

Optimizing Your Most Important Asset: Human Resources

Marine Terminal Management Training Program

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Fair Labor Standards Act

- Complex federal statute governing minimum wage and overtime
- Complex regulations covering exemptions, compensable time, wage calculations, recordkeeping and enforcement
- Complicated further by state and municipal wage laws
 - Different minimum wage rates
 - Stricter overtime obligations

OVERVIEW OF THE FLSA

BASIC TENETS OF THE FLSA

- Who is an employer?
- Who is an employee?
- What is work time?
- What is the base rate?

OVERVIEW OF THE FLSA

- *Employ*: Includes to suffer or permit to work
- *Commerce*: Trade, commerce, transportation, transmission, or communication among the several states or between any state and any place outside thereof (more than threshold amount)

The Fair Labor Standards Act

- Sets floor for minimum wage and overtime requirements for non-exempt *employees*
- Current minimum wage = \$7.25/hr except for work on federal contracts post 2015
- Overtime pay at one and one-half times the employee's regular hourly rate for **all *hours worked*** in excess of 40 hours in a 7 day workweek

Exempt v. Non-Exempt

- Most employees are non-exempt – an exempt employee can make six figures a year
- Non-exempt employees must be paid:
 - No less than minimum wage (currently \$7.25) for all hours worked
 - Time and one-half (1½) regular hourly rate for all hours worked over 40 hours in a 7-day workweek
- Exempt employees fall within specific exemption
 - Not obligated to pay minimum wage for all hours worked
 - Not obligated to pay overtime

White Collar Exemptions

- **Executive**
- **Administrative**
- **Professional**
- **Certain Computer Employees**
- **Outside Salespeople**

MINIMUM WAGE AND OVERTIME REQUIREMENTS

Basic Requirements:

- Minimum Wage
- Overtime
- Nothing about vacations, holidays, severance, unpaid wages (except minimum wages)

MINIMUM WAGE AND OVERTIME REQUIREMENTS

“Work Week”

- Basic unit of measure
- 7 consecutive 24 hour periods
- No limit on hours that employee can be required to work on daily or weekly basis
- Payroll period need not coincide with work week

MINIMUM WAGE AND OVERTIME REQUIREMENTS

“Hours Worked”

- Regular work
- Incidental Activities
- Also need to consider what is in the base rate used to calculate overtime rate

Employee or Independent Contractor: Why it Matters

Why Do Companies Try to Use Independent Contractors Instead of Employees?

Cost

- Payroll Taxes – as much as 30% of payroll costs (competitive advantage over other employers)
 - Social Security
 - Medicare
 - Unemployment Compensation
 - Workers' Compensation (but Comp Bar)
- Decreased Administrative Costs
- Benefit Plans and Overtime
- Affordable Care Act

Exempt from Coverage Under Workplace Laws

- Employment laws are based on employee/employer relationship
 - Wage and hour laws
 - State wage payment laws
 - Some anti-discrimination laws (e.g. Title VII, ADA, ADEA)
 - National Labor Relations Act
 - FMLA
 - WARN Act
 - Unemployment Compensation
 - Workers' Compensation
 - Less (if any) liability for torts committed by independent contractors
 - No requirement to obtain proof that workers are eligible to work in the US (I-9)
- No legal responsibility for withholding taxes

Who's interested in misclassification?

Agency

Affected Areas

DOL

- Wage & Hour (FLSA)
- Unpaid Leave (FMLA/USERRA)
- Immigration/I-9 issues

IRS

- Federal income and payroll taxes
- ACA

EEOC

- Employment discrimination
- Union organizing, ULPs, and collective bargaining

NLRB

The workers

- Overtime, employee benefits, etc.
- Retirement and disability coverage and payments

SSA

State and Local
Agencies

- Unemployment
- State income taxes
- Workers compensation
- Wage & Hour and Wage Payment

Increased Enforcement Efforts

- The U.S. Department of Labor (DOL) is engaged in a multi-agency initiative to strengthen federal and state efforts to identify employee misclassification
- MOUs with at least 14 states on coordinating information sharing and enforcement
- Memorandum of Understanding (MOU) with IRS (which itself has information sharing agreements with 37 states)
- Targeted industries where substantial misclassification problems have been identified
- New Labor Secretary has vowed to make this a priority and is a party in the recent port trucking decision

Independent Contractor or Employee?

Different Laws Apply Different Tests

- DOL “Economic Reality” Test (FLSA)
 - Wage and Hour
- Common Law Test
 - NLRA & ERISA
- IRS Three-Factor Test
- State Law Tests
 - A/B test
 - ABC
 - Common Law

Trends - 2014 and Beyond

- More federal and state agency enforcement activity – especially in port trucking area
- More class/collective actions, especially wages
- More proposed employee protective legislation, especially as to wages, time off, sexual orientation and gender identity
- Escalating issues around the Affordable Care Act, including employee classification and employer coverage challenges
- More same-sex benefits and discrimination issues

Social Media and Bring Your Own Device Issues

What rights do employees have?

- While private employees generally have fewer rights than public employees since no First Amendment protection in private employment some states have privacy rights
- Host of other electronic communications laws apply – traps for the unwary
- Public employees also have First Amendment rights on matters of public concern
- NLRB has stepped in

What can you do?

- Employee makes inappropriate comment on Facebook. Can you fire employee?
 - Case-by-case basis
 - Example: Teacher made comment about students, many of whom were African-American or Latino.
 - “I’m a teacher – I’m a warden for future criminals!”
 - Teacher fired for discriminatory comments.

What can you do?

