



Track 2 – Session 4

Conducting Wage and Hour Audits – Identifying Policies and Practices that Give Rise to Litigation

About the Presenters...

James J. Chiolino has worked for the Department of Workforce Development since 1991. He has worked with both of the Equal Rights Division's bureaus: the Civil Rights Bureau and the Labor Standards Bureau. Mid-career, Jim took a three-year hiatus from state service and practiced in the area of employment law, representing employers. He currently is assistant Equal Rights Division administrator and director of the Labor Standards Bureau. Jim has a Master of Public Administration degree from the University of Wisconsin-Milwaukee and a J.D. from the University of Wisconsin Law School. He also is a member of the State Bar of Wisconsin's Labor and Employment Law Section board.

Keith E. Kopplin's practice focuses on employment litigation and employment law matters. Keith assists clients in resolving wage and hour class and collective actions, defending employment discrimination claims, responding to government audits, and improving workplace policies and procedures. He also provides day-to-day counseling to employers regarding a wide range of human resource matters including discipline and discharge decisions, the Wisconsin and federal FMLA, wage and hour practices, and workplace accommodations. He is admitted to practice in all Wisconsin state courts and in the United States District Courts for the Eastern and Western Districts of Wisconsin and the District of Colorado.

Summer Murshid graduated from Georgetown University Law Center in 2009, after which she joined the labor and employment practice group at Hawks Quindel, S.C. She represents plaintiffs in individual and class action wage and hour litigation in both state and federal court. She also practices in the area of employment discrimination. She is a board member for the State Bar of Wisconsin's Labor and Employment Section and was the Chair of the Milwaukee Chapter of the ACLU from 2010 - 2011. She also works on the Election Protection Legal Coordinating Committee and volunteers with Wills For Heroes and the Volunteer Lawyers Project. She has been named a Super Lawyers Rising star since 2012 and was designated as one of Wisconsin Law Journal's 2012 Up and Coming Lawyers.

INSIDETRACK

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Understanding Wage and Hour Law: Compliance, Enforcement, and Remedies

Wage and hour law is a hot practice area, with thousands of complaints filed each year under state and federal laws. In this article, three attorneys with different perspectives provide an overview of wage and hour laws, discuss how they are enforced through government and private actions, and how employers can ensure compliance.

JAMES J. CHIOLINO, SUMMER MURSHID & KEITH E. KOPPLIN

Aug. 5, 2015 – The Wisconsin Department of Workforce Development (DWD), charged with advancing Wisconsin's economy and business climate and supporting Wisconsin's workforce, receives approximately 2,500 state wage and hour complaints per year. Last year, DWD collected more than \$2 million for about 4,600 workers affected.

Also in 2014, the U.S. Department of Labor's Wage and Hour Division collected almost \$250 million in back wages based on approximately 22,000 wage and hour complaints by employees under the federal Fair Labor Standards Act (FLSA). These numbers don't even include remedies for private actions that employees are entitled to pursue.

In short, lawyers who work on wage and hour law cases, including government attorneys and lawyers who represent employers and employees, are a busy group.

In this article, three Wisconsin attorneys who work in this area – Jim Chiolino, Summer Murshid, and Keith Kopplin – provide an overview of wage and hour laws in Wisconsin with perspectives on employer compliance, enforcement, and remedies for workers.

All three are teaming up to present "Conducting Wage and Hour Audits: Identifying Policies and Practices that Give Rise to Litigation" at the State Bar of Wisconsin PINNACLE[®]'s upcoming [Health, Labor & Employment Law Institute](#) (HLE), Aug. 20-21, at the Wilderness Hotel and Golf Resort in Wisconsin Dells.

Overview of Wage and Hour Laws (Jim Chiolino)

Federal wage and hour protections have been in place since the 1938 passage of the Fair Labor Standards Act (FLSA), which provides for a minimum wage, overtime pay, child labor protections, and record-keeping requirements.¹



James Chiolino (U.W. 2007) is an attorney in the Wisconsin Department of Workforce Development's Equal Rights Division in

This Depression-era legislation was meant to provide minimum standards of living and protections for the well-being of workers. The overtime provisions were meant to encourage hiring of employees at a time when unemployment was a scourge.

