

FOLEY EXECUTIVE BRIEFING SERIES



Wage and Hour Employment Law Update

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FOLEY EXECUTIVE BRIEFING SERIES

Overview of the Program

- Historical Perspective
- Recent FLSA Regulations Affecting Exempt and Non-Exempt Classifications
- Overview of “Compensable” Time
- Payroll Record Maintenance Requirements
- Risks, Penalties, and Compliance Strategies





What Changed in 2004?

- Increased minimum for salary level test
- Refined or changed duties test
- Eliminated short and long tests regarding duties, but allowed more flexibility for highly compensated employees
- Created safe harbor for salary basis test
- Allowed disciplinary suspension of less than one week without violating salary basis test



Background Information

- FLSA:
 - Overtime: 1.5 times regular rate for all hours over 40 in a work week
 - White Collar Exemptions: Executive, Administrative, Professional and outside sales persons and computer employees
- Three tests, generally, for exemption:
 - Salary level
 - Salary basis
 - Job duties



Salary Level Test

- Minimum raised to \$455/week (\$23,660 annually)
- No employee below this salary level can be exempt



No Salary Requirements

- The salary level and salary basis tests do not apply to:
 - Outside Sales Employees
 - Doctors
 - Lawyers
 - Teachers
 - Otherwise exempt computer-related occupations paid at least \$27.63 per hour



Highly Compensated Employee Test

- Permits exemption if employee:
 - Receives total annual compensation of \$100,000 or more, but at least \$455 per week on a salary basis;
 - Total annual compensation can include commissions, bonuses or other non-discretionary compensation, but not the cost of fringe benefits;
 - Performs office or non-manual work; and
 - Customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.



Salary Basis Test

- Employee regularly receives a predetermined amount each pay period
- Pay cannot be reduced due to variations in quality or quantity of work
- Full salary paid for any week in which *any* work performed
 - Not required to pay for workweek when no work is performed



Salary Basis Test (*cont.*)

- Deductions from salary can jeopardize exempt status.
- Making improper deductions will result in the loss of the exemption:
 - during time period in which improper deductions were made
 - for all employees in same job classification
 - working for the same managers responsible for the improper deductions



Salary Basis Test (*cont.*)

- Permitted Deductions:
 - penalties for violating major safety rules
 - unpaid suspension of one or more full days for violations of workplace conduct rules
 - unpaid FMLA leave
 - personal absence for one or more full days
 - absence for one or more full days for sickness or disability if part of a benefits plan
 - to offset jury or witness fees or military pay
 - portion for time worked in first and last weeks



Payroll Practices That Do Not Violate the Salary Basis test

- Taking deductions from exempt employees accrued leave accounts
- Requiring exempt employees to keep track of and record their hours worked
- Requiring exempt employees to work a specified schedule
- Implementing bona fide, across-the-board schedule changes



Salary Basis Test (*cont.*)

- Corrections Allowed
- “Safe Harbor” When:
 - Have a clearly communicated policy prohibiting improper pay deductions which:
 - Includes a complaint mechanism,
 - Reimbursement to the employee(s) for improper deductions, and
 - Good faith commitment to comply in the future
 - Unless the employer willfully violates the policy after receiving employee complaints



Clearly Communicated Policy

- The best evidence of a clearly communicated policy is a written policy



Salary Basis Test---DOL Opinion Letters

- FLSA 2006-6 Employer could require exempt employees to work 45 – 50 hours per week, and could require exempt employees to make up lost work due to personal absences of less than a day.
- FLSA 2006-7 Employer cannot deduct from an exempt employee's guaranteed salary for the replacement cost of lost or damaged equipment (e.g. laptops or cell phones), but employer may deduct such costs from bonuses.



Executive Exemption

- Must have a *primary* duty of management of department or area
- Must *customarily and regularly* direct the work of 2 or more employees
- Must have practical authority to recommend hiring, firing or promotion



Executive Exemption

- 29 CFR § 541.106 Employee does not lose exemption if he/she performs both exempt and non exempt work. BUT, “management” must remain the *primary* duty.
- Employee can spend as little as 5 – 10% of his/her time on exempt duties and perform manual labor, if “management” is the *primary* duty.



