Introduction

Compliance with wage and hour regulations is a complex undertaking due to overlapping and often contradictory federal and state regulations. It is also one of the most significant risk areas for companies, given the explosion of costly class action claims with sizeable settlements and verdicts in the past ten years. Year after year, class action wage and hour lawsuits have outpaced other types of employment litigation, including discrimination claims, in the federal courts. Major companies have agreed to multi-million dollar settlements. In addition to the cost and disruption of defending and even settling these cases, wage and hour claims are generally excluded from employment practices insurance coverage.

In addition to the financial and other costs, significant reputational harm is also attached to a wage and hour class action lawsuit. One can hardly be an employer of choice if it fails to properly calculate wages and pay employees. From an ethical perspective, many employers want to pay employees all wages they have earned and allow them appropriate meal and rest breaks.

Given these risks, it is critical that employers accurately track hours worked by non-exempt employees and are vigilant in ensuring that their payroll practices and protocols (including their classification of employees as exempt or non-exempt) comply with the federal, state, and other applicable laws and
These materials cover the basic landscape of wage and hour compliance, including the Federal Fair Labor Standards Act (FLSA) and its provisions related to minimum wages and other benefits, overtime, hours worked, meal and rest periods, child labor, record keeping, and equal pay. In addition, these materials address exemptions from overtime under the FLSA. Finally, these materials address the classification of independent contractors and the importance of that issue under the FLSA.

Federal Fair Labor Standards Act (FLSA) and State Laws Overview

The FLSA is administered by the U.S. Department of Labor's Wage and Hour Division. (See ) The FLSA sets the basic federal minimum wage, overtime pay, child labor, and recordkeeping requirements for covered workers. Covered workers are generally those engaged in or producing goods for interstate commerce, using the instrumentalities of interstate commerce (phone, wire, etc.) and the vast majority of employees of federal, state and local governments. The FLSA also generally applies to employers with at least two employees and an annual dollar volume of sales or business of at least $500,000, as well as government contractors and subcontractors. Certain exemptions apply to specific types of businesses or specific types of work.

In addition to the FLSA, various states have their own laws related to minimum wages, overtime pay, hours worked, child labor, and recordkeeping. These state laws have their own sets of associated civil and criminal penalties. For example, California’s wage and hour laws are generally found in the Wage Orders of the California Industrial Welfare Commission (IWC). If the FLSA and state laws conflict, the law that is more favorable to the employee applies.

Minimum Wage and Other Benefits

Workers covered by the FLSA are entitled to a minimum wage of not less than $7.25 per hour (effective July 24, 2009). (See ) Proposed legislation in 2017 would have raised the federal minimum wage to $15.00 if passed, but as of this writing no federal legislation on this issue has been enacted.
Most states and Washington, D.C., also have minimum wage laws, which may be different than the federal requirement. As of this writing, seven states had no state minimum wage or a rate lower than the federal rate (in which case the federal minimum wage applies); fourteen states mirrored the federal minimum; and the rest imposed rates higher than the federal rate. (See ). Washington, D.C., has the highest minimum wage at $11.50 per hour, though the minimum wage in some cities is higher. For example, minimum wage in San Francisco is $15.00 per hour as of July 1, 2018. Numerous states have passed legislation increasing the minimum wage in coming years, sometimes in phases, and many municipalities have done the same. These laws often differentiate between regions or industries. For example, New York minimum wage will rise to $15.00 per hour in New York City at the end of 2018 for many employers, but will only reach $15.00 per hour in other parts of the State in subsequent years, or not at all. In general, where an employee is covered by federal, state, and/or local minimum wage laws, and the minimums are different, the employee is entitled to the highest minimum wage.

The FLSA does not have any requirements for severance pay, sick leave, vacations, holidays, or other benefits such as tuition assistance or life or accident insurance. Many states and local ordinances do mandate some or all of these benefits for workers covered under their laws.

**Overtime**

Employees covered by the FLSA are entitled to overtime pay for all hours worked after 40 hours in a workweek, at a rate of at least one and one-half times their regular rate of pay. The FLSA does not require overtime pay for work on Saturdays, Sundays, or holidays unless overtime hours are worked on such days. Extra pay or shift premiums for working nights or weekends is a matter of agreement between the employer and the employee (or applicable state or local law). An employer who requires or permits an employee to work overtime is generally required to pay the employee the overtime premium for such work, even if the employer did not request the work. There is no federal limit on the number of hours employees 16 years or older may work in any workweek. (See ).

