

***Wage and Hour Issues: Clearing Up
the Confusion Surrounding the
Fair Labor Standards Act (FLSA)***

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LEARNING OBJECTIVES

One of the most critical aspects of HR is staying in compliance with wage and hour laws. This session will provide you with important information about the federal Fair Labor Standards Act (FLSA), including:

- Ensuring you are in compliance with the Fair Labor Standards Act (FLSA)
- Clarifying employee classifications: Exempt or nonexempt?
- Update on proposed legislative and regulatory changes to federal and state wage and hour laws
- Avoiding costly errors in pay calculations: overtime, comp time, on-call time, meal time, sleep time, travel time, and waiting time
- Using a checklist to assist in auditing your wage and hour practices
- Case Study—How to avoid common classification mistakes and expensive employer liability

ENSURING YOU ARE IN COMPLIANCE WITH THE FAIR LABOR STANDARDS ACT (FLSA)

The federal Fair Labor Standards Act (FLSA) was passed in 1938. It requires covered employers to pay employees at least the mandated minimum wage and to pay most employees overtime compensation for all hours worked in excess of forty in a work week.

Basic Requirements

Minimum Wage

Employers are required to pay employees at least \$5.15 per hour for all compensable working time. Almost every year, Congress considers bills to increase the minimum wage. It is important to track legislative trends. You should also check the laws of the states where your employees work. Some states require a minimum wage that is higher than the federal requirement. Employers should follow whichever law offers the most to employees.

Overtime Compensation

All employees not exempt from overtime requirements (more on that important topic later in this section) must be paid one and one-half times their regular rate of pay for all compensable work in excess of forty hours per workweek.

Most states also have laws similar to the FLSA. Sometimes these state laws offer more protections to employees. For example, employers in California generally are required to pay overtime compensation to employees who work more than eight hours in a workday. The general rule to remember if state and federal requirements are different is to follow the law that offers the most to employees.

Identifying and Avoiding the Most Common Wage and Hour Traps That Employers Fall Into

There are several areas of wage and hour law that cause great confusion for employers. Some of those areas involve pitfalls that cause more frequent problems than others. Following is a brief outline of those pitfalls and some suggestions for avoiding or dealing with them.

Assuming That a Business Is Too Small to Be Covered

Some employers assume that because their business is small, they are not covered by the FLSA. Unlike most other state and federal employment laws, the FLSA does not depend directly upon the number of employees. The FLSA covers individual employees whose work affects interstate commerce, or it can apply to all employees working for an employer covered as an enterprise that is involved in interstate commerce. The U.S. Department of Labor (DOL) and the courts have attached broad meaning to the term “interstate commerce.” For instance, it is generally assumed that businesses situated along U.S. and interstate highways are involved in interstate commerce, simply because they can easily get customers from out of state by virtue of their easy access from the highway. Similarly, any employee who routinely orders materials or supplies from out-of-state vendors, or who sells to out-of-state customers, is assumed to be involved in interstate commerce. In a very real sense, practically anything connected to our modern, networked economy is going to be sufficient to be considered involvement in interstate commerce. The vast majority of businesses can save a lot of time and legal expenses by going ahead and assuming that they and all their employees are covered under the FLSA.

Assuming That a Salary and/or Title Makes an Employee Exempt

Some employers make the mistake of assuming that simply because an employee is paid a salary, or is called “salaried” or “exempt,” or has a high-ranking job title, the employee will be considered exempt from overtime pay. Few things could be further from the truth. Many nonexempt employees are paid a salary, such as receptionists, secretaries, file clerks, and technicians. In a similar vein, giving an employee a high-sounding job title such as “director of production” or “sales manager” will make no difference if the employee’s job duties do not satisfy the criteria found in the DOL’s “duties” test for an

exemption category. In short, the DOL looks right past what a person is paid or called, instead focusing on the nature of the job and how the employee does the job.

Assuming That a Salary Will Cover Overtime Pay

A problem similar to the one immediately above occurs when an employer recognizes that an employee is nonexempt and eligible for overtime pay, but assumes that paying the employee a fixed salary that is meant to cover both straight-time and overtime pay will be sufficient to meet the overtime pay requirements. Unfortunately, that assumption is wrong. Regardless of the amount of the salary, and regardless of whether the employee agrees that the salary covers both overtime and non-overtime hours, the DOL and the courts will rule that the employer owes extra overtime pay, since the salary at most can cover only straight-time pay for all hours worked. There are some little-known overtime pay methods that to one extent or another can give the appearance of a set salary that includes overtime pay (and such methods should be attempted only with the assistance of a wage and hour law expert), but upon closer analysis, even those methods fail to fully insulate an employer from the duty of paying extra pay for extra hours worked.

Allowing Employees to Work “Off the Clock”

There is no such thing as “voluntary unpaid overtime” or “donated” time under the FLSA. Any manager who expects or allows his or her staff to put in unrecorded work time, otherwise known as working “off the clock,” is a wage claim or lawsuit waiting to happen. It is simply impossible under the FLSA for an employee to waive the right to receive at least minimum wage for all hours worked and all applicable overtime pay for hours worked over 40 in a workweek. An agreement to the contrary (other than a wage claim settlement supervised and approved by the DOL) is null, void, and completely unenforceable. Employers must ensure that all nonexempt employees properly record all time worked and are paid for all such time. The only exception to this is a very limited one applying to employees who volunteer time in employer-sanctioned civic or charitable activities not related to their regular jobs, and even then the employer should seek legal counsel before allowing such volunteer work.

Trusting Employees to Keep Their Own Time Records

Some employers fail to strictly follow the FLSA’s recordkeeping requirements, found in Part 516 of DOL’s wage and hour regulations (Title 29, Code of Federal Regulations). Among other things, those regulations require employers to maintain detailed records of hours worked by each nonexempt employee. An employer that allows employees to keep their own time records is only asking for trouble. For instance, if an employee files a wage claim for unpaid overtime, and the employer has no time records to dispute the employee’s own records showing that overtime was worked, the DOL and the courts will accept the employee’s records as valid under what is known as the “best evidence” rule, unless there is a good reason to doubt the credibility of such records. Another problem will occur if the DOL audits the employer for compliance with the FLSA. Part of any compliance audit is an inspection of the required records, and non-existent records may be cause for further DOL action.

Giving “Comp Time” in Lieu of Cash for Overtime

Compensatory time off in lieu of overtime pay is something that governmental employers may use, but private sector employers may not make use of compensatory time. Private employers may use an informal variety of compensatory time by adjusting the schedule within the same workweek to ensure that total hours worked do not exceed 40. However, overtime hours may not be averaged out over a longer period of time except in exceedingly narrow cases of certain employees of residential care facilities, and in the case of certain police, firefighting, and EMS employees. Otherwise, any overtime worked within a workweek must be paid for that workweek. (A very limited exception called the “time off plan” is discussed below under the heading “Comp Time.”)

Failing to Pay “Contract Employees” for Overtime

The difficulty here is not that independent contractors should be getting overtime pay for excessive hours they might put in on a project; they do not get overtime pay, regardless of how many hours they work, since independent contractors are not “employees” and are thus not covered under the FLSA. Rather, the problem occurs when an employer fails to understand that it takes a lot more than a contract to make a worker an independent contractor.

