

**WAGE AND HOUR UPDATE**

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**I. The Colorado Wage Act, C.R.S. § 8-4-101 et seq. (Wage Act)**

- A. Introduction. The legislature significantly revised Colorado’s Wage Act this year. The amendments took effect in August 2003 and are largely employer-friendly. By understanding the nature and impact of the new revisions, employers can more effectively protect themselves against claims under the Act.
- B. Definitions.
1. Employer.
    - a. Every person, firm, partnership, association, corporation, migratory field labor contractor or crew leader, receiver, or other officer of court in Colorado, and any agent or officer thereof, employing any person in Colorado. See C.R.S. § 8-4-101(5).
    - b. The state and its agencies, counties, cities and counties, municipal corporations, quasi-municipal corporations, school districts, and irrigation, reservoir, or drainage conservation companies or districts organized and existing under the laws of Colorado are not considered “employers” for the purposes of the Wage Act. Id.
    - c. In most instances, officers of a corporation are not employers and, therefore, are not individually liable for unpaid wages. See Leonard v. McMorris, 63 P.3d 323 (Colo. 2003), rehearing denied (Colo. Feb. 24, 2003). It is possible that an officer may be individually liable where grounds exist to pierce the corporate veil or when the officer acts outside the scope of his or her authority.
  2. Employee.
    - a. Any person including a migratory laborer performing labor or services for the benefit of an employer in which the employer may command when, where, and how much labor or services shall be performed. See C.R.S. § 8-4-101(4).
    - b. An individual is not an employee if she or he is primarily free from control and direction in the performance of the service, both under a contract for the performance of a service and in fact, and who customarily is engaged in an independent trade, occupation, profession, or business related to the service performed. Id.
  3. Wages or compensation.
    - a. All amounts for labor or service performed by employees, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculating the same or whether the labor or service is performed under contract, subcontract,

partnership, sub-partnership, station plan or other agreement for the performance of labor or service if the labor or service to be paid for is performed personally by the person demanding payment. No amount is considered to be wages or compensation until such amount is earned, vested, and determinable. See C.R.S. § 8-4-101(8)(a)(I).

- b. Bonuses or commissions earned for labor or services performed in accordance with the terms of any agreement between an employer and employee. See C.R.S. § 8-4-101(8)(a)(II).
- c. Vacation pay earned in accordance with the terms of any agreement. If an employer provides for paid vacation for an employee, the employer shall pay upon separation from employment all vacation pay earned and determinable in accordance with the terms of any agreement between the employer and the employee. See C.R.S. § 8-4-101(8)(a)(III).
- d. Vested stock options also can be deemed wages. See Montemayor v. Jacor Communications, Inc., 64 P.3d 916 (Colo. App. 2002).
- e. Severance pay is not included in the definition of wages or compensation. See C.R.S. § 8-4-101(8)(b).

C. Common provisions, requirements, and issues.

- 1. Payment. All wages or compensation earned by an employee are due and payable for regular pay periods of not greater duration of one month or thirty days, whichever is longer, on regular paydays no later than ten days following the close of each pay period, unless the employer and the employee mutually agree on any other alternative period of payment. C.R.S. § 8-4-103(1).
  - a. This requirement does not apply to compensation payments due an employee under a profit-sharing plan, a pension plan, or other similar deferred compensation programs. C.R.S. § 8-4-103(3).
  - b. At least monthly, or at the time of payment, every employer must provide to each employee an itemized pay statement in writing showing the following:
    - (1) Gross wages earned;
    - (2) All withholdings and deductions;
    - (3) Net wages earned;
    - (4) The inclusive dates of the pay period;
    - (5) The name of the employee or the employee's social security number; and
    - (6) The name and address of the employer.
- 2. Tips and gifts. It is unlawful for any employer engaged in any business where patrons or customers give presents, tips, or gratuities, to assert a claim to, or a

right of ownership in, or control over the presents, tips, or gratuities, unless the employer posts a notice in a conspicuous place on a printed card at least twelve inches by fifteen inches in size, with letters at least one-half inches high, that informs the general public that all such presents, tips, or gratuities are the property of the employer. C.R.S. § 8-4-103(6).

