

2017 LOCAL GOVERNMENT SERVICES CONFERENCE

10 Most Common FLSA Mistakes Employers Make

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#10 – ENGAGED TO WORK

• **Waiting Time:** Whether waiting time is hours worked under the Act depends upon the particular circumstances. Generally, the facts may show that the employee was:

- Engaged to wait (which is work time)
- Waiting to be engaged (which is not work time)

For example, a secretary who reads a book while waiting for dictation or a fireman who plays checkers while waiting for an alarm is working during such periods of inactivity. These employees have been "engaged to wait."

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#10 – ENGAGED TO WORK (continued)

• **On-Call Time:**

- An employee who is required to remain on-call on the employer's premises is working while "on-call."
- An employee who is required to remain on-call at home, or who is allowed to leave a message where he/she can be reached, is not working (in most cases) while on-call.

Additional constraints on the employee's freedom could require this time to be compensated.

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#9 – IMPROPER DEDUCTIONS

- In general, exempt employees must receive their full salary for any workweek in which they perform any work. Generally, the only instances in which employers may deduct from an exempt employee's pay include:
 - (1) absences of one or more full work days for personal reasons other than sickness or disability;
 - (2) to offset any amount of pay an employee receives for jury or witness fees, or for temporary military duty pay;
 - (3) for penalties imposed in good faith for infractions of safety rules of major significance;

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#9 – IMPROPER DEDUCTIONS (continued)

- (4) for unpaid disciplinary suspensions of one day or more imposed in good faith for serious workplace misconduct; or
- (5) in the employee's first or last week of employment if the employee does not work the full week.

- Budget-related furlough allowed
- Purposes of public accountability

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#8 – TRAVEL TIME

- The FLSA has numerous, specific rules about when a nonexempt employee's travel time is compensable.
 - Regular commuting from home to work is not compensable. However, travel that is "all in a day's work" is compensable.
 - Traveling from home to work on a special one-day assignment in another city is compensable (but the employer may deduct the employee's usual commute time).
 - Travel out of town, however, is handled differently and whether it is compensable depends, in part, on whether the employee was traveling during his/her work hours, and whether the employee was driving, riding, or flying.
- Tip: www.dol.gov - Wage and Hour Fact Sheets

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#7 – CALCULATING THE REGULAR RATE OF PAY

- To calculate overtime, employers must determine an employee's regular rate of pay, which includes all remuneration related to their employment with the company, except certain payments that are expressly excluded by the FLSA. In determining the regular rate of pay, generally you must take into consideration the following: salary; hourly rate of pay; reasonable cost of employer provided room and board; tips; commissions; piece rate; nondiscretionary bonuses; on-call pay; longevity; and shift differentials.
- Weighted average for employees working two (2) jobs at different rates for the same employer.
- What is joint employment?

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#6 – CLOCKING-IN, CLOCKING-OUT

- The FLSA requires accurate timekeeping and the maintenance of records, specifically for FLSA non-exempt employees. Is it okay for FLSA exempt employees to be required to clock-in/out?
- In recording working time under the FLSA, infrequent and insignificant periods of time beyond the scheduled working hours, which cannot as a practical matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such periods of time are *de minimis* (insignificant). This is commonly referred to as a grace period. Six (6) minutes is generally accepted as okay.

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#6 – CLOCKING-IN, CLOCKING-OUT (continued)

- Rounding is different than a grace period. Some employers track employee hours worked in 15-minute increments, and the FLSA allows an employer to round employee time to the nearest quarter (¼) hour. However, an employer may violate the FLSA minimum wage and overtime pay requirements if the employer always rounds down.
 - Employee time from 1 to 7 minutes may be rounded down, and thus not counted as hours worked
 - Employee time from 8 to 14 minutes must be rounded up and counted as one-quarter (¼) hour of work time
- See Regulations 29 CFR 785.48(b).

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#5 – YOUR POSTER AND RECORDKEEPING

- The FLSA requires that certain records relating to hours worked and wages earned for nonexempt employees be retained for at least three (3) years. This includes: total hours worked each work day and each workweek; total daily or weekly straight-time earnings; total overtime pay for the workweek; deductions from or additions to wages; total wages paid each pay period; and the date of payment and pay period covered.
- In addition, records that explain the basis for wage calculations (e.g., time cards, piece work tickets, and work schedules) must be retained for two (2) years.
- Employers must post the DOL-issued (and state) poster in a conspicuous place.

