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Advanced Wage and Hour Law

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The materials and opinions presented by the speaker at this session represent the speaker's views, are for educational and informational purposes only, are not intended to be legal advice and should not be used for legal guidance or to resolve specific legal problems. In all cases, legal advice applicable to your organization's own specific circumstances should be sought.

INTRODUCTION

The Importance of Compliance

Enforcement

- By the government
- By employees

Penalties for Non-Compliance

- Collect back wages, liquidated damages, attorney fees
- Civil monetary penalties
- Injunction suits to restrain violations
- Criminal penalties

THE WAGE AND HOUR LAWS

Federal

Fair Labor Standards Act (FLSA), 29 USC §201 *et seq.*

State

State law must always be considered

State law **MUST** always be considered in addition to federal requirements

FLSA COVERAGE ISSUES

Coverage Can Occur In One Of Two Ways

1. Enterprise Coverage
2. Individual Employee Coverage

Exemptions

White Collar Exemptions

29 CFR §541 *et seq*

Types Most Common In Home Care

- Executive Employees
- Administrative Employees
- Professional Employees

The Executive Exemptions

An employee is exempt under the executive exemption in one of two ways:

- He or she may meet the basic requirements for the exemption
- He or she may be a “business owner” as defined for FLSA purposes

Basic Requirements

1. Salaried Dollar Test
2. Primary Duty
3. Supervision
4. Authority to Hire and Fire

Business Owner

1. Owns at least 20% equity interest
2. Is actively engaged in management

The Administrative Exemption

Basic Requirements

- (1) Salaried or Fee Basis Dollar Test
- (2) Primary Duty
- (3) Discretion and Independent Judgment

The Professional Exemption

- (1) Salaried or Fee Basis Dollar Test
- (2) Primary Duty

The Salary or Fee Basis of Payment Requirement

- Salary Basis
- Fee Basis – commonly known as “per visit” pay

Not Applicable to Record Keeping

The exemptions do not excuse an employer from the need to comply with the record-keeping requirements of the Act.

Strictly Construed; Burden of Proof

For the exemption to apply, the employee must meet all of the necessary requirements

The burden is on the employer (not the employee) to prove the requirements of an exemption are met

The Companionship Services Exemption

Basic Requirements

- a. The services provided must constitute “companionship services”
- b. General household work may not exceed 20% of the total
- c. Must be non-trained personnel
- d. Location of services

Burden of Proving the Exemption

The burden to prove the exemption applies is upon the employer, not the employee. If the employer cannot prove the requirements for the exemption, the employee will be entitled to minimum wage and overtime pay.

WAGE AND HOUR RULES

Minimum Wage

The FLSA requires minimum wage to be paid to all employees who are covered by the statute (\$5.85 as of July 24, 2007, \$6.55 as of July 24, 2008, and \$7.25 as of July 24, 2009).

Overtime Pay

- Generally, overtime pay is 1-1/2 times the employee's "regular rate" for "hours worked" in excess of 40 hours in a workweek
- There is no requirement under the FLSA for daily overtime, holiday pay, etc. or on the total number of hours that may be worked by an employer

Important Concepts

The Workweek

- The workweek is a fixed and regularly reoccurring period of 7 consecutive 24-hour periods
- The payroll period does not need to coincide with the workweek

Hours Worked

- All time during which the employee is required to be on duty or on the employer's premises or a particular work place
- All time during which the employee is "suffered or permitted" to work whether or not she is required to do so

Hours Worked (cont'd)

- Work not requested, but suffered or permitted, is compensable even though it is performed away from the employer's premises, away from the work site, or at the employee's home
- "Hours worked" can include time in idleness and incidental activities, as well as in productive work

Regular Rate

It is the hourly rate the employee is actually paid for each week's work; it can change weekly depending upon the payment arrangement with the employee.

This is not necessarily what the employer pays the employee per hour or the minimum wage.

Regular Rate Calculation

The formula is:

$$\frac{\text{total remuneration} \\ \text{(except statutory exclusions)}}{\text{total hours worked}}$$

- Both “total remuneration” and “hours worked” have specific meaning under the law

DETERMINING THE REGULAR RATE

Earnings Excluded

- a. Gifts, including Christmas bonuses
- b. Idle time payments as for holidays and absences
- c. Reimbursements for expenses
- d. Payments similar to idle time payments and reimbursement for expenses
- e. Discretionary bonuses

Earnings Excluded (con't)

- f. Profit sharing and savings plan payments by employees
- g. Radio and T.V. talent fees which satisfy government regulations
- h. Welfare-plan contributions by employer which satisfy government regulations
- i. Premium pay of any amount for hours worked in excess of 8 in a day

Earnings Excluded (con't)

- j. Premium pay of any amount for hours worked in excess of normal or regular daily or weekly standards

- k. Premium pay resulting from time and one-half rates paid for Saturday, Sunday, holiday, day-of-rest, sixth or seventh day work

Earnings Excluded (con't)

- l. Premium pay resulting from time and one-half paid for work outside a contractual daily period not exceeding 8 hours or outside of a contractual weekly period not exceeding the straight time hours in the statutory workweek applicable to the employee

- m. Certain payments for stock options, stock appreciation and employee stock purchase plans

Hours Worked

- All hours actually worked must be included in the denominator of the calculation.

