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Overtime Regulations and the Impact for Businesses and Nonprofits

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WAGE AND HOUR LAW: SUMMARY OF THE LAW AND HOT ISSUES
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INTRODUCTION

The Fair Labor Standards Act ("FLSA") covers employees in the public and private sectors and sets a minimum wage to be paid to all covered employees and requires the payment of overtime compensation at the rate of 1 ½ for the rate of pay for hours worked in excess of 40 hours per week. The FLSA also contains provisions regarding recordkeeping, child labor and discrimination (between men and women) with respect to wages. The United States Department of Labor and specifically the Wage and Hour Division administers and enforces the law.

I. Recordkeeping, Department of Labor and Enforcement.

All employers are required to maintain records for non-exempt workers. The Act requires that employers records include identifying information about the employee and must contain information concerning the hours worked and the wages earned. The FSLA also requires that such records be kept on the employer's premises and must be made available within 72 hours if requested.

Contrary to popular belief, the FLSA does not place restrictions on the number of hours that any employee may work in any given work week but only requires that employers pay overtime compensation to all employees who work in excess of the maximum 40 hour work week.

Either the Department of Labor or any employee that believes that he/she is not being paid properly may bring an action under the FLSA. Such actions can result in administrative investigations, lawsuits and awards of damages for unpaid overtime, double damages, injunctive relief and awards of attorneys' fees. If employer is found to have willfully violated the FSLA, it can result in civil fines of $1,000.00 per violation and criminal fines of up to $10,000.00. In instances where employers have been found to be repeat offenders, it was also result in imprisonment.

All FLSA claims are subject to a two (2) year statute of limitations which can be extended to three (3) years if a willful violation is alleged and found. Importantly, and although rare, there is case law which have found individual supervisors or managers liable under the law.

The Department of Labor is permitted under the law to conduct investigations of employers which investigations can consist of entering and inspecting a company's premises to review records and interview employees. Employers are normally given very little notice of such investigations and most investigations result in the DOL requesting back pay or other damages to be paid to employees or other damages. If the employer is unwilling or disagrees with the findings, the Secretary of Labor may bring an action on behalf of all grieved employees or as previously stated, the employees may file a civil lawsuit.

II. Exemptions

White Collar Exemptions.

In order to qualify for a professional executive or administrative exemption, the employee must be paid on a "salary basis". Such employees must be paid a minimum of $47,476 per year ($913 per week), up from the previous annual salary of $23,600 per year ($455 per week).

The rules establish a mechanism for automatically updating the salary and compensation levels every three (3) years to maintain the threshold at the 40th percentile with the first update to take place in 2020.

Considerations for Applying the White Collar Exemptions

Establishing that a white collar employee is exempt from the FLSA's minimum wage and overtime requirements involves assessing:

- How much the employee is paid (salary basis test);
- How much the employee earns (salary level test); and
- Whether the employee primarily perform the kind of job duties that Congress meant to exclude from the law's overtime protections (duties test).

Three Tests Must be Met in Order to Claim a White Collar Exemption

First, they must be paid on a salary basis not subject to reduction based on quality or quantity of work ("salary basis test") rather than, for example, on an hourly basis.

Second, their salary must meet a minimum salary level, which after the effective date of the Final Rule will be $913 per week, which is equivalent to $47,476 annually for full-year worker ("salary level test"); and

Third, the employee's primary job duty must involve the kind of work associated with exempt executive, administrative, or professional employees (the "standard duties test").

Primary Job Duties for Exempt Executive, Administrative and Professional Employees

The salary level and salary basis requirements do not apply to teachers, lawyers or doctors ("bona fide practitioners of law or medicine").

Inclusion of Nondiscretionary Bonuses and Incentive Payments

For the first time, employers will be able to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level. Such payments may include, for example, nondiscretionary incentive bonuses tied to productivity and profitability.

Options for Compliance

Employers should evaluate all such categories of white collar employees to determine which employees do not work more than 40 hours per work week. The Final Rule will have no effect on these employees' pay.

