"OH, NO! IT'S WAGE AND HOUR!"

*UNDERSTANDING THE
FAIR LABOR STANDARDS ACT OF 1938*

by

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I. PURPOSE

At the height of the Great Depression, the Fair Labor Standards Act, or "FLSA," (29 U.S.C. § 201, et seq.) was passed in an effort to prevent a "disastrous collapse of the United States' entire economic system." In an attempt to meet this goal, the FLSA addresses three central issues: minimum wage, the child labor and overtime pay.

Today, the FLSA basically covers all private sector employers, or enterprises, involved in interstate commerce with two or more employees and annual gross revenues of $500,000 or more, as well as all federal, state and most local government employers, hospitals, nursing homes and schools. The FLSA is enforced by the Wage and Hour Division of the Department of Labor.

However, the FLSA allows for many exemptions from its provisions. For instance, the FLSA permits exemptions to various industries, such as to agricultural employers, amusement/recreational park employers, motor and air carriers, railroad employers, retail and service establishments, sellers of cars, trucks, boats, farm implements, aircraft and trailers, sellers of fishing or aquatic products and radio, television and newspaper employers.

The FLSA also exempts from its provisions goods that are made in foreign countries, such as clothes made by children overseas that are then shipped into the United States. Still, American-owned corporations must obey the laws of the host country. (If goods are made in violation of the FLSA in the United States, such products are referred to as "hot goods." Employers may be held liable under the FLSA for purchasing "hot goods.")

II. INDEPENDENT CONTRACTORS

A. Employees v. Independent Contractors

The protections of the FLSA only come into play in an employment relationship. In order for such a relationship to exist, the employer must typically have the authority to hire and fire the employee, direct and supervise the employee's work, and the employer must pay the employee for his efforts. Consequently, volunteers and independent contractors are not covered by the FLSA.

Unfortunately, determining whether an individual is an employee or an independent contractor involves much more than simply signing a contract. Instead, many different factors are considered in making such a determination, with no single factor being dispositive.

However, in 1947, the U.S. Supreme Court considered the following factors in United States v. Silk, 331 U.S. 704 (1947) and in Bartels v. Birmingham, 332 U.S. 126 (1947) in determining whether an individual was an employee or an independent contractor:

ECONOMIC REALITIES TEST

1. **The degree of control the employer exercised over the worker,**
2. **The worker's opportunity for profit or loss and the worker's investment in the business,**
3. **The degree of skill and independent initiative that is required to perform the work,**
4. **The permanence or duration of the working relationship, and**
5. **The extent to which the work is an integral part of the employer's business.**

The Court then stated that the test for determining whether a worker is an employee or an independent contractor is actually "**based on the totality of the circumstances**" and "**the ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves**." Therefore, since Silk and Bartels, determining whether a worker is an employee or an independent contractor under such factors has been referred to as the "**Economic Realities**" Test.

In the years following Silk and Bartels, the courts have considered many additional factors in making such a determination. Additionally, the IRS has developed its own 20-Factor Test that it uses to serve as guidelines in determining the status of an individual under the common law rules established by the courts. The IRS has stated that the degree of importance of each factor varies depending upon the occupation and the factual context in which the services are performed and no one factor is controlling. Instead, the relationship is to be ascertained by an overall view of the entire arrangement.

The IRS has further indicated that generally the relationship of employer and employee exists when the person for whom the services are performed has the **right to control and direct** the individual who performs the services, not only as to the results to be accomplished by the worker, but also as to the **means, time and manner** by which the job is performed. It is not necessary that the employer **actually** direct or control the means, time and manner in which the services are performed as it is sufficient if the employer has **the right** to do so.

In the end, the **form** of an arrangement designed to achieve a particular result will not obscure the **substance** of such arrangement. Therefore, the overall substance of the relationship will be determinative…not its mere formalities alone.

Specifically, when determining whether an individual is functioning as an employee or as an independent contractor, the IRS considers the following factors:

IRS Twenty Factor Test

1. **Instructions.** An arrangement may be viewed as an employment relationship if ordinarily the worker is required to comply with instructions regarding when, where, and how he is to perform his services.

2. **Training.** An arrangement may be viewed as an independent contractor relationship if ordinarily the worker uses his own methods and receives no training from the employer.

3. **Integration.** An arrangement may be viewed as an employment relationship if the worker's services have been integrated into the operations of the business.

4. **Services Rendered Personally.** An arrangement may be viewed as an employment relationship if the worker is required to perform the services personally.

5. **Hiring, Supervising, and Paying Assistants.** An arrangement may be viewed as an independent contractor relationship if the worker is responsible for the hiring, supervising and paying of his assistants pursuant to the arrangement under which the worker agrees to provide material and labor to the employer.

6. **Continuing Relationship.** If there is a continuing relationship between the worker and the employer, it may be viewed as an employment relationship.

7. **Set Hours of Work.** An arrangement will be viewed as an employment relationship if the employer has control over the establishing of set hours of work for the worker.

8. **Full Time Required.** An arrangement may be viewed as an independent contractor relationship if the worker is free to work when and for whom he chooses.

9. **Doing Work on the Employer's Premises.** An arrangement may be viewed as an independent contractor relationship if the work may be performed off the employer's premises since this indicates some freedom from control.

10. **Order or Sequence Set.** An arrangement may be viewed as an employment relationship if the worker must perform services in the order or sequence established by the employer.

11. **Oral or Written Reports.** An arrangement may be viewed as an employment relationship if the worker is compelled to account for his actions by submitting regular oral or written reports to the employer.

12. **Payment by Hour, Week, Month.** An arrangement may be viewed as an independent contractor relationship if generally the payment is for the job or is on a straight commission basis.

13. **Payment of Business and/or Traveling Expenses.** An arrangement may be viewed as an independent contractor relationship if the worker is responsible for all of his incidental expenses with respect to the services being performed. The worker's payment of his own expenses reflects that he is free to work according to his own methods and means.

14. **Furnishing of Tools and Materials.** An arrangement may be viewed as an employment relationship if the employer generally furnishes the tools and materials to the worker.

15. **Significant Investment.** An arrangement may be viewed as an independent contractor relationship if the worker must make an investment in the facilities used in performing the services.

16. **Realization of Profit or Loss.** An arrangement may be viewed as an independent contractor relationship if the worker can realize a profit or suffer a loss as a result of his services.

17. **Working for More Than One Firm at a Time.** An arrangement may be viewed as an independent contractor relationship if in fact the worker performs services, which are more than "de minimis" services, for a number of persons or entities at the same time.

18. **Making Service Available to the General Public.** An arrangement may be viewed as an independent contractor relationship if in fact the worker makes his services available to the general public on a regular and consistent basis.

19. **Right to Discharge.** An arrangement may be viewed as an employment relationship if the employer has the right to discharge the worker. The right of dismissal reflects that the employer, through the powerful threat of dismissal, has the ability to cause the worker to be responsive to the employer's requests or demands.

20. **Right to Terminate.** An arrangement may be viewed as an independent contractor relationship if the worker usually agrees to complete a specific job and is legally obligated to do so or compensate the employer for any failure to complete a job.

In applying the Twenty-Factor Test, the IRS clearly has a bias towards determining that a relationship is an employment relationship. Thus, the IRS is challenging many relationships long thought to be independent contractor relationships as now being classified as employment relationships.

In an effort to simplify this process, the IRS recently "collapsed" its 20-Factor Test into three major factors, which include:

1. **Behavioral Control,**
2. **Financial Control and**
3. **The Relationship of the Parties.**

The IRS refers to this as the "Common Law" Test. Just as with the 20-Factor Test, the IRS will examine these factors to determine if "on the whole" the company is actually controlling or has the right to control the individual's work. Today, either test may be applied.

In general, when considering the totality of the employer's and the worker's circumstances, both the IRS and the courts tend to view a worker as being more of an independent contractor than an employee when the individual:

1. Determines the means by which to perform the required work, while the employer is only concerned with the final result,

2. Stands to gain substantial profits by performing his work more efficiently and effectively, as opposed to being paid on an hourly or salary basis,

3. Does not work solely for the employer, but makes his services available to others,

4. Does not use the employer's tools, equipment and/or premises to perform the work,

5. Is financially liable to the employer for failing to complete his assigned work,

6. Is hired to perform tasks that are not routinely part of the employer's normal business activities,

7. Performs tasks that require a great deal of skill, as opposed to routine or menial tasks, and the individual was not trained by the employer,

8. Works when he sees fit,

9. Is not personally required to perform the contracted services,

10. Is required to hire, train, supervise and pay his own employees, as well as his other expenses, and

11. The individual does not work for the employer for a very long period of time.

III. EMPLOYEE V. VOLUNTEER: THE DOL PROVIDES GUIDANCE

In 2005, the United States Department of Labor ("DOL") issued a series of opinion letters clarifying when a "volunteer" is truly a volunteer and therefore not entitled to compensation under the Fair Labor Standards Act. The issue generally arises when a non-exempt employee agrees to put in additional time for some civic or charitable effort sponsored by the employer. The DOL has always been somewhat suspicious of "volunteer" arrangements because of their potential use as a means to circumvent the minimum wage and overtime requirements of the FLSA.

Classifying the time an individual spends as either an "employee" or as a "volunteer" is crucial under the FLSA since non-exempt employees must generally be paid time and one half for all of their time worked in excess of forty hours in a given workweek. However, under certain circumstances, time spent by employees volunteering for their employer will not be counted as hours worked, so no additional compensation will be required for this volunteer work.

The DOL specifically recognized "the generosity and public benefit of volunteering" and sought to eliminate obstacles to "bona fide volunteer efforts for charitable and public purposes." Previously, the U.S. Supreme Court has defined "volunteers" as being those individuals who "**without promise or expectation of compensation, but solely for their own personal purpose or pleasure, work in activities carried on by other persons either for their pleasure or profit.**" Walling v. Portland Terminal Co., 330 U.S. 148 (1947).

Relying largely upon this decision, as well as the DOL's own regulations, "volunteer" status will most clearly be established when the following criteria are satisfied:

1. Designation of "volunteer" status is not done unilaterally by the employer to avoid minimum wage or overtime requirements,

2. The time spent by the individual volunteering must be for a civic, charitable, or humanitarian purpose without any promise, expectation or receipt of compensation by the employee (though a nominal fee may be provided),

3. The act of volunteering truly must be voluntary, without any direct or implied coercion from the employer,

4. The employee's volunteer activities must not be similar to the services he/she performs as part of his/her regular employment and

5. The volunteering must be performed outside the employee's normal work hours.

The DOL permits a "nominal" payment to an employee for performing additional volunteer services without destroying the volunteer nature of that service. For example, a non-exempt school janitor can volunteer to coach track and receive a stipend without losing the volunteer exemption under the FLSA as long as the stipend was "**nominal**." In determining what constitutes a permissible "nominal fee," the DOL will apply a two part test.

First, the fee cannot be a substitute for compensation. In other words, the fee should not vary as the individual spends more or less time engaged in the activity, or be dependent upon the success or failure of a particular activity. 29 C.F.R. § 553.106(e).

Second, the fee must be truly nominal. The DOL will look to see "the distance traveled and the time and effort expended by the volunteer; whether the volunteer agreed to be available around-the-clock or only during certain specified time periods and whether the volunteer provides services as needed or throughout the year" in evaluating the fee.

The DOL will also compare the fee paid to the volunteer to what it would cost the school district to compensate an employee to perform the same services. With respect to volunteer coaching, the DOL believes that a fee which is greater than 20% of what it would cost to hire a coach to provide the same services is the appropriate dividing line between a permissible nominal fee and an impermissible payment of wages. W&H Op. Letter, FLSA2005-51 (Nov. 10, 2005).

An employer who permits an employee to perform volunteer services should have a written understanding with the employee to help assure that each of the foregoing criteria are satisfied.

IV. WHAT DOES FLSA COVER?

A. CHILD LABOR

The next issue addressed by the FLSA is child labor, which is commonly referred to as the federal "child labor law." The FLSA defines a minor as being any individual under the age of 18 years old. The FLSA specifies when minors can work, in what types of jobs they can work, and the number of hours they can work by age. A breakdown of these regulations is as follows:

1. Anyone 18 years old or older can work in any job for an unlimited number of hours.

2. Minors 16 to 17 years old can work in any nonhazardous job for an unlimited number of hours.

3. Minors 14 to 15 years old can work after school hours in any nonmanufacturing, nonmining, and nonhazardous job. These minors can also work no more than three hours on a school day, 18 hours in a school week, eight hours on a nonschool day or 40 hours in a nonschool week. These minors also cannot work before 7 a.m. or after 7 p.m. each day, except between June 1 and Labor Day when they can work until 9 p.m.

However, numerous exceptions to these child labor regulations exist, such as in the case of newspaper carriers, children who work for their parents, and children who perform on television, radio, stage or on the screen.

Additionally, most states require minors who are still enrolled in school and wish to be employed to first obtain an age and schooling certificate, previously referred to as “work permits,” as Ohio does in Ohio Revised Code § 4109.02. These age and schooling certificates typically verify the minor’s identity and age, the type of work involved, and the employer’s name and address. Age and schooling certificates are then typically approved by an authorized school official, ordinarily by the superintendent of schools, in order to grant authorization for the minor to obtain employment.

The FLSA, however, does require employers to verify the age of their minor employees. Many states also have more stringent restrictions on the use of child labor than are found under the FLSA.

B. MINIMUM WAGE

1. What is minimum wage?

Since its inception in 1938, the minimum wage provision of the FLSA has been raised by Congress several times. The federal minimum wage is $7.25 per hour effective July 24, 2009. Many states also have minimum wage laws. In cases where an employee is subject to both state and federal minimum wage laws, the employee is entitled to the higher minimum wage.

2. Exceptions to the minimum wage requirement

Many exceptions exist to the FLSA's minimum wage standard, such as in the case of bona fide apprentices, handicapped workers, learners, messengers, and students in agriculture, retail or service establishments or institutions of higher education. However, if an employer wishes to use one of these exceptions, it must first obtain a special certificate from the Wage and Hour Division of the Department of Labor granting such permission.

C. OVERTIME PAY

Simply put, the FLSA states that if an employer requires or allows an employee to work more than **40 hours in a given week**, it must pay the employee overtime wages, which is equal to **one and a half times** the employee's regular hourly rate.

V. THE PAYMENT OF WAGES

A. Paying Different Rates of Pay For Different Jobs

The FLSA does not tell employers what rate of pay they must pay their non-exempt employees. The FLSA merely states that non-exempt employees must be paid at least minimum wage and they must be paid time and a half their hourly rate for every hour worked over 40 in a given week. Therefore, whether the employer pays its non-exempt employees minimum wage or $20.00 an hour is irrelevant to Wage and Hour.

Therefore, if an employer wants to pay its employees different hourly rates for different jobs performed, that is also acceptable.