THE REGULAR RATE UNDER VARIOUS CIRCUMSTANCES

Hourly Pay

If an employee is paid solely on the basis of a single hourly rate for hours worked, the employee's regular rate under the FLSA is the hourly rate.

Fixed Hours of Work With A Fixed Weekly, Semi-Monthly or Monthly Pay

Effect of:

- fixed hours less than 40
- fixed hours more than 40
- additional hours of work

Irregular Hours of Work

1. With Fixed weekly Pay
2. Guaranteed Weekly Pay (BELO Contracts)

Job Rate Pay (Per Visit)

- Must be reduced to the regular rate to determine overtime pay
- Add together all of the sums received and divide by hours worked
- $\frac{1}{2}$ time pay for hours in excess of 40

Day Rate of Pay

If a nonexempt employee is paid a flat sum for a day's work without regard to the number of hours worked in the day and if he/she receives no other form of compensation for services, the employee's regular rate is determined by totaling all the sums received at such day rate in the workweek and dividing by the total hours actually worked.

Day Rate of Pay (con't)

The employee is then entitled to one half that regular rate for all hours worked in excess of forty in the workweek (the straight time portion of the overtime has been paid by the day rate).

Two Rates of Pay

(a) Average weekly rate

(b) Hourly rate in effect during the overtime hours

HOURS WORKED

Time Spent in Performing Principal Duties

Sleeping Time

1. Where the employee is required to be on duty for less than 24 hours
2. Where the employee is required to be on duty for more than 24 hours

Travel Time as Hours Worked

General Rules

- a. Home to work travel
- b. Travel during workday
- c. One-day assignment in another city
- d. Overnight travel

Training Time

Attendance occurs outside the employee's regular working hours

Attendance is voluntary

The employee does no productive work while attending

The program, etc., is not directly related to the employee's job

SOME COMMON PROBLEM AREAS

On-Call Pay and Time

On-Call Pay

On-call pay is always included in the computation of the employee's regular rate. However, the on-call hours are not always considered "hours worked". The effect of the on-call hours not being "hours worked" is to increase the employee's regular rate during the workweek he or she was on call.

On-Call Time

If the employee must remain on the employer's premises or so near to the employer's premises that he or she cannot use the time as he or she chooses, the time is compensable.

On-Call Time (con't)

- If the employee can come or go as he or she chooses, the time does not count as hours worked; even if the employee must leave a telephone number where he or she can be reached.
- Required minimum response time is especially a problem for hospitals.

Bonuses

Depending upon how bonuses are structured, the amount of the bonus may, or may not need to be included in the regular rate calculations

Unreimbursed Expenses

1. General
2. Unreimbursed travel time

Sharing Employees with Commonly Owned Company

When are the companies considered joint employers

8/80 Rule

- (1) The employer must be a hospital
- (2) The 8/80 rule applies only to activities of the hospital which constitute operation of a hospital
- (3) The employees involved must be engaged in such activities at least 80% of the time worked per workweek

Granting Time Off in Lieu of Overtime Pay

To attempt to relieve themselves of liability for overtime pay, employers sometimes grant time off in lieu of paying overtime pay.

The FLSA permits *public* employers to utilize a compensatory paid time off plan in lieu of payment of overtime pay under limited circumstances.

State Law

The FLSA does not replace state laws which establish more beneficial standards for employees than does the FLSA.

If an agency provides services in more than one state, the law of each state must be consulted.

Record Keeping

- A. Generally
- B. Record Retention
- C. Posters

The Wage and Hour Division's Web Site

www.dol.gov/esa/whd/

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ADVANCED WAGE AND HOUR LAW

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ADVANCED WAGE AND HOUR LAW

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I. INTRODUCTION

A. THE IMPORTANCE OF COMPLIANCE

B. ENFORCEMENT

1. By the government
2. By employees

C. PENALTIES FOR NON-COMPLIANCE

1. Civil actions to collect back wages, liquidated damages, and attorney fees
2. Civil monetary penalties
3. Injunction suits to restrain violations
4. Criminal proceedings

II. THE WAGE AND HOUR LAWS

A. FEDERAL

1. Fair Labor Standards Act (FLSA), 29 USC §201 *et seq*

B. STATE

1. State law must be considered.

State law must always be considered in addition to federal requirements.

- a. Even if the FLSA does not apply to a particular employee, a similar state law may establish minimum wage and overtime pay obligations which do apply.
- b. Furthermore, the FLSA does not take precedence over state laws which establish

standards more favorable to the employee than does the FLSA. For example, an employee may be exempt under the FLSA, but still be entitled to overtime under applicable state law.

