The Fair Labor Standards Act

HELPING DEALERS UNDERSTAND UPDATES TO THE “WHITE COLLAR” EXEMPTIONS AND ENSURE COMPLIANCE WITH OTHER RELEVANT FLSA EXEMPTIONS COMMONLY USED IN EQUIPMENT DEALERSHIPS.
AGENDA

1. Welcome/Overview
2. Litigation Facts
3. Rules for Non-Exempt Employees
4. “White Collar” Exemption
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5. Types of Exemptions & their Requirements
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6. Other Exemptions
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Employers who fail to accurately pay wages in accordance with the FLSA can be sued by employees seeking damages. Claims may include:

- Misclassification;
- Failure to Pay Overtime;
- Failure to Pay Minimum Wage;
- Retaliation.

Damages recoverable under the FLSA include:

- Attorneys fees;
- Back pay;
- Liquidated damages (i.e. double back pay) – these are considered automatic unless the employer can prove it did not “willfully” violate the FLSA;
- The two years of damages can be increased to three years if the employee can show that the employer acted “willfully” in not complying with the FLSA.
Wage/Hour Litigation Facts
For Employers

Employers can attempt to avoid liquidated damages by demonstrating:

- Their actions were taken in good faith and the violation was not willful;
- The employer had (objectively) reasonable grounds to believe that its pay structure complied with applicable law.

In order to avoid liquidated damages, an employer must show it took steps to learn what the law required and to comply with the law.

- Seek qualified wage/hour counsel;
- Follow counsel’s advice;
- Complying with guidance from the DOL after a DOL audit/investigation.
- Do this before an employee accuses you an unfair/illegal pay practice!
Wage/Hour Litigation Facts
For Employers

If you wait until a claim is filed to think about your dealerships compliance with the FLSA, you are too late!

From 2007-2015 the average amount paid by employers to settle wage/hour claims was $6.9 million. (July 2015 NERA Economics Consulting Study).

Damages are usually not insurable under an EPL policy. Some insurers will now offer cost of defense coverage for these claims but this coverage does not include payment to settle the claims and/or to pay any judgment entered against the employer.
Wage/Hour Litigation Facts
For Employers

Collective nature of FLSA claims means that if an employer has more than one employee misclassified (in the same or similar job categories), then:

- The court is likely to force the employer to provide the Plaintiff’s counsel with all “potential” plaintiffs’ contact information (current and former employees of that specific job type for a three year period); and
- Allow the Plaintiff’s attorney to educate the “potential” plaintiffs about their potential claims against the employer (your dealership);
- The court may require the employer (your dealership) to distribute the plaintiffs counsel’s “educational” materials about their (the potential plaintiffs’) claims to the employer’s current employees via a public posting in their workplace or by sending them to these employees with their paystubs.
- Allow Plaintiff’s attorney to “invite” the current/former employees to sue the employer.
Break for Questions

COMMITTED TO BUILDING THE BEST BUSINESS ENVIRONMENT FOR EQUIPMENT DEALERS.
Rules for Non-Exempt Employees Under the FLSA

Non-Exempt Employees:
- Must receive Overtime Pay for all hours worked beyond 40 hours in a single workweek
- Cannot average hours over two weeks
- Must receive at least the applicable minimum wage per hour
- Must record all time worked:
  - This burden is on the Employer. Employers should have a pay record policy and ensure that the policy is enforced;
  - Failure to ensure that time is accurately recorded puts the employer at a disadvantage in the event of a wage/hour lawsuit;
  - Plaintiff can make prima facie showing by producing “sufficient evidence” of amount and extent of work (very low burden);
  - Employer must then produce evidence of precise amount of work performed; or
  - Produce evidence to negate the inference.
“White Collar” Exemptions
Under Section 13(a)(1)

White Collar Exemptions alleviate some of an employers’ duties under the FLSA.

For exempt employees, the employer:
- Has no obligation to pay overtime pay;
- Has no obligation to pay minimum wage;
- Has no obligation to keep time records for the exempt employee.
  - May not be wise depending on pay structure.
  - Tracking an exempt employee’s time does not jeopardize the exemption.
“White Collar” Exemptions Under Section 13(a)(1)

To qualify for one of the “White Collar” exemptions, an employee must:

- Be paid a salary.
  - Must be paid a predetermined and fixed salary that is not subject to reduction because of variation of quantity or quality of work performed.

