



# Human Resource and Management Services

June 2007

## HUMAN RESOURCE EXCHANGE

Human resource issues and topics impacting employers

### ◆ FROM SHRM ◆

#### “First minimum wage increase in a decade becomes law”

Congress approved the first increase to the federal minimum wage in 10 years on May 24, 2007, when the House and Senate voted to pass a supplemental spending package for the war in Iraq ([H.R. 2206](#)).

The provision will increase the federal minimum wage from \$5.15 to \$7.25 per hour in stages over two years.

...The wage increase will be done in three phases of 70 cents more per hour. The first phase will raise the wage to **\$5.85 per hour (on July 24<sup>th</sup>)**, 60 days after the president signs the measure.

The other phases will follow a year apart and will be completed by the summer of 2009.

### ◆ FROM CCH EMPLOYMENT LAW ◆

#### “Salt Lake City contractor assessed \$39,270 in civil money penalties for violations of federal overtime standards”

T.J. Enterprises and Acoustical Inc. of Salt Lake City has been assessed \$39,270 in civil money penalties by the U.S. Department of Labor's Wage and Hour Division alleging the company repeatedly and willfully violated the overtime provisions of the Fair Labor Standards Act (FLSA).

A 2004 investigation of T.J. Enterprises, a drywall and acoustical ceiling construction business, found a failure to pay overtime compensation to 84 employees. A total of \$27,652 was found due when it was discovered the firm paid employees on a separate check for the overtime hours worked, calling the second check a bonus.

### ◆ FROM HR SPECIALIST EMPLOYMENT LAW ◆

#### “Exempt status in question? ‘Good-faith’ reply saves the day”

If an employee comes forward to protest that you owe him overtime pay because he should truly be a nonexempt worker, it pays to act fast and be able to show good cause why you classified him as exempt in the first place.

Your quick response may determine whether you'll owe just the back overtime pay or double that amount. The Fair Labor standards Act (FLSA) allows employees to collect double (or “liquidated”) damages unless you can show your mistake was made in good faith and you honestly intended to classify the

employee correctly. Plus, you may be off the hook for attorneys' fees.

To head off such complaints, host an annual classification review and compare all employees' job descriptions against the FLSA exemption regulations, which were revised in 2004. If any positions should be switched to hourly, make the change as soon as possible and start paying overtime. Then, do your best to calculate what you owe for past unpaid overtime.

*Bottom line:* If an employee files an overtime suit, your annual classification audit would likely be enough proof of your good-faith efforts to ward off double damages.

*Recent case:* A group of technical writers sued Indiana Michigan Power, alleging it had wrongly classified them as exempt. The court agreed. It then had to decide whether the utility made the mistake in good faith. At stake were double damages and attorneys' fees.

The three strikes against the employers: 1) It couldn't explain why it made the writers exempt. 2) The decision-makers weren't familiar with the FLSA overtime rules. 3) The employer didn't seek outside help when it received the original complaint, but waited until it was sued.

All this indicated a lack of good faith. As a result, the company's liability doubled from \$215,000 to \$430,000. Plus, the court ordered it to pay another \$111,000 to the attorneys. (*Renfro, et al., v. Indiana Michigan Power Co.*, No. 1:99-DV-877, WD MI, 2007)

#### “New rules haven't eased exempt/nonexempt confusion”

Amid much fanfare, the U.S. Labor Department in 2004 rewrote the rules that determine which employees are exempt from the Fair Labor Standards Act (not eligible for overtime) and which are nonexempt (eligible for overtime).

The goal was to ease confusion and lawsuits. But, so far, that hasn't happened. Overtime-related lawsuits are on the rise. “We thought the (new regulation) would fix that,” said Jack McKeon, a U.S. Labor Department deputy administrator, at a Society for Human Resource Management conference last month. “It really hasn't.”

◆ **FROM PERSONNEL LEGAL ALERT** ◆

**“We couldn’t make this up if we tried”**

Talk about being dedicated to your job. The women’s basketball coach at the University of Nebraska at Kearney was there for her team during the regional championship game, despite having given birth to her first child just 5 hours beforehand. She said she decided to go to the game shortly before game time because she had started to feel better, and the doctors gave her the go-ahead. The coach sat on the team bench and provided mostly “input and encouragement” as the assistant coach took over.

*(Editor’s note – What do you do when you feel the Doctor’s release is wrong? Get another opinion. And fast!)*

◆ **FROM YOU & THE LAW** ◆

**“Nonunion worker’s pay complaint is ‘protected’ activity under NLRA”**

Soon after Christopher Hayward began complaining about the way he and other consultants were paid, he was fired. His non-union employer said the firing was because Hayward was a “troublemaker” and not a team player. Still, Hayward filed a National Labor Relations Board (NLRB) complaint, saying the real reason was his “protected” wage complaints.

The NLRB sided with him and ordered his reinstatement. The company appealed, but a court concluded the company fired Hayward for his protected “concerted activities.” (*Citizens Investment Services Corporation v. NLRB, No. 04-1317, CD Ct. Appeals 2005*)

◆ **A REAL LIFE SITUATION** ◆

**Situation:** Recently, there have been several workers’ compensation claims filed in which the ex-employee has won unemployment benefits under surprising conditions.

**Observation:** In one incident, an employee’s performance and attendance were unsatisfactory. The employee had been counseled, the paper trail was clear, and the employee was eventually fired. The individual received unemployment benefits because the Commission determined that too much time had elapsed from the beginning to the end of the paper trail. The decision was that misconduct did not occur because the employer had allowed this behavior to go on for so long, that it was considered acceptable, and ultimately, satisfactory.

Another incident involved an employee that walked off the job. He was angry for being reprimanded for doctoring his time records, and he got in his car and left, telling everyone within earshot that he was quitting. Upon receiving an unemployment claim, the employer noticed that the ex-employee put the reason for leaving “Was fired, don’t know why.” Because the response did not include any behavior that violated any company policy, the individual received unemployment benefits.

A third example included an employee that was fired for misconduct, threatening other employees, and creating disruption in the workplace. The Commission requested the

specific policies that stated those rules as well as requested specific examples of how those rules were violated.

In summary, although the responses to the unemployment claims have been complete and accurate, it is obvious that through the years the Texas Workforce Commission is making it more difficult for employers to win in these unemployment claims.

**FEATURED SERVICE**  
**Unemployment Claims Assistance**

The Texas Workforce Commission of today is requesting more specific information when making a determination on whether an individual is to receive unemployment benefits or not.

Although the premise is still the same, namely, it doesn’t matter if an employee quit or was fired - the circumstances involved in the separation determine if benefits will be granted, the Commission is still looking for key words and phrases to make its determination.

HR&M can provide guidance and even write your unemployment claims. This additional insight by HR&M can increase your chances of winning an unemployment claim, especially on those situations in which misconduct was very clear.

◆ **REMEMBER! WE CAN HELP!!** ◆

Consulting on performance, attendance, FMLA, Wage & Hour, management accountability, and other unique issues is just one of the areas of our expertise.

We also provide:

- supervisory/management training, ranging from brown bag luncheon training to ½ or full day sessions
- employee handbook development, from creating to updating
- responses to discrimination charges and unemployment claims
- on-line performance review forms and processes
- guidance on coaching, counseling, and disciplining in employee relations matters