



How to Comply with Federal Wage and Hour Regulations

An Administrative Manual





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How to Comply with Federal Wage and Hour Regulations

An Administrative Guide

Cost: \$55.00

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Fair Labor Standards Act

PURPOSE

The Fair Labor Standards Act (FLSA) was enacted to permit Congress to regulate the minimum standards for hours and wages of covered employees. The legislative history of the FLSA reveals a congressional intent to a) aid unorganized and low-paid workers, b) reinforce employee bargaining power in regards to minimum wages and maximum hours, c) spread available work by placing financial pressure on employers through the overtime requirement, d) maintain the nation's working population's health and well-being, e) place a ceiling of hours on employment and a floor under wages.

Organizations should also be aware that each state has its own state-regulated and state-supported Department of Labor, each of which have requirements which may provide additional benefits for employees over and above those available under the federal Fair Labor Standards Act (FLSA). The more generous provisions could include meal and break periods, and additional requirements to comply with child labor laws. The stricter standards should apply where states provide additional or more stringent requirements for employees than are provided within the federal law. You should consult your individual state Department of Labor to determine whether the policy you are considering is compliant with that individual state's requirements before implementing any policy based upon information provided about the federal Fair Labor Standards Act.

COVERAGE

The FLSA of 1938 is the basis for coverage and compliance standards of the Federal Wage-Hour Division. The Act has been amended many times to increase the minimum wage level and include more and more workers under the definition of "coverage." Simply stated, coverage will extend to your organization in the following ways:

- **Enterprise Coverage** – If an organization has two or more employees engaged in commerce, in the production of goods for commerce, or in handling, selling, or otherwise working on goods that have been moved and/or produced for commerce by anyone and has gross annual sales volume of \$500,000 or more, then all employees of the enterprise are covered under the FLSA. Once an enterprise is covered, all employees, regardless of position, are subject to the FLSA.

This coverage is on an enterprise basis, meaning if an organization had two establishments, each doing \$300,000 per year in sales, they would be covered since their combined volume exceeded \$500,000. If an organization does less than \$500,000, the individual coverage would apply.

- **Individual Coverage** – An employee is individually covered by the FLSA if he/she is engaged in either of the following: *"1) Interstate or foreign commerce, 2) producing goods for transportation in interstate or foreign commerce, including fringe production activities."*

The term "engaged in commerce" means that the individual employee's work involves the movement of persons, goods, or information across state lines. This includes workers who purchase or order goods from business in other states, those who unload, unpack, and check goods on receipt directly from outside the state, those who maintain records on such interstate activity,

and those who regularly use channels of commerce such as the telephone or mails for interstate communication.

IMPACT OF COVERAGE

From these definitions, we can see that virtually every employee of an organization is covered under the Fair Labor Standards Act. This will mean that all employees must:

1. Record their true and accurate hours of work on a daily basis.
2. Receive minimum wage for all hours worked.
3. Receive time and one-half for all hours worked over 40 in a workweek.

...unless otherwise exempt.

WHITE-COLLAR EXEMPTION CLASSIFICATIONS

Exemption Opportunities for Your Organization

We will now look at the application of exemption opportunities available for your organization. There are essentially two classes of exemptions – "Complete Exemptions" and "Partial Exemptions." In the application of a Complete Exemption, the individual would be exempt from the recording of hours, minimum wage, and overtime pay requirements of the FLSA. A Partial Exemption means the individual is exempt only from overtime, but still must record hours and receive minimum wage for all hours worked.

Expanded Explanation of Complete Exemptions

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

Primary Duty

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

Management

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

Department or Subdivision

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

Customarily and Regularly

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

Two or More

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

Particular Weight

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

level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

Exemption of Business Owners

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

Highly Compensated Employees

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

- **The "Administrative" Salary Exemption Tests** – To qualify for the “Administrative” employee exemption, all of the following tests must be met:
 - The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
 - The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
 - The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Primary Duty

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

Directly Related to Management or General Business Operations

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

Employer’s Customers

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

Discretion and Independent Judgment

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

Matters of Significance

The term “matters of significance” refers to the level of importance or consequence of the work performed. An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly.

Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee’s duties may cause serious financial loss to the employer.

Educational Establishments and Administrative Functions

The administrative exemption is also available to employees compensated on a salary or fee basis at a rate not less than \$455 a week, or on a salary basis which is at least equal to the entrance salary for teachers in the same educational establishment, and whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment. Academic administrative functions include operations directly in the field of education, and do not include jobs relating to areas outside the educational field. Employees engaged in academic administrative functions include: the superintendent or other head of an elementary or secondary school system, and any assistants responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading

standards, and other aspects of the teaching program; the principal and any vice-principals responsible for the operation of an elementary or secondary school; department heads in institutions of higher education responsible for the various subject matter departments; academic counselors and other employees with similar responsibilities. Having a primary duty of performing administrative functions directly related to academic instruction or training in an educational establishment includes, by its very nature, exercising discretion and independent judgment with respect to matters of significance.

Highly Compensated Employees

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

- **The “Computer Employee” Salary Exemption Tests** – 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;
 - The employee’s primary duty must consist of:
 1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
 2. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
 3. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
 4. A combination of the aforementioned duties, the performance of which requires the same level of skills.

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.

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.

- **The "Learned Professional" Salary Exemption Tests** – To qualify for the “Learned Professional” employee exemption, all of the following tests must be met:
 - The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
 - The employee’s primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
 - The advanced knowledge must be in a field of science or learning; and
 - The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Primary Duty

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

Work Requiring Advanced Knowledge

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

Field of Science or Learning

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

Customarily Acquired by a Prolonged Course of Specialized Intellectual Instruction

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

- **The “Creative Professional” Salary Exemption Tests** – To qualify for the “Creative Professional” employee exemption, the following tests must be met:
 - The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
 - The employee’s primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Invention, Imagination, Originality or Talent

This requirement distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. Exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Whether the exemption applies, therefore, must be determined on a case-by-case basis. The requirements are generally met by actors, musicians, composers, soloists, certain painters, writers, cartoonists, essayists, novelists, and others as set forth in the regulations.

Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent. Journalists are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product.

Recognized Field of Artistic or Creative Endeavor

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

Teachers

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

primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge includes, by its very nature, exercising discretion and judgment.

Practice of Law or Medicine

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

Highly Compensated Employees

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

- **The "Outside Salesman" Salary Exemption Tests** – To qualify for the “Outside Sales” employee exemption, 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 is met.

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.

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.

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 take orders for a service, which may be performed for the customer by someone other than the person taking the order.

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.

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.

Promotion Work

Promotion 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, promotion work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work.

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.

- **Highly-Compensated Employees** – The 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)(17) 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.

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.

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.

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.

**TECHNICAL REQUIREMENTS OF THE “GUARANTEED SALARY”
FOR WHITE-COLLAR EXEMPT CLASSIFICATIONS**

A week is the shortest period over which the minimum guaranteed salary payments can be made in deciding whether or not the minimum salary test has been met. However, the salary requirements for "Executive," "Administrative," and "Professional" salaried employees can be paid in equivalent amounts for periods longer than a week as outlined in the following table:

	Weekly Guarantee	Bi-Weekly Guarantee	Semi-Monthly Guarantee	Monthly Guarantee
Executive	\$455	\$910	\$985.83	\$1,971.66
Administrative	\$455	\$910	\$985.83	\$1,971.66
Professional- Learned/Creative	\$455	\$910	\$985.83	\$1,971.66
Computer	\$455	\$910	\$985.83	\$1,971.66
*If paid on hourly basis – not less the \$27.63 an hour				
Outside Sales	There is no minimum salary requirement			

FLUCTUATING WORKWEEK METHOD OF PAYMENT

You may be faced with the problem of wanting to put someone on a guaranteed straight salary without overtime. However, meeting the salary exemption tests is a problem. An alternative possibility is to place this individual on a fluctuating workweek method of payment. This person must record their true and accurate hours of work on a daily basis, but could be placed on a guaranteed salary. The salary would cover any and all hours worked in a workweek, but when divided by the number of hours worked, the salary must not go below \$7.25 (effective July 24, 2009).

Using the Overtime Factor Chart (page 27), you would compute additional half-time compensation for all hours work in excess of 40. An example of the calculation of weekly earnings under the Fluctuating Workweek Method of Payment would be:

Assume the employee's guaranteed base salary is \$300, and he works the schedule shown below for a four (4)-week period. Using the Overtime Factor Chart on page 27, refer to the decimal factor for the hours worked each week, and multiply by the weekly guaranteed salary to determine the overtime pay due for that week.