III. FLSA COVERAGE ISSUES

A. COVERAGE CAN OCCUR IN ONE OF TWO WAYS

All employees covered by the FLSA are entitled to the minimum wage and overtime pay benefits of the Act unless an exemption to coverage applies. Coverage of the Act can occur in either of two ways:

1. Enterprise Coverage; or,
2. Individual Employee Coverage.

B. EXEMPTIONS

1. **“White Collar Exemptions”** 29 CFR §541 *et seq*
2. **Types Most Common in Home Care (There Are Others)**
 - Executive Employees
 - Administrative Employees
 - Professional Employees
3. **The Executive Exemption**

An employee is exempt under the executive exemption in one of two ways: he or she may meet the basic requirements for the exemption; or, he or she may be a “business owner” as defined for FLSA purposes. Both of these are discussed below.

a. Basic Requirements

One way to fall within the executive exemption is for the employee to meet all four of the following basic requirements:

- (1) **Salaried Dollar Test.** The employee must be compensated on a salary basis at a rate of not less than \$455 per week exclusive of board, lodging or other facilities (It is \$380 per week, if employed in American Samoa by employers other than the Federal Government);
- (2) **Primary Duty.** The employee’s primary duty must be management:
 - (a) of your agency; or,
 - (b) of a customarily recognized department or subdivision of your agency;

(3) **Supervision.** The employee must customarily and regularly direct the work of two or more other employees; *and*,

(4) **Authority to Hire and Fire.** The employee must have the authority to hire or fire other employees or the employee's suggestions and recommendations as to hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

b. Business Owners

The second way an employee can fall within the executive exemption is if the employee:

(1) owns at least a "bona fide 20-percent equity interest" in your agency; *and*,

(2) is actively engaged in management.

If an employee meets these requirements, there is no need to be paid any specific dollar amount per week or to be paid on a salary basis.

4. The Administrative Exemption

a. Basic Requirements

An employee is exempt under the administrative exemption if he or she meets all three of the following requirements:

(1) **Salaried or Fee Basis Dollar Test.** The employee must be compensated on a salary or fee basis at a rate of not less than \$455 per week exclusive of board, lodging or other facilities (It is \$380 per week, if employed in American Samoa by employers other than the Federal Government);

(2) **Primary Duty.** The employee's primary duty must be performance of office or non-manual work directly related to management or general business operations of your agency or of your agency's customers, *i.e.*, your clients; *and*,

(3) **Discretion and Independent Judgment.** The employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.

5. The Professional Exemption

a. Basic Requirements

As is relevant for most home care agencies, an employee is exempt under the professional exemption if he or she meets both of the following requirements:

(1) **Salaried or Fee Basis Dollar Test.** The employee must be compensated on a salary or fee basis at a rate of not less than \$455 per week exclusive of board, lodging, or other facilities (It is \$380 per week, if

employed in American Samoa by employers other than the Federal Government); *and*,

- (2) **Primary Duty.** The employee's primary duty is the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. (This is known as the "learned professional" requirement).

CAVEAT: *Except for business owners, anyone paid on an hourly basis (rather than on a salary or fee basis) does not qualify for the executive, administrative or professional exemption.*

6. The Salary or Fee Basis of Payment Requirement

The employee must be paid on a "salary basis" for the executive exemption to apply. For the administrative or professional exemption to apply, the employee must be paid on a "salary or fee basis."

- a. **Salary Basis.** Subject to certain specific exceptions contained in the FLSA regulations, the salary may not be reduced because of variations in the quality or quantity of work performed. Subject to the exceptions permitted, the employee must receive his or her full salary for any workweek in which he or she performs any work without regard to the number of days or the number of hours worked (unless he or she performs no work during the workweek).

Generally, deductions are permissible only for absences of a day or more (*not* of less than a day) for the employee's personal reasons or sickness or disability. If an employer is making deductions from the pay of an employee it believes is exempt under one of the white collar exemptions based on being paid a salary, it should review the regulations carefully.

A copy of the salary basis of payment regulations (effective August 23, 2004) is attached to these written materials as Attachment No. 1.

However, the regulations give you a way to protect against lost of exemptions due to improper deductions. To do this you must have:

- A clearly communicated policy that prohibits improper deductions from the pay of salaried, exempt employees (the best evidence of being "clearly communicated is a written policy that was distributed to employees prior to the improper pay deductions);
- That policy must include a complaint mechanism for employees to complain concerning improper deductions; and,
- You reimburse employees for any improper deductions and make a good faith commitment to comply in the future.

If your agency meets these requirements, it will not lose the exemption for any employees unless it willfully violates the policy by continuing to make improper deductions after receiving employee complaints.

If your agency fails to reimburse employees for any improper deductions or continues to make improper deductions after receiving employee complaints, the exemption is lost during the time 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.

A copy of such a policy prepared by the Wage & Hour Division of the United States Department of Labor is included as Attachment No. 2. Your agency's policy does not need to be as extensive as this sample but must include the elements mentioned above.

- b. **Fee Basis.** Payment on a fee basis is permitted for employees to meet the administrative or professional exemption. "Fee basis" refers to the payment of an agreed sum for a single job which is unique and regardless of the time required for its completions; the FLSA regulation states:

"...These payments resemble piecework payments with the important distinction that generally a "fee" is paid for the kind of job that is unique rather than for a series of jobs repeated an indefinite number of times and for which payment on an identical basis is made over and over again. Payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis. ." 29 CFR §541.605

Whether or not a fee basis of payment meets the minimum dollar test per workweek is tested on the basis of a 40 hour week.

A copy of the fee basis of payment regulations (effective August 23, 2004) is attached to these written materials as Attachment No. 3.