For instance, assume an employee worked eight hours a day on Job A Monday through Friday, which paid $10.00 per hour. Then, on Saturday, the employee worked 10 hours on Job B, which paid $15.00 per hour. The FLSA would permit the employee be paid two different rates since he worked on two different jobs that simply paid different rates.

The employer could then determine the employee's overtime rate of pay in two different ways.

METHOD #1: BLENDED HOURLY RATE

The employer could determine the employee's hourly rate for the week, and therefore for overtime calculations, by "blending" the different rates worked by the employee that week together as the following illustration shows:

40 (hours worked on Job A) X $10.00/hour = $400.00

10 (hours worked on Job B) X $15.00/hour = + $150.00

TOTAL $550.00

$550.00 ÷ 50 total hours worked = $11.00/hour "blended rate" for the week.

The employee would then receive $440.00 in straight time earnings for the week (40 hours X $11.00/hour blended rate = $440.00) and $165.00 of overtime earnings for the week ($11.00/hour blended rate X 1.5 overtime rate = $16.50/hour overtime rate X 10 hours of overtime = $165.00 in overtime earnings)

TOTAL EARNINGS FOR THE WEEK

$440.00 straight time + $165.00 overtime = $605.00 for the week

METHOD #2: OVERTIME RATE IS CLEAR

If an employee is paid different hourly rates for the week, and if it is **clear** that all of the overtime was worked at one hourly rate, then the employer need not blend the hourly rates together. Instead, the employer may pay overtime on only the hourly rate worked over 40 for the week.

For instance, consider the example used above. This employee worked all of his straight time hours for the week on Job A, which pays $10.00/hour. All of the employee's overtime was worked on Job B, which paid $15.00/hour. The employee's overtime for the week may therefore be paid according to the following calculation:

STRAIGHT TIME

$10.00/hour (Job A) X 40 hours of straight time = $400.00

OVERTIME

$15.00/hour X 1.5 overtime rate = $22.50/hour overtime rate X 10 hours of overtime = $225.00 in overtime earnings

TOTAL EARNINGS FOR THE WEEK

$400.00 straight time + $225.00 overtime = $625.00 for the week

Employers often pay different rates for different jobs performed by non-exempt employees. In fact, employers often pay different rates of pay, usually a lower rate of pay, for such time as travel time, time spent in training and so on. This way, even though the employer must pay their employees for such activities, the cost to the employer is greatly reduced.

Of course, while reducing an employee's pay for their time spent in such employer-required activities as training and traveling may be legal, it is very often an employee relations disaster.

B. Making Wage Reductions

1. Agreements for wage reduction

The questions also arises quite often regarding deductions made from employees' wages for damaging, losing or simply failing to return an employer's equipment or product. Employers must be cautious not to violate the overtime or minimum wage provisions of the FLSA.

First, it is always best to have employees sign agreements stating that if they lose or damage any of their employer's equipment, they give the employer permission to make any necessary deductions from their wages to cover the reasonable market value of the item, as determined by the employer. Such agreements should also be used whenever loans are made to employees in order to allow the employer to recover any monies that are owed upon the employee's departure from the company.

In fact, it is advisable for employers to use "Inventory Control Agreements" which list every item assigned to an employee. The employee then signs this agreement listing the items he is responsible for, as well as the fact that deductions may be made by the employer to pay for these items if they become damaged or lost.

If such agreements are not in place, then the employer will be limited in the amount of funds it can recover from the employee.

2. Reducing employee wages without an agreement

In every handbook and employment application disclaimer, employers should reserve the right to change the employee's compensation whenever the employer deems appropriate. Then, should an employee lose or damage employer property, the employee's earnings may be reduced to cover the reasonable market value of the item, as determined by the employer.

However, the employer may not reduce the employee's wages below the current minimum wage amount.

Further, some jurisdictions have ruled that employees must also receive the full value of their overtime earnings whenever they work over 40 hours in a given week. Some courts have held that the overtime provision of the FLSA prohibits employers from making any unauthorized deductions from their employees' earnings in those weeks that overtime earnings are to be paid.

The logic of these courts is if employers are permitted to make unauthorized deductions from their employees' wages whenever overtime earnings exist, then the employees would not be receiving the value of their overtime earnings. Therefore, no unauthorized deductions may be made from employees' wages in weeks that overtime earnings are to be paid.

Of course, employers must also remember that state laws also govern the law regarding minimum wage and overtime earnings. Therefore, employers should check their local laws before making unauthorized deductions from employees' wages.

C. Tipped Employees

Employers are permitted to pay their tipped employees one half the minimum wage amount per hour as long as these employees are still earning an hourly rate that is at least equal to minimum wage once they have collected their tips. If the employee fails to earn an hourly rate that is at least as much as minimum wage after having collected their tips, then the employer must pay the employee the difference.

(A "tipped" employee is an employee who receives at least $30 in tips each month.)

Of course, if an employer requires its employees to turn over their tips as part of the employer's gross receipts, then no tip credit will be allowed. Similarly, if the employer adds its employees' tips to the customer's bill and then turns this amount over to his employees, then such monies will not count as tips as far as the FLSA's tip credit is concerned.

D. New Tip Pooling Rules From DOL

Under the Fair Labor Standards Act (FLSA), employers are allowed to count a portion of an employee's tips as wages to satisfy minimum wage requirements. More specifically, although the federal minimum wage is $7.25 an hour, employers can pay tipped workers an hourly rate as low as $2.13 per hour if the workers' tips bring their pay up to at least the full minimum wage. This is called a "tip credit."

It has long been accepted that employers using the tip credit could create a "tip pool" through which all tips are collected and then redistributed evenly among tipped workers who are paid the $2.13 minimum wage (and no one else).

However, a bigger question that has arisen over the years has been how to properly distribute the tip-pool proceeds when an employer pays tipped workers the **full minimum wage** and therefore doesn't need to use the tip credit. Courts disagreed on whether such employers could distribute the tip pool among all employees, even those who didn't customarily receive tips, such as kitchen and maintenance staff.

In 2011, the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) issued regulations that said no, they couldn't. Those regulations were challenged, and some courts ruled they were invalid.

In December 2017, the DOL started the process of undoing the 2011 regulations, proposing new rules that would have allowed employers to distribute a tip pool not only to tipped workers **but also to nontipped ones**.

These new provisions:

- Allows employers to distribute money from tip pools to both tipped and nontipped employees as long as **all employees** are paid at least the full minimum wage of $7.25 per hour and not the tipped minimum wage of $2.13;

- Prohibits employers from distributing any part of the tip pool to **owners, managers, or supervisors**; and

- If employers are paying their employees the tipped minimum wage amount, then that employer must distribute the tip pool **only** to employees who contribute to the pool, just like under the 2011 regulations.

Finally, employers must remember that there is no requirement to use a tip pool at all. Employers could just allow all employees to keep the tips they individually receive, as long as their compensation after tips is at least $7.25 per hour.

WHAT DOES THIS MEAN FOR HR?

If you have tipped employees and either currently use a tip pool or are interested in adopting or expanding one, consider these next steps:

- First, consult your state law to see whether it has different requirements for tipped employees. Some states require all employees to receive the full minimum wage, while others may limit the percentage of tips that may be contributed to a pool. Those laws would take precedence over the FLSA.

- If you have not done so already, decide whether to compensate your tipped employees using the tipped minimum wage (assuming your state law allows it) or the full minimum wage.

- If you use the tipped minimum wage, decide whether you are going to require employees to share those tips through a tip pool. If you do, make sure that:

- The tip pool is distributed only to the employees who are contributing to it; and

- All such employees ultimately make at least the minimum wage after tips are added in.

If you want to implement a tip pool for tipped employees who are paid the full minimum wage:

- Select which categories of nontipped employees will be allowed to benefit from the tip pool. You might want to consult with your attorney if you are interested in distributing tips to employees who conceivably could be considered a “manager” or “supervisor.” Those terms aren’t defined, and the borders between employee and supervisor can be unclear.

- Give careful consideration to any adverse effects the change may have on your workforce morale. Employees who currently make a lot of money in tips aren’t going to be happy about being forced to share them with nontipped staff.

E. Non-Cash Wages

Employers are permitted to credit the “reasonable cost” of any board, lodging or other related facilities, which includes food, household goods, clothing, and any transportation they furnish to their employees towards satisfying the minimum wage requirements under the FLSA, as long as supplying such amenities are for the benefit of the employee and not the employer.

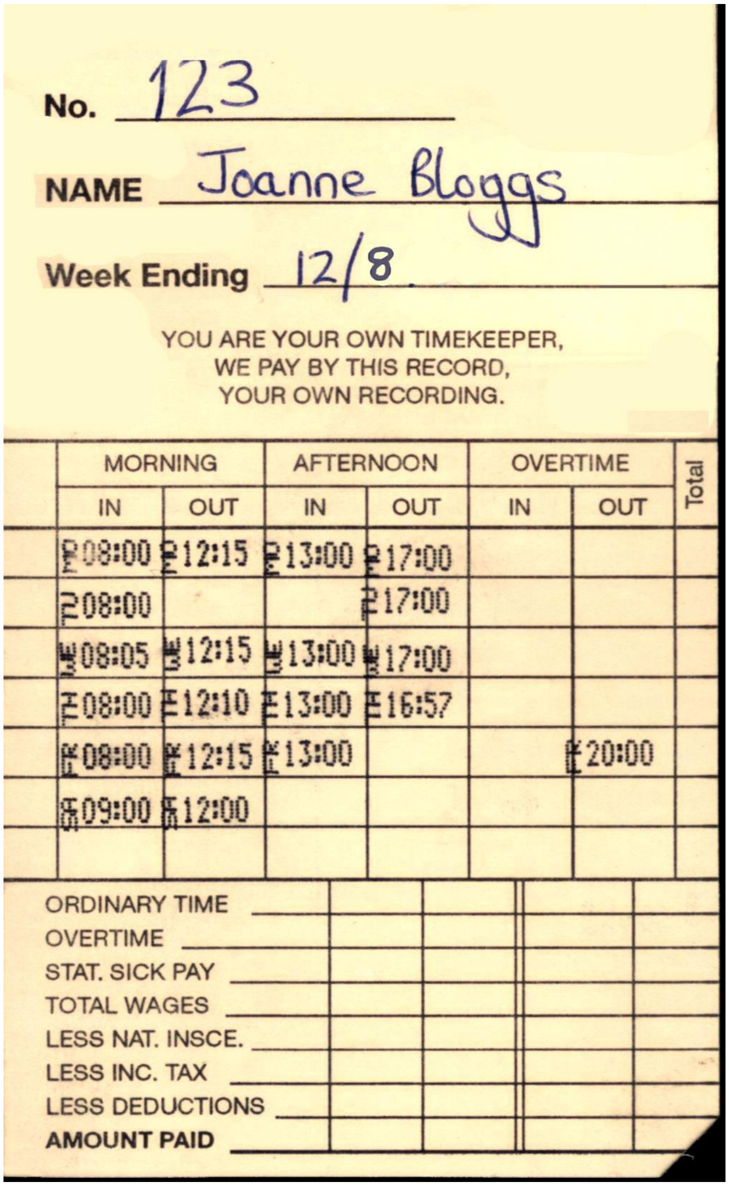
For instance, if an employer pays its employees $7.00 per hour, yet it also supplies its employees with meals which equate to a “reasonable” cost of $2.00 per hour in relation to the number of hours worked by the employee that week, the employer’s minimum wage requirement under the FLSA for that week would be satisfied.

However, it is important to understand that the “reasonable cost” of such benefits refers to the employer’s “actual cost” for the amenity in question. Therefore, when calculating the value of one of these benefits bestowed upon an employee and applying its value towards satisfying the FLSA’s minimum wage requirement, the employer must apply its actual cost of supplying the amenity to the employee, as opposed to the cost that would be charged to the general public.

For instance, if an employee is given a meal by his employer, the employer can only apply its actual cost of the meal to the employee’s wages, rather than the wholesale or “menu” cost. Any discounts employers make available to their employees regarding an employer’s merchandise may not be counted toward satisfying the minimum wage requirement of the FLSA. Of course, the cost of such services can be deducted from an employee’s wages under the FLSA if the employee’s overtime wages are not affected and the employee’s hourly rate does not fall below minimum wage.

F. Time Cards

A properly completed time card must have the exact time of clocking in and clocking out, the time period for lunch, if applicable, the employee’s name and the pay period covered by the time card.



No. 123

NAME Joanne Bloggs

Week Ending 12/8

YOU ARE YOUR OWN TIMEKEEPER,
WE PAY BY THIS RECORD,
YOUR OWN RECORDING.

	MORNING		AFTERNOON		OVERTIME		Total
	IN	OUT	IN	OUT	IN	OUT	
	MO 08:00	MO 12:15	MO 13:00	MO 17:00			
	TU 08:00			TU 17:00			
	WE 08:05	WE 12:15	WE 13:00	WE 17:00			
	TH 08:00	TH 12:10	TH 13:00	TH 16:57			
	FR 08:00	FR 12:15	FR 13:00			FR 20:00	
	SA 09:00	SA 12:00					

ORDINARY TIME				
OVERTIME				
STAT. SICK PAY				
TOTAL WAGES				
LESS NAT. INSCE.				
LESS INC. TAX				
LESS DEDUCTIONS				
AMOUNT PAID				

G. Rounding, or Averaging, Employee Work Time

One of the most common questions regarding working time that arises is whether or not an employer can "round" an employee's daily working time.

In the past, Wage and Hour has allowed employers to round its employees' working time to the nearest **five minutes**, or to the nearest tenth of an hour, if the employer can show that this rounding still results in employees being paid for ***all of the time*** they actually work and there is a need for such rounding. Therefore, employers cannot arbitrarily decide not to pay an employee for increments as small as five minutes.

The logic here is that employees cannot clock in at the time clock and then instantly start working. Actually, when you use a time clock, employees are expected to clock into work early and then walk to their work station. So, if an employee clocks into work at 8:00 am on the time clock, that employee is going to be late to his work station.

However …

When an employee is clocking in at his computer, that employee should be able to clock in at 8:00 am and instantly start working at 8:00 am. Therefore, the division of Wage and Hour will likely not allow any "rounding" of an employee's time to the nearest 5 minutes.

Rounding an employee's time must work to the employee's benefit so that the employee's time is **actually** being "averaged." This is referred to as the "De Minimus Doctrine."

Still, it is the employer's burden to prove that the rounding of an employee's time does not result in shortchanging the employee. Instead, the employer must be able to show that rounding an employee's time still results in the employee being paid for all of the time he works.

For instance, if an employee leaves work at 4:58 p.m. three days a week, then leaves at 5:03 p.m. two other days that week, the employer may round the employee's ending time to 5:00 p.m. for every day the employee worked that week.

H. Breaks

Another question that frequently arises is whether employers are required to provide their employees with breaks in the middle of the work day, and if they do, are employers required to pay their employees for these breaks?

