

**One Day, Many Solutions**  
**Employment Law Coast to Coast**  
 April 2011

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**Managing Wage Costs  
 While Complying With  
 Wage-Hour Requirements**

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**A Different Approach: "No Fear"**

- Lawsuit boom continues: Over 40,000 FLSA filings in last decade, 2010 filings up 10%
- Similar explosion under state, local laws
- Manage wage costs through careful planning, implementation, oversight

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### Basic FLSA Rules

- A minimum-wage rate (currently \$7.25).
- Pay non-exempt employees overtime wages.
- Limitations on the employment of minors under 18.
- Recordkeeping, including *accurate time records*.

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### What Can You Do?

- Don't miss opportunities to pay lawfully *and* less-expensively
- Avoid misconceptions about legal requirements that lead to needless expense
- Must balance employee morale, competitive pressures, administrative needs against cost concerns

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### Opportunities: "Workweek"

- Must adopt at least one seven-day "workweek"
- Can have *more* than one: For different groups, for different locations, even for different people
- Can adjust the "workweek" to reduce or eliminate overtime (such as in "9/80" plans)

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### Opportunities: Creative Pay Plans

- Different ways to pay non-exempt employees
- Not limited to an hourly rate
- Wide variety of complying pay plans

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### Opportunities: Creative Pay Plans

- Example: "Fluctuating-workweek" plan
- Example: "Day-rate" plan
- Example: Commission-based plans
- Example: Piece-rate plan

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### Opportunities: Advantageous Pay Plans

- "Weighted-Average" Overtime
- Overtime At "Rate In Effect"
- Overtime At 1.5 Times The Piece-Rate
- Crediting Certain Pay Against Required Overtime

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**Opportunities: Exemptions**

- "White Collar" Exemptions
- Specialized Or Industry-Specific Exemptions
- Examples: Section 7(i), Section 7(j), "Motor Carrier"
- Exempts who need not be salaried, e.g., outside sales, teachers, practicing doctors and lawyers

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**Costly Misconceptions**

- Fiction: "Employees Must Be Allowed To Work Their Full Schedules"
- Fact: Can reduce hours worked in a workday or a workweek as conditions call for (subject to any CBA or other contract)
- Example: Sending employees home to avoid overtime

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**Costly Misconceptions**

- Fiction: "Paid time off must be counted as 'hours worked' in figuring overtime wages"
- Fact: Paid time off does not have to be counted as "hours worked" (assuming employee performs no work)
- Example: Employee works 36 hours, is paid for 8 holiday hours off -- NO overtime hours

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**Costly Misconceptions**

- Fiction: "An employee must be paid overtime for working beyond the scheduled time"
- Fact: Overtime pay legally required only for work beyond number of hours law sets as threshold
- Example: No FLSA need to pay overtime for work after 5 p.m. (if overtime is not otherwise due)

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**Costly Misconceptions**

- Fiction: "An employee who meets the tests for exempt status must be treated as exempt"
- Fact: Employer may treat employee as non-exempt, even if the employee could be treated as exempt
- Example: Treat the employee as non-exempt so as not to have to pay on a "salary basis", then pay only for actual hours worked

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**Costly Misconceptions**

- Fiction: "An employer must pay the same hourly rate for compensable travel time as for other work"
- Fact: May pay for compensable travel time at a lower rate (at least minimum wage)
- Another example: May pay for compensable training time at a lower rate (at least minimum wage)

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### Possible Misconceptions

- Possible Fiction: "Our pay policies are the way they are because that is what the law requires"
- Might have been drafted for needs of a "tight" labor market
- Perhaps adopted without legal requirements in mind (e.g., to mirror policies adopted under a CBA)

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### Possible Misconceptions

- Might have been prepared to meet laws of another jurisdiction
- Might include misconceptions about what the law requires
- Don't continue expensive policies in mistaken belief that law requires them

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### Other Considerations

- Special federal-contractor laws
- Some states, other jurisdictions have their own wage-hour requirements
- Adopt new pay policies only after checking these requirements

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**Other Considerations**

- Draft changes and new plans clearly, accurately
- Draft for maximum control and flexibility
- Say what you mean, mean what you say

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**Other Considerations**

- Manage *both* wage costs *and* wage-hour risks
- Consider audits for *both* cost-management *and* compliance reasons
- Eliminate potential liabilities, bolster possible defenses
- Anticipate how to respond to government audits, likely issues

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**Other Considerations**

- Protect information, communications relating to internal reviews, deliberations, changes
- Plaintiffs now seeking to force disclosures
- Possibilities: Attorney/client privilege, "self-critical analysis" theory

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**Final Questions?**

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**Thank You**

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