What Is The FLSA?

- The Fair Labor Standards Act (1938) covers virtually all private employers. It requires employers to pay covered employees, who are not otherwise exempt, at least the federal minimum wage ($5.15/hour) and premium overtime pay for all hours worked over 40 in a workweek.
  - Covered employees must be paid for all hours worked in a workweek.
  - Overtime after 40 hours in a week = 1 1/2 times
The FLSA Requires That:

• Nonexempt employees record ALL of the hours they work.
• Employers pay nonexempt employees premium overtime pay for ALL “hours worked” over 40 in a “workweek” based on the employee’s regular rate.
• Employers have detailed record-keeping obligations.
• Certain Exemptions Apply.
  – Be careful of both federal AND state

White Collar Exemptions

• Salary Level
• Salary Basis
• Duties
  – Executive
  – Administrative
  – Professional
  – Outside Sales
  – Computer Professionals

Positions Common to Institutions of Higher Education—Are They Exempt?

• Coaches
• Assistant Coaches
• Graduate Assistants
• Admission Counselors/Representatives
• Financial Aid Personnel
What is the FMLA?

Eligible employees may take up to 12 weeks of leave during 12 months due to:
- Birth, adoption or foster care placement of a child
- Care of a child, spouse or parent with a serious health condition
- Employee’s own serious health condition

FMLA Basics

- Coverage
- Eligibility
- Types of Leave
- Notice & Certification Requirements
- Protections

Interaction With Other Laws

- State Leave Laws
- Workers’ Compensation
- Americans with Disabilities Act
- Fair Labor Standards Act
How DOL Conducts FLSA and FMLA Investigations

- Notification Procedures
- Written submissions vs. on-site
- Interviews
- Document requests
- Closure process (or lack thereof)

What To Do If You Are Contacted By DOL

- Understand request and who it is coming from.
- Obtain extension of time if necessary.
- Conduct own self-audit.
- Get prepared!
- Be cooperative.

How to Avoid DOL (or at least get a clean bill of health!)

- Common FLSA Mistakes
  - Improper Deductions to Salaried-Exempt Employees.
    - For example:
      - Inclement weather.
      - Loss of Equipment.
      - Deductions of less than a week that do not fall under the new “workplace conduct” rule for permissible deductions.
      - Partial-day deductions.
      - Deductions under “FMLA” permissible deduction provision when employee is not eligible for and/or
How to Avoid DOL-Common FLSA Mistakes (cont'd)

• Failing to include all remuneration (except the statutory exclusions) in the regular rate of pay before calculating the overtime rate of pay.
  – For example:
    • shift differentials
    • cash payouts from cafeteria benefit plans
    • call back pay
    • nondiscretionary bonuses

How to Avoid DOL-Common FLSA Mistakes (cont'd)

• Charging Non-Exempt Employees for Tools, Equipment, and Other Related Expenses When:
  – Such expenses would cause the employee’s compensation to fall below minimum wage for hours worked and into the overtime premium for hours worked above 40.

How to Avoid DOL-Common FLSA Mistakes (cont'd)

• Failing to record and pay for all compensable hours of work between the first and last principal activities of the day….
  – For example:
    • logging into computer programs
    • preparing materials before duties officially begin
    • changing clothes
    • putting on protective equipment as well as other work performed by the employee that the employer knew or had reason to know was performed before or after the scheduled workday or at home or at
How to Avoid DOL-Common FLSA Mistakes (cont’d)

• Using improper rounding policies and systems at the beginning and end of work shifts and meal periods.
• Lunch & Break Policies
  – Failing to record and pay for all meal periods of less than 30 uninterrupted minutes (or have justification for 20-30 minute lunch period).

How to Avoid DOL-Common FLSA Mistakes (cont’d)

• Improper “Comp Time” Policies
  – Compensating private sector nonexempt employees for overtime in paid time off rather than in premium wages.
  – Must be in same “workweek.”

How to Avoid DOL-Common FLSA Mistakes (cont’d)

• Failure to periodically review and update exempt status of employees.
  – Job descriptions
  – Trainees
How to Avoid DOL-Common

FLSA Mistakes (cont’d)

• Improper use of “fluctuating workweek” method.
  – Employing the fluctuating workweek method of paying for overtime without meeting the following conditions that (a) the hours must fluctuate, (b) there must be a clear and mutual understanding before the work is performed of how overtime will be calculated and (c) the salary may not be reduced in any workweek for any reason.

How to Avoid DOL-Common

FMLA Mistakes

• Failing to Grant Leave Because Employee Did Not Specifically Request “FMLA” leave.

• Not Designating Leave as “FMLA” protected.
  – Certain other notice obligations apply as well.

• Not Understanding that FMLA Leave Can (and Should) Run Concurrently With Other Leaves—e.g. Short-term disability, Workers’ Comp.

• Not Understanding that an FMLA-covered

How to Avoid DOL-Common

FMLA Mistakes (cont’d)

• Failure to allow employees to take leave on an intermittent or reduced leave schedule (or transferring them when not for planned medical treatment).

• Denial of leave because “timely” notice and/or certification is not provided.
  – Very specific timelines set forth by regulations.

• Waiting too long to obtain second opinion.
  – Regulations specifically state no second

How to Avoid DOL-Common FMLA Mistakes (cont’d)
• Taking FMLA absences into account for purposes of performance reviews, discipline, attendance bonuses, and receipt of other employment benefits.
• Not selecting a “12 month period” for calculating FMLA entitlement.

How to Avoid DOL-Common FMLA Mistakes (cont’d)
• Interaction with paid leave provided by employer.
• Understanding reinstatement obligations.

An Ounce of Prevention . . .
• Develop in-house awareness and expertise
• Conduct self-audits
• Seek outside validation of compliance
Develop In-House Awareness and Expertise

- Designate specific HR/Legal FLSA/FMLA resource persons
- Send them to FLSA/FMLA training
- Subscribe to FLSA/FMLA publications
- Conduct periodic self-audits/compliance reviews
- Provide periodic training to managers

Seek Outside Validation of Compliance

- If in doubt, request an opinion letter based on your specific situation from outside counsel or the DOL
- Monitor the DOL website for updates/opinion letters/training aids
- Get on the mailing lists of outside counsel and industry/HR associations (and read what you receive about the FLSA)
- Monitor case law

Act!

- Fix problems, don’t ignore them
- Encourage managers and other employees to ask questions and raise concerns
- Make someone responsible for following through
Trends In FLSA and FMLA Investigations

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