First, the FLSA contains no provision requiring employers to give their employees lunch breaks, restroom breaks, smoke breaks, or any type of break. Of course, not allowing employees to go to the restroom at some point throughout the day would be an employee relations disaster, not to mention the fact that such a policy could give rise to other claims against the employer, such as intentional infliction of emotional distress, for instance.

Still, as far as the FLSA is concerned, such policies are legal. (On the other hand, many state statutes require that breaks be given to employees. For instance, in Ohio, one half-hour break must be given to minors for every five hours worked.)

However, if an employer does decide to give its employees a lunch break in the middle of the day, then the employer must pay its employees for this lunch period unless it is at least **30 minutes** in length. If the lunch period is any less than 30 minutes, then the employer cannot classify it as a bona fide lunch break and the employee must be paid for this time.

Obviously, a lunch break can be longer than 30 minutes in length in order for the employer to classify it as an unpaid lunch, but the key to this issue of unpaid lunch breaks is whether it was less than 30 minutes in length. This is why ten-minute coffee breaks must be paid by the employer, but hour lunch breaks do not.

Furthermore, it is clearly dictated by Wage and Hour that not only must a bona fide lunch break be at least 30 minutes in length, but the employee must perform absolutely no services for the employer throughout this entire 30-minute time period. If an employee performs any services for the employer while on his unpaid lunch, such as answering the phones, then Wage and Hour may consider the employee as having "performed" services or as having "worked" for the employer while on his lunch.

Consequently, the employee's entire lunch period may be invalidated. If this happens, the employee may have to be paid for this entire time, which is why many employers do not allow their nonexempt employees to eat their lunches at their desks.

Rest periods may be unpaid if they are more than 20 minutes in length and the employee has the freedom to use this time as he chooses. In determining if an employee has the requisite degree of freedom during a rest break that is greater than 20 minutes in length in order to classify this break as unpaid time, the Division of Wage and Hour and the courts have generally held that the following requirements must be met:

a) The employee must be free to leave the employer's premises and go wherever he pleases,

b) The break must be for the employee's benefit and not the employer's,

c) The rest period must be long enough to allow the employee freedom of action and the opportunity to relax, and

d) The employer's motive cannot be based upon an attempt to evade the requirements of the FLSA.

If the employer requires an employee to be "on call" during a bona fide lunch break, then the employee must be paid for this time. However, if an employee is not actually on call, but the mere possibility that this employee may have his meal period interrupted exists, the employee need not be paid for this time.

- **6TH CIRCUIT HOLDS THAT AUTOMATIC MEAL BREAK DEDUCTIONS ARE PERMISSIBLE**

The 6th U.S. Circuit Court of Appeals rejected an employee's claim to compensation for working during her lunch break, in violation of the Fair Labor Standards Act (FLSA), where the employee failed to use internal reporting procedures that prevented the employer from becoming aware of its obligation to compensate her.

In White v. Baptist Memorial Health Care Corp., 6th Cir., No. 11-5717 (Nov. 6, 2012), Margaret White, a nurse for Baptist Memorial Health Care Corp., treated patients who came to the emergency department. Due to the nature of White's job at the hospital, meal breaks occurred during her shift as work demands allowed. Baptist's employee handbook stated employees working shifts of six or more hours received an unpaid meal break that was automatically deducted from their paychecks. The handbook also provided that if an employee's meal break was missed or interrupted because of a work-related reason, the employee would be compensated for the time she worked during the meal break. Baptist employees were instructed to record all time spent performing work during meal breaks in an "exception log," whether the meal break was interrupted partially or entirely.

White alleged that there were occasions when she missed meal breaks entirely or partially and Baptist did not compensate her, although she did not remember or have records of when these occasions occurred. On at least one occasion when she reported missing a meal break, she was compensated for her time. From time to time, she told her supervisors that she was not getting a meal break, but never mentioned that she was not compensated for missing her meal breaks. Eventually, White stopped reporting her missed meal breaks in the exception log.

Additionally, White knew she could report a payroll mistake to a nurse manager. When White used this procedure, the errors were “handled immediately.” However, White did not use this procedure to correct the interrupted meal break errors that she failed to report, because she felt it would be what she called “an uphill battle.”

White contended Baptist violated the FLSA by failing to compensate her for working during her lunch breaks. The district court held that Baptist’s policy for compensating hourly employees for missed meal breaks was lawful under the FLSA and the 6th Circuit affirmed.

An automatic meal deduction system is lawful under the FLSA. “As long as the employee can pursue his or her mealtime adequately and comfortably, is not engaged in the performance of any substantial duties, and does not spend time predominantly for the employer’s benefit, the employee is relieved of duty and is not entitled to compensation under the FLSA.”

If an “employer knows or has reason to believe that a worker is continuing to work, then the time is working time,” the court said. When the employee fails to follow reasonable time reporting procedures, she prevents the employer from knowing its obligation to compensate the employee and thwarts the employer’s ability to comply with the FLSA.

The 6th Circuit noted that each time White followed Baptist’s procedures for being compensated for interrupted meal breaks or for payroll errors, she was compensated. Although White told her supervisors occasionally that she was not getting her meal breaks, she never told her supervisors that she was not being compensated for missing her meal breaks. Accordingly, the court concluded that there was no way Baptist should have known White was not being compensated for missing her meal breaks.

Moreover, the court emphasized that Baptist established a system to compensate its workers for time worked during meal breaks. Without evidence that Baptist discouraged employees from reporting time worked during meal breaks or that they were otherwise notified that their employees were failing to report time worked during meal breaks, the 6th Circuit asserted that White could not recover under the FLSA.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

When automatically deducting meal breaks per shift, an employer should ensure that employees are receiving the full meal break. A “de minimis rule” applies when the matter at issue concerns only a few seconds or minutes of work beyond the scheduled working hours.

I. Call-In or Call-Back Time

Although employers often have agreed to pay their employees for a minimum number of guaranteed hours whenever they are called in or called back to work, the only time that must actually be paid as working time under the FLSA are those hours actually worked by the employee.

For instance, if an employer agrees to pay its employees for a minimum of three hours every time they are called in or back to work, and an employee is called in to work for only one hour, under the FLSA, only this one hour of time actually spent working must be counted as working time, even though the employer is contractually obligated to pay this employee for three hours of work. Still, only the one hour spent working by the employee need be counted toward overtime calculations.

J. On Call Time

In determining whether or not the time an employee spends “on call” for an employer is classified as working time depends on the amount of freedom the employee has while on call for his employer. If an employee is required to remain on the employer’s premises, or so close to it in proximity that this time is not really his own to use as he chooses, then the employer must classify this “on call” time as working time.

On the other hand, if the employee is on call but can come and go as he pleases so that this time really is to use as he chooses, then this time need not be counted as working time. This remains true even if the employee is required to leave a phone number where he can be reached, to carry a “beeper,” or to refrain from drinking alcohol while on call. It is also permissible to require employees who are on call to be at the employer’s place of business within 20 minutes of receiving a call to come into work.

K. Sleeping Time

Whether or not an employee must be paid for "sleeping time" depends on a few factors. First, if an employee is working a shift of less than 24 hours, then the FLSA classifies any time the employee spends sleeping as working time.

On the other hand, if an employee is working a shift that is longer than 24 hours in length, then the employer may exclude up to eight hours of the employee's "sleeping time" from his wages if:

a) The employer has an agreement with the employee allowing it to exclude sleep time from the employee's working time,

b) The employer supplies the employee with adequate sleeping facilities, and

c) The employee can usually get at least five hours of uninterrupted sleep.

Although the employee may be occasionally interrupted while sleeping, if such interruptions become too frequent, then the employee must be paid for the entire time spent sleeping.

Also, the agreement between the employee and the employer may be either expressed or implied. Of course, an express agreement, such as in the form of a written policy, is always preferred. However, the agreement may also be implied, such as by the custom of the industry.

L. Testing and Examinations

Since "working time" includes any time an employee is "suffered or permitted" to perform services for the employer, any time an employee spends being photographed, drug tested or receiving medical attention **during normal work hours** on the employer's premises must be counted as working time.

However, if the employer requires an employee who has been absent to undergo a medical examination **before** being allowed to return to work, this time need not be counted as working time.

On the other hand, employers need not count any time an employee spends securing medical attention outside his normal work hours, even if the employee goes to see the employer's physician and even if the employee was injured during work hours if the employer did not require the employee to secure such treatment.

And finally, the time spent by job applicants taking pre-employment tests need not be counted as working time. (They are not employees yet.)

M. Waiting Time

Employees are to be paid for the services they are "suffered or permitted" to provide to their employer. Therefore, if employees arrive to work early and simply wait to begin work, then the employer need not count this time spent waiting as working time.

On the other hand, if employees are required to report to work at a certain time and must then wait for their assigned work to become available, then this time spent waiting must be counted as working time. However, if an employee completes his work and is forced to wait for his next assignment, the employer need not count the time the employee spends waiting as working time if the employee is completely relieved of his duties and is free to leave the employer's premises for a definite, specified period of time that is long enough so that the employee can use the time as he chooses. (See previous discussion earlier in these materials regarding "Breaks.")

N. Training Time

In order for the time an employee spends in a training session, class, a meeting or a seminar to not be counted as working time, the following factors must all be present:

a) The employee's attendance must fall outside his normal work hours,

b) The employee's attendance must be truly voluntary, which means that the employer must not have led the employee to believe that failing to attend the session would harm his employment in any way,

c) The employee must not perform any productive work for the employer while attending the session, and

d) The session must not be **directly related** to the employee's job.

If all of these factors are not met, then the employer must count the time the employee spends at such sessions as working time.

Of course, whether a training session is **directly related** to an employee's job can be a source of confusion. The most common example given to clarify this issue is when CPR classes are offered. If a janitor attends these classes on his own time, he need not be paid for the time spent in this class since knowing CPR is not part of his job, unless his employer requires that the janitor be certified in CPR.

However, whether a nurse must be paid for her time spent in a CPR class is not so clear. On one hand, it could easily be argued that knowing CPR is related to the nurse's job, so this nurse should be paid for the time spent in such classes. However, knowing CPR is only remotely related to her job. It is not a principal element of her duties. Therefore, a strong argument exists that the nurse need not be paid for this time spent in CPR class if the other factors of this test are met.

Of course, if an employee voluntarily enrolls in a trade school, college or certificate program outside his normal working time, the employer need not count the time this employee spends pursuing such an education as working time. Similarly, if an employer offers a course that is also offered by an independent institution, then this training will not be viewed as being directly related to the employee's position.

And finally, if the state requires employees to undergo certain training to maintain their licenses or certifications, such as in the case of paramedics and CPR training, then such training sessions will not be viewed as being job-related. The reasoning that is being used here is since it is the state that requires the employee to receive this additional training attending the session is to the employees' benefit in maintaining their licenses or certifications and not to the employer's benefit.

Still, the other three requirements of this test must be met as well.

If a training session is meant to prepare an employee for a future position or future duties, then such a session will not be considered as being related to the employee's position.

- **When Is Training Time Not Compensable?**

In Chao v. Tradesmen Int'l, Inc., No. 99-02973 (6th Cir. 2002), Tradesmen International, Inc. was a skilled labor leasing company that provided a complete range of workers to construction contractors on an "as-needed" basis. Tradesmen leases its employees, who are all skilled tradesmen ("field employees"), to various kinds of construction contractors.

Tradesmen requires that all of its applicants complete the Occupational Safety and Health Administration 10-hour general construction safety course as a prerequisite for being hired as a field employee. Tradesmen does not have any input on the safety standards covered by the course and does not edit the course to address any particular work environment of the company's employees.

During the employment interview, Tradesmen informs all of its field employee applicants that they must complete OSHA's 10 hour course in order to work for Tradesmen. Candidates who have not attended the OSHA course are told that Tradesmen requires they complete this course as a condition of hire. However, applicants are also told that they may be offered immediate employment if they commit to registering for the OSHA course within sixty days and completing the course within a reasonable time.

Candidates who choose this option may attend either an OSHA course sponsored by an instructional institution or the class offered by Tradesmen at its field offices. Once candidates agree to satisfy the company's prehire safety training criteria, Tradesmen extends offers of employment to them.

Tradesmen presents its OSHA course over four separate 2 1/2 hour sessions. These classes are held in the evening, outside of regular working hours. Employees perform no work in the class and are not compensated for the time spent in the class. The class instruction provides only knowledge of general construction safety standards; it has no effect upon the trade skills of any field employee.

In 1998, the Department of Labor brought suit alleging that Tradesmen had violated the overtime provisions of the Fair Labor Standards Act by failing to provide overtime compensation for employees attending the course when attendance time combined with regular work hours exceeded forty hours of work time during a week.

Under the Fair Labor Standards Act of 1938, the time employees spend attending employer-sponsored lectures, meetings, and training programs is generally considered compensable. However, the Department of Labor's Wage and Hour Division has promulgated interpretive regulations for defining when employee attendance at "lectures, meetings, and training programs" is **not** compensable hours worked.

Attendance at lectures, meetings, training programs and similar activities need **not** be counted as working time if the following four criteria are met:

1. Attendance is outside of the employee's regular working hours,

2. Attendance is in fact voluntary,

3. The course, lecture, or meeting is not directly related to the employee's job, and

4. The employee does not perform any productive work during such attendance.

The parties stipulated in the district court that Tradesmen's OSHA training course satisfied the first, third, and fourth elements of this test. Thus, the only criterion at issue was whether attendance at Tradesmen's OSHA course is **voluntary** and therefore noncompensable under the FLSA. "Involuntary attendance" is defined in the regulations as follows:

> Attendance is not voluntary, of course, if it is required by the employer. It is not voluntary in fact if the employee is given to understand or led to believe that his present working conditions or the continuance of his employment would be adversely affected by nonattendance.

The 6th Circuit ruled in favor of Tradesmen. The court reasoned that the employees' understood they were to complete OSHA's 10-hour course as a condition of employment. The employees accepted these positions based upon the agreement that they would complete OSHA's 10-hour course … either before or after hire. Therefore, the employees' attendance at these sessions was voluntary.

The court therefore held that the employees' attendance at safety training course was not compensable under the FLSA.

O. Travel Time

Under the FLSA, an employee is not viewed as having arrived at work until he has reached the location required by the employer, which may be the employer's place of business or an alternative location. The employee's travel time to work is therefore regarded as being a "**preliminary activity**," which is not compensable as working time, unless such a rule is changed by practice, contract or by custom.

Even if the employer requires the employee to report to an alternative job site that requires the employee to leave home earlier than usual, the employee's travel time to and from work is generally seen as being nonwork time as long as the employee is not required to travel such a substantial distance that the distance traveled can no longer be classified as being an ordinary home-to-work commute but rather as a business trip out of town. Where the distinction between the two begins and ends is vague, although requiring employees to drive an extra **30 or so miles** has been found to be reasonable.

Of course, if an employee is required to stop at some location before going on to his work site, such as to pick up mail, then that employee's working time must begin at the time he reaches the post office to pick up the mail, since this is the first location the employer required the employee to report to that day.

