

THE INSIDE SCOOP: TOP TEN MISTAKES EMPLOYERS MAKE ACCORDING TO THE SOLICITOR OF LABOR

Robert M. Williams, Jr. , Esq.

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

165 Madison Avenue, Suite 2000

Memphis, Tennessee 38103

Phone: 901.577.2215

Facsimile: 901.577.4222

Email: rwilliams@bakerdonelson.com

PATRICIA SMITH, SOLICITOR OF LABOR



- Presidential appointee, confirmed by the Senate as Solicitor of Labor on February 4, 2010
- Office of the Solicitor (SOL) meets the legal service demands of the entire DOL
 - represents Secretary and agencies in all litigation – both enforcement and defensive
- SOL has over 425 attorneys enforcing more than 180 Federal labor laws and their implementing regulations
 - 9 national divisions
 - 6 regional offices (Atlanta, Boston, Chicago, Dallas, New York, Philadelphia and San Francisco)

1. Not Cooperating with a DOL Investigation

- In 2009, the GAO was critical of the DOL for failing to thoroughly investigate claims.
 - In response, the DOL hired 350 more investigators and sought more money from Congress.
- In 2013, DOL announced it would be increasing FMLA investigations
- More expansive investigations (not limited to one issue)
- The DOL reports that on-site visits are easier for its investigators largely because:
 1. it tends to make the investigation less time consuming for the agency;
 2. investigators have ready access to records, data, policies and forms; and
 3. investigators can interview employees face-to-face while reviewing documents on-site.

1. Not Cooperating with a DOL Investigation (Con'd)

Investigations → Process Overview

1. Selection of Company –self directed, random, complaint or follow-up
2. Initial Contact
3. Document Requests
4. Employee interviews
5. Settlement Conference
6. Litigation?

1. Not Cooperating with a DOL Investigation (Con'd)

- The FLSA gives the DOL the authority to recover back wages and liquidated damages (to be paid to employees), and to assess civil money penalties (to be paid to the government), in instances of minimum wage, overtime, and other violations.
- Solicitor discussed DOL enforcement powers
 - broad subpoena power
 - restraining orders

**HOW NOT TO MAKE THIS
MISTAKE?????**

1. Not Cooperating with a DOL Investigation (Con'd)

COOPERATE!

but an employer still has rights

- Familiarize yourself with the process and law.
- Obtain understanding of scope of audit.
- Select “point person” – typically counsel or high-level manager.
- Engage counsel at start.
- Genuine response to document requests, but do not volunteer info
- Assess problem areas with self-audit (under direction of counsel!!).
 - Better to do it before DOL comes knocking, but if not, try to stall to get an audit done. DOL must generally give 72 hours.
 - Records will make or break you
- Reign in your supervisors.
- Don’t always trust that the DOL will be fair.

2. Retaliating Against Employees Who Cooperate with DOL

- DOL can interview exempt and non-exempt employees, all shifts, all work sites, subject to employer consent
 - non-exempt employees – no company rep or attorney if the employee wants a private interview. It is the right of the employee, NOT the DOL.
 - exempt – company rep
- Employees who have filed complaints or provided information **cannot be discriminated or retaliated against or discharged** on account of such activity.
 - If adverse action is taken against an employee for engaging in protected activity, the affected employee or the Secretary of Labor may file suit for relief, including reinstatement to his/her job, payment of lost wages, and damages.
- Employers cannot interfere with the process or retaliate in any way against employees participating in process
 - DOL has used enforcement tools when this has happened.

2. Retaliating Against Employees Who Cooperate with DOL (Con'd)

HOW NOT TO MAKE THIS MISTAKE????

DON'T RETALIATE

- Be cautious with “pre-interviews”
 - Explain the process and what to expect
 - Encourage truthfulness
 - Notify employees of their rights
 - Do not coerce or pressure
 - Prepare managers as though giving a deposition
- Need documented reason for any actions taken against employee who complained or participated

3. Treating Employees As Independent Contractors

- ***“If It Sounds Too Good to Be True . . . It is”***
- ***“Rampant misclassification of employees”***
 - Cable industry
 - Construction
 - Southwest Construction Firms paid \$700,000 in back wages, damages and penalties.
 - 16 Defendants accused of misclassifying more than 1,000 construction workers – instead of employees they were “member/owners” of LLCs.
 - Landscaping
 - Restaurants and Hospitality in general. For example, last month DOL recovered over \$100,000.00 from hotel for misclassifying maintenance and janitorial staff as independent contractors.

