I. COVERAGE UNDER THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act applies only in situations where (1) a true employee/employer employment relationship exists, (2) the requirements for either individual or enterprise coverage are met, and (3) the work is performed in the United States or a U.S. possession or territory.

A. Employer/Employee Relationship

The FLSA does not apply in the absence of an employer/employee relationship.\(^1\) Under the Act, an employee is, "any individual employed by an employer."\(^2\) An "employer" is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee."\(^3\)

The focal point in determining whether a worker is an employee or an independent contractor is whether "the individual is economically dependent on the business to which he renders service...or is, as a matter of economic fact, in business for himself."\(^4\)

1. Suffer or Permit to Work

"Employ" includes to suffer or permit to work.\(^5\) The Act's regulations caution, "[w]ork not requested but suffered or permitted is work time."\(^6\) Unless the employer knows or has reason to believe that an individual is performing work on its behalf, the work performed is not within the purview of an employer/employee relationship.\(^7\) An employer has a duty of reasonable

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5. 29 U.S.C.A. §203(g).  
6. 29 C.F.R. §785.11.  
7. Shultz v. Hinojosa, doing business as H & H Meat Products Co., 432 F.2d 1092, 19 WH Cases 625 (5th Cir. 1970) (wife and children of worker who cleaned employer's floor on contract basis were employees); Burry v. Nat'l Trailer Convoy, Inc., 338 F.2d 422, 426, 16 WH Cases 713 (6th Cir. 1964) (wife of employee permitted to work in terminal of company transporting house trailers and mobile homes when husband was absent from terminal office and trained by company was employee where company, with knowledge, permitted wife to work in terminal); cf. Martin v. Wyoming, 30 WH Cases 811 (D. Wyo).
inquiry, given the conditions prevailing in its business, to determine if work is performed on its behalf.8

2. Employee or Independent Contractor

The test applied to determine whether a worker is an employee or an independent contractor is called the "economic reality" test. Neither the labeling of a worker as an independent contractor, nor common law standards regarding independent contractor status will be determinative of whether a worker is an employee under the Act,9 rather the "economic reality" of the situation will determine the matter.

The Supreme Court, in United States v. Silk10 found degree of control, opportunity for profit or loss, investment in facilities, permanency of the relationship, and required skill to be relevant in determining employee status.

a) Employee Status Found

Application of the economic realities test has resulted in a diverse range of workers being considered employees under the FLSA. Topless dancers at a night club,11 locker room attendants,12 a real estate

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8 Gulf King Shrimp Co. v. Wirtz, 407 F.2d 508, 512, 18 WH Cases 751 (5th Cir. 1969).
10 331 U.S. 704 (1947).
11 Reich v. Circle C Investments, 998 F.2d 324, 326-327, 1 WH Cases 945 (5th Cir. 1993) (topless dancers at a nightclub were employees. Club owner argued that the dancers were independent contractors because they were compensated solely by customers tips. Written agreements permitted the dancers to perform whenever they wished and required that they furnish their own costumes. The dancers paid the club a fee of $20 per night to perform but the club set hours and controlled the atmosphere. The only initiative dancers exercised was to decide what to wear and how provocatively to dance).
salesperson,13 a night dispatcher for ambulance service,14 attendants at a self-service laundromat,15 night security guards,16 truck drivers hauling logs and woods workers for a lumber company,17 waiters and waitresses,18 a hotel cardroom supervisor,19 cake decorators paid by the cake,20 employment agency employment counselors,21 nurses of a health care service working simultaneously with several different parties,22 station operators for a gas distributor,23 and parking lot valets24 have all been held to be covered by the FLSA.

2) No Employer/Employee Relationship Found

No employment relationship has been found under the FLSA with respect to an equally diverse range of workers. These include air conditioning

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14 Halferty v. Pulse Drug Co., Inc., 821 F.2d 261, 28 WH Cases 322 (5th Cir. 1987).
15 Brennan v. Partida, doing business as Texas Cleaners, 492 F.2d 707, 709, 21 WH Cases 677 (5th Cir. 1974); see also Usery v. Pilgrim Equip. Co., Inc., 527 F.2d 1308, 22 WH Cases 783 (5th Cir.), cert. denied, 429 U.S. 826, 22 WH Cases 1281 (1976) (operators of laundry pick-up stations were employees); Donovan v. Sureway Cleaners, 656 F.2d 1368, 1371-73, 25 WH Cases 105 (9th Cir. 1981) (operators of retail outlets for laundry and dry cleaning company were employees).
18 Doty v. Elias, 733 F.2d 720, 26 WH Cases 1216 (10th Cir. 1984).
20 Dole v. Snell, 875 F.2d 802, 29 WH Cases 465 (10th Cir. 1989).
21 Shultz v. Cadillac Assocs., Inc., 413 F.2d 1215, 19 WH Cases 71 (7th Cir. 1969) (counselors depended on company for training, direction, and compensation based on number of placements made, which was set by company).
22 Brock v. Superior Care, Inc., 840 F.2d 1054, 28 WH Cases 940 (2d Cir. 1988).
23 Martin v. Selker Bros., Inc., 949 F.2d 1286, 30 WH Cases 1061 (3d Cir. 1991); see also Donovan v. Williams Oil Co., 717 F.2d 503, 26 WH Cases 643 (10th Cir. 1983) (service station operators with "form leases" were employees of oil company); Marshall v. Truman Arnold distributing Co., Inc. 640 F.2d 906, 24 WH Cases 1217 (8th Cir. 1981) (service station operators were employees of distributors).
24 Weisel v. Singapore Joint Venture, Inc., 602 F.2d 1185, 24 WH Cases 276 (5th Cir. 1979) (valet wore hotel uniform supplied by hotel, was covered by hotel's insurance, had identification card identifying him as hotel employee, received Christmas bonus, and ate meals at hotel at employees' discount).
B. Enterprise Coverage

In addition to a genuine employment relationship, the requirements of individual or enterprise coverage must be met for the FLSA to apply.

Under enterprise coverage, all employees of an enterprise are covered by the FLSA if the enterprise is engaged in interstate commerce, engaged in the production of goods for interstate commerce, or working on goods or materials that have been moved in or produced for interstate commerce, and the enterprise has an annual business volume of at least $500,000. (A few types of firms, are subject to enterprise coverage regardless of their sales volume.) Under enterprise coverage, if two or more employees of one enterprise are engaged in interstate commerce, all of the employees of the enterprise are covered by the FLSA, provided that the business volume test is satisfied. As a practical matter,

28 Donovan v. John Jay Esthetic Salons, 26 WH Cases 823 (E.D. La. 1983) (but shampoo maids were found to be employees, where their jobs did not require special training or skill, and they were entirely dependent on hairdresser for whom they worked).
29 Carrell v. Sunland Constr., Inc., 998 F.2d 330, 1 WH Cases 993 (5th Cir. 1993) but cf. Robicheaux v. Radcliff Material, Inc., 697 F.2d 662, 25 WH Cases 1210 (5th Cir. 1983) (welders that worked between 10 months and three years for company performing work that required only moderate skill were employees where company told welders how long jobs should take, and welders spent only 50% of their time welding and rest of their time performing other tasks for company).
employees usually are covered under enterprise coverage since most companies have two or more employees engaged in interstate commerce

   Individuals who are not employed by a covered enterprise may nevertheless be individually covered. Under individual employee coverage, employees are covered by the Act in each week in which they are individually engaged in interstate commerce, produce goods for commerce, or work in activities closely related and directly essential to the production of goods for commerce. This includes employees who work in communications or transportation; regularly use the mails, telephones, or telegraph for interstate communications; handle, ship, or receive goods moving in interstate commerce; regularly cross state lines in the course of their employment; or work for independent employers that contract to do clerical, custodial, maintenance, or other work for firms engaged in interstate commerce or in the production of goods for interstate commerce.

   From the time of the passage of the Act until 1961, all coverage was individual; for every employee the question of coverage had to be resolved separately. The introduction of the notion of "enterprise" coverage greatly reduced the need for coverage litigation, since a single determination would typically resolve the question for every employee of the enterprise. In addition to substantially reducing the number of coverage problems needing to be litigated, it meant that virtually any litigation that did occur would likely involve the coverage of an enterprise rather than that of a single individual.

II. DETERMINING HOURS WORKED

   Two fundamental concepts of the FLSA are the requirement of a minimum wage and the requirement to pay overtime. Section 6 of the Act requires that each covered employee must be paid at least a specified minimum wage for each hour worked. Section 7 provides that persons may not be employed for more than a stated number of hours in a work week without receiving at least one and one-half times their regular rate of pay for the additional hours. The amount of money an employee is entitled to receive cannot be determined without knowing the number of hours worked.

   A. Waiting Time

   Although it is clear that employers must compensate employees for time actually spent working, questions arise as to whether the minimum wage and overtime provisions of the FLSA also apply to time spent waiting to perform
productive work. Under the regulations, whether waiting time is time worked depends on the particular circumstances.34

The Supreme Court held in *Armour & Company v. Wantoch*35 that time spent waiting for work is compensable if it is spent "primarily for the benefit of the employer and [its] business."36 Conversely, if the time is spent primarily for the benefit of the employee, the time is not compensable. In determining whether waiting time constitutes hours worked, the courts examine the amount of control the employer has over the employee during the waiting time, and whether the employee can effectively use that time for his own purposes.

1. **On Duty**

Waiting time while on duty is included in compensable time, especially when it is unpredictable, or is of such short duration that the employees cannot use the time effectively for their own purposes.37 In those instances, the employees are to be compensated whether their work is on or off the employer's premises, even if the employees spend the time engaging in such amusements as playing cards, watching television or reading.38 Examples where courts have found employees to be engaged in compensable waiting time include:

- assembly line workers who experienced idle time of 45 minutes or less due to delays in delivery and mechanical failures;39
- a well pumper who resided on the employer's premises and who was required to be on duty at least eight hours per day, seven days per week to pump wells and repair machinery when needed.40

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35 323 U.S. 126, 4 WH Cases 862 (1944).
36 Id. at 132-34.
40 *Handler*, 191 F.2d 120, 10 WH Cases 343.
• restaurant employees who were required by their employer to report to work at a certain time even though they could not punch in until enough customers were present to make work available;41

• truck washers who were idle while waiting for the arrival of the next truck;42

• truck drivers carrying the mail who had periodic layovers lasting two hours or less due to loading or unloading problems;43

• oil well casing crews who had to wait for casings after they set up their equipment;44

• truck drivers and helpers who were required by their employer to wait on premises for assignments;45 and

• employees who experienced occasional idle time caused by machinery breakdowns.46

2. Off Duty

The regulations provide that "[p]eriods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked."47 Whether time off work is truly sufficient to enable employees to effectively use the time for their own purposes is a factual issue dependent upon the circumstances.

45 Walling v. Dunbar Transfer & Storage, 3 WH Cases 284, 287 (W.D. Tenn. 1943).
47 29 C.F.R. §785.16(a) (1996).
Circumstances considered by the courts include the duration of the time off and any other facts which may place restrictions on the employees.48

Examples of cases where courts have found that employers did not violate the Act by denying compensation for idle time include:

- a telephone dispatcher who only had to answer a small number of telephone calls for non-emergency ambulance care each night and who was allowed to pursue her own personal, social and business activities during the evening hours;49

- employees who were required to live on the employer's premises during their off-shift hours, but who were free during their off duty time to sleep, eat, watch television, exercise, play ping pong or cards, read and engage in other personal amusements;50 and

- truck drivers responsible for picking up and delivering the mail who were free to attend to personal matters and occupy their time as they desired during the waiting time between scheduled runs.51

B. On-Call Time

The test for determining whether employers must compensate employees for on-call time is a fact-based question of whether the employees are required to remain on the employer's premises, or so close to the premises that the employees cannot use the time effectively for their own purposes.52 Courts also

50 Rousseau v. Teledyne Movible Offshore, Inc., 805 F.2d 1245, 1247-48, 27 WH Cases 1574 (5th Cir. 1986), cert. denied, 484 U.S. 827 (1987)(involving offshore oil derrick barge employees); Allen v. Atlantic Richfield Co., 724 F.2d 1131, 1136-38, 26 WH Cases 1050 (5th Cir. 1984) (involving security guards working during a strike). But see Campbell v. Jones & Laughlin Steel Corp., 70 F. Supp. 996, 998, 6 WH Cases 796 (W.D. Pa. 1947) (holding that security guards who were on call at all times during a strike were entitled to be compensated for working 24 hours per day).
examine the facts of each case to determine whether the time in question is primarily for the benefit of the employer or whether the employee was “waiting to be engaged.”53 Employers may impose some restrictions on employees who are on-call without the time becoming compensable. Otherwise, "all or almost all on-call time would be working time, a proposition that the settled case law and the administrative guidelines clearly reject."54

1. Cases Finding On-Call Time Compensable

Examples where courts have found that under all of the circumstances the employees were "engaged to wait" and should be compensated for their on-call time include:

• private fire fighters required to be on duty on the employer's premises, who had to remain in a state of readiness to fight fires instantly and had to respond to alarms almost every night after their regular shift ended;55

• city fire fighters required to be able to report to the station house within 20 minutes of being paged in appropriate physical condition to work, who were called back to work an average of three to five times per 24 hour on-call period, could trade on-call shifts only with great difficulty and were effectively precluded by their schedules from obtaining secondary employment;56

• forestry service employees required to remain within 50 miles of the work site, who could not participate in social or other activities which would have prevented them from monitoring radio transmissions, had to respond to an emergency call within 30 minutes and could not obtain relief from the on-call status because they were subject to call 24 hours per day.57

53 Skidmore at 137.
54 Bright v. Houston Northwest Medical Ctr. Survivor, Inc., 934 F.2d 671, 677, 30 WH Cases 609 (5th Cir. 1991) (en banc), cert. denied, 502 U.S. 1036, 30 WH Cases 2d 1176 (1992); see also Owens v. Local No. 169, 971 F.2d 347, 351, 30 WH Cases 1633 (9th Cir. 1992) (quoting Bright, 934 F.2d at 677).
56 Renfro v. City of Emporia, 948 F.2d 1529, 1538-39, 30 WH Cases 1017 (10th Cir. 1991).
57 Cross v. Arkansas Forestry Comm'n, 938 F.2d 912, 916-17, 30 WH Cases 725 (8th Cir. 1991).
2. Cases Finding On-Call Time Not Compensable

Several courts that have considered the on-call compensability issue have held in specific fact situations that the time was not compensable, because the employee was waiting to be engaged.

- city water and sewer department employees who could wear pagers, could not consume alcoholic beverages and were called back to duty an average of less than once per day;\(^\text{58}\)
- city police detectives called less than twice per week, who could be reached by pager, and who had to remain sober and report to duty within 20 minutes of responding to a pager;\(^\text{59}\)
- pulp mill mechanics who only had to respond to one-third of the calls they received, who accepted an average of six calls per year, were issued pagers and had to call their employer within 10 minutes of receiving a call;\(^\text{60}\)

The courts in these cases found that the restrictions placed on the employees while on call were not so onerous as to prevent them from using the time effectively for their own benefit.\(^\text{61}\)

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58 Gilligan v. City of Emporia, 986 F.2d 410, 412-13, 1 WH Cases 2d 425 (10th Cir. 1993).
59 Armitage v. City of Emporia, 982 F.2d 430, 432-33, 1 WH Cases 2d 312 (10th Cir. 1992).
60 Owens v. Local No. 169, 971 F.2d 347, 348-50, 30 WH Cases 1633 (9th Cir. 1992).
C. Rest Periods

Although breaks promote the efficiency of workers, the Act does not require employers to grant rest periods. If an employer does grant rest periods or coffee breaks, those of a short duration of five to about 20 minutes must be counted as hours worked. Employers may not offset any compensable rest or coffee breaks against other types of work time, such as paid waiting or on-call time.62 Conversely, a 30-minute or longer break does not have to be compensated if the employee is completely relieved from duty for the duration of the break.63

D. Meal Periods

"Bona fide" lunch or meal periods are not work time.64 According to the regulations, for a meal period to be bona fide, it ordinarily must last at least 30 minutes and the employee must be completely relieved from duty, both active and inactive. Although "30 minutes or more" ordinarily amounts to a sufficient break to constitute noncompensable time, the applicable regulation notes that a shorter period may suffice "under special circumstances."65

An employer does not have to allow workers to leave the premises during a meal period, but the time they remain on site will count as hours worked if they are required or permitted to perform any duties, whether active or inactive, during the time designated for eating. If office or factory workers are required to eat at their desks or machines the time spent eating must be treated as hours worked.66 If meal periods are frequently interrupted by calls to duty, the entire period must be counted as hours worked.67

63 Donovan v. Bel-Loc Diner, Inc., 780 F.2d 1113, 1115 n.1, 27 WH Cases 745 (4th Cir. 1985) ("To qualify as a bona fide noncompensable break, the respite must be uninterrupted and at least 30 minutes in duration, and the employee must be completely relieved from duty." (construing 29 C.F.R. §785.19) (1996).
64 29 C.F.R. §785.19(a) (1996).
65 29 C.F.R. §785.19(a) (1996); see Blain v. General Elec. Co., 371 F. Supp. 857, 860-62, 20 WH Cases 85 (D. Ky. 1971) (holding that an eighteen minute meal period is not compensable, where the employees expressly chose the period length and the evidence indicated that the employees had sufficient time to eat).
When interpreting the phrase "bona fide meal period", several courts have applied the requirement that employees must be "completely relieved from duty" literally. However, in lieu of this test set forth in the regulations, other courts have adopted a "predominant benefit" test to determine the compensability of meal periods. The "completely relieved from duty" standard embodied in the regulations appears to be yielding to the judicially devised "predominant benefit" test. Although many of the cases adopting the predominant benefit test involve

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68 See, e.g., Fourth Circuit: Donovan v. Bel-Loc Diner, Inc., 780 F.2d 1113, 1115 n. 1, 27 WH Cases 745 (4th Cir. 1985) ("To qualify as a bona fide noncompensable break, the respite must be uninterrupted and at least 30 minutes in duration, and the employee must be completely relieved from duty."); Ninth Circuit: Brennan v. Elmer's Disposal Serv. Inc., 510 F.2d 84, 88, 22 WH Cases 118 (9th Cir. 1975) ("An employee cannot be docked for lunch breaks during which he is required to continue with any duties related to his work."); Eleventh Circuit: Kohlheim v. Glynn County, 915 F.2d 1473, 1477, 29 WH Cases 1673 (11th Cir. 1990) (holding that, where employees are "subject to real limitations on their freedom during mealtime which inure to the benefit of" the employer, the meal period represents compensable work time).

69 Sixth Circuit: see Hill v. United States, 751 F.2d 810, 812-14, 26 WH Cases 1623 (6th Cir. 1984), cert. denied 474 U.S. 817 (1985) (inferring a de minimis exception within the "completely relieved from duty" standard); Seventh Circuit: Alexander v. City of Chicago, 994 F.2d 333, 336-39, 1 WH Cases 2d 657 (7th Cir. 1993) (applying the predominant benefit test in the context of police officers); Eighth Circuit: Henson v. Pulaski County Sheriff Dep't, 6 F.3d 531, 534, 1 WH Cases 2d 1057 (8th Cir. 1993) ("Established in the earliest Supreme Court cases interpreting the FLSA, this standard comports with the Supreme Court's admonition to use a practical, realistic approach under the unique circumstances of each case when deciding whether certain activities constitute compensable work.") (citing Armour & Co., 323 U.S. at 133, 4 WH Cases 862, and Skidmore, 323 U.S. at 140, 4 WH Cases 866); Tenth Circuit: Armitage v. City of Emporia, 982 F.2d 430, 432, 1 WH Cases 2d 312 (10th Cir. 1992); Lamon v. City of Shawnee, 972 F.2d 1145, 1156-58, 30 WH Cases 1665 (10th Cir. 1992), cert. denied, 507 U.S. 972 (1993) (applying the predominant benefit test in the context of police officers; Lamon is the decision on which most of the other courts have relied in breaking from the "completely relieved from duty" standard), cert. denied, 113 S. Ct. 1414, 1 WH Cases 2d 464 (1993); Eleventh Circuit: Avery v. City of Talladega, 24 F.3d 1337, 1345-47, 2 WH Cases 2d 778 (11th Cir. 1994) (applying the predominant benefit test in the context of law enforcement employees); Middle District Pennsylvania: Oakes v. Pennsylvania, 871 F. Supp. 797, 799-800, 2 WH Cases 2d 876 (M.D. Pa. 1995) (applying the predominant benefit test in the context of non-section 7(k) police officers and collecting cases); Eastern District Pennsylvania: McGrath v. City of Philadelphia, 864 F. Supp. 466, 479-81, 2 WH Cases 2d 551 (E.D. Pa. 1994) (collecting cases).

