

FAIR LABOR STANDARDS ACT (FLSA) COMPLIANCE:

OVERVIEW AND PRACTICAL TIPS

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A Firestorm on the Horizon for Labor Change

Political Forces:

- Obama has set an agenda for change in the labor market.
- Will not only strengthen enforcement of laws already in place, but will also push for change.
- Appointments:
 - Secretary of Labor Hilda Solis- daughter of a Teamsters Union shop steward
 - Many nominees appointed to fill 18 appointed DOL positions have strong connections to organized labor

Firestorm on the Horizon (cont'd)

Political Forces:

- Already passed legislation:
 - American Recovery and Reinvestment Act (ARRA)- Signed into law 2/09
 - Subsidy of up to 65% of COBRA for a max of 9 months for individuals involuntarily terminated between 9/1/08 through 12/31/09
 - Lilly Ledbetter Fair Pay Act- Signed into law 1/09
 - Eliminates SOL in any case concerning compensation and allows aggrieved persons to file claims without first filing a charge with the EEOC
 - Revisions to FMLA and ADA

Firestorm on the Horizon (cont'd)

Political Forces:

- Proposed new legislation-
 - Employee Free Choice Act (Card Check bill)
 - Would make it easier for unions to organize
 - Independent Contractor Proper Classification Act
 - Sponsored by Obama when senator
 - Would require some independent contractors to be treated as EEs under certain circumstances.
 - Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers (RESPECT)
 - Would change definition of Supervisor so that foremen permitted to join union

Firestorm on the Horizon (cont'd)

Political Forces:

- Revisions to existing legislation
 - OSHA expansion
 - More revisions to FMLA, ADA

- Stringent enforcement
 - 7/25/08 letter from then Senator Obama to Secretary of US DOL
 - "I am writing to express serious concerns regarding recent reports that the US DOL is not fulfilling its mission to prevent and remedy violations of federal minimum wage and overtime laws."

Firestorm on the Horizon (cont'd)

Proposed changes to FLSA:

- Pull back on expanded white-collar exemption
 - Would increase the number of workers that would be eligible for overtime

- "Employee Misclassification Prevention Act"
 - Introduced 5/08
 - Amend FLSA to keep records of non-employees who perform labor or services and to provide a special penalty for ERs who misclassify EE's as non-EE's

- Add compensatory and punitive damages to the FLSA
 - EE could recover those damages in addition to back pay (which can be doubled if a willful violation is found)

Firestorm on the Horizon (cont'd)

Court pressures

- Dramatic rise in FLSA lawsuits
 - PA is within top 8 most active states

- Common legal claims:
 - Whether an hourly EE has received all of the OT to which EE was entitled
 - Whether or not EE is properly classified as salaried (exempt)

Firestorm on the Horizon (cont'd)

Court pressures

- Walmart
 - Recently, Wal-Mart settled nearly 65 state and federal class action lawsuits said to cost it \$640 million
 - Heart of claims- failure to pay overtime
 - Only a few years earlier, a PA jury had awarded Wal-Mart employees \$78 million dollars in unpaid wages
- Growing number of law firms specializing in wage and hour lawsuits
 - Cases considered "low hanging fruit" because of how easy it is for employers to misapply the FLSA

Is your Workplace Low Hanging Fruit for Litigation?

Pop Quiz

- 1. T or F: A signed independent contractor agreement confirms that an individual performing work will not be deemed an EE under the FLSA.
- 2. T or F: A signed comprehensive release by an ER and an EE which explicitly waives the EE's right to bring an FLSA claim will forever bar an FLSA claim.

Low Hanging Fruit for Litigation?

Pop Quiz

- 3. Which of these are compensable work times?
 - a. Time spent in lectures, meetings, training
 - b. Off the clock work that is unauthorized
 - c. Uniform changing time
 - d. Sleeping on the job
 - e. All of the above

Low Hanging Fruit for Litigation?

Pop Quiz

- 4. Which of the following is not an exempt position under the administrative exemption?
 - a. Purchasing
 - b. Clerical
 - c. Research
 - d. Advertising

Low Hanging Fruit for Litigation?

Pop Quiz

- 5. T or F: Limiting the number of hours EEs are permitted to record is acceptable as long as an agreement is reached with the EE.
- 6. T or F: Violations of federal and state wage and hour laws can result in personal liability of corporate officers who are ERs.

Low Hanging Fruit for Litigation?

Pop Quiz

- 7. T or F: The current minimum wage in PA is \$7.15 per hour.
- 8. T or F: If an EE signs a job description indicating that the position is salaried, there is little chance that the EE can later sue for a violation of wage and hour laws.

Low Hanging Fruit for Litigation?

Pop Quiz

- 9. T or F: An EE on an 18 hour shift must be paid for time he or she is permitted to sleep or engage in other personal pursuits.
- 10. T or F: A salaried EE who has exhausted his or her PTO and then takes 3 more hours off in a day to attend a doctor's appointment may be docked for 3 hours.