Executive Exemption

Cases finding managers or assistant managers exempt executives

- Thomas v. Speedway SuperAmerica, 6th Cir., 10/30/07 (an Ohio gas station and convenience store manager is an executive employee despite performing nonmanagement tasks and being closely supervised)
- Boshaw v. Spartan Stores, Inc.
- Addison v. Ashland
- Depew v. Shopko Stores, Inc
- Mitchell v. Abercrombie & Fitch
- Posely v. Eckerd Corp.
- Thomas v. Speedway Superamerica, LLC
- Henderson v. Payless Shoes



Executive Exemption

Cases finding managers or assistant managers NOT exempt executives

- Smith v. Heartland Auto. Svcs.
- Elliott v. Flying J., Inc.
- Jackson v. Go-Tane Svcs., Inc.



Administrative Exemption

- Must have a *primary* duty of office/non-manual work related to management of general business operations of employer or customer
- Must exercise discretion and independent judgment as to matters of significance
- De-emphasizing “administration v. production”



Administrative v. Production

- FLSA 2007-7 case managers performed work free of supervision, did not operate on written protocols and were independently responsible for development of each customer’s care plan
- DOL--duties were NOT administrative, rather part of day to day services offered by Company



Administrative v. Production

- FLSA 2006-45 copy editors--at direct marketing firm that focuses on book sales--reviewed materials and checked for adherence to copyright and trademark laws
- DOL--duties were NOT administrative, rather work related to production and done as part of day to day operations



Discretion and Independent Judgment

- FLSA 2006-46 **Film Location Managers** who selected the film's location, negotiated the site rental, oversaw enforcement of rules for locations and represented the production company in various matters, exercised discretion and independent judgment
- FLSA 2006-30 **Loss Prevention Managers** who analyzed store inventory, identified paperwork controls and conducted compliance audits, exercised discretion and independent judgment



Administrative Exemption (*cont.*)

- Examples of exempt positions:
 - an employee who leads a team to complete major projects
 - executive assistants who have been delegated authority regarding matters of significance
 - human resource managers who formulate or implement employment policies
 - purchasing agents who can bind the company on significant purchases



Professional Exemption

Learned Professional—

- Work performed must require advanced knowledge in a field of science or learning
- Advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction for which an academic degree, although not absolutely required is prima facie evidence.



Professional Exemption

Creative Professional—

- Work performed requires invention, imagination, or talent
- In a recognized field of artistic endeavor



Professional Exemption

- Examples of exempt positions:
 - accountants, but not accounting clerks
 - engineers and design engineers
 - attorneys
 - doctors



Professional Exemption

- FLSA 2007-5 Radiology technologist NOT exempt since baccalaureate degree not required and work is not predominantly intellectual in character.
- FLSA 2006-26 Respiratory therapists NOT exempt since baccalaureate degree is not a standard prerequisite for entry into the field.
- FLSA 2005-35 Medical Coders NOT exempt since “coding” is not recognized by colleges and universities as a bona fide academic discipline.



Professional Exemption

- FLSA 2005-50 Social Workers who need a masters degree in a specialized field and who make independent decisions about what therapy to provide are considered learned professionals; case workers who provide case management services and are only required to have a bachelor's degree in the social sciences are not learned professionals.
- FLSA 2005-39 Substitute teachers whose primary duty is teaching qualify for the special teacher exemption under Section 541.303 regardless of whether they hold a degree.



Other Exemptions

- Computer employees
 - Primary duty must include:
 - Application of systems analysis techniques and procedures, including consulting with users to determine functional specifications;
 - Design, development, documentation, analysis, creation, testing or modification of computer systems or programs;
 - Design, documentation, testing, creation or modification of programs related to operating systems; or
 - A combination of such duties requiring the same level of skills
 - The exemption does not apply to employees whose primary duty relates to the manufacturer or repair of computer hardware or related equipment
 - exempt computer employee need not consistently exercise “discretion and judgment”



Other Exemptions

- Computer employees
 - FLSA 2006 -42 IT Support Specialist was not exempt since his duties—installing, configuring, testing, and troubleshooting computer applications, networks and hardware—did not constitute the types of high level computer activities required for the computer professional exemption.



Other Exemptions

- **Outside sales employees**
 - Primary duty must be making sales or obtaining orders or contracts for service, and must work outside the office (fixed site) majority (used to be 80%) of time.
 - Does not include sales by mail, telephone, or internet unless incidental to personal calls.