3. Direct deposit. Direct deposit of payment for compensation to an employee's bank or other financial institution is permitted, so long as the employee voluntarily authorizes the direct deposit. C.R.S. § 8-4-102(2).
4. Notice. An employer must post and keep posted in a conspicuous place a notice specifying the regular paydays and the time and place of payment as well as any changes that may occur from time to time. See C.R.S. § 8-4-107.
5. Payment upon termination.
  - a. In the event of an involuntary termination, the employer must immediately pay the employee wages or compensation earned, vested, determinable, and unpaid at the time of discharge. If the employer's accounting department (or other department responsible for payroll checks) is closed at the time of discharge, the employer must make the payment no later than six hours after the beginning of the accounting department's next regular work day. If the accounting department is located off the worksite, the employer has twenty-four hours after the next regular work day to make the payment. C.R.S. § 8-4-109(1).
  - b. In the event that an employee quits or resigns employment, the wages or compensation are due and payable upon the next regular payday. Id.
  - c. In either event, the payment shall be made to:
    - (1) The work site;
    - (2) The employer's local office; or
    - (3) The employee's last known mailing address.
  - d. An employer is not required to make payments for wages or compensation not yet fully earned under the compensation agreement between the employee and the employer, whether written or oral. C.R.S. § 8-4-109(2).
6. Payment upon death.
  - a. In the event of the death of an employee, the employer shall pay any wages or compensation earned, vested, and determinable to the personal representative of the deceased employee's estate upon the request of the personal representative. C.R.S. § 8-4-109(4).
  - b. If no personal representative of the employee's estate has been appointed, the employer shall pay any wages or compensation earned, vested, and determinable to the deceased employee's surviving spouse.

If there is no surviving spouse, the employer must make the payment to the deceased employee's next legal heir upon the request of that heir. Id.

c. Before making payment, the employer shall require proof of the claimant's relationship to the deceased employee by affidavit and require the claimant to acknowledge receipt of any payment in writing. Id.

7. No retaliation. No employer shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any employee who has filed a complaint or instituted a cause of action under the Wage Act, or who has testified or may testify in any proceeding on behalf of himself, herself, or any other employee. C.R.S. § 8-4-120.

8. No waiver. Any agreement, written or oral, by any employee purporting to waive or modify the employee's rights under the Wage Act is void. C.R.S. § 8-4-121.

D. Payroll deductions.

1. General rule. An employer generally cannot make deductions from the wages or compensation of its employees. See C.R.S. § 8-4-105.

2. Exceptions. An employer may make deductions in the following instances:

a. Deductions mandated by or in accordance with local, state, or federal law, including, without limitation, deductions for taxes, FICA, garnishments, or other court-ordered deductions;

b. Deductions for loans, advances, goods or services, and equipment or property provided by an employer to an employee pursuant to a written agreement between the employer and employee, so long as the agreement is enforceable and not in violation of the law;

c. Deductions necessary to cover the replacement costs of a shortage due to theft by an employee if a report has been filed with the proper law enforcement agency in connection with such theft pending a final adjudication by a court of competent jurisdiction;

(1) If, however, the accused employee is found not guilty in a court action or if criminal charges are not filed against the employee within 90 days after the filing of the report, the employer must pay the employee any amount wrongfully withheld, plus interest.

(2) If an employer acts without good faith, the accused employee also can recover treble damages against the employee, plus attorney's fees and court costs if the employee prevails in an action against the employer.

d. Deductions authorized by the employee, if the authorization is revocable, including deductions for insurance, savings plans, stock purchases, voluntary pension plans, charities, and deposits to financial institutions;

- e. Deductions for an amount of money, or the value of property, that the employee failed to repay or return in the case where the employee was entrusted with the collection, disbursement, or handling of such money or property. Additional requirements apply for the employer to make deductions on this basis, including conducting an audit within 10 days of the employee's termination.

C.R.S. § 8-4-105(1)(a-e).

- 3. These provisions do not authorize a deduction below the minimum wage applicable under the Fair Labor Standards Act. C.R.S. § 8-4-105(2).

E. Enforcement.

- 1. Demand. If an employer refuses to pay wages or compensation in accordance with the Wage Act, the employee or the employee's agent shall make a written demand for the payment within 60 days after the date of separation and shall state in the demand where the payment can be received. C.R.S. § 8-4-109(3).

- 2. Penalties.

