

Potential Wage and Hour Issues for the Workers' Comp Practitioner

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Workers' compensation practitioners should remain vigilant for potential wage and hour violations as they pursue claims for their clients. When getting information on a client's average weekly wage, for instance, it is important to at least consider whether your client is getting paid fully, including for overtime, under the wage and hour laws.

The Fair Labor Standards Act ("FLSA"), signed into law by President Roosevelt in 1938, was a landmark piece of legislation that emerged out of the Great Depression and which remains a vital source of protection for employees. The FLSA is most well-known for setting the national minimum wage, which was recently increased by Congress to \$7.25 (as of July 24, 2009). The FLSA also contains overtime-pay requirements, restrictions on child labor, and the mandate for equal pay for equal work between men and women.

Reviewing any portion of the FLSA in detail would require its own CLE. In this note, we would just like to highlight some potentially less obvious wage and hour issues to look out for in a workers' compensation case.

1. Employees may be entitled to overtime even if they are salaried.

Simply being paid a salary does not make any employee exempt from the overtime requirements of the FLSA. Being paid a salary is only one of the two requirements for being exempt from the overtime requirements. In order to be properly categorized as exempt, an employee must also have a specific job type, such as professional, executive, or administrative. There are extensive rules defining these exceptions, which are supposed to be narrow. If an employee is non-exempt and works more than 40 hours in a particular week, the employer must pay overtime wages (time and a half) for all hours beyond 40.

2. An employer may not give its employees comp time in lieu of overtime.

While the FLSA allows government employers to give their employees a certain amount of compensatory (or "comp") time in lieu of overtime, no such alternative is available for private employers.

3. An employer generally cannot deny overtime pay if the employee did not request approval in advance.

Employers commonly require authorization in advance for any overtime work. But if an employee works overtime anyway, without authorization, the employer still must pay them for it. Generally, employers can have policies restricting overtime work,

but they must actively enforce these policies. If an employer knowingly allows employees to work additional hours, they must pay for them.

4. “Independent contractors” can be entitled to overtime pay just as they can be entitled to workers’ compensation.

Genuine independent contractors are not covered by FLSA, but employers have been known to designate workers as contractors in an effort to avoid FLSA’s overtime requirements just like for their workers’ compensation obligations. If a worker can be proven to be an employee for workers’ compensation purposes, they likely are an employee under the FLSA. Misclassified workers are usually not paid overtime, and may be entitled to such pay going back two to three years.

5. Employers may be required to pay employees for time in addition to when they are “actually working.”

Compensable time under the FLSA can be broader than generally assumed. While commuting time to and from work is not compensable, travel time from the first reporting location to other work locations may be compensable. In addition, travel time for overnight trips can be compensable. Activities occurring before clocking in or after clocking out may be compensable, for example if employees have to put on required safety equipment before starting work. Lunch and meal periods must be paid unless the employee is completely relieved from duty for at least one-half hour. Finally, “off-the-clock” work is compensable. An employer cannot escape the law simply by concealing the hours actually worked.

6. Small companies are subject to wage and overtime laws.

For certain kinds of businesses, the FLSA applies only if the gross volume of annual sales is greater than \$500,000. State laws, however, can fill this gap. The North Carolina Wage and Hour Act covers many employers too small to fall under the FLSA, and provides most of the same rights for employees. Under the Act, there are requirements for the minimum wage, overtime pay, and the timely payment of wages.