



## 206 Preventing Wage & Hour Liabilities

**Carol Clark**  
*Senior Attorney*  
Black & Veatch Corporation

**Larry Hosey**  
*Associate General Counsel*  
Wal-mart Stores, Inc.

## Faculty Biographies

### Carol Clark

Carol Clark is a senior attorney with Black & Veatch Corporation in Overland Park, Kansas, a global engineering and construction firm that provides energy, water, and information infrastructure solutions worldwide. In 2006, Black & Veatch was ranked by Engineering News-Record as the #1 U.S. engineering design firm in power and #5 firm in both water and sewer. The company has over 8000 employees in more than 90 offices around the world. Ms. Clark serves as the company's principal attorney for labor and employment matters and legal counsel for the company's human resources division. She also serves as the principal attorney for the company's federal services division, responsible for providing counsel on government contracting and compliance matters.

Prior to joining Black & Veatch, Ms. Clark practiced with Sidley & Austin in Chicago and Spencer Fane Britt & Browne in Overland Park, Kansas. Before entering private practice, she was a law clerk for the Honorable Joseph E. Stevens, Jr., of the Western District of Missouri.

Ms. Clark served in the United States Navy prior to attending law school. She is currently a commander in the United States Naval Reserve.

Ms. Clark received a B.S. degree from the Massachusetts Institute of Technology, an M.B.A. from the University of West Florida, an M.A. from the University of Rochester, and a J.D. from Washington University in St. Louis, where she served on the law review and was elected to the order of the coif. She holds a certification as a senior professional in human resources (SPHR).

### Larry Hosey

Larry Hosey is associate general counsel, wage and hour, for Wal-Mart Stores, Inc. He has responsibilities for wage and hour advice and consultation for all of Wal-Mart's US operations. He has also managed a large number of high profile wage and hour class actions lawsuits.

Prior to joining Wal-Mart, Mr. Hosey worked with Circuit City's legal department where he served as arbitration coordinator and employment advisor.

Mr. Hosey received his B.A. from the Ohio State University and his J.D. from Capital University in Columbus, Ohio.



## 206 – PREVENTING WAGE & HOUR LIABILITIES

**Carol S. Clark – Black & Veatch**  
**Lawrence Hosey – Wal-Mart Stores, Inc.**



## PREVENTING WAGE & HOUR LIABILITIES – WHY?

- **US DOL Enforcement** - The Wage and Hour Division reports that back wage collections have increased 26% since 2001
- **FLSA Collective Actions tripled** between 2001 and 2004, and now surpass class claims under **all** other employment claims



## PREVENTING WAGE & HOUR LIABILITIES WHY THE SURGE IN CLASS AND COLLECTIVE ACTIONS?

- Attractive to plaintiff's bar
- Strict liability / many technical requirements on employers
- Burden on employer to establish compliance



## PREVENTING WAGE & HOUR LIABILITIES

- **Low threshold for collective actions**
  - **FRCP 23 class action** requires numerosity, commonality, typicality and “opt out”
  - **Section 16(b) collective action (for FLSA / ADEA claims)** requires” a showing of “similarly situated”, “opt-in provision”
- **New regulations** / Courts are picking up on “as protective if not more so than before”

ACC's 2006 Annual Meeting: The Road to Effective  
Leadership

October 23-25, Manchester Grand Hyatt



## PREVENTING WAGE & HOUR LIABILITIES

- **Very scary math – considering aggregate claims**
  - Employee earns \$20/hour
  - 10 minutes before and after work each day = 20 minutes / day
  - x 5 days/week = 1 hour, 40 minutes a week
  - x 50 weeks/ year = 83 hours, 20 minutes a year
  - x 2 years = 166 hours, 40 minutes
  - x \$30 = \$5000
- **Settlements . . .**

ACC's 2006 Annual Meeting: The Road to Effective  
Leadership

October 23-25, Manchester Grand Hyatt



## PREVENTING WAGE & HOUR LIABILITIES – WHY?

- **Pepsi Cola Co.** – \$17 million New Jersey Wage Hour Law settlement
- **Mercedes Benz US/Honda MFG of AL** - \$2 million US DOL Settlement for donning/doffing issues
- **Radio Shack** - \$29.9 million for misclassification of Store Managers