Workweek	Hours Worked	Guaranteed Base Salary	Factor Based on Hours Worked	Overtime Due for Week	Total Weekly Pay
1	50	\$300	.10000	\$30.00	\$330.00
2	47	\$300	.07447	\$22.34	\$322.34
3	43	\$300	.03488	\$10.46	\$310.46
4	40	\$300	--	--	\$300.00

Alternative Method

To calculate overtime due on the fluctuating workweek method of payment without utilizing the Overtime Factor Chart, you would divide the guaranteed base salary by the total number of hours worked in the week to obtain the straight-time rate. You would then take half of this rate and multiply by the actual number of overtime hours worked to obtain the overtime pay due.

Work-week	Hours Base Salary	Guaranteed – (Total Hours)	Straight-Time Rate (Salary Rate)	Half Time (Overtime Hours)	Overtime Hours Worked	Overtime Due (Half Time x Weekly Pay)	Total Week
1	50	\$300	\$6.000	\$3.000	10	\$30.00	\$330.00
2	47	\$300	\$6.383	\$3.192	7	\$22.34	\$322.34
3	43	\$300	\$6.977	\$3.488	3	\$10.46	\$310.46
4	40	\$300	\$7.500	\$3.750	--	--	\$300.00

You will note from the above that the hourly rate decreases as the total number of hours worked increases.

The fluctuating workweek pay plan provides the opportunity to pay a salary without the penalty of **high** overtime cost. However, since the average hourly rate decreases as the hours increase, as well as the overtime being computed on "half time," this plan does not endear itself to employees. Accordingly, it is a deterrent to excessive hours being worked.

In addition, the employees must be paid their base salary in any week they perform any number of hours of work. For example, if the employee works 10, 20, 30, or 40 hours, the employee must still receive the guaranteed base salary. This could be a concern if the employee tends to have an absenteeism problem. The Wage-Hour Division has ruled that employees paid by the Fluctuating Workweek Method cannot be paid additional premium amounts such as incentive bonuses and other non-overtime premiums.

It should be noted that the Federal Wage-Hour Division requires that an employee must understand and accept the fluctuating workweek method of payment. Please see below for a sample Fluctuating Workweek Letter of Agreement.

FLUCTUATING WORKWEEK LETTER OF AGREEMENT

The purpose of this letter is to explain your present salary method of payment. You are being paid a base guaranteed salary of \$_____ per week, and you will also receive overtime premium pay by a method known as the Fluctuating Workweek Salary Plan.

Your guaranteed base salary covers straight-time pay for all hours you work in the week and will remain the same week after week. However, your overtime pay will vary according to the hours you work, but not as much as it would if you were on an hourly rate basis.

To figure your overtime pay under this method, we simply divide your total base weekly salary by the total hours you work in a workweek. Then, we multiply one-half of this average hourly rate by the hours you worked over 40 that week.

Please acknowledge that you understand this method of payment by signing this letter on the line below marked “**ACKNOWLEDGED**” and returning one copy to the writer. Thank you.

Very truly yours,

ACKNOWLEDGED: _____ DATE: _____

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APPLYING WAGE-HOUR ACCOUNTING GUIDELINES TO YOUR ORGANIZATION

To conform to the latest enforcement policies of the Federal Wage-Hour Division, the following is a brief synopsis of procedures and policies that should be adapted for full compliance:

What is a Workweek?

A workweek for Wage-Hour purposes consists of seven consecutive days or seven consecutive 24 hour periods. It need not coincide with the calendar week – it may begin on any day and at any time of any day. A workweek may be set for the organization as a whole, or different workweeks may be set for separate groups of employees. The beginning of the workweek may be changed if the change is intended to be permanent and not to avoid the overtime requirements.

One of the 13 recordkeeping requirements under the FLSA is that there be an official statement of the workweek represented with the permanent earnings record. Consequently, we recommend you

complete the following statement on a 3 x 5 card and have it taped to the inside of your earnings record binder and/or have it contained in your employee handbook. The statement is:

The official workweek for all employees of (organization) begins at 12:01 a.m., (day) and ends at 12:00 p.m. the following (day). All employees are paid on (day) for work performed during the previous workweek.

What is a Workday?

The “day” for Wage-Hour, and more specifically for overtime pay purposes, is a period of 24 consecutive hours. The first day of the workweek starts at the time the workweek begins and ends 24 hours later. Each succeeding day starts at the same hour. Under this definition, the beginning of the “day” does not necessarily coincide with the time the employee starts work. Thus, you will incur no overtime liability because of a change in the time an employee’s work begins and ends, so long as no part of the period falls within a different 24-hour “day” and hours of work are not increased.

Determining and Paying for Hours Worked

The Federal Wage-Hour Division requires that each employee, not specifically exempt, who is engaged in interstate commerce or in the production of goods for commerce, receives a minimum hourly wage of at least \$7.25 per hour, effective July 24, 2009. The Wage-Hour Division also requires that no employee can be employed for more than 40 hours per week without receiving at least time and one-half his/her regular rate of pay for the overtime hours (unless specifically exempt). The amount of money an employee should receive cannot be determined without knowing the number of hours worked.

General Meaning of Hours Worked

As a general rule, hours worked include 1) all time during which an employee is required to be on your premises, on duty or at a prescribed workplace, and 2) all time during which an employee is suffered or permitted to work, whether or not he/she is required to do so. Thus, working time which is to be paid for includes all time spent during the workweek in physical or mental exertion, whether burdensome or not and whether controlled or required by you. Working time will include time spent by the employee on a voluntary basis even if you are not aware of it.

Time Clocks Not Required

In accordance with Federal Wage-Hour guidelines, employers are required to keep accurate records of hours worked by employees (not specifically exempt from record-keeping requirements), but there is no requirement to use time clocks or timecards as a means for doing so. However, if an employer does use a time clock, early or late punching by employees who voluntarily come in early or remain late may be ignored if the employees do not work before or after their regular hours.

No Averaging of Weeks

In accordance with Federal Wage-Hour requirements, an employee may not average hours worked in more than one workweek. Each workweek must be treated as a separate unit in computing pay.

Voluntary Overtime

It should be remembered that overtime performed voluntarily by an employee must be included in computing total hours worked. For example, an employee may voluntarily continue to work at the end of his scheduled workday. The reason for working additional overtime is immaterial. If it is known or the supervisor has reason to believe the employee is continuing to work, the time is working time. This rule also applies to work performed away from the premises or the job site or even at home. If you know or have reason to believe that work is being performed, you must count such time as hours worked for the employee.

Homework

Any work performed at home by any employee should be counted as time worked. This is true whether or not you require the work to be done at the employee's home. Such homework should be paid at the employee's regular rate and the hours should be added to the timecard the following day. Here we recommend the employee place the total number of hours on the timecard for the homework. Then, both the employee and the supervisor should place their initials by this written-in entry or hours worked. This will normally apply to office clerical employees who are accustomed to taking work home.

Waiting Time

Some employees may spend time waiting for work, waiting to record their time on timesheets, waiting to get paychecks. Whether such waiting time is to be counted as hours worked depends on the facts in such case. If the waiting time takes place during the regular workday, this waiting time may be hours worked. If the waiting time takes place outside the regular workday, that is preliminary or postliminary to the employee's principal activities, it is not hours worked unless specifically made so by a contract custom, or practice.

If an employee is required to report to work at a certain time and then told to wait until you actually put the employee to work, you should start paying the employee for the time he/she actually reports to work. The reason for this is that you have engaged him/her to wait and the employee cannot use any of that time for their use.

Waiting While on Duty

A secretary who reads a novel while waiting for dictation, or a stock clerk who plays checkers while waiting on delivery men, is still working during their period of inactivity. The rule also applies to employees who work away from your premises. For example, a transport driver is working while waiting for your vehicle to be loaded. The periods during which such waiting time occurs are unpredictable. They are usually of short duration. In either event, the employee is unable to use the time effectively for their own purposes. It belongs to and is controlled normally by the organization. In all such cases, waiting time is an integral part of the job.

Standby Time

Employees who are required to stand by their posts, ready for duty (*whether during lunch periods, during equipment breakdowns, or during temporary facility shutdowns*) must be paid for the time.

