

OVERVIEW OF FEDERAL WAGE & HOUR REGULATIONS



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San Diego, California

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WHAT ARE THE BASIC W&H REGULATIONS?



- ▶ No. 1: Keeping Employment Records
- ▶ No. 2: Minimum Wage
- ▶ No. 3: Overtime Pay
- ▶ No. 4: Employee vs. "Independent Contractor"

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"Lou" the Typical Tow Truck Driver

- ▶ Lou's regular work hours are 8:00 a.m. – 6:00 p.m., 5 days per week: 50 hours
- ▶ Required to take truck home two nights a week: 10-28 "on call" hours
- ▶ Working time per week (including nights/weekends): 60-78 hours
- ▶ Pay: Base of \$200/week plus 30% commission
- ▶ Pay range: \$500.00 to \$1000.00 per week
- ▶ No time clock or record of time on individual tow jobs

- ▶ Lou becomes undependable. You fire him.
- ▶ Next up?

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... a visit from the Department of Labor, Wage and Hour Division!



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DOL is increasing its focus on the towing industry



Left to right: Domingo Castillo, WHD; Dana Gardiner, Texas Towing; Sherry Trout, WHD; Rhonda Hight, Texas Towing.

A leg up for tow-truck drivers: When Dallas-area Wage and Hour Division officials met with members of the Texas Towing & Storage Association on Dec. 9, they had two goals – to protect workers and educate employers in the towing industry. This is just one example of the division's ongoing efforts to decrease the number of Fair Labor Standards Act violations in the industry. It is also the beginning of an enforcement initiative to help tow-truck drivers. In Texas and throughout the Southwest, tow-truck drivers often are subjected to misclassification as independent contractors, and minimum wage violations due to wage deductions for damages to vehicles in tow, and overtime payment violations that result

when an employer pays a straight commission without regard to hours worked. Tow-truck drivers who feel their rights have been violated should call the division's toll-free helpline at 866-4US-WAGE.

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Or – worse! – Lou retains an attorney and files a federal court FLSA lawsuit!



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Lawyers are soliciting your employees:



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First Question: Is Lou's Employer subject to the Federal Wage & Hour laws?

- ▶ ENTERPRISE COVERAGE:
Annual dollar volume of sales of \$500,000 or more?
or
- ▶ INDIVIDUAL COVERAGE:
If the employee is "**engaged in commerce**"?
 - ▶ to be engaged in commerce within the meaning of that phrase [in the FLSA], an employee must be **(1)** actually engaged in the movement of commerce, or **(2)** the services he performs must be so closely related thereto as to be for all practical purposes an essential part thereof.
 - ▶ "[T]owing services performed on instrumentalities of interstate commerce are essential and indispensable to the interstate movement of people and goods."
 - ▶ *Hale v. Spears Wrecker Service*, 2011 WL 1930670 (N.D. Okla., 2011) (work of intrastate tow truck driver affected the flow of interstate commerce)

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Not-so-fun Fact:

It is practically impossible for a modern-day towing company to avoid application of FLSA.

- So, let's jump into it:



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Landmine No. 1:



Recordkeeping Requirements

- Every employer subject to the FLSA is required to create and maintain records of the wages and hours of its employees. [29 U.S.C. § 211\(c\)](#).

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What records must be kept?

- ▶ Total hours worked each workday and each workweek;
- ▶ Total daily or weekly straight-time earnings;
- ▶ Regular hourly pay rate for any week when overtime is worked;
- ▶ Payroll records must be kept for FIVE (5) years ("rolling" retention)

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BAD EXCUSES

- ▶
- ▶
- ▶
- ▶
- ▶ MUST KEEP RECORDS, EVEN IF EXEMPT

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Failure to Keep Records

- ▶ Criminal or civil sanctions may be imposed.
- ▶ Court will presume that the employee's calculations are correct.

- ▶ Record-keeping tips:

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Timekeeping apps ...



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Employee handbook policy:

Drivers are responsible for keeping accurate time records of their working hours



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Lecture 2:






Minimum Wage

- ▶ General Rule: The federal minimum wage for covered nonexempt employees is \$7.25 per hour for every "hour worked". (29 U.S.C. § 206(a)(1)(C)).
- ▶ Minimum wage must be paid every workweek (7 consecutive 24 hour periods/can't average two weeks together).
- ▶ Many states have higher minimum wage requirements. If an employee is subject to both state and federal, they are entitled to the higher rate.
- ▶ But Lou makes between \$500-\$1,000 per week. Why should you be worried about minimum wage?

