FLSA WAGE AND HOUR AND TEXAS PAYDAY ACT

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FLSA WAGE AND HOUR

A. FLSA regulations overview

The Fair Labor Standards Act (FLSA) is the federal law passed in 1938 to regulate minimum wages, maximum hours, overtime pay, equal pay and child labor standards in employment. 29 UCS § 201, *et seq.* Its purpose was to protect the country's workers from substandard wages and oppressive working hours and labor conditions. It was to ensure that each employee covered by the Act would receive a fair day's pay for a fair day's work and be protected from the evil of overwork as well as underpay. *Barrentine v. Arkansas /Best Freight System*, 450 U.S. 728, 739 (1981); *Williams v. Cigna Fin. Advisors, Inc.*, 197 F. 3d 752, 758 (5th Cir. 1999).

The FLSA casts a wide net. In general, its provisions apply to all employers and cover all employees who are not specifically exempt and who are either (1) engaged in interstate commerce or in the production of goods for interstate commerce, or employed by an enterprise engaged in such activities. The United States Department of Labor (DOL) is responsible for the administration and enforcement of the FLSA and related statutes. Within the DOL, the Wage and Hour Division of the Employment Standards Administration (WHD) has the authority for administering and enforcing the FLSA. In addition to issuing rules, regulations and interpretations of the FLSA, the WHD conducts inspections and investigations to determine compliance.

1. Independent Contractors not covered.

The FLSA applies only to bona fide employment relationships; independent contractors are not covered by the Act. *Wage and Hour Fact Sheet # 13;* 29 U.S.C. §203(d). The definition of "employer" is very broad in scope and broadly interpreted by the courts. It is one of the few statutes which can impose individual liability on various owners, corporate officers and even supervisors with direct control over the affected employees for violations. *See, e.g. Donovan v. Sabine Irrigation Co.*, 695 F. 2d 190 (5th Cir. 1983). The definition of "employee" is equally broad - "any individual employed by an employer." 29 U.S.C. §203 (e)(1). To employ means "to suffer or permit to work." If an employer knows or has reason to know that an employee is performing services for its benefit, the time spent by that employee likely will constitute compensable work time. As broad as these definitions are, about the only workers who are not covered by the FLSA are those who work as independent contractors.

Employers may seek to avoid the obligations and potential liability presented by the FLSA by classifying workers as "independent contractors," and paying them by means of a 1099, rather than through taxable payroll methods. While such classifications may be appropriate, the fact that an employer labels a worker as a contractor is not controlling. Basically, ask whether the employee is controlled by and economically dependant on your business or is he in business for himself. *Reich v. Circle C Investments, Inc.*, 998 F. 3d 324 (5th Cir. 1993). The significance of misclassifying an employee as an independent contractor cannot be overstated. In fiscal year 2008, the WHD found approximately 1,600 employees who had been inappropriately designated as independent contractors and assessed employers $3.1 million in FLSA civil money penalties.

To determine whether an individual is an employee under the FLSA, courts will focus on the economic reality of the relationship and will generally consider the following factors:

- The degree of the alleged employer's right to control the manner in which the work is to be performed (the more control you have over an individual, the more likely he will be deemed an employee);
- the alleged employee's opportunity for profit or loss;
- whether the alleged employee provides the tools, equipment or materials required for his task or whether he employs helpers;
- the degree of permanence of the working relationship;
- whether the service rendered requires a special skill; and
- the extent to which the alleged services in question are an integral part of the employing entity.

Robicheaux v. Radcliff Material, Inc., 697 F. 2d 662 (5th Cir. 1983). No one factor alone is determinative and the DOL or IRS will weigh the factors when considering whether an individual has been correctly classified as a contractor. If the DOL or taxing entity finds that you have incorrectly classified a worker, you will be obligated to pay overtime worked while the employee was performing services for your company, as well as the required withholdings.

CAVEAT: Review two recent cases with opposite results regarding whether electrical splicer employees working after Hurricane Katrina are employees or independent contractors: *Cromwell v. Driftwood Electrical Contractors*, 15 Wage & Hour Cas. 2d (BNA) 718 (5th Cir. Oct. 12, 2009) and *Thibault v. BellSouth Telecommunications, Inc., et al*, 2010 WL 2891603 (5th Cir. 2010)(court looked to 5 factors to determine proper status: whether relationship was permanent, amount of

control exercised over actual work, amount of skill required, extent of worker's and employer's relative investment and whether individual has opportunity for profit and loss and to what degree is it controlled by the alleged employer).

2. FLSA Basics.

The requirements of the FLSA extend to the following issues:

- Minimum wage (currently $7.25/hour, effective July 24, 2009) paid for all hours between the commencement and completion of the same workday
- Overtime (mandating non-exempt employees be compensated at rate of 1 ½ times regular rate for all hours worked over 40 in a workweek)
- Record keeping (verifying employers keep accurate records of worked time and compensation)
- Exemptions (verifying that employees who are treated as exempt from the FLSA's provisions have been accurately classified)
- Equal pay
- Enforcement of child labor laws
- Timely payment of wages and overtime

The FLSA does not apply to issues pertaining to paid leave, vacation, holiday or sick pay; mandatory meal or rest periods; daily overtime; shift premiums; reimbursement for mileage; pay raises, benefits, termination, payment of final wages to terminated employee or contractual disputes between employers and employees pertaining to compensation.

The FLSA does not require rest or meal periods. Employees must be paid for short breaks (generally 20 minutes or less) and such break time may not be offset against other compensable working time. 29 CFR § 785.18. Bona fide meal times need not be counted as hours worked unless the employee is required to work while eating; the legal test as to whether a meal time is compensable is whether the employee is completely relieved from duty for the purpose of eating a meal during that period. *Bernard v. IBP, Inc. of Nebraska*, 136 Lab. Cas. (CCH) 33,726 (5th Cir. 1998). See, for example, *Chao v. SelfPride*, 2005 WL 1400740 (4th Cir. 2005) where company and CEO who signed time sheets were both liable for FLSA violations. A group of "living assistants" at a home for the disabled worked 48-hour weekend shifts and were required to check on the residents every two hours. When those employees turned in their time sheets, the managers would routinely deduct 8 hours because each assistant supposedly got two 4-hour breaks. The CEO then signed off on the altered time sheets. However, because the employees could not leave the building during "breaks" and had to call the main office once an hour, the court found that the time was not their own and was compensable. The company and the CEO personally were ordered to pay $500,000 in wages and $155,000 in penalties.

3. Record keeping.

The FLSA requires employers to make, keep and preserve records containing the following information regarding employees and employee compensation:

- Name and social security number
- Home address, including zip code
- Date of birth
- Sex and occupation
- Time of day and week on which employees workweek begins
- Hourly rate of pay or basis of pay
- Nature of each payment claimed as an exclusion or deduction from the regular rate
- Total hours worked for each day and each week
- Straight pay, overtime pay and total wages paid
- Date of payment and pay period covered.

29 CFR §516.5. Under the Act, all records which constitute the primary sources of this information must be preserved for a period of three years for all current and former employees. Such records include payroll records, work certifications, and individual employment contracts. Supplementary records, such as time cards or work time schedules, must be preserved for at least two years. An employer would be advised to keep these records for three years as well because if there are no records to support the employer's position in litigation, the employee's word is presumptively correct. The records must be available within 72 hours following a request by the DOL. If litigation is involved, the employer must keep all relevant records for the duration of the litigation.

4. DOL powers.

The Wage and Hour Division of the U.S. Department of Labor is charged with interpreting and enforcing the FLSA. The WHD employs about 1300 people in 220 offices through out the country. It handles about 30,000 compliance actions per year, about 80% of which come from employees who have contacted the DOL. The focus has recently been on low-wage industries: construction, janitorial, hotel and motel, and day labor. The Agency files between 100-150 lawsuits each year.

The DOL enjoys broad investigative powers. These include the right to inspect the employer's premises and records, question employees, and investigate such "facts, conditions, practices or matter

necessary or appropriate to determine whether any person has violated any provision of the FLSA." 29 U.S.C. § 211(a). Limits on this power are minimal at best.

The most recently published data indicates that the Employment Standards Administration's Wage and Hour Division (WHD) recovered more than $185 million in back wages for over 228,000 employees in fiscal year 2008 to put the eight-year cumulative total of back wages collected by the agency at over $1.4 billion. The agency concluded 28,242 compliance actions and assessed over $9.9 million in civil money penalties. The DOL attributes its increase in part to its recently having placed "a major focus on bringing very large employers into compliance."

Recent examples: DOL announced that Dow Chemical of Freeport paid $861,647 in back wages to 648 operating engineers as a result of a two year federal investigation. The DOL claimed that Dow "failed to compensate employees for hours spent studying during mandatory training." The FLSA requires training to be counted as working time unless it is outside normal hours, is voluntary, is not job-related and no other work is concurrently performed.