Meal Periods

Bona fide meal periods are not work time. (*Bona fide meal periods do not include coffee breaks or time for snacks; these are rest periods of short duration and must be counted as "hours worked."*)

The employee must completely be relieved from duty for the purposes of eating regular meals. Ordinarily, 30 minutes or more is long enough for a bona fide meal period. An employee is not relieved if he/she is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his/her desk, or a truck driver who is required to drive a vehicle while eating, is working while eating. Under such circumstances, it is recommended that there be no deduction made for the meal period because such time would have to be paid for as hours worked.

It is not necessary that an employee be permitted to leave the premises if he/she is otherwise completely freed from duty during the meal period for at least 30 full minutes.

Permitting employees to forego punching time clocks during lunch periods does not require the lunch periods be counted as hours worked -- if the employees are relieved of all duties and if the lunch period occurs at a regularly-appointed time.

Fractional Hours Worked

Employees must be paid for all time worked including fractional parts of an hour. Federal Wage-Hour guidelines require that all time actually worked by employees must be counted as time worked; arbitrary formulas or estimates are not permissible in determining compensable working time. There is one exception to the rule -- a practice of recording the employee's starting and stopping time to the nearest five (5) minutes, the nearest tenth of an hour or the nearest quarter of an hour will be accepted if it is shown that, over a period of time, the averages result in the employees getting paid for all the time they actually work.

The most common practice and one that is readily accepted by the Federal Wage-Hour Division is the use of the 7/8 minute rule. Under this procedure, the employee's time record is rounded off to the nearest quarter of an hour -- determined by whether he/she works the major portion of that quarter hour.

Accordingly, if an employee records an arrival time at 8:07 a.m., this would be considered 8:00 a.m. If the person arrived at 8:08 a.m., the adjusted starting time for compensation purposes would be 8:15 a.m.

This practice, likewise, would apply to department times. However, normally-deducted lunch breaks of thirty (30) minutes or longer would be computed right to the minute.

General Guides on Pay Requirements for Incidental Activities

The following outline is a general guide on whether or not employees are to be paid for time spent on activities incidental to their principal duties -- generally, time spent by employees on incidental activities which are part of their principal duties is compensable, regardless of when the activities are performed (whether during the workday, before the workday begins, or after the workday ends), and regardless of any contrary contract, custom, or practice.

- **Show-up, Call-in, or Reporting Time**

Under contracts guaranteeing employees' pay for minimum number of hours when they report to work, only the time actually worked generally needs to be counted as hours worked under Federal Wage-Hour guidelines. However, if the employee is required to wait 10 or 15 minutes before being advised that no work is available, the 10 or 15 minutes are compensable working time.

- **Call-back or Call-out Time**

Time not worked by an employee under guaranteed pay for a minimum number of hours, when he/she is called back to work after his/her regular workday, can be excluded from hours worked. However, time spent in traveling to a customer's premises, as well as time devoted to regular work while there, is compensable working time.

- **On-call Time**

Whether or not the time an employee is on call need be counted as part of his/her compensable working time depends on his/her freedom while on call. If he/she must remain on the employer's premises or so near thereto that he/she cannot use the time as he/she pleases, this would be compensable time. If on the other hand the employee is free to come and go, even though he/she must leave a telephone number where they may be reached, the time can be excluded from hours worked.

- **Travel from Home to Work**

An employee who travels from home before his/her regular workday, and returns to his/her home at the end of the workday, is engaged in ordinary home-to-work travel which is a normal incident of employment. This is true whether he/she works at a fixed location or at different job sites. **Normal time from home to work is not work time.**

- **Home-to-Work in Emergency Situations**

There may be instances when travel from home to work is work time. For example, if an employee who has gone home after completing his/her day's work is subsequently called out at night to perform a service or emergency work, all time spent on such travel is working time. Under such circumstances, the employee should record his/her total time spent from the time he/she receives the telephone call at home until the time he/she returns home after performing the emergency or service work.

- **Travel Time**

The guidelines which apply in determining whether or not time spent in travel is working time depends upon the kind of travel involved.

It is the position of the Wage-Hour Division that an employee who is required by their employer to drive an automobile or a truck for the transportation of other employees to or from work at any time is working while traveling. It makes no difference whether the vehicle is the employee's own car, the employer's car, a rented car, or a truck.

- **Travel During Workday**

Traveling by an employee from job site to job site during a workday is compensable work -- so is traveling to an outlying job at the end of the scheduled workday. However, if the employee goes directly home from the job instead of returning to the employer's premises, the trip home is not compensable home-to-work travel.

- **Portal-to-Portal Act**

- **Travel that is All in the Day's Work** – The walking, riding, or time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, the travel from the designated place to the workplace is part of the day's work and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked.
- **Travel Away from Home Community** – Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly work time when it cuts across the employee's workday. The employee is simply substituting travel for other duties. The time is not only hours worked on regular working days during normal working hours, but also during the corresponding hours on non-working days. Thus, if an employee regularly works from 9 a.m. to 5 p.m. from Monday through Friday, the travel time during these hours is work time on Saturday and Sunday, as well as on the other days. Regular meal period time is not counted. As an enforcement policy, the Division will not consider as work time that time spent in travel away from home outside of regular working hours as passenger on an airplane, train, boat, bus, or automobile.
- **Home to Work on Special One-Day Assignment in Another City** – A problem arises when an employee who regularly works at a fixed location in one city is given a special one-day work assignment in another city. For example, an employee who works in Washington, DC, with regular working hours from 9 a.m. to 5 p.m. may be given a special assignment in New York City, with instructions to leave Washington at 8 a.m. He arrives in New York at 12 noon, ready for work. The special assignment is completed at 3 p.m., and the employee arrives back in Washington at 7 p.m.

Such travel cannot be regarded as ordinary home-to-work travel occasioned merely by the fact of employment. It was performed for the employer's benefit and at his special request to meet the needs of the particular and unusual assignment. It would thus qualify as an integral part of the "principal" activity which the employee was hired to perform on the workday in question; it is like travel involved in an emergency call or like travel that is all in the day's work. All the time involved, however, need not be counted. Since, except for the special assignment, the employee would have had to report to his regular work site, the travel between his home and the transportation source may be deducted, it being in the "home-to-work" category. Also, of course, the usual mealtime would be deductible.

- **Lectures, Meetings, and Training Programs**

Attendance at lectures, meetings, training programs, and similar activities need not be counted as working time if all of the following four (4) criteria are met:

1. Attendance is outside employee's regular working hours.
2. Attendance is voluntary (*it is not voluntary if required by the employer or if the employee is led to believe that non-attendance will prejudice working conditions or employment standing.*)
3. Employee does no productive work while attending.
4. Program, lecture, or meeting is not directly related to the employee's job (*it is directly related to the job if it aids in handling the present job better as distinguished from teaching another job or a new or additional skill*).

Holidays and Vacations

Employers are **not required** by the Federal Wage-Hour Division to pay for unworked holidays, but union or employment agreements may provide otherwise. If an employee does not work on a holiday, the day is not counted as time worked in figuring whether the employee has worked over forty (40) hours for overtime pay purposes. Only the hours **actually worked** have to be counted even if the employee is paid for the unworked holiday.

Some employers not only give employees a day's pay for an unworked holiday, but also credit the employees with hours of work just as if they had worked the holiday, so that their employees will not lose overtime pay during weeks in which a holiday occurs. This means that the employee will be paid overtime during such a week even though he actually worked less than forty (40) hours.

Uniforms

It is the position of the Wage-Hour Division that if uniforms are required by a organization or if a majority of the employees in a particular department do wear uniforms, it is then considered to be of benefit to the employer. Accordingly, any deductions for these uniforms which bring the employee's regular hourly rate below the current minimum wage will be considered a violation.

Increases in an employee's wages to offset the cost of uniforms should equal one (1) hour at the current minimum wage for furnishing and a like amount for maintenance of uniforms. In other words, an allowance of 18¢ per hour ($\$7.25 \div 40$ hours) must be made should an employee furnish a uniform and a like amount of 18¢ if the employee is expected to launder the uniform. The adjusted minimum wage for these examples would be \$7.43 or \$7.61 per hour.

Caution: If you furnish an employee a uniform at no cost to the employee but the employee is required to launder non-wash and wear clothing, even if it is a shirt or a smock, the 18¢-per-hour increase must be added for maintenance. Also if the employee is a part-time person, he/she must receive no less than 1/5 of the minimum wage for each day worked to cover maintenance and a like amount if furnishing is required.