Employers either have to control the number of hours so they don't work over 40 hours, or they have to adjust the base hourly rate such that the base pay plus overtime will not exceed what they are making now. The rules may force companies to cut current workers back to part-time, or just cut jobs period.

A. Executive Exemption.

An employee is exempt if:

1. The employee is compensated on a salary basis of a rate of not less than $47,476 per year, up from previous amount of $23,600 per year;

2. The employee's primary duty is in a management enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

3. The employee customarily and regularly directs the work of two or more employees; and

4. The employee has the authority to hire or fire other employees or whose suggestions or recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given any particular weight.

Whether all of these criteria are satisfied requires a factual analysis to be determined on a case by case basis. The courts will look at the time spent on managerial tasks, the relative importance of managerial duties undertaken as compared to other duties, the frequency of exercising discretionary authority, the degree of freedom from supervision, and the employee's compensation compared to other employees.

Courts will many times look to the importance of the management work being performed to the organization.

Crew leaders in most instances are found not to be exempt.

The new regulations have a new section titled "Concurrent Duties" which provides in part as follows:

> "Concurrent performance of exempt and non-exempt work does not disqualify an employee from the executive exemption... Generally, exempt employees make the decision regarding when to perform non-exempt duties and remain responsible for the success or failure of business operations under their management while performing the non-exempt work. In contrast, the non-exempt employee generally is directed by a supervisor to perform the exempt work or performs exempt work for defined time periods."

Courts have held that employees who spend less than 50% of their time on managerial duties can sometimes still be exempt employees if management is still their primary duty. Another court has held that a manager who performed both managerial and non-managerial duties fell under the executive exemption if his/her primary job is to execute managerial duties.

B. Administrative Exemption.

Under the new regulations, an employee is exempt if:

1. The employee is compensated on a salary basis of a rate of not less than $47,476 per year ($913 per week);

2. The employee's primary duty "is 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;" and

3. The employee's "primary duty includes the exercise of discretion and independent judgment with respect to matters of significance."

In order to qualify for the exemption, the employee's "primary duty must be the performance of work directly related to the management or general business operations of the employer or the employer's clients."

The following have all been determined by courts to fall within the administrative exemption:

1. Administrator for a city's human relations commission who is responsible for implementing programs and providing intake services;

2. A manager of a staffing agency who provided clients with temporary labor;

3. Museum curator whose duties include quality control, selection of exhibits, fund-raising, implementation of programs and preparation of exhibits.

Examples of employees that do not meet the standard are:

1. An employee who spends approximately 80% of his time working with customers, making deliveries, and repairing and installing equipment;

2. Investigators who conduct background checks on individuals seeking top secret government clearance as it was determined that the activities were related to ongoing day to day investigative services rather than performing administrative functions.

The new regulations provide additional administrative exemption examples which are as follows:

1. Insurance claim adjustors;

2. Employees in the financial services industry if their duties include "work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing, or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify.

3. Project leaders or managers;

4. Executive assistants to high level executives;

5. Human resource managers

6. Purchasing agents.

C. Learned Professional Exemption.

An employee is exempt under the learned professional exemption if:

1. The employee is compensated on a salary basis at a rate of not less than $47,476 per year; and

2. The employee's primary duty is "the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction."

It is important to note that the new regulations did not expand the professional exemption to include employees who acquired their advanced knowledge through a combination of intellectual instruction and work experience.

D. Creative Professional Exemption.

The employee is exempt under the creative professional exemption if:

1. The employee is compensated on the salary basis at a rate of not less than $913 per week; and

2. The employee's primary duty is "the performance of work requiring inventions, imagination; originality or talent in a recognized field of artistic or creative endeavor."

The new regulations broaden the creative professional exemption to include work of "originality" and recognized fields of "creative" as well as artistic endeavor.

E. Computer Professional Exemption.

An employee is exempt if:

1. The employee is compensated on a salary basis at a rate of not less than $913 per week;

2. Employee's primary duty consists of:

a. The application of systems analysis techniques and procedures, including consulting with users, determining hardware, software, or system functional specifications;

b. 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;

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

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

Software engineers have been held to be computer professionals because they are expected to use their analysis and judgment to solve software problems.

