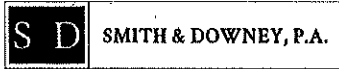


Wage and Hour Laws: Recent Developments

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Note that this presentation is intended as a general discussion of the law and is not intended as legal advice for any particular situation.

Fair Labor Standards Act

- Establishes standards for:
 - Minimum wages
 - Overtime pay
 - Wage deductions
 - Child labor
 - Calculation of hours worked
 - Recordkeeping
 - Anti-retaliation



- Generally requires employers to pay 1 1/2 times the employee's regular rate of pay for all hours worked in excess of 40 hours per week

record keeping - better to hold
than delete documents

whistleblower - anti retaliation -
employee protected - concerted
protected activity

have supervisors treat workers
respectfully - no sexual, ethnic jokes etc.

Supervisors - if they control other employees - they are the company and are held responsible as company would be

Overview

- **Fair Labor Standards Act**
 - Independent Contractors vs. Employees
 - Joint Employment
 - Special Cases – Volunteer and Trainees
 - Exempt v. Non-Exempt Employees
 - Challenging Cases
- **State Law**
 - Significant Differences from the FLSA in both minimum wage and overtime regulations

MD Law tougher than Federal law

The "White Collar" Exemptions from Overtime

- Must meet **BOTH** the Salary Basis Test and the Duties Test
 - **Salary Basis Test:** Under current standard, must be paid at least \$455 on a salary basis. No deductions for quality or quantity of the employee's work.
 - **Duties Test:**
 - Administrative
 - Professional
 - Outside Sales
 - Computer Professional
 - Executive
 - Highly Compensated
- **Reminder:** some states (i.e., New York, California, Alaska) have their own exemption requirements and thresholds.

Salary test + duty test

- white collar - professional lawyer, cpa nurse
- executive - oversee at least 2 full-time employees (or 4 pt time) input on hiring/firing
- (blue collar work is grey area)
- exec working chef → supervision to other employees
- if predominant duty is work then not supervising.

* have job descriptions for all exempt employees *

Highly Compensated Employees

- Employee **currently** must be paid at least **\$100,000** per year total annual compensation
- Employee **currently** must be paid on a salary basis of at least **\$455 per week**
- Must "customarily and regularly" perform at least one of the duties of an exempt executive, administrative, or professional employee

- outside sales - do not have to pay time + 1/2 if in a desk inside have to pay
- admin → non-manual work, requires independent judgement + discretion on matter of significance

Salary Basis Test - Overview

- Under the salary basis test, the employee must be paid a salary that meets the minimum required by the DOL, and the employer cannot deduct from the employee's weekly salary, unless authorized by the DOL or FMLA.
- **Currently**, the salary minimum is \$455/week, but the new DOL final overtime rule will raise the salary minimum for the white collar exception.

any work during day must
pay weekly salary

Proposal #1 (2016)

- Proposal was to go into effect December 1, 2016, but was blocked by a federal judge on November 22, 2016 – stating that the increase would include a large number of individuals Congress intended to be exempt from the overtime requirement.
- Key proposals:
 - Weekly salary threshold – \$913/week (or \$47,476/year).
 - Highly compensated threshold – \$134,004/year.
 - Automatic increases to the thresholds every 3 years beginning January 1, 2020.
 - Nondiscretionary bonuses may satisfy up to 10% of the minimum salary requirement (so long as the bonuses are paid quarterly).

almost happened
Texas court stopped

← NOT THE LAW, but where
Obama Admin was going

This may come back

Proposal #2 (2019)

- DOL filed a motion in Fifth Circuit to halt litigation in November 2017.
- On March 28, 2019 the DOL then announced a notice of proposed rulemaking to update the overtime regulations.
- Key Proposals:
 - Weekly salary threshold – \$679/week (or \$35,308/year).
 - Highly compensated threshold – \$147,414/year.
 - Nondiscretionary bonuses may satisfy up to 10% of the minimum salary requirement (may be paid annually).

