



## 806 - The Hard Numbers to Calculate: Complex Wage & Hour Liabilities

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*Employment Counsel*  
Western Group

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*Vice President, Bancorp Director of Employee Relations*  
Fifth Third Bank

**Kimberly Strohm**  
*Corporate Counsel*  
American Eagle Outfitters Inc

## Faculty Biographies

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## Monitoring and Measuring Hours Worked

- Protects against unexpected claims
- Manage productivity
- Monitor activity operations
- Paying people what they have earned is the right thing to do



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- The Business Case
  - Info Mgmt for Productivity, Efficiency, Cost Analysis, Coverage, Compensation
- The Regulatory Case
  - FSLA, OSHA, State Law
- The Case for Reducing Liability
  - Burden on Employer to Defend Recorded Hours and Minimize Damages.
  - See *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680 (1946)
- Avoiding Meal & Rest Period Penalties



## Meal & Rest Period Issues

- Class Action Nightmare!
- FLSA – No Need to Record Per se but Proves up Hours Worked; See e.g. 29 CFR 785.18
  - Meal Unpaid, Relieved of Duty and  $\geq 30$  Minutes
  - Rest period, almost always paid
- State Laws (aka Republic of California)
  - Penalties Beyond Compensation for Hours Worked
  - Specific Record Requirements
  - Considered Wages for Statute of Limitations  
*Murphy v. Kenneth Cole*, \_\_\_\_ Cal. Rptr. 3d \_\_\_\_ (2007)



## What's compensable?

- FLSA – All Hours Spent Under the Direction and Control of Employer
  - *Tennessee Coal v. Muscoda, Local 123*, 321 US 590 (1944); must be paid for all time spent in “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer.”
- State/CA – Includes Not Only Hours of Time Subject to Control but ‘Suffered or Permitted to Work, Whether or Not Required’. (See e.g. CA Wage Order 1, § 2(6))



## Special Issues

- Donning/Doffing/Preparatory Activity
  - *IBP v. Alvarez*, 126 S.Ct. 514 (2005) (changing clothes, washing up, or setting up is compensable if compelled by necessities of the business)
  - Special vs. standard gear? See e.g. *Garcia v. Tyson Foods* (D Kan. 2007)
  - Reporting in uniform?
- Travel
- Training, Lectures, and Meetings
- Stand-by vs. Waiting to Commence
- “On Call” Time
  - Restricted vs. Unrestricted
  - See e.g. *Madera POA v. City of Madera*, 36 Cal. 3d 403 (1984)



## What if .....

- 12 EE's working jobs for HYPO-CORP with central and customer location reporting on a 5-8 M-F basis. Half work 7am-3:30pm, have work 11am-7:30pm. EE's check in to home office for inventory and meetings as directed. Half are dispatched from office every day and half may be dispatched the evening before to direct job site reporting. Work day ends when work at last customer finished. Some EE's travel overnight and stay in distant locations in anticipation of a morning call. Dress code is slacks and logo'd golf shirt. When direct reporting, EE's are told to 'clock in' after donning safety wear necessary to the work to be performed and gathering materials for client visit. EE's regularly eat lunch en route to next call. EE's have "Blackberry" through which they may be contacted 24/7. Every weekend 3 EE's must set BB's on 'stun' for emergencies and are expected to be en route within 15 minutes. GPS/BB uplink to data terminal in vehicles, load takes 5 minutes. Circle of safety daily. Oil change and vehicles service every 3,000 miles to be scheduled and maintained on EE's time. Weekly meetings on activities and Product/Service updates are given at Friday happy hours. EE's must read. Most EEs do it on weekends. Weekly pay periods.



## Travel Time Issues

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  - Commute time vs. Job Site Reporting
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  - Travel Outside of Regular Work Hours
    - Out of Town vs. Overnight
    - CA – All Time From Residence or Period of Business Travel Listed Arrival at Location (Less Commute Time?); Meals?
    - FLSA – Same but not required to Pay for Time on Common Carrier or Regular Meal Periods *Provided* no Work is Performed.
- OUR HYPO CORP GUYS: Avg. 3 hours per week



## Training

- Non-Compensable Only if:
  - Attendance Outside Regular Hours
  - Non Mandatory
  - Not Directly Related to Job
    - Efficiency vs. New Skill
  - No Productive Work During Attendance

OUR HYPO GUYS: one hour a week



## Side Bar What if?

- Employee Works as a Loan Processor, 8-5.  
Company has training program to become Loan Marketing Rep from 7 to 9 pm, 2 nights for 4 weeks. Curriculum involves listening in on incumbent loan rep's cold calls during 3<sup>rd</sup> week of class and making a dozen or so cold calls final night of class. Compensable? OT?
- What if employer pays anyone who completes class a \$500 spot bonus, increase in monthly pay?