F. Outside Sales Exemption.

An employee is exempt if:

1. The employee's primary duty is making sales or obtaining orders or contracts for services for the use of facilities for which a consideration will be paid by the client or customer; and

2. The employee is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

The new regulations remove the previous requirement that not more than 20% of the employee's time could be spent in activities performed by the employer's non-exempt employees.

Mortgage and insurance sales continue to be contested and litigated and when salesmen are "customarily and regularly" engaged away from the employer's place of business, they generally will be considered exempt as an outside sales person. Additionally, any incidental activities to

the outside sales are also typically exempt. However, such activities must be focused on the individual sales.

Importantly, the courts increasingly seem to be examining where the employees conduct their sales and such sales must be conducted sufficiently outside the office. However, individuals who meet with clients in the employer's office are in some instances still found to be outside sales employees.

III. Salary Basis and Deductions

A salary basis is defined as an individual being paid a predetermined amount of compensation which is not subject to reduction because of variations in the quality and quantity of the work performed.

In other words, the employee may not be docked pay which means that generally, there can be no reduction in compensation based on work performance or the quantity of work performed. The employer must pay the employee a full week's salary for any work performed during the relevant work week.

There are exceptions from the "no pay" docking rule which are as follows:
Employers may deduct from an employee's pay for:

(i) Absences for one or more full days for personal reasons;

(ii) Absences for one or more full days for sickness or disability if the deductions are made pursuant to a bona fide plan, policy or practice;

(iii) Off sets for payments of jury fees, witness fees or military pay;

(iv) Penalties imposed in good faith for violating safety rules of major significance;

(v) Disciplinary suspensions imposed in good faith of one or more full days for violations of workplace conduct rules;

(vi) Proportionate amount of salary deducted for days worked during the employee's first and last weeks of employment; and

(vii) Partial day deductions for absences that qualify under the Family and Medical Leave Act.

Regulations enacted in 2004 provide a safe harbor provision for employers if they satisfy certain conditions. If the conditions are satisfied, employers will jeopardize the exempt status of their employees only if they have a "actual practice" of making proper inductions. In order to qualify for safe harbor protection:

(i) Employers must clearly communicate a policy prohibiting improper pay deductions which can be accomplished through a written policy which is disseminated at the time of hire, published in employee handbook or published on the employer's intranet;

(ii) The policy must provide a complaint procedure that employee may use to report improper reductions;

(iii) If the employer makes an inadvertent improper reduction, it must reimburse employees for the improper reduction and make a good faith commitment to comply with the no docking rules in the future; and

(iv) If the employer "willfully" violates the policy by continuing to make improper deductions following a complaint, the employer will lose its exempt status for all employees in the same job classification working for the same managers responsible for the improper reductions.

We strongly recommend that all employers have such a policy in place for the simple reason that an inadvertent violation will not result in employers losing the exemption for an entire class of employees.

A. Lack of Work Deductions.

If no work is performed in a given week, obviously, the employee does not need to be paid. However, employers are not permitted to make any deduction because of absences caused by the employer or because there is no work available in that given week. If such deductions are being made, the employee is not considered salary exempt.

B. Partial Day Absences.

Any time missed due to sickness, accident or personal reasons for less than a full day may not be deducted from an employee's pay. However, deductions from pay may be made for absences of

one or more full days as a result of sickness or disability if the deduction is made in accordance with a bona fide plan policy or practice.

C. Adjustments to Accrued Leave.

Many employers have policies which require even the salaried exempt employees to utilize earned or accrued leave, sick pay, vacation pay, etc. Although it is impermissible to deduct pay for the time missed, it is permissible under the wage and hour regulations to require to employee substitute paid leave for absences of less than a day without losing the exemption. This is considered to be a deduction from "fringe benefits" for fractional days missed rather than a deduction from the employee's salary.