- 7. **Not Applicable to Record Keeping.** The exemptions do not excuse an employer from the need to comply with the record-keeping requirements of the Act.
- 8. **Strictly Construed; Burden of Proof.** All of the exemptions are strictly construed. For the exemption to apply, the employee must meet all of the necessary requirements. The burden is on the employer (not the employee) to prove the requirements of an exemption are met.

C. **The Companionship Services Exemption**

CAVEAT: If a state minimum wage or overtime pay law applies to the employer, the availability of this exemption under that state's law must be determined. The companionship services exemption often is not available under state law.

- 1. **Basic Requirements.** Regulations of the Department of Labor (29 CFR § 552.1 - 552.110) establish the criteria which must be met before the companionship services exemption applies:
 - a. The services provided must constitute "companionship services"
 - b. General household work may not exceed 20% of the total

- c. Must be non-trained personnel
- d. Location of services

2. **Burden of Proving the Exemption.** The burden to prove the exemption applies is upon the employer, not the employee. If the employer cannot prove the requirements for the exemption, the employee will be entitled to minimum wage and overtime pay.

IV. WAGE AND HOUR RULES

A. MINIMUM WAGE

The FLSA requires a minimum wage to be paid to all employees who are covered by the statute (\$5.85 as of July 24, 2007, \$6.55 as of July 24, 2008, and \$7.25 as of July 24, 2009).

- State or local law may establish a higher minimum wage.

B. OVERTIME PAY

1. The FLSA requires extra pay for weekly overtime hours.

- Generally, overtime pay is 1-1/2 times the employee's "regular rate" for "hours worked" in excess of 40 hours in a workweek. A special rule exists for hospitals and other establishments engaged in care of sick, aged or mentally ill (see page 13 of these written materials).
- There is no requirement under the FLSA for daily overtime, holiday pay, etc., or on the total number of hours that may be worked by an employee.

C. IMPORTANT CONCEPTS

1. **The Workweek.** The FLSA establishes the workweek as the general standard for calculating the minimum wage and overtime pay due an employee.

- The workweek is a fixed and regularly reoccurring period of 7 consecutive 24-hour periods.
- The payroll period does not need to coincide with the workweek.

2. **Hours Worked.** "Hours worked" means all the time for which the employee is entitled to compensation under the FLSA. It includes:

- All time during which the employee is required to be on duty or on the employer's premises or at a particular work place.
- All time during which the employee is "suffered or permitted" to work whether or not he or she is required to do so.
- Work not requested, but suffered or permitted, is compensable even though it is

performed away from the employer's premises, away from the work site, or at the employee's home.

- "Hours worked" can include time in idleness and incidental activities, as well as in productive work.

3. **Regular Rate.** An employee who is entitled to overtime pay under the FLSA must be paid overtime pay based on the employee's "regular rate." This is not necessarily what the employer pays the employee per hour or the minimum wage.

It is the hourly rate the employee is actually paid for each week's work; it can change weekly depending upon the payment arrangement with the employee.

It is calculated by dividing the employee's total remuneration for employment (except for certain remuneration permitted to be excluded by statute) during the workweek by the total number of hours actually worked by the employee in that workweek.

The formula is:

$$\frac{\text{total remuneration} \\ \text{(except statutory exclusions)}}{\text{total hours worked}}$$

Both "total remuneration" and "hours worked" have specific meanings under the law.

The regular rate is addressed in 29 USC §207(e) and 29 CFR §778.107 *et seq.*

V. DETERMINING THE REGULAR RATE

A. EARNINGS EXCLUDED

In determining the numerator of the regular rate formula, the employee's total remuneration for the workweek (cash and noncash) must be included except for remuneration excluded by statute. The statutory exclusions are:

- a. Gifts, including Christmas bonuses.
- b. Idle time payments as for holidays and absences.
- c. Reimbursements for expenses.
- d. Payments similar to idle time payments and reimbursements for expenses.
- e. Discretionary bonuses.
- f. Profit sharing and savings plan payments by employees.
- g. Radio and T.V. talent fees which satisfy government regulations.
- h. Welfare-plan contributions by employer which satisfy government regulations.
- i. Premium pay of any amount for hours worked in excess of 8 in a day or in excess of the straight time workers in the workweek applicable to the employee.

- j. Premium pay of any amount for hours worked in excess of normal or regular daily or weekly standards.
- k. Premium pay resulting from time and one-half rates paid for Saturday, Sunday, holiday, day-of-rest, sixth or seventh day work.
- l. Premium pay resulting from time and one-half rates paid for work outside a contractual daily period not exceeding 8 hours or outside of a contractual weekly period not exceeding the straight time hours in the statutory workweek applicable to the employee.
- m. Certain payments for stock options, stock appreciation and employee stock purchase plans.

If a payment does not meet one of the above exclusions it must be included in the regular rate calculation.

B. Hours Worked

All hours actually worked in the workweek must be included in the denominator of the calculation. Hours worked in various situations is addressed beginning on page 10 of this outline.

- If an employee is paid for hours which are not compensable time, the effect is to increase the regular rate.

VI. THE REGULAR RATE UNDER VARIOUS CIRCUMSTANCES

A. HOURLY PAY

If an employee is paid solely on the basis of a single hourly rate for hours worked, the employee's regular rate under the FLSA is the hourly rate. For overtime hours, he or she is then paid 1 ½ time that hourly rate.