McLane Co., Inc., a Temple, Texas wholesale distributor of food and grocery products has paid $1.56 million to 570 current and former employees for wage and hour violations. The DOL found that McLane incorrectly classified retail merchandising specialists at its Kentucky location as outside sales employees, exempt from the FLSA overtime provisions and failed to keep the required records of hours worked.

5. Collective Actions. In addition to the DOL, Section 216(b) of the Act permits employees to bring an FLSA lawsuit "on behalf of themselves and other employees similarly situated;" this "collective action" procedure has resulted in employers being hit with huge damage awards in collective active litigation or equally sobering amounts in settlements. Employers found to have violated the FLSA can be liable for two years of back pay, three years if willful. 29 U.S.C. §255. Moreover, employers can be required to pay liquidated damages in an amount equal to the amount of back pay liability, plus attorneys fees and interest. 29 U.S.C. §216(b). While each individual's claims for unpaid overtime wages may be quite small, when similarly situated plaintiffs join together, the resulting damages (and attorneys fees) can be enormous and devastating.

Recent actions include:

- Wal-Mart announced in Feb. 2009 that it agreed to pay as much as $640 million in what may be the largest settlement ever of wage and hour claims. The settlement covers 63 class action lawsuits brought by current and former employees in state and federal courts nationwide and must be approved by each of the 63 courts presiding over the cases. The various cases accuse Wal-Mart of failing to pay overtime, requiring employees to work off the clock and preventing them from taking rest and meal breaks.
- Large misclassification cases in 2009 and 2010 include Merrill Lynch ($43.5 million re: stock brokers); Staples ($42 million re: assistant store managers); Wachovia ($39 million re: financial adviser trainees); Washington Mutual ($38 million re: loan consultants); Cintas ($22.75 million re: delivery drivers)
- In March 2006, a jury in Tuscaloosa, Alabama, awarded a group of store managers for the Family Dollar Stores, $16.6 million in overtime because the company misclassified them as exempt. The award was doubled as liquidated damages and the company had to pay the employees' attorneys fees as well, with total damages of approximately $33 million.
- In settlement with the DOL during 2005, Cingular Wireless paid $5.1 million in back wages to almost 26,000 customer service employees, based on the fact that the workers performed work before and after "clocking in" to the companies computerized time keeping system.
- In January 2007, Wal-Mart agreed to a $33 million settlement with the DOL to settle allegations that it failed to include non-discretionary premiums and bonuses into overtime calculations.
- In a case with significant consequences to the financial industry, Merrill Lynch agreed to pay up to $37 million to approximately 3,250 of its California stock brokers to settle claims that it failed to pay overtime wages. The settlement was believed to spur interest in overtime pay claims by other stock brokers, as well as inside salespersons in other segments of the financial industry.
- Farmers Insurance Exchange ($90 million), Best Buy ($5.4 million), Shoney's ($18 million), Albertsons ($37 million) and Krystal Company ($13 million) have all been involved in and either lost or settled collective action claims.
- Seyfarth Shaw reported an analysis of the "top ten" class action and collective action settlements during 2008. Plaintiffs` lawyers secured hefty settlements in 2008 for employment discrimination, wage and hour, and

ERISA class actions. The top ten settlements totaled over $18.184 billion. For employment discrimination class actions, the monetary value of the top ten private plaintiff settlements entered into or paid in 2008 totaled $118.36 million. For wage and hour class actions, the monetary value of the top ten private settlements entered into or paid in 2008 totaled $252.7 million.

CAVEAT: Any settlement of an FLSA claim must be under the direction and approval of the DOL or pursuant to a court approval fairness review. Settlements of FLSA claims must resolve a bona fide dispute over something more than coverage.

B. Overtime

The FLSA provides that, in addition to minimum wage, employees must be paid overtime at a rate of not less than 1½ times their regular hourly rate for all hours worked over 40 hours during a 7-day workweek. 29 U.S.C. § 207. Generally, regular compensation includes all wages, salary, commissions, shift differentials, value of employer-provided meals and lodging, and any bonuses based on employee performance. 29 U.S.C. § 207(e). It does not include health or pension plan payments, holiday or sick pay, expense reimbursements, discretionary bonuses or gifts. Do not assume you can avoid the overtime requirements by paying employees on a salary basis. The overtime requirement applies to all employees, regardless of how they are compensated, unless the employer can prove that the employee is exempt from overtime requirements of the FLSA. Note, there is an overtime exception for certain interstate truck drivers subject to DOT regulations.

De Minimis Time: The DOL and the courts have recognized that "insubstantial or insignificant" periods of time outside scheduled working hours "which cannot as a practical matter be precisely recorded for payroll purposes," may be disregarded in recording working time. 29 CFR §785.47. Such time is considered *de minimis.*

Litigation has increased in trying to determine what amount of time is legitimately *de minimis* and what constitutes compensable working time. See, for example: *De Asencio v. Tyson Foods, Inc*, pending in the eastern district of Pennsylvania (is 6-13 minutes/day donning and doffing *de minimis?)*; *Chao v. Tyson Foods* in the northern district of Alabama (do you look at single employee or aggregate amount?); *Scott v City of New York*, 2008 Lexis 94075 (S.D.N.Y. 2008) (is time of less than 15 minutes spent writing end of day report compensable?). See also, *Von Friewalde, et al v. Boeing Aerospace Oper.*, 2009 Lexis 17346 (5th Cir. 2009) in which the 5th Circuit decided that obtaining standard tool bags (located in easily accessible cabinets near the plaintiffs' lockers), clocking in and out (a process that normally took seconds), and donning and doffing generic safety gear (*e.g.*, hearing and eye protection) involved a *de minimis* amount of time and therefore were non-compensable activities under the FLSA. The circuit court also held that the time the plaintiffs spent walking to and from their lockers at the beginning and end of each shift was non-compensable, as the Portal-to-Portal Act specifically provided that walking before and after the performance of an employee's principal activities was non-compensable. Finally, it added, donning and doffing of generic protection gear such as safety glasses and hearing protection were "non-compensable, preliminary tasks" under the Portal-to-Portal Act.

However, the 5th Circuit added, the following activities, if actually proven to involve more than a *de minimis* amount of time, were compensable as a matter of law: performing substantive tasks on Boeing computers, such as checking work-related emails and conducting research pertinent to job assignments; checking specialized tools in and out of the tool crib and, for those working as tool control attendants, preparing the tool crib prior to the shift and putting away tools at the close of the shift; and cleaning up work stations at the end of the shift. As these activities were necessary to the plaintiffs' principal duties and were performed for Boeing's benefit, they were "integral and indispensable" to the plaintiffs' jobs, the circuit court ruled.

Calculation of Overtime: The FLSA requires calculation of overtime on the basis of the 7-day workweek; however, it does not require that you pay employees on a weekly basis. 29 CFR §778.105. In determining how much pay, including overtime, an employee is entitled to receive at the close of the pay period, you must use the 7-day workweek to make the calculation. The FLSA does not permit averaging of hours over 2 or more weeks (certain exceptions apply).

Question: Laura works a 37.5 hour set weekly schedule as an administrative assistant. However, she is occasionally called upon to work longer hours. During a recent 4 week period, Laura worked 37.5 hours the first week, 43 hours the second week, 39 hours the third week and her standard 37.5 hours the fourth week. Laura's average time worked over the 4 week period is under 40 hours. Is she owed overtime?

Answer: Yes. Laura must be paid 3 hours of overtime for the second week. The employer does not escape this obligation simply because Laura worked under 40 hours on average during this period.

Compensatory time in lieu of overtime. It is illegal for private employers to offer compensatory time off ("comp time") instead of paying overtime; "comp time" is available as an alternative to overtime payments only to governmental agencies. An employer may manage its employee's work schedules and rearrange an employee's hours within the same workweek to avoid overtime. However, such arrangements may not carry beyond the week in question.

Question 1: Jose, a full-time hourly warehouse worker, typically works a 38 hour weekly schedule, Monday through Friday. For payroll purposes, the 7 day workweek for all warehouse employees runs from 12:01 a.m. Sunday through midnight the following Saturday. Because of the receipt of a particularly large shipment of inventory, by the end of the day Thursday, Jose has already worked 38 hours. By the end of the week, things have slowed. Jose's supervisor, anxious to avoid overtime, tells him not to come in on Friday. Is this ok?

Question 2: The warehouse stays busy all week, and Jose logs 48 hours by the end of the day Friday. Because next week looks to be slow, Jose's supervisor tells him that, if he wants, instead of receiving 8 hours of overtime pay for the week, he can take a long weekend, taking Monday off, with pay. Ok?