A modification of the previous position has been taken by the Wage-Hour Division concerning reimbursement for uniform maintenance. The Division is now holding that no measurable costs are incurred in the maintenance of "wash-and-wear" uniforms which could be laundered with other personal garments.

Consequently, you would not be required to pay a uniform maintenance reimbursement for such wash-and-wear garments, providing that there are no unnecessary requirements for daily cleaning.

CHILD LABOR

The Fair Labor Standards Act also contains provisions which restrict the employment of children. These provisions protect children under 18 years of age from oppressive conditions of employment. All employers covered under the FLSA are also covered by the Child Labor provisions. A general rule of thumb to follow when employing minors is that they are not allowed to perform tasks that may be detrimental to their health or physical and mental safety.

Legal Minimum Ages

Fourteen years is the minimum age for employment in specified occupations outside school hours for limited periods of time each day and each week.

Fifteen years is the basic minimum age for employment. At 16 years of age, youths may be employed in any occupation, other than a non-agricultural occupation declared hazardous by the Secretary of Labor.

Eighteen years is the minimum age for employment in non-agricultural occupations declared hazardous by the Secretary of Labor.

Exemptions from the Child Labor Provisions of the Act

In most cases, the Child Labor provisions do not apply to:

- Children under 16 years of age employed by their parents in occupations other than manufacturing or mining, or occupations declared hazardous by the Secretary of Labor.
- Children employed as actors or performers; engaged in the delivery of newspapers to the consumer; or homeworkers engaged in the making of wreaths.

Employment Standards for 14- and 15-Year Old's

Employment of 14- and 15-year-old minors is limited to certain occupations under conditions which do not interfere with their schooling, health, or well-being.

Hours/Time Standards

Fourteen and fifteen-year-old minors may not be employed:

1. During school hours, except as provided for in Work Experience and Career Exploration Programs.

2. Before 7:00 a.m. or after 7:00 p.m., except 9:00 p.m. from June 1 through Labor Day (time depends on local standards).
3. More than three hours a day – on school days.
4. More than 18 hours a week – in school weeks.
5. More than 8 hours a day – on non-school days.
6. More than 40 hours a week – in non-school weeks.

There are a multitude of rules, regulations, and restrictions governing employment of individuals under the age of 18, and even more restrictions governing those under age 16. Even a cursory recital of these restrictions is beyond the scope of this manual. Consultation with a Wage-Hour consultant is recommended for those employing minors in any capacity. Employers should also be aware that the individual states may have additional restrictions upon work hours of minors and may also further restrict their employability by means of declaring additional occupational hazards, which is within the state's discretion. Employers should also obtain an age certificate approved by the Wage-Hour Division for all minors.

RECORDKEEPING INFORMATION REQUIRED BY THE FEDERAL WAGE-HOUR DIVISION

Below are the recordkeeping requirements currently enforced by the Wage-Hour Division. This information should be maintained in as concise a manner as possible and easily accessible. Usually, all of this data may be kept in the payroll journal on a 3 x 5 card:

1. Name in full
2. Home address
3. Sex
4. Date of birth -- if under 19 years of age
5. Job title or primary occupation with the organization
6. Time of day and day of week the employee's workweek begins
7. Regular hourly rate of pay or amount of base salary per week
8. Hours worked each day and total hours worked each week
9. Total weekly straight-time earnings
10. Total weekly overtime earnings for hours worked over 40
11. Total additions to or deductions from earnings each pay period
12. Total wages paid each pay period
13. Date of payment and period covered by the payment

How Long To Retain the Recordkeeping Information

The following records are to be safely preserved for a period of at least *three (3) years*:

1. **All payroll records.** From the date of last entry all those payroll or other records containing the employees' compensation.
2. **Age certificates, salary plans, and employee contracts.**
3. **All employment, timesheets, and earnings records.** From the date of the last entry, all time and earnings cards or timesheets of the organization on which are entered the daily starting and stopping times of the individual employee, or separate workforces, or the employees' daily, weekly, or pay period amounts of work accomplished when these amounts determine in whole or in part the pay period earnings.
4. **All wage rate tables.** From their last effective date, all tables or schedules of the employer which provide the piece rates or other rates used in computing straight-time earnings, wages, salary, or overtime excess compensation.
5. **All records of additions to or deductions from wages of employees.** (Example, authorizations for payroll deductions.)

The following records are to be preserved for at least *two (2) years*:

1. **Work time schedules.** From the last effective date all schedules or tables used by the organization which established the hours and days of employment of individual employees.
2. **All orders, shipping and billing records,** including bills of lading to customers, invoices received, incoming and outgoing shipping records.

Recordkeeping Guidelines – Age Discrimination Guidelines

Because of the age discrimination law (ADEA), employers with 20 or more employees must keep on file the following personnel and employment records for a period of one year, if any of these personnel records are obtained, made, or used in the normal course of your organization's business.

1. Job applications or other employment inquiries submitted in response to employer's advertisement or notice of job openings;
2. Records pertaining to failure or refusal to hire any individual;
3. Promotion, demotion, transfer, selection for training, layoff, recall, or discharge of any employee;
4. Job descriptions and occupational qualifications;
5. Job orders to employment agencies;
6. Aptitude or other employment test papers used in connection with any personnel action;
7. Results of physical examinations;
8. Advertisements or notices relating to job openings, promotions, training programs, or opportunities for overtime work;

9. Employee benefit plans (such as retirement, pension, and insurance plans);
10. Seniority systems and merit systems;
11. Other matters which may be pertinent to a determination whether an action, limitation, or classification is based on a factor other than age.

Note: Pre-employment records of applicants for positions known to be temporary and every record required to be kept under subparagraphs (1) through (8) above shall be kept for a period of 90 days.

DEDUCTIONS FROM WAGES

Whether or not deductions can be made from wages depends somewhat on what the deduction represents, and upon whether it cuts into the statutorily-required wages, i.e., minimum wage for all hours worked and appropriate overtime.

Where wage deductions for contributions on the part of the employees to pension, health, and welfare plans cut into statutory minimum and overtime pay, employers are permitted to make such deductions for the benefit of third parties only if the employees voluntarily agree and if neither the employer or anyone acting in the employer's behalf derives any profit or benefit from the transaction.

If the payroll deduction is for the benefit of the employee, i.e., to cover purchases, such deductions are allowed where the employee provides written authorization. The deduction for such purchases may bring the employee below minimum wage only to the extent of the employer's actual cost of the item. Any profit to the employer cannot affect the federal requirement for minimum wages.

In order to avoid having to make weekly calculations and adjust deductions, you may wish to require that the employee pay cash for their purchases or provide the employee with a cash advance which could subsequently be deducted from earnings at the full amount advanced, even if the resulting pay was below minimum wage.

In any event, we would suggest caution against deductions from employees' paychecks, other than those legally required, i.e., federal taxes, Social Security, etc., even where prior written authorization is obtained, where the resulting earnings bring the employee below minimum wage.

The cost of furnishing items which are primarily for the benefit of the employer; e.g., tools to perform the duties of the job may not be credited against statutory wage obligations. In accordance with federal regulations, such deductions could only be made to the extent where the employees' earnings were not brought below minimum wage obligations.

It is recommended that all additions to or deductions from the earnings of each of your employees be properly documented in your payroll records each week. We further recommend that all payroll deductions for items other than the required state and federal taxes be authorized by your employee in writing before they are made across your payroll. You may wish to use an authorization form similar to the following:

PAYROLL DEDUCTION AUTHORIZATION

I hereby authorize _____ to make the following deductions from my wages each pay period:

<u>Nature of Deduction</u>	<u>Amount</u>
Insurance	\$ _____
Accounts (The appropriate amount)	\$ _____
Advances	\$ _____
Miscellaneous	\$ _____

SIGNED: _____ DATE: _____

WITNESSED: _____ DATE: _____

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OVERTIME PAYMENTS REQUIRED ON COMMISSIONS AND BONUSES

Background

The Fair Labor Standards Act of 1938, commonly referred to as the Wage-Hour law, mandates that most commission and bonus payments are eligible for overtime compensation . . . if the employee's workweek exceeds forty (40) hours in a workweek. Exceptions to this requirement include:

- Bona fide supervisors, managers, and outside sales personnel who meet all the exempt tests prescribed by the Federal Wage-Hour Division.
- Highly-paid commission employees who receive more than half their money from commissions and will average \$10.88 (based on min. wage of \$7.25) per hour for all hours worked. This allowance only applies in a retail store setting where 75% of the establishment's sales are for the ultimate consumer. (This is referred to as the 7(i) exemption.)
- Bonuses paid on a discretionary basis by the employer, paid on such an infrequent basis that the employee will not expect payment on a regular basis, and the payment amount does not correlate directly to work efficiency or productivity.
- Automotive mechanics, parts persons, and sales personnel working for a new or used dealership are exempt from overtime.
- Drivers, driver helpers, loaders, and mechanics working on "commercial motor vehicles" or transporting products across state lines are likewise exempt from overtime compensation.

