

PAY-UP! - WHAT DO FLSA VIOLATIONS REALLY COST?

**4th Annual Section of Labor
and Employment Law
Conference**

November 5, 2010



Proving Damages for Off-The-Clock Claims

- **The Burden of Proof**
- **Use of Representative Testimony or Statistical Samplings**
- **The De Minimis Defense**

Calculation of Regular Rate

- **The General Rule: What is Included in the Regular Rate?**
- **The Limited Exceptions: What's Excluded from the Regular Rate?**
- **Application of Regular Rate Principles.**
 - **Hourly Workers Who Earn Bonuses**
 - **Piece-Rate Workers**
 - **Day Rates**
 - **Salaried Employees.**
 - **Regular Rate for Commissioned Employees**
 - **Regular Rate for Tipped Employees**

Calculating Back Overtime Wages in Misclassification Cases

- **Assuming liability in a misclassification case, how are the damages for back overtime wages properly calculated?**
- **2 approaches; 3 rationales.**

Time and One-Half Method

- Regular Rate: Divide misclassified EEs' weekly salary by fixed hours/week EE was hired to perform (e.g., 40).
- Multiply that amount by $1\frac{1}{2}$.
- Multiply that overtime rate by number of hours worked >40 /workweek.
- A few District Courts have adopted this approach. *Rainey v. Am. Forest Paper* (D.D.C. 1998)

Half-Time Method Based on 29 CFR §778.114

- DOL promulgated this regulation in 1968 following Supreme Court's decision in *Overnight Motor Trans. v. Missel* (1942).
- Adopted by all Circuits that have considered the issue (1st, 4th, 5th, 6th, 10th) and most District Courts.

Half-Time Method Based on 29 CFR §778.114

- EEs' hours fluctuate week to week.
- “Clear mutual understanding” that fixed weekly salary compensates for all hours worked/week.
- Regular rate: Divide weekly salary by hours worked/week; must be no less than min. wage.
- EE paid at least half regular hourly rate for all overtime worked.

Urnikis-Negro v. American Family Property Services (Aug. 2010)

- 7th Cir. rejected application of §778.114 to misclassification damages finding regulation “forward looking,” “not remedial”
- Relied on *Overnight Motor Trans. v. Missel* in reaching result subsequently codified in DOL’s regulation.

Urnikis-Negro v. American Family Property Services (Aug. 2010)

- Regular rate: Divide weekly salary by number of hours the salary was intended to compensate.
- Where ER and EE agree that EE's salary compensated for all hours worked, straight-time portion of compensation for hours >40/week has been paid.
- All remaining to be paid is the OT portion of hours >40 at .5 times regular rate.

Impact

| | Calculation of Regular Rate | | | Calculation of Unpaid Overtime | |
|-------------------------------|-----------------------------|--------------|---------------------|-----------------------------------|----------------------------------|
| | Weekly Salary | Weekly Hours | Regular Hourly Rate | Calculation of Amount | Amount of Unpaid Weekly Overtime |
| Half-time Method | \$1,000. | 50 | \$20.00 | \$20.00 x 0.5 x 10 overtime hours | \$100.00 |
| Time-and-a-half Method | \$1,000. | 50 | \$25.00 | \$25.00 x 1.5 x 10 overtime hours | \$375.00 |

Impact

Collective/Class Actions

- In collective/class litigation .5 method results in enormous damages reduction.
- Assume class of 1,000; using 40 50-hour workweeks/year and 3-year SOL:

Time and \$375 x 40 x 3 yrs x 1,000 = **\$45,000,000**

one-half

Method

Half-time \$100 x 40 x 3 yrs x 1,000 = **\$12,000,000**

Method

(75% less)

Liability Under the Fair Labor Standards Act

- **Statute of Limitations**
- **Liquidated Damages Under the FLSA**
- **Section 11 Good Faith Defense
Liquidated Damages**
- **Section 10 Is a Complete Bar to
Liability**

Attorney's Fees: Ethical Issues, When and How to Negotiate, and Fee Petitions

- **There Are Many Ways That Attorney's Fees Can Be Awarded in FLSA Actions**
- **Fee Petitions**
- **Five Basic Steps for Prevailing Plaintiff Fee Application**
 - 1. Entitlement
 - 2. Legal Standing for Lodestar
 - 3. Hourly Rates
 - 4. Apportionment Issues
 - 5. The right to a multiplier

Attorney's Fees: Ethical Issues, When and How to Negotiate, and Fee Petitions

- **Ethical Issues for When and How to Negotiate Fees**