Answers to Quiz

1. *FALSE*
2. *FALSE*
3. *E*
4. *B*
5. *FALSE*
6. *TRUE*
7. *FALSE*
8. *FALSE*
9. *FALSE*
10. *FALSE*

State Laws

Federal and State Interplay

- Some state laws provide greater EE protections
- ERs must comply with both federal and state requirements
- If conflict, the governing regulation is the one most favorable to EE

2 Major PA Wage and Hour Laws:

- 1. Pennsylvania Minimum Wage Act ("PMWA")
 - Contains substantive rights to minimum wage and hour standards in PA
 - Provides hourly rate requirements
\$7.25/ hour beginning 7/24/09
 - Overtime in amount of 1 ½ times an EE's regular rate after 40 hours worked in a workweek
Subject to certain exceptions and exemptions
 - Identifies what can be legally deducted from an EE's wages

■ 2. Wage Payment and Collection Law ("WPCL")

- Provides statutory remedies if an ER fails to meet its contractual obligation to pay wages
Includes fringe benefits or wage supplements
- Permits damages including:
 - Mandatory recovery for attorney fees to a prevailing EE
 - Liquidated damages in the amount equal to the greater of \$500 or 25% of the total amount of wages due (if there is no "good faith contest or dispute" about the wage claim)
- Does NOT create a right to compensation but a means of enforcement where compensation is due

Federal and State Conflict in Laws

- Overall, PA's laws track the FLSA, but there exist some variances:
 - PA does not recognize the skilled computer professional exemption
 - Other variances are found in the executive, administrative, professional, and outside sales exemptions

FLSA Nuts and Bolts

Background Facts

- Originally enacted in 1938 as part of FDR's New Deal.
- Establishes minimum wage, overtime pay, record keeping, and child labor standards affecting full-time and part-time workers in the private sector and in Federal, State, and local governments.
- In 2004, DOL updated its regulations governing the exemption of certain classes of employee's from the FLSA's overtime requirement requirements.
- Requires ERs to display a FLSA general information poster where EEs can readily see it.

Coverage under FLSA

- Generally extremely broad
 - EE's are covered if their work is performed in the US or its territory, if there is a true employment relationship between them and the ER, and the ER is covered.
 - Almost every EE in the US is covered by FLSA.

Coverage under FLSA

■ Who is an Employer?

- Any person or company that hires help or any business acting directly or indirectly in the interest of an ER in relation to an EE
- Includes: individuals, corps, corp officers, partnerships, associations, agents or managers, gov't, gov't contractors, and religious enterprises
- Labor unions are excluded in their relationship with members (not as to individuals hired to administer their business)

Coverage under FLSA

- Who is an Employee?
 - Any individual employed by an ER that *suffers or permits* that individual to work.

Coverage under FLSA

- EEs covered by the FLSA:
 - Family members of an ER
 - Clients:
 - Patients of health care providers or clients of social service agencies can be considered EEs if work performed has an economic benefit of any consequence to the institution or agency
 - Work is generally considered of economic benefit if it is of the kind performed by workers without disabilities in similar institutions or agencies.
 - Illegal EEs:
 - Undocumented workers generally are EEs, even though the Immigration Reform and Control Act prohibits their employment and provides sanctions against violating ERs

Coverage under FLSA

- Individuals NOT covered by the FLSA:
 - Trainees (if all 6 of the following factors apply):
 - the training they receive is similar to training offered by vocational schools;
 - trainees do not displace regular workers;
 - training is for the trainees' primary benefit;
 - ER receives no immediate benefit from the training and, in fact, its operations occasionally might be disturbed by the training program;
 - trainees are not necessarily entitled to a job at the end of training;
 - ER and trainees understand that no wages will be paid for the training.

■ Individuals NOT COVERED by the FLSA:

▪ Volunteers:

- Individuals who volunteer their time or work for their own advantage without an express or implied pay agreement
- HOWEVER, there can be no permissible "volunteering" in private sector employment
- DOL will consider: who receives the benefit of the work, how long it takes to render services, and whether those services are typical volunteer services.
- Work that is typical volunteer work must be paid if done at the direction of an ER- the individual performing the work would then be considered and EE.

■ Individuals NOT COVERED by the FLSA:

- Independent Contractors: (7 factors are considered)
 - permanence of the relationship;
 - extent to which services are integral part of ER's business;
 - nature and degree of ER's control over work;
 - opportunity for putative contractor's profit or loss;
 - putative contractor's investment in facilities and equipment;
 - extent of initiative, judgment, or foresight by putative contractor in open market competition with the others necessary for business success;
 - existence of an independent business organization and operation.
- Homeworkers:
 - Can be considered EEs if they are not independent contractors.

Who is covered by the FLSA?