- a. To the employee. If an employer does not pay the employee's earned, vested, and determinable wages or compensation within ten days after receiving the demand, the employer is liable for an amount, in addition to the unpaid wages, equal to the greater of 50% of the wages or compensation due or the employee's average daily earnings for each day, not to exceed ten days, until the payment is made. The employee or the employee's agent may bring a civil action to recover this penalty.

- (1) No penalty will be awarded if the employee does not send the demand within 60 days, or if the employee is otherwise unavailable to receive payment. Id.

- (2) No penalty will be awarded if the employer disputes the amount of wages or compensation claimed by the employee, and the employer makes a legal tender of the amount that the employer in good faith believes is due, unless the employee recovers, in a legal action, a sum greater than the amount tendered. C.R.S. § 8-4-110.

- b. To the state.

- (1) If an employer without good faith legal justification fails to pay the wages due and owing, and the violation of the Wage Act is prosecuted by the state of Colorado (through either a district attorney or a county attorney), the employer may be liable in an amount not to exceed the sum of fifty dollars per day for each such failure, commencing from the date that the wages first became due and payable. C.R.S. § 8-4-113.

- (2) All fines and penalties collected under this provision will be paid to the division and transmitted to the state treasurer for credit to the general fund. Id.

- c. Criminal penalties.
  - (1) Any employer fails to pay wages pursuant to the Wage Act may be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than three hundred dollars, or by imprisonment in the county jail for not more than thirty days, or by both fine and imprisonment. C.R.S. § 8-4-114.
  - (2) In addition an employer that willfully refuses to pay wages, or falsely denies the amount of a wage claim, the validity of the claim, or that the claim is due with the intent not to pay the indebtedness or to annoy, harass, oppress, hinder, delay, or defraud the employee, is guilty of a misdemeanor and subject to the fines and imprisonment set forth above. Id.
  - (3) Any employer violating the provisions against retaliation is guilty of a misdemeanor and will be punished by a fine of not more than five hundred dollars or by imprisonment in the county jail for more than sixty days, or both. C.R.S. § 8-4-120.
- 3. Attorney's fees.
  - a. If an employer tenders an amount the employer believes in good faith to be due, and the employee recovers more than that amount in a legal action, the employer shall pay the cost of the action and the employee's reasonable attorney's fees. C.R.S. § 8-4-110.
  - b. If an employer tenders an amount the employer believes in good faith to be due, and the employee recovers less than that amount in a legal action, the employee shall pay the cost of the action and the employer's reasonable attorney's fees. Id.

## II. The Fair Labor Standards Act (FLSA)

- A. Introduction. Several months ago, the Wage and Hour Division of the Department of Labor proposed changes in its regulations concerning the applicability of FLSA's overtime provisions. If accepted, the changes will affect whether several types of job positions will be treated as exempt or non-exempt. The proposed regulations are being scrutinized by the legislature, and it does not appear that they will take effect in the foreseeable future. In the event some or all of the regulations eventually are accepted, however, it will be important to understand FLSA's current standards and requirements.
- B. FLSA's purpose.
  - 1. Aid the unorganized and lowest paid workers; maintain their health and welfare.
  - 2. Extend employment to a greater number of people.
  - 3. Compensate employees for working more than the hours fixed by law.
- C. Significance.

1. Minimum wage. Generally, workers must be paid a wage of at least \$5.15 per hour. 29 U.S.C. § 206.
  2. Overtime.
    - a. Employees generally must be paid time and one-half their regular wage rate for each hour worked in excess of forty during a workweek. 29 U.S.C. § 207(a)(1).
    - b. A workweek consists of seven consecutive 24 hour periods. 29 C.F.R. § 778.105.
    - c. FLSA does not override higher wage/hour standards set by state, local and other federal laws. Colorado requires overtime for each hour in excess of 12 hours per day for workers in certain industries. See, e.g., C.R.S. § 8-6-111(4); 7 CCR 1103-3, Minimum Wage Order No. 22 (generally, employees in retail trade, food and beverage, public housekeeping, medical profession, beauty service, laundry and dry cleaning, and janitorial industries must be paid time and a half for each hour of work in excess of 12 hours per day and/or in excess of 40 hours per workweek).
    - d. FLSA does not relieve employer of contractual obligations.
  3. Equal Pay Act. Prohibits wage differences based solely on sex. Applies to minimum, overtime and premium wage. 29 U.S.C. § 206(d).
  4. Child labor restrictions.
    - a. Prohibit employment of young children.
    - b. Prohibit employment of older children in some jobs until they reach a certain age. 29 U.S.C. § 212; 29 C.F.R. pt. 570.
- D. Exemptions. All employees are subject to minimum wage, overtime and equal pay rules unless they are exempt. 29 U.S.C. §§ 206, 207.
1. White Collar exemptions. This is the largest category of exempt employees: executive, administrative and professional employees (the “White Collar” exemption). 29 U.S.C. § 213(a)(1); 29 C.F.R. pt. 541.
    - a. Common requirements.
      - (1) Employees must be paid on a salary or fee basis.
        - (a) Pay docking as a means of discipline may undermine an employee’s exempt status.
        - (b) Employees whose schedules and salaries change from pay period to pay period (usually based on an employer’s needs during slow times) are not paid on a salary basis.

