

Compensation Issues Under FLSA/Wage and Hour

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A. Contrasting the FLSA and Montana's wage and hour laws

Congress passed the Fair Labor Standards Act, 29 U.S.C. §201 et seq., in 1938. The legislature enacted Montana's Minimum Wages and Hours Act, §39-3-401 et seq., in 1972. While the Montana Act mimicked the FLSA in many respects, there were differences then and are more since because both acts have been amended and interpreted by courts and administrative agencies. The similarities and differences are too numerous to catalog here.

Employers must comply with both federal and state law. The "Fair Labor Standards Act does not preempt the subject of wage, hour or overtime regulation to the exclusion of Montana's Minimum Wages and Hours Act." *Plouffe v. Farm & Ranch Equipment Co.*, 174 Mont. 313, 319, 570 P.2d 1106, 1109 (1977). In *Plouffe*, the employee was a mechanic at a farm implement dealership who fell within an exception to FLSA's overtime requirement, but he was nevertheless entitled to receive overtime under Montana's law.

B. Exempt vs. nonexempt vs. independent contractors

The minimum wage and overtime provisions of FLSA and Montana's Minimum Wages and Hours Act apply to "employees" who are not "exempt." As used in both acts, "employee" means "any individual employed by an employer," where "employ"

includes “to suffer or permit to work.” Exemptions from the law are recognized for “independent contractors” and for a long list of specific occupations, the broadest and most often litigated of which is for “executive, administrative, or professional” employees.

1. Independent contractors.

Neither FLSA nor Montana’s Act has been read to impose minimum wage and overtime requirements on property owners who hire plumbers or carpenters to make repairs or improvements to their property, or other service providers who are in business for themselves. Such service providers, who fall within an implied exemption to the state and federal laws, are called independent contractors.

To distinguish employees from independent contractors, primarily for purposes of worker’s compensation, the Montana Department of Labor started issuing independent contractor (IC) exemptions in 1984. From 1984 until 2003, IC exemptions from workers' compensation insurance were conclusive in cases of injury and other liability issues, so a person who held an IC exemption document would be personally liable for any accidents she was involved in, and no liability would attach to the people or enterprises for whom the IC provided services.

In 2003, the Montana State Supreme Court decided *Wild vs Fregein Construction*, 2003 MT 115, 68 P.3d 855, 315 Mont. 425, which significantly changed the status of independent contractor (IC) exemptions. In response, the 2003 Montana Legislature established a study committee to recommend ways to clarify IC relationships

and minimize litigation. The committee learned that Montana had the highest percentage (at eight percent) of independent contractors as a portion of the state workforce of any state that registers independent contractors. The committee also heard about the problems faced by employers who were properly covered with workers' compensation insurance when they were bidding on contracts against others who were not properly covered and had an unfair advantage.

Based on the committee's work, the 2005 Montana Legislature strengthened the IC laws and re-established the conclusive status of the IC exemption certificate. Now, to be an independent contractor under worker's compensation law, as well as for other purposes including unemployment compensation, income tax withholding, and minimum wage and overtime requirements, a person generally must apply for and obtain an exemption certificate (ICEC) from the Department of Labor & Industry.

The application process consists of paying an application fee of \$125, providing documents that verify the applicant has a business, and completing two sworn, notarized statements. (Attachment A.) The applicant must swear he or she is:

- a: free from control and direction; and
- b: independently established in a trade, occupation, profession or business.

A worker must pass both "a" and "b" to be an independent contractor as well as have the ICEC. This is commonly referred to as the "ab" test.

The Montana Supreme Court looks at four factors to determine if a worker is free from control:

- 1. Direct evidence of control or direction, or the right to control the worker,*
- 2. Furnishing of equipment,*
- 3. Method of payment, and*
- 4. The right to fire the worker without liability.*

These four factors are not considered by using a balancing process. Independent contractor status is established by a convincing accumulation of these factors while employment can be solidly proved on the strength of any one of the factors.

Some questions the Department considers when determining if a worker is free from control or direction are:

1. Can the business survive without the services of the worker?
2. Can the workers' business survive?
3. Are there set hours?
4. How is the worker paid?
5. Is the worker given training?
6. Does the worker provide equipment?
7. Is the worker told how to do the work?
8. Is the worker required to submit timesheets or written reports?
9. Is there a right to fire the worker? If so, is it without consequences or liability?
10. What does the contract, if any, say?

Again, these questions are not all inclusive, as each working relationship has its own unique characteristics.