B. FIXED HOURS OF WORK WITH A FIXED WEEKLY, SEMI-MONTHLY OR MONTHLY PAY

The regular rate is the weekly salary divided by the fixed hours (assuming no other hours of work occur - it must be fixed). For semi-monthly or monthly salary, it must be converted to a weekly calculation.

- Effect of:
 - fixed hours less than 40
 - fixed hours more than 40
 - additional hours of work

C. IRREGULAR HOURS OF WORK

Things become much more complex when the employee works irregular hours of work due to the need to recalculate the regular rate each workweek.

1. With Fixed Weekly Pay

- Regular rate varies
- ½ time for overtime
- Limit on salary deductions
- May not include overtime; covers only straight time hours

2. Guaranteed Weekly Pay (BELO Contracts).

- Includes overtime
- Specific requirements must be met

D. JOB RATE PAY (PER VISIT)

This refers to a compensation arrangement where the employee is paid a set sum for a particular job or task (e.g., "per visit") irrespective of the number of hours actually spent in performing the work.

- Must be reduced to the regular rate to determine overtime pay.
- Add together all of the sums received and divide by hours worked.
- ½ time pay for hours in excess of 40.

E. DAY RATE OF PAY

If a nonexempt employee is paid a flat sum for a day's work without regard to the number of hours worked in the day and if he or she receives no other form of compensation for services, the employee's regular rate is determined by totaling all the sums received at such day rate in the workweek and dividing by the total hours actually worked. The employee is then entitled to one-half that regular rate for all hours worked in excess of 40 in the workweek (the straight time portion of the overtime has been paid by the day rate).

F. TWO RATES OF PAY

If an employee works at two or more different types of work for which different rates of pay are paid, there are two ways to compute the overtime pay:

- (a) average weekly rate
- (b) hourly rate in effect during the overtime hours

For the second approach, a number of specific conditions must be met; rarely does an employer

want to use it.

VII. HOURS WORKED

A. TIME SPENT IN PERFORMING PRINCIPAL DUTIES

B. SLEEPING TIME

Two general enforcement policies exist under the FLSA concerning time spent by employees in sleeping:

1. **Where the Employee is Required to be on Duty for Less Than 24 Hours.** If an employee is required to be on duty for less than 24 hours, the government considers periods during which he is permitted to sleep as being compensable working time.
2. **Where the Employee is Required to be on Duty for More Than 24 Hours.** Where an employee is required to be on duty for 24 hours or more, the government enforcement policy allows up to 8 hours of sleeping time to be excluded provided certain conditions are met:

"General. Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted sleep. If sleeping period is more than 8 hours, only 8 hours will be credited. Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time constitute hours worked. (Citations omitted).

Interruptions of Sleep. If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted. For enforcement purposes, the Divisions have adopted the rule that if the employee cannot get at least 5 hours sleep during the scheduled period the entire time is working time. (Citation omitted)."

Again, the Courts can differ from the government's position, depending upon the circumstances involved.

C. TRAVEL TIME AS HOURS WORKED

1. **General Rules.** Whether or not time spent in travel is working time depends upon the kind of travel involved:
 - a. **Home to Work Travel.** Travel from home to work and from work to home as a general rule is not compensable.
 - Effect of requirement of reporting to site for instructions, etc.

- Emergency situations outside of working hours can result in the travel time being compensable.
 - to customer
 - to employer's premises
- b. Travel During Workday.** Travel during the work day from job site to job site is compensable working time.
 - What of "split shifts"?
- c. One-Day Assignment In Another City.** If an employee is sent out of town for one day, the employee does not need to be paid for the time spent in travel between his or her home and the public transportation involved. The employee must, however, be paid for all other travel time involved except usual meal time.
- d. Overnight Travel.** When an employee travels overnight, the travel away from home is viewed as simply a substitution for other duties. The following portions of the travel time away from home constitute compensable working time.
 - Time spent in traveling during the employee's normal working hours.
 - Time spent in traveling during corresponding hours on non-working days.
 - Regular meal periods are not counted.
 - As an enforcement policy, the government does not consider as work time that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus or automobile.
 - If an employee is offered public transportation, but requests permission to drive his or her car instead, the employer may count as hours worked either the time spent driving the car or the time the employer would have had to count as hours worked during working hours if the employer had used the public transportation.

D. TRAINING TIME

Whether or not an employee's time spent in attending employer sponsored training programs, lectures or meetings is compensable time depends upon several factors. According to government enforcement policy, such time does not need to be counted as compensable time if all of the following conditions are met:

1. Attendance occurs outside the employee's regular working hours;
2. Attendance is voluntary (it is not voluntary if it is required by the employer or the employee is led to believe that non-attendance will adversely affect his or her present working conditions or the continuation of employment);
3. The employee does no productive work while attending; and,

4. The program, etc., is not directly related to the employee's job (it is directly related if it aids in handling his or her *present* job rather than teach another job or a new skill).