70 See Barefield v. Village of Winnetka, 81 F.3d 704, 3 WH Cases 353 (7th Cir. 1996)(meal periods not work merely because police department paid officers for 30 minute lunch when that time not spent predominately for the benefit of the employer); Bagrowski v. Maryland Port Auth., 845 F. Supp. 1116, 1119-20, 1 WH Cases 2d 1655 (D. Md. 1994). In Bagrowski, the court characterizes Lamon and similar decisions as establishing a new standard, independent of the predominant benefit test, that focuses upon whether the
law enforcement personnel, the application of this test is not limited to such cases.71

E. Sleeping Time and Certain Other Activities

Employees may have to be compensated for on-the-job time spent sleeping or engaging in other personal business, depending upon the schedules they are required to work and other circumstances. In various occupations employees remain continuously at the workplace for many hours. Some employees reside for extended periods on the employer's premises, or work full-time out of the employee's home. In the private sector, different compensability rules apply to employees who are at work less than 24 hours and those that are working 24 hours or more.72

Under the regulations, employees who are on duty for less than a 24-hour period must be paid for all their on-duty time, even if they are permitted to sleep or engage in other personal activities when not busy.73 For example, a telephone operator's full shift constitutes working time, regardless of whether the employer permits the operator to sleep between calls.74

The presence of employer-furnished sleeping facilities does not change this result.75 As long as the shift is less than 24 hours, the employer cannot exclude authorized sleeping time from the calculation of hours worked.

Where the employee is on duty for 24 hours or more, the employer and the employee may, by agreement, exclude from time worked a regularly scheduled sleeping period of not more than eight hours, provided adequate sleeping facilities are furnished by the employer, and provided the employee can usually enjoy an uninterrupted night's sleep.76 The entire sleeping period must

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71 See, e.g., Hill, 751 F.2d at 815, 26 WH Cases 1623 (involving mail carriers); Oakes, 871 F. Supp. at 800 n. 2, 2 WH Cases 2d 876.
74 29 C.F.R. §785.21 (19946 (citing pre-1950 cases).
75 29 C.F.R. §785.21 (1996).
76 29 C.F.R. §785.22(a) (1996).
be counted if the employee is interrupted so often that a reasonable night's sleep is impossible. The regulations state that if the employee cannot get at least five hours of sleep during the scheduled time, the entire time must be counted as hours worked.\textsuperscript{77} Several courts have adopted this basic rule.\textsuperscript{78}

**F. Preparatory And Concluding Activities**

In 1956, the Supreme Court issued two decisions that examined in considerable detail the compensability of preparatory and concluding activities. In *Steiner v. Mitchell*,\textsuperscript{79} the Court addressed the question of whether workers in a battery plant must be paid for time spent changing clothes and showering. During their shifts, the workers extensively used dangerously caustic and toxic materials. Given "vital considerations of health and hygiene," the workers changed clothes and showered in facilities that state law required the employer to provide. Although the parties agreed that such activities normally constitute excluded "preliminary" and "postliminary" activities, the Secretary of Labor argued that the circumstances of this case rendered such tasks compensable.\textsuperscript{80}

The Court held in *Steiner*, notwithstanding Section 4 of the Portal-to-Portal Act and Section 3(o) of the FLSA, that time spent changing clothes and showering warrants compensation when the activities are closely related to the employee's principal activity, and indispensable to its performance.\textsuperscript{81} As to the specific facts of the case, the Court found that "it would be difficult to conjure up an instance where changing clothes and showering are more clearly an integral part of the principal activity of the employment. . . ."\textsuperscript{82}

\textsuperscript{77} 29 C.F.R. §785.22(b) (1996).
\textsuperscript{79} 350 U.S. 247, 12 WH Cases 750 (1956).
\textsuperscript{80} Id. at 248-49.
\textsuperscript{81} Id. at 254-56.
\textsuperscript{82} Id. at 256.
Federal courts of appeals have generated additional opinions regarding the compensability of various preparatory and concluding activities. Activities found compensable by the courts include cleaning machines used in manufacturing, driving a company truck to the work site, caring for and transporting police dogs, conducting safety precautions, and other endeavors performed for the benefit of the employer. The courts have ruled that reporting early to relieve outgoing employees and riding to a work site on a bus provided for the employees' convenience are non-compensable activities.

84 Brennan v. E.R. Field, Inc., 495 F.2d 749, 751, 21 WH Cases 711 (1st Cir. 1974) (holding that the driving of a company truck to and from the job site was compensable, because the employer derived a benefit from the activity).
85 Graham v. City of Chicago, 828 F. Supp. 576, 582 (N.D. Ill. 1993) (holding that time spent by canine unit dog handlers transporting the dogs to the workplace represents an indispensable part of the employees' principal activities); Truslow v. Spotsylvania County Sheriff, 783 F. Supp. 274, 279, 30 WH Cases 1259 (E.D. Va. 1992), aff'd 1 WH Cases 2d 744 (4th Cir. 1993) (holding that time spent by a canine unit dog handler caring for the dogs represented an integral and indispensable part of the handler's principal activities). But see Reich v. New York City Transit Auth., 45 F.3d 646, 652, 2 WH Cases 2d 833 (2d Cir. 1995) (holding that time spent by police canine unit dog handlers driving to and from work with their dogs does not constitute compensable time, but that non-de minimis, "true dog-care work" occurring during the commute is not exempt).
86 Eighth Circuit: Barrentine v. Arkansas-Best Freight Sys., Inc., 750 F.2d 47, 50, 26 WH Cases 1663 (8th Cir. 1984), cert. denied 471 U.S. 1054 (1985) (holding that truck drivers must be paid for conducting pre-trip safety inspections required by federal regulations); Tenth Circuit: Reich v. IBP, Inc., 38 F.3d 1123, 1127, 2 WH Cases 2d 641 (10th Cir. 1994) (holding that time spent by knife-using employees of a meat packing company in the donning, removing, and cleaning of "unique" protective gear constitutes an integral part of the employees' principal activities, while time spent donning, cleaning, and gathering standard safety equipment and outer garments was not compensable).
87 Dunlop v. City Elec., Inc., 527 F.2d 394, 400-01, 22 WH Cases 728 (5th Cir. 1976) (finding that certain pre-shift activities were within the broad range of principal activities); Lee v. Am-Pro Protective Agency, 860 F. Supp. 325, 327-28, 2 WH Cases 2d 592 (E.D. Va. 1994) (refusing to grant summary judgment for the employer, because the record contained sufficient evidence that the employer derived a benefit from requiring the employees to change into their security guard uniforms at the workplace).
88 Lindow v. United States, 738 F.2d 1057, 1060-62, 26 WH Cases 1391 (9th Cir. 1984) (holding that employees who reported early to relieve outgoing employees did so for their own convenience, rather than for the company's benefit).
89 Vega v. Gasper, 36 F.3d 417, 424-27, 2 WH Cases 2d 614 (5th Cir. 1994) (holding that a long bus ride for agricultural workers to the employer's fields did not constitute an integral part of the employees' activities because the workers were not required to travel in the bus).
G. Travel Time

According to the regulations, “[t]he principles which apply in determining whether or not time spent in travel is working time depend on the kind of travel involved.” The employee’s activities during travel and the purpose of the travel are factors included in the analysis.

1. Preliminary and Postliminary Travel

The FLSA, as amended by the Portal-to-Portal Act, provides that the following activities need not be compensated by employers:

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
(2) activities which are preliminary or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

Due to the difficulty of fixing a definitive standard of what employee activities are “principal,” and further which are “integral and indispensable to

91 Portal-To-Portal Act, §4(a); 29 U.S.C. §251 et seq. (1994) and Chapter 8, Section F2.170. See also 29 C.F.R. §785.34 for the effect of §4 of the Portal-to-Portal Act.
those principal activities, each case involving compensation for travel time must be decided on its own particular facts.

2. Emergency or Call-Back Situations

Under certain circumstances, travel from home to work is compensable. Specifically, when an employee who has gone home after completing a day's work is subsequently called out at night to travel a substantial distance in order to handle an emergency for one of the employer's customers, all of the time spent while traveling is working time. However, the Wage and Hour Division has expressly taken no position on whether, in an emergency or call-back situation involving travel to an employee's regular place of business, that travel time is compensable.

H. Recording Working Time

Regardless of the type of time keeping system an employer uses, problems can arise over the proper treatment of small amounts of scheduled or unscheduled time which is worked or missed by employees. Employees must be paid for all time worked, and employers cannot use rough estimates or arbitrary formulas to compute the hours worked by employees. The regulations establish two rules, the "rounding off" and "de minimis" rules, to address these issues.

1. "Rounding Off" Practices

92 Steiner v. Mitchell, 350 U.S. 247, 256, 12 WH Cases 750 (1956); see also Lee v. Am-Protective Agency, Inc., 860 F. Supp. 325, 327, 2 WH Cases 2d 592 (E.D. Va. 1994) (activities done predominantly in employee's own interests are "preliminary and postliminary" and therefore not compensable); Nichols v. City of Chicago, 789 F. Supp. 1438, 1443, 30 WH Cases 1444 (N.D. Ill. 1992) (employer's control over its employees' preliminary or postliminary activities can be a factor in determining whether such activities are compensable).

93 D A & S Oil Well Serv., Inc. v. Mitchell, 262 F.2d 552, 554-55, 14 WH Cases 6 (10th Cir. 1958).


95 Id.


Employers may record employees' starting or stopping times to the nearest five minutes, or to the nearest one-tenth or quarter of an hour, provided the amounts rounded off average out over time.98 This practice may not result in the failure to properly compensate employees for all time actually worked.99 In general, an employer's policy of rounding off is permissible if both "rounding up" and "rounding down" occur so that employees are not disadvantaged over time.100 Rounding off practices that only benefit the employer and result in employees' not being compensated for all of their time are improper.

2. **The De Minimis Rule**

Under the FLSA, insubstantial or insignificant periods of time beyond an employee's scheduled working hours which cannot as a practical administrative matter be recorded for payroll purposes, may be disregarded.101 Such time is considered *de minimis*. This rule applies only when uncertain and indefinite periods of time of a few seconds or minutes duration are involved, and where the failure to count such time is due to considerations justified by industry realities.102 An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time, or any practically ascertainable period of time the employee is regularly required to spend on duties he is assigned.103

### III. PAYMENT OF THE MINIMUM WAGE

98 29 C.F.R. §785.48(b) (1996).
99 *Id.*
100 Bagrowski v. Maryland Port Auth., 845 F. Supp. 1116, 1120-21, 1 WH Cases 2d 1655 (D. Md. 1994) (employer's practice of rounding down to zero any overtime of thirty minutes or less did not violate the FLSA because overtime of thirty-one minutes or more was rounded up to one hour, and any employee who worked overtime of thirty minutes or less was permitted to leave early by a like time the following day).
102 *Id.*
Pursuant to the 1996 amendments to the Fair Labor Standards Act the minimum wage, effective September 1, 1997, is $5.15 an hour.\textsuperscript{104} Where a state or local minimum wage law has a higher minimum rate, that rate is applicable to all covered employees in that state.\textsuperscript{105} The FLSA minimum wage rate applies to all 50 states and U.S. territories, except American Samoa, where lower minimum wages are set by the Secretary of Labor based on recommendations from special Industry Committees.\textsuperscript{106} Puerto Rico and the Virgin Islands were previously subject to special minimum wages set by the Secretary based on recommendations from Industry Committees, but have now achieved minimum wage parity with the mainland.\textsuperscript{107}

Exceptions to the minimum wage requirement of the FLSA are few. Section 13 of the FLSA exempts certain categories of employees from the application of the minimum wage requirement.\textsuperscript{108} In addition to these exemptions, the 1996 amendments to the FLSA provide that an opportunity wage of $4.25/hour may be paid to employees under the age of 20 for their first 90 consecutive calendar days of employment.

Employees covered by the FLSA who are paid on a basis other than hourly, such as on a salary basis, on a commission basis, or on a piecework basis must still be paid the minimum wage for all hours worked. To determine whether a wage payment meets the minimum wage requirements under Section 6 of the Act, divide the total number of hours worked by an employee during the workweek into the actual compensation received by the employee for that week. If the hourly rate resulting from this calculation is below the minimum wage required by Section 6 of the FLSA, the employer must adopt the minimum wage in computing wages paid to that employee.

Minimum wage payments must be made on the regular pay day for each workweek.\textsuperscript{109} If a pay period covers more than a single week, payment of the minimum wage must be made on the regular payday for the workweek in which the pay period ends.\textsuperscript{110}

\textsuperscript{104} Public Law 104-188 §2104; 29 U.S.C. §206(a)(1). As of April 1, 1996, this includes all governmental employees who were brought within coverage of the Act as a result of the 1985 amendments.
\textsuperscript{105} 29 U.S.C. §218(a).
\textsuperscript{106} 29 U.S.C. §206(a)(3).
\textsuperscript{107} Homeworkers in Puerto Rico and the Virgin Islands may be paid a minimum piece rate prescribed by regulations or order. See 29 U.S.C. §206(a)(2).
\textsuperscript{108} 29 U.S.C. §§213(a), (d) and (f).
\textsuperscript{110} Field Operations Handbook §30b04.
If the length of the pay period is in dispute, the employer bears the burden to prove its length. For example, in Olson v. Superior Pontiac—GMC, Inc., the employer failed to meet that burden when its records showed practices inconsistent with both a weekly and a monthly pay period.

A. Deductions Allowable Under Section 3(m) of the Act

Section 3(m) of the Act allows an employer to deduct from an employee’s wages the reasonable cost of providing to that employee “board, lodging or other facilities” which are “customarily furnished” to the employee. The following items have been determined to be within the meaning of the term “facilities.”

1. Meals

Meals are always considered as primarily for the benefit and convenience of the employee. An employer is entitled to a credit for the “reasonable cost to the employer” of meals regularly furnished to employees. The reasonable cost of meals furnished by an employer cannot exceed the actual cost to the employer of the food, its preparation, and related supplies. The reasonable cost of an employer-provided meal may not include any employer profit. Courts have determined that, absent adequate records to demonstrate the actual cost of employer-provided meals, the cost of such meals cannot be deducted.

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111 765 F.2d 1570, 27 WH Cases 393. (11th Cir. 1985), mod on other grounds, 776 F.2d 265, 27 WH Cases 691 (11th Cir. 1985).
112 Id. at 1578.
113 29 U.S.C. §203 (m).
114 29 C.F.R. §531.32(c).
115 29 C.F.R. §531.33.
116 WH Admin. Op. No. 323 (May 27, 1975)(determining that since restaurant employees typically obtain their own meals from the kitchen and return their own empty plates, only a proportional cost per meal for kitchen personnel who are engaged in food preparation would be attributable to reasonable cost of employees’ meals, rather than the entire labor cost associated with serving a meal to a customer).
117 29 C.F.R. §531.3(b).
118 See e.g. Dole v. Bishop, 740 F. Supp. 1221, 1227, 29 WH Cases 1410, 1414 (S.D. Miss. 1990)(holding that without records of meal credits, an employer that arbitrarily set costs of employee meals at half their retail price could not deduct the cost of meals from employee wages); Brock v. Hamad, 28 WH Cases 714, 717 (E.D. N.C. 1987), aff’d 867 F. 2d 804, 29 WH Cases 277 (4th Cir. 1989) (holding that employer must produce credible records which demonstrate cost of meals); Frenel v. Freezeland Orchard Co., 28 WH Cases 666, 667 (E.D. Va. 1987)(same).
2. Housing

Housing costs may be included as part of an employee’s wage where the housing is provided for the benefit of the employee. In appropriate circumstances, as determined by the Administrator, this presumption is subject to challenge and rebuttal pursuant to a DOL regulation that requires the balancing of benefits accruing to the employer with the benefits accruing to the employee. When an employer requires an employee to live on-site in order to meet a particular need of the employer, or when an employee is required to be on-call at the employer’s behest, a credit for lodging may be unavailable to the employer. The cost of substandard housing cannot be credited against employee wages. The employer must demonstrate that the housing provided is adequate and that the money withheld from wages bears a reasonable relationship to the quality of housing provided.

B. Potentially Unlawful Deductions

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119 29 C.F.R. §531.3(d)(1).


121 See, e.g., Marshall v. DeBord, 23 WH Cases 1188, 1192 (E.D. Okla. 1978) (holding that lodging furnished to nursing home employees was primarily for benefit of employer since employees were required to live on premises and at least one employee had to be available at all times); Bailey v. Pilots’ Ass’n, 406 F. Supp. 1302, 1309, 22 WH Cases 723, 727 (E.D. Pa. 1976) (holding that apprentice sailor’s sleeping quarters and shore-side station were provided primarily for benefit of the employer because sailor was required to be on duty for seven days at a time).

122 See Osias v. Marc, 700 F. Supp. 842, 845, 28 WH Cases 1570, 1572 (D. Md. 1988) (holding that housing furnished to migrant farm workers which was "seriously substandard" could not be claimed as a wage credit).

123 See, e.g., Calderon v. Witvoet, 764 F. Supp. at 540, 30 WH Cases 536 (C.D. Ill. 1991), aff’d in part, 999 F.2d 1101, 1 WH Cases 2d 872 (7th Cir. 1993) (where employer of migrant farm workers made no attempt to show adequacy of housing which workers claimed was insufficient, wage credit for the housing was denied).

124 Where valid deductions are commingled with invalid ones, and the proper amounts cannot be segregated from the improper ones, no deductions will be allowed. Brennan v. Veteran’s Cleaning Service, Inc. 482 F.2d 1362, 1370, 21 WH Cases 218 (5th Cir. 1973) (“The District Court correctly imposed on the employer the burden of segregating permissible deductions [to recoup advances] from impermissible ones [for damages to company truck].”); Donovan v. New Floridian Hotel, Inc., 676 F.2d 468, 474-76, 25 WH Cases 645 (11th Cir. 1982) (food and lodging; following Brennan v. Veteran’s Cleaning Service, Inc.).
1. **Shortages**

Deductions for cash register shortages resulting from unaccountable circumstances, mathematical errors, and customers leaving without paying checks, have been found unlawful where such deductions reduce below the minimum wage the amount of money the employee receives in compensation.\(^{125}\) Theft, or misappropriation of funds, may be treated differently, however. The courts and the Wage and Hour Administrator agree that when an employee admits to or is convicted of misappropriation of funds, it is lawful to deduct the funds from the employee's wages even if it reduces the employee's wages below the statutory minimum.\(^{126}\)

2. **Uniforms and Uniform Cleaning**

If the wearing of clean uniforms is required by law, by the employer, or by the nature of the work, the cost of renting or buying and maintaining clean uniforms may not be treated as wages.\(^{127}\) Thus, it is unlawful for an employer to deduct the cost of a uniform or the maintenance cost of a uniform from an employee’s wages when the deduction reduces the wages of that employee below the minimum wage.\(^{128}\)

Where an employer requires a type or style of clothing suitable for a particular profession, usually worn in that profession,\(^{129}\) and not suitable for use on other occasions, such clothing constitutes a uniform. For example, where a restaurant or hotel requires a tuxedo or skirt, blouse and jacket of a specific or distinctive style, color and quality, such clothing would be considered a uniform.\(^{130}\) Any article of clothing which is associated with a specific employer, by virtue of an emblem (logo), or distinctive color schemes, would be considered a uniform.

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\(^{126}\) Mayhue’s Super Liquor Stores 464 F.2d at 1198; WH Admin. Op. WH-239, October 1, 1973 ("in our enforcement of the Act we would not assert a violation of its monetary requirements where there is repayment of a debt which in fact resulted from theft or misappropriation of the employer's funds"); Marshall v. Krist Oil Co., Inc., 24 WH Cases 121, 123 (W.D. Mich. 1979) ("except where an employee is convicted of misappropriation of the employer's funds").

\(^{127}\) 29 C.F.R. §§531.3 (d) (2), 531.32 (c); Field Operations Handbook §30c12(a).

\(^{128}\) Field Operations Handbook, §30c12(a).


In summary, uniforms are not considered "facilities" within the meaning of the regulations, and the reasonable cost of the uniform and its maintenance cannot be used to help satisfy minimum wage or overtime obligations of the employer.131

C. Payment Of Wages To Tipped Employees

Under the 1996 amendments to the FLSA, an employer is permitted to credit tips received up to $2.125 per hour, or one-half the FLSA minimum wage in effect on August 20, 1996 ($4.25/hour).132 In other words, after October 1, 1996, the employer is required to pay a “tipped employee” a “cash wage” of $2.125 an hour, and it may credit tips received to make up the rest of the applicable minimum wage, although this credit may not exceed the value of tips actually received.133 This 1996 amendment eliminated the “indexing” of the cash payment required for tipped employees (which was previously effected by tying the credit to the minimum wage, which was increased gradually over time) and fixed the amount of cash payment required to be paid a tipped employee at $2.125 an hour and above the tips actually received.

Under the FLSA a “tipped employee” is any employee engaged in an occupation in which he or she customarily and regularly receives more than $30 a month in tips.134 In order to take a tip credit under the FLSA the tipped employee must be informed by the employer of the tip credit law, and the employee must be allowed to retain all tips received by such employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.”135

The Wage and Hour Division will not question a practice whereby an employer mandates that tipped employees contribute up to 15% of their total tips to a tip pool to be shared by other employees who customarily and regularly


Pub. Law 104-188.

Id.

29 U.S.C §203(t). In 1977, the FLSA was amended to increase the monthly tip amount from $20 to $30. See Pub. Law 95-151 §3a.

receive tips, as long as the employer informs the employee of the Act's tip-pooling provision.

