

# FLSA/Wage & Hour Basics

James P. Wilkins, Esq.

*OSBA Certified Specialist in Labor &  
Employment Law*

Kastner Westman & Wilkins, LLC  
3480 West Market Street, Suite 300  
Akron, OH 44333

330.867.9998

[jwilkins@kwwlaborlaw.com](mailto:jwilkins@kwwlaborlaw.com)



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# What Is Wage & Hour Law About?



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- Establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments.

# What Are the Laws?

- Federal Fair Labor Standards Act (FLSA) (primary)
  - Applies to all employees of certain enterprises having workers engaged in, or producing or handling goods or services in, interstate commerce.
- Ohio minimum wage law
  - Applies to all employees of Ohio businesses with annual revenues of \$297,000.
- No preemption: federal law provides minimum employee rights; state laws supplement.
  - Example: Ohio's current minimum wage is \$8.10 (10<sup>th</sup> highest in U.S.); federal is \$7.25. Ohio min. wage thus applies to employees covered by both statutes.
- Always Consider BOTH Laws when tackling wage & hour issue

# Where To Find Answers?

- Statutes
  - Federal Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*
  - Ohio
    - Minimum Wage Law, R.C. 4111.01 *et seq.*
      - Codifies Ohio Const., Article II, Section 34(a)
    - Wage payment law, R.C. 4113.15
- Federal Regulations
  - 29 CFR Part V
    - Notable sections:
      - 29 C.F.R. § 541.1 *et seq.* (exemptions)
      - § 785.1 *et seq.* (hours worked)
      - § 778.1 *et seq.* (overtime)
      - § 553.1 *et seq.* (special rules for public employers)
- Department of Labor (DOL) Opinion Letters (2009 or prior)
- DOL Field Operations Handbook
- Court cases

# Where To Pursue Claims?

- No administrative exhaustion requirement
  - But federal complaints may be filed with Department of Labor, Wage and Hour Division, and
  - State complaints with the Ohio Department of Commerce.
- Violations may also be pursued in state and federal courts
  - State and federal courts have concurrent jurisdiction for FLSA claims

# FLSA's Overtime Rule

29 C.F.R. § 778.1 *et seq.*

- The FLSA requires an employer to compensate an employee for hours worked over 40 hours in a workweek at a rate not less than one and one-half times the employee's regular rate of pay.
- However, some employees are exempt from the FLSA.

# Exempt v. Non-Exempt

- The burden is on the employer to show by clear and convincing evidence that employee's job duties and responsibilities fall within an exemption.
- Exempt status is determined based on the employee's actual duties and responsibilities; neither the job title nor job descriptions are determinative.
- The employer's claim of exemption will be construed narrowly and in favor of the employee.

# Exempt v. Non-Exempt



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- White Collar Exemptions
  - To be exempt, an employee must meet a two-prong test.
    - The employee's primary duty must be the performance of executive, administrative or professional functions as defined in the regulations.
    - The employee must be compensated on a salary basis.

# Executive Exemption

29 C.F.R. § 541.1 *et seq.*

- The primary duty of an employee covered by the executive exemption must be the management of the enterprise, or a department or subdivision of the enterprise.
- The employee must :
  - customarily and regularly direct the work of two or more full-time employees.
  - Have the authority to hire, fire, or promote employees or effectively recommend the same.
  - be paid at least \$455 per week.

# Executive Exemption

- For purposes of the executive exemption, “management” includes:
  - Interviewing, selecting, and training employees.
  - Directing and assigning the work of employees.
  - Evaluating employees.
  - Disciplining and discharging employees.
  - Controlling the flow or work.
  - Determining materials to be bought, sold, or stocked.
  - Planning and controlling the budget.
  - Supervising employees only in the manager’s absence is not sufficient.
- Employers continue to misunderstand the executive exemption and to apply it to those classified as “manager,” “assistant managers,” etc. even when such individuals do not satisfy the criteria for the exemption.



# Professional Exemption



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29 C.F.R. 541.300 *et seq.*

- Applies to employees who:
  - are paid at least \$455 per week, and
  - whose primary duty is to perform work that requires “knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction,” or requires “invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.”
- Traditional “learned professions” that qualify for this exemption include law, medicine, theology, accounting, engineering, architecture, teaching, sciences, and pharmacy.



# Professional Exemption



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- The DOL regulations cite numerous examples:
  - registered or certified medical technologist;
  - registered nurses;
  - dental hygienists;
  - physician assistants;
  - CPAs and similar accounting professionals;
  - degreed chefs;
  - athletic trainers; and
  - licensed funeral directors.