VIII. SOME COMMON PROBLEM AREAS

A. ON-CALL PAY AND TIME

1. **On-Call Pay.** On-call pay is always included in the computation of the employee's regular rate. However, the on-call hours are not always considered "hours worked". The effect of the on-call hours not being "hours worked" is to increase the employee's regular rate during the workweek he or she was on call.
2. **On-Call Time.** Whether or not the time an employee spends "on-call" needs to be counted as compensable time depends upon his or her freedom while on call:
 - If the employee must remain on the employer's premises or so near to the employer's premises that he or she cannot use the time as he or she chooses, the time is compensable.
 - If the employee can come or go as he or she chooses, the time does not count as hours worked. This is true even though the employee must leave a telephone number at home or with the employer where he or she can be reached.
 - Required minimum response time is especially a problem for hospitals.

B. BONUSES

Depending upon how bonuses are structured, the amount of the bonus may, or may not need to be included in the regular rate calculations. If a bonus must be included in the regular rate calculation, the effect is to increase the amount of overtime pay to which the employee is entitled.

C. UNREIMBURSED EXPENSES

1. **General.** If an employee is required to pay for items which are viewed as being for the employer's benefit, the amount the employee must pay is subtracted from the wages paid to determine whether the difference still meets the minimum wage.

Examples:

- Requiring employees to purchase uniforms at their own expense, *e.g.*, *Hodgson v. Newport Motel, Inc.*, F. Supp., 87 LC ¶33,830 (S.D. Fla. 1979); *W & H Opinion Letter No. 906*, (June 6, 1968).
- If an employee is paid the minimum wage and must clean his own uniform, the employer owes him an hour of additional pay for each week since uniform costs cannot cut into required minimum wage or overtime pay. *W & H Opinion Letter No. 1326* (June 7, 1974).

- Requiring employees to provide "tools of the trade" which will be used in or are specifically required for the performance of the employer's particular work, would violate the Act in any workweek when the cost of such tools purchased by the employee cuts into the minimum wage or overtime pay required to be paid to him. 29 CFR § 531.35.

2. **Unreimbursed Travel Time.** Not addressed directly in any opinion is the situation of an employer requiring an employee to furnish his or her own transportation but not reimbursing the employee for transportation costs even though the transportation is required to perform the work.

Examples:

- A home care agency which requires its homemakers, companions, etc., to provide, at their own cost, their own transportation to visit patients.
- It appears that such a required employee expense would operate to reduce wages paid the same as for uniforms or "tools of the trade". See CFR § 531.35, 29 CFR § 531.32(c), 29 CFR § 778.217.

D. SHARING EMPLOYEES WITH COMMONLY OWNED COMPANY

Some enterprises have two closely related corporations: one performing one type of services and the other, other services. If the corporations are under common ownership and management, and the same employee is employed by both corporations to perform services in the same workweek, it is possible the time worked for each corporation will be added together in determining whether the employee has worked more than 40 hours in that workweek. Under these circumstances, the two corporations may be "joint employers" of the employee and either can be liable for the overtime pay due to the employee. 29 CFR §791.1 *et seq.* To avoid this result, employment in one of the entities must be "completely dissociated" from employment in the other.

In *Chao v. A-One Medical Services*, 346 F3d 908 (9th Cir 2003) the Court held that two providers of in-home services in Washington state were "joint employers" that had to aggregate work done by their employees where the owner and operator of one company, through that company, managed employees of the other company and the same nursing supervisors and scheduler were in charge of the employees while they were working for either company.

E. 8/80 RULE

Under the FLSA, the overtime pay of hospital and nursing home employees can be calculated on a 14-day period, rather than the usual 7-day period applicable to other employers. Overtime pay under this arrangement is paid for hours worked in excess of 8 in a work day and in excess of 80 in the 14-day period. This special rule is known as the "8 and 80 rule."

Three criteria must be met before the 8/80 rule is applicable to a particular employee:

- (1) The employer must be a hospital;
- (2) The 8/80 rule applies only to activities of the hospital which constitute operation of a hospital; and,

- (3) The employees involved must be engaged in such activities at least 80% of the time worked per workweek.

Given what is meant under the FLSA as engaged in the operation of a hospital, it is unlikely hospital based home care agency employees would be held to meet these requirements. Furthermore, it may not be permitted at all under your state's law.

F. GRANTING TIME OFF IN LIEU OF OVERTIME PAY

To attempt to relieve themselves of liability for overtime pay, employers sometimes grant time off in lieu of paying overtime pay (commonly called "comp time"). Such time off plans can avoid an employer's overtime pay liability under the FLSA *only if* the time off plan is properly structured and carefully administered. Unfortunately, however, unless an employer carefully meets the requirements for a valid time off plan, the employer can be in the unenviable position of having granted an employee paid time off and still be liable the employee for overtime pay. Such time off arrangements are permitted under the FLSA only in very limited circumstances and may not be permitted at all under your state's law. Even then, most state laws do not recognize time off plans.

The FLSA permits *public* employers to utilize a compensatory paid time off plan in lieu of payment of overtime pay under very limited circumstances. Specific requirements exist with respect to such compensatory time off plans by public employers.

G. STATE LAW

The FLSA does not replace state laws which establish more beneficial standards for employees than does the FLSA. It is not unusual for an employer who is attempting to conscientiously comply with minimum wage and overtime pay requirements, to only consider the requirements of the FLSA. The requirements of state law *must always* be considered in addition to the FLSA to determine if state law as requirements more beneficial to the employee. The employee is entitled to the benefits of both the FLSA and of applicable state law, if any.

