

Don't Forget! FLSA Compliance in a Work-From-Home World

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Overview / Summary

- FLSA Considerations (Generally)
- Work From Home Considerations
- Alternate Compensation Structures

FLSA Considerations (Generally)

- Nonexempt Workers
 - Minimum Wage
 - Overtime
 - Recordkeeping Requirements



FLSA Considerations (Generally)

- Exempt Workers
 - Salary Basis (\$684/wk - \$35,568/yr)
 - Common Exemptions
 - Lesser-Known Exemptions



Work From Home Considerations

- Nonexempt Workers
 - Overtime – Ensure full payment / recordkeeping
 - Divided Workdays – FFCRA exception to “continuous workday”



Work From Home Considerations

- Exempt Workers
 - Mix of Exempt / Nonexempt Duties – Guard against loss of exemption; emergency allowance
 - Salary Reductions – Salary basis; prospective

Alternate Compensation Structures

- **Fluctuating Workweek**
 - Hours must vary from week-to-week
 - Fixed salary (even for nonexempt) for all hours worked
 - Employee paid “half-time” for hours over 40 in a workweek

Alternate Compensation Structures (example)

- Salary = \$600 / wk
- Production Bonus = \$100
- Hours Worked = 36
- “Regular Rate” = $\$700 / 36 = \19.44 per hour
- Overtime = \$0
- Total Comp for Week = $\$600 + \$100 = \$700$



Alternate Compensation Structures (example)

- Salary = \$600 / wk
- Production Bonus = \$0
- Hours Worked = 36
- “Regular Rate” = $\$600 / 36 = \16.67 per hour
- Overtime = \$0
- Total Comp for Week = \$600

Alternate Compensation Structures (example)

- Salary = \$600 / wk
- Production Bonus = \$100
- Hours Worked = 45
- “Regular Rate” = $\$700 / 45 = \15.56 per hour
- “Half-Time Rate” = $\$15.56 / 2 = \7.78 per hour
- Overtime Owed = $\$7.78 \times 5 = \38.90
- Total Comp for Week = $\$600 + \$100 + 38.90 = \$738.90$

Alternative Compensation Structure (comparison)

Fluctuating Workweek Method	Normal Hourly / Overtime Structure
Weekly Salary = \$600	Hourly Rate = \$15 / hr (based on \$600 / 40 hrs)
Hours Worked = 45	Hours Worked = 45
Salary Paid = \$600	Straight-Time Pay = \$600 (\$15 / hr X 40 hrs)
Regular Rate = \$13.33 / hr (\$600 / 45 hrs)	Regular Rate = \$15 / hour
Half-time Rate = \$6.67 / hr (\$13.33 / 2)	Overtime Rate = \$22.50 (\$15 X 1.5)
Overtime Payment = \$33.35 (\$6.67 X 5)	Overtime Payment = \$112.50 (\$22.50 X 5)
Total Weekly Compensation = \$633.35	Total Weekly Compensation = \$712.50
(\$600 weekly salary + half-time payment for 5 hours of overtime)	(\$600 in straight-time and \$112.50 for 5 hours of overtime)

Alternative Compensation Structure (comparison)

Fluctuating Workweek Method	Normal Hourly / Overtime Structure
Weekly Salary = \$600	Hourly Rate = \$15 / hr (based on \$600 / 40 hrs)
Hours Worked = 35	Hours Worked = 35
Salary Paid = \$600	Straight-Time Pay = \$525 (\$15 / hr X 35 hrs)
Regular Rate = \$17.14 / hr (\$600 / 35 hrs)	Regular Rate = \$15 / hour
Half-time Rate = \$8.57 / hr (\$17.14 / 2)	Overtime Rate = \$22.50 (\$15 X 1.5)
Overtime Payment = \$0	Overtime Payment = \$0
Total Weekly Compensation = \$600.00	Total Weekly Compensation = \$525.00
(\$600 weekly salary regardless of the fact that only 35 hours were worked)	(\$525 in straight-time for hours actually worked)