# Administrative Exemption



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## 29 C.F.R. § 541.200

- The employee must exercise discretion and independent judgment with respect to matters of significance.
- The employee also must be paid at least \$455 per week.
- The primary duty of an employee covered by the administrative exemption must be to perform office or non-manual work that is directly related to management or the general business operations of the employer.

# Administrative Exemption

- The DOL regulations give several examples of positions that may qualify for the administrative exemption, including:
  - insurance claims adjusters;
  - financial advisors;
  - the leader of an administrative team;
  - executive or administrative assistant who has authority regarding matters of significance;
  - human resources managers; and
  - purchasing agents.
- Some work, however, will ordinarily not be exempt, including:
  - Ordinary inspection work following standardized techniques and procedures;
  - Examiners or graders; or
  - Public sector inspectors or investigators.



# Exemptions Other Than White Collar

- There also are specific occupations that are entirely exempt from the overtime provisions of the FLSA
- Many of these exemptions are set forth in Section 13 of the FLSA and include the following categories of employees, e.g.:
  - Announcers, news editors, and chief engineers of radio and television stations in small communities;
  - Drivers employed by taxicab operators;
  - Drivers and drivers' helpers making local deliveries and paid on the basis of trip rates, if the government finds that this arrangement has the general effect of reducing hours worked to the statutory straight-time maximum;
  - Employees with respect to whom the Secretary of Transportation has power to establish maximum hours of service under the Motor Carriers Act.



# Independent Contractor v. Employee



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- If a person is not an “employee,” then the person is not covered by the FLSA. Therefore, a person who is working as a *bona fide* independent contractor is not subject to the minimum wage and overtime provisions of the FLSA.
- The Supreme Court has explained that courts must determine whether, as a matter of “economic reality,” an individual is an employee or an independent contractor.
- Employers are always well advised to document an independent contractor relationship through the use of an appropriately drafted independent contractor agreement.

# Independent Contractor v. Employee



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- Over the years, the federal courts have identified six factors to be used in determining whether a person is an independent contractor for purposes of the FLSA. These factors include:
  - Whether the person performs services that are an integral part of the employer's business;
  - The permanency of the relationship;
  - The amount of the worker's investment in facilities and equipment in order to perform his work;
  - The nature and degree of control exercised by the principal;
  - Whether the worker has an opportunity for profit or loss through the work performed; and
  - The amount of initiative, judgment or foresight the worker must exercise in the performance of the work.

# When May Employers Deduct Pay from a Salaried-Exempt Employee?

## 29 C.F.R. § 541.602

- An employee's salaried-exempt status may be destroyed through improper deductions.
- To treat an employee as salaried exempt, the employee must be paid on a salary basis which means that white collar employees must receive their full, pre-determined salary for any week in which they perform any work without regard to the quantity or quality of work performed.
- Each job must be unique, rather than a series of jobs repeated an indefinite number of times, the fee basis must be an agreed rate, and the employee must earn \$455 per week if the employee worked 40 hours.

Permissible Deductions	Impermissible Deductions
During an employee's first and last weeks of work (proportionate pay is allowed)	Absences occasioned by the employer (e.g. plant shutdown)
Absences of a day or more for personal reasons other than sickness or disability	Absences due to jury duty, witness duty or temporary military leave
Whole-day absences occasioned by sickness, when in excess of # of paid sick days accrued under bona fide sick leave plan.	Personal absences of less than one day
FMLA leave	Discipline other than suspension of one or more days
Unpaid disciplinary suspensions of one or more full days (if in good faith for violating workplace conduct rule or major safety rule), and imposed pursuant to written policy applicable to all employees.	

# When May Employers Deduct Pay from a Salaried-Exempt Employee?



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- Employers are afforded a window of correction, whereby isolated or inadvertent deductions will not cause loss of exemption if they are reimbursed.
- An employer does not lose the exemption for improper deductions if it has a “safe harbor” policy. The “safe harbor” applies when:
  - There is a clearly communicated policy that prohibits improper pay deductions and includes an employee complaint procedure;
  - The employer reimburses for improper deductions; and
  - The employer makes a good faith commitment to comply in the future.



# “Hours Worked” Pitfalls



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29 C.F.R. § 785.1 *et seq.*

- Common pitfalls generally involve not paying a non-exempt employee for all hours worked.
- There are several common ways this is done:
  - Not allowing an employee an uninterrupted lunch period.
  - Only compensating for “authorized” hours worked.
  - Turning a blind eye to “diligent” employees.
  - Not properly compensating travel time.

# Not Allowing Uninterrupted Lunch Period



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- This occurs in several contexts. Some examples:
  - Requiring a receptionist or other office employee to “watch the phone” during lunch; and
  - Repeatedly requiring employees to assist with “emergencies.”
- If the lunch period is paid, the employer may legally interrupt it.



