

No Good Deed Goes Unpunished

How Employer
Generosities Increase
Potential Liability
Under Wage and
Hour Laws

Chris Mann
Partner

Maggie Spell
Partner

General Principles

- Fair Labor Standards Act (FLSA) is a technical, definitional law
- Ignorance of the law and good intentions are not defenses
- Industry and historical practice are irrelevant
- Few exceptions and exemptions apply – and the employer bears the burden of proving them
- Many states (and cities) have their own wage and hour laws – stricter laws control
- Paying employees more generously than the FLSA requires does not make up for mistakes

Good Deed – Bonuses

- Tender Loving Care (TLC), a skilled nursing facility for the disabled, pays its employees on a bi-weekly basis
- TLC operates on a relatively thin staff, making it particularly important that employees work all scheduled shifts
- TLC offers encouragement for good attendance: if employees work all the hours that they are scheduled to work in a pay period, they are given a \$100 bonus
- Betty is scheduled to work 56 hours during each workweek
- True to her word, she does so and, thus, receives the bonus
- Since Betty has worked overtime in each workweek, must her attendance bonus be included in her regular rate of pay for overtime purposes?

Good Deed – Bonuses

- Regular rate includes all payments made to employees (except certain statutory exclusions)
 - *E.g.*, paid leave, discretionary bonuses
- Regular rate determined by adding together the employee's pay for the workweek and all other earnings (again, unless properly excluded from the regular rate) and dividing that total by the number of hours the employee worked in that workweek

Good Deed – Bonuses

- Discretionary bonuses:
 - Sole discretion of the employer to award it – not an expectation by the employees
 - Form of variable pay
 - Amount, requirements, timing, and announcement of the bonus should not be disclosed in advance
 - Often, employer determines after the fact that there is a reason for awarding a bonus
 - May be excluded from regular rate

Good Deed – Bonuses

- Non-discretionary bonuses:
 - Opposite of discretionary bonuses
 - Employer from the outset determines the standards required to receive a bonus based on meeting specific criteria
 - Employees expect to earn bonus if they meet the standards
 - Additional compensation for exceeding performance or productivity goals
 - Must be included in regular rate
 - *E.g.*, productivity bonuses, shift differentials, commissions

Good Deed – Bonuses

- Is the \$100 discretionary or non-discretionary?
 - Non-discretionary
- Why?
 - Announced to Betty (and the other employees) in advance
 - To encourage them to work more steadily, rapidly, or efficiently
- Included in regular rate?
 - Yes

Good Deed – Bonuses

$\$100$ (bi-weekly attendance bonus) $\div 2 = \$50$ (weekly bonus)

56 hours worked $\times \$12$ per hour $+ \$50 = \722 (total compensation)

$\$722$ (total compensation) $\div 56$ hours worked $= \$12.89$ (regular rate)

$\$12.89$ (regular rate) $\times \frac{1}{2} = \$6.45$ (half-time premium)

$\$12.89$ (regular rate) $+ \$6.45$ (premium) $= \$19.34$ (overtime rate)

40 (straight time hours) $\times \$12.89$ (regular rate) $= \$515.60$

16 (overtime hours) $\times 19.34$ (overtime rate) $= \$309.44$ (overtime)

Total earnings for week one $= \$825.04$

Total earnings for week two $= \$825.04$

Total earnings for bi-weekly period $= \mathbf{\$1,650.08}$

Good Deed – Independent Contractor Classification

- Madonna desperately wants to work in public relations (PR)
- She approaches Fashionista, a successful magazine, asking about employment as an associate in its PR department
- Fashionista is unsure about hiring Madonna due to her lack of experience in PR
- Madonna proposes that she can start working as an independent contractor and then the magazine can bring her on full-time if she does a good job
- Fashionista doesn't see the harm in trying Madonna out
- Madonna signs an independent contract agreement and is instructed by Fashionista to report to work the next Monday at 9:00 a.m.

Good Deed – Independent Contractor Classification

- The following do not automatically create an independent contractor relationship:
 - An agreeable worker
 - Labels like “contractor” or “consultant”
 - A written independent contractor agreement
 - Working offsite or at home
 - A 1099
 - Performing services as an LLC
 - Common industry practice
 - Good faith
- Main factor – nature and degree of company’s control over worker

Good Deed – Independent Contractor Classification

- The Louisiana Workforce Commission considers misclassifying employees *fraud*, whether intentional or not
- Some factors to assess misclassification:
 - Right to supervise worker's performance or direct her work
 - Whether worker has set hours
 - Whether company provides facilities/supplies to perform work
 - Whether company trains worker
 - Whether worker is paid for business or traveling expenses
 - Whether worker can perform services for others during normal business hours
 - Whether others performing similar services are classified as employees
 - Length/permanency of the relationship

Good Deed – Independent Contractor Classification

- Because Fashionista generally hires employees for PR positions, it should be wary about hiring an independent contractor for that role, even though it was Madonna's idea and she signed an agreement
- Fashionista tells Madonna to work certain hours and to attend certain events on behalf of the magazine
- Fashionista tells Madonna how her work should be performed
- Fashionista expects Madonna to be working for the magazine full-time
- She would be considered an employee and not an independent contractor, subjecting Fashionista to potential liability under the FLSA and other penalties, fines, and fees for misclassification

Good Deed – Pay for On-Call Time

- TLC clients sometimes need medical care after hours
- Betty is on-call one night per week
- TLC pays Betty a flat \$20 fee for the inconvenience
- Her on-call shift runs from when she leaves TLC at 6:00 p.m. until 6:00 a.m. when another nurse arrives at work
- She's allowed to go home during her time off and free to engage in personal activities, like cooking dinner and walking her dog
- However, Betty isn't permitted to drink alcohol while she's on-call
- Does Betty have to be compensated for her on-call time?