min salary paid to be exempt
from overtime

not required to make employee
- handbook should reflect exempt
that employees should
ask if can work overtime
preapproval from Supervisor

Final Changes to White Collar Exemptions

- On September 24, 2019, the DOL issued its *final* overtime rule.
- Effective January 1, 2020, Changes to Salary Basis Test Minimum Levels:
 - New salary minimum increases to \$684 per week (\$35,568 per year) (higher than initial 2019 proposal); and
 - New minimum for highly compensated employees increases to \$107,432 per year (lower than initial 2019 proposal).
- No automatic threshold increases (must go through notice-and-comment process).

Proposal 1 + 2
 * this was adopted
 ← from \$445 to
 \$684/wk salary → \$35,568/week
 if making less than \$35,568
 + they are exempt, need to
 determine if make hourly.
 (Bonus - can it be counted towards
 minimum?
 ↳ coming slide)

Highly Compensated Individuals

- Salary threshold:
 - Currently - \$100,000/year.
 - Proposal #1 (2016) - \$134,004/year.
 - Proposal #2 (2019) - \$147,414/year.
 - Final Rule (effective 2020) - \$107,432/year.
- A highly compensated employee is deemed exempt under the FLSA if:
 - The employee earns a total annual compensation of \$107,432, which includes at least \$684 per week, paid on a salary basis;
 - The employee's primary duties include performing office or non-manual work; and
 - The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative, or professional employee.
- "Customarily and regularly" means greater than occasional, but may be less than constant, and includes work normally and recurrently performed every workweek (not isolated or one-time tasks).

Salary Basis Test: Allowable Deductions

- FLSA only allows for specific deductions from salary of exempt employees:
 - Absence of 1 or more full days for personal reasons other than sickness or disability.
 - Absence of 1 or more full days for sickness or disability if in accordance with bona fide policy.
 - Jury fees, witness fees, military pay.
 - Penalties imposed in good faith for infraction of safety rule of major significance.
 - Unpaid disciplinary exemption 1 or more full days imposed in good faith for infraction of workplace conduct rule.
 - Proportional payment initial or terminal week of employment.
 - Weeks in which employee takes unpaid leave under FMLA.

- can do in full day increment
 but if work an hour an
 they want to leave, can't dock
 full day, but could say no

- communicate what is major significance

Nondiscretionary Bonuses & Incentive Payments - Overview

- The new rule permits employers to use nondiscretionary bonuses and incentive payments to satisfy up to 10 percent of the standard salary level.
- For employers to credit nondiscretionary bonuses and incentive payments toward a portion of the standard salary level test, they must make such payments on an annual or more frequent basis.
 - 2016 Proposal required the payment to be quarterly.

up to 10% of salary level can come from bonus if on annual basis.

Nondiscretionary Bonuses & Incentive Payments - Catch Up

- If an employee does not earn enough in nondiscretionary bonus or incentive payments in a given year (52-week period) to retain his or her exempt status, the Department permits the employer to make a "catch-up" payment within one pay period of the end of the 52-week period.
- This payment may be up to 10 percent of the total standard salary level for the preceding 52-week period. Any such catch-up payment will count only toward the prior year's salary amount and not toward the salary amount in the year in which it is paid.

catch up w/in 1st pay period of following year.