The majority of states have overtime pay requirements that match or exceed those imposed by federal law. Many states have special state requirements. Specific state requirements generally can be found via each state’s Department
of Labor or equivalent agency. For example, California requires employers to pay overtime at one and a half times the regular rate of pay to employees who work over 8 hours in any day and over 40 hours in any workweek, and requires employers to pay two times the regular rate of pay to employees who work over 12 hours in a day or over 8 hours on the seventh consecutive day of work in a workweek. (See .) Many class action cases, especially in California, involve allegations that an employer misclassified employees as exempt from overtime and therefore failed to pay the requisite overtime. See e.g. Jaimez v. Daiohs USA, Inc., 181 Cal. App. 4th 1286 (2010); Faulkinbury v. Boyd & Associates, 185 Cal.App.4th 1363 (2010).

Under the FLSA, employers who are found to have willfully or repeatedly violated the overtime pay requirements are subject to a civil money penalty of up to $1,100 for each such violation. Similarly, state laws have various fines and penalties for failure to pay required overtime wages. In private lawsuits under the FLSA and under the laws of many states, employees can recover double the amount of unpaid overtime wages.

**Hours Worked**

Hours worked ordinarily include all time during which an employee is required to be on the employer’s premises, on duty, or at a specific work location. (See below for discussion of travel/commute time, waiting time and on-call time.) The FLSA does not have any limit on the number of hours in a day or week worked, as long as overtime is paid for hours worked in excess of 40 in a workweek.

**Travel / Commute Time.** Generally travel to and from work or commute travel is not compensable under the FLSA. However, time spent traveling during normal work hours is considered work time, and employees must be paid for this travel time. For example, time spent traveling to pick up supplies or equipment during work hours is considered compensable travel time or hours worked.

**Waiting Time.** In certain circumstances, the time an employee spends waiting to work, such as waiting for customers or phone calls, or waiting for supplies, may also be compensable under the FLSA and/or state laws. The matter turns on whether the employee is “engaged to wait” by the employer or “waiting to be engaged” by the employer. If the employee has been engaged to wait, by, for example, remaining available for an assignment or for the arrival of customers,
the employee is considered on duty and the time waiting is compensable as hours worked. In these circumstances, the period during which the employee is inactive and waiting is unpredictable and usually of short duration and, in any event, the employee is unable to use the time effectively for his or her own purposes. The employee’s time belongs to and is controlled by the employer and therefore must be treated as hours worked. By contrast, if the employee is waiting to be engaged, the employee is off duty and time waiting is not compensable as hours worked under the FLSA. These periods generally include complete relief of duties for periods long enough that the employee can use the time effectively for his or her own purposes, and the employee is typically advised as to when he or she will need to return to work.

**OnCall Time.** An employee who is required to remain on his or her employer’s premises or so close thereto that he or she cannot use the time effectively for his or her own purposes is working on-call. Not all on-call time is compensable as hours worked; the determination is fact-based. An employee who is required to remain on his or her employer’s premises or so close thereto that he or she cannot use the time effectively for his or her own purposes is working while on-call and must be compensated for the time. For example, an aid worker who must stay in the employer’s facility, but who may eat, sleep, read, surf the Internet, or watch television so long as he or she does not leave, must be compensated for on-call time. By contrast, an employee who is allowed to leave, but is required to stay within a certain distance of the location and be available by phone, such as a maintenance worker with a work phone, need not be paid for the time on call.

**Meal and Rest Periods**

The FLSA does not require that breaks or meal periods be given to workers. When an employer offers short breaks, typically 5 to 20 minutes, the FLSA treats those breaks as compensable time that should be included in calculating an employee’s work hours. Under the FLSA, bona fide meal periods, which typically last at least 30 minutes, are not compensable and do not need to be included in calculating an employee’s work hours. Many states have specific requirements for hours worked and break or meal periods that vary from the FLSA.

