proper overtime.
 - c. Compliance and Back Wages: Only the Secretary of Labor may institute an injunction proceeding under 29 U.S.C. § 217. Private litigants are limited to back wage relief under 29 U.S.C. § 216(b).
- iii. Back Wage/Liquidated Damages Suits: 29 U.S.C. § 216(c) grants the Secretary of Labor the authority to bring an action under the FLSA for back wages and/or liquidated damages. An employee’s private right to bring action under section 216(b) terminates upon the filing of a section 216(c) action by the Secretary in which back wages are sought for the employee.
- iv. Civil Money Penalties: 29 U.S.C. § 216(e) authorizes the Secretary of Labor to assess civil money penalties against employers who fail to pay minimum wage and overtime in violation of the FLSA. Civil money penalties of up to \$1000.00 per violation may be assessed

only against persons who “repeatedly or willfully” violate the minimum wage or overtime provisions.

- v. Private Actions: 29 U.S.C § 216(b) authorize a private right of action under the FLSA. This allows an employee to bring an action for back wages in any court with proper jurisdiction. Actions may be brought in federal or state court.
- vi. Back Wages: An employer found to have violated the minimum wage or overtime requirements of the FLSA is liable for back wages that the employee would have earned but for the violations.
- vii. Liquidated Damages: In addition to back wages, the employees are entitled to a like amount as liquidated damages under 29 U.S.C. §§ 216(b) or 216(c). Liquidated damages are the norm and not the exception. The employer has the burden of establishing that liquidated damages are not appropriate. Under 29 U.S.C. § 260, the court has discretion to award no liquidated damages or a lesser amount only if the employer shows that the failure to comply with the FLSA was in “good faith” and that the employer had reasonable grounds for believing that the pay practice was in compliance. Walton v. United Consumers Club, Inc., 786 F.2d 303 (7th Cir. 1986).
- viii. Reporting Requirements: Employers are obligated to keep records for non-exempt and exempt employees (29 C.F.R. Part 516).
 - a. Records must be kept for exempt executive, administrative and professional employees (29 C.F.R. § 516.3) as well as for non-exempt employees (29 C.F.R. § 516(a)(6)).
 - b. Records must include sufficient detail to permit calculation for each pay period of the employee’s total remuneration for employment, including fringe benefits.
 - c. Records must be preserved for at least three (3) years.
 - d. In addition to the recordkeeping requirement, employers are required to display the Wage and Hour Division’s minimum wage poster.
 - e. For public employees, if agreement has been reached to substitute compensatory time for overtime pay, records of compensatory time must be kept. (29 C.F.R. § 553.50(a)).

Suffer or permitted to work: Employer is obligated to enforce any and all regulations on overtime work. An Employer may post regulations establishing that overtime will only be paid when, and if, previously approved by management. Nevertheless, if the employer is aware that employees are working overtime, the

employer has a mandatory obligation to preclude employees from working additional hours. If the Employer does not take affirmative steps and allows the overtime to continue, the employer must pay for same.

- ix. Regular Rate of Pay Defined: An employee's "regular rate" of pay is defined under Section 7E of the FLSA as "all remuneration for employment paid to, or on behalf of, the employee." The "regular rate" includes:
- a. Bonuses and incentive payments based on quality, quantity or efficiency;
 - b. Bonuses that depend on hours worked;
 - c. Commission payments; and
 - d. Payments for meals and lodging.

Fair Labor Standards Handbook, Overtime Compensation § 510.

Bonuses are divided into two categories:

- a. *Discretionary* bonuses are sums paid in recognition of services performed during a given period if: 1) both the fact that the payment will be made and the amount of the payment are determined at the sole discretion of the employer, and 2) the payment is not pursuant to any prior contract, agreement or promise causing the employee to expect such payments regularly (29 U.S.C. § 207E(3)(a); 29 C.F.R. § 778.211). Such discretionary bonuses are not included in the employee's regular rate and thus have no effect on the employee's overtime compensation.
- b. *Non-Discretionary* bonuses, on the other hand, must be included along with earnings to determine an employee's regular rate on which overtime must be computed. A bonus is regarded as non-discretionary if the employer contracts, agrees or makes a promise to pay it. Examples found in regulations (29 C.F.R. § 778.211C) include:
 - 1. Bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently;
 - 2. Bonuses to remain with the employer;
 - 3. Attendance bonuses;
 - 4. Individual or group production bonuses; and
 - 5. Bonuses for quality and accuracy of work.