## On-Call

- Must be Free to Pursue Personal Activity, Otherwise Relatively Unrestricted
- What if: Employee Must be Able to Report Within 2 hours and “Fit for Duty,” if Called?
- What if: Pager and Duty may be to spend 2 to 3 minutes phoning in for further instructions or to provided information to on-site staff/supervisor?
- Blackberries? Computers at home?

OUR HYPO GUYS? - say 3 @ 24 hrs/wk



## The “Hard” Numbers Calculation

- The ‘OT’ claim (Avg. for meals, training, on-call, travel, etc.)
  - $8 \times 1.5 \times \$20/\text{hr} \times 52 \text{ wks} \times 3\text{yrs} \times 12$
  - Plus taxes/insurance @ 15% = \$50,000
- The Liquidated Damages Penalty
  - Times 2
- Attorney Fees (Yours and Theirs)
  - Tough to quantify but \$ for dollar \$ in this case?
- State Penalties and Fines
  - Can dwarf damages
  - CA - \$50 per violation, \$100 for repeated and willful
  - Doubled for failure to pay when due
  - Meal/Break penalties?  $3\text{yr} \times 3 \text{ hours/wk} \times \$20 = \$112,320$
- The Total Nightmare? > \$500,000
- Doesn't Include Lost Opportunity/Productivity/Morale Costs



## Correctly Classifying Employees

- Faulty exemptions classification can be very costly, burden always on employer
  - Settlement of disputes involving even a small numbers of employees can run in the hundreds of thousands if not millions of dollars in wages, fines, and attorney fees.



## Exemption Basics

- Executive
- Professional
- Administrative
- Computer Professionals
- Outside/Commissioned Sales
- Highly Compensated Employees





## Exemptions – Tricky Issues

- Salary basis test
  - Deductions
  - Supplemental Pay
- Production/Administration Dichotomy
- Sales vs. Administrative
- Independent Judgment & Discretion
- % of Duties



## Exemption Criteria Applied Case by Case

- Not what you call 'em its what they do
- Not what you say they do, but what they do do(o)
- Some Exemption Gray Areas
  - Computer systems analysts
  - Computer system technicians
  - Service Planners
  - Dispatchers
  - Retail 'managers' (*Kenneth Cole*)



## Some examples of recent exempt status clarifications by DOL/Courts

- Paralegals/Legal Analysts
- Insurance Claims Adjusters
- Mortgage Loan Officers
- Home care providers
- Companionship Services
- Respiratory Therapists
- Service Station managers

ACC Annual Meeting – October 28-31, 2007

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## What if...

- ER has job classification of Project/Business Analyst, salary range is \$45-105k per year, EE's work M-F, with self directed flexible start times between 7:30 and 9:30 a.m., about 200 EE's in classification at various locations
- No deductions from weekly salary but absences are charged against accrued leave banks. After exhaustion of leave banks, only whole day absences deducted.
- When project deadlines are missed or performance problems arise (e.g. absenteeism), company has an early step disciplinary policy of a one day suspension without pay

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## What if... cont.

- Typical Business Analyst duties include development and administration of various business unit function related tools and methodologies of a moderate to complex nature to support cost evaluations including value-add assessments, market analyses/trends, supplier performance, business case analysis, metrics and other operational reporting requests. Responsible for leading or participating in researching internal and external data sources to collect, analyze and report a variety of business unit function related statistics. Majority of work is in an environment of changing multiple projects, and working independently to produce work that can be incorporated into a larger team owned project using a structured approach to analyzing topics, extracting and compiling data from relevant applications, and making findings and operational/decisional recommendations. Duties also consist of gathering internal company information, designing and synthesizing complex graphs and reports at the direction/request of project management, maintenance of spreadsheet databases – including data entry- for purpose of publishing periodic standardized analytical reports, interfacing with other departments to obtain information, confirm payment compliance process, and policy consistency. Acts independently in support of project manager needs and directs the support functions of administrative clerks who print and distribute reports.



## The “Hard” Numbers Calculation

- After getting suspended by their tea totaling boss for one day due to missing a project deadline and later a second day for returning to the office ‘drunk’ after allegedly having a glass of wine at a department birthday lunch, a group of 5 EEs sue on behalf of all claiming:
  - They are all working 50 to 60 hours a week, without OT, often without lunch or rest breaks, due to the crunch of business and emergency requests.
  - Most of their day is handling routine administrative functions of filing gathering and circulating paper information, reviewing e-mails, and answering phone calls for project managers
  - Not being paid on a salary basis



## The “Hard” Numbers Calculation

- The ‘OT’ claim per employee
  - $10 \times 1.5 \times \$30/\text{hr} \times 52 \text{ wks} \times 3\text{yrs} = \$70,000$
  - w/ incremental taxes/insurance = \$75,000
- Liquidated Damages Penalties (FLSA)
  - Times 2
- Attorney Fees (Yours and Theirs)
  - But less than \$ for dollar \$ due to the size?
- State Penalties and Fines
  - CA - \$50 per violation, \$100 for repeated and willful
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