3. Treating Employees As Independent Contractors (Con'd)

- DOL signed agreement with various state Departments of Labor to reduce misclassification of employees
 - Alabama, California, Colorado, Connecticut, Hawaii, Florida, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, New York, Rhode Island, Utah, Washington and Wisconsin
 - In Fiscal Year 2013, DOL wage & hour investigations resulted in more than \$83,051,159 in back wages for more than 108,050 misclassified workers in industries, such as janitorial, food, construction, day care, hospitality and garment.

3. Treating Employees As Independent Contractors (Con'd)

HOW NOT TO MAKE THIS MISTAKE????

SELF AUDIT

1. The extent to which the work performed is an integral part of the employer's business.
2. Whether the worker's managerial skills affect his or her opportunity for profit and loss.
3. The relative investments in facilities and equipment by the worker *and* the employer.

3. Treating Employees As Independent Contractors (Con'd)

HOW NOT TO MAKE THIS MISTAKE????

SELF AUDIT

4. The worker's skill and initiative.
5. The permanency of the worker's relationship with the employer.
6. The nature and degree of control by the employer.

4. Ignoring or Not Appreciating Overtime Laws and Standards

- 8,126 FLSA cases were filed in 2014
 - increase of **438%** since 2000
- Overtime – time and a half for all hours worked in excess of 40 in a workweek by **non-exempt** employees
- Exemptions – applied on an individual workweek basis
 - **PAYING SALARY ≠ EXEMPTION**
 - Solicitor said most common mistake was employers paying non-exempt employees a salary and thinking that covers overtime or that they are not entitled to overtime

4. Ignoring or Not Appreciating Overtime Laws and Standards (Con'd)

- Commonly used exemptions
 - **Commissioned sales employees** of retail or service establishments
 - more than half of earnings comes from commissions **and** the employee averages at least 1½ times the minimum wage for each hour worked
 - **Computer professionals**
 - paid at least \$27.63/hours
 - **Seasonal or recreational establishments**
 - **Executive, administrative, professional (“white collar” exemptions) and outside sales**

4. Ignoring or Not Appreciating Overtime Laws and Standards (Con'd)

- For the FLSA exemptions to apply, an employee generally must be paid on a salary basis of no less than \$455 per week and perform certain types of work that:
 - is directly related to the management of his or her employer's business, or
 - is directly related to the general business operations of his or her employer or the employer's clients, or
 - requires specialized academic training for entry into a professional field, or
 - is in the computer field, or
 - is making sales away from his or her employer's place of business, or
 - is in a recognized field of artistic or creative endeavor.

4. Ignoring or Not Appreciating Overtime Laws and Standards (Con'd)

HOW NOT TO MAKE THIS MISTAKE????

SELF AUDIT

- Wage and hour audit of exempt and non-exempt employees
- Compare job descriptions to actual tasks performed by employees
- Review time and attendance records and overtime payments
- Review time keeping procedures. Be on the lookout for “off-the-clock” claims for non-exempt employees.
- Check 1099s
- Implement comprehensive policy for reporting wage concerns

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- **March 13, 2014 Presidential Memorandum to the Secretary of Labor: Updating and Modernizing Overtime Regulations**

“[R]egulations regarding exemptions from the Act's overtime requirement, particularly for executive, administrative, and professional employees (often referred to as “white collar” exemptions) have not kept up with our modern economy. Because these regulations are outdated, millions of Americans lack the protections of overtime and even the right to the minimum wage.