Specifically, the Department of Labor has ruled as follows:

When an employer has bona fide sick leave and vacation pay benefit plans, it is permissible to substitute or reduce the accrued leave and the plans for the times the 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 leave the employee receives a payment in equal amount to his or her guaranteed salary.

This opinion has been subsequently again followed by the DOL. However, it is important to note that where an employee has exhausted these types of sick leave and vacation benefits, deductions are still never permitted of pay for partial day absences. Such deductions can only occur where the deduction are made in increments of full days only for absences for personal reasons or illness and only after the employee has exhausted any accrued leave.

D. Family and Medical Leave Act.

For those employees who are subject to the Family and Medical Leave Act, the Act especially provides that where an employee is otherwise exempt under the FLSA, employers may "dock" the pay of otherwise exempt, salaried employees for FMLA leave taken for partial day absences. For example, if an employee needs to work a reduced or intermittent leave schedule under the FMLA, the employer can deduct from the employee's salary partial day absences for any hours

taken for such intermittent or reduced FMLA leave. It is important to emphasize that this exception only applies to leave which actually qualifies as FMLA leave.

E. Deductions for Jury Duty, Temporary Military Leave and Witnesses Subpoenaed to Testify.

Employees may not "dock" pay from employees for absences caused by jury duty, attendance as a witness, or temporary military leave. However, if such individuals receive compensation for their services, such remuneration or compensation may be used to offset the salary for the work week for which it was paid. Additionally, if the employee is out for the entire week on jury duty, military leave or attending court as a witness, no salary needs to be paid for that week because no work is performed during that week.

There may be exceptions concerning deductions if the absence from work is caused by a lawsuit in which the employee is an actual party to such lawsuit.

F. Disciplinary Deductions.

As was previously stated, an employer may fine or suspend exempt employees only for "penalties imposed in good faith for infractions of safety rules of major significance". Safety rules of major significance include those relating to the prevention of a serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries and coal mines.

Employers need to be careful in implementing this rule because various courts throughout the Country have held that unpaid suspensions for less than major infractions, may result in loss of exempt status. The Seventh Circuit Court of Appeals has ruled that a staff nurse lost her exemption as the result of the employer suspending such nurse for tardiness. The court reasoned that the reduction of her salary as a result of the suspension related to the quality and quantity of her work and was therefore prohibited.

Although rare, some employers may fine employees and this can be subject to strict scrutiny by the DOL. The DOL has stated in an opinion letter that "deductions from the salaries of

otherwise exempt employees for the loss, damage, or the destruction of the employer's funds or property due to the employees' failure to properly carry out their managerial duties will defeat the exemption because the salaries would not be "guaranteed" or "free and clear" as required by the regulations." Again, and to reemphasize, as long as the employee performs some work during the relevant work week, he or she must receive their full salary without regard to the number of days or hours worked. Employers may only suspend employees without pay as a penalty for infractions of safety rules of major significance.

G. Extra Pay for Extra Work.

Employers are permitted to provide additional pay to salaried exempt employees. For example, employers may pay holiday pay, overtime pay, accrual of comp time for extra hours worked on the weekend and payment of overtime wages on an hourly basis in addition to the established salary is permissible.

IV. Highly Compensated Employees

Any employee who "customarily and regularly" performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee and who is guaranteed annual compensation of at least $134,004 (up from previous amount of $100,000) including nondiscretionary bonuses and commissions is considered an exempt employee.

The Final Rule sets the Highly Compensated Employees (HCE) total annual compensation level equal to the 90th percentile of earnings of full-time salaried workers nationally, $134,004 annually, above which only a minimal showing reportedly will be needed to demonstrate that an employee is not eligible for overtime. To be exempt as an HCE, an employee must also receive at least the new standard salary amount of $913 per week on a salary or fee basis and pass a minimal duties test. The HCE annual compensation level set in this Final Rule brings this threshold more in line with the level established in 2004 and will avoid the unintended exemption of large numbers of employees in high-wage areas who are clearly not performing EAP duties.