Most all other employees are eligible for overtime compensation on all earnings, and the remainder of this report will highlight overtime payments required and how they are computed.

Commissions and Bonuses Subject to Overtime

Contrary to popular opinion, the Federal Wage-Hour Division's requirements for overtime are not based solely on an employee's hourly rate or minimum wage. But rather, overtime is based on an employee's total hours worked in a workweek, and total earnings received from all sources. By dividing an employee's total earnings in a workweek by the total hours worked will yield what is known as an average hourly rate or a regular rate. Consider the following examples:

1. An employee receives a commission of 20% of sales. In a given workweek, the individual produced \$3,000 in sales for total commissions of \$600, and worked 50 hours in the workweek. Thus, his average hourly rate is $\$600 \div 50 \text{ hours} = \12.00 per hour .⁽¹⁾
2. An hourly rated employee receives \$8.00 an hour as a base hourly rate. In addition, he receives a sales commission override which, in a given workweek, amounts to an extra \$110. In this particular workweek, the person worked 45 hours. The regular rate would be $45 \text{ hours} \times \$8.00 = \$360 + \text{a bonus of } \$110 = \$470$. ($\$470 \div 45 = \10.44 per hour)

In both of the preceding examples, the average hourly rate represents the employee's straight-time earnings for all hours worked in a workweek. Now, additional overtime must be calculated which is one-half of the average hourly rate for hours worked in excess of forty (40). The same examples continue:

Example

- 1 Average hourly rate of \$12 per hour $\div 2 =$ a half-time rate of \$6 x 10 hours overtime = \$60. \$600 in commissions + \$60 overtime = \$660 total earnings.

Example

- 2 $\$10.44 \div 2 =$ a half-time rate of \$5.22 x 5 hours overtime, for \$26.10 in overtime, for total earnings of \$496.10.

It is permissible to separate the hourly rate from the commission earnings and calculate overtime separately. For example, an employee making \$9 per hour in a 45-hour workweek might receive a paycheck as follows:

- (1) This example might be eligible for the 7(i) exemption discussed on page 20. However, for the sake of this application, let's assume the establishment is a **non-retail** location, thereby not eligible for the 7(i) exemption.

40 hours x \$9 =	\$360.00
5 hours @ \$13.50 per hour =	<u>\$ 67.50</u>
Total Hourly Earnings With Overtime	\$427.50
Additional Commissions Earned --	\$75.00
\$75 \div 45 hours = \$1.67 per hour	
\$1.67 \div 2 = 83¢ x 5 hours =	\$4.17
Total Commissions Earnings	<u>\$ 79.17</u>
Total Weekly Compensation	\$506.67

The employee could receive these earnings on two different paychecks during the same workweek or the amounts could be combined on one paycheck. To meet Wage-Hour recordkeeping regulations, the overtime should be separated from the straight-time earnings in the explanation column of the pay stub. However, for practical purposes, some employers will combine the “half time” with the commission, showing one commission/overtime total on the pay stub, relying on the computed documentation usually on the time record to support the calculation.

Month-End or Quarterly Bonuses

Many bonuses are calculated on a monthly basis for performance throughout the month. To compute overtime, this monthly bonus must be prorated to a weekly equivalent, with additional “half-time” computed on each of the weekly equivalents for that month.

This is accomplished by taking the monthly bonus and dividing it by the number of workweeks in the month -- either 4 or 5. This weekly equivalent in commissions is divided by the total hours worked in each workweek to compute an average hourly rate. One-half of this rate times the hours over 40 is the overtime which is due. Obviously, the overtime bonus table chart may also be used, which greatly expedites this calculation. This procedure is as follows:

Overtime Bonus Table

The overtime calculation may be simplified by using the enclosed overtime factor chart. Simply locate the decimal corresponding to the weekly hours worked on the chart and multiply this weekly decimal times the total weekly earnings. The product of this multiplication will be the additional overtime (half-time) due. For example:

An individual receives a monthly bonus of \$400. This bonus is divided by the four (4) workweeks correlating to the four (4) weeks in the month in which the bonus was earned. The hours worked in each workweek are correlated to the weekly equivalent as follows:

Workweek	Weekly Bonus Equivalent	Hours Worked	Decimal Equivalent⁽¹⁾	Overtime Due
1	\$100	42.1	.02494	\$2.49
2	\$100	46.7	.07173	\$7.17
3	\$100	40.0	-	-
4	\$100	53.3	.12477	\$12.48
Total Bonus \$400			TOTAL OVERTIME DUE	\$22.14

The total bonus payment to this individual will be \$400, plus \$22.14 for a total of \$422.14.

⁽¹⁾ Use same overtime chart as used with fluctuating workweek method of payment.

In Summary

Most extra earnings -- commissions, spiffs, bonuses, and the like -- are subject to overtime compensation unless the individual is specifically exempt. The calculation is one-half of the individual's average hourly rate, which is total earnings divided by total hours worked in a workweek. Failure to compute this additional overtime can accrue into a sizable backwage liability, which can amount to a three-year deficit, plus an equal amount of liquidated damages and court costs. Enforcement of this liability is promulgated by the compliance officers of the U.S. Department of Labor/Wage-Hour Division. Additionally, repeat violations or willful citing will usually result in the application of a permanent court injunction, making future violations possible criminal in nature. To add insult to injury, unclaimed or refused backwages revert to the U.S. Treasury.

COEFFICIENT TABLE FOR COMPUTING EXTRA HALF-TIME FOR OVERTIME

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION

WAGE AND HOUR DIVISION

Hours	Even	1/4	1/2	3/4	1/10	2/10	3/10	4/10	6/10	7/10	8/10	9/10
40	0.000	0.003	0.006	0.009	0.0012	0.0025	0.0037	0.0049	0.0074	0.0086	0.0098	0.0110
41	0.012	0.015	0.018	0.021	0.0134	0.0146	0.0157	0.0169	0.0192	0.0204	0.0215	0.0227
42	0.024	0.027	0.029	0.032	0.0249	0.0261	0.0272	0.0283	0.0305	0.0316	0.0327	0.0338
43	0.035	0.038	0.040	0.043	0.0360	0.0370	0.0381	0.0392	0.0413	0.0423	0.0434	0.0444
44	0.045	0.048	0.051	0.053	0.0465	0.0475	0.0485	0.0495	0.0516	0.0526	0.0536	0.0546
45	0.056	0.058	0.060	0.063	0.0565	0.0575	0.0585	0.0595	0.0614	0.0624	0.0633	0.0643
46	0.065	0.068	0.070	0.072	0.0662	0.0671	0.0680	0.0690	0.0708	0.0717	0.0726	0.0736
47	0.074	0.077	0.079	0.081	0.0754	0.0763	0.0772	0.0781	0.0798	0.0807	0.0816	0.0825
48	0.083	0.085	0.088	0.090	0.0842	0.0851	0.0859	0.0868	0.0885	0.0893	0.0902	0.0910
49	0.092	0.094	0.096	0.098	0.0927	0.0935	0.0943	0.0951	0.0968	0.0976	0.0984	0.0992
50	0.100	0.102	0.104	0.106	0.1008	0.1016	0.1024	0.1032	0.1047	0.1055	0.1063	0.1071
51	0.108	0.110	0.112	0.114	0.1086	0.1094	0.1101	0.1109	0.1124	0.1132	0.1139	0.1146
52	0.115	0.117	0.119	0.121	0.1161	0.1169	0.1176	0.1183	0.1198	0.1205	0.1212	0.1219
53	0.123	0.124	0.126	0.128	0.1234	0.1241	0.1248	0.1255	0.1269	0.1276	0.1283	0.1289
54	0.130	0.131	0.133	0.135	0.1303	0.1310	0.1317	0.1324	0.1337	0.1344	0.1350	0.1357
55	0.136	0.138	0.140	0.141	0.1370	0.1377	0.1383	0.1390	0.1403	0.1409	0.1416	0.1422
56	0.143	0.144	0.146	0.148	0.1435	0.1441	0.1448	0.1454	0.1466	0.1473	0.1479	0.1485
57	0.149	0.151	0.152	0.154	0.1497	0.1503	0.1510	0.1516	0.1528	0.1534	0.1540	0.1546
58	0.155	0.157	0.158	0.160	0.1558	0.1564	0.1569	0.1575	0.1587	0.1593	0.1599	0.1604
59	0.161	0.162	0.164	0.165	0.1616	0.1622	0.1627	0.1633	0.1644	0.1650	0.1656	0.1661
60	0.167	0.168	0.169	0.171	0.1672	0.1678	0.1683	0.1689	0.1700	0.1705	0.1711	0.1716
61	0.172	0.173	0.175	0.176	0.1727	0.1732	0.1737	0.1743	0.1753	0.1759	0.1764	0.1769
62	0.177	0.179	0.180	0.181	0.1779	0.1785	0.1790	0.1795	0.1805	0.1810	0.1815	0.1820
63	0.183	0.184	0.185	0.186	0.1830	0.1835	0.1840	0.1845	0.1855	0.1860	0.1865	0.1870
64	0.188	0.189	0.190	0.191	0.1880	0.1885	0.1890	0.1894	0.1904	0.1909	0.1914	0.1918