As of January 1, 2018, twenty-one states had minimum length requirements for meal periods under at least some circumstances. (See state Departments of
Labor or similar agencies for specific information on a particular state’s requirements). Some states have simple requirements such as “reasonable breaks to eat and use toilet facilities.” Other states, like California, for example, have detailed requirements that generally obligate an employer to provide non-exempt employees with the opportunity to take a 30-minute, uninterrupted, duty-free meal break during each five-hour work period, unless the total work period for the day does not exceed 6 hours. The employer must provide an opportunity for a second uninterrupted, duty-free meal break of no less than 30 minutes for 10 hours of work, which can be waived by mutual agreement so long as the first meal period is not waived. Employees cannot waive a second meal period when working more than 12 hours in a day. California also has a detailed law related to paid rest periods providing that covered employees are entitled to take at least 10 minutes of paid break for every 4 hours of work or major fraction thereof, although specialized industries such as the motion picture industry have special meal and rest break requirements. For work in states where there are no meal or break period requirements, such benefits are a matter of agreement between the employer and employee.

California and other states with meal and rest period requirements have seen a significant increase in class action wage and hour cases related to such matters in the last ten years. Indeed, the California Supreme Court’s 2012 decision in the matter of Brinker v. Superior Court clarified an employer’s duty to provide meal and rest breaks and has only increased the rate at which wage and hour cases are filed in California.

**Strategies to Effectively Implement Meal & Rest Periods for Qualified Employees**

Strategies may include:

- Adopt clear written policies
- Explain meal break requirements to employees and managers
- Train managers not to discourage or interfere with breaks
- Discipline employees and managers who fail to comply with the policy
- Have employees record meal and rest breaks
Monitor and validate any technology used to record meal and rest breaks

Have employees certify break availability and any waivers or failure to take breaks

Conduct annual audits of meal and rest periods and any technology used to capture such information

Nursing Mother Breaks

The Patient Protection and Affordable Care Act ("PPACA") of 2010 amended the FLSA to provide a break time requirement for nursing mothers. Specifically, it provides that covered employers are required to provide reasonable break time for an employee in a non-exempt role to pump breast milk for her nursing child for one year after the child’s birth. Employers are also required to provide an appropriate place, other than a bathroom, which may be used by an employee to express breast milk. Employers are not required under the FLSA to pay for these breaks unless the employee is using what would be an otherwise compensated break for this purpose. Further, during these breaks, the employee must be completely relieved from her job duties or else the time must be paid.

Certain state laws may give greater protections to nursing mothers (e.g. compensated break time, break time for nursing mothers beyond one year from the child’s birth, or break time for employees in exempt roles).

Child Labor

The FLSA also has child labor provisions which are designed to protect the educational opportunities of minors and prohibit their employment in jobs and under conditions that may be detrimental to their health or well-being. There are specific limitations on the hours and the conditions under which persons under 16 years of age may be employed. By contrast, there is no federal limit on the number of hours employees 16 years or older may work in any workweek. Violations of these FLSA child labor requirements are subject to a civil money penalty of up to $10,000 for each employee who was the subject of a violation. (See .) Child labor is one area in which every state has its own laws. Many apply to persons under 16 or 18 years of age. Most state laws address the hours and types of work allowed for children, and many have restrictions for work on
school days or during the school year. For specific information, contact a state’s Department of Labor or equivalent agency or see .

**Record Keeping**

Employers covered by the FLSA must display an official poster outlining the requirements of the FLSA and an employee’s rights under it (which can be obtained from various vendors or on the Department of Labor’s website at ). In addition, employers must also keep employee time and pay records. States may have their own record keeping requirements.

The FLSA requires employers to keep records on wages, hours, and other items, as specified in DOL recordkeeping regulations. Most of the information is of the kind generally maintained by employers in ordinary business practice and in compliance with other laws and regulations. The records do not have to be kept in any particular form and time clocks need not be used.

With respect to an employee subject to the minimum wage provisions or both the minimum wage and overtime pay provisions, the records that must be kept generally include the following:

1. personal information, including employee’s name, home address, occupation, sex, and birth date if under 19 years of age;
2. hour and day when workweek begins;
3. total hours worked each workday and each workweek;
4. total daily or weekly straight-time earnings;
5. basis on which employee is paid;
6. regular hourly pay rate for any week when overtime is worked;
7. total overtime pay for the workweek;
8. deductions from or additions to wages;
9. total wages paid each pay period; and
10. date of payment and pay period covered.
Equal Pay Provisions of the FLSA

The equal pay provisions of the FLSA prohibit sex-based wage differentials between men and women employed in the same establishment who perform jobs that require equal skill, effort, and responsibility and which are performed under similar working conditions. These provisions, as well as other statutes prohibiting discrimination in employment, are enforced by the Equal Employment Opportunity Commission. Many state and local laws also contain similar or additional requirements for equal pay.