New Wage/Hour Regulations, Issues and Concerns for Dealerships

NADA UNIVERSITY ONLINE

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NADA Regulatory Affairs

- Assists with NADA's legislative advocacy efforts.
- Advocates on wide variety of issues before numerous federal agencies.
- Educates members on compliances responsibilities.
- Suggests best practices and importance of other applicable laws.
- Works with ATAEs to address regulatory initiatives at the state and local level.

Caution!

- State and local law can be different and even stricter than federal law.
- Please check with ATAEs and your dealership legal counsel for the specifics applicable to your operations and facilities.

New NADA *Driven* Guide

A Dealer Guide to Federal Wage and Hour, Child Labor, and Wage Discrimination Compliance

- How to obtain: www.nada.org/onlinelearning/ Customer Service: 800.557.6232.
- NADA/ATD Member: included w/membership
- Non-Members: $129

Intro To Fair Labor Standards Act (FLSA)

- Enacted in 1938
- Key federal law governing compensation
- Establishes minimum wage mandate
- Requires overtime pay and recordkeeping
- Restricts child labor

Introduction to Overtime

- *Hours worked* in excess of forty in a *workweek*.
- Entitlement: premium of ½ of *regular rate of pay.*
- Cannot average hours across multiple workweeks.
- Key Definitions:
  - *Workweek*
  - *Hours Worked*
  - *Regular Rate of Pay*

Who's Exempt From Overtime?

Many dealership employees potentially exempt from overtime; some may fall within more than one exemption.

Three Main Buckets:

- Salesman, Partsman, Mechanics
- Section 7(I) *Commission* Employees
- "White Collar" Employees

DOL's New "White Collar" Rule

- 7/15: DOL proposes revisions revisions to its "White Collar" overtime exemption rules pursuant to a 2014 Presidential directive; NADA files comments in 9/15.
- 5/16: DOL issues final revisions; NADA issues FAQ.
- 12/1/2016: rule takes effect.
- DOL claims revisions will make 4.2 million workers newly eligible for overtime.
- 9/20/16: NADA joins several other employer trade associations in challenging the rule in federal court.

DOL's New "White Collar" Rule

- Adjusts salary thresholds.
- *Makes no changes to job duties tests!*
- Sets process to automatically increase the new salary thresholds every three years starting in 2020.

See: www.dol.gov/whd/overtime/final2016/

"White Collar" Overtime Exemptions

- To qualify for "White Collar" overtime (and minimum wage) exemption, employees must meet:
  - A salary level threshold test, *and*
  - A duties test.
- *Paying a salary does not in itself exempt employees from overtime!*

New Salary Threshold Level Tests

For most "White Collar" employees:

- *Before 12/1/16:* $455/week ($23,660/year); bonuses/incentive pay do not count.
- *After 12/1/16:* $913/week ($47,476/year); up to 10% may be satisfied by nondiscretionary bonuses, incentive pay or commissions if paid at least quarterly.
- Catchup payments allowed in first pay period following quarter.

Job Duties Tests

Primary job duty must involve work associated with the relevant sub-exemption.

Executive Employees:

- Manage enterprise or recognized department of enterprise.
- Regularly direct work of two or more employees.
- Have authority to hire/fire.
- e.g., owner, G.M., department head.

Job Duties Tests

Administrative Employees:

- Engage in office or non-manual labor directly related to management or general business operations of dealership or its customers.
- Use discretion and independent judgment regarding matters of significance.
- e.g., office managers, controllers, assist. managers.

Job Duties Tests

Learned Professionals:

- Perform work requiring advanced knowledge in field of science or learning customarily acquired by prolonged course of specialized intellectual instruction.
- Typically applies to in-house attorneys and accountants, but not clerks or bookkeepers.

Computer Professionals:

- Detailed criteria; must also receive $27.63/hour.

Job Duties Tests

Outside Sales:

- Make sales or obtain orders or contracts for services.
- Regularly engaged away from employer's place(s) of business.
- Typically applies to employees who make sales at a customer's location, rather than by mail, telephone, or the Internet. Parts drivers not covered unless primary duty is sales, not deliveries.
- *No minimum salary for outside sales exemption.*

Job Duties Tests

Highly Compensated Employees (HCEs):

- A "safe harbor" exemption that applies to highly-paid "white collar" employees.
- Must earn total annual compensation of $134,000 or more *and* $913 per week salary/fee without regard to receipt of nondiscretionary bonuses or incentives, *but* such bonuses and incentives (including commissions) may otherwise count toward $134,000 threshold.
- Regularly perform at least one duty of an *executive, administrative or professional employee.*

Compliance Strategy

Carefully review how and how much "white collar" employees are paid.

Possible pay plan revisions:

- Increase salaries to new thresholds.
- Reduce or eliminate overtime where possible, or divide jobs between two or more employees.
- Increase commission compensation to satisfy *commissioned employee* exemption.

Commission Employee Exemption

To qualify as a *commission* employee:

- Dealership must be retail or service establishment, i.e., not derive more than 25% of gross annual sales from wholesale/fleet sales, sales pursuant to formal bids, etc.
- Regular rate must exceed 150% of minimum wage.
- Employee's compensation for representative period (not less than a month) must primarily derive from commissions on goods or services.

No Changes to Other Overtime Exemptions

Salesmen, Partsmen and Mechanics:

- *Salesmen*: primarily engaged in sale of new or used vehicles and service; but not leasing.
- *Partsmen* : primarily engaged in requisitioning, stocking, dispensing, or selling parts. Not parts drivers.
- Mechanics: primarily engaged in exempt mechanical work. Includes get-ready, body, but not lube techs or painters.

Status of Service Advisors?

- Traditionally exempt as *salesmen*.
- 2011: DOL re-interprets *salesman* to exclude services writers.
- 3/15: Ninth Circuit rules that a CA dealership's service advisors *not* exempt as *salesmen*.
- 6/20/16: U.S. Supreme Court rules in *Encino Motorcars LLC v. Navarro* that 2011 DOL issued 2011 rule improperly; remands case to Ninth Circuit.

Liability and Enforcement

The DOL and the states

- Injunctions, penalties, back wages, damages.

Private actions

- All of the above and attorney's fees
- Big business, very active plaintiff's bar.

Other Issues In New NADA Guide

How best to pay commissions

- Settlement vs. pay periods
- Minimum wage subsidy recoupment

Recordkeeping

- Non-exempt employees
- Exempt employees
- Records retention and posters

Other Issues In New NADA Guide

Child labor restrictions

- 14-15 year-olds
- 16-17 year-olds
- Teen driving

Equal Pay and Compensation Discrimination

- Equal Pay Act
- Title VII, ADEA, PDA

Questions?

Next NADA University Online Webinar

1:00 to 1:30 pm ET
Wednesday, October 5, 2016

Think Engagements Instead of Leads

Scott Pechstein, Vice President of National Sales
Autobytel, Inc.

For more information or to register, go to www.nada.org/onlinelearning
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