ACC's 2006 Annual Meeting: The Road to Effective Leadership

October 23-25, Manchester Grand Hyatt



## PREVENTING WAGE & HOUR LIABILITIES – WHY?

- **Perdue** - \$20 million – Off the Clock
- **SBC Pacific Bell** - \$35 million – Off the Clock
- **UPS** - \$18 million – Off the Clock
- **Eckerd's** - \$8 million – Improper salary docking

ACC's 2006 Annual Meeting: The Road to Effective Leadership

October 23-25, Manchester Grand Hyatt



## PREVENTING WAGE & HOUR LIABILITIES – WHY?

- **Starbucks** - \$18 million – Misclassification
- **Merrill Lynch** - \$37 million - Misclassification
- **Farmer's Insurance** - \$210 million - Misclassification

ACC's 2006 Annual Meeting: The Road to Effective Leadership

October 23-25, Manchester Grand Hyatt



## PREVENTING WAGE & HOUR LIABILITIES

### Is your company at risk?

- US DOL estimates more than 70% of employers are not in compliance with the FLSA
- Current target groups:
  - Retail sales / fast food management
  - Engineering managers
  - Pharmacists
  - Doing business in California

ACC's 2006 Annual Meeting: The Road to Effective Leadership

October 23-25, Manchester Grand Hyatt



## PREVENTING WAGE & HOUR LIABILITIES – FLSA BASICS

- In 1938, Congress enacted the Fair Labor Standards Act (FLSA) to establish federal wage and hour standards for covered employees in the federal and private sector.
- Enacted because of labor conditions detrimental to the maintenance of the minimum standard of living necessary for “health, efficiency, and the general well-being of workers”
- Minimum wage established - \$.25/hour

ACC's 2006 Annual Meeting: The Road to Effective  
Leadership

October 23-25, Manchester Grand Hyatt



## PREVENTING WAGE & HOUR LIABILITIES – FLSA BASICS

- In addition to setting a minimum wage, the FLSA requires employees to be paid 1+ ½ their *regular rate* for every hour or fraction thereof worked in excess of 40 during any given workweek.
- FLSA defines the term employ to include the words “suffer or permit to work”. Suffer or permit to work means that if an employer requires *or allows* employees to work, the time is generally compensable. See 29 C.F.R. 785.11

ACC's 2006 Annual Meeting: The Road to Effective  
Leadership

October 23-25, Manchester Grand Hyatt



## PREVENTING WAGE & HOUR LIABILITIES

### FLSA – Other Requirements:

- Child Labor
- Record Keeping
- Impermissible Deductions below minimum wage
- Impermissible rounding that works to the detriment of employees
- Less than full day “docking” of salaried employees

ACC's 2006 Annual Meeting: The Road to Effective  
Leadership

October 23-25, Manchester Grand Hyatt



## PREVENTING WAGE & HOUR LIABILITIES

### Types of claims

- Misclassification claims
- Off-the clock claims
- Other miscellaneous claims (state law issues)
  - Breach of contract
  - Quantum meruit
  - Wage withholding statutes

ACC's 2006 Annual Meeting: The Road to Effective  
Leadership

October 23-25, Manchester Grand Hyatt





## PREVENTING WAGE & HOUR LIABILITIES – FLSA BASICS

### EXEMPTIONS

- Overtime provisions do not apply to those who are expressly “exempted” from coverage. See 29 C.F.R. 541
  - Must be performing exempt duties
  - Must be paid on a salary basis
  - Must be paid at least the minimum salary requirement (\$455/week) with limited exceptions (teachers, doctors)
- Claim risk: misclassification



## PREVENTING WAGE & HOUR LIABILITIES – FLSA BASICS

### Primary duties must be “exempt”

- Administrative
- Executive
- Professional
- Computer professionals
- Outside sales
- DOL website lists 53 “commonly used” exemptions, from livestock auction workers to television station employees in small markets



## PREVENTING WAGE & HOUR LIABILITIES – FLSA BASICS

### EXEMPTIONS

#### ● **Administrative**

- Office or nonmanual work directly related to management policies or general business operations of the employer or its customers
- Exercise of discretion and independent judgment with respect to matters of significance

#### ● **Executive**

- Managing an enterprise or a recognized division or group
- Direct two or more employees
- Have hiring / firing authority or input
- Professional