Two (2) types of coverage:

■ Enterprise Coverage:

- All EEs of the enterprise are covered by FLSA
- If 2 or more EE's recurrently work in interstate commerce, all EE's in the enterprise are covered by the FLSA for the entire year.
- Businesses must have an "annual gross volume" of \$500,000 before they are subject to enterprise coverage.
- Do not need annual gross volume requirement if hospitals, institutions primarily engaged in the care of the sick, aged, mentally ill or disabled who reside on the premises; schools for children who are mentally ill, physically disabled, or gifted; schools and colleges; federal, state, and local gov't agencies.

Who is covered by the FLSA?

■ Individual Coverage:

- Individuals may be covered by FLSA even if enterprise is not.
- Some or all EEs of uncovered ER may be covered if:
 - engaged directly in interstate commerce (comm. to people in other states, traveling between states, processing credit card transactions, etc.);
 - produce goods for interstate commerce;
 - work in any closely related process or occupation that is directly essential to the production of goods for interstate commerce (construction, repair of machines and facilities,) or provide other services to instrumentalities of commerce.
 - Domestic service workers (housekeepers, full-time babysitters, and cooks) are normally covered under this provision.

FLSA Interactive Challenge

- Who works for a company that would not have enterprise coverage?

- Who works for a company where EEs would not have individual coverage?

- Examples of enterprises where EEs may not be covered?
 - Small construction companies
 - Small independently owned retail or service businesses

Minimum Wage Requirements of FLSA

■ Generally

- \$7.25 per hour beginning July 24, 2009
- Must be received "free and clear" (cash or equivalent)

■ Compensation included in hourly calculation:

- Payment must be in cash or negotiable instrument (check or direct deposit)
- Payment in scrip, credit cards, coupons, or similar devices such as "warrants" or IOUs are impermissible
- Wages (salary, hourly, piece rate)
- Commissions
- Certain bonuses
- Tips (up to \$5.12 per hour as of 7/24/09)

■ Compensation included in hourly calculation:

- Reasonable cost of room, board, and other "facilities" provided by the ER for the EE's benefit. HOWEVER,
 - (1) Cannot exceed actual cost.
 - (2) Cannot include a profit to ER.
 - (3) Reasonable cost method must follow good accounting practices.
 - (4) Cannot take a credit when no cost is incurred.

- "Other facilities" include: meals furnished at ER restaurants; merchandise furnished by ER stores and commissaries; fuel; utilities such as electricity, water, and gas furnished for the noncommercial use of EE; transp. furnished when travel time is not time worked and transp. is not necessary to employment; educational costs absorbed by school for student EEs, meal allowances in restaurant.

Tipped EE's

- Tip Credit: ERs of "tipped employees" must pay a cash wage of at least \$2.13 per hour if they claim a tip credit against their minimum wage obligation.
- If an EE's tips combined with the ER's cash wage of at least \$2.13 per hour do not equal the minimum hourly wage, ER must make up the difference.

Tipped EE's (cont'd)

- ER may claim "tip credit" only if:
 - ER informs each tipped EE about the tip credit allowance, including amount to be credited before the credit is utilized
 - ER can document that the EE received at least enough tips to bring the total wage paid up to minimum wage or more
 - All tips are retained by the EE and are not shared with the ER or other EEs, unless through a valid tip pooling arrangement

What are “Hours Worked” Compensable under FLSA?

- EE's must be paid for work suffered or permitted (not necessarily requested).

Compensable “Hours Worked”?

■ Waiting time:

- Counted when EE is unable to use the time effectively for his or her own purposes; and time is controlled by the ER.
- NOT counted when EE is completely relieved from duty; and time is long enough to enable the EE to use it effectively for his or her own purposes.

■ On-call time:

- Counted when EE has to stay on ER's premises or so close that the EE cannot use that time effectively for his or her own purposes.
- NOT counted when EE only required to carry a pager or leave word at home and/or with the ER of where he or she can be reached.

Compensable “Hours Worked”?

■ Meal and rest periods:

- Meal- not hours worked when EE is relieved of duties for purposes of eating a meal.
- Rest- must be paid if of short duration (5-20 minutes).

■ Training time:

- Time in meetings/lectures are hours worked unless:
 - Attendance is voluntary and outside regular working hours
 - Not work related
 - EE does not perform any productive work during attendance

Compensable “Hours Worked”?

■ Apprentice training:

- Supplemental instruction sessions for apprentices do not have to be compensated if:
 - Apprentices are employed under written apprenticeship agreement that conforms to the U.S. DOL standards;
 - No productive work is done;
 - No written agreement (i.e. union contract) treats the time as worked.

Compensable “Hours Worked”?

■ Clothes-changing, clean-up:

- Treated as part of principle activities of the job if it is required by the nature of the job, and thus considered work hours.
- Can be excluded by agreement in a CBA.
- NOT compensable if activity is done for EE's own convenience.
- Packing house "donning and doffing" cases:
 - Time spent putting on and taking off safety gear found not to be work.
 - Time spent donning, doffing, and cleaning special protective gear found to be work.