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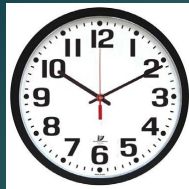
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“On Call” hours!!

- ▶ “On call” hours may count towards “hours worked” depending on restrictions placed on driver:
- ▶ COMMON “ON CALL” DRIVER RESTRICTIONS:
 - ▶ Must be available at all times via cell phone 
 - ▶ No use of alcohol or drugs and be physically and mentally ready to operate a tow truck, including arriving in uniform and appearing well-groomed 
 - ▶ Must remain within or fairly close to principal city in order to respond to a call within five minutes and arrive on site within a reasonable amount of time or within time required by contract or rules 
- ▶ Disciplined if fail to respond to call, i.e., must respond to calls
- ▶ *Lanktree v. I-70 Towing*, 2011 WL 4729726 (W.D. Mo. 2011) (If on-call drivers can decline or trade calls without restriction, on-call hours do not count).

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How Many Hours Did Lou Actually “Work?”

- ▶ Regular schedule = 50 hours
- ▶ “On call” hours (based on “on call” restriction rules)= 28 hours
- ▶ Total hours = 78 hours

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Minimum wage calculation

- ▶ Lou worked 28 "on call" hours this week, but generated only \$350 in commission
- ▶ \$200 base pay + \$350 commission = \$550 weekly pay
- ▶ $\$550 \div 78 \text{ hours worked} = \7.05 per hour (.20 below minimum)
- ▶ Current federal minimum wage is \$7.25 per hour;
- ▶ Thirty (30) states have a higher minimum wage (e.g., Ohio = \$8.30, Michigan = \$8.50, Vermont = \$9.60);
- ▶ Burden of proof is on employer to dispute claimed work hours.
- ▶ BOTTOM LINE: "On call" hours can create minimum wage problems

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Consequences of Failure to Pay Minimum Wage

- ▶ So you owe Lou 20¢ per hour back pay. What's the big deal?
 - ▶ Statute of limitations/"look back" period (2 years, 3 years for willful violations)
 - ▶ Liquidated damages (doubles unpaid wages)
 - ▶ Some states have longer SOL (Kentucky = 5 years)
 - ▶ Class action by Lou on behalf of all similarly-situated employees
 - ▶ Payment of Lou's attorney's fees! \$\$\$\$

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Recommendations

- ▶ Don't restrict your drivers while on call.
- ▶ More than one "on call" driver.
- ▶ Establish a night shift.
- ▶ Pay your drivers by the hour, especially if you're exempt from overtime.
- ▶ Establish strict policies on time and recording time
- ▶ Maintain a good employee handbook
- ▶ Place burden on driver to maintain time records

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Non-Tax Payroll Deductions: A Minimum Wage Hand Grenade:

Possible lawful reasons:

1. To allow the employee to repay a loan or advance;
2. Damage to Company Property;
3. To recover an overpayment;
4. To compensate the employer for the replacement cost or unpaid balance of the cost of the employer's merchandise or uniforms purchased by the employee.

*****MAKE SURE YOU CHECK YOUR STATE LAW*****

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If deduction is permissible...

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Landmine No. 3: Maximum Hours (Overtime Pay)

- ▶ 1. Is employer subject to the overtime provisions of the FLSA?
- ▶ 2. If yes, is employee exempt from payment of overtime?



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OVERTIME BASICS

29 U.S.C. § 207(a)(1): [N]o employer shall employ any of his employees who in any workweek is engaged in commerce ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

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<u>Regular shift</u>	<u>Hours worked</u>
8:00 a.m. – 6:00 p.m., M-F	50
Hourly rate (\$15.00/hour)	
BASE PAY FOR WEEK (\$15 x 50)	<u>\$750.00</u>
OVERTIME PAY	
\$15 x ½ = \$7.50 x 10 hours over 40	75.00
TOTAL PAY	<u>\$825.00</u>

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OVERTIME FOR LOU: COMMISSION-PAID, ON-CALL TOW TRUCK DRIVER

<u>Regular shift</u>	<u>Hours worked</u>
8:00 a.m. – 6:00 p.m., M-F	50
<u>Weekend "on-call"</u>	
3 calls on Saturday	3
2 calls on Sunday	2
TOTAL HOURS WORKED	<u>55</u>
Lou's Pay for Week:	
Base pay	\$ 200.00
Commission	1,000.00
BASE PAY FOR WEEK	<u>\$1,200.00</u>
OVERTIME PAY	
\$1,200 ÷ 55 hours worked = \$21.82 hourly rate	
\$21.82 x ½ = 10.91 x 15 hours over 40 hours	163.65
TOTAL PAY	<u>\$1,363.65</u>