- Meet the minimum pay requirements.
  - Currently $455 per week.
  - Beginning December 1, 2016 - $913 per week

- Meet the duties test for their specified exemption.
  - Employee’s duties must primarily involve those associated with the specific exemption.
White Collar
Salary Requirement Under the FLSA

An exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked.

Exempt employees do not need to be paid for any workweek in which they perform no work.

Improper deductions by an employer can lead to a determination that the employee is not exempt.
White Collar
Salary Requirement Under the FLSA

Deductions from an exempt employee’s salary are only permitted when:
- The initial or final week of employment (if the employee does not work the full week);
- When an employee takes unpaid leave under the FMLA;
- When an exempt employee is absent from work for one or more full days for reasons other than sickness or disability;
- When an exempt employee is absent from work for absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing paid sick leave;
- To offset amounts employees receive for jury duty, as a witness fee, or the like;
- Penalties imposed in good faith for infractions of safety rules of major significance;
- For unpaid disciplinary suspensions imposed in good faith.
White Collar Minimum Salary Requirements

Previously, the minimum salary requirement under “white collar” exemptions was $455.00 per week.

Under the new rule, in order for an employee to be exempt under the Administrative, Executive or Professional Exemptions, that employee must be paid:
- At least $913.00 per week.
- At least $47,476 per year.
- At least $27.63 per hour (computer exemption only).

Up to 10% of the amount paid may consist of non-discretionary bonuses or incentive payments. ($91.00 per week).

Must be paid to the employee on a quarterly or more frequent basis.
White Collar Minimum Salary Requirements - Bonuses

To qualify as a non-discretionary bonus and/or incentive payment, generally the amount must be contractual in nature based upon a mutual understanding of the parties as to how the amount will be paid.

Discretionary bonuses are those bonuses which are not guaranteed because they are based solely upon the employer’s desire to pay them (there is no contractual obligation to do so).

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<tr>
<th>Discretionary</th>
<th>Non-Discretionary</th>
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<td>Unannounced bonuses</td>
<td>Individual or Group Production Bonuses for quality or accuracy of work</td>
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<td>Performance bonuses made at the employer’s sole discretion</td>
<td>Incentive payments, including commissions</td>
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White Collar Minimum Salary Requirements - Bonuses

Under the new rule, employers can:

- Utilize commission or non-discretionary bonuses to make up 10% of the weekly salary requirement.
- If an employee does not earn enough non-discretionary bonus or incentive payment in a given quarter to meet this threshold, the DOL permits the employer to make a “catch-up” payment no later than the next pay period after the end of the quarter.
- If no catch up payment is made, the exemption is lost for the entire previous quarter and overtime pay must be paid to the employee.
- Take-away: If you are utilizing a commission or non-discretionary bonus to meet the minimum salary threshold, you should also have the employee record their time worked if there any chance the employee could fall below the threshold and not be eligible for a “catch-up” payment!
Fee Basis Pay

White collar employees can be paid on a “fee basis” rather than on a salary basis. The fee must meet the same salary requirement of $913.00 per week.

This type of pay system works for employees who paid an agreed sum for a single job (regardless of the time needed to complete the task) and is generally only used for employees performing unique tasks rather than a series of repeated duties.

Employers are advised to require the employee to keep time records to ensure that the salary minimum is being met.

*Limited/non-existent application in the dealership setting.*
“White Collar” Exemptions
Section 13(a)(1)/ 29 CFR Part 541

Exemptions for:

- Executive
- Administrative
- Professional
- Highly Compensated
Executive Exemption
Duties Requirements

All of the following job duties requirements must be satisfied:

- The employee’s primary duty must be managing the enterprise in which the employee is employed or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent;
- The employee must have the authority to hire or fire other employees, or the employee’s suggestion and recommendations as to the hiring, firing, advancement, promotion or other change of status of other employees must be given particular weight.
Professional Exemption
Duties Requirements

All of the following job duties requirements must be satisfied:

- The employee’s primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;

- The advanced knowledge must be in a field of science or learning (ex: law, medicine, accounting, actuarial computation, engineering, biological sciences, etc.). This does not include mechanical arts or skilled trades where knowledge is advanced but is not in a field of science or learning; and

- The advanced knowledge must be acquired by a prolonged course of specialized intellectual instruction. (Academic training is a standard prerequisite for entry into the profession).

- Application Advice: This exemption will not include most employees with technical training.
Administrative Exemption
Duties Requirements

All of the following job duties requirements must be satisfied:

- The employee’s primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and
- The employee’s primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.