Travel throughout the workday, on the other hand, is classified as working time. For instance, if an employee is required to drive to a work site at 3:00 p.m. and then leaves this outlying location at 7:00 p.m. to go home, the employee is to be paid for his travel time to the work site and until 7:00 p.m., which was when he ended his work for the day. The employee need not be paid for his travel time home from the work site, unless again, the employee has to travel more than a "**reasonable**" commuting distance.

However, if the employee must return to the employer's premises from this outlying work site before going home for the day, then the employee's working time ends when he **leaves the employer's premises to go home**. The employee would therefore be paid travel time from the outlying site back to the employer's premises.

If an employee is called to report back into work and is required to travel a substantial distance (not ordinary home-to-work travel) to a customer's location after having already gone home for the day, the employee must be paid for his travel time.

Next, if an employee is required to travel out of town on a trip that does **not** require an overnight stay and cannot be considered ordinary home-to-work travel, then the employee is to be paid for all of his travel time if he leaves from his home and goes directly to this appointment without first stopping at his employer's place of business. Likewise, this employee is to be paid for all of his travel time on his return trip if he does not stop at the employer's premises before returning home.

However, if the employee **does** stop at the employer's place of business before traveling to or returning from this appointment, then the employer need only count the employee's travel time to or from its premises.

Suppose an employee normally finishes his work at 5 p.m. but is instead sent to another job which he finishes at 8 p.m. Then suppose the employee is required to return to his employer's premises after the job is finished and he arrives at his employer's place of business at 12:30 am, all of this travel time counts as working time.

Travel that keeps an employee away from home overnight is clearly working time when it cuts across the employee's normal workday. The employee's hours he regularly works will be classified as "working time," even when the employee travels on nonworking days, such as for holidays, Saturdays, Sundays, etc.

It is the Division of Wage and Hour's policy ***not*** to consider the time that an employee spends traveling away from home outside of his regular working hours when he is a passenger on an airplane, train, boat, bus, or automobile.

Therefore, if the employee's travel time extends beyond his normal work hours, then the employer need **not** count such time as working time. Of course, this is assuming that the employee is not performing any work while traveling. Time spent by an employee writing a report is work time, even if it happens to occur while the employee is riding on a bus (or airplane) to or from work.

If an employee is offered public transportation but chooses to drive his car instead, the employer may count the employee's working hours as being either the time he spends driving the car ***or*** the time the employee would have been paid if he has used the public transportation.

Still, ***operating a motor vehicle*** in order to attend a business meeting may be viewed as ***performing a service*** for the employer, as opposed to merely riding in an airplane as a passenger where the employee can sleep, read, and so on. As a result, the employer may be required to count any travel time that extends beyond the employee's normal working hours as working time if the nonexempt employee is ***driving a car***, for instance. This is why many employers require an exempt person to do the driving, so the nonexempt employees can read, sleep, and so on.

For example, suppose an employee who works in CITY A with regular working hours from 9 a.m. to 5 p.m. is given a special assignment in New York City. The employee is told to drive from CITY A at 8 a.m. and the employee arrives in New York at 12 noon, ready for work. Suppose the employee completes the special assignment at 3 p.m. and he arrives back home 7 p.m. Since this travel cannot be regarded as ordinary home-to-work travel, the employee would be paid until 7:00 pm.

However, let's suppose the employee took a train to get to New York. Since he was traveling by common carrier, the employee does not have to be paid for all of this time spent traveling. The travel between his home and the railroad depot may be deducted from his "working hours" because it would be the same as "home-to-work" travel. The rest of the travel time would be paid.

VI. OVERTIME PAY

A. Definition of Overtime

One of the most common misconceptions under the FLSA is that employees must be paid overtime wages for any hours they work over eight in a given day. This is not true.

Another common misconception under the FLSA is that an employer cannot require its employees to work more than 40 hours in a given week or more than eight in a given day. This is not true either.

The FLSA simply states that if an employer does require an employee to work more than 40 hours in a given week, it must pay the employee overtime wages, which is equal to one and a half times the employee's regular hourly rate. The FLSA says nothing about paying an employee overtime for working more than eight hours in a day, nor does it say anything about not allowing an employer to work an employee as many hours in a given day or week as it would like. In fact, an employer may require its employees to work as many hours in a given day or as many hours in a week as it wants. All that is required of the employer under the FLSA is that employees be paid overtime wages for every hour worked over 40 in a given work week, which is one and a half times the employer's normal hourly rate.

An exception to this rule exists for health care facilities in that they have the option of paying their employees overtime based on the traditional 40-hour work week or they may adopt what is referred to as an 8/80 System. Under an 8/80 System, the health care facility may pay its employees overtime wages for any hours they work over eight in a day or over 80 in any consecutive two-week period instead of paying overtime for any hours worked over 40 in a given week.

B. Workweek Defined

Under the FLSA, one workweek is defined as being any consecutive 168-hour period, or any seven consecutive 24-hour periods. As a result, not every company's workweek is necessarily the same as another's. For instance, one employer's workweek may begin at 8 a.m. Monday morning while another's may begin at 12 a.m. Saturday night.

However, regardless of which 168-hour period an employer chooses to use for its workweek, all of the hours an employee works within that given workweek must be paid within that workweek for overtime purposes.

For example, if a nonexempt employee worked 50 hours in a given workweek, it would be illegal for the employer to pay the employee for only 40 hours of straight time for that week, have the employee only work 30 hours the next week, and then carry these extra 10 hours over into the next week in order to avoid paying the employee overtime wages. If an employee works 50 hours in one week, the employee must be paid for 55 hours of work, since any hours over 40 in a given week must be paid at the overtime rate of "time and a half." (10 hours X 1.5 overtime rate = 15 hours + 40 hours of straight time = 55 hours of pay.)

The FLSA is very clear on this issue: All of the hours worked by each employee must be accredited to the week in which these hours were worked and they cannot be "carried over" into the next week to avoid paying an employee overtime wages, even if that employee agrees to such a tactic.

C. Compensatory Time

Unlike private employers, public employers have an exception from the overtime requirement of the FLSA. Instead of paying their employees overtime wages, many public employers give their employees who work more than 40 hours in a given week what is referred to as "comp-time," or compensatory time off. Comp-time basically works the same as overtime pay, but instead of paying the employee overtime wages, the public employee is awarded additional time off at the rate of one and a half hours off for every hour of overtime worked.

Still, public employees are not allowed to accrue more than 240 hours of comp-time. However, if the public employee's position entails aspects of public safety, then the employee is permitted to accrue up to 480 hours of compensatory time off. Once a public employee accrues the maximum amount of comp time allowed, the employee must begin receiving overtime wages until this comp time bank is reduced. Additionally, when a public employee leaves his employment, he must be paid for all of his unused accrued comp-time.

It is important for managers to understand that the ability to award comp-time to nonexempt employees in lieu of paying overtime wages belongs exclusively to public employers. Private employers are required to pay overtime wages to their nonexempt employees who work more than 40 hours in a given work week. Therefore, the option of paying comp-time to nonexempt employees in an effort to avoid paying overtime wages is not an available option for private employers.

D. Private Sector Compensatory Time

However, one exception to this rule does exist for private sector employers whose pay periods cover a span of time greater than one week, such as when an employer pays its employees every two weeks. In such instances, private sector employers are permitted to pay their employees who work more than 40 hours in a given week compensatory time off, or comp-time, in lieu of overtime wages. This comp-time must be paid at an overtime rate of one and a half times the hours worked by the employee over 40 in one week *and* the employee must use this comp-time within the same pay period in which it was earned.

(This second requirement differs from the comp-time rules that apply to public sector employers, since public sector employees are allowed to accumulate their compensatory time off and use it anytime in the future, much like vacation time. Public sector employees are not required to use their comp-time within the same pay period that it was earned, unlike private sector employees.)

For instance, consider a situation where a private employer pays its employees every two weeks and an employee works 50 hours in the first week of the pay period. The employer does not have to pay that employee overtime wages if the employee is given 15 hours of comp-time off from work that next week before the pay period ends. (10 hours of overtime X 1.5 = 15 hours.) If the employee takes 15 hours of comp-time that next week, then no overtime wages need be paid to this employee since he will have only "worked" 80 hours within the pay period. (50 hours actually worked in week one, plus 25 hours actually worked in week two, plus 15 hours of paid comp-time = 80 paid hours.)

E. Unauthorized Overtime

The question often arises as to whether or not an employer is obligated to pay employees for unauthorized overtime work. In short, if an employer does not give an employee permission to work overtime, and if the employer is genuinely unaware of the fact that the employee worked any overtime hours, then the employer need not pay the employee for these hours worked.

On the other hand, the definition of working hours requires an employer to pay its employees for any time in which they were "suffered or permitted" to perform services for the employer. As a result, if the employer knew or should have known that an employee has worked any overtime, the employee must be paid for these services he was "permitted" to perform. Consequently, an employer has an affirmative duty to determine whether or not its employees are working overtime, whether at the employer's place of business or at home.

For instance, if an employer is aware of the fact that an employee has a basket full of work at the end of the day, yet this work is completed by the next morning, then the employer must pay the employee overtime wages for the time it took to complete this work. Even if no overtime was approved for this employee, obviously the employee performed services for the employer that required working overtime. Therefore, the employee must be paid for these services.

However, instead of refusing to pay the employee for this overtime in order to discourage employees from working unauthorized overtime, the employer's warning or discipline system should be used.

F. Payments Made To Employees Which Need *Not* Be Included In Overtime Calculations

The following forms of remuneration need ***not*** be included in an employee's overtime rate calculations:

1. Discretionary sums, such as Christmas bonuses, rewards for years of service, and other amounts **not measured by or dependent on the employee's hours worked, the employee's production or the employee's efficiency,**

2. Payments made for time not worked such as due to vacation, holiday, illness, or some other similar payment,

3. Payments for traveling expenses or other expenses incurred by an employee in the furtherance of the employer's business,

4. Payments made for an employee's services if either:

   a) The payment was totally discretionary by the employer, as well as the amount, and the employee did not come to expect the payment due to a promise made by the employer, or

   b) The payment was made pursuant to a bona fide profit-sharing, trust, thrift, or savings plan where payment is made without regard to the employee's hours of work, production, or efficiency, or

   c) The payment was made as a talent fee.

Payments irrevocably made by an employer to a trustee or third person pursuant to a bona fide old age, retirement, life, accident, health insurance or similar benefit plan for employees.

VII. EXEMPTIONS

A. Exempt v. Nonexempt Employees

When the FLSA was being debated on the floor of Congress, one of the most controversial aspects of the Act was the fact that employers were going to be required to pay all of their employees' overtime wages. Employers complained that such a requirement would be a crippling burden for them to have to carry. Therefore, in an effort to help ease this strain, and as a compromise, Congress gave employers the ability to classify certain employees "exempt" from this overtime regulation. These three classifications of exempt employees are bona fide "executive," "administrative," and "professional" employees.

Understanding what the terms "exempt" and "nonexempt" mean under the FLSA is therefore very important. "Nonexempt" employees are those employees to whom the overtime provision of the FLSA *does* apply. "Exempt" employees, on the other hand, are those employees to whom the overtime provision of the FLSA does *not* apply. As a result, employers can require their exempt employees to work as many hours in a week as they want without having to worry about paying these employees any overtime wages, since such employees are exempt from the FLSA's overtime requirements.

However, an employer cannot make just any employee it wants exempt from overtime. In order to qualify for exempt status under any one of these three classifications, employers must meet three tests, which are:

1. **The Minimum Salary Test,**

2. **The Duties Test, which includes one for bona fide executive, administrative and professional employees, and**

3. **The Salary Test.**

B. Minimum Salary Test

As of January 1, 2020, the weekly minimum salary requirement for exempt employees was increased to **$684.00** a week (or $455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal Government, or $380 per week if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities.

This weekly salary equates to **$35,568.00** per year.

Therefore, to qualify for exempt status, employees must be paid on a salary or fee basis (as defined in the regulations) at a rate of at least **$684.00** a week or **$35,568.00** per year on a salary basis. These salary requirements do not apply to outside sales employees, teachers, and employees practicing law or medicine.

Administrative and professional employees may also be paid on a fee basis.

In the case of academic administrative employees, the compensation requirement also may be met by paying the employee on a salary basis at a rate at least equal to the entrance salary for teachers in the educational establishment by which the employee is employed.

Exempt computer employees may be paid at least **$684.00** a week or **$35,568.00** per year on a salary basis ***or*** on an hourly basis at a rate not less than $27.63 an hour.

Employers may use nondiscretionary bonuses and incentive payments (including commissions) paid on an annual or more frequent basis, to satisfy up to 10 percent of the standard salary level. This provision does not apply to highly compensated employees.

The required amount of compensation per week may be translated into equivalent amounts for periods longer than one week. For example, the $684-per-week requirement will be met if the employee is compensated biweekly on a salary basis of not less than $1,368.00, semimonthly on a salary basis of not less than $1,482.00, or monthly on a salary basis of not less than $2,964.00. However, the shortest period of payment that will meet this compensation requirement is one week.

The employer may use any 52-week period as the year, such as a calendar year, a fiscal year, or an anniversary of hire year. If the employer does not identify some other year period in advance, the calendar year will apply.

C. Standard Of Review, Burden Of Proof and Rule Of Construction For Determining Exempt Status

When the FLSA was first drafted back in the 1930s, no exemptions were included in the Act at all. All employees were to be classified as nonexempt under the law. However, when employers complained that paying overtime to all of their employees would put them out of business, Congress adopted the executive, administrative and professional/technical exemptions.

However, since the original legislative intent of the FLSA was to make everyone nonexempt, the law today is very clear regarding who bears the burden of proof in FLSA employee exemption cases: It is the employer, and employers must sustain this burden by proving that their employees' exemptions "**plainly and unmistakably**" comply with the regulation's requirements by "**clear and affirmative evidence**."

Additionally, the U.S. Supreme Court has held that the rule of construction to be applied in these cases requires judges to "narrowly construe" the FLSA exemptions **against** employers in order to further Congress' goal of providing broad federal employment protection. Consequently, today's employers have the burden of proving that their positions are exempt from the overtime provisions of the FLSA in order to overcome the presumption that their positions are in fact nonexempt under the Act, which is a very heavy burden.

VIII. EXECUTIVE EXEMPTION

A. Bona Fide Executive Employee's Minimum Salary and Standard Duties Test

The bona fide executive employee's Minimum Salary and Standard Duties Test under 29 C.F.R. § 541.1 are as follows:

1. The employee must be paid on a salary basis (as defined in the regulations) at a rate of at least **$684.00** per week **$35,568.00** per year);

2. The employee's primary duty (approximately 50%) must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;

3. The employee must customarily and regularly direct the work of at least two other full-time employees or their equivalent; and

4. The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

B. Primary Duty

It is also important to understand what is meant by the term "primary duty of the management of the enterprise." The regulations (29 C.F.R. § 541.103) state, as a general rule, that the executive employee must spend at least 50 percent of his time engaged in such managerial duties. However, the "50% Rule" only acts as a general guideline. (These new regulations eliminated the previous 20% limitation on non-exempt work and adopted this new "primary duty" approach.)