Independent contractor status does not depend upon the existence of a contract specifying that the worker is an independent contractor, or upon what the parties might call the relationship, but rather on the underlying nature of the work relationship. Some employers hire temporary workers to help them with a rush period and think that they are “contract labor” or “contract employees,” when in reality such terms are practically meaningless under wage and hour laws and payroll tax laws. If such workers are truly employees, and they work more than 40 hours in a workweek, the employer must pay them overtime pay if they do not qualify for some sort of overtime exemption. There is no way to contract around that; no piece of paper and no amount of explanation will overcome the evidence of an employment relationship if the DOL or the IRS, or a state employment security agency, is examining the situation. For this reason, employers must be very familiar with the various tests for determining whether a worker is an employee or an independent contractor.

In determining whether a worker is an employee or an independent contractor, courts have generally relied on the following factors:

- The amount of control and direction the employer exercises over the manner in which the work is performed.
- The worker’s opportunity to realize a profit or loss from the work performed.
- The worker’s investment in equipment or materials required for the job or the worker’s employment of helpers.
- The degree of skill required to perform the work.
- The degree of permanence to the working relationship.

- Whether the services rendered are an integral part of the employer's business.

Independent contractors must be just that—independent. They should be free to work for other companies while working for you, should have a limited-term contract, and should retain a great deal of autonomy in deciding how the work gets done.

Coverage of State Wage Payment Laws

The main thrust of wage payment laws on a state level is to enforce existing pay agreements between employers and employees. Therefore, it is very important for an employer to ensure that it has a clear compensation agreement with employees. As a general rule, the more complex a wage agreement is (two or more components to the compensation), the more important it is to put the wage agreement in writing. Whatever the wage agreement provides is what will be enforced, assuming that none of the provisions is itself a legal violation.

Most state wage payment laws apply only to private sector employees and employers. There is usually no minimum number of employees or minimum business volume test to satisfy; a single person hiring a single employee will have to abide by whatever wage agreement was in effect when the work was performed. Just as with the FLSA, independent contractors are not covered (contract law would apply to any contract payment disputes).

CLARIFYING EMPLOYEE CLASSIFICATIONS: EXEMPT OR NONEXEMPT?

General

- Most exemption questions deal with the white-collar exemptions (executive, administrative, and professional).
- Those exemption categories each have a salary test and a duties test.
- Employees who meet the tests for their categories do not have to be paid overtime pay, regardless of how much overtime they work.
- A salary and title alone do not make an employee exempt.
- Generally, exempt employees are the most important, highest-ranking, or highest-skilled workers in the company.
- Exempt employees are the ones to whom the nonexempt workers look for leadership, supervision, and other forms of guidance.
- Exempt employees all have a great deal of discretion and independent judgment in how they do the details of their jobs, meaning that to a large extent, they are “stand-alone” employees.
- It is practically impossible to standardize the work of an exempt employee with respect to time.

- They are not treated as hourly employees, i.e., the emphasis is not on the exact number of hours they work, but rather on whether they are completing their projects or managing their departments properly.
- An employer hiring exempt employees is basically buying “results,” whether the result is a better-run company, projects being managed to completion on time, departments being efficiently managed, or professional tasks that can be performed only by the holder of a special license. An employer hires nonexempt employees for the time they will be expected to put in, carrying out specific instructions in predetermined sequences that have been designed by exempt employees.
- Executive-exempt employees have true executive authority, i.e., the power to hire and fire and carry out functions of similar importance with respect to the employment of those who work for them; they are generally the presiding officer of the company or the head of a major division of an enterprise.
- Administrative-exempt employees are the “back office” staff and support the work of the entire company or the business operations of the employer’s customers. Their primary duty must concern matters of “significance.”
- Professional-exempt employees are either people in recognized professions (usually, professions for which a basic or advanced college degree and a license or certificate from the state are required) or else people who perform creative and original work in the areas of writing, art, music, and other traditional arts.
- The outside sales representative exemption applies only to those who spend the majority of each workweek outside the employer’s main place of business in activities such as contacting customers or potential customers, making deals, working on contracts, and the like. Outside sales representatives may be given a quota, but then are generally free to determine the number of hours needed to meet or exceed the quota.

The DOL’s Final Rule Two-Part Test: Defining Salary and Duties

A significant way in which the final rule will impact the classification of employees is the change in the salary standard. Under the final rule, if an employee is paid less than \$455 per week,¹ that employee will not qualify for an exemption and must be paid overtime premium pay. This increase is significant because under the old regulations, employees who earned at least \$155 per week² (\$300 less than the final rule) could be exempt if their job duties met the requirements of the long test. *See* 29 C.F.R. § 541.117. Thus, in terms of classifying employees as exempt or nonexempt from overtime requirements, when the final rule goes into effect, employers will need to pay close attention to the minimum salary level required for the white collar exemptions. Many employees who were exempt will no longer be exempt if their salary is less than \$455 per week. With respect to some industries and market areas, this could be a very significant change in the law regarding

¹ The proposed rule set the minimum salary at \$425 per week.

² Professional employees had to earn \$170 per week to qualify (under the long test) for exempt status under the old regulations.

which and how many employees will be properly exempt from overtime premium pay requirements.

Under the final rule, employers will also no longer have to consider whether an employee's job duties must be analyzed under the long test or the short test. The final rule does away with the different "short" and "long" tests and instead provides a unified test based on an employee's primary duty. For each exemption, the revised primary duty examination strikes a "middle ground" between the long and short tests of the old regulations.

In practice, this single test should be easier to administer. Employers, however, should be aware that (assuming the new salary threshold is met) an employee whose job duties previously met the short test requirements may no longer qualify unless the new requirements imposed under the final rule are also met.

How to Apply the Final Rule's Salary Test

A major new feature in the final regulations is the minimum weekly salary required for an exempt white-collar employee: \$455 (or \$23,660 per year). Under the old regulations, the minimum weekly salary level was \$155 for the long test and \$250 for the short test. This feature is expected to impose substantial new costs on employers, including an estimated \$700 million in "startup" costs to implement the changes and about \$375 million per year in ongoing additional payroll costs.

The final rule also made a few other changes to the "salary basis" test, which are outlined below.

Salary Deductions

The final rule seeks to curb opportunistic lawsuits by limiting the impact of improper deductions. Numerous "collective action" lawsuits have been initiated based on sporadic or inadvertent salary deductions that are prohibited by the old regulations and can destroy an exemption on a broad basis. These lawsuits often seek back overtime pay for all or a large portion of a company's exempt employees on the grounds that, as a group, all of these salaried employees potentially were "subject to" the impermissible deductions.

To reduce the incentive for these lawyer-driven suits, the final rule provides that the exemption is not destroyed unless the employer had a pattern or practice of improper deductions. Even then, the exemption is lost only during the time period of the improper deductions and only for similarly classified employees working for the same managers who actually made the improper deductions. This is a dramatic change in the law.

Salary deductions (without risking loss of "exempt" status) are also permitted under the final rule for any unpaid disciplinary suspension of one or more full days imposed pursuant to a "written policy applied uniformly to all workers." For example, the final rule provides for unpaid suspensions for violations of sexual harassment or workplace violence policies without loss of exempt status. By contrast, under the old regulations, an employer could only make deductions from an employee's salary (without loss of exempt

status) for (a) absences of a day or more for sickness, accident, or reasons personal to the employee or (b) penalties imposed in good faith for an employee's violation of a safety rule of major significance. 29 C.F.R. § 541.118. Thus, under the old regulations, the exemption was lost if an employee's salary was reduced because the employee was suspended without pay for disciplinary reasons based on any misconduct other than a safety violation of major significance.