Good Deed – Pay for On-Call Time

- No, Betty doesn't need to be paid for her on-call time under these circumstances, even though she can't consume alcohol
- An employee who isn't required to remain on the employer's premises but is merely required to leave word where she may be reached isn't working while on call
- Even if the employee must be accessible by phone, or there are rules governing alcohol or participation in other activities while the employee is on-call, she may still be able to use the on-call time to engage in personal activities, like going to the movies

Good Deed – Pay for On-Call Time

- Some factors considered by the courts and Department of Labor include:
 - the frequency of calls during the on-call period;
 - the time limit provided to respond;
 - the geographic restrictions placed on the employee;
 - the ability to trade or swap on-call responsibilities, and the amount of advance notice of assigned on-call time periods;
 - the use of a pager or cell phone to contact on-call employee (e.g. whether an employee is expected to continuously monitor radio traffic for a call vs. employees being issued a pager that will notify them of calls); and
 - the employees' ability to engage in personal activities during on-call time periods

Good Deed – Pay for On-Call Time

- For nights when Betty is on-call, she's paid a flat \$20 for the inconvenience
- This is a nice perk since she rarely gets called in
- Betty never has cash on her and really likes the happy hour specials at the cash only bar next door, so she asked TLC to pay her in cash (though her regular wages are paid by direct deposit)
- TLC agreed, and the payroll clerk hands Betty a crisp \$20 bill for each night Betty was on-call that week on Friday afternoon – just in time for happy hour
- Everyone's happy – is this acceptable?

Good Deed – Pay for On-Call Time

- Even though everyone's happy, it's not acceptable
- The \$20 needs to be included in Betty's wages for calculating her regular rate and her overtime rate
- Regular rate includes all remuneration for employment except certain excluded payments, and on-call pay isn't one of those excluded payments
- Instead, this payment for on-call time was paid as compensation for performing a duty involved in the employee's job
- Betty is owed additional overtime (albeit very little) for each week in which she was on-call

Good Deed – Pay for On-Call Time

- One night while Betty is on-call, she receives a call at 7:30 p.m. (right in the middle of her dinner and her favorite television show) and has to return to TLC to administer medication to a client
- Betty conveniently lives just down the street from TLC
- In total, Betty is only gone for about 30 minutes and is able to return to her dinner and show
- Does Betty have to be paid for the time spent responding to this call, or does the \$20 cover it?

Good Deed – Pay for On-Call Time

- Regardless of the \$20 flat fee for Betty's inconvenience, the best practice would be to pay her for the additional time spent working
- Generally speaking, Betty needs to be paid for the time she spends working for her employer
- Betty could argue TLC was contractually obligated to pay her the \$20 and required under federal law to pay her at least minimum wage for all hours worked

Good Deed – Paying an Employee a Salary

- Rosie works at the Jetsons Motel and gets a promotion to senior housekeeper
- Rosie wants to be paid on a salary basis instead of hourly because hourly pay is for junior-level housekeepers
- Rosie also is happy because she knows exactly how much her paycheck will be: \$400 per week
- Jetsons Motel thinks this is great because now Rosie is exempt from overtime

Good Deed – Paying an Employee a Salary

- There are certain exemptions that may apply – an employee then does not have to be paid minimum wage or overtime
- To qualify for an exemption:
 - employees generally must be paid on a salary basis of not less than \$455 per week (or \$23,600 per year), and
 - perform certain exempt job duties
- “Salary basis” means employee regularly receives a predetermined amount of compensation each pay period on a weekly (or less frequent) basis

Good Deed – Paying an Employee a Salary

- Possible exemptions:
 - Executive Exemption
 - Administrative Exemption
 - Professional Exemption
 - Learned Professional & Creative Professional
 - Highly Compensated Employee Exemption
 - Computer Employee Exemption
 - Outside Sales Exemption

Good Deed – Paying an Employee a Salary

- The Jetsons Motel is wrong
- Being paid on a salary basis does not make an employee exempt under the FLSA
- Rosie does not meet the salary requirement because she is not paid at least \$455 per week, and also her duties do not meet any of the exemptions
- Jetsons Motel must keep accurate records of her hours and wages
- Even though she is being paid a salary, she still is entitled to *overtime*