Other Exemptions

- **Outside sales employees**

FLSA 2007-4 Resort timeshare salespersons are NOT exempt since they are not engaged in sales 'away from the employer's place of business'

FLSA 2007-2 Home sales employees working out of a model home or a trailer are exempt since they are primarily engaged in sales away from the employer's place of business



Other Exemptions

- Outside sales employees

FLSA 2006-11 Mortgage Loan Officers, some of whom perform their work at the employer's offices and some of whom perform their work outside the offices meet the requirements for the outside sales exemption.

Activities such as making phone calls, sending e-mails, and meeting with clients in the office are considered exempt if performed incidental to or in conjunction with the loan officer's own outside sales activities.



Effects on Employers

- Higher salary requirements eliminated exemptions under all tests for lesser-paid employees
- Some additional ability to make deductions and correct deduction errors



Achieving compliance

- Review exempt status of lesser-paid employees
- Review exempt status for employees making \$100,000 or more
- Conduct job analyses and revise job descriptions as necessary



Achieving compliance (*cont.*)

- Review and correct any problems with deduction policy
- Remember solutions to overtime issues that do not depend on exempt status (e.g., salary for all hours worked)
- Correct any errors in “regular rate” calculations



Overview of Compensable Time Issues (non-exempt employees)

- Pay for Preliminary/postliminary Time
- Pay for Travel
- Pay for On-Call Time
- Pay for Meal/Rest Breaks
- Pay for Training/Learning Activities



Pay for Preliminary/Postliminary Time

- General rules :
 - Activities which occur before the work day begins or after the work day ends must be compensated if they are INTEGRAL AND INDISPENSABLE to the principal activity
 - Examples—donning and doffing specialized clothing or gear, walking to/from the production floor, wash up time, pre-trip inspection of a motor vehicle
 - Exception—Time does not have to be compensated if it is *de minimis*



Pay for Preliminary/Postliminary Time

- *Gorman et al. v. Consolidated Edison and Carballo et al. v. Entergy Nuclear*, U.S. Court of Appeals for the 2nd Circuit,

Court found that extensive security precautions, which can take up to 30 minutes a day, were indispensable, but not integral to the employees' work. Plaintiffs' case for preliminary/postliminary time was dismissed.



Pay for Travel

- General rules :
 - Home to work – not compensable
 - Travel during the workday, from job site to job site – compensable
 - Day trip out of town – travel time during regular working day **and** outside regular working day is compensable (except meals), but not time spent traveling from home to location for further travel, such as airport



Pay for Travel (*cont.*)

- Overnight trips
 - Travel time during **normal work hours** on regular work days (e.g., 9 a.m. – 5 p.m.) and on non-work days (e.g., Saturday, Sunday, Holidays) is compensable (except meals). Note, however, that some states have laws that may have different requirements (e.g., Wisconsin requires pay for all travel time irrespective of time/day of travel)



Pay for Travel (*cont.*)

- Overnight trips
 - Travel **outside normal work hours** and corresponding weekend hours not compensable unless actually working (unless state law requires otherwise)
 - Time spent driving is considered working, while time spent as a passenger is not



Pay for Travel (*cont.*)

- Emergency calls outside workday
 - If an employee is called out on an emergency job after he/she has gone home for the day, travel time directly to a customer's site is compensable, but not travel time directly to the employer's premises (however, consider on-call rules)



Pay for Travel

- Dooley v. Liberty Mutual

Appraisers started laptops, opened software, checked voice and e-mail, responded to messages, reviewed and mapped daily assignments and loaded supplies into their vehicles before leaving home to drive to their first appraisal site.

Entitled to pay for “commuting” time since work at home was a principal activity, that began the work day.



Pay for Travel

- Singh v. City of New York

Travel from a remote location to work, carrying a briefcase with files, was not compensable

While the briefcase was necessary to plaintiffs' work, that did not make the activity integral and indispensable.