Question 3: On Friday afternoon of the week he worked 48 hours, Jose approaches his supervisor, saying he needs to take the day off on a Friday four weeks from now to attend a wedding. He asks if the company can hold his 8 hours of overtime and give him a future pay day off instead so he will not lose pay during the week of the wedding. Jose offers to sign a note stating he agrees to this arrangement. Ok?

Answers: Unless some other agreement applies, the employer is permitted to order Jose to take a day off during the same week in order to avoid overtime. However, the conduct described in Questions 2 and 3 is illegal. An employer may not give an employee comp time in lieu of overtime, under any circumstances, even if Jose makes the request and agrees to the arrangement.

CAVEAT: Controlling overtime. Many employers have written policies prohibiting unauthorized work, including unauthorized overtime. Be aware that even if the employee has violated your policy by working extra time, he must be paid for all time worked. As an FLSA-covered employer, your options for dealing with an employee who has worked unauthorized hours are limited to following your disciplinary procedures. You may warn, suspend, even terminate an employee who continues to work unauthorized overtime - however the employer must still pay the employee for all time worked.

CAVEAT: Use the very useful DOL tool that employers and employees can use to calculate overtime pay: http://www.dol.gov/elaws/otcalculator.htm

C. Commissions and Bonuses

Before computing the amount of overtime pay to which an employee is entitled, you must first determine the regular rate of pay (which cannot be less than the federal minimum wage). The regular rate includes all remuneration for employment and can be calculated by dividing the employee's total remuneration for a week's work by the number of hours worked in that workweek. You are required to take into account such additional compensation as commissions, bonuses, shift differentials or other premium payments.

Commissions. Commissions are payments to employees contingent on the provision of services or the sale of goods. They are typically determined as a percentage of gross receipts of profits. As an example, a salesman's commission may be 10% of gross receipts or 25% of gross profits or $10 per unit sold. Generally, commissions must be included in the regular rate of pay, regardless of the formula used for their computation and regardless of whether the commission is the sole source of the employee's compensation or is paid in addition to

a guaranteed salary, hourly rate or some other basis.[1] The fact that an employer may pay a commission on a basis other than weekly does not excuse the employer from including the commission in the employee's regular rate.

Regulations provide that where commissions cannot be determined until sometime after the regular payday for particular workweek, the employer may disregard the commission in computing the regularly hourly rate until the amount of commission can be ascertained. Until that time, overtime pay is computed based on the regular rate exclusive of the commission. When the commission is determinable, it must be apportioned over the respective workweek and the additional overtime pay attributable to the commission must be computed and paid accordingly.[2] If there are delays in crediting sales or debiting returns or allowances which affect the computation of commissions, the amounts paid to the employee for the computation period will be accepted as the total commission earnings of employee during such period, despite the fact that the credits or debits may have resulted from work which actually occurred during a previous time period.

Under the FLSA, employees may be paid on a straight commission basis; however, problems may arise. Basically, for any individual employed solely on a commission basis, the minimum wage requirement will be satisfied as long as weekly commissions paid to such employee are sufficient to meet the minimum wage requirements for that week. In a situation where an employee is paid an hourly rate for part of the week and a commission basis for the balance, minimum wage requirements will be satisfied only if the earnings for the commission and the earnings for the hourly rate together equal an average earning of at least the minimum wage. (currently $7.25/hour, effective 7-24-09).

However, a major problem can arise when employees sell large items or earn large commissions. If the employer pays commission on a weekly basis, an employee could earn $1,000 in commission in one week and no commission the following week; the employee would be owed minimum wages for all hours worked during the second week. The Act permits an employer and employee to enter into an agreement whereby the employee on his regular payday would receive the statutory minimum wage for all hours worked, plus any amount of commissions earned over that pay period which exceeds the statutory minimum wage required.

Wrong way: An employer settles commission on a weekly basis and pays all of its employees on a weekly basis. In a 4 week period, an employee earns commissions and is paid as follows:

Week	1	2	34
Commission	-0-	$3,000	-0-	-0-

> This employer is in violation of the Act in weeks 1, 3 and 4. However, had the employer established a monthly payroll, it would have been in compliance during that month.

The DOL recognizes that commissions are not necessarily earned in one week and allows employers to use a period longer than a workweek to compute minimum wage. Employers may use a commission plan where the commissions are reduced by free and clear payments to the employee. Wage and Hour has approved commission plans where employers use a monthly commission period to determine an employees earnings; however, the computation and recording of hours worked must be on a weekly basis and the employee must be paid the applicable minimum wage, free and clear for each hour worked in the work week on the regular pay for that week.

CAVEAT: Employers may find themselves in violation of the Act if the minimum wage payments in weeks when no commissions are earned are treated as draws against future commissions rather than a guarantee of the applicable minimum wage paid free and clear. In other words, compliance with the Act would be assured where the employer guarantees that for any workweek where commissions are insufficient to meet the minimum wage requirements, the employee will be paid an additional amount sufficient to make up the difference without any corresponding reduction in payments allocable to any workweek.[3]

Bonuses. Sums paid to employees in addition to the regular earnings are considered bonuses. All bonus payments must be included in the regular rate for purposes of computing overtime unless they can be characterized as discretionary. Section 7(e) of the FLSA defines discretionary bonuses as sums paid where the "fact" of payment and "amount" of payment are determined at the sole discretion of the employer. The payments must not be paid pursuant to any prior contract,

[1] If the employee is exempted as an outside sales employee per 29 CFR § 541.5 or exempted from overtime per 29 USC § 207 (I), overtime does not have to be paid.

[2] 29 CFR § 778.119

[3] *Olsen v. Superior Pontiac-GMC, Inc.*, 765 F.2d. 1570 (11th Cir. 1985).

agreement or promise causing the employee to expect such payments regularly. This type of provision could turn a discretionary bonus into nondiscretionary and thus, includeable in the regular rate for purposes of overtime.

A bonus promised to an employee upon hiring, as a term of employment would be a nondiscretionary bonus. Bonuses announced as an inducement for greater productivity or efficiency are nondiscretionary, as well as sums paid as incentives to decrease absenteeism, such as "attendance bonuses." These bonuses must be included in the regular rate. Other bonuses deemed nondiscretionary include bonuses for quality and accuracy of work, bonuses contingent upon the employee's continued employment and sums paid as premiums for working undesirable shifts. An employer who announces his intent to pay a bonus in advance of the period for which it will be paid has abandoned its discretion by creating an expectation of payment by his employees. Because it is now known that there will be a payment, although the amount of the bonus is unknown, the bonus is now a nondiscretionary bonus.

Likewise, an employer who announces a discretionary bonus "payable whenever financially feasible" based upon a fixed percentage of sales or productivity, has abandoned its discretion as to the amount of payment. For example, an employer tells the employees that a bonus of 1% of sales will be paid whenever the employer, in its sole discretion, decides the financial condition warrants payment. Because the amount of the bonus is known, although the fact of the payment is not known, the bonus is now nondiscretionary. The employer's discretion as to both the amount and the fact of the bonus must be maintained until a time quite close to the end of the period for which the hours will be paid. Note that " A bonus paid at Christmas or on other special occasion may be excluded from the regular rate even though it is paid with regularity ...**so long as the amounts are not measured by or directly dependent upon hours worked, production or efficiency."** 29 C.F.R. §778.212(c)(emphasis added).

CAVEAT: If an employer wants to ensure that a bonus is considered a discretionary bonus and overtime will not be paid on the bonus, the employer:

- Must not tell the employees that they will receive a bonus until shortly before paying the bonus;
- Must not tell the employees the amount or method of calculation of the bonus until shortly before paying the bonus.

D. Permissible and impermissible deductions

The FLSA was enacted for the purpose of enabling employees the ability to maintain a minimum standard of living; thus, the minimum wage must normally be paid free and clear. As articulated in the seminal case of *Brennan v. Herid*, 491 F 2d 1, 4 (5th Cir. 1974), this means that an employee "should have both the freedom and responsibility to allocate his minimum wage among competing economic and personal interests."

Therefore, with respect to deductions taken from wages owed an employee, the general rule is that any such deduction may not reduce an employee's cash wage below the statutory minimum. The only exception to this general rule is for those deductions which are legal, such as deductions for taxes assessed against an employee. Also, deductions made above the minimum wage standard in non-overtime weeks are always allowed. A distinction is made between legal deductions (meals, lodging and other facilities provided primarily for the benefit of the employee), which may allow the cash payment to the employee to fall below the applicable minimum wage and illegal deductions which may <u>not</u> reduce the cash payments below the applicable minimum wage.

CAVEAT: Compensation received for overtime hours may not be used to offset "illegal" deductions made below the minimum wage.