Aside from a tipped pool arrangement, a tipped employee may voluntarily share tips with anyone whom the employee desires. The Act does not govern voluntary tip sharing, as long as it is truly voluntary, free of coercion or control by the employer, and the employer plays no role in the distribution of these tips.

A number of States have laws prohibiting entirely, or restricting more significantly than the federal law does, the inclusion of employee tips in the amounts counted toward satisfaction of the employer's minimum wage obligation. If State law restricts the use of tip proceeds for minimum wage credit, State law governs.

IV. DETERMINING OVERTIME

The overtime pay provisions of the Fair Labor Standards Act generally require that employers pay their covered non-exempt employees one and one-half times their regular rate of pay for all overtime hours. In order to comply with the overtime provisions of the FLSA, an employer must first determine what constitutes an employee's "workweek," ascertain that employee's "regular rate of pay" for that workweek, and then pay one and one-half times that rate for all overtime hours worked in that workweek.

A. The "Regular Rate" of Pay

The regular rate of pay is the "keystone" to calculating the overtime rate. No matter how an employee is paid -- whether by the hour, by the piece, on a commission, or on a salary -- the employee's compensation must be converted to an equivalent hourly rate from which the overtime rate can be

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138 In one case the creation, in a State permitting different levels of minimum wage, of a two-tiered minimum wage in which the minimum for tipped employees was lower than the minimum for others was deemed illegal in light of another statute prohibiting the crediting of tips. Henning v. Industrial Welfare Commission, 28 WH Cases 1619, 762 P.2d 442 (Cal. Sup. Ct. 1988).

calculated,\textsuperscript{140} because overtime is calculated by the hour at time-and-a-half the hourly rate. As originally enacted, the FLSA contained "no definition of the regular rate of pay and no rule for its determination."\textsuperscript{141} In 1949, however, Congress amended the FLSA to define "the 'regular rate' . . . to include all remuneration for employment paid to, or on behalf of, the employee" excluding seven specific types of payments.\textsuperscript{142}

The regular rate is "the hourly rate actually paid the employee for the normal, nonovertime workweek for which he is employed."\textsuperscript{143} The actual events that occur during the employment relationship are dispositive of the regular rate; the contents of the employment contract do not govern this determination.\textsuperscript{144} Once the amount of an employee's "regular" compensation is deduced, "the determination of the regular rate becomes a matter of mathematical computation"\textsuperscript{145} in which "[w]age divided by hours equals regular rate."\textsuperscript{146}

1. Employees Paid at Two or More Hourly Rates

Some employees are paid two or more different hourly rates for different types of work during the same workweek. Under these circumstances the employee's regular rate is the weighted average of such rates.\textsuperscript{147}

2. Day Rate and Job Rates


\textsuperscript{141} Bay Ridge Operating Co., 334 U.S. at 460.

\textsuperscript{142} 29 U.S.C.A. §207(e)(1)-(7)(West Supp. 1996). See also, Donovan v. Brown Equip. and Serv. Tools, Inc., 666 F.2d 148, 154 (stating that it is a fair implication that "regular rate of pay" required to be specified by section 7(f) must be actual “regular rate” at which employee is employed), 25 WH Cases 306 (5th Cir. 1982).


\textsuperscript{144} Bay Ridge Operating Co., 334 U.S. at 464-65.

\textsuperscript{145} Youngerman-Reynolds Hardwood Co., 325 U.S. at 425.


\textsuperscript{147} 29 C.F.R. § 778.115 (1990).
An employee may be paid for each day worked or for the entire job without reference to the actual hours worked. If there is not other compensation, then the regular rate is determined by totaling all wages paid in the workweek and dividing by the total hours actually worked. All hours worked in excess of forty for the workweek are entitled to be paid at an additional one-half times the regular rate.

3. Salaried Employees

Salaried employees’ regular rate of pay is computed by reference to the number of hours the salary is intended to compensate. If the hours to be compensated are less than forty, the employee is entitled to the regular rate for those hours exceeding the intended hours of compensation up to forty hours. Beyond forty hours a week, the employee is entitled to one and one-half times the regular rate.

If an employee is employed solely on a weekly basis, regardless of the number of hours worked, the regular rate is calculated by dividing the amount of salary for that week by the number of hours worked in the week. Since such a salary compensates straight time for all hours including overtime hours, only one-half times the regular rate for hours worked beyond forty in the workweek must be added to the salary as overtime compensation. In order to be lawful,

148 The method for computing wages for day and job rates is detailed at 29 C.F.R. § 778.112 (1996). See also, dole v. Trusty, 707 F. Supp. 1074, 1076, 29 WH Cases 315 (W.D. Ark. 1989) (holding that for a truck driver whose wages were paid with the intent to compensate at a flat trip rate, the regular rate must be computed according to the job rate method under 29 C.F.R. § 778.112, as opposed to the fluctuating workweek method for salaries under 29 C.F.R. § 778.114).

149 For the provisions on converting a weekly salary to the regular rate, see 29 C.F.R. §778.113(a) (1996). See also, Newmark v. Triangle Aluminum Industries, Inc., 277 F. Supp. 480, 482, 18 WH Cases 406 (N.D. Ga. 1967)(holding that overtime is calculated after dividing the agreed upon hours of work into the wage, rather than the actual number of hours worked).

150 See Yourman v. Dinkins, 865 F. Supp. 154, 165-66, 2 WH Cases 2d 686 (S.D.N.Y. 1994), aff’d by, 84 F.3d 655, 3 WH Cases 2d 524 (2d Cir. 1996), (illustrating that, when a salary is intended to cover a 35-hour week, straight time is paid for hours worked between 36 and 40).

151 29 C.F.R. §778.114(a) (1996). See also, Condo, 1 F.3d at 601 (rejecting claim that 29 C.F.R. §778.114 violates Section 7 of the FLSA); Yourman, 865 F. Supp. at 163-65 (explaining application of fluctuating workweek method of overtime compensation); Aaron, 797 F. Supp. at 905 (finding that it is improper to include overtime hours, vacation hours, and paid but not worked "Kelly" hours, when calculating the regular rate for firefighters);
such a salary must be large enough to compensate for all hours in the workweek at no less than the minimum wage, even in the longest workweeks.

Sometimes a salary covers a period of time that exceeds the workweek. Under these circumstances, the salary must be converted to its workweek equivalent.\(^{152}\) Thus, a monthly salary is multiplied by twelve (the number of months in a year) and divided by fifty-two (the number of weeks in a year).\(^{153}\) Similarly, if the employee is paid semi-monthly, the wage is translated to its weekly equivalent by multiplying by twenty-four and dividing by fifty-two.\(^{154}\) Alternatively, the regular rate can be calculated by dividing the monthly salary by the number of working days and dividing again by the number of hours in a regular day.\(^{155}\)

4. Commission Employees

Commissions are included in the total compensation paid to the employee for purposes of calculating the regular rate.\(^{156}\) All commissions must be included in the calculation of total wages paid, whether those commissions are computed as a percentage of total sales, sales in excess of a specified amount, or another method.\(^{157}\) Calculations, however, will vary according to the timing of the commission payment.\(^{158}\)

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\(^{152}\) For the provision converting salaries for periods other than the workweek, see 29 C.F.R. §778.113(b) (1996). See, e.g., Lee v. Coahoma County, 937 F.2d 220, 224, 30 WH Cases 764 (5th Cir. 1991) (illustrating that the work period concept may be used in lieu of the workweek for public law enforcement and fire protection departments under 29 C.F.R. §553.230).

\(^{153}\) 29 C.F.R. §778.113(b) (1996); Wethington, 935 F.2d at 227 (regular rate of pay in a salaried system is determined by converting the pay to its hourly equivalent); see Lee, 937 F.2d at 225.

\(^{154}\) Id.

\(^{155}\) Id.

\(^{156}\) 29 C.F.R. §778.117 (1996).

\(^{157}\) Id. 29 C.F.R. §778.122 provides that for employees who are paid wholly or partly on a commission basis, the employer may compute overtime wages on a “basic” rate. See 29 C.F.R. §§778.400 and Part 548. Section E.1.b(1), below, addresses this issue in detail.

\(^{158}\) Olson v. Superior Pontiac-GMC, Inc., 765 F.2d 1570, 1575, 27 WH Cases 393 (11th Cir. 1985), modified by, 776 F.2d 265, 27 WH 691 (11th Cir. 1985)(holding the employer bears burden of proving duration of pay period in excess of a week).
Frequently, commission payments are deferred. If the amount of commission cannot be ascertained by the regular payday, then commission payments are excluded from the regular rate until they can be determined.\textsuperscript{159} Under these circumstances, wages paid must be at least one and one-half times the hourly rate, exclusive of the commission, for overtime hours. Once the commission is ascertained, it is apportioned back to each week that it was earned.\textsuperscript{160} In order to do this, the regular rate for each workweek must be recalculated, and the employer must pay any additional overtime wages due. This additional compensation must not be less than one-half times the increase in the regular rate that can be attributed to the commission payments.\textsuperscript{161} This method of determining wage payments is only used when the commission payment can be apportioned to the proper workweek.

5. Bonuses

Allocating bonus payments to particular workweeks can present problems. Although some bonuses are directly attributable to work performed in particular workweeks, many bonuses cover numerous workweeks. Where a bonus can be linked to particular workweeks, the bonus must be allocated to those workweeks, and then the regular rate must be recalculated for each of those workweeks so that the employee receives the full overtime premiums due based on the readjusted regular rates.\textsuperscript{162} If a bonus cannot be identified with particular workweeks, the employer must adopt "some other reasonable and equitable method of allocation."\textsuperscript{163} When a bonus plan provides in good faith for the simultaneous payment of overtime compensation by, for example, paying a bonus as a percentage of both straight-time and overtime earnings, no recalculations of rates or additional payments are required.\textsuperscript{164}

B. Exclusions from the Regular Rate

\textsuperscript{159} 29 C.F.R. §778.119 (1996).
\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{162} 29 C.F.R. §778.209(a)(1996).
\textsuperscript{163} 29 C.F.R. §778.209(b)(1996).
Seven types of payments to employees are excluded from the regular rate by Section 7(e)(1)-(7) of the Act. These include:

1. sums paid as **gifts**; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production or efficiency;

2. payments made for occasional periods when no work is performed due to **vacation**, **holiday**, **illness**, **failure of the employer to provide sufficient work**, or other similar cause; **reasonable payments for traveling expenses**, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

3. sums paid in **recognition of services performed** during a given period if either, (a) both the fact that the payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a **bona fide profit-sharing plan** or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the **payments are talent fees** (as such talent fees are defined by regulations of the Administrator) paid to
performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or other third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits to employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract of collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section), where such premium rate is not less than one and one-half times the rate established in good faith by the
contract or agreement for like work performed during such workday or workweek. \(^{165}\)

Exclusions from the regular rate, then, include overtime premiums, bonuses and prizes, gifts, benefit plan payments, expense reimbursements, holiday, vacation, and other paid leaves, show-up pay, call-back pay, and talent fees. The difficulty lies in deciding whether a particular type of payment fits within an exclusion and, if so, whether it is the type of payment that, pursuant to Section 7(h), is creditable toward statutorily required overtime premiums.

V. EXEMPTIONS FROM THE MINIMUM WAGE AND OVERTIME PROVISIONS

Among the most highly controversial, and heavily litigated provisions of the FLSA are the myriad exemptions to the Act’s minimum wage and overtime requirements. Some of the statutory exemptions are industry specific, while others serve to exempt categories of employees, principally on the basis of their duties and responsibilities.

During the nearly sixty years of the statute’s existence, Congress has created new exemptions and repealed old ones. Over time, Congress has tended to cut back on minimum wage exemptions. Sometimes these minimum wage exemptions were replaced by exemptions from the overtime requirements only, but these too have gradually been reduced in number and scope. As a consequence, the Act’s protections have extended to more and more workers. Nevertheless, a number of the early exemptions still remain in the statute, despite the fact that some of them have little applicability to the modern day workplace. In fact, technological advances and dramatic changes in business practices have rendered some of these exemptions practically obsolete.

Section 13(a) contains eleven exemptions from the Act’s minimum wage and overtime requirements. The first of these, Section 13(a)(1), provides for the "White Collar Exemptions," which will be treated in some depth herein. The remaining Section 13(a) exemptions are

- Section 13(a)(3)-Amusement and Recreational Exemption
- Section 13(a)(5)-Fishing or Operations on Aquatic Products
- Section 13(a)(6)-Agricultural Exemption
- Section 13(a)(7)-Employees under Special Certificate

• Section 13(a)(8)-Limited Circulation Newspapers
• Section 13(a)(10)-Certain Switchboard Operators
• Section 13(a)(12)-Seamen on Non-American Vessels
• Section 13(a)(15)-Casual Babysitters and Companions
• Section 13(a)(16)-Federal Criminal Investigators
• Section 13(a)(17)-Computer Professionals

Section 13(b) contains twenty-one exemptions from the Act's overtime requirements. The Section 13(b) exemptions are

• Section 13(b)(1)-Employees Under the Motor Carrier Act
• Section 13(b)(2)-Railroad Employees
• Section 13(b)(3)-Air Transportation Employees
• Section 13(b)(5)-Outside Buyers of Agricultural Products
• Section 13(b)(6)-Seamen.
• Section 13(b)(9)-Announcers, News Editors, Chief Engineers of Certain Radio or TV stations.
• Section 13(b)(10)-Certain employees of Automobile, Truck, Farm Implement, Trailer, Boat, and Aircraft Dealers.
• Section 13(b)(11)-Local Delivery Drivers.
• Section 13(b)(12)-Certain Agricultural Workers
• Section 13(b)(13)-Livestock Auction Operations.
• Section 13(b)(14)-Small Country Grain Elevators.
• Section 13(b)(15)-Processing of Maple Sap.
• Section 13(b)(16)-Transportation of Fruits and Vegetables or Vegetable Harvesters.
• Section 13(b)(17)-Taxicab Drivers.
• Section 13(b)(20)-Police and Fire Activities.
• Section 13(b)(21)-Domestic Servants who reside in Household.
• Section 13(b)(24)-Husband/Wife who serve as House Parents.
• Section 13(b)(27)-Motion Picture Theater Employees.
• Section 13(b)(28)-Small Scale Forestry or Lumbering Operations
• Section 13(b)(29)-Employees of Recreational Establishments Located in National Parks or Forests.
• Section 13(b)(30)-Federal Criminal Investigators.

Section 13(d) contains exemptions from the Act’s minimum wage, overtime and child labor requirements for two types of employees: newspaper delivery persons and homeworkers who make evergreens.

Section 13(e) contains a partial exemption from the Act's overtime requirements for employees employed in American Samoa.
Section 13(f) contains exemptions from the Act's *minimum wage, overtime, child labor and record keeping requirements* for all employees who work within a foreign country.

Section 13(g) provides that the agricultural exemption from the *minimum wage and overtime requirements* will not apply to employees who are employed by an establishment whose total annual sales volume exceeds $10,000,000.

In addition to the Section 13 exemptions, in several subparts of Section 7 of the FLSA, certain types of employees are given a limited exemption from the overtime requirements. These include:

1. Employees employed pursuant to a collective bargaining agreement—Section 7(b)(1) and (2)
2. Employees of Petroleum Distributors—Section 7(b)(3)
3. Commission Salespersons in Retail & Service Establishments—Section 7(l)
4. Employees of hospitals or establishments engaged in the care of sick, aged, or mentally ill—Section 7(j)
5. Fire Protection or Law Enforcement employees—Sections 7(k) and 7(p)
6. Certain Domestic Service employees—Section 7(l)
7. Employment in the tobacco industry—Section 7(m)
8. Employment on a charter basis by electric railway, or local trolley or motorbus carrier—Section 7(n)
9. Employees receiving remedial education—Section 7(q)

These disparate exemptions cover a broad range of activities in many diverse industries and occupations. Their widely divergent subject matter notwithstanding, these exemptions, with but a few exceptions, are the subject of extensive, and in some cases quite detailed, regulations issued by the DOL. Although there has been some judicial interpretation as to the meaning and application of several of the exemptions the key to understanding the statutory provisions on “exemptions” is a thorough knowledge of the regulations.
A. The "White-Collar" Exemptions—New Regulations

On August 23, 2004, the U.S. Department of Labor (DOL) issued new regulations that altered the criteria for determining who is a “white collar” employee, exempt from the overtime requirements of the FLSA.

These Basics Materials will address only the criteria set forth in the new regulations to define who is and who is not an exempt white collar employee. Relevant case law under the prior regulations has been included in this material where the language of the prior regulations essentially remained the same in the new regulations.

1. Overview

The designation “while-collar employee” appears nowhere in the FLSA. However, the term is a recognized short-hand for the general class of executive, administrative, professional and outside sales employees exempt from the FLSA’s minimum wage and overtime requirements of Section 13(a)(1). The white-collar category comprises the most broad-based of exemptions to the Act and cuts across the whole spectrum of industry classifications. Virtually every employer covered by the FLSA faces the sometimes difficult task of deciding which, if any, workers will qualify for white collar exempt status.

The August 23, 2004 regulations made changes to the three basic requirements of the “white-collar” exemptions:

- An exempt employee must be paid a minimum salary to be considered exempt. Under the new regulations, the minimum salary for exempt status has been increased to $455 per week ($23,660 a year);
- An exempt employee must be paid on a salary basis. The new regulations modified the requirements to be considered paid on a “salary basis” and added a Safe Harbor provision regarding the salary basis requirement;
- An exempt employee’s primary duty must consist of exempt work. The new regulations added a requirement to the primary duty of the executive employee, clarified the primary duties of the

166 29 U.S.C. §213 (a)(1). In addition, 29 C.F.R. §516.3 (concerning white collar employees) exempts from the record keeping requirements of the Act many of the specific records that are required for nonexempt employees.
administrative and professional employees, consolidated the computer professional exemptions, and modified the primary duty of an outside salesperson.

The new regulations also contain provisions specifying classes of employees to whom neither the statutory exemptions nor the Part 541 regulations apply. The white collar exemptions do not apply to:

- Manual laborers or other “blue collar” workers who perform work involving repetitive operations with their hands, physical skill and energy;\(^\text{167}\)

- Nonmanagement employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers, no matter how highly paid they might be;\(^\text{168}\)

- Police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.\(^\text{169}\)

2. Minimum Compensation

The old regulations set forth both a “long test” and a “short test” to determine exempt status. Under the new regulations, there is one standard test under each of the categories of white collar employees. To qualify for exempt status, employees generally must be paid at not less than $455 per week on a

\(^{167}\) 29 C.F.R. §541.3(a).
\(^{168}\) Id.
\(^{169}\) 9 C.F.R. §541.3(b)(1).
salary basis. These salary requirements do not apply to outside sales employees, teachers, and employees practicing law or medicine. Exempt computer employees must be paid at least $455 per week on a salary basis or on an hourly basis at a rate not less than $27.63 an hour. Employees who receive $100,000 or more may be covered by a separate exemption rule discussed in Section 9 below.

3. “Salary Basis” Method of Compensation

The requirement under the old regulations that, to be exempt, employees must be paid “on a salary (or fee) basis” remains in effect. 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 the exceptions listed below, an exempt employee must receive the full salary for any week 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 an employer makes a deduction from an employee’s predetermined salary 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.

a. Permissible Deductions From An Employee’s Salary

The prohibition against deductions from pay in the salary basis requirement is subject to the following seven exceptions listed in Section 541.602(b):

- 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.

- Deductions from pay may be made for absences of one or more full days occasioned by sickness or disability, provided the employer has a bona fide sick or disability pay plan.

- The employer may offset any amounts received by an employee as jury fees, witness fees, or military

170 Computer professionals who are not paid on a salary basis may qualify as exempt if paid on an hourly basis at least $27.63 per hour. 29 C.F.R. §541.600(d).
pay against the salary received by the employee for that particular workweek.

- Deductions from pay of exempt employees may be made for penalties imposed in good faith for infractions of safety rules of major significance.

- 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.

- Employers are not required to pay the full salary in the initial and terminal weeks of employment.

- Employers are not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act.

b. Effect of Improper Deductions From Salary

The employer will lose the exemption if it has an “actual practice” of making improper deductions from salary. 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 deductions; the time period during which the employer made improper deductions; the number and geographic location of both the employees whose salary was improperly reduced and the managers responsible; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions. If an “actual practice” is found, the exemption is lost during the time period of the deductions for employees in the same job classification working for the same managers responsible for the improper deductions.

Isolated or inadvertent improper deductions will not result in loss of the exemption if the employer reimburses the employee for the improper deductions.

c. The Safe Harbor Provision

If an employer (1) has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism, (2) reimburses employees for any improper deductions, and (3) makes a good faith commitment
to comply in the future, the employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing the improper deductions after receiving employee complaints.

