Reclassifying Exempt Employees: Navigating Wage and Hour Pitfalls

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Top 10 Wage and Hour Settlements in 2011

- $42 Million – JPMorgan Chase & Co. (misclassification of loan underwriters)
- $35 Million – Oracle (failure to pay overtime and provide meal periods to quality assurance engineers, customer support engineers and project managers)
- $34 Million – CVS Caremark Corp. (failure to pay overtime to store managers)
- $32 Million – Tyson Foods, Inc. (failure to compensate for donning and doffing and other pre- and post-shift work-related activities)
- $17.3 Million – Partners HealthCare System, Inc. (failure to pay for work during scheduled meals and breaks)
- $15 Million – Dick Sporting Goods (failure to pay for time worked during break periods and waiting to leave at the end of their shift)
- $14 Million – Beneto Bulk Transport (failure to pay truck drivers adequate overtime)
- $11.3 Million – Cin-Lan, Inc. (misclassification of exotic dancers as exempt)
- $10.5 Million – DHL Express (USA), Inc. (various wage & hour violations)
- $10 Million – Spearment Rhino Cos. Worldwide, Inc. (failure to pay minimum wage and splitting tips to pay overhead)
Wage and Hour Challenges

• Governments desperate for tax revenues
• Misclassification may affect 10 to 30 percent of employers\(^1\)
• Increased DOL funding
  ▶ President Obama’s FY2012 budget sets aside $240 million for misclassification-specific initiatives
  ▶ Between FY 2009 and FY 2010, 1,000 enforcement personnel hired throughout DOL. Trend continues in 2011 with the opening of 13 new offices, the expansion of 6 others, and an increase in the number of investigators.

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Increased WHD Enforcement Capabilities

- Opened 13 new offices nationwide and expanded 6 others in 2011

Applied Economic Strategies, using U.S. Department of Labor, Wage and Hour Division data.
U.S. DOL Strategic Plan 2011-2016
Outcome Goal 1.5 – Secure Wages and Overtime

• Protecting Vulnerable Workers
  ► Focus on subcontracting; third-party management; franchising; independent contracting; and other contractual forms that make worker-employer relationship tenuous and less transparent

• Targeting Industries
  ► High-risk industries include the agricultural, janitorial, construction, and hotel/motel industries
U.S. DOL Strategic Plan 2011-2016
“Plan / Prevent / Protect”

• Principle: employers and others must “find and fix” violations before DOL investigator arrives

• Replace “catch me if you can” with Plan/Prevent/Protect
U.S. DOL Strategic Plan 2011-2016
Wages and Overtime

• Multi-lingual public awareness campaign, *We Can Help*, to reach workers who are reluctant to report violations
• Campaign addresses such topics as rights in the workplace and how to file a complaint with WHD
“Bridge to Justice”

• November 2010:
  ► The Wage and Hour Division and the American Bar Association announced an unprecedented collaboration providing for an Attorney Referral System.
  ► When FLSA or FMLA complainants are informed that the Wage and Hour Division is declining to pursue their complaints, they may also be given a toll-free number to contact the newly created ABA-Approved Attorney Referral System.
  ► In addition, WHD will also provide prompt relevant information and documents on the case to complainants and representing attorneys.
DOL Timesheet App

• May 9, 2011:
  ► DOL announces launch of its first application for smartphones: a free timesheet to help employees independently track the hours they work and determine the wages they are owed.
  ► Available in English and Spanish
  ► Allows users to track regular work hours, break time and any overtime hours for one or more employers.
  ► “This new technology is significant because, instead of relying on their employers’ records, workers now can keep their own records. This information could prove invaluable during a Wage and Hour Division investigation when an employer has failed to maintain accurate employment records.”
  ► Currently: iPhone and iPod Touch. Future: Android and BlackBerry
  ► Future: other pay features including tips, commissions, bonuses, deductions, holiday pay, pay for weekends, shift differentials and pay for regular days of rest.
“Big Brother” Goes Digital

Welcome to DOL 2.0  

Yes, there’s an “App” for That
Audits
Reasons to Do An Audit

• Reasons to do an exempt status audit
  ► Ensure internal legal compliance
  ► Avoid future lawsuits/DOL investigations
  ► Create a “good faith defense”
  ► Know your own problems before the rest of the world
Audit Checklist