In order for an employee to be exempt from the minimum wage and overtime requirements, he or she must be paid, with only minor exceptions relating to persons paid a fee, on a "salary basis." DOL regulations at 29 C.F.R. § 541.602 state that a person is paid a salary if he or she receives each pay period a set amount constituting all or part of the compensation, the amount of which is "not subject to reduction because of variations in the quality or quantity of the work performed." Generally, an exempt employee "must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked." However, the regulation recognizes "the general rule that an employee need not be paid for any workweek in which he performs no work."

All of the white-collar exemptions, except the computer specialist exemption, require that the employee be paid on a salary basis (under narrowly-defined circumstances, administrative and professional employees may be paid on a fee basis—*see* 29 C.F.R. § 541.605). The following is a checklist of factors, all of which must be met in order to meet the salary basis test.

1. Does the employee receive a full, predetermined amount of compensation per week for any week the employee performs any work? 29 C.F.R. § 541.602.
2. Are deductions to the employee's salary made only in units of days for:
 - a. One or more days of absence caused by sickness or disability, if deduction is pursuant to a bona fide plan, policy, or practice of providing compensation for loss of salary caused by sickness and disability? 29 C.F.R. § 541.602(b)(2).
 - b. One or more days of absence for personal reasons? 29 C.F.R. § 541.602(b)(1).
 - c. Offset of amounts received as compensation for jury, witness, or temporary military duty (the employer must pay a salary for these days unless the employee works less than a full workweek)? 29 C.F.R. § 541.602(b)(3).
 - d. Penalties the employer imposes in good faith when violations occur of major safety rules designed to prevent serious harm to employees or property (use only with caution!)? 29 C.F.R. § 541.602(b)(4).
 - e. Unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules? 29 C.F.R. § 541.602(b)(5).
3. If the employee's pay is calculated on commissions, or a daily or shift basis, is the employee guaranteed a predetermined amount equivalent to the minimum salary in any week he or she does work? 29 C.F.R. § 541.604.
4. Does the employer pay the employee the full predetermined compensation when the employee is ready, willing, and able to work, even if work cannot be performed due

to the employer's wishes or the business' operating requirements (such as a plant shutdown, furlough, or "snow day")? 29 C.F.R. 541.602(a).

Special Rules for Governmental Employers

Special rules apply for governmental employers with personal leave and sick leave accrual policies. Generally, due to principles of public accountability for tax money, governmental employers may dock salaried employees' pay for absences of less than a day without losing the salary basis for the exemption, as long as the absences are due to personal or health-related reasons, assuming that the employee is either out of paid leave, chooses not to use it, or has been denied permission to use paid leave. 29 C.F.R. § 541.710; DOL administrative letter rulings of January 9, 1987 and July 17, 1987.

FMLA Exception to Salary Test

Not all partial-day deductions from salary are prohibited for private employers. Under the FMLA, 29 U.S.C. § 2612(c), an employer may grant unpaid leave for FMLA absences, even on a partial-day basis, without affecting the status of employees who are exempt from overtime pay under 29 U.S.C. § 213(a)(1). DOL's regulation on this question is found at 29 C.F.R. § 825.206(a) and makes clear that partial-day deductions for intermittent leave will be allowed only if the employer, the employee, and the situation in question are covered by the FMLA.

Deductions from Leave Balances

Employers may require salaried exempt employees who miss partial days or partial weeks to apply paid leave time to such absences. In a letter ruling dated April 9, 1993 (BNA, WHM 99:8003), DOL stated "where an employer has bona fide vacation and sick time benefits, it is permissible to substitute or reduce the accrued benefits for the time an employee is absent from work, even if it is less than a full day, without affecting the salary basis of payment, if by substituting or reducing such benefits, the employee receives in payment an amount equal to his or her guaranteed salary." DOL has affirmed this position in several letter rulings issued since then.

Additional Compensation

The old regulations permitted payment of compensation to exempt employees in addition to base salary so long as the additional compensation was "not inconsistent with the salary basis of payment." 29 C.F.R. § 541.118(b). Three examples of permissible types of additional compensation were provided in the regulations: (1) a commission based on sales, (2) a bonus based on profits, and (3) a daily or shift payment. The list does not appear to be exclusive.

Under the old regulations, courts struggled with the question of whether hourly overtime payments (whether straight-time or otherwise) meant that employees were not paid on a true salary basis. The recent trend of cases holds that where the employee receives a consistent amount each pay period which is not subject to reduction, the fact that the compensation may increase does not affect the employee's exempt status. The final rule

apparently endorses this view by clarifying that exempt employees may receive additional compensation so long as the arrangement includes a guarantee of the required minimum salary. This includes additional compensation based on hours worked for work beyond the normal workweek. It can be paid as a bonus, straight-time hourly amount, time and one-half, or any other bases. Final rule, 29 C.F.R. § 541.604.

Window of Correction

Under the old regulations, the FLSA offered a limited “window of correction” for inadvertent deductions from an employee’s salary. 29 C.F.R. § 541.11(a)(6). In such situations, if the employer reimbursed the employee any amounts improperly deducted, and promised to comply in the future, the employer would not lose the benefit of the exemption. As this provision has been applied, however, if an employer had an express policy requiring the impermissible deductions, or if the employer engaged in a pattern of improper deductions, the deductions were not deemed inadvertent, and the employer lost the benefit of the exemption.

Under the final rule, if an employer maintains and distributes a written policy prohibiting improper salary deductions and reimburses employees for any inadvertent deductions, the exemption will not be lost unless the employer repeatedly and willfully violates the policy or continues to make prohibited deductions after receiving employee complaints. This change appears to reform the “window of correction” law which has proved difficult for employers to understand and for courts to evaluate.

Determining Who Meets the Highly Paid Employee Exemption

The final rule contains an innovative new provision applicable to “highly compensated employees.” The proposed rule created a streamlined exemption test for “highly compensated” employees with a total annual compensation of \$65,000. The final rule retains this concept, but increases the minimum annual compensation threshold to \$100,000 and adds a weekly salary requirement. Thus, employees will be deemed exempt if they (1) earn an annual income of at least \$100,000, (2) are paid a weekly salary of at least \$455, and (3) customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee as defined in the final rule. The minimum annual compensation threshold can be satisfied through payment of any combination of salary, commissions, or nondiscretionary bonuses. The final rule includes a savings provision so that, where employees have not otherwise met the compensation threshold, the employer may make a final payment at the end of the year to meet the minimum guarantee.

Applying the “White Collar” Duties Tests to Determine if a Position Meets the Executive, Administrative, Professional, or Outside Sales Exemptions

Generally, the final rule streamlines the “white collar” duties tests for executive, administrative, and professional employees. What follows is a brief discussion of that streamlining, and the revised requirements for each of the exemptions.

Revised Requirements for Executive Employees

A significant change from the old short test requirement for exempt executives is that the employee must have “the authority to hire and fire other employees” or at least have the ability to make “suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status” which are given “particular weight” by the employer.

The final rule generally retains the “primary duty” requirement of the old regulations, stating that an exempt executive’s primary duty must be “management of the enterprise . . . or of a customarily recognized department or subdivision thereof.” In addition, he or she must “customarily and regularly direct the work of two or more other employees,” which means “two full-time employees or their equivalent.”

Concurrent performance of exempt and nonexempt work does not disqualify an employee from this exemption if all the requirements are met, particularly if the employee makes the decision regarding when to perform the nonexempt duties and remains responsible for the success or failure of business operations while performing nonexempt work.