The FLSA applies to approximately 130 million workers, according to the U.S. Department of Labor, Wage and Hour Division (WHD). In determining what employees are protected under the FLSA, the WHD



Madison. He currently serves as assistant Equal Rights Division administrator and director of the Labor Standards Bureau.



Summer Murshid (Georgetown 2009) is an attorney in the labor and employment practice group at *Hawks Quindel S.C., Milwaukee*. She represents plaintiffs in individual and class action wage and hour litigation in state and federal courts.



Keith Kopplin (Marquette 2005) is of counsel at *Ogletree, Deakins, Nash, Smoak & Stewart P.C., Milwaukee*. As part of his employment law practice, he represents employers in wage and hour class and collective actions, and advises employers on workplace policies.

refers to two concepts: “enterprise coverage” and “individual coverage.”

Under the enterprise coverage prong, employees are covered if the employer has at least two employees and either an annual dollar volume of sales or business of at least \$500,000 or is a hospital, business providing medical or nursing care for residents, a school or preschool, or a government agency.

Under the individual coverage prong, employees are covered if they are engaged in commerce or production of goods for commerce. Domestic service workers are also normally covered by the law. Additionally, the FLSA explicitly allows state laws to be more protective of workers.²

Wisconsin law requires overtime³ – with slightly different exemptions than under the FLSA – minimum wage,⁴ and provides child labor and “street trades” protections.⁵ Wisconsin law also contains record-keeping requirements.

In addition to these counterparts to federal law, Wisconsin has wage and hour regulations requiring employee access to personnel records,⁶ regulations dealing with deductions for faulty workmanship, loss, theft or damage,⁷ regulations requiring “One Day of Rest in Seven” for certain employees,⁸ and regulating agreed upon wages.⁹

Agency enforcement of all labor standards requirements in Wisconsin begins with a written complaint to the Wisconsin Department of Workforce Development (DWD). For the provisions involving payment of wages, complainants also have a private right of action that does not require exhaustion of administrative remedies.

The Labor Standards Bureau (LSB) of DWD's Equal Rights Division (ERD) receives approximately 2,500 wage and hour complaints each year, most involving simply unpaid wages (agreed upon wage issues, such as nonpayment of final paychecks, unlawful deductions, or

vacation pay claims).

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Of the 2,500 complaints filed annually, approximately 500 are found to have merit and the DWD settles most internally. When claims are settled with the agency, there are no penalties assessed. Approximately 9 percent of all complaints cannot be resolved by the LSB and are referred to district attorneys or the Wisconsin Department of Justice.

These prosecutors can sue for wage deficiencies plus a 100 percent “increased wage” as provided in Wis. Stat. section 109.11(2)(b). They occasionally handle these claims as criminal violations, seeking fines and imprisonment or both under section 109.11(3). In 2014, the agency collected just over \$2.25 million for nearly 4,600 affected employees.

Common Wage and Hour Violations (Summer Murshid)

Wage and hour violations come in all shapes and sizes. They are perpetrated by large and small employers in all industries, sometimes willfully, though not always. Despite the widespread nature of these violations, there are some industries and employees that tend to suffer more frequent violations, including restaurant and factory workers.

Restaurants. Restaurant employees are often the lowest paid and most abused workers plaintiffs’ attorneys have the opportunity to represent. For example, busboys, dishwashers, and other back-of-house employees are often paid a flat rate, in cash, for working up to 75 hours per week. The weekly rate is often staggeringly low – anywhere from \$200 - \$400 per week – meaning they are paid less than \$3 per hour. Most workers in these situations do not receive tips.

Violations involving tipped staff, such as servers and bartenders, often come in the form of improper tip-pooling arrangements. These employees are permitted to receive a subminimum wage (\$2.33 per hour) when the employer provides proper notice that tips will make up the difference to get the employee to \$7.25 per hour.

However, many restaurants attempt to include managers in the tip pool, which invalidates it and means that the employer must pay the full \$7.25 for each hour worked.

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Factory Workers. Many factory workers are subject to employer policies that result in unpaid work time. For instance, employers establish rounding policies that shave time from employees (rounding an employee’s punch-out time from 3:36 back to 3:30 even though the employee worked until 3:36). This type of policy has to be carefully applied so that employees don’t end up with unpaid work over a period of time and many employers get it wrong. Additionally, employers may require employees to wear protective equipment to perform work but refuse to pay for the time spent donning and doffing this equipment. If the equipment is integral and indispensable to the employee’s job, he or she must be paid for the time it takes to put it on and take it off.

