

# WAGE AND HOUR LAWS: Are You in Compliance?



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**Katie D. Triska** is a shareholder in the firm's Labor and Employment Practice. She routinely advises employers on a wide range of employment issues, including successful hiring, employee performance management and termination strategies; development and implementation of anti-harassment and other personnel policies; evaluating reasonable accommodation obligations under the Americans with Disabilities Act (ADA) and state disability laws; and achieving compliance with the Fair Labor Standards Act and state wage and hour laws.



**Robert S. Driscoll** is an attorney in the firm's Labor and Employment Practice. Rob's practice encompasses a variety of employment topics, including defending employers against claims of unlawful discrimination and/or retaliation, handling disputes over restrictive covenants, drafting non-compete agreements and representing clients in appeals. Rob also counsels employers on wage issues, including guiding employers through government wage investigations, and has defended employers against both class-action and individual wage claims.

## AGENDA

- 7:45am CT Registration, Networking and Continental Breakfast for in-person attendees; Webinar attendees may begin to log on
- 8:00am CT Presentation
- 8:50am CT Questions and Answers



### Asking Questions

Throughout the webinar, type your questions using the "QUESTIONS" section in the webinar panel. We will answer as many questions as possible during our Q & A session at the end of the webinar.

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## Webinar Housekeeping

### Viewing the Slides

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### Asking Questions

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### Information

This webinar provides general information about legal issues. It should not be construed as legal advice or a legal opinion. Attendees should seek legal counsel concerning specific factual situations confronting them.

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# WAGE AND HOUR LAWS: ARE YOU IN COMPLIANCE?

SESSION 2 OF 2

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## Training & Meetings

- Rule: Employees must be compensated for time spent attending training programs and meetings
- Exception:
  - Attendance is outside regular working hours;
  - Attendance is completely voluntary;
  - The program is not directly related to the employee's job; and
  - The employee does not perform productive work during the program

## Training & Meetings (cont.)

- What does it mean to be "voluntary"?
  - If continued employment, or conditions of employment, are dependent upon attendance, then the program is compensable
- What does it mean to be directly related to the job?
  - "Designed to make the employee handle his job more effectively"
  - Exceptions:
    - Training for a new position/preparation for a promotion
    - Benefits extending beyond the employee job duties

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## Training & Meetings (cont.)

### The "Overachiever" Exception

- Danny is a graphic artist who specializes in editing digital photographs for a family portrait studio in the mall. He uses computer software to eliminate red eye, wrinkles and other blemishes from the pictures of his employer's customers.
- On his own initiative, Danny decides to take a course at the local community college related to specialized techniques for airbrushing digital photographs. The course is taught at night, after Danny's workday ends.
- Even though the course is "directly related" to Danny's job, the time is not compensable
  - "If an employee on his own initiative attends an independent school, college or independent trade school after hours, the time is not hours worked for his employer even if the courses are related to his job"

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## Overtime Issues

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## Regular Rate

- Not the same as hourly rate!
- Includes all payments made to employees
  - Exceptions:
    - Certain premium pay
    - Pay for time not worked
    - Reimbursements for work-related expenses
    - Stock option grants
    - Benefit plan payments
    - Gifts
    - Discretionary bonuses, prizes and awards
    - Profit sharing or trust and thrift or saving plan contributions
    - Talent fees

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## Calculating Regular Rate

- Need to determine workweek
- Straight hourly rate:
  - Employee is paid \$10/hour
  - Employee works 44 hours in workweek
  - Regular rate: \$10/hour
  - Overtime rate: \$15/hour
  - Total comp. owed:  $(\$400 + \$60) = \$460$

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## Calculating Regular Rate (cont.)

- Hourly rate plus bonus:
  - Employee is paid \$8/hour
  - Employee receives \$20 nondiscretionary attendance bonus for that week's attendance
  - Employee works 45 hours in workweek
  - Regular rate:  $(45 \text{ hours} \times \$8 = \$360) + (\$20 \text{ bonus}) = \$380 \div 45 = \$8.44$
  - Total comp. owed:  $(\$360) + (5 \text{ hours} \times 4.22) + (\$20 \text{ bonus}) = \$401.10$

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## Comp. Time

- Not permissible for nonexempt employees of private employers

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## 8/80 Plans

- Allows employers to pay time and one-half the regular rate for all hours worked over eight in any workday and over eighty in the fourteen-day period

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## Direct Deposit: Can it be Mandatory?

- Federal:
  - Employees must have the option to receive payment by cash or check
- Wisconsin:
  - Employees must be able to collect their wages at a bank/facility located within the state; *and*
  - Employees must receive all their wages and cannot be required to incur any charges to receive them

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## Interns

- Six criteria
  1. Internship is similar to training the intern would receive in an educational environment
  2. Internship is for the benefit of the intern
  3. The intern does not displace regular employees, but works under close supervision of existing staff

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## Interns (cont.)

4. The employer derives no immediate advantage from the activities of the intern, and, on occasion, its operations may actually be impeded
5. The intern is not necessarily entitled to a job at the conclusion of the internship
6. The employer and intern understand that the intern is not entitled to wages for the internship

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## Vacation Pay

- No *obligation* to pay vacation upon separation—unless otherwise provided in an agreement or policy
- Check state law

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## Wage Deductions

- Uniforms
  - What is a "mandated uniform?"
    - Is *not* a "mandated uniform" if the employer requires a general type of basic street clothing and permits variations in details of dress
    - Is a "mandated uniform" if employer requires a specific type and style of clothing
    - Includes those uniforms required to be worn by guards, cleaning and culinary personnel

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## Wage Deductions (cont.)