- (c) Deductions may be made for absences of a day or more due to personal reasons, sickness, or disability, so long as the deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation for loss of salary occasioned by both sickness and disability.
  - (d) Deductions may be made for absences caused by jury duty, witness duties, or temporary military leave, but only to the extent of any amounts received as jury or witness fees or military pay.
- (2) Employees must be paid a minimum amount unless the employee is a teacher, lawyer or physician; and
  - (3) Exemptions extend to individuals, not groups of employees.
- b. Executive employees.
- (1) Primary duty (generally 50%+ of time): managing the enterprise or department or subdivision of it;
  - (2) Supervision: customarily and regularly direct the work of two or more employees;
  - (3) Authority: have authority to hire/fire other employees; suggestions as to hiring or change of status of any employee will be given particular weight;
  - (4) Discretion: customarily and regularly exercises discretionary powers;
  - (5) Nonexempt work:
    - (a) Do not devote more than 20 percent of their workweek hours (40 percent in retail or service establishment) to activities that are not directly and closely related to (1) - (4);
    - (b) Limitation in 5(a) is inapplicable where employee is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which she or he is employed;
  - (6) Salary: at least \$250 per week;
  - (7) Short test for highly salaried employees: if the employee earns a salary of \$345 per week or more and has the primary duty and supervisory responsibilities listed in b(1) and (2), that employee will also be an exempt executive under FLSA.

29 C.F.R. §§ 541.1; 541.101-541.119.

c. Administrative Employees.

- (1) Primary Duty (generally 50%+ of time): performs office or nonmanual work relating to management policies or general business operations of employer or its customers; or performs functions in the administration of a school system or educational establishment or institution, which are directly related to academic instruction or training carried on there; and
- (2) Other duties:
  - (a) Regularly and directly assists a proprietor, an executive or administrative employee; or
  - (b) Works under only general supervision along specialized or technical lines requiring special training, experience, or knowledge; or
  - (c) Executes under only general supervision special assignments and tasks; and
- (3) Discretion: customarily and regularly exercises discretion and independent judgment;
- (4) Nonexempt work: nonexempt work performed by administrative personnel in retail or service establishment must be less than 40% of their weekly hours; nonexempt work performed by other administrative employees is limited to 20% of their weekly hours;
- (5) Salary or fee: at least \$250 per week;
- (6) Short test for highly salaried employees: if the employee earns a salary of \$345 per week or more, has the primary duty listed in (1) above, and exercises discretion and independent judgment, that employee will also be an exempt administrative employee under FLSA.

29 C.F.R. §§ 541.2; 541.201-541.215.

d. Professional employees.

- (1) Primary duty (generally 50%+ of time): performs work predominantly intellectual and varied (not routine) which cannot be standardized in point of time; and
- (2) Performs work requiring scientific or specialized study (not apprentice training or training for routine work); or
- (3) Performs original and creative work in a recognized artistic endeavor, depending primarily on the invention, imagination or talent of the employee; or

- (4) Teaches, tutors, instructs or lectures in the activity of imparting knowledge and is employed and engaged in this activity as a teacher certified or recognized as such in the school system or educational establishment by which he is employed.
- (5) Discretion: consistently exercises discretion and judgment.
- (6) Nonexempt work: limited to 20% of professional employee's weekly hours worked.
- (7) Salary or fee: at least \$280. This salary or fee requirement is inapplicable to licensed legal or medical practitioners, holders of academic medical degrees who are engaged in internship or resident programs, and teachers employed by schools or other educational institutions.
- (8) Shorter test for highly salaried employees: if the employee earns a salary of \$345 per week or more, has the primary duty listed in (1) above, and consistently exercises discretion and judgment with respect to scientific, specialized or academic work, but not with respect to artistic endeavors, that employee will also be an exempt professional employee under FLSA.