*Therefore, I hereby direct you to propose revisions to **modernize and streamline the existing overtime regulations**. . . to update existing protections consistent with the intent of the Act; address the changing nature of the workplace; and simplify the regulations to make them easier for both workers and businesses to understand and apply.*

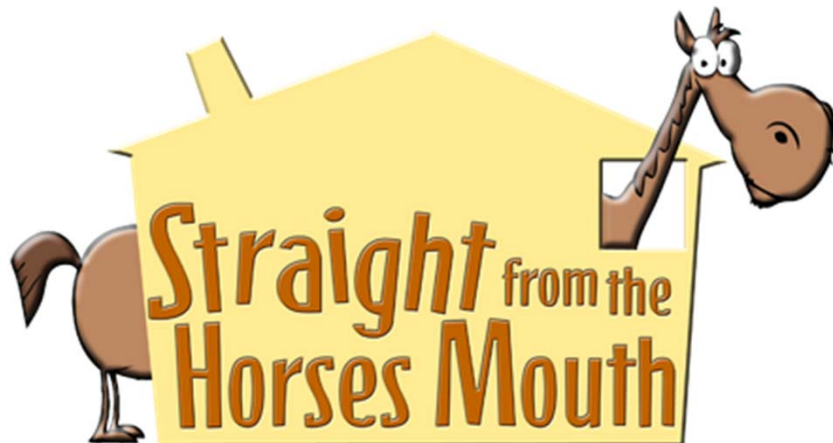
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- **March 13, 2014 Presidential Memorandum to the Secretary of Labor: Updating and Modernizing Overtime Regulations**

Solicitor's committee has been working on re-drafting regulations and there has been a lot of speculation about when they will be published.

**June 2015 released for public review
& comment**

July 2016 publish



5. Ignoring or Not Understanding Criteria for Unpaid Interns

- DOL Fact Sheet #71 – ***“extension of the individual’s educational experience”***
 1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
 2. The internship experience is for the benefit of the intern;
 3. The intern does not displace regular employees, but works under close supervision of existing staff;

5. Ignoring or Not Understanding Criteria for Unpaid Interns (Con'd)

- DOL Fact Sheet #71 – ***“extension of the individual’s educational experience”***
 4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
 5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
 6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

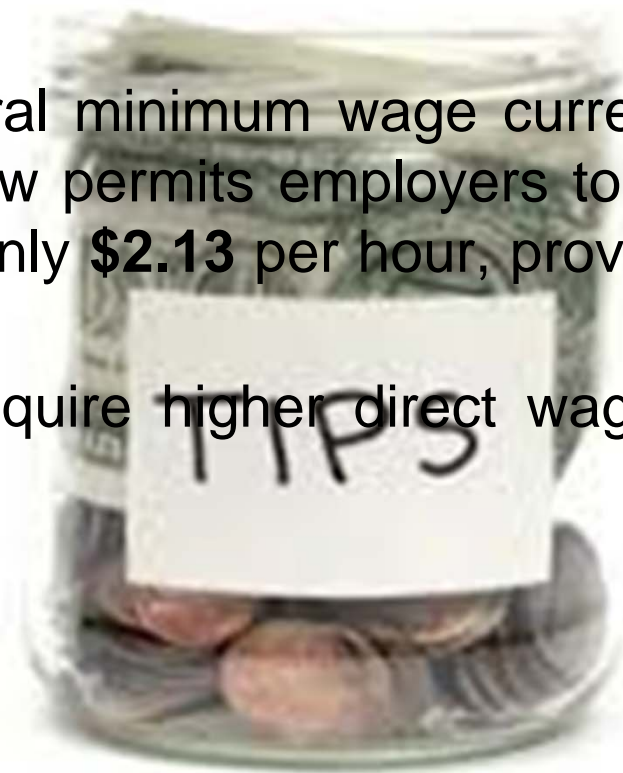
5. Ignoring or Not Understanding Criteria for Unpaid Interns (Con'd)

- Black Swan Case (*Glatt v. FoxSearchlight Pictures, Inc.*)
 - Two unpaid interns on movie set of the Black Swan sued alleging they were employees and entitled to overtime
 - Court used DOL's six criteria
 - Unpaid interns performed routine tasks that would otherwise have been performed by regular employees
 - Court found internships did not foster an educational environment and the studios received the benefits of the work.
 - Certified class of unpaid interns



6. Incorrectly Applying Tip Credit

- A tipped employee engages in an occupation in which he/she customarily and regularly receives more than \$30 per month in tips.
- While the federal minimum wage currently equals **\$7.25** per hour, federal law permits employers to pay tipped workers a base wage of only **\$2.13** per hour, provided that tips make up the difference
- Many states require higher direct wage amounts for tipped employees.