Good Deed – Paying an Employee a Salary

- If Rosie and the Jetsons Motel agreed she is expected to work 40 hours per week, but she works 45 hours this week:
 - Calculate the regular rate:
 - $\$400$ (weekly salary) / 40 hours = $\$10$ per hour
 - Calculate the overtime rate:
 - $\$10 \times 1.5 = \15 per hour
 - Calculate the overtime wages:
 - $\$15 \times 5$ overtime hours = $\$75$ in overtime
 - Calculate the total wages:
 - $\$400$ (regular weekly wages) + $\$75$ (overtime) = **$\$475$**

Good Deed – Paying an Employee a Salary

- If Rosie and the Jetsons Motel agreed her salary covers all hours worked, the regular rate and overtime rate will vary from week to week. If she works 45 hours this week:
 - Calculate the regular rate:
 - $\$400$ (weekly salary) / 45 hours = $\$8.89$ per hour
 - Calculate the overtime hourly rate:
 - $\$8.89 \times .5 = \4.45 per hour
 - Calculate the overtime wages:
 - $\$4.45 \times 5$ overtime hours = $\$22.25$ in overtime
 - Calculate the total wages:
 - $\$400 + \$22.25 = \mathbf{\$422.25}$

Good Deed – Allowing Lazy Timekeeping

- Chicory is an hourly barista at New Orleans Coffee Co.
- The baristas receive a schedule each week with their hours
- The coffee shop's written policy is that all employees must clock in and out for the day and for lunch using a timekeeping app on the store's computers
- If there are any inaccuracies or variations, the policy states the employee must tell their manager as soon as possible
- When Chicory was hired, he acknowledged that he received this policy and agreed to abide by it

Good Deed – Allowing Lazy Timekeeping

- Chicory is sometimes responsible for opening the coffee shop
- He must unlock the shop, turn on the lights, do a security check, and then boot up the computers before he can clock in
- Chicory often forgets to tell his manager what time he actually arrived in the morning to open the shop so his manager can correct his time
- Chicory also is bad about clocking out for the day because he is exhausted after getting up early to open the store
- When he does this, Chicory's manager assumes he opened the shop one minute before the shop opened and left when his shift was scheduled to end
- The company lets Chicory's technical policy violations slide because he is a hard worker and it isn't a big deal to the coffee shop

Good Deed – Allowing Lazy Timekeeping

- Employers must keep accurate records of non-exempt employees' work hours (as well as some other recordkeeping requirements)
- Employers should develop policies and procedures to ensure that they keep accurate time records for all non-exempt employees and that employees are paid for all time spent working
- Employers may use any timekeeping method they choose, provided it is complete and accurate
 - Examples:
 - Time clock
 - Timekeeper to track employee's work hours
 - Workers recording their own hours
- Employers may want to consider requiring employees to verify their time records are accurate

Good Deed – Allowing Lazy Timekeeping

- The coffee shop is subjecting itself to liability by letting Chicory's actions slide
- The coffee shop should instruct employees on how to promptly and accurately report any hours worked that are not captured via the timekeeping app
- If Chicory continues to violate the policy, he (and any other employee) should be disciplined
- Chicory's manager should also be instructed not to assume employees worked certain hours based on the schedule, but to verify with the employee when he or she actually arrived or left

Good Deed – Catching Up Over Lunch

- New Orleans Coffee Co. requires its baristas to take a 30 minute break during each shift and issues written discipline to those employees who don't take their breaks
- Samantha, the owner, visits the shop often on Mondays between 1:00 p.m. and 3:00 p.m. – the busiest time of the week – to ensure customer satisfaction
- Elizabeth, the Manager, sometimes asks Chicory to clock out and work through his break to keep the line moving while Samantha is in the store, and Chicory doesn't mind because then he doesn't get written up (and Elizabeth gives him the best shifts as a favor)
- Is this a problem?

Good Deed – Catching Up Over Lunch

- Yes – Chicory is working off the clock
- Chicory, a non-exempt employee, must receive at least minimum wage and overtime for hours worked over 40 in a workweek
- “Hours worked” includes all time an employee must be on duty
- Also included is any additional time the employee is allowed to work, such as his breaks here
- Chicory needs to be paid for those lunch breaks when he was working while clocked out

Good Deed – Catching Up Over Lunch

- Chicory, a loyal and long-term employee, is working one Monday while Samantha is in the store
- After clocking out, Chicory is walking out of the shop for his break and hears a large crash from behind the register
- Elizabeth (who makes a lot of mistakes) has dropped an entire pallet of coffee mugs, and there are shards everywhere
- There's no way she can clean this up and serve the line of customers, who are all groaning about Elizabeth's latest blunder
- Chicory sees this as his opportunity to solidify his promotion to Manager when Elizabeth is inevitably fired, so he jumps in and starts making coffee
- Does this change your analysis?

Good Deed – Catching Up Over Lunch

- Of course not!
- Chicory still has to be paid for all hours worked
- Employees cannot volunteer to do the same type of work that they perform as part of their normal work duties, so the hours must be included in calculating hours worked
- Indeed, even time spent in work for public or charitable purposes at the employer's request, under the employer's direction or control, or while the employee is required to be on premises is working time and must be compensated