



AGC Labor and Employment Law Council's

34th Annual

Construction Labor Law
SYMPOSIUM

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Wage and Hour Issues Facing Construction Contractors

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Why Is It Important To Address Wage and Hour Issues?

There are now more wage class actions filed than discrimination class actions

- In 2017, more than \$270 million in back wages was awarded for more than 240,000 workers.
- An average of \$740,000 **per day** in back wages was collected in 2017.
- Construction is being strategically targeted by plaintiff-side law firms as fertile ground for easy revenue

Overview

- Compensable Time Defined
- Failure To Pay Overtime
- Travel Time
- Exempt Status Of Site Non-Craft Employees
- Joint Employment and Misclassification Issues

Compensable Time

- FLSA broadly defines “employ” as including “to suffer or permit to work”
- Compensable time generally includes:
 - Time required to be on employer premises, on duty or at prescribed workplace
 - Includes preparatory work, loading materials, equipment, fueling, cleaning trucks; getting assignments

Compensable Time

Generally, excludes

- *Bona fide* meal periods
- Preparatory or concluding activities
- Training programs, if voluntary
- Time fully relieved from duty

Compensable Time

- Contract, custom, practice and intent inform concept
- Work-related activities during workday
- Rest and meal periods
- Transportation of equipment when integral to employee's principal job duties
- Training programs under certain circumstances
- Security Screening
- Wait time

Compensable Time

- Engaged to wait and waiting to be engaged
- Must pay for time lost due to breakdowns or delays
- Includes on-duty time
- Exception where employee is fully relieved from duty until a specified time and free to use time

Overtime Computation and Payment

- Overtime is calculable in each 7-day workweek
- Overtime payment may not be avoided through compensatory time off
- Certain payments to be included in premium computation
- Premium rates for two or more positions:
 - Typically calculated on weighted average of rates; or
 - By agreement, upon rate of work performed during OT hours

Travel Time - Basics

- Ordinary commute - not compensable
- Emergency Travel, Special one-day assignments, travel that is part of work – compensable
- Travel away from home community – compensable in part
- Work performed while traveling – compensable, except for bona fide meal periods and sleep in adequate facilities

Travel Time - Continuous Work Day

- Travel from central location to work site, generally considered home to work commute and not compensable, unless
 - Employee performs principal duties immediately prior to or after travel such as picking up tools, meeting to receive instructions, performing work related tasks (i.e. loading or fueling trucks)
 - At home activities must be substantial enough to interfere with employees free use of time

Non-Craft Employees

Exempt or non-exempt?

- Project/General Superintendents: **Executive Exemption?**
- Civil Engineers: **Professional Exemption?**
- Project/Field Engineers, operation managers, project managers, field supervisors: **Administrative Exemption?**

Non-Craft Employees Who May Qualify for the Administrative Exemption

Who falls under the administrative exemption?

- Paid at least \$455 per week (watch out for state law)
- Performs non-manual work related to business operations
- Primary duty: discretion and independent judgment as to matters of significance, directly related to the general management or business operations

Miscellaneous Issues

- Joint Employment
- Worker Misclassification – Employee v. Independent Contractor

Practical Takeaways

- The construction industry is in the cross-hairs
- Lawsuits are extremely costly and are generally not covered by insurance
- Compliance and self-audits can be extremely helpful in avoiding litigation and minimizing exposure

Questions?



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