515. Fair Labor Standards Handbook, Overtime Compensation, Section

A bonus, therefore, may be more costly than the employer originally contemplates. If the bonus is of the non-discretionary type, such as where the employer announces that the employee with the best performance will receive a \$50.00 bonus for the week, that bonus becomes part of the regular rate of pay. If the employee then works overtime, the “regular rate” on which overtime is figured will increase.

Christmas bonuses and other gifts are not included in determining the regular rate of pay so long as the amount of the bonus is “not measured by or dependent upon hours worked, production, or the employee’s efficiency” (29 U.S.C. § 207E1; 29 C.F.R. § 778.212). These special bonuses may be excluded from the regular rate even though the bonus is paid so regularly (for example, Christmas bonus) that the employee is led to expect it. Such bonuses may be excluded even if the amount paid to different employees or groups of employees varies.” Fair Labor Standards Handbook, Overtime Compensation Section 514.

Payments that need not be included in the regular rate of pay include:

- a. Vacation;
- b. Illness;
- c. Bereavement leave;
- d. Jury leave;
- e. Holiday pay;
- f. Premium pay such as time compensated at time and a half;
- g. Severance pay;
- h. Pension profit sharing, thrift and savings plans;
- i. Call-back premium pay;
- j. Show up or reporting pay;
- k. Health and welfare fund benefits received by the employee;
- l. Death benefits;
- m. Employer paid disability benefits, hospitalization, workers compensation;
- n. Reasonable uniform allowances;
- o. Tuition reimbursement; and
- p. Automobile reimbursement.

Fair Labor Standards Handbook, Overtime Compensation, Section 512.

Wage deductions: "The FLSA does not prohibit deductions from wage payments, but regular rates and overtime pay must be figured before the deductions are made. In other words, employee deductions and contributions are permissible, but overtime is calculated on the regular rate before the deductions are made (29 C.F.R. § 778.304). The following are examples of wage deductions that are includable in the regular rate:

- a. Health and welfare plan contributions by the employee;
- b. Insurance premiums paid from gross wages;
- c. Pension plan contributions by the employee; and
- d. Savings plan contributions by the employee.

Fair Labor Standards Handbook, Overtime Compensation, Section 513.

Regular rates can never be less than the minimum wage (\$5.15).

29 C.F.R. § 778.108.

x. Methods for Calculating Overtime

Hourly Employees: The regular rate for an hourly employee is the hourly rate plus all other forms of compensation received by the employee such as non-discretionary bonuses. For all hours worked over forty (40) in a week, the employee must be paid at least one and one-half (1 ½) the regular rate. An employee at \$10.00 an hour must be paid \$15.00 for each hour worked over forty (40) hours in a week.

Hourly Rate and Bonus: If an employee worked forty-six (46) hours in a work week and received a bonus of \$9.20 in addition to earnings at an hourly rate of \$4.00 per hour, the regular rate would be \$4.20 per hour. This would be computed as follows: 46 hours times 4 = 184 (plus \$9.20) = \$193.20. This total divided by 46 hours yields a regular rate of \$4.20. The employee would then be entitled to receive a total wage of 46 hours times \$4.20 plus (6 hours times \$2.10 or \$205.80).

Salaries employees working a week of 40 hours: If employee is paid a salary of \$500.00 per week to work 40 hours, the regular rate is \$12.50 an hour. If an employee works 48 hours in one week, the overtime is \$18.75 per hour.

Semi-monthly salary pay: Regular rate for an employee on a semi-monthly salary is determined by breaking down the salary into weekly portions. The salary is multiplied by twenty-four (24) (the number of semi-monthly periods in a year) and divided by fifty-two (52), the number of weeks in a year. The regular rate is determined by dividing the weekly salary by the number of hours in a work week. Thus, if the employee earned \$600.00 semi-monthly and works forty (40) hours per week, the regular rate is \$6.92.