# Only compensating for “authorized” hours worked



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- Whether authorized or not, any hours worked must be paid.
- The remedy for unauthorized overtime is discipline, not non-payment.



# Turning a blind eye to “diligent” employees

- This is common among office or administrative non-exempt employees who:
  - “work from home”;
  - leave everyday with files under arm; or
  - where the manager receives e-mails from employees after hours.
- The current hyper-production may be outweighed by future wage-hour litigation.

# Not properly compensating travel time

- Common with employees who work at a remote site.
  - Generally, the commute to the worksite is not hours worked.
  - This may change if the employee is required to pick up tools, vehicles, assignments, etc. before traveling to the work site.
- With travel arrangements made for employees' convenience, the employer may limit liability by documenting communication with employees.
- This discussion does not apply to overnight travel.
  - Overnight travel is work time when it cuts across the employee's normal work schedule; that is, the employee is simply substituting travel for his/her regular at-work duties.
  - If an employee regularly works from 8:00 a.m. to 5:00 p.m. Monday through Friday, travel during Saturday/Sunday would be considered work time as well.
  - However, the usual meal period(s) would not be considered work time. Time spent in travel away from home outside of regular work hours is not considered work time.
  - Any work that an employee performs while traveling must, of course, be counted as hours worked even if these hours are outside his/her normal work schedule.

# Calculating Overtime

- In order to determine overtime hours, an employer starts by totaling the number of hours an employee worked in any given week.
- If the number is greater than 40, the employee is due overtime for the excess hours.
- It makes no difference if the employee worked on totally unrelated job assignments or if he or she worked for two joint employers; the employee is still entitled to overtime if he or she worked more than 40 hours.

# Do employees have to be compensated on an hourly basis?



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- No. However, no matter how the employee is paid, the compensation must be converted to an equivalent hourly rate from which the overtime rate can be calculated.
  - **Hourly rate:** If more than 40 hours are worked, at least one and one-half times the regular rate for each hour over 40 is due.
  - **Piece rate:** Divide the total weekly earnings by the total number of hours worked in that week. The employee is entitled to an additional one-half times this regular rate for each hour over 40.
  - **Salary:** Divide the salary by the number of hours for which the salary is intended to compensate. Employee is entitled to an additional one-half times this regular rate for each hour over 40.

In no case may the regular rate be less than the minimum wage required by the applicable minimum wage!!

# What about bonuses?

- Many types of bonuses are normally included in computing an employee's regular rate. These include the following:
  - production bonuses;
  - bonuses paid for performing work in less than an established time;
  - cost of living bonuses; and
  - attendance bonuses.
- “Discretionary” bonuses may be excluded in computing an employee's regular rate if the employer retains discretion both as to the payment itself and the amount thereof until a time close to the end of the period in which the bonus is paid



# Workweek Defined

- An employee's workweek is a fixed and regularly recurring period of 168 hours -- seven consecutive 24-hour periods.
- The workweek need not coincide with the calendar week; it may begin on any day and at any hour of the day.
- A single workweek may be established for an entire plant or company, or different workweeks may be established for different employees or groups of employees.
- Once the beginning time of an employee's workweek is established, it remains fixed regardless of the schedule of hours worked by him. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the FLSA.

- Averaging of hours over two or more weeks, even for weeks falling within the same pay period, not permitted.
  - Example: if employee works 35 hours one week and 45 hours the next, he or she must receive overtime pay for the 5 overtime hours worked in the second week, even though the average number of hours worked in the two weeks is only 40.
  - 8 and 80 exception allows hospitals and residential care facilities to use a 14-day work period pursuant to advance agreement with healthcare workers.
- General rule: overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends.
  - Although overtime must be computed on a workweek basis, there is no requirement that overtime compensation be paid weekly.
- When the correct amount of overtime compensation cannot be determined until some time after the regular pay period, the requirements of the Act will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable.

# Ohio Law



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- Primarily used
  - To pursue minimum wages violations
    - Due to Ohio's higher minimum wage
  - To recoup late wages
    - R.C. 4113.15 requires semimonthly payment of wages
    - If more than 30 days late, employee (and former employee) is entitled to unpaid wages, plus liquidated damages: greater of 6% interest or \$200.
    - May include PTO, depending on policy
  - Employee access to wage records
    - Generally, employees are not entitled to access to personnel files in Ohio.
    - Major exception:
      - Employers must maintain a record of the name, address, occupation, pay rate, hours worked for each day worked and each amount paid an employee.
      - Employees are entitled to this information on request. R.C. 4111.14(G).
- \* The other exception is for access to medical records. 4113.23(A).



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# Questions

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