To determine whether the worker is independently established in a trade, occupation, profession or business, the Department requires the applicant to provide documents that show intentional steps to be in a business and evaluates those documents using an “objective point system to rank the individual business components of IC applicants.” The Department considers questions such as these:

1. Does the worker have a place of business?
2. Does the worker have more than one client?
3. Does the worker supply most equipment and materials?
4. Does the worker report to the IRS as a business entity?
5. Does the worker pay for licenses and insurances?
6. Can the worker be held liable?

As part of the process of obtaining an ICEC, the applicant also must specifically waive coverage under the Workers' Compensation and Occupational Disease Act.

Independent contractors must have either the exemption certificate or purchase workers' compensation insurance coverage on themselves. Failure to obtain the exemption certificate or workers' compensation insurance will result in the state treating the worker as an employee of the hiring agent. Hiring agents will be responsible for claims for injuries or occupational diseases and for payment of premium on the wages of those considered their employees.

The Department has authority to investigate the working relationship between an independent contractor and his/her hiring agent. The Department may suspend or revoke

an independent contractor exemption certificate. Fines may be assessed against the hiring agent if control is exerted to the extent it creates an employer/employee relationship.

Also, a person who believes herself to be an employee individually covered or an employee of an enterprise subject to the FLSA may file a claim with the U.S. Department of Labor or the Montana Department of Labor and Industry, or may file a complaint in state or federal court. There is no requirement that administrative remedies be exhausted under either state or federal law.

When a hiring agent responds to a claim by asserting the worker was an independent contractor, the Wage and Hour Unit of the Department forwards the complaint to the Independent Contractor Central Unit (ICCD) of the DLI for a determination on employment status. The decision of the ICCU is binding on the Wage and Hour Unit, subject to appeal through the administrative process. However, neither the U.S. Department of Labor nor the courts are bound by the determination of the ICCU or the existence of an ICEC.

Determinations of the ICCU are reviewed *de novo* by the Workers' Compensation Court. See *Hallquist v. ICCU*, 2010 MTWCC 16, ¶59. In *Hallquist*, the Workers' Compensation Court reversed an ICCU finding that five mechanics who worked out of a single shop were employees of another mechanic there. Though none of the mechanics held ICECs or was operating through a LLC or corporation, Judge Shea rejected the Department's argument that they were employees based on a careful

review of the evidence relevant to the AB test.

2. Executive, administrative, or professional employees

Under Section 39-3-406 (j), Montana Code Annotated, the minimum wage and overtime provisions of Montana's act do not apply to "an individual employed in a bona fide executive, administrative, or professional capacity, as these terms are defined by regulations of the commissioner [of labor], or in an outside sales capacity, as defined in 29 CFR 541.5."

The terms are defined similarly under state and federal law. The federal regulations, which are found at 29 CFR 541, were amended substantially in 2004 in hopes of reducing confusion and decreasing litigation over issues such as "the most important duty" test under the executive exemption. See, e.g., *Kemp d/b/a Yellowstone Mine Restaurant v. Montana Board of Personnel Appeals*, 1999 MT 255, 296 Mont. 319, 989 P.2d 317. But litigation continues over whether employees supervised the requisite 2 or more employees, and whether "assistant managers" are exempt. In the areas of administrative and professional employees - the white collar exemptions - the question is often whether they are salaried and, in the case of administrative employees, whether they are doing true "high level" administrative work or more routine, production work.

Job titles are not determinative of exempt versus non-exempt status.

"[E]xemptions from the FLSA's requirements are to be narrowly construed against the employer asserting the exemption and ... the employer has the burden of proving that the

employee fits plainly and unmistakably within the exemption's terms.” *Id.*, ¶ 34. Thus, employers must be prudent about which positions they classify as exempt from the law.

3. One more curious thing

During the Great Depression, in an apparent attempt to increase the number of people in the workforce, Montana adopted MCA § 39-4-105, a statute that limits the maximum number of daily and weekly hours for persons employed in most retail stores. Employers who violate the provision are subject to potential criminal sanctions. On its face, the statute applies to *all* employees and makes no exception for any specific category of employee.

On the other hand, the overtime laws and regulations found in MCA § 39-3-405 and A.R.M. § 24.16.2503 state there is no absolute limitation on the number of hours an employee may work so long as overtime compensation is paid. And the overtime laws exempt certain categories of employees—such as those whose duties are primarily managerial. But the ARM provision also says the overtime laws do not relieve an employer of any obligation imposed by other Federal or State law to limit overtime hours.