## PREVENTING WAGE & HOUR LIABILITIES – FLSA BASICS

### EXEMPTIONS

#### ● **Professional**

- Learned professionals (scientists, doctors, accountants, engineers, lawyers, teachers) or creative professionals (artists, writers)
- Work must require “advanced knowledge” customarily acquired by a prolonged course of specialized intellectual instruction or be “creative”

#### ● **Computer Professionals**

#### ● **Outside sales**



## **PREVENTING WAGE & HOUR LIABILITIES – FLSA BASICS EXEMPTIONS**

- Highly compensated employee
  - Annual salary over \$100,000
  - Performing office or nonmanual work
  - Customarily and regularly perform one or more exempt duties (even if not primary duties)

ACC's 2006 Annual Meeting: The Road to Effective  
Leadership

October 23-25, Manchester Grand Hyatt



## **PREVENTING WAGE & HOUR LIABILITIES – FLSA BASICS PERMITTED SALARY REDUCTIONS**

- Absence for one or more full days for personal reasons
- Absence for sickness or disability if covered under a plan; unpaid FMLA absence
- To offset military pay, jury duty pay, witness fees
- Penalties for safety violations
- Disciplinary suspensions of more than one day
- First and last week of employment

ACC's 2006 Annual Meeting: The Road to Effective  
Leadership

October 23-25, Manchester Grand Hyatt



## PREVENTING WAGE & HOUR LIABILITIES

### To ensure compliance:

- Annual review of positions
  - Look at job duties, not just job descriptions and titles – have employees fill out position descriptions
  - Look carefully at administrative and sales
  - If in doubt, seek DOL opinion letter
- Audit payroll practices
  - Ensure no improper deductions



## PREVENTING WAGE & HOUR LIABILITIES

### What are your current payroll practices?

- What overtime exemptions are being claimed? Are they valid under federal law? State law?
- Has your company adopted a 'safe harbor' policy to ensure exempt employees are not subject to improper salary deductions?
- Are non-exempt employees accurately reporting **all** working time?
  - Meal periods and breaks
  - Donning and doffing protective clothing
  - Home work
  - Remote use of technology



## PREVENTING WAGE & HOUR LIABILITIES

### What are your current payroll practices?

- What type of rounding practices are used when recording working time?
- Are supervisors permitted to edit time records? If so, are the changes lawful? Is there accountability or follow-up?
- Is overtime being properly computed?
- Are commissions, prizes/awards or incentive compensation properly included. Are they matched to the appropriate payroll periods in which they were earned?

## PREVENTING WAGE & HOUR LIABILITIES

### What are your current payroll practices?

- What type of wage deductions are allowed to be taken from employee pay? Do these deductions create minimum wage or overtime violations? Are wage deductions permitted under state laws which may be more restrictive?
- Are you meeting record keeping obligations with all work groups and properly preserving payroll records?
- Are wage payments made on a timely basis?
- Do employees' earning statement comply with federal and state law?



## PREVENTING WAGE & HOUR LIABILITIES

### FLSA Record Keeping Requirements

#### Employees Subject to Minimum Wage

- Full name and identification number
- Home address and ZIP code
- Date of Birth (if under age 19)
- Sex and occupation
- Workweek defined
- Regular hourly or base rate
- Hours worked (work day and work week total)

## PREVENTING WAGE & HOUR LIABILITIES

### FLSA Record Keeping Requirements

#### Employees Subject to Minimum Wage

- Total straight time pay (work day or work week)
- Total premium pay (work day or work week)
- Total wages paid
- Additions and deductions from wages
- Records of retroactive payment of wages
- Fixed schedules – schedule of daily and weekly hours



## PREVENTING WAGE & HOUR LIABILITIES

### FLSA Record Keeping Requirements

#### Location of Records

- Must be safe and accessible
- Place of employment or a centralized location
- Centralized location – must have accessibility within 72 for inspections
- Available after reasonable notice for inspectors to review and transcribe

## PREVENTING WAGE & HOUR LIABILITIES

### State Record Keeping Requirements

- Wage and Hour
- Unemployment
- Workers' Compensation
- State EEO
- Drug and Alcohol testing
- Workplace Safety/ OSHA
- Service Letter Statutes



## PREVENTING WAGE & HOUR LIABILITIES

### Penalties for Failure to Maintain Proper Records under the FLSA

- DOL injunctions
- Potential for Criminal Sanctions
- Civil Money Penalties are **not** available
- Burden is upon to employer to provide accurate records and can be onerous hurdle if there are any gaps