4. Executive Exemption

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

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

a. Primary Duty

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

1) Management

Generally, “management” includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees’ productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.
2) **Department or Subdivision**

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

3) **Customarily and Regularly**

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

4) **Two or More**

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

5) **Particular Weight**

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

b. **Exemption of Business Owners**

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

Although each position must be evaluated separately to determine the applicability of the executive exemption, the following examples are instructive:

- **Golf course manager** was executive employee where he spent more than 50 percent of his time on non-manual management tasks, such as keeping financial records, making recommendations on hiring and firing, overseeing the general operations of the golf course and supervising more than two full-time employees.\(^{171}\)

- **Dietary Manager** for retirement apartment complex had management as her primary duty, where she spent a significant amount of time engaged in managerial duties, such as ordering, scheduling, and planning, her managerial duties were among her more important functions, and she exercised discretionary powers, which were not dictated by higher management, in determining what food to buy and prepare, scheduling hours and assigning tasks.\(^{172}\)

- **Aquatics Director**, who was responsible for day-to-day operation of community center’s aquatics department and performed management duties was executive even though she sometimes served as lifeguard or swim instructor, answered telephone, and took class registrations where she selected, trained, supervised, and disciplined staff.\(^{173}\)

- **Working foremen** who devoted virtually all working time to repairing vehicle, waiting on customers, and cleaning up service area are not exempt executive employees.\(^{174}\)

- **Supervisor of crew** working for real estate company, who worked right along with crew and did common labor was not exempt executive.\(^{175}\)

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171 Hays v. City of Pauls Valley, 74 F.3d 1002, 3 WH Cases 2d 97 (10th Cir. 1996).
5. Administrative Exemption

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

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee’s primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and
- The employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

a. Primary Duty

As noted in the executive exemption, “primary duty” means the principal, main, major or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.

1) Directly Related to Management or General Business Operations

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

2) Employer’s Customers

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

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

1) Matters of Significance

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

c. Educational Establishments and Administrative Functions

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

d. Examples of Positions That Are Exempt or Nonexempt As Administrative Under the Old Regulations

The following examples illustrate the application of the test for administrative exemption to various job categories, but as always the reader is reminded that each case is analyzed independently on the basis of the particular duties involved.

- Managers are often times classified as exempt administrative employees. However, the mere fact that an employee holds a managerial position does not render him or her automatically exempt. Whether a manager is exempt or not will depend on whether the manager’s duties are of an exempt nature and entail the use of judgment and discretion.176

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176 Reich v. Avoca Motel Corp., 82 F. 3d 238, 3 WH Cases 2d 457 (8th Cir. 1996) (motel managers whose duties included resolving guest complaints and engaging in public relations satisfy administrative exemption); Stricker v. Eastern Off Road Equipment, Inc., 935 F. Supp. 650, 3 WH Cases 2d 748 (D. Md. 1996) (manager at truck and off-road vehicle equipment store is administrative employee where his procurement of inventory, negotiation of prices, and establishment of relationships with other dealers were directly related to employer’s management policies or general business operations); Donovan v. Great Lakes Recreation Co., 26 WH Cases 515 (E.D. Mich. 1983) (assistant manager of bowling facility did not perform exempt tasks when working at counter, conducting inventory and bookkeeping, and handling cash transactions); Nelson v. Master Vaccine, Inc. 27 WH Cases 1024, (Minn. Ct. App. 1986) (office manager was denied exempt status where 50% of time was spent on computer terminal handling inventory and 20% on clerical tasks); Donovan v. Maxwell Products, Inc., 26 WH Cases 485 (M.D. Fla. 1983) (only general manager possessed primary duties of manager, and therefore subordinates although titled “managers” were nonexempt).

177 Wineland v. County Commissioners of Dorchester County, 892 F. Supp. 719, 2 WH Cases 2d 1269 (D. Md. 1995) (director responsible for general organization, administration and supervision of public recreation programs was combination exempt executive and administrative employee); Cobb v. Finest Foods, Inc., 582 F. Supp. 818, 26 WH Cases
• **Inside Sales work** is nonexempt administrative work. However, the fact that an employee performs some sales work will not preclude a finding of exempt status if the employee otherwise meets the requirements of the exemption.

• **Buyers** who function at a certain level of responsibility, such as by purchasing inventory or setting prices may be exempt. Similarly, **traders** who have responsibility and discretion with respect to the transactions they handle may be exempt. Employees who are engaged in purchasing, but who have no discretion as to how to carry out their jobs, are nonexempt.

• **Managing credit**, including the establishment of credit limits, the decision to ship orders on credit, and the variation of credit terms, is exempt work. Employees who can authorize substantial

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1137 (E.D. La. 1984) (cafeteria manager was combination exempt executive and administrative employee where manager helped set up new facilities, trained cooks by working, worked under little supervision; manager exercised judgment and discretion in determining the methods of food preparation and training, supervising cooks, scheduling employees, and planning menus), **aff’d, 755 F.2d 1148, 27 WH Cases 215 (5th Cir. 1985).**


179 Gilstrap v. Synalloy Corp., 409 F. Supp. 621, 626, 22 WH Cases 848 (M.D. La. 1976) (employee who implemented new system of inventory control, requisitioned supplies and stock, and did some supervision and inside sales was exempt); Hodgson v. Penn Packing Co., 335 F. Supp. 1015, 1020, 20 WH Cases 384 (E.D. Pa. 1971) (employee who performed sales activities in addition to administrative work was exempt).

180 29 C.F.R. §541.205(c)(4), and 541.207(c)(6).

181 Rhule v. Pope & Talbot Co., 26 WH Cases 5 (D. Or. 1981) (log buyer who traveled extensively while purchasing logs so as to keep proper balance in employer's inventory was exempt even though many purchases reviewed), **aff’d mem., 26 WH Cases 28 (9th Cir. 1982); Herr v. McCormick Grain-The Heiman Co., 2 WH Cases 2d 717 (D. Kan. 1994) (grain dealer who purchased and sold grain based on availability, price, transportation, costs and profit was exempt).**

182 Christenberry v. Rental Tools, Inc., 655 F. Supp. 374, 377, 28 WH Cases 265 (E.D. La. 1987) (purchasing agent who had no choice as to which vendors to use and did not negotiate prices was not exempt), **aff’d mem., 851 F.2d 1419, 29 WH Cases 936 (5th Cir. 1988).**

183 29 C.F.R. §541.208(c).
loans\textsuperscript{184} and employees who make recommendations regarding the extension of credit and discounts may also be exempt.\textsuperscript{185} However, limited authority to extend credit will not make an employee exempt.\textsuperscript{186}

- **Accountants** may qualify as exempt administrative employees in addition to being considered exempt professional employees.\textsuperscript{187} Employees who utilize technical skills to audit and calculate costs may be exempt.\textsuperscript{188} However, accountants or bookkeepers who merely review entries for accuracy, tabulate results and compile reports are not exempt.\textsuperscript{189}

- Employees who carry out *clerical duties* are not exempt, even if such duties necessarily entail a small amount of discretion.\textsuperscript{190} Such activities as pursuing collections,\textsuperscript{191} pricing, taking orders and issuing credits,\textsuperscript{192} cashing checks and setting necessary cash

\textsuperscript{184} Hippen v. First Nat'l Bank, 30 WH Cases 1402, 1408 (D. Kan. 1992), reconsideration denied, 2 WH Cases 2d 828 (D. Kan. 1994) (vice president of bank who could unilaterally authorize loans to $50,000 and sat on loan committee was exempt).

\textsuperscript{185} Hills v. Western Paper Co., 825 F. Supp. 936, 939, 1 WH Cases 2d 852 (D. Kan. 1993) (employee who made customer inquiries, kept track of bills and payments, made recommendations on extensions of credit and discounts, was exempt).

\textsuperscript{186} Donovan v. Rockwell Tire & Fuel, Inc., 26 WH Cases 726 (M.D.N.C. 1982) (employee who made deposits, collected past dues, approved and disapproved credit, but whose credit decisions could be overruled by salespersons, not exempt), aff'd mem., 711 F.2d 1050, 26 WH Cases 911 (4th Cir. 1983).

\textsuperscript{187} 29 C.F.R. §541.301(f).

\textsuperscript{188} Conary v. AOG Corp., 10 WH Cases 276, 277 (D.R.I. 1951).

\textsuperscript{189} 29 C.F.R. §205(c); Clark v. J.M. Benson Co., Inc., 789 F.2d 282, 287, 27 WH Cases 1080 (4th Cir. 1986) (posting of journals, doing billings, accounts payable and learning the computer not exempt work); Brock v. National Health Corp., 667 F. Supp. 557, 566, 28 WH Cases 342 (M.D. Tenn. 1987) (staff accountants who utilized detailed manuals to review books for accuracy, tabulated results, compiled information to prepare tax returns, payrolls and other reports, not exempt).

\textsuperscript{190} 29 C.F.R. §541.205(c)(2); Goldstein v. Dabanian, 291 F.2d 208, 210-211, 15 WH Cases 84 (3d Cir.) (check cashers' verification of customers' identity is not exempt work, nor is establishing starting cash balance for the day), cert. denied, 368 U.S. 928, 15 WH Cases 270 (1961); Hodgson v. Penn Packing Co., 335 F. Supp. 1015, 1021, 20 WH Cases 384 (E.D. Pa. 1971) (inside salesperson's occasional deviation from pricing sheet is insufficient exercise of discretion to be exempt); see also, Rothman v. Publicker Industries, Inc., 201 F.2d 618, 620, 11 WH Cases 242 (3d Cir. 1953) (applying same standard to Yard Master's transmittal of instructions to subordinates under executive exemption).

\textsuperscript{191} Haber v. Americana Corp., 378 F.2d 854, 857, 18 WH Cases 91 (9th Cir.) (salespersons' collection activities were not exempt), cert. denied, 389 U.S. 914, 18 WH Cases 2d (1967).

levels\textsuperscript{193} have all been found to be nonexempt work. Similarly, accounting for receipts, making deposits,\textsuperscript{194} taking inventory, locating stock and shipping are also considered to be nonexempt work.\textsuperscript{195}

- **Assistants** who arrange interviews and meetings, without specific instructions, who handle callers and meetings in the absence of their superior, and who elect to answer correspondence personally, call it to their superior’s attention or designate it for another’s reply are performing exempt work.\textsuperscript{196} An exempt assistant may have duties that are in actuality only slightly different than the duties assigned to a nonexempt clerical employee.\textsuperscript{197}

- The classification of dispatcher has been frequently reviewed under the administrative exemption. In ascertaining the exempt status of dispatchers, courts have weighed the amount of time spent in different tasks, the importance of those tasks to the business and the use of independent judgment and discretion.\textsuperscript{198} The periodic withdrawal of administrative functions or the intermittent exercise of administrative type functions tends to defeat any claim that an

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\textsuperscript{194} Donovan v. Rockwell Tire & Fuel, Inc., 26 WH Cases 726 (M.D.N.C. 1982), aff’d mem., 711 F.2d 1050, 26 WH Cases 911 (4th Cir. 1983).
\textsuperscript{196} 29 C.F.R. §§541.207(c)(5), and 541.208(d).
\textsuperscript{197} Compare Valentine v. Bank of Albuquerque, 102 N.M. 489, 697 P.2d 489, 27 WH Cases 251 (1985) (exempt assistant worked with accounts payable, prepared reports and payroll, supervised personnel activities, relieved her superiors of certain daily responsibilities and performed related clerical functions) and Cowan v. Tricolor, Inc., 869 F. Supp. 262, 265, 2 WH Cases 2d 890 (D. Del. 1994) (office manager exempt under long test as assistant to proprietor advising how to obtain photographic effect, handling orders, quotations, shipments, and supervising one employee) aff’d mem., 60 F. 3d 814 (3d Cir. 1995); with 29 C.F.R. §541.208(f) (bookkeeping, preparing payroll, and sending monthly statements not exempt work).
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employee is exempt.\textsuperscript{199} Employees who plan efficient routes, contract with carriers, resolve damage claims and make adjustments for irregularities in transportation are engaged in exempt administrative work.\textsuperscript{200} Dispatchers who coordinated vehicle movements and responded to unusual situations were found to be exempt.\textsuperscript{201}

6. Professional Exemption

The professional exemption encompasses three types of employees: employees working in a learned profession, artistic professionals, and teachers.

a. Learned Professional

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

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

1) Primary Duty

As noted in both the executive and administrative exemptions, “primary duty” means the principal, main, major or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.

a) Work Requiring Advanced Knowledge

\textsuperscript{200} 29 C.F.R. §541.208(e).
\textsuperscript{201} Donovan v. Flowers Marine, Inc., 545 F. Supp. 991, 993-994, 25 WH Cases 983 (E.D. La. 1982) (dispatchers who coordinated barge movements, dealt with Coast Guard, responded to unusual situations and evaluated profitability of jobs were exempt).
“Work requiring advanced knowledge” means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment. Professional work is therefore distinguished from work involving routine mental, manual, mechanical or physical work. A professional employee generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

b) Field of Science or Learning

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

c) Customarily Acquired by a Prolonged Course of Specialized Intellectual Instruction

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

b. Creative Professional Exemption

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

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;

- The employee’s primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

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

2) Recognized Field of Artistic or Creative Endeavor

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

c. Teachers

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

d. Practice of Law or Medicine

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

7. Computer Employee Exemption

To qualify for the computer employee exemption, the following tests must be met:
• The employee must be compensated either on a salary or fee basis at a rate not less than $455 per week or, if compensated on an hourly basis, at a rate not less than $27.63 an hour;

• The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below.

  a. Primary Duty

The employee’s primary duty must consist of:

• The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

• The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

• The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

• A combination of the aforementioned duties, the performance of which requires the same level of skills.

The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in the primary duties test described above, are also not exempt under the computer employee exemption.

Under the new test there is no explicit requirement relating to the exercise of discretion or independent judgment.
The “highly compensated” employee test does not apply to computer employees. 202

8. Outside Sales Exemption

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

- The employee’s primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

- The employee must be customarily and regularly engaged away from the employer’s place or places of business.

The salary requirements of the regulation do not apply to the outside sales exemption. An employee who does not satisfy the requirements of the outside sales exemption may still qualify as an exempt employee under one of the other exemptions allowed by Section 13(a)(1) of the FLSA and the Part 541 regulations if all the criteria for the exemption are met.

a. Primary Duty

As with the executive, administrative and professional exemptions, “primary duty” means the principal, main, major or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.

1) Making Sales

“Sales” includes any sale, exchange, contract to sell, consignment for sales, shipment for sale, or other disposition. It includes the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property.

2) Obtaining Orders or Contracts for Services or for the Use of Facilities

Obtaining orders for “the use of facilities” includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies. The word “services” extends the exemption to employees who sell or

202 29 C.F.R. §541.601(c).
take orders for a service, which may be performed for the customer by someone other than the person taking the order.

3) Customarily and Regularly

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

4) Away from Employer’s Place of Business

An outside sales employee makes sales at the customer’s place of business, or, if selling door-to-door, at the customer’s home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer’s places of business, even though the employer is not in any formal sense the owner or tenant of the property.

b. Promotional Work

Promotional work may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee’s own outside sales or solicitations is exempt work. However, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work.

c. Drivers Who Sell

Drivers who deliver products and also sell such products may qualify as exempt outside sales employees only if the employee has a primary duty of making sales. Several factors should be considered in determining whether a driver has a primary duty of making sales, including a comparison of the driver’s duties with those of other employees engaged as drivers and as salespersons, the presence or absence of customary or contractual arrangements concerning amounts of products to be delivered, whether or not the driver has a selling or solicitor’s license when required by law, the description of the employee’s occupation in collective bargaining agreements, and other factors set forth in the regulation.

9. Highly Compensated Employees

The new regulations contain a special rule for “highly-compensated” workers who are paid total annual compensation of $100,000 or more. A highly compensated employee is deemed exempt under Section 13(a)(1) if:
• The employee earns total annual compensation of $100,000 or more, which includes at least $455 per week paid on a salary basis;

• The employee’s primary duty includes performing office or non-manual work; and

• The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

Thus, for example, an employee may qualify as an exempt highly-compensated executive if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements in the standard test for exemption as an executive.

a. Total Annual Compensation

The required total annual compensation of $100,000 or more may consist of commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period, but does not include credit for board or lodging, payments for medical or life insurance, or contributions to retirement plans or other fringe benefits.

b. Make-up Payments and Prorating

There are special rules for prorating the annual compensation if employees work only part of the year, and which allow payment of a single lump-sum, make-up amount to satisfy the required annual amount at the end of the year and similar make-up payments to employees who terminate before the year ends.

c. Customarily and Regularly

“Customarily and regularly” means greater than occasional but may be less than constant, and includes work normally and recurrently performed every workweek but does not include isolated or one-time tasks.

VI. GOVERNMENT EMPLOYMENT

The first time the FLSA covered any government employees was in 1966, when Congress amended the Act to cover state and local government employees engaged in the operation of hospitals, nursing homes, mental institutions, schools and mass transit systems. In 1972, the Education Amendments further
extended coverage to employees of public preschools. The 1974 amendments extended coverage to most federal employees and to virtually all of the remaining state and local government employees who were not covered as a result of the previous amendments.

Two years later in National League of Cities v. Usery203 the Supreme Court, in a 5-4 decision, declared that the minimum wage and overtime portions of the 1974 amendments, as applied to states and their political subdivisions, were unconstitutional under the Tenth Amendment to the United States Constitution with regard to employees engaged in "traditional governmental functions." This decision spawned a decade of litigation in which the courts struggled with the Supreme Court's analysis of traditional versus nontraditional governmental functions. In 1985, in Garcia v. San Antonio, Metropolitan Transit Authority204, the Supreme Court reversed its decision in National League of Cities, finding it "unsound in principle and unworkable in practice."205 As a result of the Supreme Court's decision in Garcia, states and their political subdivisions became effectively subject to the FLSA provisions as set forth in the 1974 amendments.

In 1995, as part of the 1995 Congressional Accountability Act, FLSA coverage was extended to employees of Congress. In extending coverage to its employees, Congress adopted most, but not all, of the provisions of the Act that apply to state and local governments.

205 Id. at 546.
A. Coverage Issues

1. Definitions

"Public agency" means the Government of the United States; the
government of a State or political subdivision thereof; any agency of the United
States, a State, or a political subdivision of a State; or any interstate governmental
agency.206

"State" means a State of the United States or the District of Columbia, or
any Territory or possession of the United States.207

In addition to including these new terms, the 1974 amendments modified
certain definitions already contained in the Act.

- The definition of the term "employer" was amended to include
  public agencies.
- The definition of the term "employee" was amended to include
  individuals employed by public agencies.
- The definition of "enterprise" contained in section 3(r) of the Act
  was modified to provide that activities of a public agency are
  performed for a "business purpose."
- The term "enterprise engaged in commerce or in the production of
  goods for commerce" defined in section 3(s) of the Act was
  expanded to include public agencies.

The determination as to whether employment is by a "public agency" is
significant because a number of special rules apply to public employees,
particularly in the area of overtime. Public agency employers are able to take
advantage of certain special exemptions to the overtime requirements of the Act
that are unavailable to private sector employers.208

1987), appeal dism. 838 F.2d 465 (4th Cir. 1988) illustrates how significant this
determination can be to the parties. Conway involved the issue of whether fire fighters
who worked out of privately operated fire protection districts were employed by the fire
districts or by the county. If they were employed by the County, they would qualify as
public agency employees and they would be subject to the partial overtime exemption
applicable to fire protection employees under 29 U.S.C. §207(k). The district court ruled
that they were employed by the fire protection districts and not the County. As a result,
the fire protection districts were found to be obligated to pay the fire fighters overtime
The Department of Labor has addressed what constitutes a public agency on a number of occasions in regard to fire, rescue, or emergency service personnel.\textsuperscript{209} The situations considered by the Department have involved programs that possess both public and private characteristics. The test applied by the Department of Labor for determining public agency status is drawn from the definition of "political subdivision" applied by the National Labor Relations Board (NLRB) and accepted by the U.S. Supreme Court in its 1971 decision in NLRB v. Natural Gas Utility District of Hawkins County.\textsuperscript{210}

In Hawkins County, the NLRB defined political subdivisions as entities either created directly by the state, or administered by people responsible to public officials or to the general electorate.\textsuperscript{211} In three subsequent Circuit Court of Appeals cases, the courts applied the NLRB's Hawkins test for the definition of "political subdivision" to the definition of a public agency under the FLSA.\textsuperscript{212} These courts determined that receipt of public funds and substantial state

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\textsuperscript{210} 402 U.S. 600 (1971).

