

\$175 MILLION IN EMPLOYER FINES & PENALTIES IN 2002
.....ARE YOUR EMPLOYEES PROPERLY CLASSIFIED UNDER THE FLSA?

The Department of Labor (DOL) collected fines and penalties totaling \$175M from employers in fiscal year 2002 for Fair Labor Standards Act (FLSA) violations including \$18M from Starbucks, \$22M from the Bank of America and \$25M from Rite Aid. The violations were a result of improperly classified employees (exempt vs non-exempt) and the resultant pay practices errors. The 2002 employer fines and penalties were more than 30% above the dollar value of 2001 fines and penalties; the largest amount collected in 10 years; and more than double the amount collected for discrimination related lawsuits.¹ In 2003, enforcement agencies continue to aggressively pursue FLSA class action claims against employers of all sizes. This article provides with an overview of the FLSA, the penalties for noncompliance, and recommended business practices to minimize the chances of your organization violating the exemption pay and record keeping requirements of the Act. The information presented was gleaned from various legal seminars, training programs and recent business magazines and newspaper articles.

The FLSA, administered by the Wage and Hour division of the DOL, applies to private-sector employers and retail services with two or more employees and minimum annual gross sales of \$500,000. The FLSA regulates child labor, minimum wage, overtime pay, record keeping and other administrative employer pay requirements. One of the primary objectives of the FLSA, and the focus of this article, is its exemption classification system. It is the **exempt** or **nonexempt** classification that determines the overtime pay requirements under the FLSA and where employers should exercise great caution. Almost all US workers are covered under the FLSA with the exception of independent contractors or the rare few that are legally exempt from coverage. Remember this, the actual job duties and responsibilities determine exemption status *not* job titles or pay structure (hourly vs salary).

For a position to be exempt it must meet the requirements of *both* the DOL salary basis test and the duties test. The salary basis test states that to be considered exempt the position must earn a minimum weekly salary of \$455 (rev 8/2004). The duties test states that to be considered exempt the employee must exercise specialized knowledge, discretion and independent judgment in the performance of non-routine tasks. Accordingly, the FLSA classifies executives, administrative management, outside salespeople or professionals that meet both the salary basis test and the duties test as **exempt**. Exempt employees are paid the same pre-determined amount of compensation regardless of the number of hours worked or the quality of work and not entitled to overtime pay. The FLSA defines **non-exempt** employees as those whose tasks are highly administrative and performed under the direction and discretion of an exempt management level employee. Non-Exempt employees are entitled to overtime pay at one and one-half (1½) times their base pay for *hours worked* over 40 in a *workweek*. *Hours worked* is an important distinction in the overtime calculation as it only includes hours actually worked (not time compensated for vacation, holiday, or other paid time off categories). A *workweek* is any fixed, recurring period of 168 consecutive hours (7 days x 24 hours = 168 hours). Once the *workweek* is established it becomes the consistent metric that must used to calculate overtime pay requirements.

Current and former employees can file for claims against employers for up to three-years for suspected willful FLSA violations and up to two-years against employers found to be acting in “good faith.” As a result, the FLSA requires employers to retain basic timesheet and payroll

¹ Clark, Margaret, M., Employer, Audit Thyself, HR Magazine, February 2003 p.p. 64 – 71.

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data for its workforce for a three-year period. It should be noted that FLSA claims are generally excluded from any protections under your employment practices liability insurance and employees cannot legally waive or release their claim through a release agreement as outlined in the Act.

The fines and penalties of non-compliance for just one employee can be thousands of dollars and the costs grow exponentially when multiple employees join together to file a class action FLSA lawsuit. Employers found in violation of the FLSA may be required to pay double damages equal to unpaid wages plus the same amount in liquidated damages unless they can prove they acted in “good faith.” The fines and penalties described do not account for legal fees, morale and productivity losses and the possible negative publicity that results from an FLSA class action lawsuit. In addition, federal contractors subject to the Davis Bacon and Service Contract Acts risk debarment from future contracts.

Compliance is the best strategy for protecting your organization. You can minimize your chances of an FLSA claim by implementing one or more of the systems and practices described below.

- Maintain accurate and detailed payroll records and timesheets;
- Write job descriptions consistent with the responsibilities actually performed;
- Document the methodology and structure of your compensation system;
- Verify that Policies & Procedures Manuals and Employee Handbooks accurately document your management practices;
- Assign a person accountable for FLSA compliance and pay practices; and
- Assess on a regular basis the impact of any organizational changes on the responsibilities of positions and update and reclassify positions as needed.

HiRe Expectations, Argy, Wiltse & Robinson’s human resources and management consulting practice, develops cost effective workforce solutions that improve the productivity and minimizes the potential for employment-related litigation. **Through June 30, HiRe Expectations will conduct a complimentary comprehensive Human Resources Assessment of your workforce practices including federal and state compliance requirements including wage payment practices and job classification systems, benefits analyses, and policies and procedures review to identify employment practices risks and estimated non-compliance costs.** For additional information, contact Michelle Geddes at 703 770 6343 or mgeddes@HiRe-Expect.com. Visit our website at www.HiRe-Expect.com.

¹ Clark, Margaret, M., Employer, Audit Thyself, HR Magazine, February 2003 p.p. 64 – 71.