## PREVENTING WAGE & HOUR LIABILITIES

### Why do preventative wage and hour strategies make good sense:

- Avoid willful violations and limit statute of limitations
- Avoid liquidated damages





## PREVENTING WAGE & HOUR LIABILITIES

### Willful Violations:

- Extends statute of limitations from 2 to 3 years
- Plaintiff must show either:
  - Employer knew its practices violated FLSA
  - Employer showed reckless disregard its practices were in violation
- Willfulness is ordinarily in the jury's hands

## PREVENTING WAGE & HOUR LIABILITIES

### ● Willfulness Examples:

- Supervisors instructed employees to work off-the clock or under report hours
- Supervisors knew of off-the-clock work but failed to eliminate
- Repeat violations from previous DOL or state investigations
- Supervisors altered employee time records to "shave" time
- Employer advised by legal counsel to reclassify positions as non-exempt but failed to do so



## PREVENTING WAGE & HOUR LIABILITIES

### Employer's Responsibilities

- An employer's ignorance of the requirements imposed by the FLSA is not a defense
- Employers have an affirmative duty to understand the FLSA (and state laws where they operate) requirements and take reasonable steps to insure ongoing compliance.

## PREVENTING WAGE & HOUR LIABILITIES

### AFFIRMATIVE GOOD FAITH DEFENSES

- Section 10 Good Faith Defense - Complete defense to liability
  - Extremely rare
  - Employer's burden of proof
- Section 11 Good Faith Defense - Partial or complete defense to liquidated damages
  - Employer's burden of proof
  - Employer must show that actions were taken in good faith **and** that there was a reasonable basis to believe its actions did not violate the FLSA



## **PREVENTING WAGE & HOUR LIABILITIES SECTION 10 DEFENSE**

- Employer must show:
  - Good faith reliance upon a written administrative regulation, ruling, interpretation, administrative practice or enforcement policy of the US DOL Wage and Hour Administrator
  - Violation occurred because employer relied upon the Wage and Hour Administrator's actions



## **PREVENTING WAGE & HOUR LIABILITIES SECTION 11 – GOOD FAITH DEFENSE**

- Some jurisdictions hold a willful violation precludes an employer from proving a Section 11 good faith defense
- Good intentions will not meet the standard if there was any sign of negligence on the employer's part
- Judge determines the existence of good faith and whether liquidated damages apply in total or only partially
- Assertion of good faith defense can waive certain attorney client privileged communications



## PREVENTING WAGE & HOUR LIABILITIES

### HOW DO YOU PREVENT LIABILITY?

- Implement payroll reporting and safe harbor policies
- Implement a reporting mechanism that allows multiple avenues to register problems
- Training and Orientation
- Insure non-exempt employees certify accuracy of time records
- Audit exempt and non-exempt pay practices



## PREVENTING WAGE & HOUR LIABILITIES

### PAYROLL REPORTING

- Payroll or timekeeping policies
  - define working time
  - require review by employees of time records and paychecks
  - prohibit any off the clock work
  - develop and train all employees on reporting mechanisms for any violations and provide a place where questions can be answered



## PREVENTING WAGE & HOUR LIABILITIES

### SAFE HARBOR POLICY

- Required by new White Collar regulations See 29 C.F.R. 541
- Unpaid disciplinary suspensions of a full day or more imposed in good faith for infractions of workplace conduct rules...Such suspensions must be imposed pursuant to a **written policy** applied uniformly to all workers.

## PREVENTING WAGE & HOUR LIABILITIES

### IMPLEMENT A REPORTING MECHANISM

- Reporting mechanism should be well publicized (e.g. employee handbooks, orientation materials, facility posters, wallet cards)
- Mechanism should allow employees access to multiple channels to express concerns to circumvent direct supervisors and should clearly state retaliation will not be permitted.
- Consider streamlining reporting mechanism to align with other reporting procedures such as harassment, discrimination or SOX hotlines.