29 C.F.R. §§ 541.3; 541.300-541.315.

2. Outside salespersons. Another exempt category of employees that commonly arises is that of outside salespersons. Employees will fall in this category if they meet the following requirements.
  - a. The purpose of their employment must be to (i) make sales or (ii) obtain orders or contracts for services or for the use of facilities. See 29 C.F.R. § 541.5(a).
  - b. They must customarily and regularly spend time conducting such work away from the employer's place of business. See 29 C.F.R. § 541.5(a).
  - c. The amount of time that they spend in work not falling within the categories set forth above must not exceed 20% of the work week. Work that is incidental to and in conjunction with the above activities will be regarded as selling time. See 29 C.F.R. § 541.5(b).
3. Computer occupations. Several years ago, Congress amended FLSA to treat certain computer-related employees as exempt. See 29 U.S.C. § 213(a).
  - a. Highly skilled computer analysts, programmers, software engineers, and other computer-related occupations, so long as their primary duties include:
    - (1) The application of systems analysis techniques and procedures, including consulting with users in determining hardware, software, and systems specifications;

- (2) The design, development, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
      - (3) A combination of the duties above, the performance of which requires the same level of skills, and who are compensated at a rate of not less than \$27.63 an hour.
    - b. Trainees and entry-level employees are not covered by this category. To qualify, employees must have a certain level of education and on-the-job training in the field. No particular degree, license, or certification are required. See 29 C.F.R. § 541.303(c).
    - c. Employees who operate, manufacture, repair, or maintain computers, hardware, software, or related equipment will not fall within this exemption. See 29 C.F.R. § 541.303(d).
  4. Other particular exemptions from FLSA or from some of its provisions may apply. See 29 U.S.C. §§ 213(a)(5)-(15).
  5. Avoiding liability.
    - a. Determine first if a potential or current employee would be exempt from the FLSA before offering that person a salary.
    - b. Review the list of current salaried employees whom you believe are exempt from FLSA.
    - c. Be sure each such employee meets the requirements necessary to be an executive, administrative or professional employee, or to fit into one of the other exemptions.
    - d. If not, comply with FLSA or, if possible, change the duties of the employee.
- E. Independent contractors.
1. General rule. FLSA controls an employer's responsibility to "employees" for wage and hour issues.
  2. Standard. To determine whether a worker is an employee within the meaning of FLSA, courts look to the economic realities of the relationship and focus on whether the worker is economically dependent on the business to which he or she renders service or is, as a matter of economic fact, in business for himself or herself. Henderson v. Inter-Chem Coal Co. Inc., 41 F.3d 567 (10th Cir. 1994). Courts generally consider six factors:
    - a. The degree of control exerted over the worker;
    - b. The worker's opportunities for profit or loss;
    - c. The worker's investment in the business;

- d. The permanency of the working relationship;
- e. The degree of skill required to perform the work; and
- f. The extent to which the work is an integral part of the employer's business.

Courts look at the totality of the circumstances. No one factor is dispositive.

3. Avoiding liability.

- a. Make a written agreement with independent contractors which defines them as such and characterizes their job duties based on the six factors.
- b. Consult your attorney regarding specific jobs to determine whether independent contractor status applies.
- c. Consult IRS standards on independent contractor status for a more specific breakdown of the six factors, especially payment on a piece-meal basis.

F. Tipped employees.

- 1. General rule. FLSA defines "wage" to include compensation paid to a tipped employee. In determining the wage of a tipped employee, the amount paid to the employee shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50% of the applicable minimum wage rate. 29 U.S.C. § 203(m), 29 C.F.R. § 531.50-60.
- 2. Standards. For these provisions to apply, (a) the employee must be informed of the provisions of the above section, (b) all tips received by the employee must be retained by the employee (does not prohibit "pooling" of tips), and (c) the employee must be engaged in an occupation in which he or she customarily and regularly receives more than \$20 a month in tips.
- 3. Overtime. When overtime is worked by a tipped employee subject to the overtime provisions of FLSA, his or her "regular rate" is determined by total compensation in a week divided by hours worked in that week. The regular rate of pay includes the tip credit taken by the employer and cash wages paid including certain bonuses. Any tips received by the employee in excess of the tip credit need not be included in the regular rate.