Monthly salary pay: "To compute the regular rate for an employee who is paid monthly, the employee's salary is multiplied by 12, (the number of months in a year) and divided by 52 (the number of weeks in a year). This figure must be divided by the number of hours in a work week. If the employee earns \$1,500.00 a month and has a work week of 40 hours, the regular rate is \$8.65 an hour. If the employee worked 44 hours in a month containing 23 working days, the employee would be entitled to overtime pay for 4 hours at time and a half (4 times \$12.98 or \$51.92). The employee's salary for the month would be \$1,551.92).

- xi. Statute of Limitations: 29 U.S.C. § 255 provides a two year statute of limitations on back wage and liquidated damage recovery, and a three (3) year period for willful violations.

B. The Iowa Wage Payment Collection Act.

1. The Iowa Wage Payment Collection Act is codified at Iowa Code chapter 91A. Its purpose is to facilitate the collection of wages owed to employees. Phipps v. IASD Health Services, Corp., 558 N.W.2d 198, 201 (Iowa 1997). With that purpose in mind, the Act is primarily focused upon the requirement that an employer pay all wages due its employees. Iowa Code § 91A.3(1).
 - i. Because the statute is remedial in nature, it is to be liberally construed. Hornby v. State, 559 N.W.2d 23, 26 (Iowa 1997).
2. Wages: defined as compensation owed by an employer for "labor or services rendered by an employee." Iowa Code § 91A.2(7).
 - ii. Wages include vacation, holiday, sick leave, severance payments, any payments to the employee or to a fund for the benefit of the employee, and any expenses incurred and recoverable under a health benefit plan, as due an employee under an agreement with the employer or under a policy of the employer. Id.
3. Employer: defined as a person who employs a natural person for wages within the State of Iowa. Iowa Code § 91A.2(4).

- iii. “An employer does not include a client, patient, customer, or other person who obtains professional services from a licensed person who provides the services on a fee service basis or as an independent contractor.” Iowa Code § 91A.2(4).
 - iv. Person for purposes of this section means an “individual, corporation, limited liability company, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity.” Iowa Code § 4.1(20).
4. Employee: defined as a “natural person who is employed in this state for wages by an employer.” Iowa Code § 91A.2(3).
- a. “Employee” includes a commission salesperson who takes orders or performs services on behalf of a principal and who is paid on the basis of commissions but does not include persons who purchase for their own account for resale. Id.
 - b. “Employee” does not include, with respect to persons engaged in agriculture, the spouse and relatives of the employer or spouse residing on the premises of the employer, a person engaged as an owner-operator or tenant-operator or relation residing therewith, or neighboring who are exchanging labor or other services. Id.
4. Independent Contractors: A person who is an independent contractor generally does not fall within the scope of the definition of employer or employee. See Miller v. Component Homes, Inc., 356 N.W.2d 213, 216 (Iowa 1984); Wolf v. DaCom Inc., 499 N.W.2d 728, 731 (Iowa Ct. App. 1993).
- a. An exception to this rule was added in a 1985 amendment to the definition of employee, which now includes “a commission salesperson who takes orders or performs services on behalf of a principal and who is paid on the basis of commissions but does not include persons who purchase for their own account for resale.” This language has been interpreted to include independent contractors that fall within this definition as employees. Jeanes v. Allied Life Insurance Company, 2002 WL 1940800, at *4 (8th Cir. 2002).
 - b. Independent contractor defined: An independent contractor is generally defined as a person who carries on an independent business, and contracts to do a piece of work according to his own methods, subject to the employer’s control only as to results. Mallinger v. Webster City Oil Co., 211 Iowa 847, 234 N.W. 254, 256-57 (1931).

- i. In evaluating whether a person is an independent contractor or an employee, courts look primarily to see who has the right of control and will look secondarily at the intent of the parties. Miller, 356 N.W.2d at 216-17.
- ii. Other factors to be considered in determining whether an employer-employee relationship exists include: (1) the right of selection, or to employ at will, (2) responsibility for the payment of wages by an employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) identity of the employer as the authority in charge of the work for whose benefit the work is performed. Wolf, 499 N.W.2d at 730.