\textsuperscript{211} Id. at 604-605.

regulation will not change an otherwise private company into a public agency.\textsuperscript{213}

In particular, lack of public control over an entity's board of directors is considered a crucial factor in determining that the entity does not constitute a public agency.\textsuperscript{214} These courts also held that whether the parties' contracts designate them as state agencies rather than independent contractors is important when considering their status for FLSA purposes.\textsuperscript{215}

\section*{2. Exclusions}

A few classes of individuals employed by public agencies are specifically excluded from coverage under section 3(e)(2)(C) of the Act. These exclusions apply to (1) Elected Public Officials, (2) the Personal Staff of Elected Public Officials, (3) Policy-Making Appointees and (4) Legal Advisors. Employees of legislative branches of state and local governments are also excluded from coverage. A condition for all of the exclusions is that the employee not be subject to the civil service laws of the employing State or local agency.\textsuperscript{216}

\section*{3. Volunteers}

Section 3(e) of the Act, as amended in 1985, provides that individuals performing volunteer services for units of state and local governments will not be regarded as "employees" under the Statute.\textsuperscript{217}

The DOL's regulations define the circumstances under which individuals may perform volunteer service for units of state and local governments without being considered to be their employees. Section 553.101 of the regulations provides:

\begin{itemize}
\item[(a)] An individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise,
\end{itemize}

\textsuperscript{213} Powell, 771 F.2d at 1312; Williams, 669 F.2d at 679.
\textsuperscript{214} Powell, 771 F.2d at 1312; Williams, 669 F.2d at 679; Skills Development, 728 F.2d at 294.
\textsuperscript{215} Wilcox v. Terrytown Fifth District Volunteer Fire Dept., Inc., 897 F.2d 765, 767, 29 WH Cases 1218 (5th Cir. 1990), \textit{cert. denied}, 498 U.S. 900 (1990); Powell, 771 F.2d at 1311; Skills Development, 771 F.2d at 299.
\textsuperscript{216} See, 29 C.F.R. §553.10.
\textsuperscript{217} 29 U.S.C.A. §203(e). As explained more fully in Chapter 3, the FLSA prohibits employees from being permitted to volunteer to work without compensation in the for-profit private sector.
expectation or receipt of compensation for services rendered, is considered to be a volunteer during such hours. Individuals performing hours of service for such a public agency will be considered volunteers for the time so spent and not subject to sections 6, 7, and 11 of the FLSA when such hours of service are performed in accord with sections 3(e)(4)(A) and (B) of the FLSA and the guidelines in this subpart.

(b) Congress did not intend to discourage or impede volunteer activities undertaken for civic, charitable, or humanitarian purposes, but expressed its wish to prevent any manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon individuals to "volunteer" their services.

(c) Individuals shall be considered volunteers only where their services are offered freely and without pressure or coercion, direct or implied, from an employer.

(d) An individual shall not be considered a volunteer if the individual is otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer. 218

Under the definition set forth in this regulation, to determine whether an individual is a bona fide volunteer, the motivation of the individual must be examined. Volunteer status is not established simply because a person works for a civic, charitable or humanitarian organization. If the individual volunteers for a reason other than a civic, charitable or humanitarian one, e.g., out of self-

218 29 C.F.R. §553.101(a)-(d).
interest or profit, the individual cannot be excluded from coverage under the
Act.219

The DOL regulations also address issues involving private individuals
who volunteer services to public agencies.220 Hours of work can be donated for
civic or humanitarian reasons, where there is no promise or expectation of
compensation, and no receipt of compensation except for expenses, reasonable
benefits, and nominal fees. Examples of services which might be performed on a
volunteer basis by private individuals for public agencies include such activities
as helping out in a sheltered workshop, providing personal services to the sick or
the elderly in hospitals or nursing homes, assisting in a school library or
cafeteria, driving a school bus to carry a football team or band on a trip, or
working with retarded or handicapped children or disadvantaged youth.221

B. Exemptions From Overtime Requirements In The Public Sector

1. Section 7(o) - Compensatory Time

In the 1985 amendments, Congress sought to address the concerns of state
and local governmental employers regarding the costs of compliance with the
FLSA, while still protecting employees who worked overtime, by permitting
states and local governments to agree with their employees that overtime work
would be rewarded with compensatory time off ("comp time") in lieu of
monetary payment.222 The 1985 Amendments require that comp time be
awarded at a rate of at least 1.5 hours for each hour of overtime work, similar to
section 7(a)'s requirement that an employer pay 1.5 times an employee's regular
wage rate for overtime.223 The statute requires that employers reach an
agreement or understanding with their employees prior to the performance of
overtime work if the employer intends to compensate the employees for
overtime work with comp time.224 As a further protection for employees, the

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219 29 C.F.R. §553.101(a)-(d). See Rodriguez v. Township of Holiday Lakes, 866 F. Supp. 1012 (S.D. Tx. 1994) (individual who was required to "volunteer" as a patrol officer in order to be classified as a full-time police officer, which was necessary to obtain paid employment as a road-construction flagman in a neighboring county, was not a "volunteer" within the meaning of the FLSA.)
220 29 C.F.R. §553.104.
221 29 C.F.R. §553.104(b).
223 Id. at 658. 29 U.S.C.A. §207(o)(1); 29 C.F.R. §553.20.
224 Id. at 658-59. 29 U.S.C.A. §207(o)(A); 29 C.F.R. §553.23.
1985 Amendments placed a cap on the amount of comp time that could be accrued, and set forth specific requirements on the preservation, use, and "cashing out" of accrued comp time.225

2. Section 7(p)(2) – Occasional Or Sporadic Employment

In contrast to FLSA provisions covering the private sector,226 the 1985 Amendments to the FLSA provide that when state or local government employees, at their option, work occasionally or sporadically on a part-time basis for the same agency in a capacity different from their regular employment, the hours worked in the different job do not have to be combined with the regular hours for the purpose of determining overtime liability.227

According to the Department, "occasional or sporadic" means infrequent, irregular or occurring in scattered instances.228 The Department has determined that to prevent overtime abuse, hours worked will be excluded only where the occasional or sporadic assignment is not within the same general occupational category as the employee's regular work.229 Moreover, the decision to work in a different capacity must be made freely by the employee and without coercion, implicit or explicit, by the employer.230

The Department's regulations contain a detailed explanation of what is meant by the phrase working in a "different capacity from any capacity in which the employee is regularly employed."

3. Section 7(p)(3) – Substitution

Section 7(p)(3) of the 1985 Amendments provides that any individual employed in any capacity by a public agency may agree to substitute, during scheduled work hours, for another employee.231 This can take the form not only of trading hours, but of Employee A paying Employee B to work in Employee

225 29 U.S.C.A. §207(o)(3); 29 C.F.R. §553.22.
226 29 C.F.R. §791.2.
228 29 C.F.R. §553.20(b)(1).
229 29 C.F.R. §553.30(c)(3).
230 29 C.F.R. §553.30(b)(2).
A's place, or even of Employee B "covering" for Employee A without any quid pro quo. Employees may work substitution schedules where the substitution is voluntarily undertaken and agreed to by the employees and approved by the employer.

The traded time will not be considered by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation. In effect, even though a substitution has taken place, each employee will be considered to have worked his or her normal schedule.\(^{232}\) Under this regulation, the non-working employee is credited with the hours worked by the substitute. In addition, the employer is not required to keep a record of the hours of substituted work.\(^{233}\)

It is important to note that the substitution provisions apply only when the employee's decision to substitute is made freely and without direct or implied coercion.\(^{234}\) An employee's decision to substitute will be deemed to have been made freely where it is made without fear of reprisal or promise of reward by the employer, and it is exclusively for the employee's own convenience.\(^{235}\)

C. Special Provisions Applicable To Fire Protection And Law Enforcement Employees Of Public Agencies

The FLSA contains a number of provisions which are unique to fire protection or law enforcement employees employed by public agency employers, such as application of special rules regarding accumulation of compensatory time, certain tour of duty practices, the exemption for small departments, and, most significantly, the hourly standards used to determine overtime compensation. These special rules are applicable only to employees engaged in "fire protection activities" and "law enforcement activities."\(^{236}\)

1. Small Department Exemption

Section 13(b)(20) of the Act provides a complete overtime pay exemption for "any employee of a public agency who in any workweek is employed in fire

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\(^{232}\) 29 U.S.C. §207(p)(3).
\(^{233}\) 29 U.S.C. §211(c); 29 C.F.R. §553.31(c).
\(^{234}\) 29 C.F.R. §553.31(b).
\(^{235}\) Id.
protection activities or . . . law enforcement activities . . . if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities." The determination as to whether the exemption applies is made on a workweek basis.

In determining whether the exemption applies, law enforcement and fire protection activities are considered separately. Thus, if a public agency employs fewer than 5 employees in fire protection activities, but 5 or more employees in law enforcement activities, it may claim the exemption for the fire protection employees but not for the law enforcement employees.

In counting the number of employees for purposes of the exemption, no distinction is made between full-time and part-time employees, or between employees who are on duty and employees who are on leave. "Volunteers," and "elected officials" are not counted as employees. In addition, all employees of the department are counted, not just those who would be subject to the Act's minimum wage and overtime protections. For example, a police chief would count as an employee for purposes of this exemption even though it is likely that a police chief would be considered to be exempt from the FLSA as an executive employee.

2. The Section 7(k) Exemption

Generally, a government employer is required to pay its employees, even fire protection and law enforcement employees, overtime compensation if they work more than 40 hours in a 7-day workweek. In the amendments to the FLSA pertaining to state and local government employees, Congress has recognized the longer tours of duty worked by most law enforcement and fire protection

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238 In considering comments made in response to a proposed rulemaking, the Department specifically rejected the suggestion that the determination as to whether the exemption applied be made on periods longer than a workweek. 52 F.R. 2021 (January 16, 1987).
239 29 C.F.R. §553.200(b).
240 Id.
241 29 C.F.R. §553.101.
242 29 C.F.R. §553.11.
243 29 C.F.R. §553.200(b).
employees employed in the public sector.\textsuperscript{245} To insure that public agencies would not be unduly burdened by the FLSA's overtime requirements, Congress enacted a partial overtime exemption for these employees. This partial overtime exemption is set forth in Section 7(k) of the Act.\textsuperscript{246}

Section 7(k) provides a partial overtime exemption in two respects: it provides for higher hourly standards before requiring that overtime compensation be paid and it permits overtime hours to be computed over a work period selected by the employer, which may be longer than a workweek. Under Section 7(k), public agency employers may adopt a work period for any period of at least 7 but not more than 28 consecutive days.\textsuperscript{247} Overtime need not be paid until the number of hours the employees work in the work period exceeds the ratio of 212 hours to 28 days for fire protection employees and 171 hours to 28 days for law enforcement employees.\textsuperscript{248} The Department has provided a table in its regulations that shows how this ratio translates into hours based on the length of the work period.\textsuperscript{249} For example, in a 7-day work period, fire protection employees do not have to be paid overtime until they work in excess of 53 hours and law enforcement employees do not have to be paid overtime until they work in excess of 43 hours.

To use the Section 7(k) exemption, a public agency employer must have an "established and regularly recurring period of work" of 7 to 28 days for its police or fire employees.\textsuperscript{250} The employer has the burden of proving it has adopted a work period "by clear and affirmative evidence."\textsuperscript{251} The case law is currently unclear whether an employer must formally adopt a work period by taking some sort of action announcing that a work period was adopted.\textsuperscript{252}

\begin{itemize}
  \item \textsuperscript{245} 1985 U.S.C.C.A.N. 651, 653.
  \item \textsuperscript{246} 29 U.S.C. §207(k).
  \item \textsuperscript{247} 29 C.F.R. §553.201(a).
  \item \textsuperscript{248} Id., 29 C.F.R. §553.230.
  \item \textsuperscript{249} 29 C.F.R. §553.230.
  \item \textsuperscript{250} 29 C.F.R. §553.224(a).
  \item \textsuperscript{251} Birdwell v. City of Gadsden, Alabama, 970 F.2d 802, 805, 30 WH cases 1745, 1748 (11th Cir. 1992), quoting Donovan v. United Video, Inc., 725 F.2d 577, 581, 26 WH Cases 938, 940 (10th Cir. 1984). But see Lamon v. City of Shawnee, Kansas, 972 F.2d 1145, 1154, 30 WH Cases 1665 (10th Cir.), cert. denied, --- U.S. --- 113 S.Ct. 1414, 1 WH Cases 2d 464 (1993) (proper standard is preponderance of the evidence, not clear and affirmative evidence).
  \item \textsuperscript{252} Birdwell, 970 F.2d at 805 (holding City could take advantage of exemption based upon fact that officers worked in 7 day cycles of 5 days on and 2 days off); Martin v. Coventry
\end{itemize}
The rules for computing the "regular rate of pay" for purposes of computing overtime compensation are the same for employees whose overtime is paid under either Section 7(k) or Section 7(a) of the Act. For Section 7(k) employees, the Department states in its regulation that "wherever the word 'workweek'" is used in 29 C.F.R. Part 778, the words "work period should be substituted."253

D. Unique Constitutional Issues

Two unique constitutional considerations may arise in the application of the FLSA to state and local governments. The Tenth and Eleventh Amendments to the Constitution may limit or affect the jurisdiction of the claims.

1. The Tenth Amendment

The Supreme Court has gone back and forth in its interpretation of the Tenth Amendment. In National League of Cities v. Usery,254 the Court ruled that the Tenth Amendment barred application of the FLSA to state and local government employees who performed traditional governmental functions. Nine years later this decision was reversed in Garcia v. San Antonio Transit Authority.255 In Garcia, the Court found the distinction set forth in National League of Cities between traditional and non-traditional functions to be unsound.

Fire District, 981 F.2d 1358, 1 WH Cases2d 247 (1st Cir. 1992) (fire district entitled to take advantage of exemption even though it never formally adopted a "7(k) pay plan"); FOP Lodge No. 13 v. Smyrna, 2 WH Cases2d 440 (N.D.Ga 1994) (appropriate work period adopted where internal memoranda, policy statements, and pay period evidenced such adoption, even though city did not enact formal resolution); Mills v. Maine, 853 F. Supp. 551, 2 WH Cases 2d 175 (D.Me. 1994) (state allowed to apply exemption, although it never formally complied with statutory requirements because it treated employees as totally exempt); 29 CFR §553.224(a) ("work period refers to any established and regularly recurring period of work."). See also, Ackley v. Kansas Department of Corrections, 844 F. Supp. 680, 687, 1 WH Cases2d 1530 (D.Kan. 1994) (city "produced no evidence that it adopted a §207(k) workweek exemption"); McGrath v. City of Philadelphia, 864 F. Supp. 466, 2 WH Cases2d 551 (E.D.Pa. 1994) (disputed fact issue on whether city adopted 13 day work period); Atana v. Department of Corrections, 2 WH Cases2d 272 (W.D. Mo. 1994) (defendant failed to prove that it adopted §7(k) exemption); Maldonado v. Administraccon de Correccion, 1 WH Cases2d 913, 915 (D.P.R. 1993) ("defendant did not choose to avail itself of the provisions of §7(k)"); WH Admin. Op., January 3, 1994, reprinted in Fair Labor Standards Handbook, pp. 351-352 (App. III January 3, 1994) (Section 7(k) must be affirmatively claimed and cannot be claimed retroactively).

253 29 C.F.R. §553.27.
in theory and unworkable in practice. The Court held that the FLSA could be applied to state and local government employees without implicating Tenth Amendment concerns. The 1985 Garcia decision remains in effect. Nonetheless, public employers continue to raise the Tenth Amendment as a defense to employees' FLSA lawsuits, apparently in the hope that Garcia will be reversed.
2. The Eleventh Amendment

The FLSA provides for concurrent jurisdiction in state and federal courts.\textsuperscript{256} Thus, an FLSA action may be brought in either state or federal court.

The Eleventh Amendment to the Constitution, however, provides that the jurisdiction of the federal courts does not extend to suits against a state brought by a private citizen. This immunity is not absolute; a state may consent to be sued in federal court and state officials may be sued in their individual capacities for money damages.\textsuperscript{257}

In a 1989 decision, Pennsylvania v. Union Gas,\textsuperscript{258} the Supreme Court held that Congress could abrogate the states' Eleventh Amendment immunity by making the abrogation of immunity explicit and by exercising its authority under the Commerce Clause. In 1996, the Court directly reversed \textit{Union Gas} in \textit{Seminole Tribe of Florida v. Florida}.\textsuperscript{259} In \textit{Seminole Tribe}, the Court articulated a view of the Constitution which greatly reduced the power of Congress to abrogate states' Eleventh Amendment immunity. The Court held that Congress' constitutional authority to abrogate Eleventh Amendment immunity emanates only from the Fourteenth Amendment.

The Court established a two-part test to determine whether Congress has validly abrogated Eleventh Amendment immunity. First, Congress must express the intent to do so. Second, the abrogation of immunity must be pursuant to a valid exercise of power under the Constitution.

Applying this test to actions against states under the FLSA, there is little question that the first part of the test is met: the FLSA clearly expresses Congressional intent to abrogate states' Eleventh Amendment immunity. The FLSA defines an employer as including "any person directly or indirectly in the interest of an employer in relation to an employee and \textbf{includes a public agency}." (Emphasis supplied.)\textsuperscript{260} The definition of public agency includes "a State or political subdivision of a State."\textsuperscript{261}

\textsuperscript{256} 29 U.S.C. §216(b).
\textsuperscript{257} Ex parte Young, 209 U.S. 123 (1908).
\textsuperscript{258} 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989).
\textsuperscript{259} 116 S.Ct. 1114, 134 L.Ed. 2d 252 (1996).
\textsuperscript{260} 29 U.S.C. §203(e).
\textsuperscript{261} 29 U.S.C. §203(x).
Applying the second test Congress may abrogate Eleventh Amendment immunity only pursuant to a valid exercise of power. Congress stated that it enacted the FLSA under the Commerce Clause:

It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several states . . . .

In Seminole Tribe, the Court held that Congress could not exercise its authority to abrogate states' Eleventh Amendment immunity under the Indian Commerce Clause, which the Court found to be virtually indistinguishable from the Commerce Clause power. Soon after Seminole Tribe was issued, several district courts held that the decision means that FLSA actions brought against states cannot be pursued in federal court. Each of these courts has held that it is not a valid exercise of Congressional power for Congress to abrogate states' Eleventh Amendment immunity through the Commerce Clause.

VIII. RETALIATION

Section 15(a)(3) of the FLSA provides:

(a)...it shall be unlawful for any person

* * * *

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee. (Emphasis supplied.)

263 116 S. Ct. at 1126.
In analyzing the language of Section 15(a)(3) of the FLSA, courts have compared and contrasted similar “retaliatory discharge” language in other federal statutes. These statutes should be referred to when an issue arises concerning the application of the language of Section 15(a)(3) of the FLSA.

A. Plaintiffs

Unlike the minimum wage and overtime provisions found in Sections 6 and 7 of the FLSA, Sections 15(a)(3) applies “without qualification to ‘any employee.’”

Courts have also found that a “former” employee, voluntarily separated from his employer, is protected by the anti-discrimination provisions of Section 15(a)(3). Spouses of employees have also been protected under the anti-retaliation provision of the FLSA.

However, Section 15(a)(3) has been held not applicable to non-employee/non-former employee job applicants, because the statute only identifies “employees” as coming within its provisions.

B. Defendants

Section 15(a)(3) of the Act provides that it shall be unlawful for “any person” to engage in retaliatory conduct. The Act defines the term person as follows:

(a) “Person” means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

In early cases determining coverage under Section 15(a)(3), courts emphasized that a “person” did not have to be an employer in order to be liable

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268 Dunlop v. Carriage Carpet Company, 548 F. 2d 139, 140, 22 WH Cases 1481, 1483 (6th Cir. 1977).


for retaliatory conduct. In *Meek v. United States*,272 Meek knew of the FLSA complaints before he transferred his business, that after the transfer he still did most of the hiring and firing, and that he told one of the employees he would ‘fire every damn one of them’ if they filed a wage claim.273 The appeals court held that this evidence was sufficient to find that Meek exercised enough control of the business to make him responsible for the discriminatory discharges.274

C. What Conduct Has Been Found To Be Protected

Section 15(a)(3) extends protection to an employee who has “filed a complaint or instituted or caused to be instituted any proceeding under or related to the [FLSA]...”275 In construing the meaning of this language, courts have given protection to activities which are not specifically enumerated in that Section. Such results are generally said to be in keeping with the Supreme Court’s view of the remedial nature of the FLSA. In *Mitchell v. Robert DeMario Jewelry, Inc.*276 the Supreme Court noted that in drafting the FLSA Congress did not seek to assure that the minimum wage and overtime provisions of the Act would be complied with by instituting a detailed system of federal oversight.277 Rather, Congress relied on employees to complain to secure their rights under the statute.

1. Contacting The Department Of Labor

An employee need not necessarily "file a complaint" with the DOL in order to come within the protection of Section 15(a)(3). In *Morgan v. Future Ford Sales* 278 a car salesman called the DOL to determine if employees were entitled to compensation for time spent in staff meetings. The DOL Compliance Officer told the salesman that the employer was required to pay the minimum wage for time spent in required meetings. The car salesman relayed that information to other salespersons. Shortly thereafter, the car salesman was asked by two management representatives if he had contacted the DOL. The car salesman said that he had done so, and later informed the general sales manager of his contact with the DOL. Two days later the salesman was terminated.279

272  136 F.2d 679 (6th Cir. 1943).
273  Id.
274  Id.
277  Id. at 292.
279  Id. at 810.
In analyzing whether the salesman’s conduct was protected under Section 15(a)(3), the court wrote

Under this language, [Section 15(a)(3) of FLSA] activity beyond the filing of an employee’s own complaint is protected. The language addressing acts by which an employee “caused to be instituted any proceeding” does not cover an employee’s own complaint, which is expressly covered. Instead, this language protects actions of an employee which may cause third parties to institute their own proceedings.280

2. Informal Workplace Complaints

Most federal courts which have addressed the issue have found that informal complaints in the workplace about an employer’s possible violation of the wage and hours provisions of the FLSA are protected activity under Section 15(a)(3). In Love v. RE/MAX of America, Inc.,281 Love discovered that male vice-presidents had received larger starting salaries than she, and had been given more substantial raises than she had received. Love sent a memo to the company president requesting a raise and attached a copy of the Equal Pay Act282 to her memo. Within two hours, the CEO of RE/MAX went to Love’s office, a copy of her memo in his hand, and fired her.