Common deductions:

- **Taxes** - taxes assessed against an employee may legally be deducted from the employee's wages, even if such deductions reduce wages below the minimum standard. This includes social security, state and federal withholding and other state, federal or local taxes and assessments. However, an employer is not permitted to deduct any tax that he is required to bear by law (state unemployment compensation tax).
- **Third Party Assignees** - Generally, voluntary assignments made by an employee are permitted. For instance, where an employee directs the employer to pay a sum to creditor or other third party, the employer may deduct the sum from the wages owed, provided that neither the employer nor a person acting in his behalf, derives any profit or benefit from the assignment. Such deductions would include union dues, purchase of savings bonds, payment of insurance premiums, contributions to religious, charitable or social organizations. The assignment of wages may be prohibited if the arrangement was entered into for a purpose of evading the law.
- **Court Orders** - Employers may also be

obligated to make payments to third persons pursuant to a court order. For example, a court may order an employer to pay a sum for the benefit of the employee, to a creditor, trust, third party under garnishment, income deduction order, child support, bankruptcy proceeding. The payment to third persons under these circumstances is considered equivalent to a payment of wages to the employee.

- **Losses, shortages and recovery of stolen money** - Employers may not make deductions from wages of its employees for cash shortages or business losses where such deductions reduce wages below the minimum wage standard. For example, a retail business employer who holds his employees responsible for cash shortages, bad or uncollectible customer credit card charges and stolen merchandise will be in violation of minimum wage provisions if the deduction from wages reduces the wages paid below the statutory minimum.

  Even when an employee voluntarily agrees to the deduction for shortages or losses, the employer may not make such a deduction below the minimum standard. The Fifth Circuit held that "this amounts to nothing more than an agreement to waive the minimum wage requirements," and thus is an invalid agreement.[4] There exists several exceptions to this general rule. (i.e. an employee is convicted of misappropriation). In such a case, the employer may lawfully deduct the amount misappropriated from the convicted employee's wages even if the deduction results in wages paid below the minimum standard.

  Another exception to the rule occurs when an employer makes deductions from an employee's paycheck to recoup amounts expended by the employer to pay a fine imposed on the employee and to compensate the owner of an automobile damaged by the employee in a traffic accident. Courts have found that such payments were the equivalent of an advance or loan made to the employee and, thus, permissible.

- **Loan payments** - The only deductions permitted from minimum wages for debts owed by employees to employers are advances and loans. This is distinguishable from a situation where the employee owes a debt directly to the employer. In this situation, because of the employment relationship between the two parties and the superior bargaining power of the employer, the voluntary assignment of wages is inherently suspect. The general rule in such a case is that an employer may not make otherwise impermissible deductions based on a "voluntary" assignment of wages.

  For example, an employer may not make deductions from an employee's wages to recoup business losses even if the employee voluntarily agrees to the deductions. This situation is distinguished from one involving an advance against a salary or loan agreement between the employer and employee since an advance or loan is equivalent to free and clear payment of wages and that the employee has complete freedom in allocating his minimum wage among competing economic and personal interests.

Examples: An employee borrows $1,000 from employer at 6% interest. The employer may deduct payments for the principle from minimum wages, but not for the interest.

Employee wrecks employer's truck causing $600 in damages. Employer demands payment and employee requests an advance against his minimum wage. The deduction for the "advance" is a violation of the Act.

- **Tools of trade** - Courts have never recognized tools of the trade to be "facilities" as defined by the FLSA; therefore, if an employer provides his employees with tools of the trade, he may not count the value of such tools towards the payment of wages. In other words, an employer may not make deductions from the wages of its employees for the tools of the trade furnished to an employee if such deductions reduce the wage below minimum.
- **Uniforms and cleaning** - The general rule as to the cost of uniforms and their maintenance is if an employer requires its employees to wear uniforms, then the cost of the uniforms cannot be imposed upon the employees if it would reduce their wage below minimum. When an employee is required to purchase a uniform, the employer must reimburse him for the cost to the extent the expense cuts into the minimum wage required. It is important to remember that the reimbursement must be made on the regular

[4] *Mayhue's Stores v. Hodgson*, 464 F. 2d 1196 (5th Cir. 1972)

payday for the work week in which the expense was incurred and cannot be spread over the life of the garment.

E. Classification of Exempt Employees

The FLSA covers every individual who is engaged in interstate commerce and requires the payment of minimum wage for all hours worked and overtime for all hours worked over 40 in any one workweek. However, Section 13(a)(1) of the Act exempts from overtime requirements of section 207 those employees who occupy certain "bona fide executive, administrative, or professional" positions, as well as certain computer employees. 29 U.S.C. §§ 213(a)(1), (17). In 2004, the DOL promulgated revisions to correct "confusing, complex and outdated" regulations that were "difficult for the average worker or small business owner to understand." An employer does not need to track the time or pay overtime to such properly classified exempt employees.

However, exemptions from the overtime requirements of the FLSA are just that - exceptions to the rule. They are very narrowly construed and the employer will always bear the burden of proving that an employee is correctly classified as exempt. *Singer v. City of Waco,* 324 F.3d 813, 820 (5th Cir. 2003), *cert. denied,* 540 U.S. 1177 (2004); *Billings v. Rolling Frito-Lay Sales, LP,* 413 F. Supp. 2d 817, 820 (S.D. Tex. 2006).

Deciding how to classify a new hire is one of the most important decisions an employer will ever make, because mistaken classification can lead to enormous potential exposure and financial impact if this classification turns out to be incorrect. The FLSA exemptions are misunderstood and misapplied; here are common mistakes and fallacies regarding FLSA exemptions:

- If I put an employee on salary, he becomes exempt.
- If an employee has a manager, supervisor or administrator title, he is exempt.
- If an employee is highly compensated, he is exempt.
- If an employee is college educated and performs white collar office work, he is exempt.
- If an employee is performing inside sales work, he is exempt.
- I have an employee who wants to be paid on salary rather than hourly and does not want to record on his time. Based on his wishes, it is alright for me to treat him as exempt.
- Everyone else in my industry classifies this position as exempt, therefore I am entitled to as well.

The FLSA contains dozens of exemptions, many of which are obscure and highly specialized. However, the most well-known and commonly used are the so-called "white collar" exemptions for executive, administrative and professional employees, as well as outside sales employees and computer professionals. Generally, in order to qualify for a white collar exemption, an employee must:

1. Perform duties which fit the FLSA's test for the exemption; and
2. Be paid at least $455 per week on a salary basis.

An employee's duties are a critical factor in determining exempt status - merely paying an employee a salary and giving him an exempt sounding job title are not enough to justify the application of an exemption. See, *Vanstory - Frazior v. CHHS Hospital,* 2010 Lexis 387(E.D.Pa. 2010)(plaintiff could not be considered exempt as either executive or administrative because she had no authority to hire or fire and evidence unclear whether her "supervisory" responsibilities were her most important duties); WHD Administrator's Interpretation No. 2010-1 (March 24, 2010)(mortgage loan officer who performs typical duties does not qualify as exempt; primary duty is making sales); *Robinson -Smith v. Govt. Employees Ins. Co.,* 590 F.3d 886 (D.C. Cir. 2010)(insurance adjustor misclassified as exempt; discretion used by adjustor in settling claims is not sufficient to qualify under administrative exemption).

On August 23, 2004, the DOL began enforcing the new regulations regarding these exemptions. The biggest change in the Fair Pay amendments was the elimination of the old law-duties tests distinction. The new regulations increase the minimum salary level for exempt employees, providing that any employee making less than $455 per week will automatically be nonexempt and must be paid overtime. Only employees that earn more than that threshold amount, and otherwise pass the salary basis test, will be subject to the new single standard duties test.

The salary basis means an amount of money that the employee regularly receives each pay period on a weekly or less frequent basis. It is a predetermined amount and it is not subject to reduction because of variations in the quality or quantity of work performed. 29 CFR §541.118(a). Subject to certain exceptions, the employee must receive the full salary for any week in which he performs any work without regard to the number of hours or days he worked. Any deductions for discipline will cause a loss of the exempt status. *Auer v. Robbins,* 117 S. Ct. 905 (1997); 29 CFR §541.118(a)(2) (true executive, administrative or professional employees are not disciplined by piecemeal deductions, but are

terminated, demoted or given restricted assignments). However, deductions may be made "when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident." *Id.* Deductions may also be made for absences of a day or more occasioned by sickness or disability if the deductions are made in accordance with a bona fide sickness or disability plan. No employee is entitled to be paid for any workweek in which he performs no work. 29 CFR §541.602(a).

SAFE HARBOR: As amended in 2004, the regulations include a "safe harbor" provision whereby an employer may preserve the exemption notwithstanding that improper deductions were made, and regardless of the reason for the improper deductions, by maintaining a clearly communicated policy prohibiting deductions proscribed under the salary basis test. 29 C.F.R. §541.603.

To take advantage of this "safe harbor," the employer's policy must: include a complaint procedure; employees must be reimbursed for any improper deductions; and the employer must make a good faith commitment to comply in the future. 29 C.F.R. §541.603(d). An employer that "willfully violates the policy by continuing to make improper deductions after receiving employee complaints" cannot invoke the safe harbor provision and loses the exemption "during the period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions."