Employees vs. Independent Contractors: Definitions

- **Employee:** An individual employed by an employer and who, as a matter of economic reality, is dependent on the business that they serve. 29 U.S.C. § 203(e).
- **Independent Contractor:** One who performs a service for a business, but is not in an employment relationship with the business.


independent - not economically dependent on you as employer.

if they are, they are an employee



Employees vs. Independent Contractors: Economic Realities Test

- Consider the following factors:
 - Degree of control
 - Investment in facilities
 - Opportunity for profit and loss
 - Permanency of relationship
 - Required skill




Employee
 Independent Contractor

contractor - brings own materials
 to job site, specific duty not
 done every day for you
 permanency - pictures on desk = employee

independent contractors - make sure
 they have own insur, (workers comp)

Special Cases: Volunteers


- Individuals can volunteer services to non-profit, religious, or charitable organizations
- Relevant factors:
 - Who receives greater benefit from the work
 - Whether work is integral to the business
 - Presence of coercion
 - Whether activity occurs during normal work hours
 - Similarity between volunteer activities and regular job duties
 - Length of relationship
 - Number of hours spent volunteering



can volunteer & not get paid.

Special Cases: Trainees/Interns

- Not employees if training/internship is:
 - Similar to training in educational environment
 - Primarily for benefit of intern
 - Doesn't displace regular employee
 - Trainee works under supervision of regular staff
 - No immediate advantage to employer
 - Mutual understanding that trainee is not entitled to compensation
 - No guarantee of a future job



normally pay summer intern - if
 providing value to you - unless
 for reasons on left

Employees v. Employers

- The Fair Labor Standards definition: **"Employer"** includes any person acting directly or indirectly in the interest of an employer in relation to an employee..."
- The Department of Labor definition: **"Employer"** means a person engaged in a business affecting commerce who has employees..."
- National Labor Relations Board definition: **"Employer"** means:
 - **Nonretail business** – direct sales of goods to consumers in other States, or indirect sales through others, of at least \$50,000/year; or direct purchases of goods from suppliers in other States, or indirect purchases through others, of at least \$50,000/year.
 - **Retail businesses** – at least \$500,000 in total annual volume of business.
 - *There are many other threshold distinctions...*

Nonexempt Employees: Compensable Time

- **General Rule:**
 - "Suffer or permit to work"
 - Ordinarily includes all time during which an employee is required to be on the employer's premises, on duty, or at a prescribed workplace.
- **Special Cases**
 - Waiting Time
 - Rest Periods
 - Meal Periods
 - Prep Time and Concluding Activities
 - Meetings and Trainings
 - Travel Time



30 min unpaid lunch break = do not bother them for 30 min
- allow leave building
- if doing something of value to company, must be paid.
- if tell come 15 min earlier - have to pay

MD doesn't require lunch break.

* any break under 20 min - must be paid

Nonexempt Employees: Waiting Time

- "This is a 9-5 job that is spaced out over the course of the day."
- Lady Gaga
- **Factors:**
 - Requirement to live on premises
 - Excessive geographic restrictions on employee movement
 - Frequency of calls
 - Fixed time limit to respond to a call
 - Whether trading of on-call responsibilities is permitted
 - Whether employee can be reached by pager or cell phone
 - Whether employee actually engaged in personal activities during the on-call time.

Nonexempt Employees: Rest and Meal Periods

- Rest Periods
 - Rests of short duration should be counted as hours worked
 - Longer breaks need not be counted if the employee is relieved of all duties
- Meal Periods
 - "Bona fide" meal period not compensable, provided employee not required to perform any services
 - "Bona fide" meal period usually 30 minutes or more



20min ↓ or less - paid

now is time to make any change in policy/procedure b/c change is 1/1/20

-VERY IMPORTANT TO WRITE JOB DESCRIPTION

Best Practices for Avoiding FLSA Liability

- Dealing with New Technology and Off-the-Clock Work
- Importance of Job Descriptions
 - Updated?
 - Actually describe what the employee does?



performing poorly → tell them "wish they were successful, success looks like this - job description"

"what can I do to help you be successful" offer advice to help them be successful → engaged in interactive dialogue.

+ document that did this

FLSA Safe Harbor

- Improperly docking exempt employees' pay may jeopardize exempt status.
- Exemption is not lost if an employer:
 - Has a clearly communicated policy prohibiting improper deductions, and includes complaint mechanism;
 - Reimburses employees for improper deductions; and
 - Makes good-faith commitment to comply in future.



