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The failure to correctly pay employees as required by the Fair Labor Standards Act (FLSA), as well as similar state wage and hour laws, causes the most frequently filed style of lawsuits by employees against their employers. The claims made in these cases are more often than not proven true. The Biden Administration has announced its intention to focus more aggressive enforcement efforts at these wage and hour compliance issues. It is the proverbial low hanging fruit.

The FLSA has existed since the Great Depression. In addition to mandating a federal minimum wage, it mandates overtime pay of one-and-one-half times an employee's regular rate of pay for all hours worked over 40 in a workweek. The overtime requirement was intended to create more jobs in response to massive unemployment

by making employees working long hours more expensive. By requiring a 50%

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largest companies.

### **Misclassification**

Perhaps the largest cause of liability for unpaid wages is the misclassification of employees as exempt from overtime. The so-called “white collar” exemptions under the FLSA set out categories of employees exempt from overtime pay, which are executive, administrative, professional, computer employees, highly compensated employees, and outside sales exemptions. To be exempt, the employee must generally be paid above the minimum salary and perform certain, specified duties.

### **Salary Rules**

The minimum salary required for exempt status under the FLSA is currently \$684 per week (\$35,568 annually). The “computer employee” exemption has two, separate minimum pay limits under different FLSA provisions. There is a minimum salary similar to the other exempt categories, as well as an hourly rate of no less than \$27.63 per hour. The “outside sales” exemption has no minimum salary requirement.

### **Duties Rules**

The required duties for the executive, administrative and professional categories sound relatively straightforward. To be an exempt “executive,” the employee must have as their primary duties the management of the enterprise or a recognized department thereof, the direction of two full-time employees or their equivalents, and have the authority to hire, fire, promote, or to effectively recommend such action. To qualify for the “administrative” exemption, an employee must have as their primary duty the performance of office or non-manual work directly related to management or general business operations.

The person must also exercise discretion and independent judgment with respect to

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engaged in sales functions away from the office. Inside sales personnel do not qualify for the exemption.

### **Independent Contractors**

In this age of Uber, Lyft, and countless gig economy jobs, the question of who truly qualifies as an “independent contractor” is a hotly contested issue. The issue has arisen regarding Microsoft contract workers, Uber and Lyft drivers, Fed Ex and Grub Hub delivery personnel, and numerous others. In 2019 the Department of Labor (DOL) issued revised guidelines on who qualifies as an independent contractor. The Biden Administration has put these guidelines on hold for further review. They will likely be rescinded in favor of what is referred to as the “ABC test.”

Under that test the relevant factors are: 1) whether the worker is free from control and direction of the hiring entity; 2) whether the worker performs work that is outside the normal course of the hiring entity's business; and 3) whether the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed. The goal is to make proving independent contractor status more difficult.

### **Off-the-Clock Work**

In addition to employee misclassification, another cause of overtime liability is the failure to pay for all hours worked by an employee. In most cases it involves preliminary or postliminary functions that are part of the employee's principal activity. It is not uncommon for a conscientious employee to engage in preparations before punching in. It could be setting up a machine, gathering needed supplies for the day's work, sorting through daily work orders or production schedules, or similar preparatory functions. Similar activity can occur at the end of the workday, after the employee punches out. It could involve completion of production reports, a

meeting with employees coming on shift about problem issues or similar work-

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performed, what is normally unpaid time would become worktime necessary for inclusion in properly calculating overtime. Employers can avoid much liability for off-the-clock work by maintaining policies prohibiting off-the-clock work, requiring employees to promptly report any unrecorded work, and ensuring not to prevent or discourage employees from reporting any worktime. Employers should prominently post notices regarding these policies and should also periodically remind employees about them.

As these various examples make evident, the potential for improper pay exists in a wide variety of circumstances. Off-the-clock claims are one of the most frequently filed lawsuits employers confront, and one the Biden DOL will target for enforcement. By adopting proactive policies and monitoring for potential off-the-clock work by employees, the risk of facing such lawsuits can be drastically reduced.

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