Application Advice:

- Consider whether the employee is creating the policies/procedures or are they merely implementing the policies that are in place? Discretion is the hallmark of this exemption.
- A payroll manager may be exempt while a payroll clerk may not be. You must look at the specific facts!
- This is by far the most litigated FLSA exemption
Highly Compensated Employees

$134,004 annual pay required as of December 1, 2016.

May utilize non-discretionary bonuses and incentive payments toward $134,004 BUT the employer must pay at least the full standard salary of $913.00 per week for this exemption to apply.

Duties:
- Must customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee.
- “Catch-All” for employees who are highly paid but may not fit precisely into one of the exemptions.
Break for Questions

COMMMITTED TO BUILDING THE BEST BUSINESS ENVIRONMENT FOR EQUIPMENT DEALERS.
Other Common Exemptions Under the FLSA Remain Unchanged

- Farm Implement Dealer Mechanic Exemption
- Farm Implement Dealer Partsman Exemption
- Farm Implement Dealer Salesman Exemption
- Commissioned Sales Exemption
- Outside Sales Exemption
Other Common Exemptions Under the FLSA Remain Unchanged

These exemptions:
- Are not impacted by the significantly increased minimum salary requirements set forth in the “White Collar” exemptions;
- Have completely separate duties test(s);
- Are exemptions from overtime pay requirements but not:
  - (1) timekeeping; or
  - (2) minimum wage requirements.
Other Common Exemptions Under the FLSA

These exemptions are only applicable to employees of dealerships who are primarily (more than 50% of its business) engaged in the business of selling farm implements to consumers or end users. If the employee meets this preliminary threshold, the exemption apply to employees performing the following duties:

**Farm Implement Dealer Mechanic**
- The employee spends more than 50% of their time engaged in doing mechanical work and servicing farm implements;
- The employee spends less than 50% of their time performing non-mechanical work such as washing, cleaning, painting, polishing, changing tires, installing seat covers, oil changes, etc.;

**Farm Implement Dealer Partsman**
- The employee spends more than 50% of their work time engaged in the requisitioning, stocking and dispensing of parts for farm implements.
- Employees who deliver parts do not qualify for this exemption.

**Farm Implement Dealer Salesman**
- More than 50% of the employee’s work time is spent making sales of farm implements, obtaining orders for farm implements or obtaining contracts for the sale of farm implements.
Other Common Exemptions Under the FLSA

An employee who qualifies for one of these exemptions (Mechanic, Partsman, Salesman) is exempt from overtime pay. The employer, however, must still:

- Keep accurate time records for all hours worked by the employee; and
- Pay the employee at a rate in which they are never paid below the applicable minimum wage.

While the federal government sets a nationwide minimum wage, dealerships should check state/local minimum wage laws to ensure compliance.

To the extent state/local minimum wage rates are higher than the federal level, they will be controlling. The most effective way to ensure compliance is to pay the employee on a set, hourly basis for all hours worked.
Commissioned Sales Exemption

This exemption applies to retail and service establishments. As such, dealerships which do not sell farm implements (ie: OPE and Construction) may still qualify for this exemption.

A “retail and service establishment” is a company that 75% of its annual dollar volume of sales of goods, services, or both is not for resale and it is recognized as retail sales or services in a particular industry.

For an employee to qualify for this exemption, the employee must meet the following requirements;

- At least 50% of the employee’s total compensation (for a representative period not less than one month) must come from commissions;
- The employee must earn at least 1.5 times the applicable minimum wage for each hour worked (during each work week worked).
Commissioned Sales Exemption

An employee who qualifies for this exemption is exempt from overtime pay. The employer, however, must still:
- Keep accurate time records for all hours worked by the employee; and
- Pay the employee at a rate in which they are never paid below 1.5 times the applicable minimum wage.

While the federal government sets a nationwide minimum wage, dealerships should check state/local minimum wage laws to ensure compliance.

To the extent state/local minimum wage rates are higher than the federal level, they will be controlling.
Outside Sales Exemption

This exemption applies to retail and service establishments. As such, dealerships which do not sell farm implements (ie OPE and Construction) may still qualify for this exemption.

For an employee to qualify for this exemption, the employee must meet the following requirements;

- The employee must be primarily engaged in making sales or obtaining orders or contracts for which consideration will be paid by the client or customer;
- The employee is customarily and regularly engaged away from the employer’s place of business in performing their primary duties.
  - Similar to a door-to-door salesperson
  - An employee’s home office may be considered the “employer’s place of business” and, thus, an employee regularly working from their home may not qualify for the exemption.