Compensable “Hours Worked”?

■ Travel time:

- Ordinary travel from home to work is not counted.
- Travel between job sites during normal work day is counted.
- "Portal to Portal" Act: Time spent "getting there"; and preliminary and postliminary activities are NOT compensable UNLESS compensable under the terms of a contract, custom, or practice.

■ Sleep time:

- Less than 24 hour duty: EE who is on duty for less than 24 hours is considered to be working even if allowed to sleep or engage in other personal pursuits.
- Duty of 24 hours or more: Parties can agree to exclude bona fide sleep and meal periods.

Compensable “Hours Worked”?

- Unauthorized Work: Unrequested work (i.e. voluntary off-clock)
 - ERs must pay for unauthorized work, but
 - ERs may also take disciplinary action against employees who perform unauthorized work.
- Leave Time:
 - Hours that an EE is absent because of sick leave, vacation, holidays, jury duty, etc. need not be counted as hours worked, unless a contract, custom, or practice exists to the contrary.

Overtime Requirements

■ Generally:

- At least 1½ times an employee's *regular rate of pay* for all hours worked over 40 in a *work week*.

■ What is a work week?

- A fixed and recurring period of 7 consecutive 24 hour periods (168 hours).
- Does not have to coincide with the calendar week.
 - Where there is a change of the start day/time of the workweek, an EE's hours that overlap must be calculated by both the old and new workweeks, the EE getting paid the greater amount.
 - Hospital ERs may use a period of 14 consecutive 24 hour periods.
 - Each workweek stands alone.
 - Comp time in most circumstances is not permissible if beyond work week.

■ What is a regular rate of pay?

- May not be less than the applicable minimum wage.
- Some payments may be excluded from regular rate calculation, including, but not limited to:
 - Sums paid as gifts
 - Payments for time not worked
 - Reimbursement for expenses
 - Discretionary bonuses
 - Profit sharing plans
 - Retirement and insurance plans
 - Overtime premium payments
 - Stock options
 - Suggestion plan awards
 - Employee referral bonuses
 - Paid leave
 - Severance
 - Talent fees

■ What can be deducted?

- No limit on the amount deducted for the reasonable cost of board, lodging, or other facilities.
 - Items that are primarily for the benefit or convenience of the ER do not qualify as facilities.
 - Regular rate is calculated before deduction is taken.

- Deductions for items other than board, lodging, and facilities may be made if:
 - It is bona fide,
 - Made for particular items under a prior agreement,
 - The purpose is not to evade statutory overtime requirements or other laws, and
 - It is limited to the amount above the highest applicable minimum wage for the first 40 hours.

Exemptions

- ERs may be exempt from one or any combination of the overtime (OT), minimum wage (MW), and/or child labor (CL) provisions.
- Exemptions are narrowly construed against the ER asserting them, and the ER has the ultimate burden of supporting the actual application of an exemption.
- Limited exemptions to the FLSA minimum wage and overtime obligations exist for white-collar EEs. (Took effect on 8/23/04 following DOL revisions to regulations.)

"White-collar" or "541" Exemptions:

- New regulations relating to exemptions of the FLSA took effect during 2004
- Were largely unchanged since 1949
- In order for most "white-collar" exemptions to apply, an EE's *salary level*, *salary basis*, and *job duties* MUST meet ALL the requirements of the DOL's regulations.

Salary Level Test

- EE must be paid a salary level not less than the statutory minimum.
- The minimum salary level required for exemption under the FLSA is \$455 per week (\$23,600 per year).
- PA's minimum salary level is \$455 per week exclusive of board, lodging and other facilities.
- Must be paid "free and clear"
- May be paid for periods exceeding one week, but must be in equivalent amounts (i.e. biweekly, semimonthly, or monthly)

Salary Basis Test

- EEs must regularly receive a predetermined amount of compensation each pay period.
- Pay periods must at least be weekly.
- ER may not reduce EE's compensation because of variations in the quality or quantity of the work performed.
- An EE must be paid the full salary for any week in which the EE performs any work.
- ERs do not need to pay EEs for any workweek where the EE did not perform any work.

Pay Docking Rules

- A salaried EE is NOT paid on a salary basis if deductions are made for absences occasioned by the ER or by the operating requirements of the business.
- If EE is ready, willing, and able to work, deductions may not be made for time when work is not available.
- An ER will lose exemption if it has an "actual practice" of making improper deductions from salary. Improper deductions may result in loss of the exemption during the time period when improper deductions were made; for EEs in the same job classification; or for EEs working for the same managers responsible for the actual improper deductions.