## **PREVENTING WAGE & HOUR LIABILITIES**

### **TRAINING & ORIENTATION**

- Orient and train new non-exempt employees about proper timekeeping and policies prohibiting off the clock work
- Orient and train new managers about requirements of federal and state law and proper timekeeping procedures.
- Document training but more importantly discipline and document discipline for all policy infractions



## **PREVENTING WAGE & HOUR LIABILITIES**

### **CERTIFICATION OF TIME RECORDS**

- Require non-exempt employees to review and certify accuracy of time records.
- Certification should be offered in different languages for diverse employee groups within your workforce
- Install an auditing process to review certification records on a regular cycle



## Time Card Certification

**TIMESHEET CERTIFICATION**

**I CERTIFY:**

- I have carefully reviewed my timesheet. I have accurately recorded all of my working time and absences, including any overtime, vacation, sick leave and meal breaks.
- I understand it would be a serious violation of Company policy for me to work "off-the-clock" (perform any work that is not reported on my timesheet). I have not been instructed to work off-the-clock or to incorrectly report my working time, absences or meal breaks.

**I also certify (check one):**

I have taken my required, uninterrupted meal break of at least 30 minutes each day.

**OR**

I was unable to take a meal break(s) or it was interrupted by work-related activities on {date(s)}. I notified my supervisor in advance and my timesheet has been corrected to include any missed or interrupted meal periods as working time.

**OR**

I was unable to take a meal break(s) or it was interrupted by work-related activities on {date(s)} but I did not notify my supervisor in advance. My timesheet has been corrected to include any missed or interrupted meal periods as working time.

**I WILL NOT SIGN THIS CERTIFICATION IF THE ABOVE INFORMATION IS NOT CORRECT.**

\_\_\_\_\_  
Employee Signature

\_\_\_\_\_  
Date

ACC's 2006 Annual Meeting: The Road to Effective Leadership

October 23-25, Manchester Grand Hyatt



## PREVENTING WAGE & HOUR LIABILITIES AUDIT EXEMPT & NON-EXEMPT PAY PRACTICES

- Are exempt employees paid on a salary basis?
- Have exempt duties or responsibilities changed over time?
- Consider periodic self assessments to confirm exempt status
- Are non-exempt employees reporting all working time?
- What steps have been implemented to prevent off the clock work?
- Are supervisors permitted to edit time records? - Audit
- Are rounding rules operating properly?

ACC's 2006 Annual Meeting: The Road to Effective Leadership

October 23-25, Manchester Grand Hyatt





## PREVENTING WAGE & HOUR LIABILITIES

### AUDIT EXEMPT & NON-EXEMPT PAY PRACTICES

- Are wage deductions proper?
- Is overtime earnings being properly calculated?
- Are incentive earnings properly factored into overtime earnings?
- Are accurate timekeeping and payroll records maintained?
- Are employees paid on a timely basis?



## PREVENTING WAGE & HOUR LIABILITIES

### A CAUTIONARY NOTE

- Self critical analysis may not apply
- Employee questionnaires may not be privileged even if self critical analysis exists. See Deel v. Bank of America, 227 FRD 456 (WD VA 2005)
- Consider before you begin an audit whether the results and corrections are intended to be a part of any future defense. Design the process to insure the audit will be admissible.



## PREVENTING WAGE & HOUR LIABILITIES

### ● FLSA Collective Action Process

- Filing
- Conditional Certification / Judicial Notice
- Discovery
- Decertification
- Summary judgment

ACC's 2006 Annual Meeting: The Road to Effective  
Leadership

October 23-25, Manchester Grand Hyatt



## PREVENTING WAGE & HOUR LIABILITIES

### ● Conditional Certification / Judicial Notice

- Judicial notice of conditional certification / Plaintiff may contact "similar situated" individuals
- Process starts with a request for names of "similarly situated" employees
- Think early about whether to challenge discovery request
  - You can provide names to plaintiff's counsel early and let plaintiff's counsel contact persons or contact them directly, seeking an affidavit on relevant issues OR
  - You can have plaintiff's counsel contact them with "judicial notice" which carries weight with lay person
- Low threshold - requires affidavit of plaintiff

ACC's 2006 Annual Meeting: The Road to Effective  
Leadership

October 23-25, Manchester Grand Hyatt



## PREVENTING WAGE & HOUR LIABILITIES

### ● Discovery

- Scope – representative v. individualized
  - Nature of claim (misclassification or off the clock)
  - Likelihood of success (isolated issues or systemic problem)
  - Depose every individual plaintiff?

