Texas and Federal Wage and Hour Laws

William T. Simmons
Legal Counsel to Commissioner Tom Pauken
Commissioner Representing Employers
Texas Workforce Commission
tommy.simmons@twc.state.tx.us
www.twc.state.tx.us/news/efte/tocmain.html

What Wage and Hour Laws Do And Do Not Do

The FLSA covers:
- minimum wage ($7.25/hour)
- overtime
- child labor
- equal pay

The TPL covers:
- timely payment of wages in full
- enforcement of the wage agreement
- final pay
- wage claims
- it does not cover school districts

The law does not require:
- breaks
- premium pay
- shift differentials
- raises

* unless such benefits are promised in a written policy or agreement

- vacation or sick leave
- holiday pay
- severance pay
- pension benefits

** unless business expenses take an employee below minimum wage

FLSA Coverage

- Individual coverage – employee’s work involves interstate commerce
- Enterprise coverage – employer is involved in interstate commerce and has at least $500,000 in gross annual revenues
- All schools, hospitals, nursing homes, and residential care facilities are covered regardless of revenues
- All governmental entities are covered
- Exceptions: churches and other similar entities that are not organized for a business purpose, unless they engage in business activities
Trainees – Six Criteria

- Training similar to voc ed school
- Training for benefit of trainees
- Trainees don't displace regular EEs – under close observation
- ER has no immediate benefit
- No guarantee of a job
- ER and EE both agree that the training time is not for wages

Minimum Wage – Historical View

Minimum Wage – Allowable Deductions

- Payroll taxes and other legally-required deductions
- Court-ordered garnishments (child support)
- Meals, lodging, and other facilities
- Voluntary wage assignments, loans, and advances
- Vacation pay advances
- Uniforms and uniform cleaning costs *
- Tip credits
- Union dues
- Cash losses due to misappropriation *
- Keep other laws in mind!

Hours of Work

- Includes all time during which the employee is at the disposal of the employer, i.e., “suffered or permitted to work”
- Waiting or on-call time
- Breaks
- Preparatory and concluding activities
- Time spent in meetings and training programs
- Travel time
- Time worked does not include paid leave
- Hours worked and the FMLA – goes by FLSA rules

Voluntary or Unauthorized Overtime

- If overtime is worked, employer must pay for it
- Whether it was authorized or wanted is irrelevant
- Employer may handle unauthorized overtime as a disciplinary matter
- Employees may not voluntarily give up the right to overtime pay – agreements to contrary are void
- No working “off the clock” allowed
Calculating Overtime Pay

- Hourly: time and a half over 40 hours
- Salary: salary ÷ number of hours the salary is intended to compensate = regular rate
  - Regular hours < 40: add regular rate for each hour up to 40, then pay time and a half for hours over 40
  - Regular hours = 40: time and a half
  - Regular hours > 40: pay hours from 40 up to regular schedule at half-time, then time and a half past that
  - Irregular hours: regular rate = salary + total hours, then pay half-time for all hours over 40
- Other pay methods: regular rate = total pay ÷ total hours; add half the regular rate for each overtime hour
- Public employers may give comp time at time and a half

Part 541 Changes - DOL

- DOL has issued new white-collar exemption regulations – effective date 08/23/04
- Minimum salary - $455/week (biweekly: $910; semi-monthly: $985.83; monthly: $1971.66) – on annual basis, that is $23,660.00
- Annual total compensation of at least $100K gets presumption of exempt status
- Duties test – focus is on “primary duty” of exempt work – exempt employees customarily and regularly perform an exempt duty as their primary duty

White Collar Exemptions

- Salary level, salary basis, and duties tests
- Salary and title make no difference by themselves
- These include outside sales representatives
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Salary Basis Test

• True salary
• No partial-day deductions
• Partial-week deductions only if specifically allowed (absences due to personal business, medical reasons, unpaid suspensions)
• Special exception for FMLA
• Special rules apply for governmental employers, including school districts
• Extra pay for extra work is OK