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#4 – PERMITTING OFF THE CLOCK WORK

- Employers are not permitted to ask or require a nonexempt employee to work "off the clock." If an employee starts early or stays late, the time must be paid - even if an employee works overtime without prior authorization.
- Supervisors should be trained on the FLSA's requirements and be instructed that they are prohibited from requiring or allowing nonexempt employees to work off the clock.
- Common examples – Lunch Breaks, Cell Phone, Early to Work, Staying Late
- How should this situation be handled?

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#3 – FAILING TO FOLLOW STATE LAW OR COLLECTIVE BARGAINING AGREEMENT

- Luckily, for the most part Ohio differs only slightly from the federal law (mostly with minimum wage and/or child labor laws). Generally, where federal and state law conflict, the law that more generously benefits the employee must be followed. Be sure to check your state law before classifying employees as exempt, determining hours worked, calculating overtime, making a deduction, classifying an individual as an independent contractor, or taking any other pay-related action.

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#3 – FAILING TO FOLLOW STATE LAW OR COLLECTIVE BARGAINING AGREEMENT (continued)

- For those who are unionized, do not forget to check your collective bargaining agreement. While the bargaining agreement may not diminish one's rights under the federal law, it can increase one's entitlement to benefits under the FLSA (e.g., overtime for hours worked vs. overtime for active pay status, 8-hour overtime standard, and 40-hour overtime). You could also have dual calculation.

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#2 – MISCLASSIFYING AN INDEPENDENT CONTRACTOR

- This is a very common and expensive mistake. It can result in additional payroll taxes, fines, and pension payments. There are very specific requirements that must be met in order for an individual to be correctly classified as an independent contractor.
- One test that can be used to make this determination is the Internal Revenue Service's common law test. This test examines the amount of:
 - Behavioral control (e.g., who has control over how work is done)

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#2 – MISCLASSIFYING AN INDEPENDENT CONTRACTOR (continued)

- Financial control (e.g., whether the individual has unreimbursed expenses or realizes a profit or loss from the working relationship)
- Type of relationship between the employer and the individual (e.g., whether there are written contracts or employee-type benefits, such as health care or paid time off).
- Pension implications

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#2 – MISCLASSIFYING AN INDEPENDENT CONTRACTOR (continued)

- Employers may obtain an official determination from the IRS by submitting Form SS-8: Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding. Other governmental agencies, such as OPERS have similar tests and forms.
- OPERS also requires notice and acknowledgment forms for independent contractors.

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#1 – INCORRECT APPLICATION OF AN EXEMPTION

- The FLSA provides certain exceptions to the minimum wage and overtime requirements. These positions are commonly referred to as “FLSA-exempt.” These exemptions are narrowly defined and apply only to certain executive, administrative, and professional employees, outside sales personnel, and employees in certain computer-related occupations.
- The requirements to meet these exemptions are duty-driven and one’s job title alone is not enough. Whether one is paid on a “salary basis” is also taken into consideration.
- Tip: www.dol.gov – Wage and Hour Fact Sheets

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WHITE COLLAR EXEMPTIONS

Executive exemption. To qualify as an exempt executive, an employee must:

- Manage other workers as the primary job duty
- Direct the work of two (2) or more full-time employees
- Have the authority to hire, fire, discipline, promote, and demote others or make recommendations about these decisions; AND
- Earn a salary of at least \$455 per week.

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WHITE COLLAR EXEMPTIONS

Administrative exemption. An administrative employee generally must:

- Primarily perform office or non-manual work directly for company management or administration
- Primarily use his or her own discretion and judgment in work duties; AND
- Earn a salary of at least \$455 weekly.

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WHITE COLLAR EXEMPTIONS

Professional exemption. To qualify as an exempt professional, an employee must:

- Perform work requiring invention, imagination, originality, or talent in a recognized creative field—such as music, writing, acting, and the graphic arts; OR
- Perform work requiring advanced knowledge—work that is predominantly intellectual, requires a prolonged course of instruction, and requires the consistent exercise of discretion and judgment, such as law; medicine; theology; accounting; actuarial computation; engineering; architecture; teaching; various types of physical, chemical, and biological sciences; and pharmacy; AND

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WHITE COLLAR EXEMPTIONS

Professional exemption (continued)

- Earn a salary of at least \$455 per week (although doctors, lawyers, teachers, and many computer specialists need not meet this minimal earning requirement).