G. Bonuses.

- 1. Understanding the "regular rate."
  - a. Regular rate equals an employee's weekly earnings divided by hours worked (regardless of whether the non-exempt employee is hourly or salaried). See 29 C.F.R. § 548.3.
  - b. Effect. Bonuses which are not excluded are factored into the regular rate, increasing overtime liability. See 29 U.S.C. § 207(e).

c. Regular rate includes all compensation for employment unless excluded. This includes:

- (1) Wages (before withholdings);
- (2) Stocks;
- (3) Housing;
- (4) Board;
- (5) Merchandise.

See 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.27-531.32.

d. Regular rate excludes payments to an employee not made as compensation for employment, including the following:

- (1) Vacation and sick pay;
- (2) Expense reimbursement;
- (3) Radio and television talent fees;
- (4) Welfare-plan contributions by employers;
- (5) Certain premium pay;
- (6) Discretionary bonuses;
- (7) Profit-sharing and savings-plan payments by employers;
- (8) Christmas and gift bonuses.

See 29 U.S.C. § 207(e).

2. Exclusions. Bonuses to encourage increased efforts are included in wages. Bonuses which are rewards for past services and are not devised until service is rendered, may be excludable.

a. Types of bonuses that may be excluded from the regular rate.

- (1) Discretionary bonus:
  - (a) Employer must retain discretion as to payment;
  - (b) Employer must retain discretion as to amount;
  - (c) Employer must retain discretion until the end of the period bonus covers; and

- (d) Employer must not be under any prior obligation to pay bonus (i.e., contract, agreement or promise).

29 U.S.C. § 207(e)(3); 29 C.F.R. § 778.211.

(2) Percentage of wage bonus:

- (a) Must be based on percentage of straight time and overtime earnings;
- (b) Cannot be conditional;
- (c) Cannot be used to keep salaries fixed for variable hours.

See 29 U.S.C. § 207(e)(3); 29 C.F.R. §§ 778.210; 778.503.

(3) Christmas or gift bonus requirements:

- (a) Cannot be measured by hours worked, production or efficiency;
- (b) Cannot be so substantial that employees consider it part of wages;
- (c) Cannot be paid under a contract.

See 29 U.S.C. § 207(e)(1); 29 C.F.R. § 778.212.

(4) Profit-sharing bonuses:

- (a) Formal profit-sharing plans must conform to administrative regulations for bonuses paid under them to be excludable;
- (b) Bonuses paid out informally from profits should be paid out according to percentage of earnings or discretionary bonus requirements.

See 29 U.S.C. §§ 207(e)(3); 207(e)(4); 29 C.F.R. § 778.214.

3. Avoiding liability.

(1) Discretionary bonuses:

- (a) Retain the required discretion as to payment, amount and timing; and
- (b) Do not attempt to pay this kind of bonus under a prior obligation.

(2) Percentage of wage bonus:

- (a) Base the bonus on percentage of straight time and overtime earnings;
  - (b) Give the bonus without strings attached; and
  - (c) Do not use the bonus to keep salaries fixed for variable hours.
- (3) Christmas bonus:
- (a) Do not base the bonus on production, hours worked or efficiency;
  - (b) Do not make the bonus so substantial that employees consider it part of wages; and
  - (c) Do not attempt to pay this kind of bonus under a prior obligation.
- (4) Profit-sharing bonus:
- (a) When using a formal plan, make sure that it meets FLSA's administrative requirements;
  - (b) When providing an informal profit-sharing bonus, comply with discretionary bonus or percentage of earning bonus requirements;
  - (c) Do not attempt to credit any bonus against overtime pay; and
  - (d) Have someone review your bonus plan.

H. Unauthorized overtime.

1. General rules.

- a. Employer must pay overtime at time and a half for each hour over 40 in a workweek. 29 U.S.C. § 207(a).
- b. Employer cannot stand idly by and allow an employee to perform overtime without proper compensation, even if the employee does not make a claim for overtime.

2. Compensable hours.

- a. Generally, all time during which employee is required to be on duty or on the employer's premises or at the workplace is compensable.
- b. All time during which the employee is suffered or permitted to work whether or not he is required to do so is compensable.