CAVEAT: Download the DOL fact sheets and analyze your white collar positions to verify that they perform the duties required under the new amendments.

Also, add a "safe harbor" policy to the employee handbook. It can be as simple as " Company will reimburse any exempt employee's pay that has been reduced in violation of the FLSA. If you believe that your pay has been reduced incorrectly, please notify HR."

F. Retaliation

The FLSA prohibits retaliation against an employee who files a complaint or testifies in a proceeding under the Act. 29 U.S.C. §215(a)(3). The anti-retaliation provision only protects employees who assert their statutory rights. The employee must either file or threaten to file an adverse action, actively help other employees in asserting their rights, or otherwise engage in activities that could be perceived as assertion of rights under the FLSA. *McKenzie v. Renberg's, Inc.*, 94 F. 3d 1478 (10th Cir.), *cert. denied* 137 L. Ed. 2d 682 (1996).

G. Texas Payday Act/Payments Upon Termination

The Texas Payment of Wages Act, ("Texas Payday Law") governs the time and manner of the payment of wages in Texas. The statute's objective is to deter employers from unlawfully withholding wages to employees. The Payday Law does this by providing employees with an avenue for the enforcement of wage claims through the Texas Workforce Commission. No employer is to small to be covered by the Payday Act, but the law applies to private employers only. An employee who qualifies as a bonafide executive, administrator or professional under the FLSA must be paid at least once a month. All other employees must be paid at least twice a month. As much as possible, each pay period within the month must consist of an equal number of days.

An employer must "designate" paydays. Failure to do so results in paydays falling by default on the 1st and 15th day of each month. The employer must post, in a conspicuous work place location, notices informing employees of scheduled paydays.

An employee who has been terminated from employment must be paid in full within 6 days (not work days) after the employee is discharged. Payment must include vacation pay and sick pay pursuant to any written agreement. An employee who quits his employment must be paid in full on or before the next regularly scheduled payday.

Texas law prohibits an employer from withholding or diverting any part of an employee's wages unless the employer:

- Is ordered to do so by an appropriate court of law;
- Is authorized to do so by federal law (income taxes or student loans);
- Is authorized to do so by Texas law (child support payments); or
- Has obtained written authorization from the employee.

Accordingly, it is prudent for an employer to obtain written authorization from an employee to withhold payment from a last paycheck for employer property (i.e. uniforms, tools) which is not returned upon termination.

The general rule is that you cannot make payroll deductions that cut an employee's pay to a level below the minimum wage. Examples of illegal deductions include:

- Fines for infractions, poor work or other disciplinary reasons
- Deductions for damage to company property
- Repayment of shortages

- Repayment for employee theft, unless the employee has been convicted
- Voluntary payments from an employee that do not involve payroll deductions, such as a cash bond required at the time of hiring
- Wardrobe costs deducted from paychecks for employee clothing purchases.

Pay Day Claims - Except for public employers, all Texas business entities, regardless of size, are covered by the Texas Payday Law. Other than close relatives and independent contractors, all persons who perform a service for compensation are considered employees. An employee who feels that he or she has not been paid all wages earned may file a complaint with the Texas Workforce Commission (TWC). Complaint forms may be obtained from local TWC offices, or upon request through the mail, through the agency website, or by calling 1-800-832-9243 /TDD 1-800-735-2989.

The completed form, along with any information necessary to support the claim, may be mailed to TWC at the address shown on the complaint form or may be faxed to 1-512-475-3025. The complaint must be signed, and the signature of the claimant must be verified by a Notary Public or by any employee of TWC. A wage claim must be filed no later than 180 days after the date the claimed wages originally became due for payment.

Upon receipt of a wage claim, TWC notifies the employer of the claim by sending the employer a copy of the wage claim and a form on which to furnish the employer's response. An investigator from TWC's Labor Law Section, using the information furnished by the employee and the employer, along with any additional information that the investigator feels to be essential, issues a written decision [Preliminary Wage Determination Order (PWDO)] as to whether wages are due, and if so, the amount due.

Either party dissatisfied with the PWDO may appeal that ruling to the Special Hearings Department. Requests for hearing must be made in writing no later than the 21st day after the PWDO is mailed to the parties by the Labor Law Section. This time limit is mandatory.

U.S. Department of Labor
Wage and Hour Division

APPENDIX

U.S. Wage and Hour Division
(Revised July 2009)

Fact Sheet #13: Employment Relationship Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information concerning the meaning of "employment relationship" and the significance of that determination in applying provisions of the FLSA.

Characteristics

An employment relationship under the FLSA must be distinguished from a strictly contractual one. Such a relationship must exist for any provision of the FLSA to apply to any person engaged in work which may otherwise be subject to the Act. In the application of the FLSA an employee, as distinguished from a person who is engaged in a business of his or her own, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which he or she serves. The employer-employee relationship under the FLSA is tested by "economic reality" rather than "technical concepts." It is not determined by the common law standards relating to master and servant.

The U.S. Supreme Court has on a number of occasions indicated that there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. The Court has held that it is the total activity or situation which controls. Among the factors which the Court has considered significant are:

1) The extent to which the services rendered are an integral part of the principal's business.

2) The permanency of the relationship.

3) The amount of the alleged contractor's investment in facilities and equipment.

4) The nature and degree of control by the principal.

5) The alleged contractor's opportunities for profit and loss.

6) The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.

7) The degree of independent business organization and operation.

There are certain factors which are immaterial in determining whether there is an employment relationship. Such facts as the place where work is performed, the absence of a formal employment agreement, or whether an alleged independent contractor is licensed by State/local government are not considered to have a bearing on determinations as to whether there is an employment relationship. Additionally, the Supreme Court has held that the time or mode of pay does not control the determination of employee status.

Requirements

When it has been determined that an employer-employee relationship does exist, and the employee is engaged in work that is subject to the Act, it is required that the employee be paid at least the Federal minimum wage of $7.25 per hour effective July 24, 2009, and in most cases overtime at time and one-half his/her regular rate of pay for all hours worked in excess of 40 per week. The Act also has youth employment provisions

which regulate the employment of minors under the age of eighteen, as well as recordkeeping requirements.

Typical Problems

(1) One of the most common problems is in the construction industry where contractors hire so-called independent contractors, who in reality should be considered employees because they do not meet the tests for independence, as stated above. (2) Franchise arrangements can pose problems in this area as well. Depending on the level of control the franchisor has over the franchisee, employees of the latter may be considered to be employed by the franchisor. (3) A situation involving a person volunteering his or her services for another may also result in an employment relationship. For example, a person who is an employee cannot "volunteer" his/her services to the employer to perform the same type service performed as an employee. Of course, individuals may volunteer or donate their services to religious, public service, and non-profit organizations, without contemplation of pay, and not be considered employees of such organization. (4) Trainees or students may also be employees, depending on the circumstances of their activities for the employer. (5) People who perform work at their own home are often improperly considered as independent contractors. The Act covers such homeworkers as employees and they are entitled to all benefits of the law.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

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U.S. Department of Labor
Wage and Hour Division

U.S. Wage and Hour Division
(Revised July 2008)

Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information on the exemption from minimum wage and overtime pay provided by Section 13(a)(1) of the Fair Labor Standards Act as defined by Regulations, 29 CFR Part 541.

The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations.

See other fact sheets in this series for more information on the exemptions for executive, administrative, professional, computer and outside sales employees, and for more information on the salary basis requirement.

Executive Exemption

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

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Administrative Exemptions

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

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be 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
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Professional Exemption

To qualify for the **learned professional** employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

To qualify for the **creative professional** employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Computer Employee Exemption

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

- The employee must be compensated **either** on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week **or**, if compensated on an hourly basis, at a rate not less than $27.63 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- The employee's primary duty must consist of:
  1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
  2) 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;
  3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
  4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

Outside Sales Exemption

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

- The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- The employee must be customarily and regularly engaged away from the employer's place or places of business.

Highly Compensated Employees

Highly compensated employees performing office or non-manual work and paid total annual compensation of $100,000 or more (which must include at least $455 per week paid on a salary or fee basis) are exempt from the

FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

Blue Collar Workers

The exemptions provided by FLSA Section 13(a)(1) apply only to "white collar" employees who meet the salary and duties tests set forth in the Part 541 regulations. The 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. FLSA-covered, non-management employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the FLSA, and are not exempt under the Part 541 regulations no matter how highly paid they might be.