Pay Docking Rules (cont'd)

- "Actual practice" does not have a clear definition, however, factors that have been considered to make a determination of "actual practice" include: the number of improper deductions; the span of time during which deductions were made; the number and location of affected employees; the number and location of responsible managers; and whether the employer has a "clearly communicated policy" permitting or prohibiting improper violations.
- Isolated or inadvertent improper deductions may not result in loss of exempt status if the ER reimburses the EE.

Pay Docking Rules (cont'd)

- Exempt status will not be lost if the employer's actions are in accordance with the "safe harbor" so long as the improper deduction was not a willful violation.
- Safe Harbor Requirements:
 - ER has clearly communicated policy prohibiting improper deductions, including a complaint mechanism;
 - ER reimbursed EEs for any improper deductions, and
 - ER made a good faith commitment to future FLSA compliance.

Exceptions to the FLSA No-Pay Docking Rules:

- 7 exceptions from the "no pay-docking" rule which permit the following permissible salary deductions:
 - 1. Personal Reasons: Absence from work for one or more full days for personal reasons, other than sickness or disability.
 - 2. Sickness or Disability: Absence from work for one or more full days due to sickness or disability if deductions made under a bona fide plan, policy, or practice of providing wage replacement benefits for these types of absences.

■ 7 exceptions to "no pay-docking" rule:

- 3. Jury Duty/Witness Fee Offset: Deductions made to offset any amounts received as payment for jury fees, witness fees, or military pay.
- 4. Safety Penalties: Penalties imposed in good faith for violating safety rules of "major significance."
- 5. Disciplinary Suspension: Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of written workplace conduct rules.
- 6. First Week/Last Week: Proportionate part of an EE's full salary may be paid for time actually worked in the first and last weeks of employment.
- 7. FMLA: Unpaid leave taken pursuant to the FMLA.

Pay Docking (cont'd)

- “Red Flag” deductions that can make a formerly exempt EE eligible to collect overtime:
 - Business trips
 - No deductions from salary for business trips
 - Lack of work
 - If an exempt EE is ready, willing and able to work, you cannot deduct money for slow times when there's little or no work assigned.
 - Recent DOL Opinions speak to this issue.

Recent DOL Rulings

DOL Opinion 2009-18

- Facts: ER proposed requiring salaried EEs to stay home or leave work early during periods of insufficient work and deduct the non-work time from the EE's accrued PTO accounts. EEs would receive regular salaries so long as they have sufficient hours in PTO accounts to cover non-work periods. If EE's accrued PTO is exhausted, EE's salary would be reduced in full-day increments, except that it will not be reduced below the minimum salary of \$455 per week.

Recent DOL Rulings

DOL Opinion 2009-18

■ DOL Opinion:

- 1. Will requiring mandatory PTO during periods of “low patient census” jeopardize exempt status?
 - Answer- Yes.
 - Reason- If an ER requires an exempt EE to work less than a full workweek, ER must pay EE’s full salary even if:
 - ER does not have a bona-fide benefits plan;
 - EE has no accrued benefits in the leave bank;
 - EE has limited accrued leave benefits and reducing accrued leave will result in negative balance; or
 - EE already has a negative balance in the accrued leave bank

Recent DOL Rulings

DOL Opinion 2009-18

■ DOL Opinion:

- 2. If accrued PTO is exhausted, periods of law patient census continues, can EEs be scheduled for less than 40 hours and reduce pay accordingly? (i.e. go from 5 to 4 day schedule and get paid for 4 days)
 - Answer- No
 - Reason- Would mean that EE is not paid on a fixed and guaranteed weekly salary basis without regard to quantity of work performed. Only way to accomplish would be to have a “permanent” change in work schedule.

Recent DOL Rulings

DOL Opinion 2009-14

- Facts: When low patient census, ER offers “voluntary time off” (VTO), where EEs may choose to use paid accrued leave. ER approves VTO on a first-come, first-served basis. If insufficient volunteers, ER requires “mandatory time off “ (MTO) under seniority-based rotation method. Exempt EEs may then use accrued paid leave or take unpaid MTO.

Recent DOL Rulings

DOL Opinion 2009-14

- Facts (cont'd): If EE elects not to use PTO or does not have sufficient accrued PTO to cover VTO or MTO, ER deducts amount equal to VTO or MTO from EE's salary, if it is shorter than 1 workweek. If 1 workweek, the salary is not paid for that pay period. May take VTO or be assigned MTO only in 1 day increments.

Recent DOL Rulings

DOL Opinion 2009-14

- DOL Opinion:
 - Salary deductions due to a reduction of hours worked for short-term business needs do not comply with FLSA because they result from the operating requirements of the business. Salary deductions due to MTO lasting less than 1 workweek violate salary basis requirement. ER is not, however, required to pay salary for MTO of a full workweek because exempt EEs need not be paid for any workweek in which they perform no work.