The trial court found that Love was discharged in retaliation for her good faith assertion of her statutory rights. The Tenth Circuit affirmed.

“the Act also applies to the unofficial assertion of rights through complaints at work.”283

This view has been followed in other circuits:

• Third Circuit: Brock v. Richardson284 (informal complaint is sufficient to bring employee under Act; formal filing is not necessary)

280 Id. at 814.
281 738 F. 2d at 389.
283 738 F.2d at 387.
284 812 F. 2d 121, 124-25, 27 WH Cases 1689 (3rd Cir. 1987).
- Sixth Circuit: *EEOC v. Romeo Community Schools*\(^{285}\) (After female custodian complained to employer about wage disparities between male and female custodians’ rates of pay, she was terminated)

- Eleventh Circuit: *EEOC v. White and Sons Enterprises*\(^{286}\) (unofficial complaints to employer about unequal pay constituted assertion of rights protected under FLSA)

On the other hand, the Second Circuit has declined to adopt a construction of Section 15(a)(3) that encompasses informal workplace complaints. In *Lambert v. Genesee Hospital*\(^{287}\) the Second Circuit court of appeals found that informal complaints were not covered by Section 15(a)(3).

### 3. What Conduct Has Been Found To Be Prohibited

The anti-retaliation provisions of Section 15(a)(3) prohibit an employer from *discharging or in any other manner discriminating against* an employee because that employee had engaged in protected conduct. The most common retaliatory act is discharge. That term includes the “constructive discharge” of an employee for engaging in protected conduct. Other discriminatory acts such as harassment on the job, wage reductions, and post discharge black listing or disparagement are also prohibited.

Actions such as changing an employee’s seat at work, changing work assignments, making an employee stay in one place while at work, and finding fault with an employee’s work product may constitute unlawful retaliatory acts if they are done because an employee has asserted rights under the FLSA.\(^{288}\)

However, every act that affects an employee is not necessarily unlawful harassment. For example in *Cuevas v. Monroe Street City Club*\(^{289}\) the district court found that Cuevas’ transfer from sous chef to buffet chef “cannot in any terms be characterized as an adverse action”\(^{290}\) because Cuevas did not receive a cut in pay or a decrease in benefits, Cuevas admitted that the demands [of sous chef]

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\(^{285}\) 976 F. 2d 985, 1 WH Cases 2d 264 (6th Cir. 1992).

\(^{286}\) 881 F. 2d 1006, 1011, 29 WH Cases 719, 724 (11th Cir. 1989).

\(^{287}\) 10 F.3d 46, 1 WH Cases 2d 1124 (2d Cir. 1993).


\(^{290}\) *Id.* at 1411.
were too intense for him, and the job of buffet chef was essential to the business and carried as much responsibility as the job of sous chef.\textsuperscript{291}

Furthermore, courts allow employers latitude to supervise their workers, and will not construe normal workplace disciplinary actions as retaliation in the absence of clear discriminatory motivation for such actions. In \textit{Martin v. Grey Eagle Distributors, Inc.},\textsuperscript{292} the court held that increased supervision and monitoring of employees' break times were motivated by legitimate productivity concerns, and not retaliatory intent.\textsuperscript{293} Also, in \textit{Caryk v. Coupe},\textsuperscript{294} the District Court for the District of Columbia rejected a retaliation claim on the grounds that the employer had legitimate reasons to discipline the employees for workplace mistakes.\textsuperscript{295}

\textbf{D. \textit{Prima Facie} Case And Burden Of Proof}

The \textit{prima facie} case of retaliation consists of three elements:

1. the plaintiff must have engaged in statutorily protected conduct under Section 15(a)(3) of the FLSA, or the employer must have erroneously believed that plaintiff engaged in such conduct;\textsuperscript{296}

2. the plaintiff must have suffered some adverse employment action; and

3. a causal link must exist between plaintiff's conduct and the employment action.\textsuperscript{297}

\textsuperscript{291} \textit{Id.}

\textsuperscript{292} 937 F. Supp. 845, 3 WH cases 2d 834 (E.D. Mo. 1996).

\textsuperscript{293} \textit{Id.} at 855.


\textsuperscript{295} \textit{Id.} at 1254. See also Campbell v. HSA Managed Case, 4 WH Cases 2d 365 (N.D. Ill. 1997); (being treated rudely, being "set-up," "games being played" on employee did not constitute adverse employment actions);\textsuperscript{296} \textit{But see} O'Brien v. DeKalb-Clinton Ambulance, 3 WH Cases 2d 37 (W. D. Mo. 1995); (derogatory comments denigrating employee's professional capabilities and comments that employee was an alcoholic constituted retaliatory harassment).

\textsuperscript{296} Brock v. Richardson, 812 F.2d 121, 27 WH Cases 1689 (3d Cir. 1987) (employee protected from employer's retaliation where employer erroneously believed that employee engaged in protected conduct).

The strength and nature of the plaintiff’s evidence concerning the third element of the *prima facie* case determines the allocation of proof.

Where a plaintiff contends that the employer’s stated reason for the adverse action is pretextual, the allocation of proof set forth in *McDonnell Douglas Corp. v. Green*,298 *Texas Department of Community Affairs v. Burdine*,299 and *St. Mary’s Honor Center v. Hicks*300 will be applied. However, where a plaintiff proves, by substantial, direct evidence of retaliation that the employer was motivated at least in part by the plaintiff’s protected conduct, i.e., "mixed motives" cases, then according to *Price Waterhouse v. Hopkins*301 the plaintiff may prevail without necessitating recourse to the burden-shifting schemes noted above.302

In presenting proof of a retaliation claim the plaintiff must establish each element of the *prima facie* case. The third element, causal link, is most often the one in dispute. A sufficient causal link may be established by a showing that only a very brief period of time separated the assertion of statutory rights and the adverse employment action.303 In contrast, a longer period of time can serve to defeat the *prima facie* case.304 "Unless the termination is very closely connected in time to the protected conduct, the plaintiff will need to rely on additional evidence beyond mere temporal proximity to establish causation."305

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298  411 U.S. 792, 802-05, 5 FEP Cases 965 (1973).
301  490 U.S. 228, 49 FEP Cases 954 (1989).
303  Morgan v. Future Ford Sales, 830 F. Supp. 807, 1 WH Cases 2d 995 (D. Del. 1993) (employee terminated two days after telling a manager he contacted DOL establishes *prima facie* case where manager making termination decision knew of his activity); Love v. RE/MAX Inc., 738 F.2d 383, 14 WH Cases 1360 (10th Cir. 1984) (employee discharged two hours after raising FLSA claim); Mitchell v. Goodyear Tire & Rubber Co., 278 F.2d 562, 14 WH Cases, 621 (8th Cir. 1960) (short period of time aids in establishment of *prima facie* case).
304  Conner v. Schnuck Markets, 121 F.3d 1390, 4 WH Cases 2d 43 (10th Cir. 1997) (four month time lag between Conner’s participation in protected activity and his termination, by itself, would not be sufficient to justify an inference of causation).
305  Id.
1. "Pretext" Cases

Under the McDonnell Douglas-Burdine-Hicks framework, the plaintiff’s initial burden “is not onerous.” The plaintiff can usually establish causation by showing that the protected activity preceded the adverse action, and that the employer was aware of the plaintiff’s protected activity before taking the adverse action. Once the plaintiff has made out a prima facie case of retaliation, the burden of producing evidence (not the burden of proving) shifts to the defendant to articulate a legitimate nonretaliatory reason for its action.

In FLSA cases, legitimate nonretaliatory reasons for discharge have included:

- violation of a company policy prohibiting the acceptance of gifts from vendors and lying to company officials charged with investigating the incident.

- excessive lateness in violation of company policy.

- violation of company rule prohibiting secretly taping conversations with supervisor, and conducting oneself in a manner that employer thought was a breach of trust.

- failure to follow directions, mismanagement, and the inappropriate use of students to care for a small child.

- unacceptable job performance

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306 Burdine, 450 U.S. at 253.
308 Conner v. Schnuck Markets, 121 F.3d 1390, 4 WH Cases 2d 43 (10th Cir. 1997).
311 Martin v. Gingerbread House, Inc., 977 F.2d 1405, 1 WH Cases 2d 89 (10th Cir. 1992).
After the defendant has articulated a nonretaliatory reason for the employment action, the plaintiff must then prove, by a preponderance of the evidence, that the defendant's articulated reason is a "pretext" for unlawful retaliation.313

A plaintiff demonstrates pretext by showing either 'that a discriminatory reason more likely motivated the employer or...that the employer's proffered explanation is unworthy of credence.'314

2. "Mixed Motive" Cases

The "mixed motives" analysis is used when the evidence shows the possibility that both lawful and unlawful reasons influenced an employer in making an adverse employment decision, while the McDonnell Douglas-Burdine sequence is used where "either a legitimate or an illegitimate set of considerations led to the challenged decision, but not both."315

Under the "mixed motives" analysis, if a plaintiff proves that the employer was motivated at least in part by the plaintiff's protected conduct, then the plaintiff may prevail without recourse to the burden-shifting scheme of Douglas-Burdine-Hicks,316 provided that plaintiff can create a reasonable inference that retaliatory considerations were "a substantial factor" in the complained-of adverse employment decision.317

If the plaintiff can create that inference, Price Waterhouse holds that the burden of persuasion then shifts to the defendant to show that the challenged action would have been taken even if the unlawful motivation was not present.318 That is, the defendant prevails only if it would have made the same decision for legitimate, non retaliatory reasons.319

Courts have disagreed over whether the burden of proving the "but for" causation, or the lack thereof, under the "mixed motives" approach shifts to the employer once the employee presents direct evidence that an illegitimate reason

313 Meeks v. Computer Assoc., Int'l, 15 F.3d 1013, 1 WH Cases2d 1544, 1549 (11th Cir. 1994).
314 Rea v. Martin Marietta Corp. 29 F.3d 1450, 1455, 65 FEP Cases 1751 (10th Cir. 1994).
315 Price Waterhouse, 490 U.S. at 247.
317 Price Waterhouse, 490 U.S. at 259, 265.
319 Price Waterhouse, 490 U.S. at 242.
was a substantial factor in an adverse employment decision, or is more appropriately characterized as an affirmative defense. This divergence of opinion arises from differing interpretations of the Supreme Court’s discussion of this issue in Mt. Healthy320 and the plurality and concurring opinions in Price Waterhouse.

E. Mitigation

An employee discharged for retaliatory reasons is expected to look for other employment. The quality of a former employee's search efforts may affect the amount of back pay awarded.321 Two district courts have limited back pay to six months because in the court's determination, the former employee could have found substitute employment at an equivalent wage in that time period.322

However, in Pedreyra v. Cornell Prescription Pharmacies,323 the court held that an employee who sought new employment by making at least three contacts a week with potential employers met her duty to mitigate damages, despite the employer's argument that she should have listed her name with commercial employment agencies and with other employers.

F. Remedies

Section 16 of the FLSA is entitled "Penalties." That Section sets forth the various penalties that are available to the Secretary and to private parties for violations of certain provisions of the Act. Subsection (b) of Section 16 was

320 In Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 1 IER Cases 76 (1977) a teacher contended that he had been discharged because he had exercised his free speech rights. The school board contended that the discharge was based on an inadequate job performance. The Supreme Court, acknowledging the possibility of "dual motives" in the case, ruled that the school board was entitled to prevail if the fact-finder concluded that the teacher would have been discharged even if the protected conduct had not occurred (i.e., that the improper reason was not the "but for" cause of the discharge.) The Supreme Court assigned to the defendant as an affirmative defense the burden of persuasion on the hypothetical issue as to what would have happened if the valid reason alone had existed. In 1989, the Supreme Court, in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), a "mixed motive" case, held in a plurality decision, that once an employee presents direct and substantial evidence of discriminatory animus, the burden of persuasion shifts to the defendant to show by a preponderance of the evidence that it would have made the same decision even if it had not taken the discriminatory factor into account.


323 465 F. Supp. at 950.
amended in 1977 to create an additional private right of action for violations of Section 15(a)(3). The amendment also provided a broader basis for relief:

...Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of Section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages...

(Emphasis supplied.)

In a suit brought by the Secretary under Section 17, a court may order an employer to reinstate an employee who has been discharged in violation of Section 15(a)(3). Private plaintiffs may also seek reinstatement, as well as other legal and equitable relief, in retaliation cases brought under Section 16(b) of the Act. Reinstatement is the preferred remedy unless there are compelling reasons, such as continued hostility between the employer and employee, to provide for an alternative remedy.

Other remedies available in Section 15(a)(3) retaliation actions include:

- **Back Pay**

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328 Brock v. Casey Truck Sales, 839 F.2d at 881 (by retaliating, employer gains fearful silence of remaining employees, which encourages continued wrongdoing; reinstatement is appropriate remedy, unless compelling reasons, such as continued hostility between employer and employee, require alternative remedy); Goldberg v. Bama Mfg., 302 F.2d at 156 (reinstatement is appropriate remedy unless employer establishes compelling reasons to avoid it).
329 To calculate a back pay award, the district court first determines each discharged employee's hourly wage rate at the time of termination, and the duration of the loss period, usually measured from discharge date to judgment date. Courts differ as to whether or not to consider wage increases that an employee could have received had he not been terminated. The court may also determine whether reasonable efforts to mitigate damages have been made. Offsets to a back pay award may include interim earnings and unemployment benefits. However, some courts have refused to offset unemployment compensation from a back pay award.
• Front Pay\textsuperscript{330}
• Interest\textsuperscript{331}
• Compensatory Damages\textsuperscript{332}
• Liquidated Damages\textsuperscript{333}
• Punitive Damages\textsuperscript{334}

VIII. RECORDKEEPING REQUIREMENTS

Section 11(c) of the FLSA requires employers to "make, keep and preserve records" of employees and of their "wages, hours, and other conditions and practices of employment" in accordance with the regulations prescribed by the Administrator of the Wage and Hour Division of the Department of Labor.\textsuperscript{335}

Pursuant to the recordkeeping regulations, set out in 29 C.F.R. Part 516,
employers must maintain certain records for both exempt and nonexempt employees.336

A. Items Required

29 C.F.R. Section 516.2(a) sets out 12 records that employers must maintain for each employee who is covered by the FLSA's minimum wage or minimum wage and overtime pay requirements:

(1) The employee's full name as used for Social Security recordkeeping purposes and, on the same record, the employee's identifying symbol or number if such is used in place of the name on any time, work, or payroll records.337

(2) The employee's home address, including zip code.338

(3) The employee's date of birth, if under 19 years of age.339

(4) The employee's sex and occupation in which employed, (the records may show the employee's sex by use of the prefixes Mr., Mrs., Miss, or Ms.).340

(5) The time of day and day of the week on which the employee's workweek begins. Public agencies that claim exemption for fire protection and law enforcement employees under Section 7(k) of the FLSA should instead show the starting time and length of the work period. If the employee is part of a workforce or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning of the workweek for the whole workforce or establishment will suffice.341


337 29 C.F.R. §516.2(a)(1).

338 29 C.F.R. §516.2(a)(2).

339 29 C.F.R. §516.2(a)(3).

340 29 C.F.R. §516.2(a)(4). Other equal pay recordkeeping requirements are set forth in 29 C.F.R. Part 1620.

341 29 C.F.R. §516.2(a)(5).
(6) The regular hourly rate of pay for any workweek in which overtime compensation is due; an explanation of the basis of pay showing the monetary amount paid on a per hour, per day, per week, per piece, commission on sales, or other basis; and the amount and nature of each payment that is excluded from the regular rate under Section 7(e) of the Act. These records may be in the form of vouchers or other payment data. 342

(7) The hours worked each work day and the total hours worked each workweek. Under this regulation, a "work day" is any fixed period of 24 consecutive hours and a "workweek" is any fixed and regularly recurring period of seven consecutive work days. 343

(8) The total daily or weekly straight-time earnings or wages due for hours worked during the work day or workweek, exclusive of premium overtime compensation. 344

(9) The total premium paid over and above straight-time earnings for overtime hours. 345

(10) The total additions to or deductions from wages paid each pay period, including employee purchase orders or wage assignments. The individual employee records must also include the dates, amounts, and nature of the items that make up the total additions and deductions. 346

(11) The total wages paid each pay period. 347

(12) The date of payment and the pay period covered by the payment. 348

B. Posting of Notices

342 29 C.F.R. §516.2(a)(6).
343 29 C.F.R. §516.2(a)(7).
344 29 C.F.R. §516.2(a)(8).
345 29 C.F.R. §516.2(a)(9).
346 29 C.F.R. §516.2(a)(10).
347 29 C.F.R. §516.2(a)(11).
348 29 C.F.R. §516.2(a)(12).
Department of Labor regulations require employers to post various notices. If these required posters are not in place, an employer can be charged with a recordkeeping violation.349

Employers that employ any employee subject to the FLSA's minimum wage provisions are required to post a notice explaining the Act.350 This notice must be posted in conspicuous places in every establishment where such employees are employed, so as to allow them to readily observe a copy.352

Employers may request permission to post posters photographically reproduced in a reasonable and moderate size. An appropriate DOL regional official shall approve such a request provided there is no attempt to evade the posting requirements and the reproductions are of such size and so placed as to be read easily by the employees.353

C. Violation Of Recordkeeping Requirements

An employer violates the FLSA by failing to keep records in accordance with the Act's recordkeeping provisions.354 An employer that delegates its

349 Field Operations Handbook §30a06.
350 29 C.F.R. §516.4.
351 WH Form 1088; WH Form 1088Sp in Spanish.
352 29 C.F.R. §516.4.
353 Field Operations Handbook §30a07(a).
354 First Circuit: McComb v. La Casa Del Transporte, Inc., 167 F.2d 209, 7 WH Cases 880 (1st Cir. 1948) (employer recorded only average hours of drivers rather than actual time). Third Circuit: Williams v. Tri-County Growers, Inc., 747 F.2d 121, 26 WH Cases 1519 (3rd Cir. 1984) (employer's estimation of hours each employee worked constituted recordkeeping violation). Fifth Circuit: Marshall v. Partida, 613 F.2d 1360, 24 WH Cases 694 (5th Cir. 1980) (owner of self-service laundromat failed to keep records showing hours that attendants worked); Wirtz v. Keystone Readers Service, Inc., 282 F. Supp. 871, 18 WH Cases 356 (S.D. Fla. 1968) (magazine subscription service failed to record employees' wages and hours), aff'd, 418 F.2d 249, 19 WH Cases 240 (5th Cir. 1969); Wirtz v. Williams, 369 F.2d 783, 17 WH Cases 526 (5th Cir. 1966) (employer violated Act by recording estimated number of hours truck drivers' trips were supposed to consume, rather than actual time consumed). Tenth Circuit: Dunlop v. Gray-Goto, Inc., 528 F.2d 792, 22 WH Cases 640 (10th Cir. 1976) (inaccurate payroll records were such as to mislead outsider examining them); Mitchell v. Hertzke, 234 F.2d 183, 12 WH Cases 877 (10th Cir. 1956) (injunction requiring grower and crew chief to maintain required records issued, where labor was done by family of
obligations is not excused from the recordkeeping requirements or from liability incident thereto.355

In a joint employment situation, the employer that actually pays the employees the monies intended as compensation for hours of employment may be considered responsible for the keeping of required records and may be treated as the one who has the primary duty of compliance as to such hours of employment. Where each employer makes direct payment to the employees, the employer being investigated may be deemed to be the one having the primary duty of compliance.356

Failure to keep records can result in an injunction against future violations357 and criminal sanctions.358 The Department of Labor does not have authority to impose civil money penalties for recordkeeping violations.

migrant workers working as unit but only records kept were of head of family who collected the pay).

355 Castillo v. Givens, 704 F.2d 181, 26 WH Cases 184 (5th Cir. ) (farmer's failure to keep records was not mitigated by fact that he had hired individual to supply crew and to keep record of hours worked), cert. denied, 464 U.S. 850, 26 WH Cases 757 (1983); Wirtz v. Mississippi Publishers Corp., 364 F.2d 603, 607, 17 WH Cases 397 (5th Cir. 1966) ("The record-keeping requirements are fundamental underpinnings of the Act," and employers may not delegate this responsibility to the employees "so as to excuse the employer for any neglect or default"); Walling v. Sun Publishing Co., 47 F. Supp. 180, 2 WH Cases 687 (D.W. Tenn. 1942) (employer is not relieved of recordkeeping obligations because extent of its business may preclude personal supervision and compel reliance on subordinates), aff'd as modified, 140 F.2d 445, 4 WH Cases 126 (6th Cir.), cert. denied, 322 U.S. 728, 4 WH Cases 403 (1944).

356 Field Operations Handbook §30a09.


Seventh Circuit: Walling v. Panther Creek Mines, Inc., 148 F.2d 604, 5 WH Cases 155 (7th Cir. 1945) (employer's failure to comply with recordkeeping provisions authorized issuance of injunction, notwithstanding employer's contention that requirements not commercially feasible).