The business owner exemption that is a subset of the executive exemption applies to an employee who owns at least a bona fide 20 percent equity interest in the enterprise in which the employee is employed, and who is actively engaged in its management.

CASE EXAMPLE: Although the following case was decided under the “old” regulations, it should remain relevant, as the outcome of the case is grounded in the “primary duty” requirement, which remains basically unchanged in the revised regulations.

A Dairy Queen/convenience store manager who spent 75-80 percent of her time performing “basic line-worker tasks” was properly treated as an FLSA exempt executive employee, when she simultaneously performed supervisory and management duties, according to the U.S. Court of Appeals for the Fourth Circuit. *Jones v. Virginia Oil Co. Inc.* (4th Cir. 7/23/2003, unpublished).

Terri Jones worked as a manager of a combination Dairy Queen and convenience store. Her weekly salary was \$585. Although she worked about 60 hours per week, she was never paid overtime. Jones testified that she spent 75-80 percent of her time performing “basic line-worker tasks” such as cooking burgers, serving ice cream, cleaning the store, working the cash register, and stocking shelves. Jones also performed management-related duties such as daily sales paperwork, the weekly schedule and payroll, handling customer complaints, and hiring, training, evaluating, and firing employees. She also set salaries for the hourly employees.

After quitting her job she sued, seeking unpaid overtime wages under the Fair Labor Standards Act (FLSA). The federal trial court granted Virginia Oil’s motion for summary judgment on the grounds that Jones was an exempt executive under the Act. On appeal the Fourth Circuit affirmed summary judgment.

Applying the “short test,” the court said that the sole issue before it was whether Jones’s primary duty consisted of carrying out managerial tasks. While the FLSA regulations state that as a “rule of thumb” an employee who spends over 50 percent of her time in management has management as her primary duty, “time alone . . . is not the sole test.” (This same language appears in the revised regulations.) That is particularly true, according to the court, “if while engaged in nonexempt work, the employee also ‘supervises other employees, directs the work of warehouse and delivery men, . . . handles customer complaints, authorizes payment of bills, or performs other management duties as the day-to-day operations require.’”

The court held that time alone was not dispositive in Jones’s case, because while performing nonexempt work she was also “engaged in the supervision of employees, handled customer complaints, dealt with vendors, and completed daily paperwork.” Furthermore, the court found that Jones’s managerial functions were critical to the success of the Dairy Queen. The court said “the Dairy Queen could not have operated successfully unless Jones performed her managerial functions, such as ordering inventory, hiring, training, and scheduling employees, and completing daily paperwork.”

In addition, the court determined that Jones was “vested with enough discretionary power and freedom from supervision to qualify for the executive exception.” Finally, comparing Jones’s salary to that of the hourly employees, the court found that Jones was paid more or at least the same as nonexempt employees. The court dismissed Jones’s argument that the “working foreman” exception to the executive exemption should apply. “[W]here an individual’s responsibilities extend ‘to the evaluation of . . . subordinates’ and include ‘the exercise of considerable discretion,’ the working foreman exception does not apply,” said the court.

Revised Requirements for Administrative Employees

Under the short test provided in the old regulations, assuming the salary requirement was met, an exempt “administrative” employee was one who primarily performed office or non-manual work that was directly related to management policies or general business operations. The exemption was not limited to employees who formulated policies; individuals who carried out and executed them could also be bona fide administrative employees. 29 C.F.R. § 541.2(e)(2).

A significant change from the old short test requirement for exempt administrative employees is that under the final rule the primary duty must include the exercise of discretion and judgment “with respect to matters of significance.” The old test does not include the latter phrase, which is added in the final rule to clarify the type of discretion and judgment exercised. Although the proposed rule would have deleted the “discretion and judgment” requirement and encompassed employees in a “position of responsibility,” the final rule does not adopt this change.

The remaining primary duty requirements are mostly unchanged from the old regulations. Exempt administrative employees still must have as their primary duty “the performance of office or non-manual work directly related to the management or general business

operations of the employer or the employer's customers." These terms are further defined and clarified in the final regulations.³

The final rule also provides that an employee's use of a reference manual will not affect his or her exempt status if the employee otherwise performs administrative work that satisfies the "high level of skill or training" standard, provided that the manual contains information that can be interpreted only by someone with a high level of specialized skills or training. This change is designed to reflect the reality that, in the 21st Century workplace, even highly placed administrative managers may follow a standardized procedure. Under the old rule, courts often concluded that an employee did not qualify for the exemption if he or she followed a standardized procedure because such conduct was inconsistent with the requirement that an administrative employee exercise "discretion and independent judgment." Even under the final rule, however, employees who merely "look up" information in a manual to determine the correct response to an inquiry or a set of circumstances generally would not be eligible for exemption.

The terms described above that will be used for applying the "new" administrative exemption under the final rule are somewhat indefinite and open to interpretation. Accordingly, employers can expect that litigation will arise as to the precise meaning of these terms and their application to specific circumstances. Case law developed under the prior formulation of the exemption will likely be useful, and may often be determinative, but that may not always be the case.

Revised Requirements for Professional Employees

Under the old short test, the "professional" exemption required that the employee perform work requiring scientific or specialized study, as distinguished from apprentice training or routine work.⁴ 29 C.F.R. § 541.3. The old regulations contain four separate categories of exempt professional employees: (1) learned professionals, (2) artistic professionals, (3) teachers, and (4) computer professionals. The final rule simplifies this scheme by moving computer professionals to a separate and distinct part of the regulations, and employing a single "duties test" for each of the remaining three types of professionals (instead of the long and short tests for each that were in place). In addition, the final rule clarifies several areas that have generated confusion and litigation in the past. The primary duty of an exempt professional employee remains "the performance of work (i) requiring knowledge of an advanced type in a field of science or learning

³ The types of work areas that qualify as "office or non-manual work related to the management or general business operations" are tax, finance, accounting, auditing, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, and government relations. Examples of activities that "relate to" the "management policies or general business operations" include advising management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control.

⁴ Under the old regulations, employees had to earn a salary of \$250 per week to qualify for treatment under the short test. However, employees with a weekly salary of \$170 could also qualify as professionals provided that the employee satisfied a more detailed long test.

customarily acquired by a prolonged course of specialized intellectual instruction; or (ii) requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.”

Under the final rule, learned professionals will qualify for the exemption (assuming they meet the new salary minimum) if their primary duty is performing office or non-manual work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience. The educational requirement for the “learned professional” exemption is not significantly changed. Although the proposed rule would have deleted a requirement that the employee perform “work requiring the consistent exercise of discretion and judgment,” that requirement has been retained as part of the “advanced knowledge” component of the duties test for exempt professionals.

Specialized academic training as a standard prerequisite to entry into the field of work generally will be required for an exempt learned professional employee. Although the exemption may apply in some instances to employees who have not obtained a particular degree in a recognized field related to the work, the exemption “does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction.”

Creative professional employees must have a primary duty of performing work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor (and meet the minimum salary requirement).

The standard test for teachers under the final rule is unchanged from the prior short test, except that the final rule eliminates the requirement that the employee exercise discretion and judgment. Under the old regulations, a teacher was exempt if his or her primary duty was teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and he was employed by an educational establishment.

The final regulations identify several types of positions that presumptively will fall within the duties test for the professional exemption, including registered nurses (but not licensed practical nurses), certified physician assistants with four-year degrees from accredited schools, certified public accountants (but not accounting clerks and bookkeepers), certified athletic trainers with four-year degrees from accredited schools, and licensed funeral directors or embalmers with four-year degrees from accredited schools.