• What To Do?
  ► Identify your exempt positions
  ► Prioritize positions to be reviewed
  ► Gather and review documents
  ► Conduct interviews
  ► Assess Facts
  ► Develop communication plan
  ► Implement changes
Special Considerations

- Keep it confidential!
- Get it right
- Consider engaging counsel
  - Good Faith Defense
  - Privilege Issues
Identify Exempt Positions

- Identify all exempt positions
  - Job titles
  - Number of individuals in the position
  - Locations of positions
  - Departments/Divisions
  - Managers
  - Direct reports
  - Degrees
  - Pay
  - Other information to help prioritize
Prioritize Positions to be Reviewed

• Identify clearly exempt or low-risk positions
  ► CEO
  ► Executives
  ► Doctors
  ► Lawyers
  ► Scientists
  ► Engineers
  ► Accountants, CPA required for position
  ► People Managers with 5+ direct reports
  ► $100,000+, if state law permits
Prioritize Positions to be Reviewed

• Identify clearly non-exempt or high risk positions
  ► Accounts Payable, Accounts Receivable, Bookkeeping
  ► Customer Service
  ► Inside Sales (non-retail or service establishments)
  ► Administrative Assistants
  ► Help Desk
Prioritize Positions to be Reviewed

• Prioritize Remaining Positions
  ▶ Number of people in the position
  ▶ Location of position
  ▶ Red Flag job titles for DOL
  ▶ Internal concerns
Assess Positions

• Investigator
  ► Who will conduct the investigation?
  ► Consistent messaging
  ► Prepare template introduction
  ► Prepare template questions
Assess Positions

• Fact Gathering – Salary Level Test
  ► $23,660/year ($455/week)

• Fact Gathering – Salary Basis Test
  ► Payroll records
  ► Timesheets
  ► Memos re leave policies, docking
  ► Handbooks
Assess Positions

• Fact Gathering – Duties Test
  ► Interviews
    • Supervisors
    • Employees
  ► Observe employees
  ► Review documents
    • Job Descriptions
    • Performance Reviews
    • Self-evaluations
    • Hiring posts
Assess Positions

• Fact Gathering – Duties Test
  ▶ Management Employee
    • Hire/Fire authority
    • Department size
    • Management duties
      • Interviewing, selecting, and training employees
      • Setting and adjusting pay and work hours
      • Maintaining production or sales records
      • Appraising employee productivity and efficiency
      • Handling employee complaints and grievances
      • Disciplining employees
      • Planning and apportioning work among employee

• Assistant Managers
Assess Positions

• Fact Gathering – Duties Test
  ► Administrative Exempt Employees
    • Office or non-manual work
    • Sales or production work
    • Exercise discretion and independent judgment
  ► Computer Professional
    • Help Desk v. Programmers
    • Exercise discretion and independent judgment
Assess Positions

• Fact Gathering – Duties Test
  ► Outside Sales
    • Making sales
    • Away from the
  ► Motor Carrier
    • Interstate commerce
    • 10,001+ pounds
  ► Other exemptions
Reclassification Issues

• What if a position is on the bubble?
• What if a position “needs to be exempt for recruiting purposes”?
• What if the employee wants to be exempt?
Reclassification Issues

• Impact on other employment conditions
  ► Benefit plans
  ► Bonuses
  ► Non-Monetary Issues
Reclassification Issues

• Communication
  ► Executive Leadership Team
  ► Managers of reclassified positions
  ► Individuals in positions
    • Who tells them
    • Consistent messaging
    • Point person for follow-up questions
    • Develop responses to anticipated FAQs
    • In writing v. verbal
Reclassification Issues

- Why is my position being reclassified?
- What do these changes mean to me?
- How do I record my time?
- How is overtime calculated?
- When will I begin receiving overtime pay?
- How does this impact my benefits?
- How does this impact my bonus/incentive compensation?
- Who can I talk to about follow up questions?
- Am I being demoted?
- Will I receive less pay?
- So, does this mean I can work as much overtime as I please?
- What if I would rather receive comp time instead of overtime?
Reclassification Issues

• On your own, without back pay
• On your own, with back pay
  ► Release
  ► How far back?
  ► Liquidated Damages?
• With DOL
• During litigation
  ► Part of settlement
  ► Before settlement
Thank You!

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