

The Department of Labor's Growing Interest in Targeting *YOU* for Wage & Hour Violations

*Brian L. Lerner, Ward Kim Vaughan & Lerner
Martin Salcedo, The Human Equation
Anita Byer, Setnor Byer Insurance & Risk*

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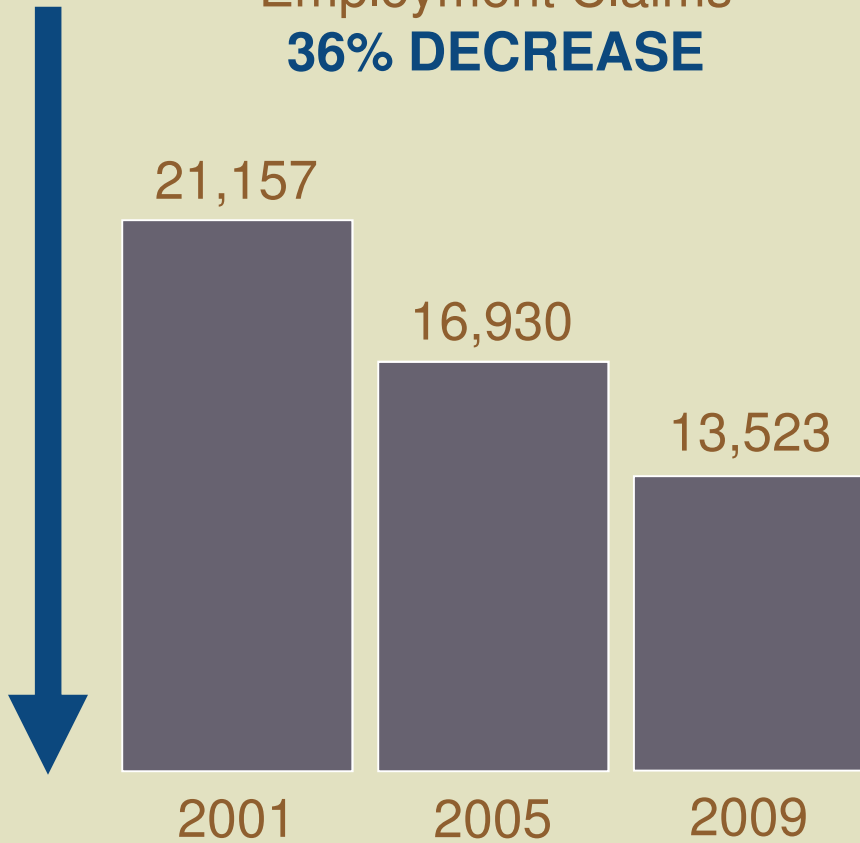


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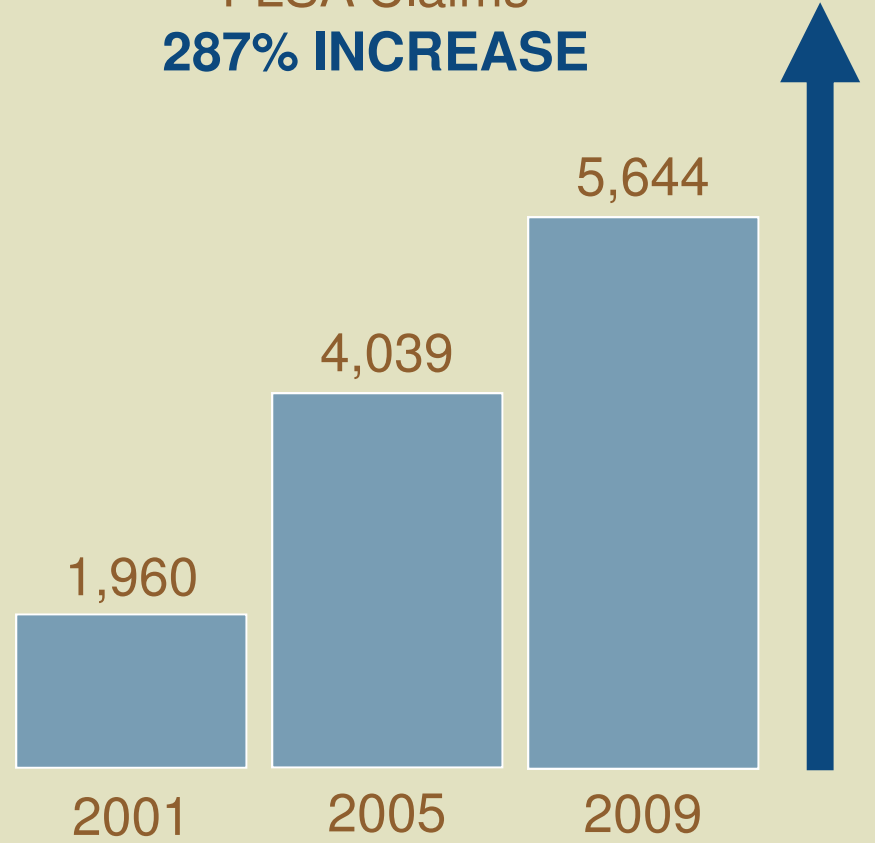