Duties Test

Common threads:
• Discretion and independent judgment
• Primary duty

Easiest Ways to Tell If An Employee is Exempt

• They’re your boss
• They sign your paychecks
• They design workplace policies
• They decide rates of pay
• They decide on promotions
• They’re the ones the subordinate employees criticize behind their backs
• They do the work only a licensed professional can do
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Exempt Salaried Employees
- the company is buying results, not specific amounts of time
- no way to tell how long specific projects or tasks will last
- discretion and independent judgment are major criteria
- other employees look to exempt employees for leadership
- their decisions affect other employees’ jobs and the company as a whole

Executive Exemption
- Primary duty is management of the enterprise or a recognized department or division
- Customarily and regularly supervises two or more employees
- Authority to hire and fire, or else has substantial power to recommend such actions
- Examples: president/CEO, district superintendent, school principal, department head, general manager

Administrative Exemption
- Primary duty is office or non-manual work directly related to management or general business operations of employer or employer’s customers
- Exercises discretion and independent judgment as to matters of significance
- Not “line employees”
- Examples: department head, personnel director, COO/CFO, VP for Administration, marketing manager, database administration
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Professional Exemption

- Primary duty is work requiring advanced knowledge in a field of science or learning that is customarily acquired by a prolonged course of specialized intellectual instruction
- At least a four-year college degree in employee's field of work
- Not skilled trades, but rather established professions, generally involving state licensure or certification
- Examples: physician, attorney, teacher, engineer, architect, CPA, scientist, pharmacist, registered nurse

Creative Professionals

- Primary duty is work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor
- Does not include work that primarily depends upon intelligence, diligence, and accuracy, or that can be done with general manual ability or training
- Examples: musician, novelist, playwright, actor, painter, photographer, cartoonist, editorial writer, investigative journalist

Computer Software Professional / Computer Employee Exemption

- Top computer programmers, systems analysts, or network administrators
- Webmasters arguably included as well, depending upon scope of job
- Straight-time hourly pay of at least $27.63 per hour, or salary of at least $455/week
Special Exemption

- Physicians, attorneys, and teachers are exempt from any salary or fee requirement
- Exempt from federal minimum wage as well
- Also exempt from state minimum wage

Coverage of the Texas Payday Law

- All private employees in Texas
- All private employers in Texas
- Governmental employers and employees are not covered
- Thus, ISDs are not covered
- Independent contractors and volunteers are not covered

Purposes of the Texas Payday Law

- Enforces the wage agreement in effect when the work was performed
- Prohibits illegal wage deductions – only legal if:
  - Ordered by a court
  - Required or specifically authorized by a law
  - Made for a lawful purpose and authorized in writing by the employee
- Requires timely payment of wages due, at least twice/month for non-exempt employees and once/month for exempt employees
- Provides a deadline for final pay
- Provides a claim and appeal process for wage claims
Deductions Under The Texas Payday Law

- deductions do not have to be authorized in writing by the employee if they are ordered by a court (child support), or else are required or specifically authorized by law (payroll taxes, etc.)
- deductions made for any other reason must be authorized in writing by the employee
- have all employees sign wage deduction authorization forms listing all reasons you are likely to ever need to deduct pay

Pay Agreements

- generally governed by contracts under the Education Code, and by district policies and rules
- educators and other professional staff are paid minimum salaries under Educ. Code § 21.402
- the more complicated the arrangement is, the more important it is to put it in writing
- a retroactive pay cut will always violate the law

Methods of Pay

- hand-delivery to employee at work
- hand-delivery at other place agreed to by employee
- registered mail, to arrive no later than payday
- delivery to another person designated by the employee in writing by a method similar to first three methods
- any reasonable method agreed to by employee in writing
- direct deposit if employee has bank account
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Direct Deposit

- OK under both FLSA and TPL
- Must be voluntary on employee’s part, according to DOL (minimum wage issue)
- EEOC issues as well (minimum wage and disparate impact)
- Acceptable method of wage delivery if employee has bank account
- Texas law doesn’t cover issue of forcing employee to have a bank account - FDIC prohibits employers from requiring employees to have a specific bank
- Payment by debit card – written authorization