However, it is important to note that this exemption does not apply to "non-management production line workers and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsman, operating engineers, longshoreman, construction workers, laborers and other employees who perform work involving repetitive operations with their hands, physical skill and energy… no matter how highly paid they might be".

V. Compensatory Time Off.

Contrary to popular belief and opinion, the FSLA does not provide for compensatory time off in lieu of overtime for private employers. However, the FLSA requires that employers must pay overtime when an employee works more than 40 hours in any given work week. Employers are free to establish when the work week begins and to establish different work weeks for different groups of employees.

For example, employees can work 12 hours in one day without earning overtime so long as they do not work over 40 hours in any given work week. Additionally, employees may work 12 hours on one day, 4 hours on another day, and 8 hours the other three days and the overtime provisions of the FSLA are not applicable.

VI. Regular Rate.

A. The regular rate of pay is determined by dividing the total compensation that the employee receives in a work week divided by the total number of hours worked. It is important to note that the regular rate must include all compensation including shift differentials and commission payments and thus, the employee's regular rate may be different from the employee's hourly rate of pay. However, the regular rate does not include payments or reimbursement for board and lodging expenses, gifts, sick or vacation pay, profit sharing, or pension or health benefit plan contributions. It is again important to point out that commissions received must be included in the regular rate and this includes commissions that are paid in addition to a salary or an hourly rate.

B. Multiple Rates.

In some instances, employees may work at two or more hourly rates in any given work week. In such instances, the regular rate is the weighted average of the rates. If the employee works overtime during that given work week, the employee must be paid time and a half of the weighted average even if the employee is performing overtime work in the job which pays the lesser hourly rate. However, in some limited instances where an employee and employer have agreed that different rates will apply to the different kinds of work, the employer may pay the employee at a rate of 1 ½ times the hourly work of the hourly rate applicable to the same work performed during non-overtime hours.

There are various court decisions interpreting multiple rates and an interesting decision found that a hospital did not violate the FLSA by paying operating room personnel only 1 ½ times the federal minimum wage for the time that they were not actually working during that shift rather than at 1 ½ times their normal daytime wages. The waiting periods during which the personnel were free to sleep or watch television were different that the brief idle moments inherent in any normal job.

C. Regular rate for Salaried Non-Exempt Employees.

Some employers pay individuals a weekly salary despite the fact that they are not exempt. In such instances, the employee's regular rate (for overtime purposes) is determined by dividing the weekly salary by the number of hours the salary is intended to compensate. If employee is paid a salary of $400.00 and it is understood that the employee is required to work a regular 40 hour work week, the employee's regular rate of pay is $10.00 per hour. When such employee works overtime, the employee is entitled to $15.00 per hour for each work over 40 hours.

VII. Profit Sharing and Bonuses

The FSLA and DOL regulations exclude payments or amounts made pursuant to a bona fide profit sharing plan from the regular rate of pay. Discretionary bonuses are not included in the regular rate of pay. However, non-discretionary bonuses must be calculated into the regular rate for overtime determination purposes. Importantly, the amount of non-discretionary bonus must be allocated over the period of time covered by the bonus and then for each overtime hour

worked during that period, the employee is entitled to an additional amount equal to 1 ½ the hourly rate of pay allocable to the bonus for the pay period in question.

In my experience, most employers are not including these non-discretionary bonuses in the regular rate. Furthermore, it is important to note that if discretionary bonuses are given on a regular basis, they may be considered to be part of the employee's regular pay. Employers who utilize discretionary bonuses should have a written policy which clearly states that the bonuses are in fact discretionary, not guaranteed, and may be discontinued at any time.

Bonuses which are based on a percentage of an employee's total earnings are permitted to be excluded from overtime wage computations. However, to qualify as a percentage bonus, the earnings used to compute the bonus must include all overtime earnings in the bonus.

VIII. Gifts and Stay Bonus

A. Payments which are made as in the nature of gifts such as at Christmas may be excluded from an employer's regular rate of pay only if (i) they are not measured by or dependent upon factors such as productivity, hours worked, attendance, etc., (ii) are not so substantial that it can be assumed that the employers consider it part of their wages, and (iii) are not paid pursuant to any prior agreement or promise.