Eighth Circuit: Dole v. Continental Cuisine, Inc., 751 F. Supp. 799, 30 WH Cases 163 (E.D. Ark. 1990) (employer enjoined from recordkeeping violations, but no damages assessed since violations were minor and not willful).
An employer that fails to keep records also faces the potential and costly consequence of an onerous burden of proof in cases brought by employees, or by the Secretary of Labor, claiming back wages.\footnote{359}

The Supreme Court has held that in the absence of employment records, wages owed to an employee should be awarded even if approximate, if (1) the evidence shows that the employee performed work for which there was improper compensation and (2) the amount and the extent of work can reasonably be inferred.\footnote{360} The burden of proof then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference drawn from the employee's evidence.\footnote{361}


\textit{But see,} Brock v. Wilamowsky, 28 WH Cases 608 (2d Cir. 1987) (no injunction issued against employer that, among other things, spent $10,000 to update and computerize its recordkeeping procedures to facilitate compliance with Act), and Martin v. Petroleum Sales, Inc., 1 WH Cases 2d 363 (W.D. Tenn. 1992) (no injunction issued where court imposed severe penalties and sanctions for employers' unlawful contemptuous conduct).

\footnote{358} 29 U.S.C.A. §216(a); United States v. Landin, 14 WH Cases 466 (2d Cir. 1960) (evidence supported employer's conviction for willfully keeping false records by understating number of hours worked by homeworkers).

\footnote{359} 29 U.S.C.A. §215(a)(5); Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 6 WH Cases 83 (1946) (employer that failed to keep records could not complain that employees' evidence on damages was inexact or imprecise).

\textit{Fifth Circuit:} Castillo v. Givens, 704 F.2d 181, 26 WH Cases 184 (5th Cir.) (employer that delegated recordkeeping obligations to farm labor contractor who did not keep complete records was required to negate the inferences to be drawn from employees' evidence), \textit{cert. denied}, 464 U.S. 850, 26 WH Cases 757 (1983).

\textit{Sixth Circuit:} Hodgson v. American Concrete Construction Co., 471 F.2d 1183, 20 WH Cases 1074 (6th Cir.) (when employer's records are inadequate, employer must negate reasonable inference drawn from employee's evidence showing amount and extent of work to avoid damages, even though result may be only approximate), \textit{cert. denied sub nom}, American Concrete Construction Co. v. Brennan, 412 U.S. 949, 21 WH Cases 103 (1973).


\textit{Tenth Circuit:} Wirtz v. McClure, 333 F.2d 45, 16 WH Cases 526 (10th Cir. 1964) (testimony of employee that he worked seven hours and 25 minutes for seven days a week sufficient to make out prima facie case).

\footnote{360} Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687, 6 WH Cases 83 (1946).

\footnote{361} \textit{Id.} at 687-688.
An employer that has violated the recordkeeping provisions of the FLSA cannot complain that the resulting calculation of the number of hours worked or back pay owed is too uncertain or approximate. Such calculations can be made through employee testimony, including representative testimony, establishing by "just and reasonable" inference of the number of hours worked and amount of back pay deserved.

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362 Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 6 WH Cases 83 (1946) (employer that failed to keep records could not complain that employee's evidence of damages was inexact or imprecise).

Fifth Circuit: Marshall v. Partida, 613 F.2d 1360, 24 WH Cases 694 (5th Cir. 1980) (lower court reminded not to penalize laundromat attendants by denying back wages if they were unable to prove precise extent of uncompensated work); Hodgson v. Ricky Fashions, Inc., 434 F.2d 1261, 19 WH Cases 781 (5th Cir. 1970) (employees' testimony as to hours they worked was sufficient to provide basis for reasonable determination of unpaid wages due from employer that deliberately falsified work records); Mitchell v. Mitchell Truck Line, Inc., 286 F.2d 721, 14 WH Cases 900 (5th Cir. 1961) (back wages for truck drivers could be awarded as long as there was certainty of damage even if there was uncertainty as to its extent).

Sixth Circuit: U.S. Department of Labor v. Cole Enterprises, Inc., 62 F.3d 775, 2 WH Cases 2d 1487 (6th Cir. 1995) (employer that failed to keep accurate records properly was required to prove that minimum wage was paid for all hours worked by employees).

Eighth Circuit: Mumbower v. Callicott, 526 F.2d 1183, 22 WH Cases 602 (8th Cir. 1975) (switchboard operator's recollections of number of hours worked was sufficient where employer failed to keep records); Wirtz v. First State Abstract and Ins. Co., 362 F.2d 83, 17 WH Cases 358 (8th Cir. 1966) (employer that has not kept required records may not complain that there is no evidence on precise amount of time worked in interstate commerce).

Ninth Circuit: Brock v. Seto, 790 F.2d 1446, 27 WH Cases 1129 (9th Cir. 1986) (employer that did not keep records could not complain that testimony from four employees and calculations of compliance officer were too speculative or unspecific).

Tenth Circuit: Doty v. Elias, 733 F.2d 720, 26 WH Cases 1216 (10th Cir. 1984) (employees' figures as to hours worked supported award of unpaid wages, despite employer's testimony that at least some of employees' figures were exaggerations).


Ninth Circuit: McLaughlin v. Ho Fat Seto, 850 F.2d 586, 28 WH Cases 1225 (9th Cir. 1988) (five employees’ testimony was adequate to compensate 28 employees where employer records were inadequate), cert. denied, 488 U.S. 1040, 29 WH Cases 160 (1989).

Tenth Circuit: Donovan v. Williams Oil Co., 717 F.2d 503, 26 WH Cases 643 (10th Cir. 1983) (testimony of 19 of 34 employees was sufficient, along with documentary evidence, to establish hours worked by employees who did not testify).

IX. ENFORCEMENT AND REMEDIES

A. Administrative Enforcement

Section 16(e)\(^{364}\) and accompanying regulations\(^{365}\) authorize the Secretary to assess civil money penalties (CMPs) for repeated or willful minimum wage or overtime violations and for violations of the child labor provisions (including a hot goods shipment). Section 11(d)\(^{366}\) and separate homework regulations\(^{367}\) authorize the Secretary to assess CMPs for violations of those regulations. Civil money penalties are not available for any other types of violations, including repeated recordkeeping violations. The statute also addresses\(^{368}\) and the regulations\(^{369}\) describe in detail, the types of violations for which such penalties may be imposed, factors affecting the amount of those penalties, and procedures for challenging those penalties. The contest procedure for child labor violations is the same as for repeated or willful Section 6 or 7 violations. For each of these types of penalties, judicial review is subject to the Administrative Procedure Act.\(^{370}\)

An administrative proceeding concerning alleged minimum wage, overtime, or child labor violations commences upon timely receipt of proper exceptions to the assessment of CMPs and a request for a hearing.\(^{371}\) The chief

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\(^{364}\) 29 U.S.C.A. §216(e).

\(^{365}\) 29 C.F.R. Parts 578 (repeated or willful minimum wage and overtime) and 579 (child labor).

\(^{366}\) 29 U.S.C.A. §211(d).

\(^{367}\) 29 C.F.R. §§530.301-.304.

\(^{368}\) 29 U.S.C.A. §216(e) (repeated or willful minimum wage or overtime, child labor). There are no substantive statutory provisions regarding industrial homework. The Secretary is empowered to adopt such regulations in 29 U.S.C.A. §211(d).

\(^{369}\) The substantive requirements of violations for which the Secretary may assess civil money penalties are set forth in 29 C.F.R. Part 578 (repeated or willful wage or overtime), Part 579 (child labor), and §§530.301-.304 and §516.31 (homework). The procedures for assessing and contesting such penalties are contained in 29 U.S.C.A. §216(e) (child labor and repeated or willful minimum wage or overtime), in 29 C.F.R. Part 580 (repeated or willful minimum wage or overtime, child labor), and in 29 C.F.R. §§530.401-530.414 (homework). Except as otherwise provided in the specific regulations for each of these civil money penalty proceedings, 29 C.F.R. Part 18 (“Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges”) applies to hearings contesting all three types of assessments. See 29 C.F.R. §§530.405, 580.7.


\(^{371}\) 29 C.F.R. §580.9 and other regulations might be read to suggest that a request for hearing alone is sufficient to initiate the hearing procedures, e.g., 29 C.F.R. §580.6 (one desiring to
administrative law judge then appoints an administrative law judge ("ALJ") to hear the case.\textsuperscript{372} The decision of the administrative law judge is the final order of the Secretary unless a timely appeal is taken to the Secretary.\textsuperscript{373}

\section*{B. Actions For Injunctions}

\subsection*{1. Plaintiff in Injunction Actions}

Sections 11(a)\textsuperscript{374} and 12(b)\textsuperscript{375} of the Act vest the Secretary of Labor with exclusive authority to seek injunctive relief under Section 17 for violations of Section 15. With the limited exception of employees' rights to seek reinstatement and similar equitable relief in retaliation actions,\textsuperscript{376} employees may not seek injunctive relief.\textsuperscript{377}

\textsuperscript{372} 29 C.F.R. §580.11.

\textsuperscript{373} 29 C.F.R. §580.12(e).

\textsuperscript{374} 29 U.S.C.A. §211(a) (placing authority to bring suit to seek restraint of all violations except those of §12 [oppressive child labor] in the Administrator). Under Reorganization Plan No. 6 of 1950, 15 Fed. Reg. 3174, 64 Stat. 1263, \textit{reprinted in} 5 U.S.C.A. App. at 234, this authority to sue for injunctive relief was transferred to the Secretary of Labor (with additional power to delegate) from the Wage and Hour Administrator. Virtually all of the authority transferred from the Administrator to the Secretary by the Reorganization Plan has been delegated back to the Administrator (and to other subordinate officials in some cases). \textit{See} Wirtz v. Atlantic States Construction Co., 357 F.2d 442, 17 WH Cases 257 (5th Cir. 1966) (§17 injunctive suit was properly instituted by regional attorney in name of Secretary of Labor, considering both express and implied powers of Secretary to delegate authority and Secretary's explicit ratification of initiation and prosecution of suit).

\textsuperscript{375} 29 U.S.C.A. §212(b) (placing authority to seek restraint of violations of §12 [oppressive child labor] in the Secretary, subject to direction of the Attorney General).


\textsuperscript{377} 29 U.S.C.A. §§ 211(a), 212(b), 217; Lorillard v. Pons, 434 U.S. 575, 581 (1978) ("[I]n construing the enforcement sections of the FLSA, the courts had consistently declared
According to the Act, the Secretary's authority to bring an action and specifically to seek injunctive relief to restrain child labor violations, including hot goods violations involving child labor, is subject to the direction and control of the Attorney General. Pursuant to a Memorandum of Understanding between the Departments of Justice and Labor, however, the Secretary, acting through the Solicitor's Office, handles most civil litigation below the Supreme Court, and criminal matters (including criminal contempts) are referred by the DOL through the Attorney General to the U.S. Attorneys for presentation.

The Secretary of Labor has discretion whether to seek injunctive relief under Section 17. Once the Secretary institutes a suit under Section 17 to enjoin continued withholding of unpaid minimum wages or overtime pay, any private right of action that employees might otherwise have under the FLSA terminates. Because Section 17 suits are equitable in nature, there is no right to a trial by jury.

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378 §§4(b), 11(a), and 12(b), 29 U.S.C.A. §§ 204(b), 211(a) and 212(b).

379 As provided in this understanding, incorporated in a letter agreement, the DOL staff handles all civil litigation with notice to the Attorney General (who may "take such part in the [case's] conduct" as he or she determines to be "in the best interest of the United States") in cases (1) raising constitutional issues, (2) in state courts of last resort, and (3) federal Courts of Appeals. Supreme Court cases are under the control and direction of the Attorney General and the Solicitor General with "such assistance as they may desire" from the DOL Solicitor's Office. Criminal matters are to be certified to the Attorney General by the DOL, and the U.S. Attorneys will present them with such assistance from the staff of either the Department of Justice or DOL as is decided in each case. See Letter of January 18, 1939, Frank Murphy, Attorney General to Elmer F. Andrews, Administrator, Wage and Hour Division, DOL.


2. Defendants in Injunction Actions

If an individual is found to be an “employer” within the meaning of the Act (normally because he or she exercises some supervisory authority over employees and is responsible in part, at least, for the alleged violation)\(^{383}\) that individual may be personally enjoined jointly with the employing entity.\(^{384}\) It is only necessary for a court to find that the individual was within the definition of an employer at the time the violation occurred; even if the individual no longer is within the definition at the time the action is commenced, he or she may be enjoined.\(^{385}\)

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\(^{383}\) See 29 U.S.C.A. §203(d); see Falk v. Brennan, 414 U.S. 190, 195 (1973) (officers of employer may be found to be “employers” within the meaning of the Act).

\(^{384}\) Donovan v. Sabine Irrigation Co., 695 F.2d 190, 196, 25 WH Cases 1142 (5th Cir.), cert. denied, 463 U.S. 1207 (1983) (individual who was president of both defendant and its parent corporation and who actively administered the business affairs of defendant corporation); Donovan v. Hamm’s Drive Inn, 661 F.2d 316, 318, 25 WH Cases 195 (5th Cir. 1981) (two owner-officers active in managing corporation); Chambers Constr. Co. v. Mitchell, 233 F.2d 717, 724, 12 WH Cases 889 (8th Cir. 1956) (president-general manager who actively controlled defendant corporation’s employees)); McLaughlin v. McGee Bros. Co., 681 F. Supp. 1117, 1132, 28 WH Cases 808 (W.D.N.C. 1988), aff’d, 867 F.2d 196 (4th Cir. 1989) (owners and officers who were active in the business are §3(d) employers and may be held liable personally in civil contempt of prior injunctions against corporation); Marshall v. New Floridian Hotel, Inc., 24 WH Cases 530, 538 (S.D. Fla. 1979) (individual who was principal officer, stockholder, and managing officer of corporation and another individual who was his partner in some of the operations); But see Donovan v. Daylight Dairy Products, Inc., 26 WH Cases 1598, 1599, 1601 (D. Mass. 1984), aff’d on other grounds, 779 F.2d 784, 27 WH Cases 766 (1st Cir. 1985) (court found it difficult to accept that Congress intended that every corporate officer with ultimate operational control over payroll matters is to be held personally liable; corporate president's "involvement in matters of employee compensation does not rise to the level necessary to hold him personally liable" where his only involvement was to vote as a director for compensation plan outlined by another officer).

\(^{385}\) Sabine Irrigation, 695 F.2d at 196 (individual defendant properly prospectively enjoined even though company involved is no longer in business in view of past record of poor compliance of several businesses with which defendant was connected; citing Donovan v. American Leader Newspapers, Inc., 524 F. Supp. 1144, 25 WH Cases 212 (M.D. Fla.)
3. Conduct Subject to Injunction Actions

Section 17 of the Act\textsuperscript{386} grants jurisdiction to United States District Courts to restrain violations of Section 15\textsuperscript{387} for cause shown.\textsuperscript{388} Section 15 sets forth the Act's prohibitions on:

- transportation of hot goods;\textsuperscript{389}
- failure to pay minimum wages or overtime;\textsuperscript{390}
- retaliation;\textsuperscript{391}
- child labor violations;\textsuperscript{392}
- recordkeeping violations;\textsuperscript{393} and
- homework violations.\textsuperscript{394}

4. Prospective and Restitutionary Injunctions

Section 17 authorizes a court to issue restitutionary and prospective injunctions.\textsuperscript{395} A restitutionary injunction orders the employer to compensate, or desist from withholding compensation from, employees who have been

\textsuperscript{386} 29 U.S.C.A. §217.
\textsuperscript{387} 29 U.S.C.A. §215.
\textsuperscript{388} 29 U.S.C.A. §217; cf. Mitchell v. DeMario Jewelry, Inc., 361 U.S. 288, 291, 14 WH Cases 416 (1960) (upholding jurisdiction of district court in Secretary’s §17 action to award backpay lost as a result of retaliatory discharge prohibited by §15(a)(3); "...all inherent equitable powers of the District Court are available for the proper and complete exercise of...jurisdiction [to enforce compliance with the Act]"").
\textsuperscript{389} §§15(a)(1)(goods produced in violation of minimum wage, overtime, or employment under special certificate requirements) and 15(a)(4) (goods produced in violation of child labor requirements), 29 U.S.C.A. §§215(a)(1) and (4); and see §12(a)(child labor hot goods prohibition), 29 U.S.C.A. §212(a). Not all substantive prohibitions of the FLSA have parallel provisions making shipment of goods produced in violation of that provision an enjoineable "hot goods" violation.
\textsuperscript{394} Id.
unlawfully deprived of minimum wages or overtime pay.\textsuperscript{396} It may also be used to remedy unlawful retaliation. A prospective injunction is used to correct substandard labor conditions by requiring future compliance with the Act.\textsuperscript{397} A prospective injunction is not punitive; it merely requires an employer to comply with the law.\textsuperscript{398} Because of the prospect of increased adverse consequences, including civil and criminal contempt and the possibility of being compelled to reimburse the DOL for the costs and expenses of its investigation, prospective injunctions reduce the DOL's burden in enforcing compliance by past violators.\textsuperscript{399}

C. Actions For Back Wages

1. Secretary

In addition to the Secretary's right to pursue claims for unpaid minimum wage or overtime wages through seeking a restitutionary injunction, Section 16(c)\textsuperscript{400} permits the Secretary to bring an action for a money judgment on behalf of an employee or group of employees for unpaid minimum wages or overtime pay and for an equal amount as liquidated damages.

The Secretary's Section 16(c) damage action is considered to be brought "on behalf" of the adversely affected employee or group of employees and, if successful, damages will be calculated and paid for each such employee. Although the Act requires that the employee be named as a "party plaintiff,"\textsuperscript{401}...

\textsuperscript{396} Brock v. Casey Truck Sales, Inc., 839 F.2d 872, 879, 28 WH Cases 697 (2d Cir. 1988); Donovan v. Sovereign Sec., Ltd., 726 F.2d 55, 58 (2d Cir. 1984) (restitutionary injunctions make whole employees who have been deprived of wages due to them under the Act); accord, Donovan v. Grantham, 690 F.2d 453, 456-57, 25 WH Cases 1025 (5th Cir. 1982); Brown Equip., 666 F.2d at 156-57.

\textsuperscript{397} Brock v. Big Bear Market No. 3, 825 F.2d 1381, 1383, 28 WH Cases 382 (9th Cir. 1987).

\textsuperscript{398} Dunlop v. Davis, 524 F.2d 1278, 1281, 22 WH Cases 625 (5th Cir. 1975) (reversing district court's failure to grant prospective injunction; a prospective injunction is not punitive and does not impose a hardship on an employer, since it merely requires it to do what the Act requires); Martin v. Funtime, Inc., 963 F.2d 110, 114, 30 WH Cases 1425 (6th Cir. 1992) (same; affirming issuance of prospective injunction following Davis); Marshall v. Lane Processing, Inc., 606 F.2d 518, 520, 24 WH Cases 411 (8th Cir. 1979), cert. denied, 447 U.S. 922 (1980) (same; abuse of discretion not to issue prospective injunction where there were 15 child labor violations following the filing of the complaint and repeated violations and assurances of compliance prior to the filing).

\textsuperscript{399} Davis, 524 F.2d at 1280-81; see also, Funtime, 963 F.2d at 114.

\textsuperscript{400} 29 U.S.C.A. §216(c).

\textsuperscript{401} 29 U.S.C.A. §216(c).
the Secretary does not need the consent of the employees on whose behalf the suit is brought. Rather, an action may be commenced by the Secretary without a request from an employee, or even when the affected employees oppose filing suit.402

There is a right to a jury trial in Section 16(c) actions for back wages and liquidated damages brought by the Secretary.403 Because the Act authorizes each kind of relief in distinct statutory provisions, the Secretary may seek both legal relief under Section 16(c) and equitable relief under Section 17 in a single lawsuit, either jointly or alternatively.404 By seeking liquidated damages in a legal claim under Section 16(c), the Secretary makes all issues common to both the equitable and legal claims triable by jury.405 In injunction actions brought under Section 17, alone, liquidated damages may not be awarded, and there is no right to a jury trial.406


Tenth Circuit: Dept. of Labor v. City of Sapulpa, Okl., 30 F.3d 1285, 1288 n.5, 30 WH Cases 1752 (10th Cir. 1994).

404 Tiller Helicopter Servs., 8 F.3d at 1033 n.11; Owens Plastering Co., 841 F.2d at 300.

405 See Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Owens Plastering Co. 841 F.2d at 300-01.

406 Lorillard v. Pons, 434 U.S. 575, 580-81 & n. 7 (1978); Tiller Helicopter Servs., 8 F.3d at 1031-36; Deiriggi, 985 F.2d 134-35; Superior Care, 840 F.2d at 1062-65.
2. Private Plaintiffs

An employee may bring a private action for back wages, liquidated damages, attorney’s fees and litigation costs under Section 16(b). Employees may bring actions on their own behalf and on behalf of other employees similarly situated who agree to join. There is a right to a jury trial in such Section 16(b) actions.