- c. Employee need not be on the employer's premises to constitute compensable time.
- d. Idle hours generally are compensable, as are hours spent in incidental, non-productive work. See 29 C.F.R. §§ 553.221(b), (c); 29 C.F.R. § 785.17.
- e. Whether "on-call time" is compensable depends on whether the "time is spent predominantly for the employer's benefit or for the employee's benefit." Gilligan v. Emporia, 986 F.2d 410 (10th Cir. 1993) (quoting Armour & Co. v. Wantock, 323 U.S. 126, 133 (1944)).
  - (1) Several factors are considered:
    - (a) The agreement between the parties;
    - (b) The nature and extent of the restrictions;
    - (c) The relationship between the services rendered and the on-call time; and
    - (d) The surrounding circumstances.

3. Avoiding liability.

- a. Clearly state to employees the circumstances under which they are/are not to work overtime.
- b. Implement a written, uniform policy under which employees working unauthorized overtime are consistently, fairly disciplined for it.
- c. Regardless of whether employees are authorized to work overtime, ensure they are paid overtime for doing so when it happens.

I. Enforcement of FLSA.

1. Criminal, civil and administrative sanctions for FLSA violations.

- a. Criminal penalties for willful violations:
  - (1) Up to \$10,000 fine;
  - (2) Up to 6 months imprisonment (2d time offenders); or
  - (3) Fine and imprisonment.

See 29 U.S.C. § 216(a).

2. Civil remedies – U.S. Department of Labor.

- a. Wage suits.

- (1) Department of Labor has authority to bring wage suits on behalf of employees against their employers.
  - (2) Potential liability: amount of unpaid minimum wages or unpaid overtime plus an equal amount as liquidated damages. 29 U.S.C. § 216(c).
  - (3) A misunderstanding of the requirements of FLSA is no defense. See Crenshaw v. Quarles Drilling Corp., 798 F.2d 1345 (10th Cir. 1988) (upholding liquidated damages award).
- b. Injunction suits.
- (1) Courts are authorized to grant an order to restrain violations of FLSA. 29 U.S.C. § 217.
  - (2) “Hot goods” ban. An employer may be enjoined from selling, shipping, delivering or transporting any goods with knowledge that any employee involved in their production was involved in a violation of FLSA requirements. 29 U.S.C. § 215(a). Moreover, a secured creditor in possession of hot goods manufactured by an employer who failed to pay workers in accordance with FLSA requirements may be enjoined from selling them.
  - (3) Employee retaliation claims. Employer can be enjoined from discharging or discriminating against an employee who has filed a FLSA complaint or participated in a FLSA proceeding. 29 U.S.C. § 215(a). (Department of Labor and private individuals may bring an action for damages for such a violation).
- c. Administrative supervision of wage collection. Wage and Hour Division has authority to supervise collection of wages even in the absence of suit.
- d. Additional powers of Wage and Hour Division.
- (1) Subpoena power.
  - (2) Inspection and investigation.
    - (a) Reviewing records.
    - (b) Interviewing management and other employees.
    - (c) Searching for possible recordkeeping violations.
    - (d) Reinspection to ensure compliance. See 29 U.S.C. §§ 209, 211.
3. Private civil wage suits by employees.
- a. Form: individual suit or class action.

- b. Possible liability: amount of unpaid minimum wages or unpaid overtime plus an equal amount as liquidated damages.
  - c. Attorney's fees: employees who obtain a judgment can recover attorney's fees and costs from their employer. 29 U.S.C. § 216(b).
  - d. An employer's voluntary payment of wages due will protect it against an employee's suit for wage if the employee agrees to accept payment. 29 U.S.C. § 216(c).
4. Civil penalties.
- a. Secretary is authorized to impose civil penalties after an administrative determination.
  - b. Potential liability: \$1,100 per violation against a frequent or willful violator of overtime, minimum wage, or equal pay provisions. \$10,000 per violation for child labor provisions. 29 U.S.C. § 216(e).
5. Avoiding all sanctions.
- a. Review organization policies now.
    - (1) Payroll policies – exempt/non-exempt, overtime and minimum wage.
    - (2) Bonus policy.
    - (3) Recordkeeping policy.
    - (4) Maximum hours policy.
  - b. Bring your organization into compliance.
  - c. Seek review of policies concerning thorny FLSA issues before problems arise.