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SALARY THRESHOLD UPDATE

ON HOLD

The Final Rule focuses primarily on updating the salary and compensation levels needed for Executive, Administrative and Professional workers to be exempt. Specifically, the Final Rule:

- Sets the standard salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, currently the South (\$913 per week; \$47,476 annually for a full-year worker);
- Sets the total annual compensation requirement for highly compensated employees (HCE) subject to a minimal duties test to the annual equivalent of the 90th percentile of full-time salaried workers nationally (\$134,004); AND

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SALARY THRESHOLD UPDATE

ON HOLD

- Establishes a mechanism for automatically updating the salary and compensation levels every three (3) years to maintain the levels at the above percentiles and to ensure that they continue to provide useful and effective tests for exemption.
- Additionally, the Final Rule amends the salary basis test to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level
- Pending Injunction; hold on regulations by way of Presidential memorandum

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WHAT TO DO...

- Increase salary above threshold
- Salaried non-exempt and the fluctuating workweek
- Do not allow overtime to be worked except as necessary

NOW ... WAIT!

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WHAT TO DO...

Salaried Non-Exempt

- Salaried nonexempt employees receive a flat salary rate that is sufficient to provide employees at least minimum wage for all hours worked every workweek, provided employees meet the four requirements
 - 1) clear understanding
 - 2) salary will cover full workweek
 - 3) salary is at least minimum wage
 - 4) ½ times for all hours over 40

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WHAT TO DO...

Salaried Non-Exempt

- When they exceed more than 40 hours in a week, they receive overtime compensation.
- The basis of the calculation of their overtime compensation is the equivalent hourly rate the employee earns (66% savings).

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WHAT TO DO...

Salaried Non-Exempt

- Fixed Hours - \$1,000 per week
 - 37.5hr/work week.
 - Effective hourly rate \$26.66
 - Overtime rate - \$40.00 (1.5 x \$26.66)
- Fluctuating Hours - \$1,000 per week
 - Week 1: 20 hours worked, hourly rate \$50.00, no OT earned
 - Week 2: 40 hours worked, hourly rate \$25.00, no OT earned
 - Week 3: 45 hours worked, hourly rate \$22.00, \$55.55 earned in OT (total of 5 hours at \$11.11/hr.)

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EXEMPTIONS CHECKLISTS

Administrative Exemption

1. Does the employee receive a weekly salary of more than \$455 per week (\$23,660 annually for a full-year worker)?
2. Is the employee paid on a salary basis (i.e., the employee regularly receives, each pay period, a predetermined amount of compensation which is not subject to reduction because of variation in the quality or quantity of the work performed)?
3. Is the employee's primary duty the performance of non-manual or office work directly related to the management or general business operations (i.e., work directly related to the running or servicing of the business)?

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EXEMPTIONS CHECKLISTS

Administrative Exemption (Continued)

4. Does the employee's primary duty include the exercise of discretion and independent judgment with respect to matters of significance or makes recommendations for action to someone at a higher level?

- Source: 29 C.F.R. § 541.200 et seq., 29 C.F.R. § 541.602 and 29 C.F.R. § 541.700 et seq.

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EXEMPTIONS CHECKLISTS

Executive Exemption

1. Does the employee receive a weekly salary of more than \$455 per week (\$23,660 annually for a full-year worker)?
2. Is the employee paid on a salary basis (i.e., the employee regularly receives, each pay period, a predetermined amount of compensation which is not subject to reduction because of variation in the quality or quantity of the work performed)?
3. Is the employee's primary duty the management of the company, a formally established department or subdivision?
4. Does the employee customarily and regularly direct two (2) or more other full-time employees or several part-time employees working hours equal to two (2) full-time employees?

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EXEMPTIONS CHECKLISTS

Executive Exemption (Continued)

5. Does the employee have the power and authority to hire, fire, promote, etc., employees and to make managerial and supervisory decisions or are the employee's suggestions regarding such decisions given particular weight?

- Source: 29 C.F.R. § 541.100 et seq., 29 C.F.R. § 541.602 and 29 C.F.R. § 541.700 et seq.

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EXEMPTIONS CHECKLISTS

Professional Exemption

1. Does the employee receive a weekly salary of more than \$455 per week (\$23,660 annually for a full-year worker)?
2. Is the employee paid on a salary basis (i.e., the employee regularly receives, each pay period, a predetermined amount of compensation which is not subject to reduction because of variation in the quality or quantity of the work performed)?
3. Is the employee's primary duty 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?

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EXEMPTIONS CHECKLISTS

Professional Exemption

4. Is the employee's primary duty the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor?

- Source: 29 C.F.R. § 541.300 et seq., 29 C.F.R. § 541.602 and 29 C.F.R. § 541.700 et seq.

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QUESTIONS?



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