Why Be Concerned: Lawsuits

Employment Claims
36% DECREASE



FLSA Claims
287% INCREASE



Why Be Concerned: The DOL

- Enforcement budget
 - 2004 → \$160 million
 - 2011 → \$244 million
- Enforcement hiring
 - 2009 → 1,268
 - 2011 → 1,672
- Enforcement results (2009)
 - 25,000 compliance actions
 - \$172,600,000 collected



Overview

- **Biggest myths and misconceptions**
- **Areas of focus by Department of Labor**
- **Areas of focus by plaintiffs in lawsuits**
- **FLSA considerations when implementing recession-based pay decisions**



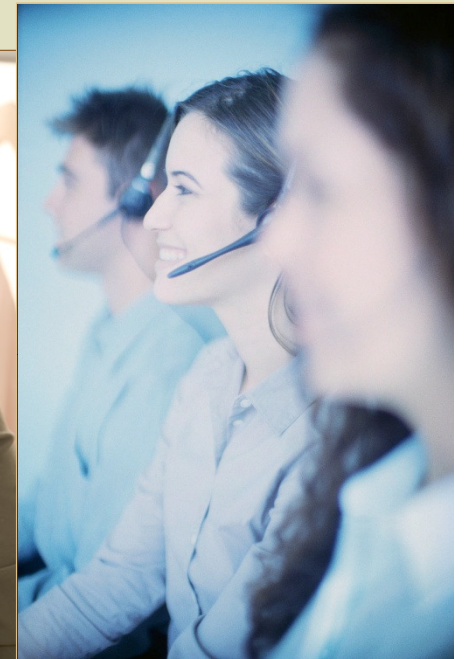
Myths and Misconceptions: Salaried Means Exempt

- **A salary is required**
 - Paid regardless of quality or quantity of work
 - Very limited right to deduct full day
 - Even more limited right to deduct partial day
- **But job duties must meet exempt category**
 - Executive, administrator, professional, computer professional, outside sales, highly compensated



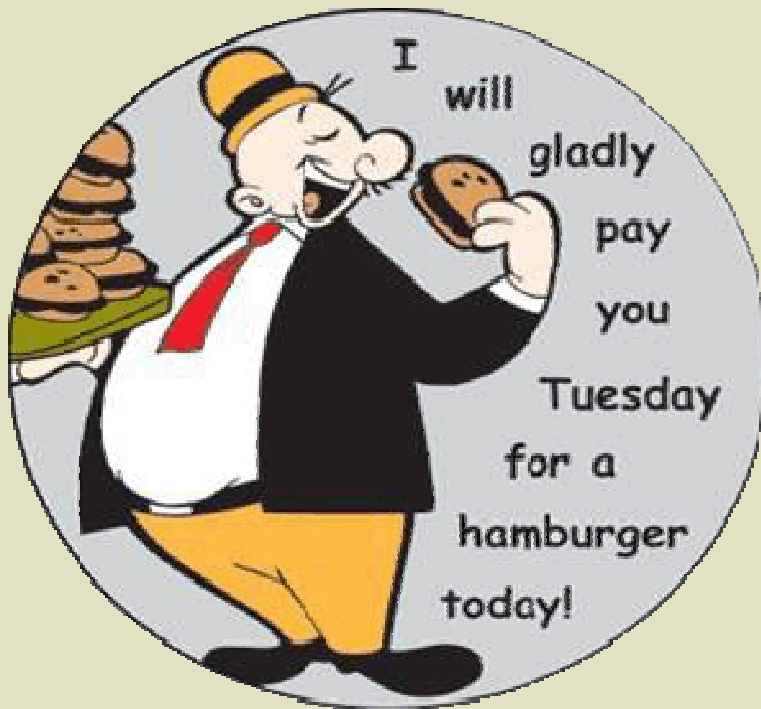
Myths and Misconceptions: Commissioned Means Exempt

