

## **WAGE AND HOUR ISSUES FACING AGRIBUSINESS**

Thomas P. Godar  
Michael Best & Friedrich LLP  
1 South Pinckney Street  
Madison, WI 53707  
[tpgodar@mbf-law.com](mailto:tpgodar@mbf-law.com)

### **I. GENERALLY, THE WAGE AND HOUR ISSUES FACING BUSINESSES ARE GOVERNED BY THE FEDERAL FAIR LABOR STANDARDS ACT.**

- A.** The FLSA has been around for about 70 years, and often does not reflect the modern way in which agra business and other business is conducted.
- B.** The FLSA is enforced by the United States Department of Labor, Wage and Hour Division which has the right to investigate complaints, or perform audits.
- C.** Failure of an employer with responsibilities to meet standards of the Wage and Hour Division can include back pay for two or three years to affected employees, doubling of the back pay for willful violation, and penalties.
- D.** Wisconsin has its own standards governing pay practices, which largely mirror the federal standards, but in certain circumstances can be more demanding.
  - 1. If an employment is not subject to federal wage and hour standards, then state standards may apply.
  - 2. Even if federal standards apply, state standards can be applied simultaneously, so long as they are not in conflict with federal wage and hour standards.

### **II. COVERAGE UNDER THE FAIR LABOR STANDARDS ACT IS VERY BROAD.**

- A.** The FLSA covers all employees of employers if:
  - 1. The business meets the enterprise coverage test which means that it is engaged in interstate commerce, and its gross annual sales or business is not less than \$500,000.
  - 2. Even if a company is not found to be covered by the FLSA, an individual employee may be covered if the individual is engaged in commerce on behalf of the employer; i.e., whether the employee's activities are actually in or so closely related to the movement of commerce as to be part of it.

### **III. FAIR LABOR STANDARDS ACT GENERAL OVERTIME REQUIREMENTS.**

- A.** Employers must pay non-exempt employees at the rate of time and a half and employee's regular rate for all of hours worked over 40 hours in a workweek.
  - 1. A workweek is defined as a fixed and recurring period of 168 hours of seven consecutive 24-hour days.
  - 2. A workweek need not coincide with a calendar week.
  - 3. A regular rate includes all remuneration for employment, whether paid hourly, piecemeal, by salary, on a commission or a bonus.
  - 4. Narrow exceptions include:
    - a. Gifts or discretionary bonuses.
    - b. Vacation, holiday or sick pay.
    - c. Reimbursement for travel and other expenses.
    - d. Profit sharing, thrift or savings plans.
    - e. Bona fide benefit plans.
    - f. Premiums pay for hours worked in excess of daily or weekly standards.
    - g. Premium pay for work on weekends or holidays.

### **IV. TREATMENT OF INCENTIVE PAYMENTS.**

- A.** Non-discretionary bonuses and incentive payments must be included to determine a "regular rate" for purposes of determining overtime. Bonuses for quality and accuracy of work, for attendance, or to induce steady or rapid work are all included in the regular rate.
- B.** A truly discretionary gift or bonus is determined by the employer without any other prior promise or agreement to make payment.

### **V. EXEMPTIONS FROM THE OVERTIME REQUIREMENTS ARE NARROWLY CONSTRUED.**

- A.** The typical exemption is for professional, executive, administrative employees, or outside salespersons.
- B.** An exception also applies to employees under the Motor Carriers Act, which establishes qualifications and maximum hours of service rules. Application revolves around a three-factor test.

1. Employees employed by a carrier subject to the U.S. Secretary of Transportation to establish qualifications and maximum hours of services.
2. The affected employees are engaged in activities that directly affect the operational safety of motor vehicles.
3. Those vehicles transport passengers or property on public highways in interstate or foreign commerce.

**C.** Certain agricultural employees are exempt from overtime requirements, or may be exempt from both overtime and minimum wage requirements for certain agricultural operations.

1. Employee's activities must be in "agriculture" which includes farming or any practices performed by a farmer or on a farm, as an incident to or in connection with farming operations. 29 U.S.C. § 203(f). Hence, the application of water, fertilizer or limestone to farmland is normally seen as agriculture.
2. A secondary meaning of "agricultural" activities is broader, and includes practices performed by a farmer or on a farm. Therefore, a practice incidental to agriculture that is neither performed by a farmer, nor on the farm, is generally not within this scope of secondary meaning of agriculture. Therefore, employees employed by commissioned brokers, or warehouse employees may **not** be agricultural employees
3. While the term "farmer" is not limited to individual persons and can include the employees of a farmer, as a general rule employees whose primary agricultural activity consists of the application of fertilizer, herbicides and pesticides are not farmers within the meaning of the FLSA. *Reich v. Tiller Helicopter Services*, 8 F.3d 1018 (5<sup>th</sup> Cir. 1993).
4. If an activity is not performed by a farmer, it must be performed on a farm, which is a tract of land devoted to the actual farming activities.
5. Practices performed by a farmer must be in connection with the farm rather than in connection with non-farming operations, or with farming operations that are not their own.
6. Farming operations, to qualify for the exemption, does generally not apply to an independent business which otherwise supports farming operations.

- D.** The exception to overtime is not only limited in application to farmers performing farm work on the farm, but the regulations also state that when an employee in the same workweek performs work which is exempt under one section of the Act **but not exempt under some other section**, that employee is not exempt for that week, and the wage and hour requirements of the Act are applicable.
- E.** There is even a narrower exception to both the overtime and minimum wage requirements that apply if an employee is “employed by an employer who did not, during any calendar quarter during the preceding calendar, use more than 500 man days of agricultural labor, or if such employee is the parent, spouse, child or other member of the employer’s immediate family or if the employee is principally engaged in range production of livestock.” (See § 13(a)(6) of the FLSA).

## **VI. APPLICATION OF EXEMPTIONS.**

- A.** One must look carefully at the Motor Carrier Exemption to see if an employer qualifies by meeting all three provisos of the exemption. A separate analysis may reveal certain qualified employees because of the employee’s participation in interstate commerce.
- B.** The agricultural exemptions should be examined, but may not apply even if much of the activities of the employees would otherwise qualify because certain of the activities of the employees, such as cleaning and maintenance of equipment, would not otherwise fit the exemption, keeping in mind that when both exempt and non-exempt activities are performed within a week, the wage and hour requirements of the Act apply.

## **VII. PRACTICAL IMPLICATIONS ARE PAYING OVERTIME ON COMMISSIONS OR BONUS RELATED TO PRODUCTION.**

- A.** Use all the earnings attributed to a workweek, including commissions or bonuses, divide by the number of hours worked, and multiply that hourly rate by .5 times the number of hours greater than 40 to get the total overtime worked in a week.
- B.** Consider the alternatives and incentives carefully before abandoning a system that seems to work.
- C.** If you fear you are not in compliance with wage and hour laws, and do want to change the pay system, seek counsel first, to minimize risks.

Q:\FIRM\000000\0342\B0189024.1