Once the Secretary files an action for back wages, by seeking either a restitutionary injunction pursuant to Section 17 or back wages and liquidated damages pursuant to Section 16(c), or intervenes in a pending employee’s Section 16(b) action, an employee's right to commence or join a private action is terminated. Employees who have commenced their own private actions before the time the Secretary files may continue to pursue those claims individually. The Secretary's subsequent settlement of all claims asserted in the government's suit does not settle any of the prior pending private claims. Employees who consent to the filing of an action by the Secretary on their behalf waive their private right of action, unless the Secretary's action is dismissed on a motion of the Secretary and without prejudice.

D. Criminal Proceedings

Section 16 (a) provides that a person who willfully violates Section 15 shall upon conviction be subject to fine of not more than $10,000 or to imprisonment for not more than six months, or both, except that no person shall be imprisoned

408 Id.
410 29 U.S.C.A. §§ 216(b), 216(c).
411 See, e.g., University of Tex. at El Paso, 643 F.2d at 1207.
413 29 U.S.C.A. §216(c).
for a first offense. Criminal actions may be prosecuted instead of, or in addition to, civil actions.

It is the prosecution's burden to show, beyond a reasonable doubt, that the course of conduct at issue was covered by the Act during some period covered by the indictment, that such conduct violates the Act, and that the violation was willful.

"Willfulness" is a question of fact to be determined by a jury. Courts have construed the willfulness standard under Section 16(a) to require proof either of a deliberate, voluntary, and intentional violation of the Act or of a violation undertaken with reckless indifference to, or disregard for, the Act's requirements. A willful violation does not require a showing of an evil purpose. Willfulness is not established, however, if a violation of the Act is

414 29 U.S.C.A §216(a).
415 See 29 U.S.C.A. §216(a); Dickenson v. United States, 353 F.2d 389, 392, 17 WH Cases 157 (9th Cir.), cert. denied, 384 U.S. 908 (1966) (prosecution need only prove commerce beyond a reasonable doubt at some time during the period covered by the indictment; defendant who disputes coverage must then prove by preponderance of evidence which employees were not "engaged in commerce" (in a case involving individual coverage) during any particular workweek).
416 Each element of the violation must be proven beyond a reasonable doubt. See United States v. Drago, 18 WH Cases 881, 883 (E.D.N.Y. 1969)(record keeping count dismissed because government failed to prove beyond a reasonable doubt that defendant failed to maintain alternative piece-work record as permitted by regulation or that defendant was aware of the record keeping regulation involved).
418 See Nabob Oil Co. v. United States, 190 2d 478, 480, 10 WH Cases 318 (10th Cir.), cert denied, 342 U.S. 876, 10 WH Cases 465 (1951)("deliberate, voluntary and intentional"); see also United States v. Klinghoffer Bros. Realty Corp., 285 F.2d 487, 492, 14 WH Cases 765 (2d Cir. 1960); Ewald Iron, 67 F.Supp. at 75; Darby, 132 F.2d at 930.
419 Klinghoffer Bros. Realty, 285 F.2d at 492 ("reckless indifference" concerning Act is sufficient to establish willfulness); Nabob Oil, 190 F.2d at 480 (affirming jury instruction that an employer does not violate Act "unless he is either conscious of the fact that what he is doing constitutes a violation of the Act or unless he wholly disregards the law and pursues a course without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law").
420 Nabob Oil, 190 F.2d at 480; Darby, 132 F.2d at 930. See also Trans World Airlines v. Thurston, 469 U.S. 111, 126-27, 36 FEP Cases 977 (1985)(defining "willful" for purposes of ADEA liquidated damages provision and relying on civil and criminal cases interchangeably including United States v. Murdock, 290 U.S. 389 (1933)("marked by careless disregard [for] whether or not one has the right so to act" supports "willful"
merely "... committed through inadvertence, accidentally or by ordinary negligence."421

A defendant can refute a charge of willfulness by showing substantial affirmative steps to comply with the Act which are at least partially successful.422 By contrast, repetition of previous violations,423 falsified records or other evasive actions424 each presents strong evidence of willfulness. A defense of good faith compliance with the Act based on advice of counsel may be difficult to sustain if the cases relied upon were reversed several years before the alleged violation occurs.425 However, an honest mistake about the meaning of the law after diligent inquiry is not willful.426

finding in criminal context) and United States v. Illinois Central R.R., 303 U.S. 239 (1938)(civil case holding that failure to unload cattle car was "willful" because it showed a disregard for the governing statute and an indifference to its requirements)); Wehr v. Burroughs Corp., 619 F.2d 276, 281-82, 22 FEP Cases 994 (3rd Cir. 1980)(pre-Thurston suit deciding what constitutes "willful" violation of ADEA and collecting authorities stressing the importance of a lower standard for "willful" in civil context than in criminal context).421 Nabob Oil, 190 F.2d at 480.

United States v. Ewald Iron Co., 67 F.Supp. 67, 75-76, 6 WH Cases 227 (W.D. Ky. 1946) (no willful violation for paying employees based on work schedule, rather than time cards, where administrator had previously approved this bookkeeping practice, and employer had sent letter to employees stating necessity of compliance with Act); cf., United States v. Little Rock Packing Co., 104 F. Supp. 527, 531-32, 10 WH Cases 691 (E.D. Ark. 1952), aff’d sub. nom., Tobin v. Little Rock Packing Co., 202 F.2d 234, 11 WH Cases 278 (8th Cir.), cert. denied, 346 U.S. 832, 11 WH Cases 632 (1953)(civil and criminal contempt proceeding; no willful violation of injunction seeking compliance with Act where company failed to keep accurate payroll records for only a small number of a large group of employees, resulting in only a small underpayment of wages and the company otherwise complied with Act for more than nine years).

422 See United States v. Heilig, 137 F. Supp. 462, 466, 12 WH Cases 757 (D. Md. 1956) (willfulness where defendant’s payment practices had previously been found to violate Act and defendant ordered bookkeeper to renew illegal practices after brief period of compliance); cf. In re Wheeland, 108 F. Supp. 10, 12, 11 WH Cases 148 (M.D. Pa. 1952) (willful violation of injunction constitutes both civil and criminal contempt where no affirmative measures taken to avoid further violations); Dole v. Elliot Travel & Tours, Inc., 942 F.2d 962, 967, 30 WH Cases 803 (6th Cir. 1991) (in civil case, willfulness as a matter of law where defendant had actual notice of requirements of Act due to earlier violations).

423 Cf., e.g., Hertz Drivuself Stations, Inc. v. United States, 150 F.2d 923, 929, 5 WH Cases 558 (8th Cir. 1945)(criminal contempt proceeding based on act of branch manager who falsified time records).

424 United States v. Lorain Trucking Co., 15 WH Cases 445, 445 (N.D. Ohio 1962) (denying motion to dismiss criminal prosecution because willful violation of Act was matter to be determined upon evidence at trial despite employer’s alleged belief that it was exempt from Act in reliance on advice of counsel which was based on a district court decision
A defendant is criminally liable for each “course of conduct” that violates the Act without regard to the number of employees affected or the number of weeks the conduct continued.427

X. LITIGATION ISSUES IN FLSA CASES

A. Burden Of Proof

Since the Supreme Court's decision in Anderson v. Mt. Clemens Pottery Co.,428 courts have held that the burden of production does not shift to the employer unless the claimant first establishes a prima facie violation.429 Normally, as employee need not testify in order to make out a prima facie case of the number of hours worked as a matter of just and reasonable inference.430 A prima facie wage claim includes proof by the Secretary or individual plaintiff(s) of (1) the existence of an employment relationship with the defendant;431 (2)
engagement by the employee(s) in work with the requisite relationship to interstate commerce to establish coverage;432 (3) the employer's constructive or actual knowledge of overtime worked or wage payments in violation of the Act,433 and (4) the amount of liability by a just and reasonable inference.434 These elements of a *prima facie* wage case may be summarized as employment, coverage, knowledge and amount owed.

**B. Affirmative Defenses**

**1. Exemptions, Deductions and Credits**

Statutory affirmative defenses were added by the 1947 Portal-to-Portal Act.435 They include the statute of limitations;436 good faith reliance upon rulings of the Wage-Hour Administrator;437 good faith conduct with reasonable grounds for the employer believing that it was not in violation of the Act.438 Non-statutory defenses of latches; estoppel; mootness; res judicata and collateral estoppel; exhaustion of remedies and arbitration; and various types of agreements and settlements,439 private, DOL-supervised, and judicially approved are also considered affirmative defenses and must be pled as such.

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432 For individual coverage: See Warren-Bradshaw Drilling Co. v. Hall, 317 U.S. 88, 2 WH Cases 52 (1942); Engler v. S. Birch & Sons Constr. Co., 163 F.2d 34, 7 WH Cases 71 (9th Cir. 1947), *cert. denied*, 332 U.S. 816 (1947) (Act does not apply where employees are not engaged in interstate commerce); Engebretsen v. E.J. Albrecht Co., 150 F.2d 602, 5 WH Cases 455 (7th Cir. 1945) (plaintiff must prove that he is an employee engaged in commerce and that his employer is in interstate commerce). If the plaintiff proves that the employer qualifies for enterprise coverage, proof of individual coverage is not necessary.

433 Davis v. Food Lion, 792 F.2d 1274, 27 WH Cases 1214 (4th Cir. 1986) (employee must prove that his employer had actual or constructive knowledge of alleged overtime violation); Forrester v. Roth's IGA Foodliner, Inc., 646 F.2d 413, 414, 24 WH Cases 1406 (9th Cir. 1981) (Act has been consistently interpreted to require proof of employer knowledge); Prime Communication v. Sylvester, 615 N.E.2d 600, 1 WH Cases2d 895 (Mass. App. 1993) (assistant editor must prove employer had actual or constructive knowledge of unpaid overtime).


439 The effect to be given to settlements under the FLSA is partly governed by explicit statutory provisions and partly by judicial interpretations of the FLSA's general
Exemptions, wage deductions, and credits are also affirmative defenses. For example, the employer bears the burden of proving all of the statutory and regulatory elements of the professional, administrative, and executive exemptions from minimum wage and overtime provided in Section 13(a)(1). Similarly, defendants bear the burden of proof regarding the propriety of payroll deductions for rent, utilities and other facilities and services provided to employees. Once an employee establishes that deductions resulted in net pay falling below the statutory minimum, the employer bears the burden of proving the reasonableness of the deductions.

purposes. See 29 U.S.C.A. §216(c) (DOL-supervised settlement), §253 (compromise of pre-Portal-to-Portal Act claims).


Fourth Circuit: Clark v. J. M. Benson Co., 789 F.2d. 282, 27 WH Cases 1080 (4th Cir. 1986) (employer has burden of persuasion for facts requisite to administrative exemptions); Pugh v. Lindsey, 206 F.2d 43, 11 WH Cases 504 (4th Cir. 1953) (newspaper has burden of proof that superintendent is exempt as executive).

Fifth Circuit: Marshall v. Mamma's Fried Chicken, Inc., 590 F.2d 598, 24 WH Cases 39 (5th Cir. 1979) (restaurant claiming chief as exempt executive has burden of proof).

Eighth Circuit: Murray v. Stuckey's, 50 F.3d 564, 2 WH Cases2d 1057 (8th Cir.) cert. denied, 116 S. Ct. 174 (1995) (reversing district court's denial of §13(a)(1) executive exemption because of failure proof that store managers regularly and customarily supervised two or more employees where employer's payroll study of available records from closed stores representing more than 30 store-years showed such individuals supervised two or more employees who worked at least 80 hours during the week in 98.2 percent of the store weeks, even though complete records were not available).


Caro-Galvin v. Curtis Richardson, Inc., 993 F.2d 1500, 1513-14, 1 WH Cases2d 797 (11th Cir. 1993) (employees who establish they were paid less than statutory minimum shift burden to employer to prove wage deductions are reasonable); Brennan v. Davis, No. 1120, 22 WH Cases 345 (N.D.Ga. Mar. 13, 1975) (employer has burden to prove propriety of deductions for alleged debts and for payments made to third party on plaintiff's behalf).
Each affirmative defense, of course, must be pleaded\textsuperscript{443} by the defendant, or it will be waived.\textsuperscript{444} Each of the elements of the exemption must be proven by the employer by a preponderance of the evidence.\textsuperscript{445} Because of the FLSA's

\textsuperscript{443} Fed. R. Civ. Proc. 8(c); \textit{e.g.} Conklin v. Joseph C. Hofgesang Sand, 565 F.2d 405, 23 WH Cases 575 (6th Cir. 1977) (administrative exemption must be pleaded); Portal-to-Portal Act §10, 29 U.S.C.A. §259 (good faith reliance defense applies if defendant "pleads and proves" the requisite elements).

\textsuperscript{444} Fed. R. Civ. Proc. 12(h).


\textit{Sixth Circuit:} Conklin, 565 F.2d at 406-407 (district court precluded from considering administrative exemption first raised in post-trial brief in §16(b) action); De Waters v. Macklin Co., 167 F.2d. 694, 699-700, WH Cases 6th Cir., \textit{cert. denied}, 335 U.S. 824 (1948) (error to permit exemption to be raised for first time in post-trial proposed findings).

\textit{Ninth Circuit:} Magana v. Northern Mariana Islands, ___ F.3d ___ 3 WH Cases 2d 1413, 1419-20, (9th Cir. 1997) (professional exemption raised in summary judgment motion waived by defendant's failure to plead it for three months after action was commenced); Coast Van Lines, 167 F.2d 705, 707-708, 7 WH Cases 969 (9th Cir. 1948) (good faith defense under §9 of Portal-to-Portal Act, 29 U.S.C.A. §258, waived by failure to plead).

\textit{Tenth Circuit:} Renfro v. City of Emporia, 741 F. Supp. 887, 888, 29 WH Cases 1567, \textit{aff'd}, 948 F.2d 1529, 1534, 30 WH Cases 1017 (10th Cir. 1991) ("City did not affirmatively plead the defense of [§13(a)(1) executive] exemption from the FLSA until it filed a motion to alter or amend. Thus the district court properly found that City's failure to affirmatively plead the defense prior to grant of summary judgment in favor of [plaintiffs] was an effective waiver").

\textsuperscript{445} Wouters v. Martin County, 9 F.3d 924, 929, 1 WH Cases 2d 1335 (11th Cir. 1993); Carlson v. City of Minneapolis, 925 F.2d 264, 266, 30 WH Cases 249 (8th Cir. 1991); Coastal Van Lines v. Armstrong, 167 F.2d 705, 707 (9th Cir. 1948) (employer must prove by a preponderance of the evidence that the employee falls within an exception); \textit{Fight v. Armour}, 533 F. Supp. at 1004; Marshall v. Burger King, 505 F. Supp. 404, 407 (E.D. N.Y. 1980). \textit{See also}, Bence v. Detroit Health Corp., 712 F.2d 1024, 1029, 26 WH Cases 452 (6th Cir. 1983), \textit{cert. denied}, 104 S.Ct. 1282 (once plaintiff establishes prima facie case under the Equal Pay Act of 1963, burden shifts to employer to prove by preponderance of evidence its compensation system is justified by an exception); EEOC v. Aetna Insurance, 616 F.2d 719 (4th Cir. 1980) (in EPA case, the employer has burden by preponderance of evidence to show pay differential was justified by exception). The Fifth Circuit and Eleventh Circuit all refer to a "preponderance of the evidence" burden of proof on defendants who invoke exemption defenses. The substantive elements of each of the exemptions, deductions, and credits developed in the earlier chapters indicated above will not be repeated here.
remedial purpose, its exemptions are narrowly construed, and the employer must demonstrate that an exemption clearly and unmistakably applies.446

2. Statute of Limitations

Any complaint should always be checked for the dates of the violations alleged and whether any periods more than two or three years prior to the commencement of the action have been included.447

- The FLSA provides a period of two years "after the cause of action occurred" during which time an employee can file a complaint in federal or state court.448

- The FLSA limitations period is extended to three years after the cause of action accrued for violations that are willful.449 The plaintiff carries the burden of pleading and proving that a violation is willful.450

3. The Good Faith Defenses

The 1947 Portal to Portal Act amendments to the FLSA created two affirmative defenses which are sometimes inadequately referred to as "good faith" defenses. Because "good faith" is a necessary, but not sufficient, element in each they are frequently confused.


447 For this reason the District Office or Regional Solicitor will often request a written waiver of the statute of limitations in order to continue settlement discussions without filing an enforcement action. Of course, a defendant should not normally execute a waiver for liabilities accruing earlier than the period of the statute of limitations prior to the date of the waiver request. See, FOH §53c16 (11/13/95).


a. **Actions Taken In Good Faith, In Conformity With, and In Reliance On Written Rulings of the Administrator**

Section 10 of the Portal Act states:

> . . . [N]o employer shall be subject to any liability or punishment for . . . failure of the employer to pay minimum wages or overtime compensation under the . . . [Act] . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the . . . [Administrator of the Wage and Hour Division of the Department of Labor], or any administrative practice or enforcement policy . . . with respect to the class of employees to which he belonged. Such . . . defense . . . shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined . . . to be invalid or of no legal effect.\(^{451}\)

Under the provisions of Section 10, an employer has a complete and absolute defense against liability or punishment in any action or proceeding brought against the employer for its failure to comply with the minimum wage and overtime provisions of the FLSA.\(^{452}\) By statute, the defense is limited to suits alleging minimum wage and overtime violations and does not apply to suits alleging claims of retaliatory discharge, child labor, or recordkeeping violations.

An employer's failure to plead a Section 10 defense in its answer bars the employer from raising the affirmative defense during trial or on appeal.\(^{453}\)

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\(^{451}\) 29 U.S.C.A. § 259(a),(b)(1).
\(^{452}\) 29 C.F.R. § 790.13(a).
\(^{453}\) Conklin v. Joseph C. Hofgesang Sand Co., Inc., 565 F.2d 405, 406-07 (6th Cir. 1977) (district court was precluded from deciding question of administrative employee exemption under 29 U.S.C. § 213(a)(1) where employer failed to plead such exemption as a defense in an action for back wages, liquidated damages and attorney's fees pursuant
to the FLSA and, instead, raised defense for the first time in its post-trial brief); Coast Van Lines, Inc. v. Armstrong, 167 F.2d 705, 707-08 (9th Cir. 1948).
b. Actions Taken In Good Faith and With Reasonable Grounds For Believing They Were Not In Violation of the Act

While an employer may not have a complete defense under Section 10 of the Portal to Portal Act to liability under the FLSA, it may, nevertheless, have a limited "good faith" affirmative defense under Section 11 of the Portal to Portal Act, which, upon proper pleading and proof, empowers a judge to exercise discretion to eliminate or reduce its liability for liquidated damages only. Under Section 16 of the FLSA an employer is routinely liable for liquidated damages in an amount equal to the amount of unpaid minimum wages or overtime awarded to either private plaintiffs or the Secretary.

Section 11 of the Portal to Portal Act provides, however, that in such an action for unpaid wages and liquidated damages,

\[
\ldots \text{if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he [sic] had reasonable grounds for believing that his [sic] act or omission was not a violation of the [Act], the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in Section 16 of such Act.}
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C. Settlements

The Supreme Court held that the private rights guaranteed by the FLSA could not be waived and that any private agreement to waive these rights was

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void as against public policy.459 The Court explained that "where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate."460

1. DOL Supervised Settlements

While an employee cannot validly waive FLSA rights for minimum wages, overtime or liquidated damages in a private agreement, a valid FLSA waiver can be obtained during a settlement which is administratively supervised as provided in Section 16(c).461 Under Section 16(c), the Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation arising to any . . . employee . . . and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under [Section 16(b)] . . . to such unpaid minimum wages or unpaid overtime and an unpaid amount as liquidated damages.462

This waiver provision was added to the FLSA in 1949 as an incentive for employers to accept settlements supervised by the DOL, and as a means of providing employers with certainty as to what constitutes a valid and final waiver of FLSA claims.463 Section 16(c) requires: (1) the employee to agree to accept the payment which the Secretary determines to be due; and (2) that the payment is "in full."464 In the context of Section 16(c), "payment in full" means the payment of an administratively determined amount of back wages as a settlement amount, not full payment of the underlying claim.465

The Secretary's supervised settlement is a bar to subsequent suits by that employee for unpaid minimum wages and overtime and claims for liquidated damages for the time period covered by the settlement.

460 Id.
462 Id. (emphasis added).
463 Sneed v. Sneed's Shipbuilding Inc., 545 F.2d 537, 539, 22 WH Cases 1504 (5th Cir. 1977).
464 Id.
465 Walton v. United Consumers Club, Inc. 786 F.2d 303, 305, 27 WH Cases 962 (7th Cir. 1986).
2. Judicially Approved Consent Decrees

A court may enter a stipulated judgment with the consent of the parties, after it has scrutinized the settlement for its fairness to the employee.466

If agreements are not entered as stipulated judgments in an action brought against the employer by its employees, under existing case law, the agreement will not be enforced.467

Thus, the judicially approved consent judgment is the only effective means of settlement of claims under the Act without DOL supervision.468

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467 Lynn’s Food Stores, Inc., 679 F.2d at 1350.
468 While this section deals with private settlement, the DOL has also sometimes settled cases with employers by stipulated decisions. These are almost indistinguishable from litigated precedents and have been mistakenly cited as such. E.g., Hodgson v. Pipeline Oil Co., 20 WH Cases 1225, 1972 WL 740 (W.D. Ky. 1972).