Unfortunately, the interaction of these different laws has never been addressed in the courts. The only decision to even mention the retail hour limit dates back to 1939 and simply states that the provision is constitutional.

The Montana Department of Labor and Industry’s stance is that compliance with the overtime laws allows for work in excess of the limits found in § 39-4-105. In other

words, DOL will not punish any employer who complies with the overtime laws. But DOL also acknowledges that a county attorney could prosecute an employer for violating the statute.

C. Varying rates, commissions, and bonuses

Any non-exempt employee must be paid no less than the minimum wage, and at a rate of one and one-half times their regular rate of pay for all hours worked in excess of 40 within the workweek. There is no statutory requirement for overtime worked over 8 hours per day, on Saturdays, Sundays or holidays. But an employer who agrees to pay overtime on weekends or holidays is bound by it.

The workweek is a regularly reoccurring period of 168 hours in the form of seven consecutive 24-hour periods. Each workweek stands alone and workweeks cannot be averaged together. Pay for time not worked, e.g. holidays, sick time, vacation time etc, does not count toward reaching the statutory 40 hour trigger for overtime payment.

Employees who perform different types of work for which they receive varying rates of pay must be paid overtime at a weighted average hourly rate.

EXAMPLE: One week an employee works in the waitress position for 36 hours for which \$5.15 per hour is paid. The employee then spends 6 hours in the cook position for which \$7 per hour is paid. This same worker performs hostess work in the evenings for the employer and is paid \$6 per hour for those 4 hours worked per week. The wages are computed as follows:

$$\begin{array}{rcl} 36 \text{ hours} \times \$5.15 \text{ per hour} & = & \$185.40 \\ 6 \text{ hours} \times \$7.00 \text{ per hour} & & 42.00 \end{array}$$

$$\frac{4 \text{ hours} \times \$6.00 \text{ per hour}}{46 \text{ hours worked}} = \frac{24.00}{24.00} = \$251.40 \text{ regular earnings}$$

$$\$251.40 \div 46 \text{ hours} = \text{regular rate} = \$5.47 \text{ per hour}$$

$$\$5.47 \div 2 = \frac{1}{2} \text{ time rate} = \$2.74 \text{ per hour}$$

$$\$2.74 \times 6 \text{ overtime hours} = \$16.44 \text{ overtime earnings}$$

$$\$251.40$$

$$\underline{16.44}$$

$$\$267.84 \text{ total due}$$

The regular rate of an employee paid on a commission, piece rate, or flat book rate basis is arrived at by dividing the total weekly earnings by the total number of hours actually worked in the week. The employee is entitled to payment of one-half this regular rate for each hour worked over 40 - in addition to the full commission or piecework earnings.

EXAMPLE: Ann works 45 ½ hours and earns \$325. Her regular rate is \$7.15 per hour (\$325 divided by 45 ½ hours). She is entitled to her regular earnings (\$325) plus an additional half of her regular rate (\$7.15 / 2) which equals \$3.58 for each hour worked over 40. In this case, she is due an additional \$19.69 or a total of \$344.69 for that workweek.

D. Travel time and other “hours worked” issues

The “hours worked” by an employee includes all the times an employee is required to be on duty or on the employer's premises or at a prescribed work place and all the time during which he is suffered or permitted to work for the employer.

“Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer.” *Armour & Co. v. Wantock*, 323 U.S. 126 (1944); *Skidmore v.*

Swift, 323 U.S. 134 (1944). The workweek ordinarily includes “all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place.”

Time spent by employees must be counted as compensable under the FLSA and the Montana Minimum Wage and Overtime Law as well as the Montana Wage Payment Act whenever there is:

- physical or mental exertion by the employee (whether burdensome or not);
- exertion controlled or required by the employer; or
- exertion pursued necessarily and primarily for the benefit of the employer and its business.

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946); *Garsjo v. Montana Department of Labor and Industry*, 172 Mont. 182, 562, P.2d 473 (1977).

“Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of a shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time.” A.R.M. 24.16.1005.

Some issues concerning hours worked that arise frequently include:

- Preparatory and concluding activities, including travel

Federal “Portal to Portal” regulations found at 29 CFR 790.2 Section 4(a)

provide that, unless deemed compensable by contract or custom, employers do not have to pay employees for:

- ▶ walking, riding, or traveling to and from the actual place of performance of the principal activity the employee was hired to perform; and
- ▶ activities which are "preliminary" or "postliminary" to the principal activity.

Travel that is all in the days work - travel between work locations, for instance - remains compensable as does travel on special assignments.