ACC's 2006 Annual Meeting: The Road to Effective  
Leadership

October 23-25, Manchester Grand Hyatt

## PREVENTING WAGE & HOUR LIABILITIES

### ● Decertification

- Do you want it? Might lead to individual claims, but easier to settle
- Here, it is plaintiff's burden to show similar situated (higher burden than at conditional certifications stage)

### ● Summary judgment

- Often plaintiffs file for summary judgment
- Defendant's burden to prove exemption or to prove proper payment

ACC's 2006 Annual Meeting: The Road to Effective  
Leadership

October 23-25, Manchester Grand Hyatt



## **PREVENTING WAGE & HOUR LIABILITIES RESOURCES**

- Association of Corporate Counsel
- US Department Of Labor website: [WWW.DOL.GOV](http://WWW.DOL.GOV)
- Society of Human Resource Management's website: [WWW.SHRM.ORG](http://WWW.SHRM.ORG)

ACC's 2006 Annual Meeting: The Road to Effective  
Leadership

October 23-25, Manchester Grand Hyatt



## **206 – PREVENTING WAGE & HOUR LIABILITIES**

**Carol S. Clark – Black & Veatch**  
**Lawrence Hosey – Wal-Mart Stores, Inc.**

ACC's 2006 Annual Meeting: The Road to Effective Leadership

October 23-25, Manchester Grand Hyatt



## PREVENTING WAGE & HOUR LIABILITIES – WHY?

- US DOL Enforcement - The Wage and Hour Division reports that back wage collections have increased 26% since 2001
- FLSA Collective Actions have tripled since 1997 and now surpass class claims under **all** other employment claims
- Settlements.....

ACC's 2006 Annual Meeting: The Road to Effective Leadership

October 23-25, Manchester Grand Hyatt



## PREVENTING WAGE & HOUR LIABILITIES – WHY?

- Pepsi Cola Co. – \$17 million New Jersey Wage Hour Law settlement
- Mercedes Benz US/Honda MFG of AL - \$2 million US DOL Settlement for donning/doffing issues.
- Radio Shack - \$29.9 million for misclassification of Store Managers

ACC's 2006 Annual Meeting: The Road to Effective Leadership

October 23-25, Manchester Grand Hyatt



## PREVENTING WAGE & HOUR LIABILITIES – WHY?

- Perdue - \$20 million – Off the Clock
- SBC Pacific Bell - \$35 million – Off the Clock
- Starbucks - \$18 million – Miss-classification
- UPS - \$18 million – Off the Clock
- Eckerd's - \$8 million – Improper salary docking
- Farmer's Insurance - \$210 million - Miss-classification

ACC's 2006 Annual Meeting: The Road to Effective  
Leadership

October 23-25, Manchester Grand Hyatt



## PREVENTING WAGE & HOUR LIABILITIES – WHY?

- Is your company at risk?
- US DOL estimates more than 70% of employers are not in compliance with the FLSA.

ACC's 2006 Annual Meeting: The Road to Effective  
Leadership

October 23-25, Manchester Grand Hyatt



## PREVENTING WAGE & HOUR LIABILITIES – FLSA BASICS

- In 1938, Congress enacted the Fair Labor Standards Act (FLSA) to establish federal wage and hour standards for covered employees in the federal and private sector.
- In addition to setting a minimum wage, the FLSA requires employees to be paid 1+ ½ their **regular rate** for every hour or fraction thereof worked in excess of 40 during any given workweek.
- FLSA defines the term employ to include the words “suffer or permit to work”. Suffer or permit to work means that if an employer requires or allows employees to work, the time is generally compensable. See 29 C.F.R. 785.11
- Overtime provisions do not apply to those who are expressly “exempted” from coverage. See 29 C.F.R. 541

ACC's 2006 Annual Meeting: The Road to Effective  
Leadership

October 23-25, Manchester Grand Hyatt



## PREVENTING WAGE & HOUR LIABILITIES

### FLSA – Other Requirements:

- Child Labor
- Record Keeping
- Impermissible Deductions below minimum wage
- Impermissible rounding that works to the detriment of employees
- Less than full day “docking” of salaried employees

ACC's 2006 Annual Meeting: The Road to Effective  
Leadership

October 23-25, Manchester Grand Hyatt



## PREVENTING WAGE & HOUR LIABILITIES

What are your current payroll practices?

- What overtime exemptions are being claimed? Are they valid under federal law? State law?
- Has your company adopted a 'safe harbor' policy to ensure exempt employees are not subject to improper salary deductions?
- Are non-exempt employees accurately reporting **all** working time?
  - Meal periods and breaks
  - Donning and doffing protective clothing
  - Home work
  - Remote use of technology

## PREVENTING WAGE & HOUR LIABILITIES

What are your current payroll practices?