Recent DOL Rulings

DOL Opinion 2009-2

- Facts: ER wants to require exempt EEs to use accrued vacation time during a plan shutdown of less than 1 workweek
- DOL Opinion:
 - ER may require exempt EEs to use accrued vacation time for any absence, including one resulting from a plant shutdown, without affecting exempt status, provided that EEs receive a payment in an amount equal to their guaranteed salary.
 - If an EE has no accrued benefits or a negative balance still must receive the EE's guaranteed salary for any absence occasioned by the ER or the operating requirements of the business.

Job Duties Test

- Job titles alone do not determine exempt status.
- Measures an EE's regular job functions against a list of criteria to determine if an EE qualifies as a "white-collar" EE.

Executive Exemption

FLSA Executive Duties Test

- EE must be compensated on a salary basis at a rate not less than \$455 per week (\$23,660 per year);
- Primary duty- management of the enterprise or of a customarily recognized department or subdivision of that enterprise;
- Customarily and regularly direct the work of at least 2 or more other full-time EEs or their equivalent; and
- Has the authority to hire or fire other EEs, or the EE's suggestions and recommendations about the hiring, firing, promotion, or other status changes of subordinate employees must be given particular weight.
- An individual who is a bona fide 20% owner of an enterprise is exempt if they are actively engaged in management of the enterprise. (Salary level and basis requirements do not apply to 20% owner executives.)

Executive Exemption

PA's Duties Test

- Salary basis requirements;
- EE's primary duty must consist of man't of the enterprise in which he is employed or of a customarily recognized dep't or subdivision thereof;
- EE must customarily and regularly direct the work of two or more other EEs therein; and
- EE must customarily and regularly exercise discretionary powers and not devote more than 20% (or in the case of an EE of a retail or service establishment, 40%) of the hours in his or her workweek to activities not directly related to the requirements set forth above.
 - If an EE is in sole charge of an independent establishment or a physically separated branch established or owns at least 20% interest in the enterprise by which he/she is employed, this prong does not need to be met.

Administrative Exemption

FLSA Administrative Duties Test

- EE must be compensated on a salary basis at a rate not less than \$455 per week (\$23,660 per year);
- Primary duty: performance of office in non-manual work directly related to the management or general business operations of the ER or the EE's customers;
 - Examples of "management or general business operations" include: tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; human resources; employee benefits; labor relations; public and government relations; legal and regulatory compliance; and computer network, internet, and/or database administration.

Administrative Exemption

FLSA Administrative Duties Test (cont'd)

- An administrative EE's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance;
- For some specific jobs/positions, individuals' exempt status depends on actual job duties.

Administrative Exemption

FLSA Administrative Duties Test (cont'd)

■ Examples:

▪ Insurance Claims Adjusters

- May be exempt if duties include: interviewing insured, witnesses, and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total claim value; negotiating settlements; or making recommendations regarding litigation.

Administrative Exemption

FLSA Administrative Duties Test (cont'd)

- Financial Services EEs
 - May be exempt if duties include: collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet customer's needs and financial circumstances; advising customer regarding the advantages and disadvantages of different financial products; marketing, servicing, or promoting the employer's financial product.
 - Primary duty of selling financial products does not qualify for the administrative exemption.

Administrative Exemption

PA's Administrative Duties Test

- Primary duty must be performance of office or nonmanual work that is directly related to man't or general business operations of the ER or ER's customers;
- Must exercise discretion and independent judgment with matters of significance;
- Regularly and directly assist an EE employed in a bona fide executive or administrative capacity, who performs under only general supervision, work along specialized or technical lines requiring special training, experience in knowledge, or who executes under only general supervision special tasks and assignments; and
- Not devote more than 20% (or in the case of an EE of a retail or service establishment, 40%) of the hours in workweek to activities not directly related to the requirements set forth above.

Professional Exemption

FLSA Learned Professional Duties Test

- EE must be compensated on a salary basis of not less than \$455 per week (\$23,660 per year);
- Primary duty-the performance of work requiring advanced knowledge,
 - Work which is predominantly intellectual in character and requires the consistent exercise of discretion and judgment
- Advanced knowledge must be in a "field of science or learning";
 - "Field of science or learning" refers to occupations of recognized professional status rather than mechanical arts or skilled trades.
 - Includes law, theology, medicine, pharmacy, accounting, actuarial computation, teaching, architecture, engineering, physical, chemical and biological sciences.

Professional Exemption

FLSA Learned Professional Duties Test (cont'd)

- Advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction;
- Exempt medical professions include:
 - Doctors
 - Registered nurses
 - Registered or certified medical technologists
 - Must have 3 years of pre-professional study in an accredited college or university, plus 1 year of professional study in an accredited school of medical technology.
 - Dental Hygienists
 - Must have 4 years of pre-professional study in an accredited college or university.
 - Certified physician assistants
 - Must have 4 years of pre-professional and professional study including graduation from an accredited physician assistant program.