Medical Care Providers. Hospital employees such as nurses and certified nursing assistants often carry communication devices throughout the course of a shift so that they can be reached by patients and other staff. When these employees are required to carry and respond to communication devices during meal periods, they may not be receiving a bona fide meal period. This is relevant when employers automatically deduct meal periods from the employee’s pay. If an employee is working through his or her lunch, the employee must be paid for that meal period and in many cases, auto-deduct policies operate to deprive employees of pay for time spent working.

What Can Employees Do If Their Rights are Being Violated?

Employees who suffer wage and hour violations should contact an attorney if they are interested in pursuing wage claims under state or federal laws. Employees can also file claims with the Department of Labor (for federal violations) or with the Wisconsin Department of Workforce Development (for Wisconsin law violations). Sometimes, however, the best place to start is by having a direct conversation with the employer.

If an employee is successful in a wage and hour claim, he or she is entitled to back pay and usually liquidated damages, as well as attorneys’ fees. ”

Not all employers are intentionally depriving employees of wages and employees might be able to affect positive changes in the workplace simply by bringing the matter to the employer’s attention. Of course, if an employee does not make progress with the employer, it’s probably wise to contact an attorney. Wage claims under state and federal law must be filed within two years of the date of the violation (three years, in some circumstances under federal law).

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What Can Employers Do to Ensure Compliance? (Keith Kopplin)

Wage and hour violations can come in many forms. Sometimes, employers improperly designate individuals as independent contractors instead of employees, and thereby fail to pay them minimum wage and overtime. Other times, employers misclassify individuals as exempt from overtime. One of the most difficult wage and hour issues facing employers, however, is “off-the-clock” work.

Under Wisconsin and federal law, employers are obligated to pay nonexempt employees for any and all time that they are required or permitted to work.

This means that employees must be paid for any time their employer knows, or has reason to know, they are performing work activities. From a practical perspective, this means that compensable work can and does occur before and after scheduled shifts and during unpaid break periods. More importantly, this also means that compensable work can occur without a specific request from the employer, or a specific request for compensation by the employee. Some of the common instances of off-the-clock work include:

- Pre- and post-shift activities, like changing clothing and equipment, performing maintenance, and completing paperwork;
- Off-premises and off-duty work activities like sending text messages and emails; and
- Working during unpaid meal periods.

Making matters worse, the exposure associated with off-the-clock work typically extends beyond a single employee. If an employer has a common policy, plan, or decision resulting in off-the-clock work, all affected employees may be permitted to join together in a class or collective action for unpaid minimum wage and/or overtime. This raises the stakes significantly.

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Fortunately, employers can minimize the risks associated with off-the-clock work by taking a few proactive steps. First, employers should implement clear policies indicating, among other things, that:

- All hourly nonexempt employees must record all hours worked, including their start and end times and the start and end of their unpaid breaks;
- Employees must record their own time;
- Employees must receive authorization prior to working overtime;
- Supervisors and managers are not authorized to require employees to work “off-the-clock;” and
- Hourly, nonexempt employees are expected to report any pressure or requests to work off-the-clock to human resources.

Failure to comply with these policies should result in discipline, up to, and including, discharge. Importantly, however, employers should never discipline with pay. For example, if an employee works overtime without authorization, the employer must compensate the employee, but can and should consider disciplining the employee for violating the policies.

Second, employers should train employees regarding off-the-clock work. This training must extend beyond merely informing hourly, nonexempt employees of their obligation to accurately record their actual work hours.

Specifically, employers must also train supervisors and managers regarding their obligation to eliminate instances of off-the-clock work. Again, regardless of whether the time is authorized or compensation requested, if a supervisor has reason to know that hours are being worked, the employer has an obligation to compensate employees accordingly. For that reason, supervisors and managers should be trained to recognize off-the-clock work, and take appropriate steps to ensure that the time is paid.

Finally, employers must maintain accurate and complete records, consistent with state and federal requirements. These records should include employee start and end times, and the start and end times of any unpaid breaks.