B. Note of Caution "stay bonus"

Sometimes when employers are closing a facility or a particular location, they will offer employees a bonus to remain at the particular facility until it ceases operations. This type of "stay bonus" has been determined by the DOL to be a non-discretionary bonus and therefore must be included in the employee's regular rate of pay for purposes of overtime pay.

IX. Volunteer Work and Interns

A. Unpaid Interns

The Department of Labor seems to equate "intern" with "trainee" in determining whether an intern is an "employee" for the purposes of the FLSA. If **all** of the following criteria apply, an intern is not an employee for FLSA purposes:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;

2. The training is for the benefit of the trainee;

3. The trainees do not displace regular employees, but work under close observation;

4. The employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion the employer's operations may actually be impeded;

5. The trainees are not necessarily entitled to a job at the completion of the training period; and

6. The employer and the trainee understand that the trainees are not entitled to wages for the time spent in training.

Employment Relationship Under the Fair Labor Standards Act. United States Department of Labor. WH Publication 1297.

Provided these six criteria are met, where internship programs are designed to give interns professional experience, and the training is academically orientated for their benefit, the interns will not be considered employees. While an internship program is not *required* to be associated with an educational institution or academic credit, this association, allows the company to more easily maintain that the internship is part of an academic or a training program benefitting the *intern* with mentoring and real-life experience.

If the potential intern is not associated with an educational institution, the nonprofit should be especially careful to ensure that the intern does not seem to be a de facto part time employee. To do this, the nonprofit should develop a program curriculum, focusing more on mentoring and teaching the intern about the industry. Obviously, the intern should sign an agreement stipulating to the fact that she does not expect to be compensated, and is not entitled to a job offer after the internship period has ended.

B. Volunteers

It may be easier for the organization to simply allow the potential intern to work as a volunteer. The Department of Labor states that individuals who volunteer at or donate their services to a religious, charitable, or similar *non-profit* agency for public service, religious, or humanitarian

objectives without contemplation of pay are not considered employees of the organization. *Employment Relationship Under the Fair Labor Standards Act.* The Department of Labor's interpretation of "volunteer" (as it pertains to the private sector) seems to contemplate an individual voluntarily "helping out," generally on a part-time basis, with services needed to carry out the organization's charitable, educational, or religious programs, and in a capacity that does not displace the organization's regular employees. *Id.*

X. "ON CALL" PERSONNEL, TELECOMMUTERS, WORKING FROM HOME AND TRAINEES

A. Taking Work Home

The FSLA requires overtime compensation for all employees who work any hours in excess of 40 hours per week regardless of where the employee works. Thus, employees who are working at home, while traveling, or at the office, must be compensated.

Technology advancements have resulted in the ability and availability for employees to perform work in a variety of locations and in many instances, employees are choosing to either finish their work or perform additional work from their home or other remote locations. This has caused a great deal of difficulty for employers in monitoring the number of hours worked by its employees as the employers may be unaware that particular employees are taking work home unless such work is being reported by the employee.

Employers have a duty to determine if their employees are in fact working overtime at their homes but importantly, this duty can be modified or limited if the employer has instituted appropriate written policies covering such potential practices. It is our very strong recommendation that all employers should have policies in place requiring employees to submit overtime requests; policies that require all overtime to be approved in advance of such overtime work taking place; and policies governing off premises work; etc. If such written policies are properly disseminated, the employer has the right to discipline and thus control overtime if such overtime is being performed without the employer's knowledge.

The more difficult issue concerns employees who regularly and routinely perform additional duties at home. Experience has demonstrated that many managers or supervisors that employees are regularly and routinely taking work home with them to perform during off hours. These employees in many instances are not reporting such time and all employers should understand that if the supervisors or managers are aware of such practice and thereby acquiesce in and/or ratify such conduct, the employer can be held responsible for both regular and overtime hours being worked by such employees.