Therefore, even if an employee does not spend 50 percent of his time performing managerial duties, the employee may still qualify for the executive exemption if it can be shown that the "primary focus" of his position is the management of the enterprise. (Both the "50%" and the "primary focus" tests also apply to the administrative and professional exemptions.)

C. Management

Generally, such duties as **interviewing, selecting, and training of employees, setting and adjusting their rates of pay and hours of work, directing the work of employees, maintaining production or sales**

records for use in supervision or control, appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status, handling employee complaints and grievances, disciplining employees, planning the work, determining the techniques to be used, apportioning the work among the employees, determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold, controlling the flow and distribution of materials or merchandise and supplies, providing for the safety and security of the employees or the property, planning and controlling the budget, and monitoring or implementing legal compliance measures have all been viewed as being managerial, or "executive," duties that qualify under this exemption.

However, performing the same work that is performed by the manager's employees, such as **production duties, preparing payroll, inspecting production goods, performing routine clerical duties, keeping records on another supervisor's employees, repairing machines and performing maintenance on or cleaning equipment** have not been viewed as qualifying as managerial duties under this exemption.

D. Department or Subdivision

The phrase "a customarily recognized department or subdivision" is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function.

E. Customarily and Regularly

The phrase "customarily and regularly" means greater than occasional but less than constant; it includes work normally done every workweek, but does not include isolated or one-time tasks.

F. Two or More

The phrase "two or more other employees" means two full-time employees or their equivalent.

For example, one full-time and two half-time employees are equivalent to two full-time employees. The supervision can be distributed among two, three or more employees, but each such employee must customarily and regularly direct the work of two or more other full-time employees or the equivalent. For example, a department with five full-time nonexempt workers may have up to two exempt supervisors if each supervisor directs the work of two of those workers.

G. “Actual Authority To Hire and Fire” and “Particular Weight”

The new Executive Exemption regulations adopted in 2004 **require** the employee to have the **actual authority to “hire or fire” or the authority to make recommendations that are given “particular weight.”** The new regulations also eliminated the special rule for “sole charge” executives. Instead, they require a 20% owner/employee to be “actively engaged” in the management of the enterprise.

However, executive trainees, or individuals who are in training to become executives but are not yet performing the duties of executives are not covered by this exemption.

Factors to be considered in determining whether an employee’s recommendations as to hiring, firing, advancement, promotion or any other change of status are given “particular weight” include, but are not limited to, whether it is part of the employee’s job duties to make such recommendations, and the frequency with which such recommendations are made, requested, and relied upon. Generally, an executive’s recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include occasional suggestions. An employee’s recommendations may still be deemed to have “particular weight” even if a higher level manager’s recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee’s change in status.

IX. ADMINISTRATIVE EXEMPTION

A. Bona Fide Administrative Employee’s Minimum Salary and Standard Duties Test

The bona fide administrative employee’s Minimum Salary and Standard Duties Test under 29 C.F.R. § 541.2 are as follows:

1. The employee must be paid on a salary basis (as defined in the regulations) at a rate of at least **$684.00** per week **$35,568.00** per year);

2. The employee's primary duty (approximately 50%) must be office or non-manual work **directly related to the management or general business operations** of the employer or the employer's customers; and

3. The employee's primary duty includes the exercise of **discretion and independent judgment** in **significant matters**.

Perhaps the most difficult test to understand and apply under the FLSA is the administrative exemption test.

It is important to note that these new Administrative Exemption regulations retain the requirement for the employee to "exercise discretion and independent judgment"; however, it has eliminated the requirement that the employee be engaged in the "management of policies."

B. Primary Duty

"Primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

C. Directly Related to Management or General Business Operations

First, this test requires the individual primarily ("50%" or "primary focus" tests) perform duties directly related to "management policies or the general business operations" of the employer. Wage and Hour has interpreted this phrase in 29 C.F.R. § 541.205 to mean that the primary focus of the individual's position must relate the "administrative operations" of the employer's business, as opposed to "production operations."

To meet the "directly related to management or general business operations" requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example from working on a manufacturing production line or selling a product in a retail or service establishment. Work "directly related to management or general business operations" includes, but is not limited to, work in functional areas such as **tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, Internet and database administration; legal and regulatory compliance; and similar activities.**

D. Employer's Customers

An employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Thus, employees acting as advisors or consultants to their employer's clients or customers — as tax experts or financial consultants, for example — may be exempt.

E. Discretion and Independent Judgment

In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term must be applied in the light of all the facts involved in the employee's particular employment situation, and implies that the employee has authority to make an independent choice, free from immediate direction or supervision.

Factors to consider include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval, and other factors set forth in the regulation.

The fact that an employee's decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment.

The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.

In the 2004 regulations, the Department of Labor said that the use of manuals, guidelines or other established procedures containing or relating to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted ***only*** by those with **advanced or specialized knowledge or skills would not preclude someone from being exempt under the FLSA**.

The DOL reasoned that such manuals and procedures provide guidance in addressing difficult or novel circumstances and therefore using such reference material would not affect an employee's exempt status.

Using manuals that are simply apply well-established techniques or procedures or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances would not constitute the use of independent judgment and discretion.

The regulations also make it clear that employers should not confuse the fact that a position may require a high level of skill with exercising discretion and independent judgment. Many positions require a great deal of skill in performing their various functions, yet the amount of discretion and independent judgment required are minimal.

For instance, while a computer repair person must possess a high level of skill in order to perform his job, little discretion and independent judgment exists since most of his decisions are made against the pre-established guidelines of the computer's design itself.

The regulations then state functions that require the exercise of discretion and independent judgment includes advising management, planning, negotiation, representing the company, purchasing, promoting sales, and business research and control. On the other hand, the regulations also specifically state that the typical duties of a secretary, such as typing, filing and answering correspondence at the direction of her supervisor, do not qualify under this test. However, answering correspondence on her own authority, interviewing applicants and arranging meetings under her own discretion do qualify under the administrative exemption test.

F. Significant Matters

The term "significant matters" refers to the level of importance or consequence of the work performed.

Therefore, administrative duties that are clerical or routine in nature do not qualify under this test.

G. Educational Establishments and Administrative Functions

The administrative exemption is also available to employees compensated on a salary or fee basis at a rate not less than $684.00 a week and whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment. Academic administrative functions include operations directly in the field of education, and do not include jobs relating to areas outside the educational field. Employees engaged in academic administrative functions include: the superintendent or other head of an elementary or secondary school system, and any assistants responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program; the principal and any vice-principals responsible for the operation of an elementary or secondary school; department heads in institutions of higher education responsible for the various subject matter departments; academic counselors and other employees with similar responsibilities.

X. BONA FIDE LEARNED PROFESSIONAL EMPLOYEE’S MINIMUM SALARY AND STANDARD DUTIES EXEMPTION TEST

A. Learned Professional Exemption

To qualify for the Learned Professional Exemption, all of the following tests must be met:

1. The employee must be paid on a salary or fee basis (as defined in the regulations) at a rate of at least **$684.00** a week or **$35,568.00** per year;

2. The employee's primary duty (approximately 50%) must be work requiring “advanced knowledge,” which means it's predominantly intellectual in character and requires the consistent exercise of discretion and judgment;

3. The advanced knowledge must be in a field of science or learning; and

4. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction or a combination of experience and instruction which enables the person to perform the same work as degreed professionals.

The final regulations define “work requiring advanced knowledge” (one of the three essential elements of the professional primary duties test) as “work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment”. The final regulations also clarify that **veteran or long-term status alone is insufficient** to satisfy the Professional Exemption.

Typically, fields of study that qualify under the professional exemption test are doctors, lawyers, bona fide accountants, and so on.

Also, the professional exemption test requires the **“consistent”** exercise of discretion and judgment, which may be interpreted as raising the degree of discretion and judgment required over what is established under either administrative exemption test. However, many courts still tend to equate this “consistent exercise of discretion and judgment” requirement of the professional exemption test to the standards used under the administrative exemption tests.

B. Primary Duty

"Primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

C. Work Requiring Advanced Knowledge

"Work requiring advanced knowledge" means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment. Professional work is therefore distinguished from work involving routine mental, manual, mechanical or physical work. A professional employee generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

D. Field of Science or Learning

Fields of science or learning include law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but is not in a field of science or learning.

E. Customarily Acquired by a Prolonged Course of Specialized Intellectual Instruction

The learned professional exemption is restricted to professions where specialized academic training is a **standard prerequisite for entrance into the profession**. The best evidence of meeting this requirement is having the appropriate academic degree.

However, the word "customarily" means the exemption may be available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction.

XI. BONA FIDE CREATIVE PROFESSIONAL EMPLOYEE'S MINIMUM SALARY AND STANDARD DUTIES EXEMPTION TEST

A. Creative Professional Exemption

To qualify for the Learned Professional Exemption, all of the following tests must be met:

To qualify for the Creative Professional Exemption, all of the following tests must be met:

1. The employee must be paid on a salary or fee basis (as defined in the regulations) at a rate of at least **$684.00** a week or **$35,568.00** per year; and

2. The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

B. Invention, Imagination, Originality or Talent

This requirement distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. Exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Whether the exemption applies, therefore, must be determined on a case-by-case basis.

The requirements are generally met by **actors, musicians, composers, soloists, certain painters, writers, cartoonists, essayists, novelists, and others as set forth in the regulations. Journalists** may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring **invention, imagination, originality or talent**. Journalists are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product.

C. Recognized Field of Artistic or Creative Endeavor

This includes such fields as, for example, **music, writing, acting and the graphic arts.**

XII. HIGHLY-COMPENSATED WORKERS

A. Highly Compensated Test

As of January 1, 2020, the total annual compensation requirement needed to exempt highly compensated employees (HCEs) was raised to **$107,432.00** a year, of which **$684.00** must be paid weekly on a salary or fee basis.

(The increase is about $40,000.00 less than what the DOL initially proposed because it is based on the **80th percentile** of all full-time salaried workers' earnings nationwide.)

Additionally, the weekly salary amount of $684.00 must be paid in its entirety. Employers may not use nondiscretionary bonuses and incentive payments (including commissions) to satisfy any portion of the weekly standard salary level for highly compensated employees.

A highly compensated employee is deemed exempt under Section 13(a)(1) if:

1. The employee earns total annual compensation of $107,432.00 or more, which includes at least $684.00 per week paid on a salary basis;

2. The employee's primary duty includes performing office or non-manual work; and

3. The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

For example, an employee may qualify as an exempt highly-compensated executive if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements in the standard test for exemption as an executive.

B. Total Annual Compensation

The required total annual compensation of **$107,432.00** or more may consist of commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period, but does not include credit for board or lodging, payments for medical or life insurance, or contributions to retirement plans or other fringe benefits.

There is a special rule that allows an employer to prorate the annual compensation for employees who only work part of the year.

C. Make-up Payments and Prorating

Employers are also allowed to make a single lump-sum payment to an employee to “make-up” the amount needed to meet this **$107,432.00** minimum threshold at the end of the year.

So, if an employee's total annual compensation does not total at least **$107,432.00** by the last pay period of that year, then the employer may make one final payment to that employee in order to bring that employee’s annual salary up to this level. This additional payment must be made within the last pay period of that year or within one month after the end of the 52-week period.

For example, let’s say for the calendar year beginning January 1, 2020, an employee earns $90,000 in base salary and the employer anticipated that the employee was going to earn an additional amount of $17,432.00 in commissions. However, due to poor sales in the final quarter of the year, the employee actually only earned $12,000.00 in commissions. This gave the employee an annual salary of $102,000.00, which is below the annual minimum salary that is to be paid to highly compensated employees.

In this situation, the employer may make within one month after the end of the year a payment of at least $5,432.00 to the employee in order to bring her annual compensation up to **$107,432.00.** Any such final payment made after the end of the 52-week period may count only toward the prior year's total annual compensation and not toward the total annual compensation in the year it was paid.

Of course, if the employer fails to make such a payment, the employee does not qualify as being exempt under the highly compensated employee category.

Employers may also make similar payments to employees who terminate before the year ends.

D. Customarily and Regularly

“Customarily and regularly” means greater than occasional but may be less than constant, and includes work normally and recurrently performed every workweek but does not include isolated or one-time tasks.

XIII. OUTSIDE SALES EXEMPTION

A. Outside Sales Test

To qualify for the outside sales employee exemption, all of the following tests must be met:

1. The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

2. The employee must be customarily and regularly engaged away from the employer's place or places of business.

The requirements established by the FLSA in order to qualify for exempt status as an outside salesperson are relatively simple. First, unlike the other previously discussed exemptions, no Salary Test requirements exist. Instead, determining whether an individual qualifies for the outside salesperson exemption depends on where the actual work or services are performed by the employee and whether the individual was hired primarily for the purpose of making outside sales.

An employee who does not satisfy the requirements of the outside sales exemption may still qualify as an exempt employee under one of the other exemptions allowed by Section 13(a)(1) of the FLSA and the Part 541 regulations if all the criteria for the exemption is met.

B. Primary Duty

"Primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

C. Making Sales

"Sales" includes any sale, exchange, contract to sell, consignment for sales, shipment for sale, or other disposition. It includes the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property.

D. Obtaining Orders or Contracts for Services or for the Use of Facilities

Obtaining orders for "the use of facilities" includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies. The word “services” extends the exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order.

E. Customarily and Regularly

The phrase “customarily and regularly” means greater than occasional but less than constant; it includes work normally done every workweek, but does not include isolated or one-time tasks.

F. Away from Employer’s Place of Business

Basically, an outside salesperson is one whose point of sale is at the customer's place of business or location or, if selling door-to-door, at the customer’s home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer’s places of business, even though the employer is not in any formal sense the owner or tenant of the property.

Inside salespersons, which would include telephone and mail order sales, do not qualify for exempt status under this category. Of course, those duties which are in conjunction with and are incidental to the employee's outside sales, such as completing sales reports, writing contracts, and scheduling appointments, are considered exempt functions.

G. Promotion Work

Promotional work, on the other hand, either may or may not be classified as exempt work. If performing the promotional work is simply incidental to the sales that are to be made by the employee, then the work qualifies as being exempt. If such promotional work is incidental to sales being made by someone else, then the work is classified as being nonexempt.

H. Drivers Who Sell

In some instances, outside salespersons not only sell their employer's products, but they also deliver them to their customers. If the primary focus of the individual's job is to deliver the employer's products or services, then any outside sales made by the employee will be viewed as being secondary duties and the employee will therefore not qualify for this exemption. However, if in viewing the content of the job in its entirety it is determined that delivering the employer's goods or services to the customer is only incidental to the employee's position as a bona fide outside salesperson, then the exemption may be granted.