Under the FLSA, employees under this exemption are exempt from 1) Minimum Wage (2) Overtime Pay and (3) Timekeeping requirements (State law may vary).
Break for Questions

COMMITTED TO BUILDING THE BEST BUSINESS ENVIRONMENT FOR EQUIPMENT DEALERS.
Defending Your Dealership: How to Prepare for Claims

DEALERSHIP LEADERSHIP SHOULD BE AWARE/SUPPORTIVE OF THE PERFORMANCE OF WAGE/HOUR (AND OTHER LEGAL COMPLIANCE) AUDITS.

- It will make dealership leadership more credible in a deposition and/or at trial if a lawsuit is ever filed.
- If a dealership’s leadership appears to have a lack of interest or familiarity with legal compliance matters, this does not “play well” for a jury.
- Dealerships should consider conducting compliance audits on a regular basis (such as the beginning or end of each fiscal or calendar year). These audits may be done in conjunction with reviews of other employment practices.
- This helps to demonstrate the good faith needed to avoid liquidated damages.
- Have a policy where employees can report pay discrepancies and ensure all complaints are investigated and addressed. Also, ensure that if there is a pay discrepancy that all similar employees are audited to ensure no other similar mistake was made.
- This allows the dealership to deal with any legal issues which arise in a proactive manner. If you wait until a claim is filed, you are too late!
Defending Your Dealership: How to Prepare for Claims

Regular or Annual Audits should:
- Check for compliance in high risk areas such as:
  - exempt employee classification;
  - independent contractor classifications;
  - calculations of regular rate of pay and overtime rate of pay of nonexempt employees; and
  - employee timekeeping and break practices.
Defending Your Dealership: How to Prepare for Claims

In addition to regularly scheduled audits, dealerships should be aware that certain events increase the risk of non-compliance. These events include:

- Reorganization or restructuring;
- Changes in the employer’s business model;
- Changes in the FLSA, DOL guidance, case law, or applicable state laws;
- An increase in hours worked by employees in job categories which are not plainly exempt;
- Employee complaints alleging: misclassification, unpaid work time or improper deductions from pay.

*If a dealership experiences one of these events, it is best to consult with wage/hour counsel to determine if an audit is merited.*
Defending Your Dealership:
How to Prepare for Claims

Before performing an audit, management should determine the goals/scope of the audit:

- If the audit is for general compliance purposes, the entire work force may need to be evaluated.
- If the audit is to address a specific change in the law for a single or set of exemptions, the scope of the audit may be smaller.

After determining the audit’s scope, the dealership should:

- Provide the audit team with a list of the employees, positions or job categories to review;
- Provide them with information about which dealership locations are included in the review;
- Identify and specify which records should be reviewed:
  - Job Descriptions (ensure these reflect duties actually performed by the employee);
  - Pay records (deductions from salary, deductions for uniforms, etc.);
  - Timekeeping records (rounding, automatic deductions from time clock, off the clock work, breaks, etc.);
  - Employment contracts or Collective Bargaining Agreements;
Defending Your Dealership: How to Prepare for Claims

The audit should be performed by a combination of the following individuals:

- Skilled wage/hour counsel;
- Skilled human resources professional;
- Senior management in the event a discretionary decision (which could result in liability) needs to be made;
- Skilled member(s) of management with personal knowledge of the job duties performed by each employee;
- Employees on and as-needed basis.
Defending Your Dealership: How to Prepare for Claims

After audit is complete:

- An audit and consultation alone is not enough to defeat willfulness;
- Question is whether employer diligently ensured practice complied with the law;
- Similarly, not consulting with an attorney or having an audit done does not automatically show that the employer acted willfully or in good faith;
- The company has to follow through and comply with recommendations from the individual completing the audit.
Defending Your Dealership: How to Prepare for Claims

The audit should be thoroughly documented:
- Who conducted the audit;
- Description of the context of the audit;
- Whether some or all of the audit is protected by the attorney/client privilege;
- The results of the audit;
- Description of how the employer addresses/plans to address any issues discovered during the audit.

An employers’ defenses are only as good as the documentation it creates before it is accused of wrongdoing!
Questions?

COMMITTED TO BUILDING THE BEST BUSINESS ENVIRONMENT FOR EQUIPMENT DEALERS.