In many instances, such claims are not made until the employee is disciplined and/or terminated and at that time, the disgruntled employee makes the claim for the uncompensated hours. This is why it is very important that all supervisors and managers closely monitor employees' off premises work practices and that written policies be implemented controlling such practices.

There are several court cases that hold that employer must pay for all hours worked "if the employer knew or had reason to believe that the work was being performed". An employer cannot merely set back and accept the benefits without compensating employees for such work if the employer knew or had reason to know that such work was being performed. All employers should implement clear policies requiring employees to obtain written permission before taking work home to be completed.

B. Telecommuters

It is extremely difficult, if not impossible, for employers to track the actual number of hours worked by telecommuters. This is because such employees working at home essentially are setting their own hours of work and the employer must trust that such employees are accurately recording their time worked. There is a home workers' exception which has been built into the wage and overtime requirements which provides as follows:

An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining and other periods of complete freedom from all duties where he may leave the

premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under the circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the pumper of a stripper well who resides on the premises of his employer and also to a telephone operator who has a switchboard in his/her own home.

Thus, where an employer cannot determine the exact number of hours that an employee works, the home worker's exception allows the employee and the employer to reach an agreement concerning reasonable compensation. In order for the home worker's exception to apply, two criteria must be met:

1. There must be periods of the employee's day spent at home during which the employee has complete freedom from his or her duties;
2. The employee and the employer must have reached an agreement for the number of hours worked.

It is important to note that this exception will not apply to the situation where the employee is working a standard 8 hour day 40 hour per week and works consistently throughout the day despite the fact the employee is working at home.

C. On-Call Time.

Many employees in the ever changing workplace are requested or required to be "on-call" either at the office or at home or another remote location. A perfect example of this is an Information Technology (IT) specialist who are frequently requested to take calls when problems arise with computers or other information technology or data. The DOL regulations provide as follows:

Employee who is required to remain on-call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on-call". An employee who is not required to remain on the employer's premises, but is merely required to

leave word at his home or with company officials where he may be reached as not working while on-call.

On the basis of such regulation, time is found to be compensable based on several factors which are used to determine compensable time.

1. Requirement that the employee remain on the premises;
2. Excessive geographical restrictions;
3. Frequency of calls to duty;
4. Fixed time limits for response to calls of duty;
5. The ability to trade on-call responsibility;
6. The ability to ease restrictions; and
7. Whether the employee actually engaged in personal activities during the on-call time.

It is important to point out that these factors are not exhaustive and no one factor is dispositive of the issue. The courts have balanced the factors to determine whether on-call time is compensable.

D. Training Time (including attending seminars, etc.)

The regulations provide that under usual circumstances, all training time must be compensated. However, the regulations also recognize that in some instances time spent in training does not count towards hours worked for purposes of calculating overtime. Attendance at meetings, lectures and training programs need not be counted as working time if:

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.

Importantly, training is not "directly related" to an employee's job if the training is designed to assist or help the employee to develop a new skill or to train him or her for another job. However, training is directly related if it is designed to enhance an employee's skill in a job

presently held. Quite obviously, if the employee initiates training or education at a school or college, etc. after working hours, this does not count towards hours worked even if it is directly related to the employee's present job. Additionally, if the courses are offered by the employer outside working hours and the attendance is voluntary, time spent at the course is not considered time worked, even if the class is directly related to employee's job or even if the employer pays for such training.

As a general rule, time that is spent at recognized apprenticeship programs is not considered as time worked as long as the time does not involve productive work or performance of the apprentice's regular job duties.

Off the Clock Work and Issues

All employers should be aware that employees are entitled to compensation for any activities that are considered an "integral and indispensible part of the principal activities for which covered workmen are employed". For example, time spent in getting ready for work, preparing the workspace, putting on or taking off specialized clothing and safety equipment, is all considered to be compensable time.

Employers that require such activities or work to take place prior to or after their regular work hours, are many times required to pay for such time. Consequently, all employers should either require these activities to be performed during regular work hours or clearly recognize that such employers may be required to pay overtime at the end of any regular work week.