Pay for Waiting/On-Call Time

- Fact specific inquiry
- Waiting time while on duty is compensable
- On-call time is compensable if required to stay on-site or so close impossible to use time for own purposes
- May be compensable if other restrictions are so severe or numerous that they interfere with ability to use time for own purposes



Pay for Meal/Rest Periods

- ALL of the following conditions must be satisfied for meal breaks to be unpaid:
 - At least 30 minutes
 - Must be relieved of all duties
 - Must be free to leave his/her post (but can be confined at the employer's premises)
 - State laws may vary or have additional restrictions



Pay for Meal/Rest Periods

- Meal periods have to be 30 uninterrupted minutes. Otherwise, meal periods will be compensable (ALL of period, not just interrupted portion)
- Unless the interruptions are extremely sporadic, that means all meal periods are compensable, not just the ones where interruptions actually occur



Pay for Training, Meetings, and Learning

- General rule: time spent at employer-sponsored meetings and training programs is compensable unless:
 - Attendance is outside the employee's regular working hours
 - Attendance is voluntary
 - The course or meeting is not directly related to the employee's job; and
 - Employee does not perform any productive work during attendance



Wage and Hour – Meal Period

- Should the following employee be compensated for her meal period?
 - Sally is a legal secretary. She chooses sit at her desk during her 30 minute lunch period. She sometimes answers her bosses' telephone and sometimes is asked to perform miscellaneous duties that only take several minutes.
 - A. Yes.
 - B. No.



Wage and Hour - Meetings

- Should the following employees be compensated for this time?
 - Sarah, a machine operator, volunteers to be on the plant's first responder team. So as not to conflict with the work schedule of Sarah and the other team members, the Company schedules their required training sessions for Saturday mornings.
 - A. Yes.
 - B. No.



Wage and Hour - Meetings

- Should the following employee be compensated for this time?
 - Non-exempt employees volunteer to help with a blood drive that is taking place at the Company during their non-scheduled work hours.
 - A. Yes.
 - B. No.



Wage and Hour – Time Worked

- Which of the following are considered work time under FLSA?
 - A. Time spent traveling from home to the day's work site.
 - B. Time spent traveling to a meeting in another city by car.
 - C. Time spent traveling home during the evening from a meeting in another city.
 - D. All of the above.



Overtime Calculation

- In settling a labor contract the company pays each employee a lump sum payment of \$1,000. Does this payment change the regular rate on which overtime is paid?
 - A. Yes.
 - B. No.



Overtime Calculation

- Employer pays employees a production bonus of 2% of their compensation each quarter. Does this payment affect the regular rate on which overtime is paid?
 - A. Yes.
 - B. No.



Overtime Calculation

- The company pays employees a bonus of \$100 per quarter for perfect attendance. Does this payment have to be included in the regular rate for overtime?
 - A. Yes.
 - B. No.



Overtime Calculation

- An employee shows up for an overtime shift on Saturday. The foreperson is late and the facility is not open. The employee waits an hour and goes home. Is he due pay?
 - A. Yes.
 - B. No.



Overtime Calculation

- Employer employees five telephone sales representatives on a commission basis. Does it have to pay them time and a half for working more than 40 hours a week?
 - A. Yes.
 - B. No.



Pay-Related Record Maintenance Requirements

- Employers are required to maintain payroll records under several federal and state statutes
- The maximum retention period is generally six (6) years



Record Maintenance (*cont.*)

- FLSA
 - Three (3) years for payroll records, collective bargaining agreements, certificates, and employment contracts
 - Three (3) years (from date of termination of program) for records relating to apprenticeship programs where employees are paid less than minimum wage
 - Two (2) years for “supplementary” records (basic employment and earning records – including performance reviews, evaluations, merit raise records, wage rate tables, work time schedules, and the like)



Record Maintenance (*cont.*)

- FICA/FUTA
 - Retention of payroll records for four (4) years after the tax has been paid or becomes due

- ADEA
 - Retention of payroll records for three (3) years

- ERISA
 - Retention of records on matters on which disclosure is required for six (6) years after filing date. Payroll records must be maintained in order to determine plan benefits or contributions (sick pay, wage continuation, etc.).



- Title VII
 - One (1) year for records relating to promotion, demotion, transfer, layoff, termination, and selection for training or apprenticeship

- AAP/OFCCP
 - Two (2) years for records pertaining to affirmative action programs and reports



Penalties Under the FLSA

- Relevant time period is 2 to 3 years
- Person may be fined up to \$10,000 and sentenced to up to 6 months imprisonment
- An amount equal to the unpaid amount of minimum wage or overtime is awarded as liquidated damages – willful violations
- A reasonable attorney's fee will also be awarded



Penalties Under the FLSA

- Costs and interest
- *Individual* Liability is possible under the statute
- Collective Actions are possible
 - Opt-in provisions
- DOL may impose fines



FLSA

Thank You!

Additional Questions?