Alternate Compensation Structures

- Piece-rate
 - Employees earn a set amount for each “piece” of work completed
 - Shadow records for hours (ensure minimum wage and overtime)

Alternate Compensation Structures (example)

- Piece Rate = \$3.00 / piece
- Pieces Completed = 200 in one workweek
- Hours Worked = 30
- Total Piece Rate Compensation = $\$3.00 \times 200 = \600
- “Regular Rate” = $\$600 / 30 = \20.00 per hour
- Total Compensation = \$600

Alternate Compensation Structures (example)

- Piece Rate = \$3.00 / piece
- Pieces Completed = 200 in one workweek
- Hours Worked = 50
- Total Piece Rate Compensation = $\$3.00 \times 200 = \600
- “Regular Rate” = $\$600 / 50 = \12.00 per hour
- Overtime Options
 - “Half-time” of regular rate = $(\$12.00 / 2) \times 10 = \60
 - 1.5 times the Piece Rate for each piece produced during OT hours
- Total Compensation = \$660 (using half-time method)

Questions?



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Ready or Not – 2021 Employment Law Updates

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Occupational Safety and Health Administration



September 30, 2020

- OSHA Mandatory Reporting Requirements for Fatalities from a Work-Related Covid-19 Infection
- OSHA “Inquiries” regarding pandemic-related employee complaints
- OSHA Inspections – General Duty Clause – Employers must “furnish employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”

Emergency Temporary Standard

- President-elect Biden has urged Trump to “immediately release and enforce an OSHA Emergency Temporary Standard to give employers and frontline employees specific, enforceable guidance on what to do to reduce the spread of COVID.”



OSHA Takeaway?

- **Employers can anticipate that this standard will be developed and additional enforcement of OSHA regulations pursued. Employers can also anticipate more OSHA investigators will be hired and OSHA committees fully staffed.**
- **Make sure your business is complying with OSHA's and the CDC's pandemic guidelines.**
- **Listen to employee concerns regarding workplace safety; investigate and document steps taken to address.**
- **Update retaliation policies to include safety and health issues.**



Fair Labor Standards Act

September 22, 2020

- U.S. DOL Released Proposed Rule Making it Easier for Employers to Classify Workers as Independent Contractors. Two Core factors:
 - The Nature and degree of the worker's control over the work; and
 - The worker's opportunity for profit or loss based on initiative and/or investment



Fair Labor Standards Act

- If these two factors don't align, then the following three additional factors should be considered:
 - The amount of skill required for the work;
 - The degree of permanence of the working relationship; and
 - Whether the work is part of an integrated unit of production.

Will the DOL's Proposed Rule Become Finalized?

- Probably, if it is done before the end of the Trump Administration.
- Unlikely under Biden's Department of Labor as the Proposed Rule is viewed as less protective of individuals who should be classified as employees and eligible for benefits, etc.
- Front and center is the “gig” economy.

Gig Economy Considerations

- Biden promised he would “ensure workers in the ‘gig economy’ and beyond [would] receive the legal benefits and protections they deserve.”
- Can and should he fulfill this promise?



Who is Part of the Gig Economy?

- Freelancers
- People with regular full-time jobs with a part-time “gig”
- Uber, Lyft and Instacart grocery delivery workers, etc.
- Often classified as independent contractors and ineligible for unemployment, health insurance, minimum wage or paid sick leave.

California and Proposition 22

- Proposition 22 was a ballot initiative exempting many gig companies from state workplace laws.
- Uber, Instacart, Lyft, DoorDash and others spent an estimated \$200 million supporting Prop 22
- Prop 22 was in response to a California law effective January 1 making it harder to classify workers as independent contractors.

California's Proposition 22

- With 58% voter support, Proposition 22 in California allows companies such as Uber and Lyft to keep classifying their drivers as independent contractors
- These companies are planning to target other states next and even nationwide.
- Gig companies will have to pay their contractors 12% of the state or local minimum wage and 30 cents per mile for gas, adjusted annually.