Outside Sales Employees

Unlike the other exemptions, there is no minimum salary level outside sales employees must be paid to be considered “exempt.” Nor is there a separate short test for outside sales employees under the old regulations. Outside sales employees are exempt if they are customarily and regularly engaged away from the employer’s place of business making sales or obtaining orders or contracts for services or the use of facilities. “*Inside*

sales” employees and “route delivery” personnel are not covered by the exemption. Under the old rule, outside sales employees could not devote more than 20 percent of the hours worked to activities that were unrelated to outside sales or solicitations.⁵

The final rule essentially retains the current regulatory standards for outside sales employees. In keeping with the revised approach of the other white-collar exemptions, however, the proposal adopts a primary duty analysis and eliminates the confusing 20 percent limitation on nonexempt work.

Classifying Other Select Groups of Employees: IT Professionals, Inside Sales, and Semiretired Employees

A number of issues also frequently arise in connection with IT professionals, inside sales employees, and semiretired employees. Each of these categories will be discussed below.

IT Professional Employees

Under regulations enacted in 1992, certain types of computer workers were specifically included under the professional exemption. Whether computer programmers and systems analysts qualified as learned professionals was determined on a case-by-case basis. Under the old regulations, individuals qualified for the exemption if they (a) had the requisite academic training, (b) exercised discretion and judgment in their job performance, and (c) performed work that was intellectual and varied in character.

In addition, under the old regulations, certain highly paid computer employees were exempt without the “traditional” academic criteria and without being paid on a salaried basis if:

- Their rate of pay exceeded \$27.63 per hour; and
- Their primary working duties required “theoretical and practical application of highly specialized knowledge in computer software analysis, programming, or software engineering.”

The final rule consolidates and condenses the current regulatory requirements for exempt computer professionals into its own subpart of the regulations. The final rule eliminates any requirement that exempt computer professionals exercise “independent judgment and discretion.” The minimum salary level under the final rule is \$455 per week or at least \$27.63 an hour. To qualify for the exemption, the computer employee must have a primary duty of:

- (A) Application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional applications; or

⁵ Activities that are incidental to outside sales or solicitations, such as making deliveries or collecting payments, are not counted towards the 20 percent limitation.

- (B) 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; or
- (C) Design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
- (D) A combination of duties described in (A), (B), and (C), the performance of which requires the same level of skills.

To qualify for the exemption, the computer employee must be employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.

Inside Sales Employees

Unlike outside sales employees, inside sales employees have no specific exemption. They may, however, in certain circumstances qualify under the administrative exemption. As should always be the case in analyzing the exempt status of an employee, the employer must pay careful attention to the job duties of the employee in determining exempt status.

Semiretired Employees

The issue with semiretired employees typically involves the salary basis requirement. There is no requirement under the salary basis test that the salary be for a particular number of hours; in fact, just the opposite is true. Thus, a semiretired employee may be paid a “reduced” salary with the expectation that the semiretired employee will work fewer hours. That reduced salary, however, still must be paid on a salary basis and must be at least \$455 per week for the exemption to continue.

In addition, the employer must analyze the “revised” job duties of the semiretired employee. Presumably, the semiretired employee will have different job duties than when he or she worked “full time.” The employee still must have exempt duties as his or her primary duty to qualify for exempt status.

Employees Specifically Entitled to Overtime Under the Final Rule

The final rule clarifies that the white-collar exemptions do not apply to “manual laborers or other ‘blue collar’ workers who perform work involving repetitive operations with their hands, physical skill, and energy.” For example, “non-management production-line employees and non-management employees in maintenance, construction, and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, and laborers” will continue to be subject to overtime requirements.

Police officers, firefighters, paramedics, emergency medical technicians, and other public safety employees 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; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; and similar work will not be exempt from overtime.

Auditing Your Workforce to Determine Whether Your Exempt Employees Meet the Final Rule's Criteria

As discussed above, the final rule significantly impacts the exempt or nonexempt classification of millions of employees nationwide. Employees who previously may have been exempt may no longer be exempt; conversely, employees who were nonexempt may now qualify for an exemption.

In an effort to ensure that your organization's financial interests are protected, it is imperative to audit your workforce to determine whether employees are appropriately classified. You will need to review job descriptions to determine whether the position complies with the duties tests, and to determine whether the job description accurately reflects the day-to-day activities of the position. You will need to review salaries to ensure that each exempt employee meets the revised salary standard. Finally, you should review the organization's payroll policies, practices, and procedures to ensure that they do not permit improper salary deductions.

Although the audit may initially be undertaken in response to the change in the regulations, it cannot be considered a one-time undertaking. Your organization must make a commitment to perform such an audit—as well as a general audit of all HR functions—on a regular basis to ensure that you comply with the applicable law and regulations.

How to Classify Your Newly Created Positions Under the Final Rule

A critical point to remember, either in classifying new positions or reviewing and analyzing existing positions is that job titles, nomenclature, or job descriptions do not establish whether a particular exemption applies. *Cooke v. General Dynamics Corp.*, 993 F. Supp. 56, 60-61 (D. Conn. 1997) (“Whether an employee is exempt is determined by the employee's actual work activities, not by the employer's characterization of those activities through a job title or job description. Therefore, defendant's descriptions of plaintiffs' job assignments and responsibilities in their review forms are not controlling on the issue of whether they are [exempt] employees”). In fact, the final rule itself states that “[a] job title alone is insufficient to establish the exempt status of an employee. The exempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements” of the final rule.

Thus, in classifying newly created positions as exempt or nonexempt, it is helpful to create a job description that will identify very clearly the employee's primary duty. Think about the reasons the position was created. Presumably, the position was created to fill a particular need. Determine what that need was and make sure that the employee's job description reflects that need. Revisit the job description several months

after the employee has worked in the position to determine whether the job duties originally described continue to be accurate.

Clarification of “Salaried” vs. “Hourly” Employees

One of the most common errors in classifying employees as exempt or nonexempt is the assumption that “salaried” equals “exempt” and “hourly” equals “nonexempt.” Payment of a “salary” as opposed to an hourly wage, however, does not determine an employee’s status. Instead, to determine whether an employee is exempt, an employer must show that (1) the employee is compensated “on a salary basis,” (2) the employee is paid at not less than the specified minimum salary level for the particular job category, and (3) the employee’s duties meet the conditions set forth in the applicable exemption. Thus, merely being paid a salary is insufficient to determine whether an employee is exempt (although all employees paid on an hourly basis are necessarily nonexempt (excluding computer employees paid at least \$27.63 per hour), because they fail the first part—salary basis—of the test).

Employers must make sure that they have reviewed and analyzed both the salary basis and the job duties portions of the white collar exemption tests before making the conclusion that an employee is exempt from the overtime premium pay requirements of the FLSA.

AVOIDING COSTLY ERRORS IN PAY CALCULATIONS: OVERTIME, COMP TIME, ON-CALL TIME, MEAL TIME, SLEEP TIME, TRAVEL TIME, AND WAITING TIME

Overtime

The federal wage and hour laws do not limit the number of hours an employer can require employees to work. This means that mandatory overtime is allowed. The FLSA simply requires that all employees, unless they are exempt, be paid one and one-half times their regular rate of pay for all time worked in excess of forty hours in a workweek. Be sure to check the overtime requirements of the states in which employees work. Employers should comply with whichever law provides the most benefits to employees.