Hours	Even	1/4	1/2	3/4	1/10	2/10	3/10	4/10	6/10	7/10	8/10	9/10
65	0.192	0.193	0.195	0.196	0.1928	0.1933	0.1937	0.1942	0.1951	0.1956	0.1960	0.1965
66	0.197	0.198	0.199	0.200	0.1974	0.1979	0.1983	0.1988	0.1997	0.2001	0.2006	0.2010
67	0.201	0.203	0.204	0.205	0.2019	0.2024	0.2028	0.2033	0.2041	0.2046	0.2050	0.2054
68	0.206	0.207	0.208	0.209	0.2063	0.2067	0.2072	0.2076	0.2085	0.2089	0.2093	0.2097
69	0.210	0.211	0.212	0.213	0.2106	0.2110	0.2114	0.2118	0.2126	0.2131	0.2135	0.2139
70	0.214	0.215	0.216	0.217	0.2147	0.2151	0.2155	0.2159	0.2167	0.2171	0.2175	0.2179
71	0.218	0.219	0.220	0.221	0.2187	0.2191	0.2195	0.2199	0.2207	0.2211	0.2214	0.2218
72	0.222	0.223	0.224	0.225	0.2226	0.2230	0.2234	0.2238	0.2245	0.2249	0.2253	0.2257
73	0.226	0.227	0.228	0.229	0.2264	0.2268	0.2271	0.2275	0.2283	0.2286	0.2290	0.2294
74	0.230	0.231	0.232	0.232	0.2301	0.2305	0.2308	0.2312	0.2319	0.2323	0.2326	0.2330
75	0.233	0.234	0.235	0.236	0.2337	0.2340	0.2344	0.2347	0.2354	0.2358	0.2361	0.2365
76	0.237	0.238	0.239	0.239	0.2372	0.2375	0.2379	0.2382	0.2389	0.2392	0.2396	0.2399
77	0.240	0.241	0.242	0.243	0.2406	0.2409	0.2413	0.2416	0.2423	0.2426	0.2429	0.2433
78	0.244	0.244	0.245	0.246	0.2439	0.2442	0.2446	0.2449	0.2455	0.2459	0.2462	0.2465
79	0.247	0.248	0.249	0.249	0.2472	0.2475	0.2478	0.2481	0.2487	0.2491	0.2494	0.2497
80	0.250	0.251	0.252	0.252	0.2503	0.2506	0.2509	0.2512	0.2519	0.2522	0.2525	0.2528
81	0.253	0.254	0.255	0.255	0.2534	0.2537	0.2540	0.2543	0.2549	0.2552	0.2555	0.2558
82	0.256	0.257	0.258	0.258	0.2564	0.2567	0.2570	0.2573	0.2579	0.2582	0.2585	0.2587
83	0.259	0.260	0.261	0.261	0.2593	0.2596	0.2599	0.2602	0.2608	0.2611	0.2613	0.2616
84	0.262	0.263	0.263	0.264	0.2622	0.2625	0.2628	0.2630	0.2636	0.2639	0.2642	0.2644
85	0.265	0.265	0.266	0.267	0.2650	0.2653	0.2655	0.2658	0.2664	0.2666	0.2669	0.2672

TO CONVERT INTO WEEKLY EQUIVALENT: Multiply SEMIMONTHLY salary by 0.4615; MONTHLY salary by 0.2308; ANNUAL salary by 0.01923.

TO CONVERT INTO STRAIGHT-TIME HOURLY EQUIVALENT FOR 40 HOURS: Multiply WEEKLY salary by 0.025; SEMIMONTHLY by 0.01154; MONTHLY salary by 0.00577; ANNUAL by 0.00048.

TO CONVERT INTO TIME AND ONE-HALF HOURLY RATE BASED ON 40 HOUR WEEK: Multiply WEEKLY salary by 0.0375; SEMIMONTHLY by 0.0173; MONTHLY salary by 0.00866; ANNUAL by 0.000721.

CAUTION: Be sure straight-time earnings are not below legal minimum.

INSTRUCTIONS

General: In determining the extra half-time that is due for overtime pay after 40 hours, the method of calculation commonly used is to divided the straight-time earnings by the total number of hours worked and multiply the result by the number of overtime hours divided by two (2). For instance, the

Computation for 48 hours would be $\frac{\text{Earnings}}{48} \times \frac{8}{2}$; for 50 hours, $\frac{\text{Earnings}}{50} \times \frac{10}{2}$; for $47\frac{3}{4}$ hours,

$\frac{\text{Earnings}}{47\frac{3}{4}} \times \frac{7\frac{3}{4}}{2}$. The table on the reverse side contains the decimal equivalents of the fraction,

$\frac{\text{O.T. Hours}}{\text{Total Hr.} \times 2}$

For example, the decimal for 48 hours is $\frac{8}{48 \times 2} = \frac{1}{12} = .083$; for 50 hours it is $\frac{10}{50 \times 2} = \frac{1}{10} = .1$;

and for $47\frac{3}{4}$ hours $\frac{7\frac{3}{4}}{47\frac{3}{4} \times 2} = \frac{7.75}{95.5} = .081$.

How to use: (a) Multiply the straight-time earnings for an overtime week by the application decimal and the result will be the extra half-time due. Thus, by using the decimals in the table (on the reverse side) the computations performed are, in effect, exactly the same as if the equivalent fractions were used, with the advantage of having eliminated the long division necessitated by the fractions. For example:

1. A pieceworker earns varying wages each week. In a $43\frac{9}{10}$ hour week he earned \$153.65 straight-time. The coefficient for $43\frac{9}{10}$ hours is .0444. $.0444 \times \$153.65 = \6.82 , additional half-time due. $\$153.65 + \$6.82 = \$160.47$, the pieceworker's total pay for the week.
2. Jones is paid a weekly salary of \$180.25. He worked $51\frac{1}{2}$ hours. The coefficient for $51\frac{1}{2}$ hours is .112. $.112 \times \$180.25 = \20.19 . $\$180.25 + \$20.19 = \$200.44$, Jones' total pay for the week.

(b) The decimal table can also be used effectively when back wages are due because of additions to wages (such as a weekly bonus) that were not included in the regular rate in computing overtime. For example:

1. An employee worked 48 hours and received a production bonus of \$9.60 which was not included in the regular rate. Thus, $\$9.60 \times .083 = \0.80 , the additional half-time due on the bonus.
2. Jones in the same week (example (a), 2 above) received a production bonus of \$25.00. $.112 \times \$25.00 = \2.80 , the additional half-time due on the bonus. $\$180.25 + \$20.19 + \$25.00 + \$2.80 = \$228.24$, Jones' total earnings. A further short-cut (combining (a), 2, and (b), 2) would be: $\$180.25 + \$25.00 = \$205.25 \times .112 = \$22.99 + \$205.25 = \228.24 , Jones' total earnings.