Professional Exemption

FLSA Learned Professional Duties Test (cont'd)

- Other commonly exempt professions include:
 - Lawyers
 - Teachers
 - Accountants
 - Pharmacists
 - Engineers
 - Actuaries
 - Chefs
 - Certified athletic trainers
 - Licensed funeral directors or embalmers
- The salary level test does not apply to physicians, lawyers, and teachers

Professional Exemption

FLSA Learned Professional Duties Test (cont'd)

- Non-exempt professions include:
 - Licensed practical nurses
 - Accounting clerks and bookkeepers who normally perform a great deal of routine work
 - Cooks who perform predominantly routine mental, manual, mechanical or physical work
 - Paralegals and legal assistants
 - Engineering technicians

Professional Exemption

FLSA Creative Professional Exemption

- EE must be compensated on a salary basis at a rate not less than \$455 per week (\$23,660 per year);
- Primary duty- duty-the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor;
- Examples include:
 - Music- musicians, composers, conductors, soloists;
 - Writing- essayists, novelists, short-story writers, play writers, screen play writers who choose their own subjects, responsible writing positions in advertising agencies;
 - Acting; graphic arts-painters, photographers, cartoonists.

Professional Exemption

PA's Professional Duties Test

- PA has retained a percentage test required to meet the professional exemption.
- In addition to the salary requirements, EE's primary duty consists of work
 - Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized instruction and study, or
 - Performance of work that is original and creative in character in a recognized field of artistic endeavor,
- Work must require
 - Exercise of discretion and judgment, or
 - Performance of work requiring invention, imagination or talent in a recognized field of artistic endeavor

Professional Exemption

PA's Professional Duties Test (cont'd)

- Work is predominantly intellectual and varied in character, as opposed to routine mental, manual, mechanical or physical work,
- Output produced or the result accomplished cannot be standardized in relation to a given period of time and does not devote more than 20% of the hours in a workweek to activities not an essential part of and necessarily incident to the requirements set forth above.

Computer Employee Exemption

FLSA Computer Related Occupations

- Must be compensated either on a salary or fee basis at a rate not less than \$455 pre week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;
- EE 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;

Computer Employee Exemption

FLSA Computer Related Occupations (cont'd)

- Primary duty must be:
 - Application of systems analysis technologies and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
 - 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;
 - Design, documentation, testing, creation, or modification of computer programs related to machine operating systems;
 - A combination of the above requiring the same level of skills.

Computer Employee Exemption

PA Computer Related Exemption

- PA does NOT recognize the federal exemption for computer EEs.

Outside Sales Exemption

FLSA Outside Sales Exemption

- No compensation test.
- Primary duty- Making sales or obtaining orders or contracts for services or facilities for consideration paid by customer
- Customarily and regularly engages away from the ER's place of business in performing primary duty.

Outside Sales Exemption

PA Outside Sales

- EE who is employed for the purpose of and who is customarily and regularly engaged more than 80% of work time away from ER's place of business;
- Makes sales
 - Includes sale, exchange, contract to sell, consignment for sale, or other disposition or selling, and delivering articles or goods
- Obtains orders or contracts for the use of facilities for which consideration will be paid
- EE may not spend more than 20% of the hours worked in any week in matters not directly related to and in conjunction with the making of sales;
- Work performed incidental to and in conjunction with EE's own outside sales or solicitations, including deliveries and collections, is not nonexempt work.
- Like federal law, no compensation level is required

Highly Compensated Employees

FLSA Test

- Applies to EEs 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)
- Primary duty- includes performing office or non-manual work;
- Customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional EE identified in the standards tests for exemption
- An EE may qualify as an exempt highly compensated executive if the EE customarily and regularly directs the work of 2 or more other EEs, even though the EE does not meet all of the other requirements in the standard test for exemption as an executive.

Youth Employment Regulations

Federal Requirements (for non-hazardous jobs)

- **14 and 15 year olds:**
 - During school
 - Maximum of 8 hours per day and 18 hours per week
 - Cannot work before 7 am and after 7 pm
 - June 1 through Labor Day
 - Maximum of 8 hours per day and 40 hours per week
 - Cannot work before am and after 9 pm
- **16 and 17 year olds:**
 - May be employed for limited hours. No restrictions on number of hours of work per day or per week
- **18 year olds:**
 - Restrictions no longer apply

Youth Employment Regulations

PA Regulations (for non-hazardous jobs)

■ Under 16

- During school
 - Maximum of 4 hours on school day, 8 hours any other day
 - Maximum of 18 hours per week
 - May not work before 7 am or after 7 pm
- June 1 through Labor Day
 - Cannot work before 7 am or after 10 pm

Youth Employment Regulations

PA Regulations (for non-hazardous jobs)

■ Under 18

▪ During school

- May not work more than 28 hours during school week

▪ Other prohibitions

- No more than 6 consecutive days or more than 44 hours in any 1 week
- No more than 8 hours in 1 day
- No more than 5 hours continuously without a break of at least 30 minutes for lunch
- May not work from 12 am to 6 am, except 16 and 17 year olds may work until 1 am on Friday and Saturdays and on days preceding school vacation during school year