If an agency provides services in more than one state, the law of each state must be consulted. Minimum wage and overtime pay matters do differ from state to state.

IX. RECORD KEEPING

A. Generally

Every employer subject to the FLSA wage payment requirements is required to maintain certain records concerning covered employees. This is also true for exempt employees but the information required is less. Records do not need to be maintained in a particular form provided they are kept clearly and accurately in a manner which permits intelligent investigation by the government.

B. Record Retention

The FLSA requires various records to be retained for at least 3 years and others for at least 2 years. The information stated above for each employee must be preserved for at least 3 years.

C. Posters

A poster must be displayed to advise employees of their FLSA rights. The poster can be obtained from Wage & Hour Division offices and from the Wage and Hour Divisions web site. It must be posted in all establishments where employers subject to the FLSA are employed.

X. WAGE & HOUR DIVISION'S WEB SITE

www.dol.gov/esa/whd/

FLSA SALARY BASIS OF PAYMENT RULES

(Effective August 23, 2004)

Sec. 541.602 Salary basis.

- (a) **General rule.** An employee will be considered to be paid on a "salary basis" within the meaning of these regulations if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided in paragraph (b) of this section, an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. Exempt employees need not be paid for any workweek in which they perform no work. An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.
- (b) **Exceptions.** The prohibition against deductions from pay in the salary basis requirement is subject to the following exceptions:
- (1) Deductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability. Thus, if an employee is absent for two full days to handle personal affairs, the employee's salaried status will not be affected if deductions are made from the salary for two full-day absences. However, if an exempt employee is absent for one and a half days for personal reasons, the employer can deduct only for the one full-day absence.
 - (2) Deductions from pay may be made for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability. The employer is not required to pay any portion of the employee's salary for full-day absences for which the employee receives compensation under the plan, policy or practice. Deductions for such full-day absences also may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted the leave allowance thereunder. Thus, for example, if an employer maintains a short-term disability insurance plan providing salary replacement for 12 weeks starting on the fourth day of absence, the employer may make deductions from pay for the three days of absence before the employee qualifies for benefits under the plan; for the twelve weeks in which the employee receives salary replacement benefits under the plan; and for absences after the employee has exhausted the 12 weeks of salary replacement benefits. Similarly, an employer may make deductions from pay for absences of one or more full days if salary replacement benefits are provided under a State disability insurance law or under a State workers' compensation law.
 - (3) While an employer cannot make deductions from pay for absences of an exempt employee occasioned by jury duty, attendance as a witness or temporary military leave, the employer can offset any amounts received by an employee as jury fees, witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.
 - (4) Deductions from pay of exempt employees may be made for penalties imposed in good faith for infractions of safety rules of major significance. Safety rules of major significance include those relating to the prevention of serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries and coal mines.
 - (5) Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of

one or more full days imposed in good faith for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a written policy applicable to all employees. Thus, for example, an employer may suspend an exempt employee without pay for three days for violating a generally applicable written policy prohibiting sexual harassment. Similarly, an employer may suspend an exempt employee without pay for twelve days for violating a generally applicable written policy prohibiting workplace violence.

- (6) An employer is not required to pay the full salary in the initial or terminal week of employment. Rather, an employer may pay a proportionate part of an employee's full salary for the time actually worked in the first and last week of employment. In such weeks, the payment of an hourly or daily equivalent of the employee's full salary for the time actually worked will meet the requirement. However, employees are not paid on a salary basis within the meaning of these regulations if they are employed occasionally for a few days, and the employer pays them a proportionate part of the weekly salary when so employed.
- (7) An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. Rather, when an exempt employee takes unpaid leave under the Family and Medical Leave Act, an employer may pay a proportionate part of the full salary for time actually worked. For example, if an employee who normally works 40 hours per week uses four hours of unpaid leave under the Family and Medical Leave Act, the employer could deduct 10 percent of the employee's normal salary that week.
- (c) When calculating the amount of a deduction from pay allowed under paragraph (b) of this section, the employer may use the hourly or daily equivalent of the employee's full weekly salary or any other amount proportional to the time actually missed by the employee. A deduction from pay as a penalty for violations of major safety rules under paragraph (b)(4) of this section may be made in any amount.

Sec. 541.603 Effect of improper deductions from salary.

- (a) An employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer did not intend to pay employees on a salary basis. An actual practice of making improper deductions demonstrates that the employer did not intend to pay employees on a salary basis. The factors to consider when determining whether an employer has an actual practice of making improper deductions include, but are not limited to: the number of improper deductions, particularly as compared to the number of employee infractions warranting discipline; the time period during which the employer made improper deductions; the number and geographic location of employees whose salary was improperly reduced; the number and geographic location of managers responsible for taking the improper deductions; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.
- (b) If the facts demonstrate that the employer has an actual practice of making improper deductions, the exemption is lost during the time 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. Employees in different job classifications or who work for different managers do not lose their status as exempt employees. Thus, for example, if a manager at a company facility routinely docks the pay of engineers at that facility for partial-day personal absences, then all engineers at that facility whose pay could have been improperly docked by the manager would lose the exemption; engineers at other facilities or working for other managers, however, would remain exempt.
- (c) Improper deductions that are either isolated or inadvertent will not result in loss of the exemption for any employees subject to such improper deductions, if the employer reimburses the employees for such improper deductions.
- (d) If an employer has a clearly communicated policy that prohibits the improper pay deductions specified in § 541.602(a) and includes a complaint mechanism, reimburses employees for any improper deductions and makes a good faith commitment to comply in the future, such employer will not lose the exemption for any employees unless the

employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints. If an employer fails to reimburse employees for any improper deductions or continues to make improper deductions after receiving employee complaints, the exemption is lost during the time 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. The best evidence of a clearly communicated policy is a written policy that was distributed to employees prior to the improper pay deductions by, for example, providing a copy of the policy to employees at the time of hire, publishing the policy in an employee handbook or publishing the policy on the employer's Intranet.