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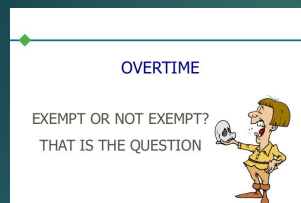
Consequences of Failure to Pay Overtime

- ▶ Back OT pay
- ▶ Statute of limitations/"look back" period (2 years, 3 years for willful violations)
- ▶ Some states have longer SOL (Kentucky = 5 years)
- ▶ Liquidated damages (doubles unpaid OT);
- ▶ Class action by Lou on behalf of all similarly-situated employees;
- ▶ Payment of Lou's attorney's fees!
- ▶ PERSONAL liability of employer or officer of corporate entity! (29 U.S.C. § 203 ("employer" defined); *Carnley v. Muggle Towing*, USDC, E.D. Tex. 2021)

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Overtime Exemptions



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EXEMPTIONS FROM
OVERTIME RULES!

Three Potential Exemptions Applicable to Towing Business:

1. Executive Exemption (mistakenly referred to as "salary" exemption)
2. Retail Services Exemption (mistakenly referred to as "commission" exemption)
3. Motor Carrier Act Exemption (MCAE)

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Possible Overtime Exemption #1:

Executive, Administrative, and Professional (EAP) Exemption

(Often called the "Salary Exemption")

- ▶ All of the following must be met for an EAP exemption:
- ▶ Compensated on a salary basis at a rate not less than \$47,476 per year/\$913 per week;
- ▶ Management employee;
- ▶ Authority to hire/fire .

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Possible Overtime Exemption #2: Retail or Service Establishment

- ▶ Three conditions must be met:
 - ▶ Must be employed by a retail or service establishment, and
 - ▶ Makes at least minimum wage, and
 - ▶ Paid at least ½ in commissions.

TOWING BUSINESSES: *Brennan v. Keyser Towing Company*, 507 F.2d 472 (9th Cir. 1974) (disallowing retail exemption where towing businesses derive a large proportion of their business from police calls, holding that police work is a distinct activity from tows requested directly by the vehicle owner)

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Overtime Exemption #3: Motor Carrier Act Exemption (MCAE)

1. Employed by a motor carrier.
2. Employee's duties affect the safety of operation of motor vehicles in transportation on public highways in interstate or foreign commerce;
3. Not excluded by the small vehicle exception.

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Motor Carrier Act Exemption (MCAE):

1. *Employed by a motor carrier*



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Motor Carrier Act Exemption (MCAE):

2. *Employee's duties affect the safety of operation of motor vehicles in transportation on public highways in interstate or foreign commerce*

- ▶ *Interstate* drivers are a category that expressly meet definition. (29 C.F.R. 782.3(b); *Finney v. Free Enter. Sys.*, 2012 WL 5462971 (W.D. Ky. Nov. 8, 2012).
- ▶ *Intrastate* drivers? Continuation rule. (Intrastate driving covered by exemption if "the goods ... being transported are in the process of being transported from another state.") (29 C.F.R. § 782.7(b)(2); *Morris v. McComb*, 332 U.S. 442, 68 S.Ct. 131 (1947)).
- ▶ "Four-month" rule (46 Fed. Reg. 37,902; DOL Wage and Hour Division's Field Operations Handbook, § 24e01(b)).
- ▶ "*De minimus* rule": If employee's safety-affecting duties are so trivial, casual or insignificant as to be *de minimus*. *Demma v. Chicago 24-Hour Towing*, 2016 WL 1639695 (N.D. Ill., 2016) (38 interstate tows in 3 years out of 20,000 calls dispatched; rule not recognized)

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Motor Carrier Act Exemption (MCAE):

3. *Small Vehicle Exception Not Apply*

- ▶ Enacted by Congress in 2008 (SAFETEA-LU Technical Corrections Act of 2008)
- ▶ Overtime must still be paid to employees who perform duties on vehicles weighing 10,000 pounds or less.
- ▶ Light duty service trucks weighing 10,000 pounds or less (*not* GVWR).
- ▶ Mixed-fleets

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MCAE Pointers

- ▶ The Motor Carrier Act Exemption (MCAE) does not apply to employees not engaged in "safety affecting activities", such as dispatchers, office personnel, those who unload vehicles, or those who load but are not responsible for the proper loading of the vehicle.
- ▶ Not every tow company is engaged in interstate commerce.
- ▶ Burden is on tow company to prove MCAE applies. *Hix v. Johnson Wrecker Service, Inc.* 651 F.3d 658 (7th Cir. 2011).