(c) Short-cuts For Computing Back Wages. When both the overtime hours and the earnings vary, individual weekly computations must be made. However, if an employee is paid at a constant hourly rate, time can be saved by adding the unpaid overtime hours during the period and multiplying the total by one-half the hourly rate. When the weekly hours vary and the straight-time earnings are constant, add the decimals for the overtime weeks and multiply the total by the earnings for one (1) week. When the weekly hours are constant but the earnings vary, add the earnings for the overtime weeks and multiply the total by the decimal for one (1) week. For example:

VARYING HOURS – CONSTANT EARNINGS CONSTANT HOURS – VARYING EARNINGS

<u>Hours</u>	<u>Decimal</u>	<u>Earnings</u>	<u>Hours</u>	<u>Earnings</u>
42	.024	\$180.25	47	\$164.50
43	.035	\$180.25	47	\$159.80
46	<u>.065</u>	<u>\$180.25</u>	47	<u>\$162.15</u>
	.125 x \$180.25 =	\$22.35		\$486.45 x .074 = \$36.00

THE REGULAR RATE AND EXCLUSIONS FROM THE REGULAR RATE

The regular rate under the Fair Labor Standards Act is an hourly rate figured on a weekly basis. It does not mean that employees must be hired on an hourly basis; they may be paid piece rate, salary, commission, or any other basis agreeable to the employer and the employee. All that the FLSA requires in such cases is conversion of their pay to an hourly rate – the regular rate – when figuring overtime wages accorded them by the statute.

Exclusions from the Regular Rate

Certain payments are authorized by the FLSA as excludable for monies when figuring regular rates, including:

1. Gifts, Christmas and special-occasion bonuses – the amounts of which are not measured by or dependent on hours work, 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.
3. Sums paid in recognition of services performed during a given period if either a) both the fact that 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, 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 Secretary of Labor, or c) the payments are talent fees.
4. Contributions irrevocably made by an employer to a trustee or a third person pursuant to a bona fide plan for providing old age, retirement, life, accident, or health insurance or similar benefits for 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 8 in a day or in excess of 40 during the workweek.
6. Extra compensation provided by a premium rate paid for the work by the employee on Saturday's, Sunday's, 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 non-overtime hours on other days.
7. Extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective bargaining agreement, for work outside of the hours established in good faith by the contract or agreement.

INDEPENDENT CONTRACTOR GUIDELINES

FLSA coverage is based on an employer/employee relationship. Thus independent contractors are not covered where it can be shown that the individual is not dependent upon a specific employer for a livelihood.

Factors to determine whether a worker is an employee under the FLSA include:

1. The degree of the alleged employer's right to control the way in which work is done;
2. The alleged employee's opportunity for profit or loss depending upon managerial skill;
3. The alleged employee's investment in equipment or materials;
4. Whether the work requires a special skill;
5. The degree of permanence of the working relationship; and
6. Whether the work is an integral part of the alleged employer's business.

Before you apply the independent contractor status to anyone at your organization, we recommend that the application be discussed with a professional consultant for more definitive details.

PENALTIES FOR VIOLATIONS

The Wage-Hour Division of the Department of Labor has broad powers in enforcing the minimum wage and overtime provisions of the FLSA. A complaint may be initiated by any employee which is covered by the FLSA. The enforcement of the FLSA is carried out by Wage-Hour Division compliance officers who are stationed across the United States. The compliance officers have the authority to conduct investigations and gather data on wages, hours, and other employment conditions or practices in determining compliance with the Act.

Wages that are withheld in violation of the FLSA have the status of unpaid minimum wages or unpaid overtime compensation under the FLSA. The following methods are provided under the FLSA for recovery of unpaid wages:

1. The Commission may supervise payment of the back wages and they may bring suit for back pay in an equal amount as liquidated damages.
2. The employee can sue for back pay and an additional sum, up to the amount of back pay, as liquidated damages, plus court costs and attorneys' fees. The employee cannot bring suit if he or she has been paid back wages in full under the supervision of the Commission, or if the Commission has filed suit under the Act to collect the wages due the employee.
3. The Commission can obtain a court injunction to restrain any person from violating the law, including the unlawful withholding by an employer of proper compensation.

There is a two (2)-year statute of limitation for recovery of unpaid wages, except in the case of a willful violation, where a three (3)-year statute applies.

Willful violations of the Act can be prosecuted criminally and the violator may be fined up to \$10,000. A second conviction for such a violation can result in imprisonment.

WAGE-HOUR CHECKLIST

	Complies	Does Not Comply
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Method of Payment:

All salaries and hourly rates checked against federal/state minimum wage rates and appropriate overtime.

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Bonuses or incentive payment have been recorded properly and overtime pay has been adjusted accordingly.

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All exempt employees are truly exempt.

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Payroll record containing the employee's name, position, base pay rate, hours worked, overtime, and sex (if applicable).

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Recording of Hours:

Nonexempt employees record true and accurate hours of work on a daily basis.

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Timecards compare favorably with recorded hours on individual earnings record cards.

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Total hours of work are computed on an acceptable basis (i.e., 7/8 minute rule, tenths, hundredths, etc.)

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Complies **Does Not
Comply**

Recording of Hours (continued):

Missed and corrected time clock entries are initialed by the employee and the approved supervisors.

Absences and tardies are recorded properly.

Compensable Time:

Hours of work for the following were properly compensated:

Waiting time, preliminary activities, postliminary activities, rest periods, meal periods, employee meetings, training programs, post office and bank trips, extra help, sleeping time, residing on premises, deliveries, working two different jobs, travel time, clothes-changing, homework, voluntary overtime, reporting time, emergency work.

**Highlight any that are not in compliance.*

Payroll Recordkeeping:

Full name, home address, sex, date of birth (under 19 years), job title, workweek definition, regular hourly rate – base salary, regular weekly/daily work hours, total weekly straight time/overtime earnings, total additions/deductions from earnings, total wages paid each period, date of payment.

**Highlight any that are not in compliance.*

Employment Posters:

Federal Wage-Hour, State Labor, OSHA, Age Discrimination, FMLA, ADA.

**Highlight any that are not in compliance.*

Complies **Does Not
Comply**

Pay Plans:

Review of applicable method of payment (i.e., fluctuating workweek, straight salary, hourly without overtime, commission, piece rate, etc.) *(Note: Review personnel files to ensure the appropriate documentation is maintained for the method of payment being used.)*

Workweeks have not been averaged with overtime paid in the week in which it was earned.

Discretionary bonuses are truly discretionary and properly documented.

No discrepancies in pay between male and female employees in the same positions.

No discrepancies in pay based on employee age.

Pay Plans (continued):

All wage garnishments and deductions (with proper authorization) were accurately calculated and subtracted from employee's pay.

Complies **Does Not
Comply**

Child Labor Regulations:

All employees under the age of 18 have appropriate working permits.

The hours for employment of minors are posted and followed.

Federal/state hazardous duties for minors are followed.

Meal/break periods for minors comply with federal/state regulations.

Additional Notes: Total Number of Timecards Examined: _____

Number	Employee Name

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Handling Federal Wage-Hour Investigations

WHAT TO DO WHEN THE FEDERAL WAGE-HOUR INVESTIGATOR ARRIVES

Introduction

What Causes A Federal Wage-Hour Investigation

"Why am I being investigated?" More and more employers are asking this question. There are several possible answers. A Federal Wage-Hour investigation will take place for one or a combination of the following reasons:

- A complaint filed by a former or present employee who feels he was paid improperly.
- A complaint of alleged non-compliance from competitors, labor unions, and other federal and state agencies. The organization or person filing a complaint is held in strict confidence. Rarely will you ever know who *"turned you in"*. An investigation is scheduled if it appears warranted by the Wage-Hour Division.
- You may have a competitor who believes that your establishment is not paying the required minimum wage and overtime pay. His complaint to the Wage-Hour Division goes something like this: *"You make me comply with the law; make my competitor comply also."*
- A labor union makes complaints to the Wage-Hour Division on behalf of employees they represent. Unions also file complaints against non-union firms where they have tried to unionize and have been unable to do so.
- Follow-up investigation since you were last investigated to see you are complying with the latest personnel, accounting, and recordkeeping requirements. They will check to be sure any violations found during the first investigation have been corrected. Investigations are scheduled to find out if you are complying with an earlier consent or court injunction agreement requiring certain Wage-Hour compliance and conduct.
- Particular industry investigations -- the Wage-Hour Division may be investigating you because you are in a particular industry and they are trying to find the extent of compliance of employers in that industry with the particular Wage-Hour accounting and recordkeeping requirements.

Why A Compliance Investigation Is "Serious Business"

Most investigations end up with the employer being found in violation of some Wage-Hour accounting or personnel requirement. Department of Labor officials report that an overwhelming majority of employers against whom they have computed back wages, levied fines, and injunctions, actually believed they were in compliance with the complex Wage-Hour personnel and accounting regulations. The Federal Wage-Hour Division and their one thousand plus investigating staff of compliance officers have now computed over one billion dollars in back wages due employees. No industry is safe from an investigation. No employer subject to the regulations can be considered *"safe"*.