Police, Fire Fighters, Paramedics & Other First Responders

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

Other Laws & Collective Bargaining Agreements

The FLSA provides minimum standards that may be exceeded, but cannot be waived or reduced. Employers must comply, for example, with any Federal, State or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the FLSA. Similarly, employers may, on their own initiative or under a collective bargaining agreement, provide a higher wage, shorter workweek, or higher overtime premium than provided under the FLSA. While collective bargaining agreements cannot waive or reduce FLSA protections, nothing in the FLSA or the Part 541 regulation relieves employers from their contractual obligations under such bargaining agreements.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

When the state laws differ from the federal FLSA, an employer must comply with the standard most protective to employees. Links to your state labor department can be found at www.dol.gov/whd/contacts/state_of.htm.

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U.S. Department of Labor
Wage and Hour Division

U.S. Wage and Hour Division

(Revised July 2008)

Fact Sheet #17B: Exemption for Executive Employees Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information on the exemption from minimum wage and overtime pay provided by Section 13(a)(1) of the Fair Labor Standards Act as defined by Regulations, 29 CFR Part 541.

The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations.

See other fact sheets in this series for more information on the exemptions for administrative, professional, computer and outside sales employees, and for more information on the salary basis requirement.

Executive Exemption

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

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Primary Duty

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

Management

Generally, "management" includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity

and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

Department or Subdivision

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

Customarily and Regularly

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

Two or More

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

Particular Weight

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

Exemption of Business Owners

Under a special rule for business owners, an employee who owns at least a bona fide 20-percent equity interest in the enterprise in which employed, regardless of the type of business organization (e.g., corporation, partnership, or other), and who is actively engaged in its management, is considered a bona fide exempt executive.

Highly Compensated Employees

Highly compensated employees performing office or non-manual work and paid total annual compensation of $100,000 or more (which must include at least $455 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

Where to Obtain Additional Information

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When the state laws differ from the federal FLSA, an employer must comply with the standard most protective to employees. Links to your state labor department can be found at www.dol.gov/esa/contacts/state_of.htm.

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Wage and Hour Division

U.S. Wage and Hour Division
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Fact Sheet #17C: Exemption for Administrative Employees Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information on the exemption from minimum wage and overtime pay provided by Section 13(a)(1) of the Fair Labor Standards Act as defined by Regulations, 29 CFR Part 541.

The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations.

See other fact sheets in this series for more information on the exemptions for executive, professional, computer and outside sales employees, and for more information on the salary basis requirement.

Administrative Exemption
To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be 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
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

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

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

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

Discretion and Independent Judgment
In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term must be applied in the light of all the facts involved in the employee's particular employment situation, and implies that the employee has authority to make an independent choice, free from immediate direction or supervision. Factors to consider include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval, and other factors set forth in the regulation. The fact that an employee's decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.

Matters of Significance
The term "matters of significance" refers to the level of importance or consequence of the work performed. An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

Educational Establishments and Administrative Functions
The administrative exemption is also available to employees compensated on a salary or fee basis at a rate not less than $455 a week, or on a salary basis which is at least equal to the entrance salary for teachers in the same educational establishment, and whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment. Academic administrative functions include operations directly in the field of education, and do not include jobs relating to areas outside the educational field. Employees engaged in academic administrative functions include: the superintendent or other head of an elementary or secondary school system, and any assistants responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program; the principal and any vice-principals responsible for the operation of an elementary or secondary school; department heads in institutions of higher education responsible for the various subject matter departments; academic counselors and other employees with similar responsibilities. Having a primary duty of performing administrative functions directly related to academic instruction or training in an educational establishment includes, by its very nature, exercising discretion and independent judgment with respect to matters of significance.

Highly Compensated Employees
Highly compensated employees performing office or non-manual work and paid total annual compensation of $100,000 or more (which must include at least $455 per week paid on a salary or fee basis) are exempt from the

FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

When the state laws differ from the federal FLSA, an employer must comply with the standard most protective to employees. Links to your state labor department can be found at www.dol.gov/whd/contacts/state_of.htm.

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

1-866-4-USWAGE
TTY: 1-866-487-9243
Contact Us

U.S. Department of Labor
Wage and Hour Division

U.S. Wage and Hour Division
(Revised July 2008)

Fact Sheet #17D: Exemption for Professional Employees Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information on the exemption from minimum wage and overtime pay provided by Section 13(a)(1) of the Fair Labor Standards Act as defined by Regulations, 29 CFR Part 541.

The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations.

The specific requirements for exemption as a bona fide professional employee are summarized below. There are two general types of exempt professional employees: learned professionals and creative professionals.

See other fact sheets in this series for more information on the exemptions for executive, administrative, computer and outside sales employees, and for more information on the salary basis requirement.

Learned Professional Exemption

To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Primary Duty

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

Work Requiring Advanced Knowledge

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

Field of Science or Learning

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

Customarily Acquired by a Prolonged Course of Specialized Intellectual Instruction

The learned professional exemption is restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best evidence of meeting this requirement is having the appropriate academic degree. However, the word "customarily" means the exemption may be available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. This exemption does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.

Creative Professional Exemption

To qualify for the **creative professional** employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Invention, Imagination, Originality or Talent

This requirement distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. Exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Whether the exemption applies, therefore, must be determined on a case-by-case basis. The requirements are generally met by actors, musicians, composers, soloists, certain painters, writers, cartoonists, essayists, novelists, and others as set forth in the regulations. Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent. Journalists are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product.

Recognized Field of Artistic or Creative Endeavor

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

Teachers

Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. Exempt teachers include, but are not limited to, regular academic teachers; kindergarten or nursery school teachers; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrument music teachers. The salary and salary basis requirements do not apply to bona fide teachers. Having a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge includes, by its very nature, exercising discretion and judgment.

Practice of Law or Medicine

An employee holding a valid license or certificate permitting the practice of law or medicine is exempt if the employee is actually engaged in such a practice. An employee who holds the requisite academic degree for the general practice of medicine is also exempt if he or she is engaged in an internship or resident program for the profession. The salary and salary basis requirements do not apply to bona fide practitioners of law or medicine.

Highly Compensated Employees

Highly compensated employees performing office or non-manual work and paid total annual compensation of $100,000 or more (which must include at least $455 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

When the state laws differ from the federal FLSA, an employer must comply with the standard most protective to employees. Links to your state labor department can be found at www.dol.gov/whd/contacts/state_of.htm.

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WAGE DEDUCTION AUTHORIZATION AGREEMENT

(Texas Payday Law Rule 821.28(b) requires written authorizations for deductions to be as specific as possible as to the amount and purpose of the deduction and to make it clear that the deductions will be made from the employee's wages. Rule 821.28(d) requires deductions to be applied to their intended purposes. When drafting such an agreement, try to be specific enough to where a reasonable employee would be able to predict how much a particular deduction would be in a particular situation. What appears below is not an official form - it is only a sample that is meant to illustrate how such deductions may be authorized in writing.)

I understand and agree that my employer, _____ (the Company), may deduct money from my pay from time to time for reasons that fall into the following categories:

1. my share of the premiums for the Company's group medical/dental plan;
2. any contributions I may make into a retirement or pension plan sponsored, controlled, or managed by the Company;
3. installment payments on loans or wage advances given to me by the Company, and if there is a balance remaining when I leave the Company, the balance of such loans or advances;
4. installment payments on loans based upon store credit that I use for my own personal purchases, including the value of merchandise or services that I purchase or have purchased for personal, non-business reasons using my employee charge account or credit card, an account or credit card assigned to another employee, or a general company account or credit card, regardless of whether such purchase was authorized, and if there is a balance remaining when I leave the Company, the balance of such store credit or charges;
5. if I receive an overpayment of wages for any reason, repayment to the Company of such overpayments (the deduction for such a repayment will equal the entire amount of the overpayment, unless the Company and I agree in writing to a series of smaller deductions in specified amounts);
6. the cost to the Company of personal long-distance calls I may make, or messages I may send, using Company phones (land lines or cell phones) or Company accounts, of personal faxes sent by me using Company equipment or Company accounts, or of non-work related access to the Internet or other computer networks by me using Company equipment or Company accounts;
7. the cost of repairing or replacing any Company supplies, materials, equipment, money, or other property that I may damage (other than normal wear and tear), lose, fail to return, or take without appropriate authorization from the Company during my employment (except in the case of misappropriation of money by me, I understand that no such deduction will take my pay below minimum wage, or, if I am a salaried exempt employee, reduce my salary below its predetermined amount)*;
8. the cost of Company uniforms and of cleaning the uniforms (the Company will deduct only the actual price it pays for uniforms and cleaning costs)**;
9. the reasonable cost or fair value, whichever is less, of meals, lodging, and other facilities furnished to me by the Company in connection with my employment***;
10. administrative fees in connection with court-ordered garnishments or legally-required wage attachments of my pay, limited in extent to the amount or amounts allowed under applicable laws;
11. if I take paid vacation or sick leave in advance of the date I would normally be entitled to it and I separate from the Company before accruing time to cover such advance leave, the value of such leave taken in advance that is not so covered;
12. the value of any time off for absences to which paid leave is not applied (non-exempt salaried employees will have all such unpaid leave deducted from their salary, while exempt salaried employees will experience salary reductions only in units of a full day or week at a time, depending upon the exact nature of the absence, unless partial-day deductions are specifically allowed under federal law); and
13. if my employer pays any insurance premiums or retirement system contributions ("payments") on my behalf that I would normally make under the applicable Company benefit plan, the amount of such payments made by the Company, such payments being an advance of future wages payable to me.
14. (any other items appropriate for your company's situation - go over this with your attorney).