Activities performed either before or after a regular workshift, the Supreme Court said in *Steiner v. Mitchell*, 350 U.S. 247 (1956), are compensable under the portal-to-portal provisions if those activities are an integral and indispensable part of the workmen's principal activities. In *IBP Inc. v. Alvarez*, 546, U.S. 21 (2005) the court expanded the "continuous workday" deemed compensable to include all time spent after donning safety equipment and before taking it off. The court held that "any activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity' ..." and therefore marks the beginning or end of the continuous and compensable workday. A meat cutter's donning of protective gear was a "principal activity" that marked the beginning of the compensable workday because it was integral and necessary to the meat cutting work.

A standard defense to donning and doffing claims and to other potential claims for uncompensated time is that time spent on such activities is de minimis, or too

negligible to qualify as time worked. There is no bright-line rule regarding how many minutes of work must be performed so that the work will not be considered de minimis. See, e.g., *Reich v. Monfort Inc.*, 144 F.3d 1329, (10th Cir. 1998), but there is a three factor test used to assess whether otherwise compensable time should be considered de minimis, and therefore not compensable:

- (1) the practical administrative difficulty of recording the additional time;
- (2) the size of the claim in the aggregate; and
- (3) whether the claimants performed the work on a regular basis.

Lindow v. United States, 738 F.2d 1057 (9th Cir. 1984).

In *Dooley v. Liberty Mutual Ins. Co.*, 307 F. Supp. 2d, (D. Mass 2004), insurance appraisers who performed work on laptops before and after their daily work shifts were entitled to compensation because the computer work and related driving was “work.” Just transporting the laptop (a “work tool”) would not have been a compensable principal activity, but answering e-mails and making phone calls are principal activities that triggered compensation for everything the employees did from that point, including travel.

► Rest and meal breaks

There is no federal or Montana law requiring employers to furnish a rest or coffee break, but if an employer provides a break, the time spent on break is work time.

No federal or state law requires employers to furnish a meal break; however, if a meal break is provided, it will be regarded as work time unless the employee is

completely relieved of duty and the break is at least 30 minutes in duration.

- ▶ Business meetings and training

Meetings are not treated as work time only if attendance is outside of employee's regular working hours, attendance is voluntary, the meeting or training is not directly related to the employee's job, and the employee does not perform any productive work during attendance.

- ▶ Waiting time

Whether waiting time is time worked under the act depends upon particular circumstances. The determination involves “scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the circumstances. Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged.” A.R.M.

24.16.1005(4).

A stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, a fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity. The rule also applies to employees who work away from the plant. For example, a repair man is working while he waits for his employer's customer to get the premises in readiness. The time is work time even though the employee is allowed to leave the

premises or the job site during such periods of inactivity. The periods during which these occur are unpredictable. They are usually of short duration. In either event the employee is unable to use the time effectively for his own purposes. It belongs to and is controlled by the employer. In all of these cases waiting is an integral part of the job. The employee is engaged to wait and entitled to be paid. A.R.M. 24.16.1005(5).

- ▶ On call time

An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call". An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call.

Periods during which an employee is completely relieved from duty and which are long enough to enable the employee to use the time effectively for their own purposes are not hours worked. An employee is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived or the employee is called back to work. Whether the time is used effectively for the employee's own purposes depends upon all of the facts and circumstances of the case. Some factors considered in assessing whether "on call" time constitutes hours worked:

- ▶ Was there an on premises living requirement?

- ▶ Were there excessive geographical restrictions on movements of the employees?
- ▶ Did the frequency of calls unduly restrict the activity of the employee during the on call period?
- ▶ Was the fixed time limit for response unduly restrictive?
- ▶ Can the on call employee easily trade on call responsibilities?
- ▶ Whether the use of a pager can ease restrictions?
- ▶ Does the employee actually engage in personal activities during the on call time?

If an employee is on call, but not actually called to work, then on call pay has to be included in calculating overtime if it is worked. If the employees who are on call are not confined to their homes or to any particular place, but may come and go as they please, provided that they leave word where they may be reached, the hours spent “on call” are not considered as hours worked. Although the payment received by such employees for such “on call” time is, therefore, not allocable to any specific hours of work, it is clearly paid as compensation for performing a duty involved in the employee's job and is included in the employee's regular rate in the same manner as any payment for services.