Several factors should be considered in determining whether a driver has a primary duty of making sales, including a comparison of the driver's duties with those of other employees engaged as drivers and as salespersons, the presence or absence of customary or contractual arrangements concerning amounts of products to be delivered, whether or not the driver has a selling or solicitor's license when required by law, the description of the employee's occupation in collective bargaining agreements, and other factors set forth in the regulation.

XIV. COMPUTER EMPLOYEE EXEMPTION

A. Computer Employee Exemption Test

To qualify for the computer employee exemption, the following tests must be met:

1. The employee must be paid on a salary or fee basis (as defined in the regulations) at a rate of at least **$684.00** a week or **$35,568.00** per year ***or***, if the computer employee is compensated on an hourly basis, at a rate not less than $27.63 an hour;

2. The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;

   ➢ The application of systems analysis techniques and procedures, including consulting with users to determine hardware, software or system functional specifications;

   ➢ The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

   ➢ The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

   ➢ A combination of the aforementioned duties, the performance of which requires the same level of skills.

Consequently, this exemption is only available to those computer professionals who have reached a high level of proficiency in computer systems analysis, programming and software engineering. This exemption does not apply to trainees, entry-level employees, or employees who do not work independently or without close supervision.

The regulations also state that if a computer professional meets the requirements of the duties test, and if this individual is paid at least $27.63 per hour, then the salary test portion of the exemption test does not apply.

The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in the primary duties test described above, are also not exempt under the computer employee exemption.

B. Primary Duty

"Primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

XV. TEACHERS

Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. Exempt teachers include, but are not limited to, regular academic teachers; kindergarten or nursery school teachers; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrument music teachers.

The minimum salary and salary basis requirements do not apply to bona fide teachers.

XVI. PRACTICE OF LAW OR MEDICINE

An employee holding a valid license or certificate permitting the practice of law or medicine is exempt if the employee is actually engaged in such a practice. An employee who holds the requisite academic degree for the general practice of medicine is also exempt if he or she is engaged in an internship or resident program for the profession.

The minimum salary and salary basis requirements do not apply to bona fide practitioners of law or medicine.

In the case of medical occupations, the exception from the salary or fee requirement **does not apply** to pharmacists, nurses, therapists, technologists, sanitarians, dietitians, social workers, psychologists, psychometrists, or other professions which service the medical profession.

XVII. POLICE, FIRE FIGHTERS, PARAMEDICS & OTHER FIRST RESPONDERS

These exemptions do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

XVIII. COLLECTIVE BARGAINING AGREEMENTS

The FLSA provides minimum standards that may be exceeded, but cannot be waived or reduced. Employers must comply, for example, with any Federal, State or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the FLSA. Similarly, employers may, on their own initiative or under a collective bargaining agreement, provide a higher wage, shorter workweek, or higher overtime premium than provided under the FLSA.

While collective bargaining agreements cannot waive or reduce FLSA protections, nothing in the FLSA or the Part 541 regulation relieves employers from their contractual obligations under such bargaining agreements.

XIX. RETAIL OR SERVICE ESTABLISHMENT EXEMPTION

Another exemption that is available to employers is the “retail or service establishment” exemption. This exemption was enacted to relieve employers in retail and service industries from the obligation of paying overtime compensation to certain employees paid primarily on the basis of commissions.

In order for an employee to be covered under this exemption:

> “the regular rate of pay of such employee (must be) in excess of one and one-half times the (Act's minimum wage),” and “more than half (of the employee's) compensation for a representative period (not less than one month) (must represent) commissions on goods or services.” 29 U.S.C. 207(i).

However, the more confusing part of this exemption was in determining if the employee was employed by a retail or service establishment. In general, *t*he DOL has interpreted a “retail or service establishment” as requiring the establishment to have a “retail concept.” 29 CFR 779.316

The regulations state that typically a retail or service establishment is one which sells goods or services to the general public. It serves the everyday needs of the community in which it is located. The retail or service establishment performs a function in the business organization of the Nation which is at the very end of the stream of distribution, disposing in small quantities of the products and skills of such organization and does not take part in the manufacturing process. 29 CFR 779.318

More specifically, in order for an establishment to qualify as a “retail or service establishment,” the regulations go onto state that the business:

1. Must engage in the making of sales of goods or services; and

2. 75 percent of its sales of goods or services, or of both, must be recognized as retail in the particular industry; and

3. not over 25 percent of its sales of goods or services, or of both, may be sales for resale. 29 CFR 779.313

In addition, the establishment must meet the following three tests:

1. The establishment must be recognized as a retail establishment in the particular industry.

2. The goods which the exempt establishment makes or processes must be made or processed at the establishment which sells the goods.

3. More than 85 percent of the establishment's annual dollar volume of sales of the goods which it makes or processes must be made within the State in which the establishment is located. 29 CFR 779.346

However, in 1961, the DOL introduced into the regulations a lengthy but non-exhaustive list of 89 types of establishments that it viewed as lacking a “retail concept.”

Likewise, in 1961, the DOL established a separate non-exhaustive list of 77 types of establishments that “may be recognized as retail.”

Then, in 1970, the DOL added to the list another 45 types of establishments that it viewed as also lacking a “retail concept.”

As a result, any types of organizations that were on this “blacklist” were excluded from claiming the **“**retail or service establishment” exemption from overtime for its employees.

Such excluded establishments included industries such as dry cleaners, tax preparers, laundries, roofing companies, travel agencies, blue printing and photostating establishments, stamp and coupon redemption stores, and telegraph companies.

The "may be" retail list included establishment in industries such as coal yards, fur repair and storage shops, household refrigerator service and repair shops, masseur establishments, piano tuning establishments, reducing establishments, scalp-treatment establishments, and taxidermists.

These lists simply added confusion as to which industries could qualify and could not qualify under the standard "retail concept" test.

So, on May 19, 2020, the DOL removed the regulatory provisions that listed the specific types of establishments that it believed lacked "retail concept" and were therefore ineligible to claim this exemption. As a result, those establishments that had been listed as lacking a "retail concept" may now assert that they have a retail concept and may be able to qualify as retail or service establishments in order to exempt certain employees from overtime. For these employers and workers, they could consider whether more commission-based pay is sensible.

The DOL will now apply its interpretations to determine whether establishments previously excluded from this exemption may now be classified as having a "retail concept" and satisfy the additional criteria needed to qualify as retail or service establishments.

Accordingly, the DOL will from now on apply one analysis to all establishments, thus promoting a more consistent treatment for purposes of the retail or service establishments exemption.

The DOL also withdrew the list of establishments that "may be recognized as retail."

XX. COMMISSION ONLY DRAWS

In Stein v. hhgregg, Inc., No. 16-3364 (Sixth Cir., Oct. 12, 2017), hhgregg was an appliance, furniture, and electronics retailer has more than 25 stores in Ohio and more than 220 stores in the United States. The company's retail sales employees are paid solely on commissions. However, in pay periods in which employees' earned commissions fall below minimum wage, hhgregg pays them a "draw" to meet the minimum wage requirement. Employees are required to repay the draws based on future commissions earned. Under hhgregg's policy, employees could be subject to discipline, including termination, if they received frequent draws or accumulated too great of a balance. The written policy also stated that upon termination, employees would "immediately pay the company any unpaid deficit amounts."

Two hhgregg employees, Robert Stein and Robert Beck, filed a lawsuit in the U.S. District Court for the Southern District of Ohio, Cincinnati, on behalf of themselves and all other former and current hhgregg retail sales employees alleging that the company's compensation policy was illegal under the Fair Labor Standards Act (FLSA) and Ohio law. Specifically, Stein and Beck alleged that:

1. The draw policy encouraged retail employees to work "off the clock."

2. The draw policy improperly manipulated commissions in violation of the FLSA.

3. The company failed to properly pay overtime in weeks in which overtime was worked.

4. The policy required employees to pay back deficit amounts upon termination in violation of the FLSA.

The "encouraged employees to work off the clock" claim was premised on allegations that hhgregg required employees to attend mandatory training and conferences. Because no commissions were earned during the meetings, Stein and Beck claimed that employees, with the knowledge and approval of managers, worked "off the clock" to avoid incurring a draw based on those hours.

Rather than filing an answer to Stein and Beck's complaint, hhgregg filed a motion to dismiss asserting that the commission payment policy was legal on its face. The district court ultimately agreed with hhgregg and dismissed all of Stein and Beck's federal claims and declined to hear the state-law claims. Stein and Beck appealed to the Sixth Circuit.

In a 2-1 decision, the Sixth Circuit agreed with the district court on some issues but reversed the lower court's decision on other issues. Adopting a long-standing position from the U.S. Department of Labor (DOL), the court rejected Stein and Beck's contention that the draw structure violated the FLSA when draw advances were repaid from subsequent commissions earned during the course of employment.

The Sixth Circuit ruled differently, however, regarding the provision in hhgregg's commission payment policy that required **terminated employees to repay deficits in their draw balances after termination**. In its ruling, the district court noted that the legality of the provision was **questionable** but granted hhgregg's motion to dismiss because there was no evidence that hhgregg **actually enforced that aspect of the compensation plan when employees' employment ended**.

A majority of the judges on the Sixth Circuit panel disagreed with the district court that the lack of enforcement of the payback provision made a difference. The Sixth Circuit ruled that although the provision had never been enforced, **the fact that the policy said money had to be repaid was sufficient to state a viable claim**. According to the court, "Incurring a debt, or even **believing** that one has incurred a debt, has far-reaching practical implications for individuals."

The Sixth Circuit also ruled that Stein and Beck alleged sufficient facts to state a claim that hhgregg's policies and practices unlawfully encouraged employees to work "off the clock" without compensation.

WHAT DOES THIS MEAN FOR HR?

The Sixth Circuit's decision is significant in several respects. It confirms that the practice of advancing future commissions to retail and service employees during employment lawfully meets the FLSA's minimum wage requirement. However, including post-termination repayment requirements in a commission-based compensation policy could create liability, even if the requirements are never actually enforced.

Also, the court's decision on the off-the-clock work claim is a good reminder to implement clear policies prohibiting off-the-clock work, even for employees paid on a commission basis.

XXI. SALARY BASIS REQUIREMENT

A. Salary vs. Hourly and Exempt v. Nonexempt

First, it is important for managers to understand that there is a difference between classifying an employee as being "exempt" from overtime and being paid on a salary basis. "Exempt" employees, as required under the FLSA, must paid on a salary basis. "Salaried" employees, however, do not have to be made exempt from overtime.

Every so often, an employer will decide that it wants to pay its nonexempt employees on a salary basis. When such an arrangement occurs, these salaried nonexempt employees are paid their normal salary whether they work one hour, eight hours, or ten hours in a given day. Even though these nonexempt employees are paid on a salary basis, these salaried employees must be paid overtime for any hours they work over 40 in a given work week since they are not exempt from the overtime requirement of the FLSA.

Consequently, while employers are allowed to pay their nonexempt employees on a salary basis, exempt employees must be placed on salary in order to qualify for the FLSA's exemption from overtime. Therefore, managers must understand that paying employees on either an "hourly" or "salary" basis and classifying employees as being either "nonexempt" or "exempt" are totally separate issues, aside from the fact that all exempt employees must be paid on a salary basis.

B. Salary Test In General

Being paid on a "salary basis" means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work. Subject to exceptions listed below, an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked. Exempt employees do not need to be paid for any workweek in which they perform no work.

If the employer makes deductions from an employee's predetermined salary, i.e., because of the operating requirements of the business, that employee is not paid on a "salary basis." If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

As previously mentioned, the final test employers must pass if they hope to classify any of their employees as being exempt from the overtime provision of the Act is the Salary Test, which has historically been the most obscure of the three tests. Interestingly, the Salary Test portion of the FLSA's overtime exemption requirements does not apply to physicians, or interns or residents of a medical program, lawyers and teachers in a school or educational institution.

C. Meeting The Salary Test Requirements

Meeting the requirements of the Salary Test sounds exceedingly simple:

Salaried employees must be paid a specific daily stipend, or sometimes weekly, depending on the issue at hand, regardless of the number of hours the salaried employee works for the employee.

But exactly how the term "salary" has been defined under the regulations and interpreted by the courts has given rise to much confusion. Therefore, the specific provisions of the Salary Test should be examined in order to decipher what is meant by the term "salary."

Under the Salary Test, employees are considered as being paid on a "salary basis" if they receive a predetermined daily wage that is **not** subject to reduction. For instance, if a salaried exempt employee is paid $100 per day, the employee is to receive this sum irrespective of whether he works one hour or 15 hours a day.

Of course, employees need not be paid for any day in which the employee performs no work at all. (i.e., Employee misses the entire day.) In 1990, the importance of the FLSA's Salary Test in relation to the exempt status of employees abruptly came to the attention of American management.

In Abshire v. County of Kern, 908 F.2d 438 (9th Cir. 1990), the Kern County Fire Department had historically classified its Battalion Chiefs as being salaried and exempt from the overtime provision of the FLSA. However, the Kern County Fire

Department also had a policy that allowed it to dock the pay of its salaried exempt employees for a partial day absence from work if these employees had already exhausted their accrued paid leave accounts.

The Battalion Chiefs contended that this policy violated the FLSA's Salary Test provision for exempt status. The Battalion Chiefs claimed that since the department was able to dock their pay for a partial day absence based on the number of hours they missed from work, their wages were in reality being calculated on an hourly basis. The Battalion Chiefs therefore argued that they were not really being paid on a salary basis, as required by the FLSA in order to qualify for exempt status. As a result, the Battalion Chiefs claimed that they were in actuality nonexempt employees and were entitled to receive overtime pay.

When the court examined this issue, it first held that not only must employers satisfy the "Duties Test" and the "Minimum Salary Test" of the FLSA in order to be considered "exempt" from paying their employees overtime, as previously discussed, but employers must also satisfy the "Salary Test" requirement of the Act. The court then held that if employers fail any one of these three tests, then their employees will lose their exemption from the overtime provision of the FLSA. As a result, employers could be ordered to pay their offended employees overtime wages for as far back as the last three years.

The court in Abshire then examined the requirements of the Salary Test. Agreeing with the Battalion Chiefs, the court held that since the pay of every Battalion Chief was potentially "subject to" deductions for partial day absences due to the Kern County Fire Department's policy, the Salary Test of the FLSA had been violated. As a result, the court found that the Battalion Chiefs were not actually being paid on a salary basis, which invalidated the exempt status of all the Kern County Fire Department's Battalion Chiefs.

When the Kern County Fire Department defended itself by claiming that no Battalion Chief's pay had ever actually been docked for a partial day absence in spite of this policy, the court responded by holding that this fact was "irrelevant." The court reasoned that under the Salary Test, the sole fact that the Battalion Chiefs' pay was even potentially "subject to" any deductions at all as a matter of policy was enough to invalidate the salaried exempt status of all the Battalion Chiefs, regardless of whether or not any such deductions were ever actually made.