← have this in handbook!
pay min wage

FLSA Safe Harbor (cont.)

- Should Include:
 - Statement of Policy and Practice to accurately compensate employees;
 - Statement of Purpose;
 - Statement of Responsibility;
 - Prohibition of off-the-clock work;
 - Confirmation that company will promptly correct mistakes brought to its attention; and
 - Reporting Procedures.

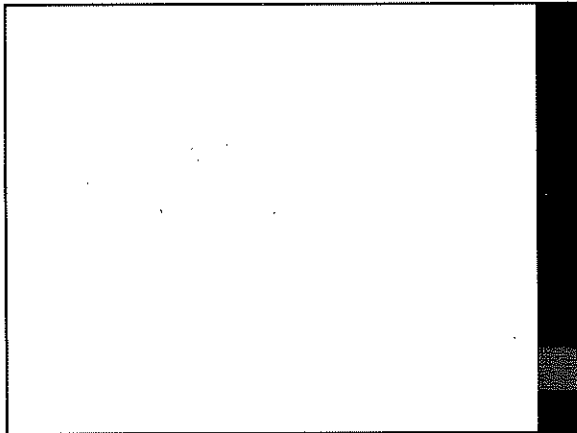


Minimum Wage Overview

- Federal – \$7.25/hour.
 - Has been effective since July 2009.
- “Fight for \$15”
 - July 2019 – marked a renewed attempt at raising the minimum wage.
 - House of Representatives passed the “Raise the Wage Act” with a vote of 231-199, which would raise the minimum wage to \$15/hour by October 2025.
 - Claims 33 million Americans will get a raise.
 - Senate Majority Leader Mitch McConnell said he would not take up the bill for a vote.

FLSA v. State Minimum Wage

- Whichever minimum wage is higher between the federal and state must be used.
- Higher than the federal minimum wage: 29 states + D.C., Guam, and the U.S. Virgin Islands.
- Same or lower than the federal minimum wage: 16 states + Puerto Rico.
 - Georgia, Iowa, Idaho, Indiana, Kansas, Kentucky, North Carolina, North Dakota, New Hampshire, Oklahoma, Pennsylvania, Texas, Utah, Virginia, Wisconsin, Wyoming, and Puerto Rico.
- Plus, Alabama, Louisiana, Mississippi, South Carolina, and Tennessee do not require minimum wages.



Maryland Wage & Hour Law

- **General Provisions**
- Establishes exemptions from minimum wage and overtime
- Similar to FLSA but contains some important differences
- Prohibits retaliation

*Federal
Double damages if in violation
Maryland - TRIPLE damages*

Maryland Wage Payment and Collection Law

- Sets forth the rights by which employees receive wages.
- States when and how often employees must be paid, general guidelines for making wage deductions, which actions are prohibited and how employees may enforce their rights.



Wage Deductions

- Maryland law prohibits deductions except where:
 - Court ordered
 - Permitted by law or regulation
 - Authorized expressly in writing by employee
 - Commissioner of Maryland DLLR has allowed to offset or "pay for" something of value the employee received

- don't make take home pay below min wage MD

- give them paycheck and then get them to pay you back

- Uniform deduction - sometimes ok but have to walk away w/ min wage

Minimum Wage Increase - Overview

- Maryland Law
 - Currently set at \$10.10 (last increased July 1, 2018).
 - New increases will be effective Jan. 1, 2020 and every subsequent January until 2025 (or July 2026 for small employers).
- FLSA
 - Federal minimum wage does not apply to Maryland employers, since the state minimum wage is more generous than the federal law.
 - But certain tipped workers regulations do.