Employees should confirm the accuracy of their timesheets on a weekly basis, and supervisors and managers who review and approve the timesheets should ensure that they confirm their employees’ actual work activities. Few employees work in positions that allow for 100 percent predictability in their start and end times, and the start and end of their unpaid breaks. For that reason, rote entries suggest inaccurate timekeeping practices, and may be an indication of off-the-clock work.

Catch Them at the Health, Labor, and Employment Law Institute

Jim Chiolino, Summer Murshid, and Keith Kopplin are teaming up to present “Conducting Wage and Hour Audits: Identifying Policies and Practices that Give Rise to Litigation” at the State Bar of Wisconsin’s upcoming [Health, Labor & Employment Law Institute \(HLE\)](#), Aug. 20-21, at the Wilderness Hotel and Golf Resort in Wisconsin Dells.

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Endnotes

¹ 29 U.S.C. § 201, *et seq.*

² 29 U.S.C. § 218(a) (“savings clause”).

³ Wis. Stat. §§ 103.01-.03; Wis. Admin. Code ch. DWD 274.

⁴ Wis. Stat. ch. 104; Wis. Admin. Code ch. DWD 272.

⁵ Wis. Stat. §§ 103.21-.32; 103.64-.82; Wis. Admin. Code chs. DWD 270, DWD 271.


⁶ Wis. Stat. § 103.13 .

⁷ Wis. Stat. § 103.455 .


⁸ Wis. Stat. § 103.85 .

⁹ Wis. Stat. ch. 109 (Wage Payments, Claims Collections).

Wage & Hour Audits


Ogletree Deakins 

Keith Kopplin - Ogletree Deakins
Summer Murshid - Hawks Quindel, SC
Jim Chiolino – DWD – Equal Rights Division


STATE OF WISCONSIN
DWD
Department of Workforce Development

Introduction and Disclaimer: they've only given us 50 minutes.

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Introduction

- Overview
 - FLSA
 - Wisconsin
- Meal Periods
 - Rules
 - Case Study
 - Flags during audits, intake, and investigation
- Off-the-Clock
 - Rules
 - Case Study
 - Flags during audits, intake, and investigation

Overview

- Fair Labor Standards Act
 - Minimum Wage:
29 U.S.C. § 206



Overview

- Minimum Wage, cont.
 - Deductions
 - Taxes
 - Court Orders
 - Shortages
 - Unearned Vacation
 - Uniforms

Overview

- Fair Labor Standards Act
 - Overtime:
29 U.S.C. §207



"Who wants to work late again, raise your hands."

Overview

- Overtime, cont.
 - Proper calculation of overtime rate
 - Regular rate: 29 CFR § 778.109
 - Exemptions from overtime pay: 29 U.S.C. § 213
 - New Proposed Rules

Overview

- Fair Labor Standards Act
 - Damages
 - Back pay: 29 U.S.C. § 216(b)
 - Liquidated Damages: 29 U.S.C. § 216(b)
 - Prejudgment Interest: *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945) but see *Uphoff v. Elegant Bath, Ltd.*, 176 F3d 399 (7th Cir. 1999)
 - Postjudgment interest: 28 U.S.C. § 1961
 - Attorneys' Fees and Costs: 29 U.S.C. § 216(b)
 - Enforcement
 - Department of Labor
 - Litigation

Overview

- Wisconsin
 - Minimum Wage
 - \$7.25/hour
 - Wis. Stat. 104; Wis. Admin. Code DWD 272.
 - Overtime
 - 1.5 x regular rate for hours worked in excess of 40 in a workweek.
 - Wis. Stat. 103; Wis. Admin. Code DWD 274
 - Agreed-upon Wages
 - Also called "gap time"
 - Wis. Stat. § 109.01(3)



Overview

- Wisconsin
 - Enforcement
 - By complaint to the Labor Standards Bureau (LSB). Wis. Stat. § 109.09(1).
 - By civil suit. Wis. Stat. § 109.03(5).
 - Wage claim lien. Wis. Stat. § 109.09(2).
 - Damages
 - Increased wages. 50% or 100%. Wis. Stat. § 109.11(2).
 - Criminal penalties. \$500 fine / 90 days. Wis. Stat. § 109.11(3).
 - Forfeitures for violations of chs. 103 to 106. \$10 to \$100 for each offense. Wis. Stat. § 103.005(12).