The regular rate of pay is the employee’s hourly rate, plus certain kinds of bonuses. Other compensation that should be included in calculating the employee’s regular rate of pay include:

- Awards or prizes for quality, quantity, or efficiency.
- Bonuses and incentives based on quality, quantity, or efficiency.
- Bonuses based on hours worked, including attendance bonuses.
- Contractual bonuses.
- Safety bonuses.
- Commission payments.

- Shift differentials.
- Lump sum on-call payments.
- Reasonable costs of employer-provided lodgings, meals and other facilities provided to employees.

Discretionary bonuses, employee referral bonuses, benefit plan contributions, paid leave, and gifts do not need to be included in determining regular rate of pay.

Comp Time

An extremely frequent misconception among private (non-public) employers is that it is permissible to pay nonexempt employees “comp time” in lieu of cash for overtime worked. Not only does the statute on compensatory time apply only to public employers (*see* 29 U.S.C. § 207(o)), but many of these employers compound the error by giving compensatory time on a straight-time basis. If a public employer gives compensatory time to a nonexempt employee in lieu of cash for overtime worked, it must do so on a time-and-one-half basis, and personnel not engaged in public safety are limited to a total of 240 compensatory hours before cash must once again be paid for overtime.

Alternatives to paying overtime hardly merit the appellation “alternatives.” For instance, an employer can give an informal variety of compensatory time during the workweek simply by adjusting the hours worked so that they do not exceed 40 in the week. In addition, there is a little-known exception to the general rules on overtime known as the “time off plan.” Buried deep within the Field Operations Handbook at Section 32j16b, this rule states that in the case of a pay period with more than one workweek, if the employee works overtime during one week and is given compensatory time off during a subsequent week or weeks within the pay period, no overtime as such must be paid if the total wages for the pay period equal what the pay would be if the overtime were paid and the other workweeks paid on the basis of actual hours worked. Since many employers are not often readily able to give time off, and since the time off plan does not apply in the situation of an employee paid a fixed salary for fluctuating workweeks (29 C.F.R. § 778.114), this exception is practically useless. Furthermore, to apply this alternative, employees must be paid a fixed wage or salary and the plan must provide a fixed number of working hours per week. Therefore, it is not applicable to most regular hourly workers who normally work variable hours and receive variable pay. Employers are advised to seek counsel before applying this limited exception.

What the DOL Says About Compensatory Time for Exempt Salaried Employees

The Department of Labor’s position on compensatory time for exempt employees is that extra pay above and beyond the salary does not violate the salary basis for the exemption. Perhaps wanting to encourage extra pay for such workers, the DOL states that as long as exempt employees receive a guaranteed salary free and clear of any reductions on the basis of quality or quantity of time worked, extra pay or extra leave time for extra work is permissible. 29 C.F.R. § 541.118(b) provides that “additional compensation besides the salary is not inconsistent with the salary basis of payment.” DOL’s *Field Operations*

Handbook, Section 22b01, states that “Extra compensation may be paid for OT to an exempt employee on any basis. The OT payment need not be at time and one-half, but may be at straight time, or flat sum, or on any other basis.” In other words, an employer is allowed to pay exempt employees who work over a stated minimum number of hours (45, 50, or whatever) in a week, extra pay or compensatory time on a straight-time basis for each additional hour. Some companies that have a difficult time attracting and keeping qualified employees find that they must offer such additional pay as an incentive to join and stay with the company.

Hours Worked

General

In general, an employer must pay employees for all hours in which they are “suffered or permitted to work.” Most employers have no problem with paying employees for all hours recorded by a time clock or other timekeeping device or for hours worked in a normal week with a normal schedule followed by all employees. The troubles arise primarily in situations involving work outside normal schedules, outside the office, or outside of the usual job duties. This section highlights those specific problem areas.

CASE EXAMPLE: In *Sehie v. City of Aurora* (N.D. Ill., 4/21/04, *bench ruling*), a federal district court in Illinois ruled that the time an employee spent attending mandatory therapy sessions and traveling to and from them was compensable under the Fair Labor Standards Act (FLSA).

Kari Sehie was a dispatcher for the Aurora, Illinois, police department. After leaving work one day due to stress, Sehie was required to submit to a fitness-for-duty evaluation. The physician who administered the evaluation determined that she was fit for duty. However, he recommended that Sehie attend weekly psychotherapy sessions for six months as a condition of continuing her job. The city told Sehie she would have to attend the sessions to keep her job, and she began seeing a counselor outside her regularly scheduled work hours, spending an hour at each session and two hours traveling back and forth. Sehie worked more than 40 hours during the weeks she attended the counseling sessions but was not paid for any time related to the sessions.

Sehie alleged that the travel time was compensable and she was due overtime compensation for any time over 40 hours per week associated with attending the sessions. After a trial before the bench, the judge agreed that the time Sehie spent attending mandatory therapy sessions, plus the time traveling to and from them, satisfied the FLSA’s definition of compensable working time. The judge awarded Sehie \$1540.56 in back wages, plus an equal amount in liquidated damages.

The FLSA provides that the time spent in physical or mental exertion controlled or required by an employer and for the employer’s benefit is compensable. The Department of Labor had previously opined that “whenever an employer poses special requirements or conditions that an employee must meet before commencing productive work, the time spent in fulfilling such special conditions is regarded as indispensable to the performance

of the principal duty the employee is hired to perform.” Further, the doctor’s report had indicated that long-term stress could result in Sehie mishandling a call. Accordingly, the court stated, “The counseling sessions . . . were required by the city, presumably for its own benefit—that is, to ensure that Sehie could perform her duties properly.” Thus, the time spent in counseling and the associated travel time was compensable.

“Suffered or Permitted to Work”

The general rule is stated in 29 C.F.R. § 785.11, which notes that work that is “not requested, but suffered or permitted, is work time.” The regulation lists the specific example of employees who choose to keep working after the end of their shifts. The reason the worker decides to continue with the work is irrelevant. As long as the employer “knows or has reason to believe that he is continuing to work,” the hours so spent constitute “working time.” 29 C.F.R. § 785.12 extends that rule to work performed at home or at other places away from the normal job site, as long as the employer “knows or has reason to believe that the work is being performed.” Many employers feel that such time should not be payable as long as the employer has not authorized the extra work, but the DOL’s position is that it is up to the employer to control such extra work by using its right to schedule employees and to use the disciplinary process to respond to employees who violate the schedule. 29 C.F.R. § 785.13.

Waiting or On-Call Time

Employees who are temporarily idle while waiting for further work in such a way that they are not able to use the time effectively for their own purposes must still be regarded as working, according to 29 C.F.R. § 785.15. The DOL’s position regarding “on-call” time is found in 29 C.F.R. §§ 785.16 and 785.17. In deciding whether time spent “on call” is compensable, the DOL and the courts have traditionally used one variation or another of the test of whether an employee is “waiting to be engaged” (non-compensable time) or is “engaged to be waiting” (compensable time). *Skidmore v. Swift*, 323 U.S. 134 (1944).

The Fifth Circuit adopted a fairly strict standard for determining whether on-call time is payable in the 1991 case of *Bright v. Houston Northwest Medical Center Survivor, Inc.*, 934 F.2d 671, *cert. denied*, 112 S. Ct. 882. This case has become the standard for issues involving on-call time. The plaintiff was a life support equipment repair technician who was on call 24 hours a day, seven days a week. He claimed, and the DOL agreed, that he should be entitled to pay for 168 hours each week, since he was on call literally around the clock, could not consume alcohol, and had to respond within twenty minutes to each call. However, he admitted being able to do normal personal things during the time he was not responding to calls. The Fifth Circuit ruled that the critical question is “whether the employee can use the on-call time effectively for his or her own purposes”; since the evidence showed that was the case, the employee was not entitled to be paid for the on-call time not spent responding to calls.