Record Keeping

- All ERs subject to any provision of the FLSA must make, keep, and preserve true and accurate record of hours worked by each EE and the wages paid to each EE
- Should be preserved for a minimum of 3 years (best practice is at least 6 given other requirements)
- Need to be readily accessible for review
- Must maintain special certificates granted by the Secretary of Labor for employment of students and learners

Record Keeping

■ Must keep:

- Name and address,
- Regular hourly rate of pay,
- Occupation,
- Beginning time and day of workweek,
- Number of daily and weekly hours worked,
- Total daily or weekly straight-time wages,
- Overtime,
- Total deductions from or additions to wages,
- Total wages,
- Allowances claimed as part of minimum wage,
- Date of payment and period covered.

■ Should keep:

- Job descriptions,
- Copies of old superseded handbooks,
- Time cards or time sheets

Record Keeping

- For tipped employees must keep:
 - List of EEs paid by tips;
 - Weekly or monthly amount of tips reported by each EE;
 - Amount by which tips increased each EE's wages;
 - Amount of hours each EE worked in no-tip job;
 - Amount of hours EE worked in tip-related job.

Required Postings:

- The FLSA and state regulations require employers to conspicuously post certain mandatory posters for purposes of giving notice to employees.
- Federal and State posters are available in numerous languages.

Enforcement & Penalties

FLSA

■ Enforcement

- Wage and Hour Division (WHD) of the US DOL is responsible for enforcing.
- EE may file a complaint before the DOL
 - Secretary of Labor may:
 - File on behalf of EEs for back wages and an equal amount in liquidated damages.
 - Obtain injunctive relief to restrain ER from violating the law
- EE may file an action in federal court and collect statutory damages
- DOL may initiate investigation

■ Agreement to resolve FLSA claims

- Not effective absent DOL or Court approved settlement, despite the existence of a written agreement between ER and EE

FLSA Penalties

- **Personal liability for corporate officer**
 - Where the corporate officer is an ER defined as "any person acting directly or indirectly in the interest of an ER in relation to an EE and includes a public agency, but does not include any labor organization (other than when acting as an ER) or anyone acting in the capacity of officer or agent of such labor organization."
- **Recover back wages, and equal amount in liquidated damages, plus attorneys fees and court costs.**
 - May go back 2 years from date of claim or 3 years for a willful violation.

FLSA Penalties

- Civil monetary violations for repeat and/or willful violations of the FLSA's minimum wage or overtime requirements
 - Up to \$1,100 per violation
- Willful violators may face criminal penalties

PA Wage and Hour Laws

Enforcement

- Secretary of Labor and Industry has right to:
 - enforce provisions,
 - the right to investigate alleged violations, and
 - the right to institute prosecutions for alleged violations.
- EE may file civil suit within 3 years after the date on which such wages were due and payable

PA Wage and Hour Laws

Penalties

■ Personal liability

- Where the corporate officer falls into the definition of an "employer" under state law.
- Under the Minimum Wage Act, an ER is defined as "any individual, partnership, association, corporation, business trust or any person or group of persons acting, directly or indirectly, in the interest of an employer in relationship to any employee."

PA Wage and Hour Laws

Penalties

- Liquidated damages in the amount equal to 25% of the total amount of wages due, or \$500, whichever is greater
 - Where wages remain unpaid for 30 days beyond the regularly scheduled payday, and where there is no good faith dispute or right to set-off or counterclaim
- Mandatory recovery for attorney fees to a prevailing party

Best Practices

- ERs and EEs should always closely check the exact terms and conditions of an exemption in light of the employee's actual duties before assuming that the exemption might apply.
 - Solely relying on written job description is not foolproof.
 - If possible, get a written opinion from a lawyer supporting the exemption.
- Keep accurate records for exempt and non-exempt EEs so that if exempt status is challenged, back-up records of OT exists.

Best Practices (cont'd)

- Conduct internal audits and consult HR team and legal counsel; ask questions.
- Be responsive and careful if an EE makes a claim that they have not been paid correctly.
- Go back to your workplace and let your owners know about the personal liability section you learned about today.

Where to Get More Information

- **United States Department of Labor**
 - [.http://www.dol.gov/compliance/laws/comp-flsa.htm](http://www.dol.gov/compliance/laws/comp-flsa.htm)
 - See Fact Sheets
 - 1-866-4-USA-DOL, TTY: 1-877-889-5627
 - U.S. Department of Labor, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210

- **Pennsylvania Department of Labor and Industry**
 - <http://www.dli.state.pa.us>
 - 717-787-5279
 - Bureau of Labor Law Compliance Offices- Harrisburg, Philadelphia, Pittsburgh, and Scranton

Where to Get More Information

Copy of slide show, posters, questions:

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