How Will a Biden Administration Reconcile the Gig Economy Issue?

- Biden appointed Seth Harris, a former deputy labor secretary under President Obama, to the Biden-Harris Department of Labor transition team.
- In 2015, Harris co-authored a paper that argued that workers who partake in the “online gig economy” should not be classified as employees but rather as “independent workers”, able to organize and collectively bargain, but not required to receive minimum wage or overtime payment.

Takeaway?

- Exercise continued caution in hiring workers as independent contractors who currently qualify as employees under most federal and state laws.
- The exposure to a company for misclassification is significant under a myriad of federal and state laws.

Raising the Federal Minimum Wage

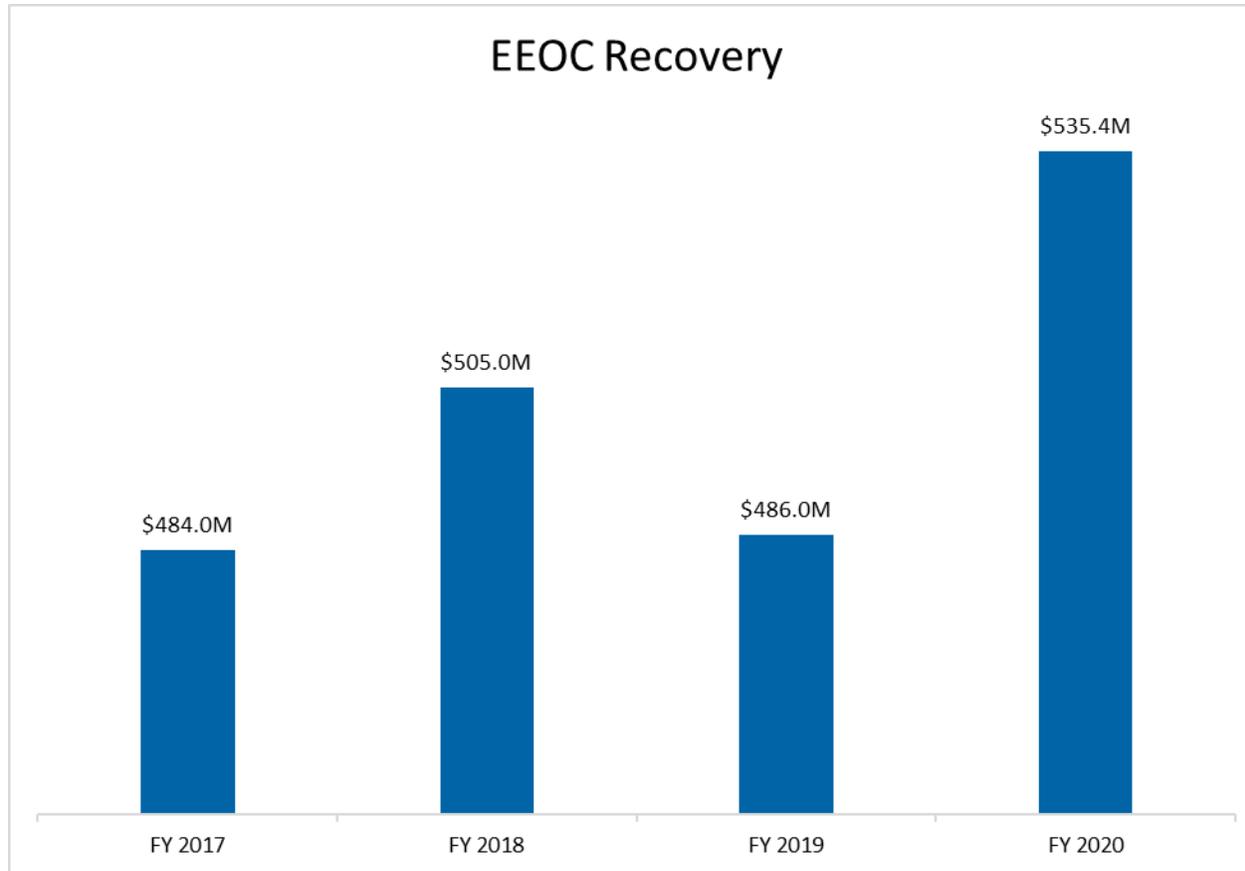
- Biden has pledged to increase the federal minimum wage from \$7.25 to \$15.00 an hour.
- Pledged to end tipped minimum wages common in restaurant industries (i.e. minimum wage is only \$2.13 an hour and balance is made up in tips.)
- Viewed as negatively impacting women and people of color who make up majority of tipped employees.

