



Playing By the Rules

Avoiding Wage-and-Hour Litigation with FLSA Compliance

Executive Summary

In 2010, the U.S. Department of Labor's Wage and Hour Division escalated FLSA (Fair Labor Standards Act) litigation against employers. This trend is expected to grow in 2011 due to efforts by the Wage and Hour Division (WHD) to sustain increased staff levels, conduct more targeted enforcement investigations, and reinforce employers' culpability in FLSA compliance. Consequently, employers can expect more federal scrutiny on compliance and higher settlements for wage-and-hour litigation in 2011. However, employers can combat the risk of legal action by reviewing FLSA standards with supervisors, ensuring workers are correctly classified, maintaining and retaining employee records appropriately, and choosing a timekeeping system to help automate compliance.

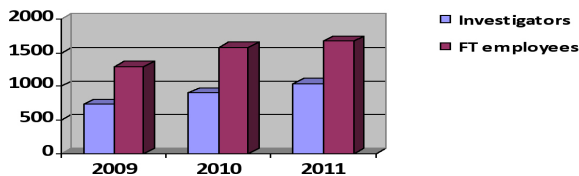
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Employers Need to Know: Wage-and-Hour Litigation is on the Rise

Last year, employers faced an increased risk of FLSA-related litigation from the Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL). This trend is likely to increase in 2011 for three reasons:

- 1. More Investigators.** For the past two years, the DOL has steadily increased its staff. Specifically, the WHD, responsible for administration and enforcement of the Fair Labor Standards Act (FLSA) and other laws governing employment in the U.S., underwent significant staff increases in an attempt to restore WHD to 2001 staffing levels.ⁱ More investigators will increase WHD's ability to prosecute employers who are not FLSA compliant.
- 2. Targeted Enforcement.** The 2011 WHD budget is earmarked to conduct more targeted investigations, provide meaningful compliance assistance and respond appropriately to complaints of employment-related compliance infractions. Notably, a Misclassification Initiative focused on employers who incorrectly classify independent contractors, is expected to gain 90 full-time employees and culminate in an additional 4,700 investigations this year. Targeted industries include construction, child care, home health care, grocery stores, janitorial, business services, poultry and meat processing, and landscaping.ⁱⁱ

Total Number of WHD Full-Time Employees and Investigators



Since 2009, WHD has steadily grown its staff of investigators and full-time employees, increasing the agency's ability to audit and prosecute employers deemed noncompliant. (Source: Department of Labor Budget, 2010, 2011 and 2012.)

- 3. 100% Employer Culpability.** Launched in spring 2010, DOL's Plan/Prevent/Protect strategy states, "...employers...must understand the burden is on them to obey the law, not on the Labor Department to catch them violating [it]," reinforcing that employers are 100% responsible for complying with DOL's employment provisions.ⁱⁱⁱ This means in every instance of alleged compliance infraction the burden of proof rests squarely on employers' shoulders.



The Result: More Scrutiny and Higher Settlements

With WHD's staff increases, targeted enforcement strategy and employer culpability policy, employers should expect both more scrutiny from WHD on FLSA compliance and higher settlements stemming from increased enforcement litigation. WHD reports completing almost 26,500 compliance actions in 2010 and collecting more than \$176 million in back wages for nearly 210,000 U.S.-employed workers.^{iv} This is expected to increase in 2011.

Staying FLSA-Compliant

With employers shouldering 100% of the responsibility for FLSA compliance, how can they avoid the growing risk of enforcement litigation? Here are four steps HR departments can consider when assessing compliancy:

1. Educate managers on FLSA.

The Fair Labor Standards Act sets minimum wage, overtime pay and youth employment standards for workers and employers in the private sector as well as federal, state and local governments.^v However, FLSA also specifies an employer's responsibility for accurate timekeeping, record retention and employee classification—duties which can often fall on managers and supervisors. Ensure management team members understand FLSA and recognize their part in keeping the organization compliant. More information and fact sheets about FLSA can be found on the DOL website at www.dol.gov/whd/flsa. DOL also offers an online “Compliance Assistance” program to help employers meet federal employment regulations (including all FLSA provisions) at www.dol.gov/compliance. Employers can contact WHD directly by calling 1-800-4USWAGE (1-800-487-9243).

2. Correctly classify workers.

Compliance hinges on the accurate classification of employees as exempt or non-exempt from FLSA provisions. But because there is no single rule to determine whether a worker is covered under FLSA, employers who incorrectly classify workers may be at risk for auditing under WHD's Misclassification Initiative. Typically, three criteria are used to determine a worker's classification: (1) compensation method, (2) compensation level and (3) job duties.