6. Incorrectly Applying Tip Credit (Con'd)

Tip pooling:

- Requirement that an employee must retain all tips does not preclude a valid tip pooling or sharing arrangement among employees who customarily and regularly receive tips, e.g. waiters, waitresses, bellhops, counter personnel, bussers, and service bartenders, but exclude dishwashers, cooks, chefs and janitors.
- FSLA does not impose a maximum contribution amount or percentage on valid mandatory tip pools.
- Employee must not be required to contribute a greater percentage of their tips than is customary and reasonable.

6. Incorrectly Applying Tip Credit (Con'd)

Tip pooling - Employers:

- Must notify tipped employee of any required tip pool contribution amount (notice in writing is not required but suggested to avoid any question of whether notice was received)
- May only take a tip credit for the amount of tips each tipped employee ultimately receives
- May not retain any of the employees' tips for any other purpose. 29 C.F.R. § 531.35.
 - Generally, supervisors and managers may not participate.

7. OSHA Violations - Abatement

- OSHA investigations where violations are identified during the investigation
 - The abatement period shall be the shortest interval within which the employer can **reasonably** be expected to correct the violation.
 - In situations where an employer contests either (1) the period set for abatement or (2) the citation itself, the abatement period generally shall be considered not to have begun until there has been an affirmation of the citation and abatement period.
- Solicitor commented that it was not advisable for employers to wait until litigation or investigation is over to abate known OSHA violations

8. OSHA Violations – Fall Protection

- Falls are among the most common causes of serious work related injuries and deaths.
- OSHA provides fall protection be provided at elevations of four feet in general industry workplaces, five feet in shipyards, six feet in the construction industry and eight feet in longshoring operations.
- OSHA requires fall protection be provided when working over dangerous equipment and machinery, regardless of the fall distance.

8. OSHA Violations – Fall Protection (Con'd)

General Industry Protection:

- Employers must take measures in their workplaces to prevent employees from falling off overhead platforms, elevated work stations or into holes in the floors and walls.
- To prevent employees from being injured from falls, employers must:
 - Guard every floor hole into which a worker can accidentally walk (by use of a railing or toeboard or a floor hole cover)
 - Provide a guardrail and toeboard around every open-sided platform, floor or runway that is 4 feet or higher off the ground or next level.

8. OSHA Violations – Fall Protection (Con'd)

General Industry Protection (Con'd):

- Regardless of height, if a worker can fall into or onto dangerous machines or equipment (such as a vat of acid or a conveyor belt), employers must provide guardrails and toeboards to prevent works from falling and getting injured
- Other means of fall protection that may be required on certain jobs include safety harness and line, safety nets, stair railings and handrails.

8. OSHA Violations – Fall Protection (Con'd)

General Industry Protection:

- OSHA requires employers to:
 - Provide working conditions that are free of known dangers.
 - Keep floors in work areas in a clean, preferably dry, and sanitary condition.
 - Select and provide required personal protection equipment at no cost to workers.
 - Train workers about job hazards in a language that they can understand.

9. OSHA Violations - Transportation

- Solicitor cautioned that employers should address transportation safety issues
 - She noted that in 2013, 30% of all workplace deaths result from workers vehicle accidents . . . even if not an OSHA issue, the Solicitor suggested all employers pay attention
- Implementing a driver safety program in the workplace can greatly reduce the risks faced by your employees and their families while protecting the employer.



9. OSHA Violations – Transportation (Con'd)

HOW NOT TO MAKE THIS MISTAKE????

- Driver Agreements
- Written Policies and Procedures
- Motor Vehicle Record (MVR) Checks
- Crash Reporting and Investigation
- Driver Training/Communication



10. Ignoring Information on DOL's Website

- Fact Sheets
- Find It! Topic Search
- DOL Opinions
- Regulations
- Exemptions