Expect Increase in EEOC Activity

- According to a 2017 survey cited by the Biden campaign:
 - One in three Latinos
 - One in four Asian Americans
 - One in three Native Americans
 - More than half of African Americans have experienced racial discrimination in the workplace
 - Biden has proposed doubling the funding for the EEOC so that the agency can “fulfill its mission and address discrimination.”



2019 – Highest Recovery; Fewest Lawsuits



EEOC Record Recoveries Fiscal Year Ending 9/30/20

- The commission's recovery in 2020 included two of the largest settlements in recent history:
- \$20 million deal with Walmart over its physical ability tests that discriminated against female applicants. The job was an order filler position and the test required lifting up to 80 pounds. EEOC claimed the test overstated the physical demand.
- \$20.5 million pact with Jackson National Life over sex and race bias claims.
- \$106 million for 26,000 workers through litigation
- \$156.6 million through 6,700 successful mediations

Takeaways?

- Make termination decisions thoughtfully
 - Age claims increasing – challenges to “but for” standard likely through legislation
 - ADA discrimination claims increasing based on pandemic-related factors such as denial of accommodation requests.
 - Watch for Equality Act –prohibiting discrimination on basis of sexual orientation and gender identity (codification of *Bostock v. Clayton County*)
 - Pregnant Workers Fairness Act – requiring reasonable work accommodations
 - Be Heard Act – extend antidiscrimination protections to all employees not just businesses with 15 or more.

Medical and Recreational Marijuana

- 4 More States Legalize Marijuana
 - Arizona
 - Montana
 - New Jersey (recreational)
 - Mississippi (medical)
 - South Dakota (both)
- 35 states and D.C. Allow for Medical Marijuana Use and 15 Recreational
- Several States trying to Reduce Criminal Penalties for Marijuana Use (NJ, CO, GA)
- Cannabis sales totaled about \$15 billion in 2019; expected to climb to \$30 billion by 2024



Takeaway

- Determine which state or local laws apply.
- Understand that a one dimensional approach that relies strictly on federal law treatment of marijuana as a controlled substance rule may not work in all states.
- Consider impact of testing for drugs other than marijuana.

Paid Leave

Will the Families First Coronavirus Response Act be extended into 2021?

- Currently set to expire on December 31, 2020
- Emergency paid sick leave has reduced the spread of COVID-19
- The FFCRA had bipartisan support
- Pandemic expected to extend into the new year

NLRB

Union matters and the NLRB

- President-elect Biden is a strong union supporter
- NLRB remain in Republican control until August 2021
- Has expressed support for Protecting the Right to Organize Act
 - Feb. 2020 passed by House – What does the PRO Act provide?
 - Ban on employer mandatory “captive audience” group meetings
 - Apply strict independent contractor test
 - Bar class action arbitration waivers



PRO Act Continued:

- Mandate immediate collective bargaining for 90 days and, if no agreement is reached, require binding arbitration of contract terms
- Ban employer lockouts and the permanent replacement of strikers while allowing intermittent strikes
- Ban “right to work” laws
- Allow “unfair labor practice” claims to be brought as civil actions in court
- Add fines and liquidated damages as remedies for unfair labor practices, and add personal liability on corporate directors and officers

Takeaways?

- Understand what union organizing looks like with today's technology.
- Understand what is and what is not allowed in conjunction with union organizing campaigns.
- Don't overlook the little things that often prompt union organizing efforts.

Questions?



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