THE TOP TEN FAIR LABOR STANDARDS ACT VIOLATIONS

BY: KATHRYN J. STEFFEY, ESQ.[1]

10. FAILURE TO USE INTERNS CORRECTLY

The Fair Labor Standards Act ("FLSA") requires those who are "employed" to be compensated, with the term "employ" defined broadly as "suffer or permit to work." 29 U.S.C. § 203(g).

With respect to educational internships, the Department of Labor has identified the following six criteria which must be met in order to properly qualify as an unpaid internship:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;

2. The internship experience is for the benefit of the intern;

3. The intern does not displace regular employees, but works under close supervision of existing staff;

4. The employer that provides the training 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; and

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[1] Kathryn J. Steffey is a partner at Smith Hartvigsen and has extensive experience in representing a diversity of clients in both state and federal courts. Kathryn has acted as lead counsel for local general contractors regarding multi-faceted construction contract disputes concerning both private and public projects. She has also defended local governments in actions concerning a variety of matters ranging from breach of contract to violation of civil rights to union contract disputes. Kathryn has also provided legal counsel and advice to municipalities and private corporations regarding compliance with federal and state laws and regulations. In addition to appearing before the Tenth Circuit Court of Appeals, the United States District Court for the District of Utah, the Utah Supreme Court, the Utah Court of Appeals, and the state district courts located throughout Utah, she has also represented clients before state and local administrative agencies, including, but not limited to, the Utah Anti-Discrimination and Labor Division and Utah's Division of Occupational and Professional Licensing.

6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

The FLSA excludes from the definition of "employee" any "individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if (i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and (ii) such services are not the same type of services which the individual is employed to perform for such public agency." 29 U.S.C. § 203(e)(4)(A).

However, the regulations define "volunteer" as "an individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered." 29 C.F.R. § 553.101(a).

9. USING COMP TIME IN LIEU OF OVERTIME

29 U.S.C. § 207 prohibits an employer from employing any employee for a workweek longer than forty hours unless the employee receives compensation for the hours worked in excess of 40 at a rate of not less than one and one-half times his or her regular rate.

Although 29 U.S.C. § 207(o) allows employees of a public agency, in lieu of overtime compensation, to receive compensatory time off at a rate of not less than one and one-half hours for each hour of employment for which overtime compensation is required, certain requirements must be met in order to provide comp time. Specifically, the comp time must be pursuant to an agreement or memorandum of understanding between the public agency and employee. Additionally, the comp time received cannot exceed 480 hours for employees engaged in public safety activities, emergency response activities, or seasonal activities, and 240 hours for all other employees.

8. CALCULATING OVERTIME INCORRECTLY

Overtime must be calculated based on the "regular rate" of the employee. The "regular rate" is defined as "all remuneration for employment paid to, or on behalf of, the employee." 29 U.S.C. § 207(e). Thus, if additional benefits are provided to the employee, such as buying lunch, paying rent, etc., and such benefits are not expressly excluded by the FLSA, those benefits must be included in calculating the "regular rate."

7. FAILURE TO PAY TRAVEL TIME

Although travel time to and from work is not deemed to be "compensable," other travel may qualify as work time and therefore be compensable. For example, the Department of Labor has stated that "[t]ravel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly work time when it cuts across the employee's workday.

The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days." *See* Wage and Hour Division, U.S. Department of Labor, *Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA)*, http://www.dol.gov/whd/regs/compliance/whdfs22.pdf (last visited October 3, 2014).

6. FAILURE TO PAY ON-CALL EMPLOYEES

"An employee who is required to remain on call on the employer's premises is working while 'on call.' An employee who is required to remain on call at home, or who is allowed to leave a message where he/she can be reached, is not working (in most cases) while on call." *See* Wage and Hour Division, U.S. Department of Labor, *Fact Sheet #22: Hours Worked Under the Fair Labor Standards (FLSA)*, http://www.dol.gov/whd/regs/compliance/whdfs22.pdf (last visited October 3, 2014). However, "[t]ime spent at home on call may ... be compensable ... [if] the restrictions placed on the employee preclude using the time for personal pursuits." 29 C.F.R. § 553.221.

5. IMPROPER CLASSIFICATION OF INDEPENDENT CONTRACTORS

To determine whether an individual is properly classified as an independent contractor rather than an employee, the IRS uses the "right to control test," which includes the following factors:

1. Does the company control or have the right to control what the worker does and how the worker does his or her job?

2. Are the business aspects of the worker's job controlled by the payer?

3. Are there written contracts or employee type benefits? Will the relationship continue and is the work performed a key aspect of the business?