Paying on Time

- No specific penalty for paying late, other than contractual remedies
- Employer cannot hold paycheck pending return of items or repayment of loans
- Employer cannot hold paycheck pending submission of timesheets, unless there is no way to calculate pay otherwise
- Excessive late payments may lead to bonding requirement

Property Return Security Deposit

- Method for encouraging return of property
- Small deduction each pay period for PRSD
- 100% return to employee upon work separation if everything is returned in decent shape; offset against PRSD for replacement cost if some items are not returned
- TPL compliance: written authorization for deduction; written policy; the two can be combined into one form for ease of use
- Sample form is in the book Especially for Texas Employers (see http://www.twc.state.tx.us/news/efte/property_return.html)
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Garnishment of Wages

- Ordered by a court for the benefit of a third party
- Child support, alimony, bankruptcy
- Full faith and credit given to out-of-state court orders (even for consumer debts!)
- Exception to written authorization requirement of the Texas Payday Law – also exception to minimum wage
- Not the same as attachment of wages

Attachment of Wages

- Required by a law or agreement in order to satisfy a debt or obligation of some kind
- For the benefit of the government or the employer
- If for the government, it is an exception to the written authorization rule – also an exception to minimum wage requirement
- IRS tax levies, guaranteed student loans

Attachment of Wages 2

- If for the employer, subject to the written authorization requirement (Benton v. Wilmer-Hutchins I.S.D. case)
- For repayment of loans, wage advances, paid leave advances, or wage overpayments
- Exception to minimum wage
- Different from voluntary wage assignments
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Voluntary Wage Assignments

• Deduction for something of benefit to the employee
• Subject to the written authorization requirement
• Exception to minimum wage
• Employee contributions to group health or retirement plans
• Employer can have policy prohibiting third-party wage assignments, or else charge administrative fee to employee in the case of membership fees (Educ. Code §§ 22.001, 22.002)

Final Pay

• Determined by contract, or district policies and rules
• Must include all components of final pay
• Layoff or discharge: within six calendar days of discharge
• Voluntary quit: by next regularly-scheduled payday
• Exception: commissions, bonuses, and fringe benefit payments covered by written contract, policy, or agreement – simply follow the agreement and the timeline in it
• Nature of work separation is determined by TWC’s rules on unemployment claims

Impact on Other Laws

• NLRA issue with salary confidentiality policies (private sector, but be aware of this issue)
  – Employer can’t prohibit wage discussions between employees regarding their own wages
  – Employer can prohibit improper access of confidential wage information, including inducing others to allow such improper access
  – Employer also doesn’t have to allow such discussions during work time, but should be consistent
• UI cases:
  – Failure to submit timesheets properly is usually not cause to delay wages, but can be misconduct
  – Frequent late wage payments can be good cause to quit
SSN Confidentiality

- New statute effective 01-01-05 prohibits public display of SSNs
- Put SSNs on mailed items (such as paychecks and pay stubs) only if employee is given an annual reminder of the right to request that the SSN not appear on such a document (exception: W-2s and similar documents required by law to include the SSN)

FLSA and Other Laws

- DOL audits often follow I-9 audits
- Texas Payday Law includes FLSA enforcement, but TPL rules on deductions are tougher than FLSA rules
- FMLA and FLSA “hours worked” regulations are the same

FLSA Liability

- Conciliation
- Civil action by DOL for back pay and damages
- Injunction
- Criminal action
- Civil actions by employees
- If no violation found, “right to sue” letter under 216(b) of FLSA
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Claims and Audits

- Present all information promptly
- Be organized
- Educate yourself about basics
- Treat DOL person with respect
- Know a good deal when it's offered
- Hire legal counsel for tough cases

Tips for Compliance

- Educate yourself about wage and hour law
- Train other managers and payroll department staff
- Call DOL and TWC for help, advice, and training if possible
- Correct violations ASAP!
- If higher-ups balk, remind them of personal liability risk
- Document your advice to senior management and advise them of the possible consequences

Thanks for your attendance!

tommy.simmons@twc.state.tx.us
www.texasworkforce.org

Especially for Texas Employers book:
www.twc.state.tx.us/news/efte/tocmain.html

1-512-463-2826 or
1-800-832-9394