5. Prompt Payment of Undisputed Wages Required

- a. If there is a dispute regarding the amount of wages or expense reimbursement due an employee, the employer must pay all wages conceded due, less any lawful deductions as specified in section 91A.5, without condition and pursuant to section 91A.3. Iowa Code § 91A.7.
- b. When an employee is terminated or suspended, the employer must pay all wages earned, less any lawful deductions specified in section 91A.5, up to the date of the suspension or termination not later than the next regular payday. Iowa Code § 91A.4.

6. Penalties: If an employer fails to pay an employee wages, the employer is subject to liability for unpaid wages or expenses, court costs and attorney fees. If the employer's conduct is "intentional," liquidated damages are also recoverable. Iowa Code § 91A.8.

- a. The critical inquiry with respect to liquidated damages is whether the employer knew the wages were due, and yet failed to pay. If employer possessed a good faith belief that wages were not due, even if the court would later decide that belief was wrong, liquidated damages are not appropriate. Jeanes v. Allied Life Ins. Co., 168 F. Supp. 2d 958 (S.D. Iowa 2001), rev'd on other grounds, 2002 WL 19408000 (8th Cir. 2002).
 - i. "'Liquidated damages' means the sum of five percent multiplied by the amount of any wages that were not paid or of any authorized expenses that were not reimbursed on a regular payday or on another day pursuant to section 91A.3 multiplied by the total number of days, excluding Sundays, legal holidays, and the first seven days after the regular payday on which wages were not paid or expenses were not reimbursed.

However, such sum shall not exceed the amount of the unpaid wages and shall not accumulate when an employer is subject to a petition filed in bankruptcy.” Iowa Code § 91A.2(6).

b. If an employer is held liable to an employee for unpaid wages or expenses, the employer is also liable for the usual and necessary fees of the employee’s attorney. Maday v. Elview-Stewart Systems Co., 324 N.W.2d 467, 469 (Iowa 1982). The employer bears this liability whether the failure to pay was intentional or otherwise. Id.

i. Attorney fees are not an element of damages to be determined by the jury, but should be taxed as costs by the trial court. Unless the parties agree to the contrary, a hearing should be held to determine the amount of fees required. Id.

7. Limitation on Actions: Claims under Chapter 91A are controlled by a two-year statute of limitations. Iowa Code § 614.1(2). The statute begins to run when compensation becomes payable. Halverson v. Lincoln Commodities, Inc., 297 N.W.2d 518, 521 (Iowa 1980).

8. Agency Enforcement. Under Iowa Code section 91A.10, an employee may file a complaint with the labor commissioner, which has the power to investigate wage payment violations and hold hearings pursuant to section 91A.9. There is, however, no exhaustion requirement; an employee is not required to exhaust his or her administrative remedies prior to filing suit. Maday, 324 N.W.2d at 468.

D. Anthony v. State, 632 N.W.2d 897 (Iowa 2001): The Iowa Supreme Court held that federally mandated payments such as overtime wages can be collected under Iowa Code Chapter 91A. Id. at 901. The court followed the positions taken by the 7th and 9th Circuits, in holding that an employee otherwise paid on a salary basis is not exempt under the salary basis test where the employer is shown to have a general policy of making deductions from salaries for disciplinary violations. Only where employers have taken such disciplinary deductions in a few selected instances will the window-of-correction defense be available. Id. at 904. See also Whetsel v. Network Property Servs., 246 F.3d 897, 902 (7th Cir. 2001); Klem v. County of Santa Clara, 208 F.3d 1085, 1094 (9th Cir. 2000).

References:

29 U.S.C. § 201

29 U.S.C. § 206

29 U.S.C. § 207

29 U.S.C. § 213

29 C.F.R. § 778.105

Stephanie Levy, *Lawyers Work Overtime on Wage and Hour Suits*, 38 Trial 80 (May 2002).

Kay H. Hodge, *Fair Labor Standards Act and Federal Wage and Hour Issues*, SG060 ALI-ABA 95 (2002).

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