CASE EXAMPLE: Three South Carolina firefighters were not owed overtime compensation in accordance with the Fair Labor Standards Act (FLSA), because during

time spent while on call, their freedom of movement was not sufficiently restricted as to prevent them from engaging in personal activities.

In *Whitten v. City of Easley* (4/9/2003), the U.S. Court of Appeals for the Fourth Circuit, in an unpublished decision, applied the “waiting to be engaged” doctrine to the firefighters’ work schedules. That doctrine holds that time spent waiting for a call from work to begin a shift of any duration is not compensable where employees enjoy a certain personal freedom.

Easley firefighters were required to work a 24-hour “on-duty” shift followed by a 48-hour “on-call” shift. During their “on-call” days, firefighters were encouraged to respond to 80 percent of second-alarm calls, which equated to four second-alarm calls each month. The majority of firefighters rarely met this quota. In ruling in favor of the city, the court relied on testimony that on-call firefighters had the flexibility to go shopping, eat in restaurants, even travel to other states and hold part-time jobs.

Breaks

Breaks are a common source of confusion for employers. The FLSA does not require employers to give breaks during the workday, but if breaks are given, certain rules apply. Rest or coffee breaks, defined as 20 minutes or less, are compensable hours worked under 29 C.F.R. § 785.18, since they are regarded as being for the benefit of both the employer and the employee. Meal breaks, on the other hand, are not compensable, as long as they are at least 30 minutes in length and the employee is “completely relieved from duty for the purpose of eating a regular meal” (*see* 29 C.F.R. § 785.19). Shorter meal breaks may be considered valid under special circumstances. The most frequent pitfall for employers is thinking that employees have true meal breaks if they are allowed to eat at their desks while answering phones, opening mail, sorting files, and so on. Such duties performed while trying to eat will render the time spent during the meal break compensable. Employers may control unauthorized work during meal breaks by the disciplinary process.

CASE EXAMPLE: Nurses and technicians whose meal periods were frequently interrupted could proceed to trial on their claims that they were due overtime for their 30-minute meal breaks, according to the Tenth Circuit Court of Appeals. *Beasley v. Hillcrest Medical Center*, 78 Fed. Appx. 67 (10th Cir. 2003).

Eight nurses and technicians sued their employer for overtime under the Fair Labor Standards Act (FLSA) after they were told at a union meeting that they were entitled to overtime compensation for meals that were interrupted for a work purpose. The district court granted Hillcrest’s motion for summary judgment and dismissed the case. The plaintiffs appealed.

On appeal, the Tenth Circuit reversed the district court and remanded the case to the lower court for trial, finding that there was a triable issue whether the plaintiff’s meal periods were spent predominantly for Hillcrest’s benefit.

The plaintiffs were nurses and technicians employed by Hillcrest. They generally were paid for a shift minus 30 minutes for lunch. Hillcrest paid all requests for overtime, including over a hundred missed lunches for one of the plaintiffs. The plaintiffs alleged that they never sought overtime for their interrupted lunches because they thought they were entitled to overtime only if they completely missed a meal period.

The plaintiffs testified in depositions that their lunch periods were interrupted on a daily basis. Many of them had to watch patient monitors, work on a computer, or answer phones during their meal break. Most also had to respond to patient calls while trying to eat. It was not unusual for them to have three or four interruptions during a meal period.

Taking this testimony into consideration, the court concluded that “plaintiffs raised a triable issue whether their ‘time or attention [was] taken up principally by official responsibilities that prevent[ed them] from comfortably and adequately passing the mealtime.’”

Hillcrest argued that because it had an overtime reporting system in place, and the plaintiff’s managers were not aware that plaintiffs were working uncompensated overtime, it could not be held liable under the FLSA. The court rejected this argument, saying that “even if the employer did not know that the employees’ time met the legal definition of work, it ‘certainly knew that plaintiffs were performing the duties they had been assigned.’”

Sleeping Time

If an employee is on a shift lasting less than 24 hours and is required to be on duty during such a shift, she or he will be considered as working during the entire time, even if permitted to sleep during such time or engage in personal activities, such as eating meals, when not busy. 29 C.F.R. § 785.21. Under 29 C.F.R. § 785.22, if an employee is on duty for a shift of 24 hours or more, the employer and employee may agree to exclude from hours worked the time spent in meal breaks and in “bona fide regularly scheduled sleeping periods,” but there is a limit of eight hours on the amount of time that can be excluded as sleeping time. In the case of employees who work at home or reside on the employer’s premises, 29 C.F.R. § 785.23 allows the employer and employee to reach a reasonable agreement as to the hours worked that fits the circumstances of the job in question and that could potentially exclude hours spent sleeping, eating, or pursuing personal business.

Preparatory and Concluding Activities

Time spent in preparatory and concluding activities constitutes compensable hours worked if the activities are an integral part of a principal activity of the work, i.e., if they are closely related activities which are indispensable to the performance of the principal activity. *See* 29 C.F.R. § 785.24. Such activities might include oiling or cleaning of a machine used in the work, installation of blades or bits in a machine, formatting a floppy diskette or a hard drive, installing new software prior to engaging in word processing, distributing materials or arranging furniture in preparation for a meeting, distributing

clothing or safety items to other employees, wiping off tables in a restaurant prior to beginning table waiting duties, removing clothes and showering after working in a hazardous environment, and so on.

Time Spent in Meetings and Training Programs

This is a particularly difficult area for many employers to understand. The general rule is found in the wage and hour regulations at 29 C.F.R. § 785.27, which states the following:

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

- (a) attendance is outside of the employee's regular working hours;
- (b) attendance is in fact voluntary;
- (c) the course, lecture, or meeting is not directly related to the employee's job; and
- (d) the employee does not perform any productive work during such attendance.

Hence, if all four criteria are not met, the time so spent will be considered compensable.

29 C.F.R. § 785.28 explains that attendance is not truly voluntary if it is required by the employer, or if the employee is led to believe that nonattendance would somehow adversely affect his employment, as would be the case with most meetings called by the employer. 29 C.F.R. § 785.29 notes that "training is directly related to the employee's job if it is designed to make the employee handle his job more effectively, as distinguished from training him for another job, or to a new or additional skill." For example, if an employee attends a training course on his or her own after hours or on the weekend in order to qualify for a different line of work or possibly for a promotion or transfer, the employer would not have to pay for the time spent in such training. However, 29 C.F.R. § 785.30 of the regulations makes clear that "if an employee on his own initiative attends an independent school, college, or independent trade school after hours, the time is not hours worked for his employer even if the courses are related to his job." The important thing there would be that the employer did not instruct the employee to attend such classes or otherwise make the course a condition of the job. Similarly, 29 C.F.R. § 785.31 states that if the employer offers for the benefit of the employees a training course "which corresponds to courses offered by independent bona fide institutions of learning," an employee voluntarily attending such courses would not be entitled to pay for time spent in such training even if the courses are directly related to the job or provided free of charge by the employer.