- Cannot reduce employee's wages below minimum wage or reduce overtime compensation
- Prorated deductions over an extended period are permissible

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## Wage Deductions (cont.)

- Tools
  - Nonovertime weeks: Must not reduce wages below minimum wage
  - Overtime weeks: Amount deducted cannot exceed that which would have been deducted if the employee had not worked overtime hours
- Overpayments and loans
  - Deductions are permissible

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## Wage Deductions (cont.)

- Deductions for faulty workmanship, loss, theft or damage to property
  - One of the following must exist:
    - Employee authorizes the deduction *after the loss and before the deduction*
    - Employer and the employee's representative determine that the loss was due to the employee's negligence, carelessness or willful and intentional conduct
    - The employee is found guilty or held liable for the loss in a court of competent jurisdiction
  - What if an employee fails to return property upon separation of employment?

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## Payment of Final Wages

- No later than the next regularly scheduled payroll date
- Exception
  - Loss of job due to merger, liquidation, cessation of business operations or relocation: 24 hours after separation

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## Department of Labor Investigations

- In FY2013, the Department of Labor (DOL) recovered a record **\$280 million** on behalf of 260,000 workers
- DOL is increasing its enforcement efforts, even if it has not received a complaint
  - **40% increase** in investigators since 2008
  - Finds FLSA violations in **71% of its investigations**

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## DOL Investigations

- Reasons
  - Complaint
  - Chance/investigative priorities
- Steps
  - Initial conference
  - Records examination
  - Employee interviews
  - Final conference

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## DOL Investigations (cont.)

- Be prepared!
  - Keep up-to-date policies and perform internal audits
  - Training
  - Establish a response team

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## DOL Investigations (cont.)

- Initial conference
  - Scheduled by letter or a surprise visit
  - Preliminary meeting with a company representative

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## Initial Conference

- Do:
  - Verify the investigator's credentials
  - Introduce the response team
  - Clarify the scope of the investigation
  - Ask the investigator for 72 hours to respond (if the visit is a surprise)
  - Insist that the investigation does not interfere with normal business operations
  - Cooperate
- Don't
  - Allow the investigator to tour the premises alone
  - Volunteer information, unless necessary to clarify

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## Records Examination

- The investigator may set this up in advance by letter, or may issue the request during the initial conference
- The employer can insist on at least 72 hours to produce records
- Will often request records going back two years

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## Records Examination (cont.)

- Establish a production protocol
  - Label all documents "confidential"
  - Use a sequential labeling system
  - Keep duplicates of all records produced
- Comply with the request, but do not produce more than what was requested

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## Employee Interviews

- Interviews are used to identify violations
  - DOL prefers in-person interviews, but will conduct phone interviews if necessary
  - Will ask the employee to sign a statement after the interview
  - Employers can insist that interviews are scheduled in advance to avoid disruptions
- Nonexempt employees have the right to a private interview
  - But the employer has the right to be present for interviews of exempt employees

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## Employee Interviews (cont.)

- Preparing for employee interviews
  - Explain what to expect
  - Encourage truthfulness
  - Explain that the interview is voluntary
  - Avoid coercion or intimidation

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## Closing Conference

- Investigator will:
  - Review records and interview notes
  - Conduct follow-up interviews
  - Research applicable standards
  - Calculate backpay due, if any
- The closing conference is when the investigator will share his findings

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## Closing Conference (cont.)

- Do:
  - Listen and take notes
  - Discuss corrective actions
  - Ask questions, including about any penalties
  - Request time to provide supplemental information
- Don't:
  - Expect to find out the reason for the investigation
  - Make any promises
  - Agree with the investigator's findings

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## Final Options

- Pay the amount owed without question
- Negotiate a settlement, including corrective actions
- Challenge findings while attempting to negotiate
- Challenge findings and prepare for legal action

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## Private Lawsuits

- Employees can bring their own complaints in multiple forums:
  - Wisconsin ERD
  - Wisconsin state court
  - Federal court

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## Private Lawsuits (cont.)

- Many claims involve small amounts of backpay. Why should employers be worried?
  - Two-year statute of limitations
    - Three years if the violation is willful
  - Class actions
  - Liquidated damages
    - Will double the recovery and are virtually always awarded
  - Attorney's fee awards are standard
    - The award is **not** tied to the amount of the underlying backpay claim

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## Class Actions

- Federal class actions come in three varieties
  - Collective actions
  - Class actions
  - Both (hybrid actions)

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## Class Actions (cont.)

- Collective actions
  - Class members must "opt in"
  - Class certification is a two-step process
    - Conditional certification
    - Decertification
  - All class members must be "similarly situated"

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## Class Actions (cont.)

- Class actions
  - Class members must "opt out." Applies to state law claims in federal court
  - Governed by Federal Rule 23
    - More difficult than FLSA to demonstrate that a class action is appropriate

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## Class Actions (cont.)

- Hybrid actions
  - Plaintiff's attorneys will file both state and federal claims
  - Courts will decide whether a class is appropriate under both Rule 23 and the FLSA

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## Avoiding Lawsuits

- How can you avoid a class action?
  - Proper policies and training are vital
  - Keep proper records
  - Mandatory arbitration and class-action waivers

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## Responding to a Lawsuit

- What should you do if a claim is filed?
  - Act quickly!
    - Counsel should be notified immediately
  - Evaluate plaintiff's claim to determine exposure
  - Consider an early offer of judgment

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## Questions?



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# THANK YOU!

Thank you for attending our presentation.  
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