E. When are deductions from wages permissible?

Generally, an employer in Montana “may not withhold wages due an employee

except for room, board, or incidentals.” *In the Matter of the Wage Claims of Smith, et al. v. Tyad, Inc.*, 2009 MT 180, ¶ 30, 351 Mont. 12, 209 P.3d 228. Agreements by employees to pay unlawful kickbacks to employers or to have unreasonable deductions taken from their pay are governed by Montana’s wage statutes and regulations and fall within the jurisdiction of the Department of Labor and Industry’s Wage and Hour Unit.

In *Tyad*, the employees worked as exotic dancers at the Playground Lounge and Casino. Until January 1, 2003, they were paid minimum wage for dancing on stage, and also were allowed to generate fees by performing private dances at rates they negotiated, but they had to pay to the employer a \$5 fee for each “lap” dance and a \$10 fee for each “hostage” dance they performed. After January 1, 2003, the hourly pay ended and the dancers were required to sign contracts making them “independent contractors” who paid “rent” for the stage and dressing room where they worked.

The Department and the Supreme Court had little trouble rejecting the argument that the dancers were independent contractors, and holding that the so-called rent was an improper attempt to circumvent Montana’s wage laws. The Court awarded one dancer \$8,822.80 plus a 15% penalty of \$1,323.42, another \$8,865 plus a 15% penalty of \$1,329.75, a third \$189.50 plus a 15% penalty of \$28.43, and a fourth \$5,451.70 plus a 15% penalty of \$817.76.

F. Paying wages correctly upon separation of employment

When an employee separates from employment voluntarily all unpaid wages are

due and payable on the next regular payday for that pay period or 15 days from the date of separation from employment, whichever occurs first. Payment may be made through the regular pay channels or by mail if requested by the employee. MCA 39-3-205(1).

When an employee is terminated for cause or laid off, all unpaid wages are due and payable immediately unless the employer has a written personnel policy that extends the time for payment of final wages to the employee's next regular payday or to within 15 days from the separation, whichever occurs first. MCA 39-3-205(2).

When an employee is discharged for an alleged theft of property or funds connected to the employee's work, the employer may withhold from the employee's final paycheck an amount sufficient to cover the value of the theft if:

- (a) the employee agrees in writing to the withholding; or
- (b) the employer files a report of the theft with the local law enforcement agency within 7 business days of the separation from employment,

subject to the following conditions:

- (i) if no charges are filed in a court of competent jurisdiction against the employee for the alleged theft within 30 days of the filing of the report with a local law enforcement agency, wages are due and payable upon the expiration of the 30-day period.

- (ii) if charges are filed against the employee for theft, the court may order the withheld wages to be offset by the

value of the theft. If the employee is found not guilty or if the employer withholds an amount in excess of the value of the theft, the court may order the employer to pay the employee the withheld amount plus interest.

MCA 39-3-205(3).

G. Penalties: understanding the “down side”

The employer is responsible for maintaining records showing compliance with minimum wage and overtime laws. The records must include:

- ▶ Name in full
- ▶ Home address
- ▶ Time of day and day of week employee's workweek begins
- ▶ Regular hourly rate of pay and length of pay period
- ▶ Hours worked each work day and total hours worked each workweek
- ▶ Date of payment and pay period covered by payment
- ▶ Social Security Number
- ▶ Date of birth
- ▶ Total daily or weekly straight time earnings or wages
- ▶ Total weekly overtime compensation
- ▶ Total additions to or deductions from wages
- ▶ Total wages paid each pay period

In the absence of satisfactory records, the employee can prove the extent of overtime worked as a matter of “just and reasonable inference.”

An employer who fails to pay wages within 10 business days after they are due and payable is guilty of a misdemeanor, remains liable for the unpaid wages, and “must also be assessed [a penalty] ... in an amount not to exceed 110% of the wages due and unpaid.” 39-3-204 & 206, MCA. Furthermore, “[a]ny judgment for the plaintiff in a proceeding pursuant to this part must include all costs reasonably incurred in connection with the proceeding, including attorneys' fees.” 39-3-214(2), MCA.

The Department of Labor has adopted rules governing the amount of penalties it will assess against employers. If the employer pays the wages before the Department makes a determination, no penalty is imposed. Where the Department makes a determination, the maximum penalty of 110% of the wages due is mandatory where the employer fails to cooperate with the Department, provides payroll records that are falsified or intentionally misleading, has a history of prior violations, or has issued an NSF paycheck.

For minimum wage and overtime claims where none of the mandatory factors are present, the penalty is reduced to 55% provided the employer pays the wages and penalty due in the time specified in the determination. In other types of wage claims, the penalty may be reduced to 15% (as it was in *Tyad*).