I agree that the Company may deduct money from my pay under the above circumstances, or if any of the above situations occur. I further understand that the Company has stated its intention to abide by all applicable federal and Texas wage and hour laws and that if I believe that any such law has not been followed, I have the right to file a wage claim with appropriate Texas and federal agencies.

_____ _____
Signature of Employee Date

_____
Employee's Name - Printed

_____ _____
Company Representative Date

Notes for employers to keep in mind - do not include the following comments in any form used by the company. They are here only to explain about particular types of deductions:

* (Deductions for this purpose that take the pay below minimum wage, or that cut into an exempt, salaried employee's salary, are allowed only in the case of misappropriation of money by the employee; in addition, the employer must be able to prove that the employee was personally responsible for the misappropriation.)

** (Caution: this is a type of deduction that is strongly restricted by federal wage and hour regulations - see the provision for uniform cost deductions in Part 531 of the regulations (Title 29 of the Code of Federal Regulations, Part 531), and also Section 30c12 of the Department of Labor's Field Operations Handbook - both of those provisions are explained here.)

*** (See Part 531 of the wage and hour regulations, as well as Sections 30c00 - 30c09 of the Field Operations Handbook - click here.)

Note: do not include the asterisks in the form or the parenthetical comments immediately above in an actual form to be signed by employees. The asterisks and explanations are included here only to call your attention to the issues in question. If you have any questions, call the TWC employer Commissioner's office at the toll-free number 1-800-832-9394, or consult an employment law attorney of your choice.

See also: Deduction Problems under the Texas Payday Law

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US Department of Labor
Employment Standards Administration
Wage and Hour Division

U.S. Wage and Hour Division
December 2008

WAGE AND HOUR COLLECTS OVER $1.4 BILLION IN BACK WAGES FOR OVER 2 MILLION EMPLOYEES SINCE FISCAL YEAR 2001

The Employment Standards Administration's Wage and Hour Division (WHD) recovered more than $185 million in back wages for over 228,000 employees in fiscal year 2008 to put the eight-year cumulative total of back wages collected by the agency at over $1.4 billion. The agency concluded 28,242 compliance actions and assessed over $9.9 million in civil money penalties.[1]

WHD Enforcement Statistics – All Acts	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Back Wages Collected	$131,954,657	$175,640,492	$212,537,554	$196,664,146	$166,005,014	$171,955,533	$220,613,703	$185,287,827
Employees Receiving Back Wages	216,647	263,593	342,358	288,296	241,379	246,874	341,624	228,645
Complaints Registered	29,085	31,413	31,123	31,786	30,375	26,256	24,950	23,845
Enforcement Hours	998,937	1,070,600	1,032,879	1,000,739	969,776	951,971	899,406	882,419
Average Days to Resolve Complaint	139	129	108	92	85	93	97	97
Concluded Cases	38,051	40,264	39,425	37,842	34,858	31,987	30,467	28,242

The number of registered complaints declined for the fourth year, reflecting the agency's emphasis on complaint intake strategies that screen incoming calls and correspondence to ensure that the issue is properly within WHD's enforcement jurisdiction, allowing the agency to focus resources on targeted investigations. The percentage of WHD complaint investigations that found no violation of WHD laws remained low at 20 percent as a result of this strategy. The percentage of "no violation" cases concluded during the last ten years peaked at 41 percent in FY 1998.

[1] The concluded case numbers represent all investigations and conciliations for which the Department has completed work during the fiscal year. Cases are generally concluded when back wages are collected and distributed, civil money penalties are paid, no violations are disclosed, or no further action is appropriate.

OVER 197,000 EMPLOYEES RECEIVED FAIR LABOR STANDARDS ACT BACK WAGES

In fiscal year 2008, more than 197,000 employees received a total of $140.2 million in minimum wage and overtime back wages as a result of Fair Labor Standards Act (FLSA) violations. WHD collected over $123 million in back wages for FLSA overtime violations and more than $16 million for FLSA minimum wage violations. Back wages for overtime violations represented approximately 88 percent of all FLSA back wages collected, and the number of employees receiving overtime back wages represented about 93 percent of all employees due FLSA back wages. WHD investigators examined FLSA compliance in over 24,500 of the 28,242 cases concluded during the fiscal year. They found FLSA violations in 19,000 of those cases: approximately 78 percent. Minimum wage and / or overtime violations were cited in 17,700 cases. The most frequently cited violation (in term of the number of employees affected) was the payment of straight-time pay for overtime-hours worked, which affected approximately 52,000 workers. Approximately 34,000 workers were not paid for all hours worked. WHD investigators identified approximately 1,600 workers who did not receive the minimum wage or the correct overtime pay because their employer misdesignated the employees as independent contractors. WHD also assessed employers $3.1 million in FLSA civil money penalties.

	Violation Cases	Back Wages Collected	Percent of FLSA Back Wages	Employees Receiving Back Wages (duplicated)	Percent of Employees Receiving FLSA Back Wages
Minimum Wage	10,085	$16,557,184	12%	42,199	21%
Overtime	10,105	$123,686,617	88%	182,964	93%

Note: The number of employees receiving back wages sums to more than the 197,000 because one employee may be due back wages for both a minimum wage and an overtime violation. The number of violations cases sums to greater than 17,700 for the same reason.

VIOLATIONS OF THE PART 541 OVERTIME SECURITY REGULATIONS DECLINE

Of the $140.2 million in FLSA back wages collected, nearly $12.8 million was collected for approximately 9,600 employees as a result of violations of the Overtime Security regulations (29 C.F.R. Part 541). This compares to $16 million collected for approximately 12,000 employees in fiscal year 2007. The violation cited in the greatest number of cases was one in which the employees did not meet the duties test required for exempt executive employees. Violations of the executive duties test were cited in 524 cases and resulted in back wages of $3.4 million for approximately 2,600 employees. Although cited in fewer cases, back wages resulting from determinations that employees failed to meet the duties test for administratively exempt employees were nearly $4 million and affected approximately 2,900 employees.

BACK WAGES COLLECTED FOR WORKERS IN LOW-WAGE INDUSTRIES CONTINUES TO INCREASE

In fiscal year 2008, the agency collected over $57.5 million in back wages for approximately 77,000 workers in low-wage industries—an increase of over 77 percent of back wages collected during fiscal year 2001 for violations in the same group of low-wage industries. The number of employees receiving back wages in the nine tracked low-wage industries increased nearly 10 percent over those receiving back wages in FY 2001. WHD expended approximately 35 percent of its FY 2008 enforcement hours on cases in the nine low-wage industries listed below.

Low-Wage Industries Statistics	Cases	Back Wages	Employees
Agriculture	1,600	$2,116,712	5,397
Day Care	746	$1,058,579	3,070
Restaurants	3,942	$18,917,992	23,433
Garment Manufacturing	385	$2,596,986	2,278
Guard Services	633	$13,595,350	13,138
Health Care	1,302	$11,403,813	15,768
Hotels and Motels	875	$2,445,094	5,034
Janitorial Services	507	$3,469,956	5,417
Temporary Help	309	$1,945163	3,368
Total Low-Wage Industries	**10,299**	**$57,549,645**	**76,903**

Low-Wage Industries Statistics	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Back Wages Collected	$32,470,183	$38,608,612	$39,595,382	$43,141,911	$45,783,743	$50,566,661	$52,722,681	$57,549,645
Employees Receiving Back Wages	69,469	86,432	80,772	84,897	96,511	86,780	86,560	76,903
Cases In Low-Wage Industries	14,267	14,016	12,962	12,625	12,468	11,172	11,382	10,299

LOW-WAGE WORKERS IN THE GULF COAST RECEIVE OVER $11 MILLION IN BACK WAGES

Since the 2005 hurricanes, WHD has opened 1,102 hurricane-related cases and collected over $11.3 million in back wages for 17,700 workers in concluded cases. The agency also has collected an additional $2 million in back wages on cases not yet concluded. Since January 2006, WHD has detailed over 35 additional investigators and managers to the Gulf Coast offices

affected by Hurricanes Katrina and Rita. WHD hired four additional investigators and a manager in New Orleans, Louisiana, and two additional investigators in Gulfport, Mississippi. In addition, WHD transferred two team leader investigators to New Orleans for multi-year details and opened a satellite office space in Kenner, Louisiana, to provide greater access to the community. WHD also hired an additional investigator, a WHD technician, and a new manager in Mobile, Alabama.