- What type of rounding practices are used when recording working time?
- Are supervisors permitted to edit time records? If so, are the changes lawful? Is there accountability or follow-up?
- Is overtime being properly computed?
- Are commissions, prizes/awards or incentive compensation properly included. Are they matched to the appropriate payroll periods in which they were earned?





## PREVENTING WAGE & HOUR LIABILITIES

### What are your current payroll practices?

- What type of wage deductions are allowed to be taken from employee pay? Do these deductions create minimum wage or overtime violations? Are wage deductions permitted under state laws which may be more restrictive?
- Are you meeting record keeping obligations with all work groups and properly preserving payroll records?
- Are wage payments made on a timely basis?
- Do employees' earning statement comply with federal and state law?

## PREVENTING WAGE & HOUR LIABILITIES

### FLSA Record Keeping Requirements

#### Employees Subject to Minimum Wage

- Full name and identification number
- Home address and ZIP code
- Date of Birth (if under age 19)
- Sex and occupation
- Workweek defined
- Regular hourly or base rate
- Hours worked (work day and work week total)



## PREVENTING WAGE & HOUR LIABILITIES

### FLSA Record Keeping Requirements

#### Employees Subject to Minimum Wage

- Total straight time pay (work day or work week)
- Total premium pay (work day or work week)
- Total wages paid
- Additions and deductions from wages
- Records of retroactive payment of wages
- Fixed schedules – schedule of daily and weekly hours

## PREVENTING WAGE & HOUR LIABILITIES

### FLSA Record Keeping Requirements

#### Location of Records

- Must be safe and accessible
- Place of employment or a centralized location
- Centralized location – must have accessibility within 72 for inspections
- Available after reasonable notice for inspectors to review and transcribe



## PREVENTING WAGE & HOUR LIABILITIES

### State Record Keeping Requirements

- Wage and Hour
- Unemployment
- Workers' Compensation
- State EEO
- Drug and Alcohol testing
- Workplace Safety/ OSHA
- Service Letter Statutes

## PREVENTING WAGE & HOUR LIABILITIES

### Penalties for Failure to Maintain Proper Records under the FLSA

- DOL injunctions
- Potential for Criminal Sanctions
- Civil Money Penalties are **not** available
- Burden is upon to employer to provide accurate records and can be onerous hurdle if there are any gaps



## PREVENTING WAGE & HOUR LIABILITIES

Why do preventative wage and hour strategies  
make good sense:

- Avoid willful violations and limit statute of limitations
- Avoid liquidated damages

## PREVENTING WAGE & HOUR LIABILITIES

- Willful Violations:
  - Extends statute of limitations from 2 to 3 years
  - Plaintiff must show either:
    - Employer knew its practices violated FLSA
    - Employer showed reckless disregard its practices were in violation
- Willfulness is ordinarily in the jury's hands



## PREVENTING WAGE & HOUR LIABILITIES

### ● Willfulness Examples:

- Supervisors instructed employees to work off-the clock or under report hours
- Supervisors knew of off-the-clock work but failed to eliminate
- Repeat violations from previous DOL or state investigations
- Supervisors altered employee time records to "shave" time
- Employer advised by legal counsel to reclassify positions as non-exempt but failed to do so

## PREVENTING WAGE & HOUR LIABILITIES

### Employer's Responsibilities

- An employer's ignorance of the requirements imposed by the FLSA is not a defense
- Employers have an affirmative duty to understand the FLSA (and state laws where they operate) requirements and take reasonable steps to insure ongoing compliance.



## PREVENTING WAGE & HOUR LIABILITIES

### AFFIRMATIVE GOOD FAITH DEFENSES

- Section 10 Good Faith Defense - Complete defense to liability
  - Extremely rare
  - Employer's burden of proof
- Section 11 Good Faith Defense – Partial or complete defense to liquidated damages
  - Employer's burden of proof
  - Employer must show that actions were taken in good faith **and** that there was a reasonable basis to believe its actions did not violate the FLSA



## PREVENTING WAGE & HOUR LIABILITIES

### SECTION 10 DEFENSE

- Employer must show:
  - Good faith reliance upon a written administrative regulation, ruling, interpretation, administrative practice or enforcement policy of the US DOL Wage and Hour Administrator
  - Violation occurred because employer relied upon the Wage and Hour Administrator's actions