- Walmart Employee saw photos of co-worker at 4th of July party when individual had been out sick.
- Employee went on co-worker's Facebook page and accused co-worker of lying about reason for absence from work.
- Employee fired for violation of company policy that required work-related complaints by using open door policy rather than posting on social media.

What can't you do?

- NLRB says company policies that prohibit workers from discussing terms and conditions of employment with co-workers interferes with “protected concerted activity” under NLRA. This applies to all statutory employees.
- FLSA requires overtime pay where non-exempt employees work more than “insignificant” or “insubstantial” (de minimis) overtime. Recent class certification in off-duty Blackberry access police case.
- Computer Fraud and Abuse Act, Electronic Communications Protection Act, etc., etc., etc. Swords with two edges on dual use devices.

Bring Your Own Device (BYOD)

- Employment law concerns
 - Personal privacy
 - Off duty monitoring/tracking - FLSA
- Record retention
- Expectation of privacy
- Litigation impacts
 - **Discovery Burdens**
 - **Discovery Benefits**

BYOD Policies

- Limit expectation of privacy in device
- Sets rules for safe use (NEVER while driving)
- Consider whether to require a remote-wiping application
- Specifies whether off-duty nonexempt employees are expected to check email and addresses FLSA implications
- Restrict sharing of confidential information where legal

How to Balance the Rewards and the Risks

- Well drafted social media policy
- Well trained employees
- Oversight by appropriate employees prior to employer-generated content
- Monitoring of sites
- Know what you can and can't do, at the federal level and in your state

Social Media Policy Guidelines

Purpose

- The Company recognizes that the internet provides unique opportunities to participate in interactive discussions and share information using a wide variety of social media, such as Facebook, Twitter, blogs and wikis. However, the use of social media can pose risks to our confidential and proprietary information, reputation and brand, and can compromise our compliance with business rules and laws.
- To minimize all these risks, to avoid loss of productivity or job performance and to ensure that our assets are used only for appropriate institutional purposes, we expect all employees to adhere to the following guidelines and rules regarding use of social media.
- Apart from personal use of social media in accordance with this policy, we encourage all employees to utilize responsibly these media as a means of generating interest in the Company.

Social Media Policy Guidelines

Compliance With Related Policies and Agreements

- This Policy does not affect other policies of general applicability that might apply to use of social media. Employees should continue to follow those policies when using social media. In particular, the following non-exhaustive list of policies should be kept in mind: *[list related policies]*.
- If your social media use would violate any of the Company's policies in another forum, it will also violate them in an online forum. *For example, employees are prohibited from using social media to: [list specific prohibitions, if desired].*

Social Media Policy Guidelines

Personal Use of Social Media

- Personal use of social media is never permitted on working time or by means of the Company's electronic communications systems.

or

- Occasional personal use of social media is permitted, provided it does not involve unprofessional or inappropriate behavior or content and does not interfere with your employment.

Social Media Policy Guidelines

No Expectation of Privacy

- The Company's electronic communications systems, and all the information stored thereon, are the property of the company. Employees should have no expectation of privacy whatsoever in any data in any format or any other kind of information or communications transmitted to, received or printed from, or stored or recorded on any of these systems.
- The Company reserves the right to monitor all employee usage of these systems and to intercept and review any data or communication, in any format, using these systems, including but not limited to social media postings and activities. You consent to such monitoring by your acknowledgement of this policy and your use of such assets and systems.
- The Company may store copies of such data or communications for a period of time after they are created, and may delete such copies from time to time without notice.
- Do not use the Company's electronic communications assets for any matter that you desire to be kept private or confidential.

Social Media Policy Guidelines

Protecting Our Reputation

- The Company [identify applicable policy(ies)] prohibits the posting of disparaging or defamatory statements about the Company. You should also avoid social media communications that could be understood to damage our brand and our reputation.
- Unless otherwise authorized, you are speaking on your own behalf in your social media postings. Write in the first person and use your personal e-mail address when communicating via social media.
- You are personally responsible for what you communicate. You cannot control your audience or the length of time a posting is available. Keep this in mind before you post.
- If you identify yourself as our employee, include a disclaimer that your views do not represent ours (e.g., “the views in this posting do not represent the views of the Company”).
- If you communicate about your work or the Company in general, disclose your position. Remember that anything you say can reflect on the Company, even if you include a disclaimer. Strive to be accurate. Remember that your posts could result in liability for yourself or us. Be respectful. Be professional. Be honest.
- If you are uncertain or concerned about the appropriateness of any statement or posting, refrain from making the communication.
- If you see content on the internet, including on social media sites, that disparages or reflects poorly on the Company, please contact [identify contact person].

Social Media Policy Guidelines

Respect Intellectual Property and Confidential Information

- The Company's [identify policy(ies)] restricts employees' use and disclosure of the Company's confidential information and intellectual property. You should treat the Company's trade secrets, confidential information and intellectual property confidentially and not jeopardize them through your use of social media. You also should avoid communications regarding the intellectual property and confidential information of third parties that you learned of through your employment. Such communications can create liability for yourself and for the Company.
- Do not use the Company's logos or other trademarks, or post any confidential or proprietary information about the Company, without prior written permission.

Social Media Policy Guidelines

Respect Your Co-Workers and Other Stakeholders

- Do not post anything that your co-workers or the Company's business partners or other stakeholders would find offensive, including ethnic slurs, sexist comments, discriminatory comments, insults or obscenity.

Social Media Policy Guidelines

Acknowledgement of Receipt and Review

- I have received and read a copy of the Company's Social Media Policy and understand its contents. I understand that the Company expressly reserves the right to change, modify or delete its provisions without notice.
- [employee signature with date]