New Maryland Minimum Wage Rate

- Raised the State-wide Minimum Wage
 - Starting January 1, 2020, the minimum wage will incrementally increase for most employers every following January until 2025.
- Increases for employers with 15 or more employees:
 - Jan. 1, 2020: \$11.00
 - Jan. 1, 2021: \$11.75
 - Jan. 1, 2022: \$12.50
 - Jan. 1, 2023: \$13.25
 - Jan. 1, 2024: \$14.00
 - Jan. 1, 2025: \$15.00

Small Employers

- A late amendment created a smaller incremental rise for “small employers.”
- Increases for small employers (fewer than 15 employees):
 - Jan. 1, 2020: \$11.00 (same as all other employers)
 - Jan. 1, 2021: \$11.60
 - Jan. 1, 2022: \$12.20
 - Jan. 1, 2023: \$12.80
 - Jan. 1, 2024: \$13.40
 - Jan. 1, 2025: \$14.00
 - Jan. 1, 2026: \$14.60
 - July 1, 2026: \$15.00

Young Employees

- Effective immediately, employees who are younger than 18 years old may be paid 85% of the applicable minimum wage.
- For example:
 - 85% of \$11.00 = \$9.35
 - 85% of \$13.00 = \$11.05
 - 85% of \$15.00 = \$12.75
- Previous wage law limited this exception to only the employee’s first 6 months of employment – the new law eliminates this limitation.
- The previous law exempted employees younger than 20, or amusement/recreational employers (both exemptions are now eliminated):



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DEPARTMENT OF
L.R.E.M.

Budget Increase Tie-Ins

- The law requires the Governor to tie a budget increase for “community providers” and “providers” each year until 2026.
 - This is intended to ensure that community providers have enough funding to meet the demands of the new minimum wage.
- “Community providers” are community-based agencies or programs which serve individuals with (1) developmental disabilities, or (2) mental disorders, substance-related disorders, or a combination of both disorders.
- “Providers” are nursing home services, medical day care services, private duty nursing services, personal care services, home- and community-based services, and services provided through the Community First Choice program.

Future Changes to Minimum Wage

- The wage increases will be analyzed each year *before* October to determine any negative consequences to the State.
- The Board of Public Works (which includes the Governor, Comptroller, and Treasurer) is tasked with analyzing the seasonal employment statistics and compare job totals to the totals of the previous year.
- If the Board notes a downward trend in job totals, it is authorized to suspend the next minimum wage increase, which will result in whatever the current rate is being effective for another year, and the next increase being delayed a full year.



DLA 2018-03 Created under C.F.R. 2018-03

Tipped Employees

- FLSA – only have to pay tipped employees \$2.13/hour in direct wages if using a tip credit.
- “**Tipped employee**” means an employee who engages in an occupation in which he or she customarily and regularly receives more than \$30/month in tips.
- “**Tip credit**” means counting a limited amount of an employee’s tips as a partial credit to satisfy the difference between the direct wage paid to the employee (\$2.13) and the federal minimum wage (\$7.25).
 - Credit can be no more than \$5.12/hour (\$7.25 - \$2.13).
- If the direct wage, combined with the tip credit, does not equal the minimum hourly wage, the employer must make up the difference.

Tipped Employees (cont.)

- On **October 7, 2019**, the DOL announced a proposed rule for tip provisions of the FLSA (adopting many Consolidated Appropriations Act of 2018 (“CAA”) policies):
 - **Explicitly** prohibits employers, managers, and supervisors from keeping tips received by employees (already prohibited under CAA, but the new proposed rule explicitly states such).
 - Allows employers **who do not take tip credits** to include “back of the house employees” (ex.: cooks, dishwashers) in mandatory tip pools.
 - Reflects recent guidance that employers may take a tip credit for time that an employee in a tipped occupation performs related non-tipped duties contemporaneously with his or her tipped duties or for a reasonable time immediately before/after performing the tipped duties (ex.: organizing silverware, sweeping floors, etc.).
 - **Eliminates the “80/20 Rule.”**
- Establishes civil fines of up to \$1,100.

QUESTIONS?

THANK YOU!