Furthermore, the Abshire court also held that the fact that the Kern County Fire Department paid its Battalion Chiefs overtime in the form of compensatory time off for the work they performed beyond their regular work schedule also indicated that these Battalion Chiefs were in reality being treated as hourly employees and were not being paid on a salary basis.

Therefore, according to the Abshire court, the Kern County Fire Department's practice of voluntarily paying its Battalion Chiefs additional wages or compensatory time off for the extra hours these employees worked also invalidated the Battalion Chiefs' exempt status under the Act.

Before Abshire, most employers were unaware that many of the policies they were adopting would have the effect of invalidating the exempt status of their employees under the FLSA. As a result, employers' confusion over the Salary Test portion of the Act is easily understood. First, the Salary Test is an obscure portion of the FLSA that never drew much attention before Abshire. Next, the Department of Labor's policy on docking salaried employees' pay is not clearly stated anywhere in its regulations.

Since Abshire, many issues regarding the Salary Test have arisen, as well as many splits of authority regarding how this test is to be interpreted. Some of the more vital issues surrounding this test are as follows:

1. Employers are not permitted to actually dock their exempt employees' wages for a partial day absence in any federal jurisdictions even if the employee has already exhausted all of his paid time-off account. Therefore, if an exempt employee has no paid time off available to him and that employee so much as goes to work, opens his mail, and then goes home ill, this exempt employee must be paid for the entire day since exempt employees are paid on a daily salary basis, regardless of how long, or short, their work day is for the employer. Of course, if an exempt employee misses an entire day of work and has no paid time off left in his account, the employee need not be paid for the day since no services were performed for the employer.

2. Also, since Abshire was decided, the U.S. Supreme Court held in Auer v. Robbins, 117 S. Ct. 1055 (1997), that an employee's exempt status will not be invalidated simply because a general policy adopted by the employer ***may*** be applied to a salaried employee. However, the Court also indicated that a policy which specifically violates the Salary Test may invalidate the exempt status of an employer's exempt employees, regardless of whether the policy is actually applied or not.

   The Court also reiterated that fact that employers may correct one time deductions that violate the Salary Test, even if the deduction was made pursuant to company policy and therefore not actually made inadvertently.

D. “Safe Harbor” For Damages Under The Salary Test

If employers err and make an impermissible deduction from their salaried employees’ wages under the Salary Test, the regulations allow employers an opportunity to correct this error without invalidating their employees’ exempt status. The regulations allow employers to correct an isolated impermissible deduction from any salaried employees’ pay if the following requirements are met:

1. The employer has a clearly communicated policy in place that prohibits improper deductions from an employee’s pay,
2. This policy includes a clear complaint process,
3. The employer reimburses the employee and
4. The employer makes a good faith commitment to comply in the future.

Sample Policy:

> It is the Company’s policy to never make impermissible deductions from an employee’s pay whether the employee is classified as being exempt or non-exempt from overtime pay. Should any employee feel that the Company has made an impermissible deduction from his/her pay, the employee should contact ______ immediately.

E. Circumstances In Which The Employer May Make Deductions From Pay

Deductions from pay are permissible when an exempt employee is absent from work for **one or more full days**:

- ➢ For personal reasons,
- ➢ For absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice,
- ➢ To offset amounts employees receive as jury or witness fees, or for military pay and

NOTE: While an employer cannot make deductions from pay for absences of an exempt employee occasioned by jury duty, attendance as a witness or temporary military leave, the employer can offset any amounts received by an employee as jury fees, witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

- For unpaid disciplinary suspensions of **one or more full days** imposed in good faith for workplace conduct rule infractions.

Employers are also allowed to suspend a salaried exempt employee in any amount for violating **safety rules of major significance.** (i.e., Smoking in explosive plants, oil refineries and coal mines.) In such instances, the suspension need not be based on a daily or weekly sum.

Also, an employer is not required to pay the full salary in the initial or final week of employment, or for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act.

When calculating the amount of a deduction that is allowed from a salaried employee's pay, the employer may use the hourly or daily equivalent of the employee's full weekly salary or any other amount proportional to the time actually missed by the employee, unless the deduction is due to the violation of a major safety rule.

F. One Day Suspensions For Exempt Employees

Under the 2004 regulations, employers were allowed to suspend salaried employees in full day increments for any infraction of workplace conduct rules, not just safety rules of major significance

However, such suspensions must be imposed pursuant to a written policy applicable to all employees.

G. Effect of Improper Deductions from Salary

The employer will lose the exemption if it has an "**actual practice**" of making improper deductions from salary. Factors to consider when determining whether an employer has an actual practice of making improper deductions include, but are not limited to:

- The number of improper deductions, particularly as compared to the number of employee infractions warranting deductions;
- The time period during which the employer made improper deductions;
- The number and geographic location of both the employees whose salary was improperly reduced and the managers responsible; and
- **Whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.**

If an "actual practice" is found, the exemption is lost during the time period of the deductions for employees in the same job classification working for the same managers responsible for the improper deductions.

Isolated or inadvertent improper deductions will not result in loss of the exemption if the employer reimburses the employee for the improper deductions.

H. Fee Basis

Administrative, professional and computer employees may be paid on a “fee basis” rather than on a salary basis. If the employee is paid an agreed sum for a single job, regardless of the time required for its completion, the employee will be considered to be paid on a “fee basis.” A fee payment is generally paid for a **unique job**, rather than for a series of jobs repeated a number of times and for which identical payments repeatedly are made.

In order to determine whether the fee payment meets the minimum salary level requirement, employers must consider the amount of time the employee worked on the job and determine whether the payment is at a rate that would amount to at least $684.00 per week if the employee worked 40 hours. For example, an artist paid $250 for a picture that took 20 hours to complete meets the minimum salary requirement since the rate would yield $500.00 if 40 hours were worked.

I. Public Sector Employees’ Exemption To The Salary Test

On September 6, 1991, the Department of Labor granted public sector employers a special exemption from the Salary Test’s “no pay-docking” rule for their exempt employees. This exemption, which was made final on August 19, 1992 (29 C.F.R. § 541.5(d)), made it permissible for public employers to dock the pay of their exempt public employees for partial day absences once those employees’ accrued paid leave accounts were exhausted.

This exemption also allows public employers to make “budget-required furloughs,” or layoffs, of less than a week without permanently invalidating their exempt employees’ salary status. The interpretation of this public sector exception may also allow for the recording of hours by public sector exempt employees.

The Department of Labor contended that this exemption for public employees was necessary since most state and local government laws prohibit public employers from paying their employees for time not worked. As of yet, however, no such relief has been granted to the private sector.

J. Family and Medical Leave Act ("FMLA") and the Salary Test

Congress has already recognized and attempted to address the many problems created by the Salary Test when it adopted the Family and Medical Leave Act ("FMLA") (29 U.S.C. §§ 2601, et seq.). Congress stated that one of the primary purposes of enacting the FMLA was to help American workers balance the great demands placed upon them by their home and work lives. Congress recognized the fact that it is becoming increasingly difficult for workers to balance these conflicting demands, largely due to the changing demographics of today's workforce, which include more single-parent households and dual career couples than ever before in history.

Congress then examined the problems caused by the FLSA's Salary Test for those exempt employees who need to take partial day absences from work in order to attend to the serious medical conditions of either themselves or their families. In order to help ease the burden placed on exempt employees by the Salary Test, Congress included an exemption from the Salary Test's requirements in the FMLA that allow salaried employees to take partial day absences from work without pay and not invalidate their exempt work status.

However, this exemption Congress provided in the FMLA is a very limited one. First, the scope of the FMLA's coverage is very narrow. The FMLA only applies to employers of 50 or more employees. It also only allows for 12 weeks of coverage per year, so once this allotted time period is exhausted, the exemption ceases to operate. And finally, the FMLA only applies to either the birth or adoption of a child and to "serious health conditions" of employees or of their family members, as defined in the FMLA. Due to this narrow scope of coverage, many employers and many of the situations employees commonly encounter simply will not fall under this FMLA exemption provided by Congress.

This narrow focus of the FMLA therefore creates the opportunity for some very contradictory situations to arise. For instance, if an exempt employee who is covered by the FMLA needs to take an afternoon off from work without pay to watch over a child who has contracted a serious health condition, this employee's pay could be docked for this partial day absence and the Salary Test would not be violated. However, if another salaried employee took the same afternoon off from work to go golfing, then this employee's pay should not be docked. Therefore, when such a narrowly focused exemption exists in the law, some very inequitable results are bound to occur.

K. Outside Sales, Teachers, Lawyers and Physicians

These salary requirements do not apply to outside sales employees, teachers, and employees practicing law or medicine.

XXII. FIXED SALARY FOR FLUCTUATING WORKWEEK

Buried in the regulations (Section 29 CFR 778.114), the Department of Labor allows employers to pay nonexempt employees a salary pursuant to a **written agreement** that these employees will receive a fixed weekly salary amount as **straight time pay** for whatever hours they work in a workweek when those hours the employee works “fluctuate” from week to week, whether they work just a few hours or many. This written agreement with these employees ***must*** be in writing and it ***must*** state that the fixed weekly salary pays these employees for all of their straight time wages for the hours they work each workweek.

Since the employee’s fixed weekly salary in the agreement is intended to compensate the employee at **straight time rates** for whatever fluctuating hours are worked in the workweek, the employee’s calculated regular hourly rate will vary from week to week. The employee’s hourly rate **is determined by dividing the number of hours worked in the workweek into the employee’s weekly salary to determine the employee’s hourly rate for that week.**

So, the more hours a nonexempt salaried employee works in a given week, the lower his/her hourly rate becomes.

In the end, since the nonexempt salaried employee’s straight time wages have already been paid to him/her for the week, the employer only owes the employee half-time wages for all of the hour he/she worked over 40 in that week.

Of course, the employee’s hourly wage for that week must be greater than the FLSA’s minimum hourly wage rate (as well as the state’s minimum hourly wage rate).

For example, consider the situation of an employee who is classified as a nonexempt fixed salaried employee at $600.00 per week. However, that employee works 50 hours in a given week.

For example, consider the situation of an employee who is classified as a nonexempt fixed salaried employee at $600.00 per week. However, that employee works 50 hours in a given week.

Fixed Salary For Fluctuating Workweek Example

$600 per week salary

Works 50 hours in one week

Since the employee has already received straight-time compensation on a salary basis for all straight time hours worked (50), the employer only owes the employee **additional half-time pay for those hours worked over 40 in that week.**

$600.00 ÷ 50 Hours = $12.00/hr. wage

$12.00/hr. wage ÷ 1/2 time overtime rate = $6.00/hr.

$6.00/hr. X 10 hours of overtime = $60.00 overtime earnings

TOTAL WEEKLY WAGE = $660.00

In the end, the employee is paid $660.00 for working 50 hours that week.

As you can see, moving an employee from salaried exempt status to a fixed salaried nonexempt status can give these employees additional wages over what they earned as exempt employees while providing the employer with a more affordable way to deal with this new regulation.

However, this method of paying employees is called the “fluctuating workweek” method for a reason. If an employee always works a fixed 44-hour schedule that never varies from week to week, this method cannot be used. According to the U.S. Department of Labor, not only do the employee’s hours have to fluctuate, but they have to fluctuate both ***above and below*** 40 hours per week. So, if the employee’s schedule bounces between 41 and 45 hours per week, but they never have a week below 40 hours, this is not the method for you.

However, in reality, it is hard to find a salaried person who always works a fixed schedule and who never drops below 40 hours in a given week. Still, if an employer wants to use this fluctuating workweek method, it had better make sure the employee’s hours do fluctuate above and below 40 hours at some time throughout the year.

Also, if you want to pay employees a fixed salary for working a fluctuating workweek, the weekly salary has to actually be ***fixed***.

For example, with regular salaried exempt employees, you can dock their salary if they are absent from work for a full day if they did not perform any services for you. However, this is not allowed for non-exempt employees paid on a fixed weekly salary under a Fluctuating Workweek Agreement.

If employers want to pay employees a fixed salary for working a fluctuating workweek, that also means the employer will have to pay employees their **full salary for every workweek in which they perform any work, even if it’s just one day or even one hour**. You can charge their vacation or sick day accounts … but you cannot dock their pay, even if they work one hour for the week.

Therefore, to use this method, it is best to make sure that the employee has plenty of time saved up in their sick and/or vacation banks. If absenteeism gets to be a problem with an employee paid under a Fluctuating Workweek Agreement, employers would probably want to change the employee's wage status and use a more traditional method.

And, of course, this understanding with the employee as to how they are to be paid under this Fluctuating Workweek must absolutely be in writing.

XXIII. JOINT EMPLOYERS

In January 2020, the DOL announced its final rule regarding joint employers under the FLSA. This final rule became effective on March 16, 2020.

Under this final rule, the DOL continues to recognize two potential scenarios where an employee may have one or more joint employers.

In the first scenario, an employee performs work for one employer that simultaneously benefits another individual or entity. In this situation, the DOL has adopted a four-factor balancing test to determine whether the potential joint employer is directly or indirectly controlling the employee. These four factors assess whether the potential joint employer:

- Can hire or fire the employee;
- Supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
- Determines the employee's rate and method of payment; and
- Maintains the employee's employment records.

The term "employment records" in this case refers to records, such as payroll records, records pertaining to the hiring or firing, supervision and control of the work schedules or conditions of employment, or determining the rate and method of payment of the employee.

Whether the entity or person receiving the benefits of the employee's labor is a joint employer will depend on balancing all the facts in a particular case. How much weight each particular factor should be given in this analysis will vary depending on the circumstances of each situation.

The final rule notes that additional factors may also be relevant in determining whether another person or entity is a joint employer in this type of situation, but only when they show whether the potential joint employer is exercising significant control over the terms and conditions of the employee's work.

Accordingly, to determine joint employer status, **no factors should be used to assess economic dependence**. Examples of factors that are **not relevant** because they assess economic dependence include, but are not limited to:

1. Whether the employee is in a specialty job or a job that otherwise requires special skill, initiative, judgment, or foresight;

2. Whether the employee has the opportunity for profit or loss based on his or her managerial skill;

3. Whether the employee invests in equipment or materials required for work or the employment of helpers; and

4. The number of contractual relationships, other than with the employer, that the potential joint employer has entered into to receive similar services.

The final rule also identifies certain other factors that do not make joint employer status more or less likely under the Act, including:

- If the company is operating as a franchisor, entering into a brand and supply agreement, or using a similar business model;

- The employee's economic dependence on the potential joint employer;

- The presence of contractual agreements the potential joint employer has that would require it to meet legal obligations or standards to protect the health or safety of employees or the general public;

- Requiring, monitoring, and enforcing other businesses' compliance with quality-control standards to ensure the consistent quality of a work product, brand, or business reputation; and

- Practices of providing sample handbooks or other forms to the employer, allowing an employer to operate a facility on its premises, offering an association health or retirement plan to (or participating in such a plan with) the employer, or jointly participating with an employer in an apprenticeship program.