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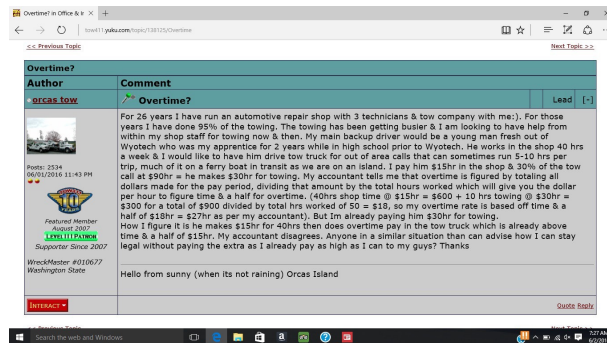
Scope of Exemptions

- ▶ MCAE only Exempts Employees from Overtime, Not Minimum Wage
- ▶ Just because Lou might be exempt, other employees still might be entitled to overtime
- ▶ Even if employee exempt, employer must still keep records

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Overtime Quiz



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Recommendations/Suggestions

- ▶ If OT applicable and not compliant, get compliant right away (SOL)
- ▶ Voluntarily pay backpay (avoid attorney involvement)
- ▶ Obtain release (with add'l consideration)
- ▶ Insurance: Wage & Hour coverage
- ▶ DOL opinion letter
- ▶ Legislation: OT exemption for tow truck drivers? (47 current exemptions)

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Landmine No. 4



Paying as "Independent Contractor" (Form 1099)

Sounds like a good idea:

- No minimum wage/overtime concerns
- No worker's compensation insurance
- No Form 941 filings
- No employer's contribution to SS/Medicare
- No health insurance/benefits

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Supreme Court: *Goldberg v. Whitaker House Coop.*:

- "Economic Realities" Test (minimum wage/overtime cases)

- ▶ Is the employee "economically dependent on the employer"?
- ▶ The mere labeling of an individual as an employee or an independent contractor is not dispositive. *Jeanneret v. Aron's East Coast Towing*, 2002 WL 32114470 (N.D. Fla. 2002)
- ▶ DOL Administrator's Interpretation No. 2015-1 (July 15, 2015):
- ▶ "The Department of Labor's Wage and Hour Division (WHD) continues to receive numerous complaints from workers alleging

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Relevant Factor of DOL's "Economic Realities" Test

- ▶ 1) the permanency of the relationship between the parties;
- ▶ 2) the degree of skill required for the rendering of the services;
- ▶ 3) the worker's investment in equipment or materials for the task;
- ▶ 4) the worker's opportunity for profit or loss, depending upon his skill; and
- ▶ 5) the degree of the alleged employer's right to control the manner in which the work is performed;
- ▶ 6) whether the service rendered is an integral part of the alleged e

Donovan v. Brandel, 736 F.2d 1114 (6th Cir. 1984)

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IRS "20 Factors" Test (withholding tax cases)



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Is Lou an Independent Contractor?

- ▶ Difficult for a tow operator to qualify as an independent contractor under either DOL or IRS test.
- ▶ Name on the truck?
- ▶ Is driver subject to discipline from employer?
- ▶ Is work schedule set by employer?
- ▶ Has driver made any financial investment in equipment?
- ▶ Who has control?

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A written "independent contractor" agreement with the tow truck driver?

"[Whether employees] should be characterized as employees or as contractors for FLSA purposes [is not] dependent upon the interpretation or validity of the contracts that purport to govern their relationship with Defendants."

Crouch v. Guardian Angel Nursing, Inc., 2009 WL 3738095 (M.D. Tenn. Nov. 4, 2009)

The intent of the parties and their contractual designations do not control the inquiry into whether an employment relationship existed.

LeMaster v. Alternative Healthcare Solutions, Inc., 726 F.Supp.2d 854 (M.D.Tenn. 2010).

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Consequences of Misclassification

- ▶ Liable for any unpaid wages below minimum wage, plus damages
- ▶ Liable for any unpaid overtime wages, plus damages
- ▶ Liable for unpaid employment taxes, interest and penalties
- ▶ Liable for unpaid worker's compensation premiums
- ▶ No records of hours worked

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Recommendation:



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Questions/Comments

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