- **Commission is required**
 - Must be 50% or more of wages
- **But other factors matter**
 - Work location
(in or out of office)
 - Sales are retail in nature
 - Where sales are made
(in or out of state)



Myths and Misconceptions: Comp Time in Lieu of Overtime

- Example: working 50 hours one week and giving employee 10 paid hours off in another week to make-up for overtime hours worked



- Violation of the law for private employers
- Non-exempt employees must receive overtime pay for hours worked

Myths and Misconceptions: Unauthorized Overtime Not Paid

- Must pay overtime even if employer maintains a policy prohibiting overtime work without prior approval

Policy Statement Number: PS-61
Title/Topic: Overtime Policy
Effective Date: 11/29/2004
Revision Number: PS0061.R02

OVERTIME POLICY

When operating requirements or other needs cannot be met during regular working hours, employees may be scheduled to work overtime hours. Qualified volunteers will be assigned to overtime work whenever possible. In the absence of volunteers, advance notification of mandatory assignments will be provided to the extent possible. Overtime, however, for hourly employees is not permitted unless approved in advance by the supervisor. If you work unauthorized overtime, you may be subject to the disciplinary process.

Overtime compensation is paid to all nonexempt employees in accordance with federal and state wage and hour restrictions. Overtime pay is based on actual hours worked. Time off for vacation, sick/personal leave, company-observed holiday, or any leave of absence will not be considered hours worked for purposes of performing overtime calculations.

Overtime, however, for hourly employees is not permitted unless approved in advance by the supervisor.

If you work unauthorized overtime, you may be subject to the disciplinary process.

Areas of Focus By Department of Labor

- Renewed emphasis on investigation and enforcement
- Increase in budget and investigators
- New multi-agency “Misclassification Initiative”
 - \$12.0 million in extra funding
 - 4,700 additional investigations



Areas of Focus By Department of Labor

Misclassifying employees as
“independent contractors”

Common problems

- Construction industry where contractors hire so-called independent contractors
- Franchise arrangements (function of level of control the franchisor has over the franchisee)
- People who perform work at their own home
- Volunteering, i.e., employee volunteers to perform the same type service performed as an employee



Areas of Focus By Department of Labor: Independent Contractors

FACTORS DOL CONSIDERS SIGNIFICANT (But No Single One Controls)

- Extent worker's services are integral part of employer's business
- Permanency of the relationship
- Amount of worker's investment in facilities and equipment
- Nature and degree of control by principal
- Worker's opportunities for profit and loss
- Level of skill required in performing job and amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent enterprise

Areas of Focus By Department of Labor: Independent Contractors

FACTORS DOL CONSIDERS IMMATERIAL

1. Place where work is performed
2. Absence of a formal employment agreement
3. Whether independent contractor is licensed by state/local government
4. Time or mode of pay

Areas of Focus By Department of Labor: Independent Contractors

- But don't forget about the IRS
- Evidence of degree of control and independence
 - Behavioral: Does the company control or have the right to control what the worker does and how the worker does his or her job?
 - Financial: Are the business aspects of the worker's job controlled by the payer?
 - Type of relationship: Are there written contracts or employee type benefits? Will the relationship continue and is the work performed a key aspect of the business?
- No magic or set number of factors
- No one factor stands alone
- Keys are to look at entire relationship and degree or extent of the right to direct and control