Meal Periods

- Wisconsin
 - Meal periods are not required under Wisconsin law or the FLSA.
 - Employers may require employees to take meal periods.
 - To be unpaid, Wisconsin law requires:
 - That they be at least 30 minutes in duration
 - That the employee be completely relieved of duty, and
 - That the employee be free to leave the premises. Wis. Admin. Code §§ DWD 272.04(1), DWD 272.12(2)(c)

Meal Periods

- Wisconsin
 - Record-keeping:
 - Employers are to keep record of time of beginning and ending of meal periods when such periods are required OR when the time is deducted from work time. Wis. Admin. Code § DWD 272.11(1)(e).
 - Automatic deduction can be a problem...

Meal Periods

- Healthcare providers and employee meal periods



Meal Periods

- Things management lawyers look for during audits...
 - Lawful policies
 - Payment by default
 - Deduction override
 - Unlawful practices
 - short meals
 - interrupted/working/captive meals
 - Complaint/correction procedure



Meal Periods

- Things labor lawyers look for during client intake...
 - Automatic meal deduction
 - Ability to cancel meal deduction and related training
 - Interruptions during meal period and how interruptions happen (phone, pager, Vocera, etc.)
 - Hospital wide policy regarding meal periods
 - Record Keeping
 - Knowledge

Meal Periods

- Things DWD looks for during investigations...
 - Does the employer record meal period times?
 - If not, does the employer have a clearly stated policy about automatic deductions?
 - Does the employer follow its policy?
 - Is there evidence that the employer pays for meal periods that are “on duty” meal periods?

“The department shall investigate and attempt equitably to adjust controversies...” (Wis. Stat. § 109.09(1).

Off-the-Clock

- What is “work?”
 - *Anderson v. Mt. Clemens Pottery*
 - All work and no pay!
 - Pre-shift activities
 - Walking
 - Work
 - Walking
 - Post-shift activities
 - “Physical and mental exertion required or controlled by employer”
 - 29 U.S.C. §203(g) (“to suffer or permit to work”)



Off-the-Clock

- Preliminary/Postliminary – not compensable; 29 U.S.C. § 254(a)(2)
- Integral and Indispensable – compensable; *IBP v. Alvarez*, 546 U.S. 21 (2005)
- “Clothes” – 29 C.F.R. §§ 790.8(c) and 203(o)
- *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 190 L. Ed. 2d 410 (2014).
- *Weissman v. Tyson Prepared Foods, Inc.*, 2013 WI App 109 (2013).

Off-the-Clock

- Use of technology
 - Examples:
 - Electronic Medical Records Access
 - Pagers/Phones
 - Email
 - Text messages
 - Social Media



Off-the-Clock

- Use of technology, cont.
 - Spring 2015 DOL Regulatory Agenda
 - Hours Worked Under the FLSA
 - “Prerule Stage”
 - RFI by end of August 2015
 - Focus on off-duty use of technology
 - All will constitute work?
 - Reaffirm position on *de minimis*? 29 CFR § 785.47.

Off-the-Clock

- Case examples...
 - Rote time entries.
 - Supervisors assessed on overtime budget.
 - Same workload; watch your overtime.
 - Expectation of after-hours communication.
 - Supervisor greets subordinate to start/end day.

Off-the-Clock

- Things management lawyers look for during audits...
 - Lawful policies
 - Record all hours
 - Pre-approval to work overtime
 - Unlawful practices
 - After hours communication?
 - Workload doesn't match recorded time?
 - Employee pressure?
 - Supervisor/manager incentives?
 - Complaint/correction procedure



Off-the-Clock

- Things labor lawyers look for during client intake...
 - Start and end times of shift versus first and last activity of the day
 - Company wide policies regarding start and end times or rounding
 - Tasks to be completed outside normal business hours
 - Availability of and access to tools to perform job duties outside of normal business hours (i.e. email)
 - Knowledge

Off-the-Clock

- Things DWD looks for during investigations...
 - Is there a policy or practice of requiring time to be worked either before or after start times?
 - Does the employer expect employees to work during non-work hours? What about electronic devices? Policies? Practices?
 - Are there "rogue supervisors" requiring off-the-clock work despite the company's efforts?

Questions?



Thank You!

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