IRS, *Independent Contractor (Self-Employed) or Employee?*, http://www.irs.gov/Businesses/Small-Businesses-%26-Self-Employed/Independent-Contractor-Self-Employed-or-Employee (last visited October 3, 2014).

Additionally, the Department of Labor uses a number of "economic realities" factors to determine whether a worker is in fact an employee or is instead an independent contractor. These factors include the following:

1. The extent to which the work performed is an integral part of the employer's business.

2. Whether the worker's managerial skills affect his or her opportunity for profit and loss.

3. The relative investments in facilities and equipment by the worker and the employer.

4. The worker's skill and initiative.

5. The permanency of the worker's relationship with the employer.

6. The nature and degree of control by the employer.

Wage and Hour Division, U.S. Department of Labor, *Determining Whether an Employment Relationship Exists: Is a Worker an Employee or Independent Contractor?* http://www.dol.gov/whd/regs/compliance/whdfs13.htm (last visited October 3, 2014).

4. FAILURE TO PAY MINIMUM WAGE

29 U.S.C. § 206(a)(1) requires that each employee be paid a minimum of $7.25 per hour. Often, employers who pay employees by a non-hourly pay structure, such as commissions, salary, or piecemeal, fail to document the number of hours actually worked. But if the number of hours worked by an employee paid on a non-hourly pay structure reduces his or her wages to less than $7.25 per hour, the employer may have violated the FLSA.

Additionally, the FLSA prohibits an employer from deducting certain amounts (i.e., costs of uniforms), when the deduction reduces the employee's wage below the minimum wage. *See* U.S. Wage and Hour Division, U.S. Department of Labor, *Deductions from Wages for Uniforms and Other Facilities Under the Fair Labor Standards Act*, http://www.dol.gov/whd/regs/compliance/whdfs16.pdf (last visited October 3, 2014).

3. REST AND MEAL PERIODS

Although the FLSA does not mandate breaks, it does require employers who offer such breaks to treat the breaks as compensable work hours to be included in the total hours worked for the week. Thus, if given, "[t]hey must be counted as hours worked" and cannot "offset against other working time such as compensable waiting time or on-call time." 29 C.F.R. § 785.18.

The Department of Labor has declared that bona fide meal periods "serve a different purpose than coffee or snack breaks and, thus, are not work time and are not compensable." U.S. Department of Labor, *Work Hours*, http://www.dol.gov/dol/topic/workhours/breaks.htm (last visited October 3, 2014). However, if such meal periods are allowed, "the employee must be completely relieved of duty" during that time because the period is not compensated. 29 C.F.R. § 785.19.

2. OFF-THE-CLOCK WORK

The FLSA defines "employ" as "suffer or permit to work." 29 U.S.C. § 203(g). This means that "if an employer requires or allows employees to work, the time spent is generally worked. Thus, time spent doing work not requested by the employer, but still allowed, is generally hours worked, since the employer knows or has reason to believe that the employees are continuing to work and the employer is benefiting from the work being done." This is commonly referred to as "working off-the-clock." elaws, U.S. Department of Labor, *Suffer or Permit to Work*, http://www.dol.gov/elaws/esa/flsa/hoursworked/screen1d.asp (last visited October 3, 2014).

Examples of working off-the-clock include finishing an assigned task or waiting on a customer or patient at the end of the employee's regular working hours, or taking work home to complete during the evening or on the weekend. *Id.*

1. IMPROPER CLASSIFICATION AS EXEMPT EMPLOYEE

Whether an employee can claim any of the above violations is contingent upon his or her status as a nonexempt employee. The FLSA has several exemptions, and there are several tests used to determine whether an employee qualifies for any exemptions. The tests are highly fact specific, so an employer should not assume an employee is exempt simply because his or her job is important, the employee is salaried, or the employee makes more than $100,000 per year.

Some of the exemptions offered by the FLSA include:

1. Executive Exemption
2. Administrative Exemption
3. Professional Exemption
4. Computer Employee Exemption
5. Outside Sales Exemption
6. Highly Compensated Exemption

Exemptions do not apply to Blue Collar Workers (those who perform work involving repetitive operations with their hands, physical skill, and energy), and exemptions are also not applicable to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, correctional officers, parole officers, fire fighters, paramedics, and ambulance personnel. Wage and Hour Division, U.S. Department of Labor, *Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act*, http://www.dol.gov/whd/overtime/fs17a_overview.pdf (last visited October 3, 2014).