In September 2008, Hurricane Ike came ashore along the east Texas Gulf Coast. In response, WHD began detailing additional staff to that section of the Gulf Coast region to investigate allegations of labor standards violations and to conduct directed investigations of government remediation and reconstruction projects. The agency also began hiring additional investigative staff, including additional Spanish-language investigators, to support the increased work associated with hurricane-related clean-up efforts.

WHD continued its work with a number of groups to provide outreach to workers in the Mississippi and Louisiana Gulf Coast region, including the Hispanic Apostolate of the Archdiocese of New Orleans, the Mexican Consulate, and the Mississippi Immigrants Rights Alliance. The WHD Houston District Office, in response to Hurricane Ike, has contacted its partners in the *Justice and Equality in the Workplace* partnership initiative to encourage workers to come forward with allegations of labor law violations.

This past January, WHD hosted a National Prevailing Wage Conference for the government contracting community, which included employers, contracting agencies, employee representatives, and advocacy organizations.

Included among the more significant cases concluded this fiscal year are:

- T.L. Wallace Construction Inc., of Columbus, Mississippi—Wallace was a subcontractor to Heritage Inc., which held the contract with the Federal Emergency Management Agency (FEMA) for the inspection and repair of trailers provided to people affected by Hurricane Katrina. The firm agreed to pay $168,220 in back wages to 27 employees for violations of the McNamara O'Hara Service Contract Act (SCA) and the Contract Work Hours and Safety Standards Act (CWHSSA).

- LJC Defense Contracting Inc. in Dothan, Alabama—LJC entered into a contract with the U.S. Army Corps of Engineers to install blue tarps as temporary roofing protection on structures damaged by the hurricanes. The company paid $202,508 in back wages after an investigation found that 828 current and former construction workers were not properly paid as required by the Davis Bacon Act (DBA) and the Contract Work Hours and Safety Standards Act (CWHSSA).

- ICF Emergency Management LLC, headquartered in Fairfax, Va., and Quadel Housing Services Inc., headquartered in Washington, D.C.—These private contractors were hired by the state of Louisiana to administer recovery and rebuilding "Road Home" grants to property owners. The contractors paid a total of $225,275 in back wages to 399 current

and former housing advisors who were misclassified as exempt from the FLSA minimum wage and overtime requirements.

In June 2008, WHD filed a lawsuit against Houston-based Universal Project Management Inc. and Irving, Texas-based Fluor Enterprises Inc. for failing to pay overtime back wages amounting to more than $1.8 million to 154 workers who were not properly paid in the wake of Hurricanes Katrina and Rita.

WHD Continues Strong Child Labor Enforcement

Results for fiscal year 2008 show a total of 4,734 minors found illegally employed, an average of 4.2 minors illegally employed per investigation. The majority of child labor violations occurred when workers under the age of 16 worked too many hours, too late at night, or too early in the morning. In total, 2,785 minors were employed in violation of the child labor hours standards. Hazardous Occupation Order (HO) violations were found in 41 percent of the cases with child labor violations. Violations of HO No. 12 (paper balers) were the most common type of HO violation found, followed by violations of HO No. 11 (dough mixers). The high number of minors found illegally employed in violation of HO No. 12 is consistent with WHD's FY 2008 initiative to investigate establishments likely to employ minors in violation of this HO. WHD assessed over $4.2 million in child labor civil money penalties in fiscal year 2008.

Child Labor Statistics	FY 2001	FY 2002	FY 2003	FY2004	FY 2005	FY 2006	FY 2007	FY 2008
Directed Child Labor Cases	2,021	2,105	2,031	2,155	1,406	952	1,285	1,269
Cases With Child Labor Violations	2,103	1,936	1,648	1,616	1,129	1,083	1,249	1,129
Minors Employed In Violation	9,918	9,690	7,228	5,840	3,703	3,723	4,672	4,734
Minors Per Case	4.7	5	4.4	3.6	3.3	3.4	3.7	4.2
Cases With HO Violations	876	747	654	459	396	361	410	466
Minors Employed In Violation of HOs	2,060	1,710	1,449	1,087	1,091	994	1,000	1,617

The percent of investigator enforcement time spent in examining child labor compliance increased from 6.7 percent of all enforcement time in fiscal year 2007 to 6.9 percent in fiscal year 2008. In addition to conducting directed child labor investigations of employers, WHD investigators examine employers' compliance with child labor laws in all on-site investigations. This past fiscal year, WHD investigators examined child labor compliance in over 17,360 investigations. Thirty-nine percent of the cases with child labor violations (438) were investigations in which the primary Act being investigated was an act other than child labor. In

most cases, the registration Act or primary Act was the FLSA or the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

Declines in the number of young workers illegally employed from FY 2001 may also be related to the continued overall decrease in the employment of workers 16 to 19 years of age. The Bureau of Labor Statistics Current Population Survey shows a drop in the employment-population ratio of 16- to 19-year-olds from 42.3 percent in 2001 to 34.8 percent in 2007. The annual employment level of 16- to 19-year-olds fell from approximately 6,740,000 in 2001 to 5,911,000 in 2006.

FAMILY AND MEDICAL LEAVE ACT ENFORCEMENT COMPLAINTS DECLINED

The number of Family and Medical Leave Act (FMLA) complaint cases concluded in fiscal year 2008 continued to decline. While the number of no violation cases concluded during the fiscal year remained constant, the number of violation cases declined by eight percent. Termination of employees seeking FMLA leave continues to be the primary reason that employees filed a complaint. The number of FMLA complaint cases has declined over the last five years. This corresponds to a similar decrease in the percentage of cases in which no violation was found. As with complaints in general, the trend reflects an emphasis on more efficient complaint intake strategies to ensure that registered complaints are those on which the agency can act.

During fiscal year 2008, WHD continued to promote FMLA compliance through its outreach program. WHD field offices participated in over 161 FMLA compliance assistance events in fiscal year 2008. Approximately 9 percent of all compliance assistance events undertaken by WHD are focused on increasing compliance with FMLA.

FMLA Enforcement Statistics	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Number of Complaint Cases	2,790	3,501	3,565	3,350	2,784	2,161	1,983	1,889
Percent of No-Violation Cases	48%	50%	54%	55%	51%	49%	45%	47%
Nature of Complaint								
Refusal to Grant FMLA Leave	629	741	815	697	647	522	459	416
Refusal to Restore to Equivalent Position	360	400	370	369	328	261	242	220
Termination	1,123	1,503	1,567	1,473	1,132	870	764	757

FMLA Enforcement Statistics	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Failure to Maintain Health Benefits	62	71	46	48	50	31	29	39
Discrimination	616	786	767	763	627	477	489	457
Status of Compliance Action								
No Violation Cases	**1,343**	**1,766**	**1,911**	**1,848**	**1,429**	**1,069**	**896**	**894**
Employer Not Covered	58	63	68	75	37	39	27	29
Employee Not Eligible	164	224	199	238	176	152	82	105
Complaint Not Valid	953	1,281	1,417	1,301	1,058	765	689	655
Other	168	198	227	234	158	113	98	105
Violation Cases	**1,447**	**1,735**	**1,654**	**1,502**	**1,355**	**1,092**	**1,087**	**995**
Number of Employees Affected	1,627	2,077	1,867	1,742	1,626	1,200	1,675	1,082
Amount of Back Wages	$2,983,936	$3,731,929	$2,397,876	$2,311,781	$1,867,807	$1,772,342	$1,573,501	$1,532,505

FISCAL YEAR 2009 INITIATIVES

WHD will maintain a presence in the Gulf Coast region, including the recently affected areas of the Texas Gulf Coast as clean-up and reconstruction activities continue. In addition to this effort, WHD regions have planned regional and local initiatives for fiscal year 2009. These initiatives continue to employ the strategies of compliance assistance, partnerships, and directed enforcement to increase compliance with the FLSA, including child labor, in low-wage industries. In FY 2009, WHD will continue to investigate employers who are most likely to employ young workers in violations of HO No. 12 (balers). These child labor initiatives are typically concentrated in shopping malls, retail stores, and theaters. WHD's fiscal year 2009 low-wage initiatives continue in those industries, such as restaurants, health care, hotels and motels, grocery stores, day care, and construction in which the agency is most likely to find minimum wage and overtime violations. WHD investigators will also continue to look for situations in which employers' misdesignation of employees as independent contractors results in FLSA violations. As it does each year, WHD will undertake regional and district enforcement initiatives in agriculture to increase compliance with the all labor standards statutes applicable to that industry and in reforestation to increase MSPA and SCA compliance. WHD will also continue to focus on increasing compliance among prior violators through both directed and complaint investigations and to effectively manage its complaint program to increase labor standards outcomes for the greatest number of workers.

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