PUBLICATION

Oilfield Service Companies Face Daunting Challenges

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A focus on oilfield services companies' decades old compensation plans for their service technicians began shortly after President Obama took office in 2009. The U.S. Department of Labor (DOL) commenced a more concentrated effort to audit the manner in which oilfield services companies compensated their service technicians.

The latter included, for example, technicians in the area of wireline, fishing, logging, directional drilling and pressure pumping.

An investigation (audit) was initiated by "random" selection or by employees' complaints. An investigation normally included all aspects of Fair Labor Standards Act (FLSA) compliance, even though a complaint may have been limited to a particular issue.

The DOL investigator would make contact with a local office and arrange an appointment. Sometimes the investigator appeared unannounced. This investigation likely included:

- an initial conference,
- a tour of the facility,
- a review of time and payroll records,
- a review of job descriptions of all technicians,
- employee interviews, and
- a final conference (which could be several weeks after the investigator completed the audit).

During this audit, the investigator dissected the job descriptions for exempt employees in order to ascertain whether the employee was properly classified. It was not unusual for the employer to receive a letter from a DOL regional office announcing violations of the overtime provisions of the FLSA. Thereafter, a negotiation process began relating to those service technicians who were misclassified. This was followed by recalculations of wages, including payments that should have been included as "wages," properly calculating an applicable overtime rate for each pay period and then a calculation of overtime wages. The calculation of overtime wages usually covered a period of two years retroactively from the date of the complaint or audit.

Once an agreement was reached between the DOL and the employer, the latter would tender a check for the back overtime wages, provided the technician (whether a current or former employee) signed a DOL settlement agreement. If the technician could not be contacted or refused to sign the release, then the employer paid those overtime funds to the DOL. The audits usually only related to technicians who worked out of the location that was audited.

Thereafter, an onslaught of civil lawsuits targeting particular categories of technicians began. These types of lawsuits are known as "collective actions." Typically, one or more technicians in a particular job classification, for example, a pressure pumper, would file a lawsuit on their own behalf and all those similarly situated on a national level. The plaintiffs would state that the class should have been classified as non-exempt and would seek damages for overtime wages retroactively for three years, liquidated damages in the amount equal to that of the unpaid overtime and attorneys' fees. These lawsuits were filed against large, medium and small companies.

Many companies settled and continue to settle because a number of levels within a certain category of technicians were misclassified, and exposure for liquidated damages and attorneys' fees were real. Moreover, oilfield services companies have been and continue to reclassify technicians as non-exempt, but face many hurdles, given the present state of the economy in the oil and gas industry and the applicable regulations.

On May 18, 2016, President Obama and U.S. Secretary of Labor Thomas Perez announced the publication of the DOL's final rule updating the overtime regulations. The new rules increase the standard annual salary for exempt employees to $47,476 ($913 per week), more than doubling the previous standard. The annual salary for highly compensated employees has been increased to $134,004. These salary thresholds go into effect December 1, 2016.

Despite these changes, the "duties" tests to determine whether employees are properly classified under executive, administrative or professional exemptions remain the same. So, the service companies' adjusting salaries to meet the yearly thresholds under the new standards is not enough. The salaried employees under the exempt categories must still meet the requisite duties test.

Currently, service companies are reclassifying these affected technicians to hourly, non-exempt employees. This process begets many daunting challenges and poses a number of questions.
For decades, service companies in the oil and gas industry compensated these technicians by paying a monthly salary. Additionally, these technicians were paid a number of different bonuses; for example, day rates, job bonuses, a percentage of a job ticket and/or safety bonuses. Generally, the monthly salary was perceived by the employee as a steady level of income, so that the employee and his/her family could count on these funds to pay for certain recurring expenses.

With the reclassifications, what income and for what period does the service company use to calculate the hourly rate? Does the company include all income that an employee made for the last 12 months? Is it an average of all the technicians on a national level, or should the average be calculated on a local or regional basis? Or, does each product line calculate its own average?
This new hourly rate calculation struggle is further compounded in that a significant portion of these technicians are employed on a rotational basis. That is, they work for a stated period of time (typically seven, ten or 21 days) and then are off for a stated period of time (usually seven or ten days). Does the company only pay the employee for time worked while on a rotational basis? Or, does the company use two or more hourly rates of each category of employee depending upon the employee's duties, such as field work, equipment preparation or special shop work?
If a company creates a position that has rotation of 21 days on and 21 days off (typically for offshore work), will the employee on his/her time off be eligible for unemployment benefits under applicable state law?

The Code of Federal Regulations (CFR) established regulations relating to what constitutes work and when it starts and stops. The information technology world within this economic sector has changed from paper to digital at supersonic speed. If a technician is on his/her free time (not on his or her tower), how many emails and his/her responses to them constitutes "work" such that the hourly technician will have to be paid for responding to those emails? As a general rule, if an employee is performing any task that is for the benefit of the employer, it is compensable time.

This latter issue is a good segue into another possible land mine for the service companies: record keeping. The DOL has adopted regulations that address record keeping requirements. When adopting time recording policies and procedures, service companies should consider both what is legal and permissible, and what is necessary to minimize the likelihood and severity of class litigation. An employer has a duty to assure that payroll records are detailed and accurate. These duties cannot be delegated to the employees.

With respect to service companies, the general practice is to track time using paper, computers and/or phone applications. These record keeping requirements impose additional burdens. Generally, any phone application requires a smart phone which allows the employee to log on and log off. These requirements will have to be accomplished by the employee. And, the company should supply these smart phones, lest they run afoul of privacy issues, if the company requires the employees to use his/her private phone. Then, the company is taxed with additional security issues with respect to communicating with the employee's payroll information. An alternative to the "smart phone" is using a central computer in the field or at "man camps." A single source for the employees to input time also poses practical problems. If the computer is solely used by a supervisor or manager, how and when will the employee have access? How does the service company properly isolate other company confidential information from those hourly employees inputting the hours worked?

With regard to keeping records on paper, the service companies will potentially be required to have fax machines at every one of their customer's work locations or at the "man camps." As seen in the past, paper records in the field or at the companies' service centers can lead to opportunities for fraud.

The current slump in the oil and gas industry, particularly with respect to service companies, has knocked everyone off of their traditional feet. No one knows with any degree of probability when the market will rebound, but the industry is seeing several early trends. First, the exploration and production companies are looking more at viable returns than at pure production numbers. There will be more analyses undertaken before any drilling begins. Moreover, these same companies have publicly reiterated that they expect the service companies to provide better services at more predictable lower costs.

What will this mean for the service companies when they have a work force of mixed exempt and non-exempt technicians? Even if the service companies switch every technician to an hourly rate, how will the service companies quote a particular job? In the past, service companies would quote day rates for these technicians, and generally speaking, the operator could estimate the time needed to perform certain duties. The service companies will be hard-pressed to estimate the hours required to perform those same services on a given well. And, will the operators shift estimating costs and burden to the service companies? Could this mean limiting hours of technicians or hiring additional ones?

Recently, a very large service company announced that in the future it may drop service lines that have been less profitable. Another very large service provider announced that it will no longer offer the same scale of integrated services in all of its locations. How these factors will influence the market remains to be seen.

The above is based upon federal law. Each service company will have to be very familiar with wage and hour laws in each state in which it operates. Recall that if a particular state's wage and hour law is more stringent than the federal wage and hour law, then the state law will govern.