Areas of Focus By Department of Labor

Low-wage and fissured industries

- History of violations
- Have employees holding low-paying supervisor and manager positions



Industries of focus:

- Child care
- Home health care
- Landscaping
- Construction
- Hotels and motels
- Poultry and meat processing
- Grocery stores
- Janitorial services
- Restaurants

Areas Of Focus By Plaintiffs In Lawsuits

- Off the clock work
- Preliminary or postliminary activities that are integral and indispensable part of employee's principal activities
- Typical claim
 - Working prior to or staying after shift
 - Training
 - Meetings
 - Managers editing time sheets

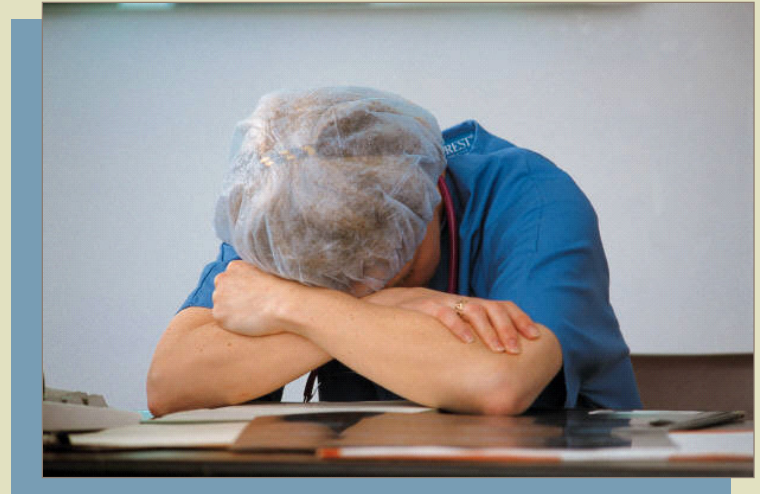


Areas of Focus By Plaintiffs in Lawsuits

- Unrecognized work
 - Social networks
 - Remote logins
 - Cell phones
 - Blackberries
- Work not requested but suffered or permitted must be compensated
- Questions to ask:
 - Whether activities are principal activities?
 - Whether the employee is able to use the time effectively for own purposes?
 - Whether the time is de minimis?



Areas Of Focus By Plaintiffs In Lawsuits



- Automatic deductions for rest and meal breaks
- Rest breaks of short duration (5-20 minutes) compensable
- Meal breaks at least 30 minutes not compensable
 - Must not perform any duties

Areas Of Focus By Plaintiffs In Lawsuits



- Tip pooling / sharing
- Okay if those persons sharing in the tips are persons who “customarily and regularly” receive tips

Areas of Focus By Plaintiffs in Lawsuits

Rounding

- When employees clock in a few minutes before shift and clock out a few minutes after shift
- Can round 5, 10, or 15 minutes
 - But can't round up and down



Implementing Recession-Based Pay Decisions

- Unpaid furloughs
 - Non-exempt: no issue
 - Exempt: full week
- Pay freezes
 - Generally okay
- Pay cuts
 - Can't drop below minimum wage
 - Watch if cut impacts exemption



Brian L. Lerner

Ward, Kim, Vaughan & Lerner LLP

954-527-1115

blerner@wardkim.com

www.wardkim.com

Martin Salcedo

The Human Equation

954-888-1259

martins@thehumanequation.com

www.thehumanequation.com

Anita Byer

Setnor Byer Insurance & Risk

954-888-1240

anitab@setnorbyer.com

www.setnorbyer.com

Thank you for joining us

**The Department of Labor's
Growing Interest in Targeting *YOU*
for Wage & Hour Violations**

This program has been approved for 1 recertification credit hours toward PHR, SPHR, and GPHR recertification through the HR Certification Institute. Please be sure to note the program ID number on your recertification application form. For more information about certification or recertification, please visit the HR Certification Institute homepage at www.hrci.org.

