

# Lawyers, Time & Money: *Avoiding Wage & Hour Missteps that Lead to Costly Legal Battles*

**Sally A. Piefer**

**Kristofor L. Hanson**

Lindner & Marsack, S.C.

411 E. Wisconsin Avenue, Suite 1800

Milwaukee, WI 53202

(414) 273-3910

[spiefer@lindner-marsack.com](mailto:spiefer@lindner-marsack.com)

[khanson@lindner-marsack.com](mailto:khanson@lindner-marsack.com)

[www.lindner-marsack.com](http://www.lindner-marsack.com)

**L I N D N E R**

**&**

**M A R S A C K**

ATTORNEYS AT LAW

**Christopher J. Smith**

Legal Counsel

CD Smith Construction

125 Camelot Drive

Fond Du Lac, WI 54935

(920) 924-2900

[email]

[www.cdsmith.com](http://www.cdsmith.com)

**C.D. SMITH**  
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# Agenda:

- ❖ Wage and Hour Overview
- ❖ Misclassification Issues
  - ❖ Employee vs. Independent Contractor
- ❖ The New White Collar Exemptions
- ❖ Off-the-Clock & Work from Home Issues
- ❖ Deductions from Salary
- ❖ Interns
- ❖ On-Call Issues
- ❖ Liability for FLSA Violations

# What's the Big Deal?

- ❖ Wage & hour claims are on the rise & costly
  - ❖ 2019—top 10 private-plaintiff wage & hour class actions totaled \$449.05 million (SHRM)
  - ❖ 2018—top 10 private settlement totaled \$253.5 million (SHRM)
- ❖ Systemic issues often times filed as a class or collective action
  - ❖ Certification can be the holy grail
  - ❖ Individual claim worth \$100 can grow exponentially if there are 5,000 class members
- ❖ Wisconsin employers not immune
  - ❖ 2019--103 federal court cases
  - ❖ 2020\* – 75 federal court filings

\* (through 8/5/2020)

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# The Laws:

- ❖ Fair Labor Standards Act (FLSA)
  - ❖ Enforced by U.S. Dep't of Labor - WHD
- ❖ Wisconsin Wage Payments Claims & Collections Act
  - ❖ Enforced by DWD – Labor Standards
- ❖ Coverage
  - ❖ Minimum wage
  - ❖ Overtime pay
  - ❖ Recordkeeping requirements
  - ❖ Employment of minors

# Misclassification Issues:

- ❖ Employee vs. independent contractor
  - ❖ DOL crackdown in recent years
  - ❖ Multiple tests to determine status
    - ❖ DOL Economic Realities Test
    - ❖ IRS 20-Point Test
    - ❖ Wisconsin Unemployment Test
    - ❖ Wisconsin Worker's Compensation Test

# The New White Collar Exemptions:

- ❖ Effective January 1, 2020
- ❖ Increased salary threshold to \$35,568 (\$684/week)
- ❖ 3 basic tests to qualify as white-collar exempt:
  - ❖ Salary test
  - ❖ Duties test
    - ❖ Job must have as its primary duty the job functions described under 1 of the exemptions

# White Collar Exemptions:

- ❖ Executive
  - ❖ Management of department or subdivision, supervises 2 or more & authority to hire/fire
- ❖ Administrative
  - ❖ Office or non-manual work “directly” related to management or general business operations, discretion with respect to “matters of significance”
- ❖ Learned Professional
  - ❖ Performs work requiring advanced type of knowledge, discretion & judgment, prolonged instruction
- ❖ Creative Professional
  - ❖ Performs work requiring invention, imagination, originality or talent in recognized field of artistic or creative endeavor
- ❖ Computer Professional
  - ❖ Application of systems analysis techniques & procedures to determine specifications, design of computer systems, creation or modification of computer programs
- ❖ Outside Sales
  - ❖ Making sales, regularly away from place of business

# Off-the-Clock & Work from Home:

- ❖ Failure to pay for all time worked
  - ❖ “Suffered or permitted” to work
  - ❖ Use of smart phones & other remote tools
    - ❖ Are employees recording time?
  - ❖ Lectures, meetings & training programs
  - ❖ Travel time
  - ❖ Meal & rest breaks
    - ❖ Automatic deductions for breaks
  - ❖ Pre-clock and post-clock work
    - ❖ Employees who clock in early
    - ❖ Procedures for reporting extra work
  - ❖ Donning & doffing
    - ❖ Changing clothes v. safety equipment
  - ❖ COVID’s impact



# Deductions from Salary:

- ❖ Generally must pay exempt employees full salary in week in which *any* work is performed
- ❖ Specific permitted exceptions:
  - ❖ 1<sup>st</sup> week and last week of employment
  - ❖ Sickness covered by bona fide sick pay plan, provided employee is eligible for benefits
  - ❖ Authorized FMLA leave
  - ❖ No deductions for jury duty, witness, military leave
  - ❖ Can force employee to use leave time for missed time
- ❖ How is overtime calculated for salaried employees?

# Interns:

- ❖ FLSA requires “for-profit” employers to pay employees for work
- ❖ Are interns and students “employees”?
- ❖ Primary beneficiary test
  - ❖ Mutual understanding of no expectation of compensation
  - ❖ Does internship provide training similar to that received in educational environment or other hands-on training
  - ❖ Is internship tied to a formal education program
  - ❖ Does internship accommodate intern’s academic commitments to school
  - ❖ Is the duration limited to period where the internship provides beneficial learning
  - ❖ Does intern’s work complement, rather than displace work of paid employees while providing significant educational benefits
  - ❖ Mutual understanding of no entitlement to a paid job at end of internship

# On-Call Issues:

- ❖ Engaged to wait or waiting to be engaged?
- ❖ On-premises vs. off-premises
- ❖ What does your policy say?
- ❖ What additional restrictions does employer place on the employee?
- ❖ Can employee engage in personal activities?
- ❖ Fact-intensive inquiry

# Liability for Violations:

- ❖ FLSA –“Any person acting directly or indirectly in the interest of the employer in relation to the employee”
  - ❖ Power to hire & fire
  - ❖ Control over schedule, conditions of employment, method & rate of payment, employment records
  - ❖ Control over business enterprise (more than one business for common purpose)
- ❖ Liquidated damages
- ❖ Attorney’s fees & costs
- ❖ Possible criminal penalties

# Take-Aways:

- ❖ Private lawsuits on the rise
- ❖ Wage & hour claims are costly – and likely not covered by your EPLI coverage
- ❖ Conduct audits to identify trouble spots
  - ❖ Exempt vs. non-exempt
  - ❖ Employee vs. independent contractor
  - ❖ Pay deductions
  - ❖ Interns, work from home, off the clock
  - ❖ Record-keeping

# Questions?

Sally A. Piefer  
Kristofor L. Hanson  
Lindner & Marsack, S.C.  
411 E. Wisconsin Avenue  
Milwaukee, WI 53202  
(414) 273-3910  
[spiefer@lindner-marsack.com](mailto:spiefer@lindner-marsack.com)  
[khanson@lindner-marsack.com](mailto:khanson@lindner-marsack.com)  
[www.lindner-marsack.com](http://www.lindner-marsack.com)

Christopher J. Smith  
Legal Counsel  
CD Smith Construction  
125 Camelot Drive  
Fond Du Lac, WI 54935  
(920) 924-2900  
[email]  
[www.cdsmith.com](http://www.cdsmith.com)

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