For example, time spent walking to and from the production floor has also been found by the courts in some instances to be compensable time where the employees were required to walk between locker rooms or changing rooms to their work station after changing into necessary uniforms.

A particular section of the FLSA excludes from coverage washing time, clothes and protective gear changing time, etc. if such time is "excluded from measured working time during the work

week involved by the express terms or by customer practice under a bona fide collective bargaining agreement applicable to the particular employee".

Call centers have been targeted by the DOL for "off the clock activities". For instance, requirements that employees arrive at work prior to the start of a shift to complete necessary paperwork, start up computers and perform other preparatory activities are all considered to be compensable. Additionally, if employees are required to take calls or perform work during paid breaks and lunches, the DOL considers this to be compensable time. As long as the work is being required or performed for the benefit of the employer, the DOL takes the position that it is compensable time.

Physical or Mental Exertion

Work is "physical or mental exertion (whether burdensome or not) if it is controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer". Thus, the DOL takes the position that pre-shift reporting time and end of day clean up time is compensable.

XI. Recordkeeping Requirements.

As previously stated, all employers are required to keep records on their premises and such records must be made available within 72 hours. The employer is free to choose the form of the records and the regulations specifically provide that the records may be maintained and preserved on microfilm or other source documents such as automated word or data processing memory provided that adequate protection and reviewing equipment is available, that the reproductions are clear and identifiable by date or pay period and that transcriptions of the information are made available upon request.

The following records must be kept concerning all employees:

1. Name and identifying number or symbol;
2. Home address and zip code;
3. Date of birth if under 19;
4. Sex; and

5. Occupation in which employed.

In addition to all the records listed above, the following records must be kept for all employees subject to FLSA wage and overtime provisions:

1. Time of day and day of work workweek begins;
2. Rate of pay;
3. Hours worked each workday and each workweek;
4. Total daily and hourly straight time earnings;
5. Total weekly overtime earnings;
6. Total additions or deductions to wages each pay period;
7. Hourly rate of pay for each week overtime is worked;
8. Total wages each pay period; and
9. Date of payment and pay period covered by the payment.

All payroll records, collective bargaining agreements, employment contracts, plans, trusts, sales and purchase records must be retained for at least 3 years. All records on which wage computations are based must be retained for 2 years which includes time cards, piece work tickets, wage rate tables, work and time schedules, and records of additions to or deductions from wages.

XII. Notices

Every employer covered by the FSLA must display the FLSA poster on minimum wage, overtime compensation and child labor in a conspicuous place for the employee to review. The poster is available electronically for downloading and printing at http://www.dol.gov/osbp/sbrefa/poster/main.htm.

XIII. Enforcement and Penalties

The wage and hour division enforces the FSLA and as previously stated, the Secretary of Labor can bring suit against an employer for damages and injunctive relief. Damages may include any and all back wages owed in an amount equal to such amount which is liquidated damages. The

Secretary of Labor may also seek injunctive relief which includes a ban on employers from shipping across state lines which have been produced by workers paid less than the minimum wage, employees not paid overtime compensation or by illegal child labor.

Individual employees may also file actions to recover unpaid minimum wages and overtime compensation and to recover liquidated damages. Increasingly, employers are being subjected to class action lawsuits.

Damages

Damages can include back pay which includes any unpaid compensation and unpaid overtime compensation.

Liquidated Damages

Unless the employer can demonstrate that the act or omission was in good faith and the employer had reasonable grounds to believe that the act or omission was not a violation. Liquidated damages are in an amount equal to the back pay.

Interest

Employees are not entitled to interest on damages if the employee receives liquidated damages.

Attorneys' Fees

The prevailing party is entitled to attorneys' fees but the amount of the award is within the discretion of the trial judge.

Civil Penalties for Repeat Violations of up to $1,000.00 per Violation

The $1,000.00 penalty can also be imposed for willful violations where the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA".

An employer who willfully violates the FLSA may be subject to a criminal fine of up to $10,000.00 and up to six (6) months in jail.