In the second scenario, one employer employs an employee for one set of hours in a workweek, and then another employer employs the same employee for a separate set of hours in the same workweek.

However, the final rule did not make any substantive changes to the standard for determining joint employer liability in this second scenario. If the employers are acting independently of each other and are disassociated with respect to the employment of the employee, each employer may disregard all work performed by the employee for the other employer in determining its liability under the FLSA.

However, if the employers are sufficiently associated with respect to the employment of the employee, they are joint employers and must aggregate the hours worked for each for purposes of determining if they are in compliance. The employers will generally be sufficiently associated if:

- There is an arrangement between them to share the employee's services,
- The employer is acting directly or indirectly in the interest of the other employer in relation to the employee, or
- They share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

Finally, the final rule provides several examples of how the DOL's joint employer guidance should be applied in various factual circumstances at 29 CFR 791.2.

XXIV. DAMAGES UNDER THE FLSA

A. Willful v. Nonwillful Violations

When the FLSA was enacted in 1938, it did not include a statute of limitations for any violations committed under the Act. As a result, any civil actions that were brought against employers under the FLSA were governed by each individual state's laws according to their statute of limitations.

However, in 1947, Congress passed the Portal-to-Portal Act (29 U.S.C. § 216, et seq.) which imposed a two-year statute of limitations for FLSA violations. In 1966, Congress amended the FLSA again and extended its statute of limitations to three years for any violations deemed to be "willfully" committed by employers.

Today, if employers violate the FLSA, and their violation is found to be nonwillful, employers will be liable for any damages caused by this violation for only the last two years. However, if employers "willfully" violate the FLSA, then they will be liable for any damages resulting from this violation for the last three years.

An obvious problem arising from this provision is how to define the term "willful." Throughout the various jurisdictions, a split of authority has arisen regarding what exactly is meant by this term.

One interpretation of this "willfulness" standard that was previously accepted in some jurisdictions was the "in the picture" standard. Under the "in the picture" standard, it was contended that once an issue under the FLSA had been decided by the U.S. Department of Labor, or was "in the picture," then employers were responsible for being in compliance with the decided issue.

Otherwise, employers were deemed to have "willfully" violated the Act, regardless of whether these employers were ever even aware of the fact that the standard existed. Under the "in the picture" standard, mere ignorance, or negligence, could place employers in the position of having "willfully" violated the FLSA, thus making employers liable for any violations they committed for the last three years.

However, in McLaughlin v. Richland Shoe Company, 486 U.S. 128 (1988), the U.S. Supreme Court examined the "in the picture" standard. The Court looked to the Webster's Dictionary's definition of the term "willful," and held that the term "willful" was synonymous with such terms as "voluntary," "intentional," or "deliberate." The Court therefore held that a violation under the FLSA would be deemed "willful" only if "the employer either knew or showed reckless disregard" for the applicable FLSA regulation, thereby overturning the "in the picture" standard.

As a result, today employers' mere negligence of an FLSA standard will no longer create a "willful" violation.

B. Liquidated Damages

When the FLSA was enacted in 1938, it contained a provision stating that employers who were found to be in violation of the overtime or minimum wage provisions of the Act must not only be ordered to reimburse the offended employees for their unpaid wages, but employers would also be ordered to pay these employees an additional sum of money equal to their back wages as "liquidated damages." Therefore, whenever employers violate the overtime or minimum wage provisions of the Act, they may actually be liable for "double damages."

The purpose behind mandating "double damages" for employees was not to penalize employers, but instead to compensate employees for damages they have suffered related to lost wages that are too obscure or difficult to prove, such as lost interest, lost investment opportunities, and so on. However, since the awarding of interest charges was already part of the reasoning for awarding liquidated damages in the first place, plaintiffs may not recover both liquidated damages and prejudgment interest.

In 1947, Congress amended the FLSA to help ease the harshness of the mandatory liquidated damages rule. As a result of this 1947 amendment, employers may now avoid paying these double damage awards if they are able to show that they acted in good faith with a reasonable belief they were not violating the Act at the time of the offense. However, there is still a strong preference for awarding employees double damages. Consequently, awarding double or liquidated damages still tends to be the norm, while awarding only single damage awards remains the exception.

Even if employers can sustain their burden of proof and overcome this presumption of double damages, the court may still decide to award double damages to employees anyway. Consequently, the decision to award single damages is completely discretionary by the court, so even if employers meet their burden of proof and show that they acted in good faith ad had reasonable grounds for believing they were not violating the Act, employers might still find themselves paying offended employees double or liquidated damages.

One of the most difficult aspects employers face in sustaining this burden of proof is understanding what is meant by the terms "good faith" and "reasonable belief." In short, an affirmative duty is placed on employers to prove that they made an honest attempt to ascertain the proper interpretation of the Act in relation to their situation *and* that their reliance on the information they obtained was reasonable.

In carrying this burden, many courts have held that once the U.S. Department of Labor has voiced its opinion on a particular FLSA overtime or minimum wage issue, employers can no longer argue that they made a "good faith" effort to discover the law's application to their particular situation, which is very similar to the "in the picture" standard of the U.S. Supreme Court overturned regarding the "willfulness" definition, or that their reliance on erroneous information was reasonable. Consequently, employers claim mere ignorance of an FLSA regulation and sustain their burden of proof regarding liquidated damages.

Generally, in order for employers to fulfill their duty of inquiry for the purpose of liquidated damages, several courts have interpreted the regulations as requiring employers to solicit instructions directly from the proper governmental officials in writing, as opposed to obtaining mere oral directives, regarding their specific situation before they act.

Seeking general advice regarding the FLSA will not satisfy the requirements of this test, nor will receiving an oral response to a specific situation. If employers hope to rely upon the U.S. Department of Labor's advice in showing that they fulfilled their "good faith" duty of inquiry and that they had a "reasonable belief" they were not violating the Act, employers must receive a written response from the Department of Labor providing them with a clear answer regarding their specific inquiry into their particular situation before such a letter will satisfy this test.

Employers may also rely on a U.S. Department of Labor Policy Letter in order to establish a "good faith" and a "reasonable belief" in relation to liquidated damages. However, since employers bear the burden of proving that they acted "explicitly" in good faith, employers also have the burden of proving that the policy letter they are relying upon fits exactly with their specific situation and that the policy letter has not been overturned.

Some employers accused of noncompliance have tried to argue that they were uncertain as to whether or not a certain provision of the Act applied to them. The courts have held, however, that mere uncertainty as to whether a law applied to employers is not a "reasonable belief." Conversely, arguing that employers had discovered no precise legal guidelines governing their acts after conducting a good faith inquiry has been found to satisfy this test.

C. Other Remedies

In addition to incurring liquidated damage awards dating back as far as three years, employers may be subject to monetary liability for violating the Act in other areas as well. Two of these additional areas of liability are attorneys' fees and costs. Under the FLSA, the courts are required to award reasonable attorneys' fees and costs to successful plaintiffs who sue for violations under the Act.

Employers who violate the FLSA may also be subject to both civil and criminal penalties. Civil penalties can amount to as much as $1,000 per offense, or $10,000 for each child labor violation, while criminal penalties can run up to $10,000 for each violation, as well six months of possible imprisonment for willful violations.

Additionally, anyone who fails to obey a court-ordered subpoena, such as by failing to testify or supplying documents, may be subject to fines of no less than $1,000 and no more than $5,000, as well as possible imprisonment of up to one year upon conviction.

And finally, anyone filing a false FLSA claim or issuing a false statement in a Wage and Hour investigation may be subject to up to $5,000 in fines and liquidated damages for any harm caused by such false claims or false statements.

XXV. U.S. SUPREME COURT: ORAL COMPLAINTS UNDER THE FLSA COUNT

In Kasten v. Saint-Gobain Performance Plastics Corp. No. 09-834 (2011), Kevin Kasten claimed that while he worked for Saint-Gobain Performance Plastics Corporation, the company's time clocks were located between the place he and his fellow employees donned and doffed their job-related protective gear and the place where they performed their assigned duties. According to Kasten, the clocks' location kept the workers from being paid for the time they spent donning and doffing their work gear. (In a separate but related lawsuit, a district court found that Saint- Gobain's time-clock placement violated the FLSA.)

After Saint-Gobain terminated his employment, Kasten sued under the FLSA, asserting that he was fired in retaliation for orally complaining about his employer's time-clock placement. The FLSA prohibits employers from retaliating against employees who have "**filed any complaint**" under the statute. Kasten claimed that he repeatedly raised the time-clock placement issue with Saint-

Gobain, using its internal grievance resolution procedure. More specifically, he asserted that he talked to his shift supervisor, an HR employee, his lead operator, the HR manager, and the operations manager about the time-clock placement and that those actions led the company to fire him.

According to Saint-Gobain, Kasten didn't make a "significant complaint" about the time-clock placement. The company claimed it fired him after he was repeatedly warned about his failure to properly clock in and out and didn't adjust his actions. The district court and the Seventh Circuit ruled for the employer, holding that FLSA complaints must be made in writing because of the "filed" language (*i.e.*, an oral complaint can't be "filed").

Kasten appealed to the U.S. Supreme Court. The court held for Kasten.

The Supreme Court examined whether the FLSA's anti-retaliation provision protects only written complaints or whether oral complaints are also protected. The Court started its analysis with the text of the FLSA and noted that the "word 'filed' has different relevant meanings in different contexts." The Court looked at various dictionaries, court decisions, statutes, and regulations for help and determined that those resources referenced both oral and written filings.

The Court next looked at other places in the FLSA where the term "filed" is used. It found that some of the other provisions involve filed material that is almost always in writing, some specifically require a writing, and some don't resolve the oral/written question at all.

The Court concluded that the text of the FLSA alone didn't provide an answer regarding whether the term "filed any complaint" included oral complaints and next looked at several functional considerations. The Court reasoned that the U.S. Congress intended the FLSA's anti-retaliation provision to cover oral complaints because allowing only written complaints would undermine the Act's basic objectives. In particular, it questioned why Congress would want to hinder use of the FLSA's complaint procedure by workers who were illiterate, less educated, or overworked (*i.e.,* workers who would have trouble putting their complaints in writing).

Additionally, the Court noted that restricting complaints to only written ones would take away government agencies' flexibility when enforcing the FLSA (*e.g.*, they might not be able to use hot lines, interviews, or other oral methods of receiving complaints). The Court also observed that not allowing oral complaints would discourage employers from using "desirable informal workplace grievance procedures to secure compliance with the Act."

Next, the Court looked at the federal agencies' views on what the term "filed any complaint" entails. It noted that the secretary of labor has consistently held that the term covers oral and written complaints and that the U.S. Department of Labor expressed that view in an enforcement action filed years ago. The Court also found that the Equal Employment Opportunity Commission takes a similar stance in its compliance manual.

The Court addressed how complaints must be fair to employers and must give them "fair notice that an employee is making a complaint that could subject the employer to a later claim of retaliation." Additionally, according to the Court, FLSA complaints must have some degree of formality: "To fall within the scope of the anti-retaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection." The Court asserted that this standard can be met by both written and oral complaints.

The Supreme Court didn't address Saint-Gobain's claim that Kasten didn't have a case because the FLSA's anti-retaliation provision applies only to complaints filed with the government and he complained to a private employer, not the government. The Court noted that the lower courts disagreed with that claim and that since Saint-Gobain didn't raise the legal question in its Supreme Court petition, it didn't address the claim. Justice Antonin Scalia, however, raised the issue in his dissent, claiming that the FLSA's anti-retaliation provision doesn't cover complaints to employers but instead covers only official complaints to courts or government agencies.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Although the Court did not address the question of whether complaints to private employers are protected under the FLSA's anti-retaliation provision, you still need to proceed with caution under the assumption that they ***are*** covered. It's a good time to update your policies and make sure your supervisors are trained on how to properly handle any kind of complaint — oral or written. You must also make sure that you *always* carefully document any type of complaint. In fact, it's a good idea for your organization to have established documentation and investigation procedures for addressing employee complaints.

Notice: Legal Advice Disclaimer

The purpose of these materials is not to act as legal advice but is intended to provide human resource professionals and their managers with a general overview of some of the more important employment and labor laws affecting their departments. The facts of each instance vary to the point that such a brief overview could not possibly be used in place of the advice of legal counsel.

Also, every situation tends to be factually different depending on the circumstances involved, which requires a specific application of the law.

Additionally, employment and labor laws are in a constant state of change by way of either court decisions or the legislature.

Therefore, whenever such issues arise, the advice of an attorney should be sought.

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Scott combines the areas of law and human resources to help organizations in "Solving Employee Problems ***BEFORE*** They Start." Scott's goal is ***NOT*** to win lawsuits. Instead, Scott's goal is to ***PREVENT THEM*** while improving ***EMPLOYEE MORALE***.

Scott's first book, ***Solve Employee Problems Before They Start: Resolving Conflict in the Real World***, is a #1 Best Seller for Business and Conflict Resolution. It was also named by EGLOBALIS as one of the best global Customer and Employee books for 2020-2021. Scott's next book, ***Living The Five Skills of Tolerance***, is also a #1 Best Seller in 13 categories on Amazon. His most recent book, ***Healing The Human Brain***, is an International Best Seller in 14 categories with sales in over a dozen countries worldwide.

Scott Trains Managers & Employees ON-SITE in over 50 topics, all of which are customized for each client. Scott is a national speaker who travels the country presenting seminars on such topics as Healing The Human Brain, Employment Law, Conflict Resolution, Leadership and Tolerance, to mention a few.

Scott is also a seven-time SHRM National Diversity Conference presenter. In 2023, he presented his ground-breaking "**TOLERANCE & BRAIN HEALTH**" program.

Scott's ***MASTER HR TOOL KIT SUBSCRIPTION*** is a favorite for anyone wanting to learn Employment Law and run an HR Department.

Scott's videos are also favorite tools for anyone wanting easy, convenient and affordable access to in-house training, including his ***SCOTT'S SUPERVISOR MASTER VIDEO SERIES*** and his ***STOP BULLYING & HARASSMENT NOW!*** video, which complies with all of the new EEOC Harassment Training Guidelines.

Scott was named one of Business First's 20 People To Know In HR by CEO Magazine' and a Human Resources "Superstar" in 2008. Scott also received the Linda Kerns Award for Outstanding Creativity in HR and the Ohio State Human Resource Council's David Prize for Creativity in HR Management.

Scott's academic background and awards include Capital University College of Law (Class Valedictorian (1st out of 233) and Summa Cum Laude), Master of Labor & Human Resources and B.A. in Organizational Communication from The Ohio State University.

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"OH, NO! IT'S WAGE AND HOUR!"
Understanding the Fair Labor Standards Act of 1938

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