A worker may be exempt (and therefore not covered under FLSA) if he or she:

- Is paid on a salary basis
- Receives not less than \$455 per week
- Has job duties that meets FLSA's criteria of executive, administrative, professional, computer or outside sales^{vi}

Because there is no single test to correctly classify workers, classification is an understandable pain point for many employers. However, WHD's Misclassification Initiative demonstrates a serious intent to enforce correct worker classification. Any employer uncertain about the exempt or non-exempt status of its workers should contact WHD directly at 1-800-4USWAGE.



3. Maintain updated employee records.

FLSA requires employers to maintain accurate records on covered employees. Specifically, employers must keep:

- *Identifying information* — full name, Social Security number, address, birth date (for workers under age 19), sex and occupation
- *Work hours and wage information* — time/day employee's workweek begins, daily hours worked, total hours worked weekly, basis on which wages are paid (e.g., per hour, per week), regular hourly pay rate, total daily/weekly straight earnings, total weekly overtime, any additions or deductions from employee's wages, total wages paid each pay period, date of payment and pay period covered.

FLSA also requires employers to retain records for a specific period of time. Records to be kept for three years include payroll records, bargaining agreements, and sales and purchase records. Records requiring retention for two years include time cards, piece work tickets, wage rate tables, work and time schedules, and records of additions to or deduction of wages.^{vii}

4. Use a timekeeping system to help automate compliancy.

Although FLSA demands employers record very specific work and wage information, it does not specify the timekeeping system employers should use. A reliable, accurate timekeeping system can not only ensure compliance but also help establish an employer's good intent in the face of auditing or litigation. When choosing or evaluating a timekeeping system, keep these considerations in mind:

Can it be customized for your organization?

Is it user-friendly, making time recording simple for employees?

Will it track management adjustments?

Does it allow for easy employee scheduling?

Does it deliver specific and real-time reporting capabilities?

Can it handle complex pay rules and scenarios in an accurate, straightforward way?

Will it integrate with an existing HR system to track employee data and leave accrual?

A timekeeping system that meets these criteria will help ensure FLSA compliancy.

By staying current on FLSA compliance requirements, correctly classifying FLSA-covered workers, maintaining and retaining specified employee records, and choosing a timekeeping system that helps automate compliancy, employers can stay a step ahead of enforcement investigators and litigators.



Conclusion: The Rewards of Playing by the Rules

When it comes to labor law compliancy, WHD investigation and litigation is on the rise. This trend is expected to impact employers even more in 2011 due to WHD's increased staffing levels, targeted enforcement strategy and employer culpability policy, resulting in closer investigations by the WHD into employers' compliancy efforts and higher settlements for enforcement-related legal action. However, by reviewing FLSA compliance criteria with managers, ensuring employees are correctly classified under FLSA provisions, maintaining and retaining employee identification and wage/work records, and choosing a timekeeping system that helps automate FLSA compliancy, employers can help mitigate their risk of wage-and-hour litigation in 2011.

ⁱ U.S. Department of Labor. *2011 Department of Labor Budget in Brief*, p. 44. February 2010.

ⁱⁱ *ibid*

ⁱⁱⁱ U.S. Department of Labor. "Leveraging Limited Resources to Increase Compliance: Plan/Prevent/Protect." 2010. <http://www.dol.gov/regulations/2010RegNarrative.htm>

^{iv} U.S. Department of Labor. *2012 Department of Labor Budget in Brief*, p. 48. February 2011.

^v <http://www.dol.gov/whd/flsa/>

^{vi} U.S. Department of Labor. "Fact Sheet 17a: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act." July 2008.

^{vii} July 2008.

About Attendance on Demand, Inc.

Attendance on Demand employee time and attendance service supports the labor management needs of thousands of companies and a quarter of a million employees across North America. Launched in 2006, Attendance on Demand is a rapidly deployed, cloud-based solution that minimizes a company's risk and technology investment while providing advanced features for securely managing labor data — calculating pay rules, scheduling employees, budgeting labor, and automating record keeping for labor law compliance. With over 99.9962% uptime and above average customer retention rates, Attendance on Demand removes the worry of maintaining expensive infrastructure. An extensive North American distribution network helps organizations use Attendance on Demand to reduce labor expenses and improve decision making.

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