However, employers should be careful to distinguish between training that is voluntary or not necessary for a job and training that the employer is required by law or regulation to furnish to its employees. A good example of this is found in the child care industry. Regulations in many states require child care facilities to ensure that employees receive a certain number of "contact hours" of training each year (the number varies from state to state). The U.S. Department of Labor (DOL) takes the position that such training is

compensable. The DOL explains that since the obligation is on the employer to get the employees trained, the training is not really voluntary and thus represents hours worked. Of course, if a child care worker voluntarily attends additional training beyond the minimum requirement outside working hours, such time would not normally be compensable. Employers in that industry are usually allowed to apply time spent in mandatory staff meetings devoted to child care issues toward the training hours requirement. Since the DOL also prohibits employers from making employees pay for the minimum standard training courses, child care organizations would want to take advantage of their right to specify the times and places where compensable training will take place. That means that employers can notify employees that if they decide on their own to go to some expensive training at some out of the way location, neither the time nor the course would be paid. Finally, most states provide that if a child care teacher has already satisfied the training requirement for the year, no additional training is necessary within that year if the worker is hired by another child care facility.

The converse of the child care training situation is true for continuing education requirements related solely to the ability of an employee to practice a particular trade or profession, as long as the training is of general applicability and is not designed to fit a specific job with a specific employer (*see* DOL Opinion Letter WH-504, October 23, 1980). Such training is “portable” and allows the person to find work in that trade or profession with any employer or even on his or her own. Of course, many of those types of employees would qualify for an overtime exemption in any event.

Travel Time

The easiest way to think of the travel time regulations is to remember that, basically, any travel on company business that cuts across the normal workday is part of hours worked, regardless of whether such travel occurs on a day the employee is normally scheduled for work.

The wage and hour regulation at 29 C.F.R. § 785.33 states that whether time spent in travel must be considered working time depends upon the kind of travel involved. The general rule is found in 29 C.F.R. § 785.35, which provides that “normal travel from home to work is not worktime.” That means that the normal commute from home to work and vice-versa is not compensable. However, 29 C.F.R. § 785.36 states that home to work travel and back again that falls outside of the regular hours may be compensable hours worked. For example, if the worker is called back to work somewhere on an emergency basis for one of the employer’s customers and must travel a “substantial” distance, the travel time would be compensable. The regulation does not provide that all such travel time is compensable; the decision would presumably be made on a case-by-case basis. Similarly, a special temporary assignment in another city would involve compensable travel time, according to 29 C.F.R. § 785.37, but the employer could disregard the time corresponding to the normal home-to-work commute and the time spent on meals.

Time spent traveling between worksites during a workday is compensable under 29 C.F.R. § 785.38. For example, if a worker reports to the main office to start the day

and is then told to report to another job site, all time spent traveling to that worksite and back again to the main office will be paid. Some workers normally report to a number of jobsites each day as part of their duties; all such time is compensable. If the worker does not have to report back to the main office after finishing at the last jobsite, but instead returns directly home, the time spent returning home is not compensable.

Many questions arise concerning travel to other locations involving overnight stays. 29 C.F.R. § 785.39 states that “travel away from home is clearly worktime when it cuts across the employee’s workday. The employee is simply substituting travel for other duties.” However, if the employee travels as a passenger outside normal working hours, the time is not compensable. An employee who serves as a driver or a pilot for other employees would be paid for the entire travel time. This same rule applies even in the case of travel on days not normally worked. For instance, if the normal hours are 8 am to 5 pm from Monday through Friday, and the employee must perform job-related travel on Sunday from 3 pm to 7 pm, the employer would need to pay only for the time from 3 to 5 pm. Similarly, work performed while traveling must be counted as hours worked under 29 C.F.R. § 785.41.

“Hours Worked” Does Not Include Paid Leave!

Under the FLSA, the only time counted when determining whether and how much overtime was worked is the time the employee actually spent engaged in work. Time represented by paid holidays or paid leave does not count toward hours worked. Thus, if employees who are given paid leave during FMLA-related or other absences also work during a workweek, the paid leave is left out of the equation. It would not be a common situation for an employee to have FMLA-related leave and overtime during the same workweek, although it would be possible.

USING A CHECKLIST TO ASSIST IN AUDITING YOUR WAGE AND HOUR PRACTICES

- ___ Employee job descriptions have been reviewed within the past 12 months
- ___ Job descriptions accurately reflect actual employee duties
- ___ Exempt positions have been reviewed within the past 12 months for accuracy of exempt classifications
- ___ Exempt classifications are based on job duties, not job title
- ___ Exempt employees are paid the same base salary regardless of hours worked
- ___ Exempt employee pay is not reduced for partial-day absences, unless absence is for FMLA leave
- ___ Exempt employee pay is reduced for full-day absences only if absence is for personal reasons or is due to illness or disability and formal paid time off policy is in place (unless absence is for FMLA leave)
- ___ Exempt employee pay is not reduced for disciplinary reasons other than full-day absences for violations of major safety rules

- ___ Employees are classified properly as exempt and nonexempt according to FLSA regulations
- ___ Nonexempt employees are required to record all time worked
- ___ Overtime is regularly and accurately reported
- ___ Supervisors do not write off unauthorized overtime
- ___ Employees are paid regularly for all time worked
- ___ Compensatory time for nonexempt employees is not allowed
- ___ Overtime pay is calculated at one and one-half times the regular rate of pay

Recordkeeping Checklist

- ___ Required Department of Labor posters regarding minimum wage and other wage and hour issues properly posted
- ___ Required state wage and hour postings are displayed

For All Employees

- ___ Full name
- ___ Address
- ___ Date of birth
- ___ Social Security Number
- ___ Gender
- ___ Occupation
- ___ Time and day of week when employee's workweek begins
- ___ Total weekly earnings
- ___ Total wages paid each pay period
- ___ Dates of wage payments
- ___ Deductions from or additions to pay
- ___ Hourly or salary wage basis

For Nonexempt Employees

- ___ Regular hourly rate
- ___ Total hours worked per day
- ___ Total hours worked per week
- ___ Straight time earnings
- ___ Payments excluded from regular rate of pay
- ___ Weekly overtime payments

ANSWER

Employers should be careful to revisit exempt and nonexempt classifications of employees whose duties change significantly. Here, although the 200 supervisors affected by the lay-offs of nonexempt workers continued to perform their supervisory jobs managing people and directing departmental business, they added nonexempt duties to their workloads. Look back to the requirements for executive exemption from overtime laws:

- Are the supervisors paid on a salary basis? Yes, their compensation structure has not changed. They continue to be paid the same amount each week even though their work hours have increased substantially.
- Is the primary duty of the supervisors the management of departmental business? The supervisors' most important job duty continues to be the direction and management of their departments. However, the proportion of time they spend on this responsibility compared to their other duties may have changed. You will need to determine whether they continue to spend more than 50% of their time, week after week, on this responsibility. If not, they may have automatically converted to nonexempt status. This assessment should be made for each individual supervisor.
- Do the supervisors customarily and regularly direct the work of at least two other people? It's unclear from the facts if all supervisors continue to meet this requirement. If, as a result of the reduction in force, some of the supervisors' direct reports decreased, this requirement needs examination. Being a supervisor of one is not sufficient to meet this element of the executive exemption. Remember that all factors must be met to carry the executive exemption.

The company could have avoided a Department of Labor investigation by reviewing the exempt classification soon after the reduction in force mandated the significant change in supervisor responsibilities. Although the case study presents a clear point in time when the work duties changed, a more common scenario about which participants should be warned is a gradual change of duties for exempt employees. Employers should annually review their exempt classifications to determine if the employees in those classifications actually perform work that meets the factors of their exempt status.