- (e) This section shall not be construed in an unduly technical manner so as to defeat the exemption.

§ 541.604 Minimum guarantee plus extras.

- (a) An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis. Thus, for example, an exempt employee guaranteed at least \$455 each week paid on a salary basis may also receive additional compensation of a one percent commission on sales. An exempt employee also may receive a percentage of the sales or profits of the employer if the employment arrangement also includes a guarantee of at least \$455 each week paid on a salary basis. Similarly, the exemption is not lost if an exempt employee who is guaranteed at least \$455 each week paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. Such additional compensation may be paid on any basis (*e.g.*, flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off.
- (b) An exempt employee's earnings may be computed on an hourly, a daily or a shift basis, without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked, and a reasonable relationship exists between the guaranteed amount and the amount actually earned. The reasonable relationship test will be met if the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek. Thus, for example, an exempt employee guaranteed compensation of at least \$500 for any week in which the employee performs any work, and who normally works four or five shifts each week, may be paid \$150 per shift without violating the salary basis requirement. The reasonable relationship requirement applies only if the employee's pay is computed on an hourly, daily or shift basis. It does not apply, for example, to an exempt store manager paid a guaranteed salary of \$650 per week who also receives a commission of one-half percent of all sales in the store or five percent of the store's profits, which in some weeks may total as much as, or even more than, the guaranteed salary.

UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION

The information below is designed to provide an example of what constitutes compliance for purposes of §541.603(d) (addressing "Effect of improper deductions from salary") and is for illustrative purposes only. Other policies may comply with §541.603(d) which contain more or less information.

SAMPLE SALARY BASIS POLICY

The Fair Labor Standards Act (FLSA) is a federal law which 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.

Salary Basis Requirement

To qualify for exemption, employees generally must be paid at not less than \$455 per week on a salary basis. These salary requirements do not apply to outside sales employees, teachers, and employees practicing law or medicine. Exempt computer employees may be paid at least \$455 on a salary basis or on an hourly basis at a rate not less than \$27.63 an hour.

Being paid on a "salary basis" means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work. Subject to exceptions listed below, an exempt employee must receive the full salary for any workweek in which the employee performs any work, regardless of the number of days or hours worked. Exempt employees do not need to be paid for any workweek in which they perform no work. If the employer makes deductions from an employee's predetermined salary, i.e., because of the operating requirements of the business, that employee is not paid on a "salary basis." If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

Circumstances in Which the Employer May Make Deductions from Pay

Deductions from pay are permissible when an exempt employee: is absent from work for one or more full days for personal reasons other than sickness or disability; for absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary

lost due to illness; to offset amounts employees receive as jury or witness fees, or for military pay; or for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions (see Company Policy on penalties for workplace conduct rule infractions). Also, an employer is not required to pay the full salary in the initial or terminal week of employment; for penalties imposed in good faith for infractions of safety rules of major significance, or for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. In these circumstances, either partial day or full day deductions may be made.

Company Policy

It is our policy to comply with the salary basis requirements of the FLSA. Therefore, we prohibit all company managers from making any improper deductions from the salaries of exempt employees. We want employees to be aware of this policy and that the company does not allow deductions that violate the FLSA.

What To Do If An Improper Deduction Occurs

If you believe that an improper deduction has been made to your salary, you should immediately report this information to your direct supervisor, or to [insert alternative complaint mechanism(s)].

Reports of improper deductions will be promptly investigated. If it is determined that an improper deduction has occurred, you will be promptly reimbursed for any improper deduction made.

FLSA FEE BASIS OF PAYMENT RULES

(Effective August 23, 2004)

§ 541.605 Fee basis.

- (a) Administrative and professional employees may be paid on a fee basis, rather than on a salary basis. An employee will be considered to be paid on a “fee basis” within the meaning of these regulations if the employee is paid an agreed sum for a single job regardless of the time required for its completion. These payments resemble piecework payments with the important distinction that generally a “fee” is paid for the kind of job that is unique rather than for a series of jobs repeated an indefinite number of times and for which payment on an identical basis is made over and over again. Payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis.

- (b) To determine whether the fee payment meets the minimum amount of salary required for exemption under these regulations, the amount paid to the employee will be tested by determining the time worked on the job and whether the fee payment is at a rate that would amount to at least \$455 per week if the employee worked 40 hours. Thus, an artist paid \$250 for a picture that took 20 hours to complete meets the minimum salary requirement for exemption since earnings at this rate would yield the artist \$500 if 40 hours were worked.