## **PREVENTING WAGE & HOUR LIABILITIES**

### **SECTION 11 – GOOD FAITH DEFENSE**

- Some jurisdictions hold a willful violation precludes an employer from proving a Section 11 good faith defense
- Good intentions will not meet the standard if there was any sign of negligence on the employer's part
- Judge determines the existence of good faith and whether liquidated damages apply in total or only partially
- Assertion of good faith defense can waive certain attorney client privileged communications

## **PREVENTING WAGE & HOUR LIABILITIES**

### **HOW DO YOU PREVENT LIABILITY?**

- Implement payroll reporting and safe harbor policies
- Implement a reporting mechanism that allows multiple avenues to register problems
- Train and Orientation
- Insure non-exempt employees certify accuracy of time records
- Audit exempt and non-exempt pay practices



## PREVENTING WAGE & HOUR LIABILITIES

### PAYROLL REPORTING

- Payroll or timekeeping policies
  - define working time
  - require review by employees of time records and paychecks
  - prohibit any off the clock work
  - develop and train all employees on reporting mechanisms for any violations and provide a place where questions can be answered



## PREVENTING WAGE & HOUR LIABILITIES

### SAFE HARBOR POLICY

- Required by new White Collar regulations See 29 C.F.R. 541
- Unpaid disciplinary suspensions of a full day or more imposed in good faith for infractions of workplace conduct rules...Such suspensions must be imposed pursuant to a **written policy** applied uniformly to all workers.





## **PREVENTING WAGE & HOUR LIABILITIES**

## **PREVENTING WAGE & HOUR LIABILITIES**

### **IMPLEMENT A REPORTING MECHANISM**

### **SAMPLE REPORTING PROCEDURE POSTER**

- Reporting mechanism should be well publicized (e.g. employee handbooks, orientation materials, facility posters, wallet cards)
- Mechanism should allow employees access to multiple channels to express concerns to circumvent direct supervisors and should clearly state retaliation will not be permitted.
- Consider streamlining reporting mechanism to align with other reporting procedures such as harassment, discrimination or SOX hotlines.



## **PREVENTING WAGE & HOUR LIABILITIES**

### **TRAINING & ORIENTATION**

- Orient and train new non-exempt employees about proper timekeeping and policies prohibiting off the clock work
- Orient and train new managers about requirements of federal and state law and proper timekeeping procedures.
- Document training but more importantly discipline and document discipline for all policy infractions

## **PREVENTING WAGE & HOUR LIABILITIES**

### **CERTIFICATION OF TIME RECORDS**

- Require non-exempt employees to review and certify accuracy of time records.
- Certification should be offered in different languages for diverse employee groups within your workforce
- Install an auditing process to review certification records on a regular cycle



## PREVENTING WAGE & HOUR LIABILITIES

### TIME CARD CERTIFICATION EXAMPLE

ACC's 2006 Annual Meeting: The Road to Effective  
Leadership

October 23-25, Manchester Grand Hyatt



## PREVENTING WAGE & HOUR LIABILITIES

### AUDIT EXEMPT & NON-EXEMPT PAY PRACTICES

- Are exempt employees paid on a salary basis?
- Have exempt duties or responsibilities changed over time?
- Consider periodic self assessments to confirm exempt status
- Are non-exempt employees reporting all working time?
- What steps have been implemented to prevent off the clock work?
- Are supervisors permitted to edit time records? - Audit
- Are rounding rules operating properly?

ACC's 2006 Annual Meeting: The Road to Effective  
Leadership

October 23-25, Manchester Grand Hyatt



## PREVENTING WAGE & HOUR LIABILITIES

### AUDIT EXEMPT & NON-EXEMPT PAY PRACTICES

- Are wage deductions proper?
- Is overtime earnings being properly calculated?
- Are incentive earnings properly factored into overtime earnings?
- Are accurate timekeeping and payroll records maintained?
- Are employees paid on a timely basis?

## PREVENTING WAGE & HOUR LIABILITIES

### A CAUTIONARY NOTE

- Self critical analysis may not apply
- Employee questionnaires may not be privileged even if self critical analysis exists. See Deel v. Bank of America, 227 FRD 456 (WD VA 2005)
- Consider before you begin an audit whether the results and corrections are intended to be a part of any future defense. Design the process to insure the audit will be admissible.