Unfavorable newspaper publicity, penalties ranging from the payment of back wages over a two-and-three-year period, with fines of up to \$10,000, imprisonment up to six months, and permanent federal courts injunctions against future violations make Federal Wage-Hour investigations a serious matter.

The above enforcement policies and penalties can be very costly in dollars as well as extremely detrimental to employee morale and goodwill. The personnel unrest will not only affect those employees directly involved with "*alleged back wages due*", but also affect employees company-wide. Poor employee morale results from an investigation where back wages have been computed and employees interviewed.

How You Are Notified Of a Pending Investigation

As a general practice, the Wage-Hour investigator feels **No** obligation to give you advance notice of an investigation. Usually you will be notified of his intent to make an investigation by his personal presence at your office or at one of your establishments. You may also receive a telephone call from the investigator advising you that an investigation will be made. He will suggest a time when he can be there. If you are going to be out of town or your payroll department is tied up on that particular date, most investigators will normally work with you in arranging a more convenient time for your business. However, there is no use to keep delaying the investigation since investigators will sooner or later come in with or without your consent. Once you have been notified, arrange for the presence of the investigator at a time when it is most convenient for your payroll clerk or bookkeeper. You should also notify your Wage-Hour consultant immediately of the pending investigation so that they can stand by and offer you additional recommendations as the need arises.

Authority of Wage-Hour Compliance Officers

Authorized compliance officers of the Federal Wage-Hour and Public Contracts Divisions have plenty of authority to conduct these investigations. The Federal Wage-Hour laws give investigators the power to investigate and gather data on your wages, hours, working conditions, and other employment practices. They may enter your establishment and inspect any and all payroll and personnel records, transcribe records, and interview as many employees as they feel necessary. The purpose is to find out whether an employer has violated any accounting or recordkeeping requirements.

Their extremely broad authority gives a Wage-Hour investigator virtually carte blanche authority to enter your establishment, talk to your employees, and look at any records the investigator may feel are appropriate to find out whether you are in compliance with all of the personnel and payroll accounting requirements. This is an important reason for maintaining clear, complete, and accurate personnel and payroll records.

Vulnerability Areas to Be Investigated By Compliance Officer

- Improper minimum wage and overtime payments
- Hours of work that have not been recorded or paid properly
- Improperly compensating employees on a straight salary method of payment
- Working employees who fail to meet the minimum age requirements
- Falsification of personnel, payroll or time-keeping records

- Possible grounds for charges of discrimination between the sexes on equal pay for equal work
- Possible grounds for discrimination charges because of discriminatory personnel and wage and salary policies affecting employees over the age of 40
- Improper payroll deductions on garnishees, tools, uniforms, and company merchandise

Within these broad categories, there are a host of loopholes and vulnerability areas that the investigator will be checking with a fine-tooth comb.

Important Questions to Ask Yourself

If a Federal Wage-Hour investigator conducted an investigation of your organization today, would you be in full compliance?

If your employees were interviewed by an investigator, what would they tell him?

Are you absolutely certain your present pay methods, personnel policies, and payroll records meet all the latest requirements of the Federal Wage-Hour Division?

WHAT TO DO BEFORE THE INVESTIGATOR ARRIVES

Have A Professionally Conducted Wage-Hour Accounting Compliance Audit

Whether you are complying 100% with all aspects of the accounting and recordkeeping requirements depends upon your particular situation as well as the current interpretation of the Federal Wage-Hour Administrator and his enforcement policies. SESCO recommends an immediate in depth Wage-Hour accounting compliance audit be conducted to determine your current status under Federal Wage-Hour enforcement policy. It is recommended that all areas of non-compliance involving methods of payment, compensable work time, personnel records, compensable payroll records, payroll deductions and all other areas be corrected as soon as possible using professional guidelines on how to meet these requirements.

It is far better for an investigator to observe "*good faith intention*" by observing that past mistakes are being corrected even though he may observe a period during the preceding two years in which you were not meeting all the requirements. One basic reason for a professional Wage-Hour Accounting Audit rests with your being able to initiate a record of compliance. If you're fortunate enough to avoid an investigation for the next two years, you will have saved yourself many thousands of dollars in that you self-corrected your areas of non-compliance.

It is recommended that job descriptions be completed on any "*gray*" employee classifications which you claim to be exempt from overtime pay before an investigation. It is also recommended that a "*letter of understanding*" outlining basic accounting tests, job duties, and responsibilities be acknowledged by salaried employees whom the investigator may look upon as occupying "*borderline*" positions with reference to the "*white collar*" salary classification. This will eliminate any confusion that may exist in the mind of an employee with regard to his "*job duties*" when questioned by a Federal Wage-Hour compliance investigator.

Communicate and Instruct Key People

SESCO recommends that before any Federal Wage-Hour compliance investigation takes place that time be taken to instruct key personnel on *"what they should and should not do when the Wage-Hour investigator arrives."* For example, SESO recommends that you instruct your receptionist or secretary, office or business manager, and payroll supervisor on certain guidelines they should follow should you be faced with a Federal Wage-Hour investigation. SESO's staff recommendations under the heading ***"What To Do During The Wage-Hour Investigation"*** would be very appropriate to go over with these key people. These recommendations can save you a great deal of money, doubt, uncertainty, confusion, and help you approach a future investigation with confidence.

Locate and Review Pertinent Personnel-Payroll Records

Along with the previous recommendation on having a professionally-conducted Wage-Hour accounting audit, it is equally important to have a complete analysis and review of all present personnel and payroll accounting records subject to the scrutiny of a Federal Wage-Hour investigator. You should make certain that all required personnel and recordkeeping information is available and current on your records as specified by the Federal Wage-Hour Division. Furthermore, you should make certain in advance that you are meeting the present two-and-three-year retention requirements on the specified personnel and payroll records.

Needless to say, your payroll and personnel records should be centrally located in a neat order and available for inspection whenever the investigator asks for them. It is to your advantage to avoid having an investigator go on a *"hunting expedition"* in determining what he is looking for in this particular area or recordkeeping.

Prepare Audit Work Area for Investigator

Look ahead and plan for a convenient location in your facilities for the investigator to perform his audit work. If possible, try to make a separate room available to the investigator where he can look at the requested records by himself. He then can be *"isolated"* from most employees. This tends to minimize the *"grapevine"* talking among your personnel and he will find it less easy to interrogate just anybody about a questionable area he may uncover.

WHAT DO TO DURING THE WAGE-HOUR INVESTIGATION

Ask For the Investigator's Credentials

When the investigator arrives and introduces himself, be certain he has the proper identification and credentials. All investigators are required to carry and show their federal credentials. It is an identification card containing his name, address, assignment location, along with his picture and signature. If he does not volunteer this to you, be sure to request it, and if his credentials and identification don't match, you should not permit any investigation to take place.

Request that the individual posing as an investigator leave. Let him know that once his credentials and identification are in order, he may return and perform an authorized investigation. This same recommendation applies to any investigator who does not have his proper credentials with him.

Communicate Investigator's Presence to Top Management

Do not permit any Federal Wage-Hour investigator to perform any type of investigation, look at any records or interview any employee until permission has been granted from the head of the organization or his designated representative. The investigator can be requested to leave his card and to call back at a more convenient time if you or your designated manager is not available to assist him. Feel free to let the investigator know if his timing is not convenient to you nor to your payroll department. But you should have a good reason. Give him an alternative date when it would be more convenient for him to return and begin his investigation. It is wise to accommodate the investigator. Regardless of how you may feel about the Wage-Hour regulations or federal investigators, no useful purpose can be gained by dragging your feet or making it difficult for any investigator.

Treat Investigator with Courtesy and Give Him a Suitable Place to Work

Try to create a reasonably friendly climate. Let the investigator know that you and your employees will cooperate with him in every possible way. During this first conference, arrangements will be made as to a place where he can sit down at a desk and inspect your personnel and payroll records. He will also explain to you that it will be necessary to interview various employees. You can expect many borderline questions to arise during his investigation. There is no point in creating any animosity or antagonistic feeling because of discourtesies.

But employers should not be fooled by outward appearances. A good working guideline we recommend is for you to assume that the investigator is not normally inclined toward management. Furthermore, it is natural for the investigator to want to find violations. In his eyes, the importance of his work increases in direct proportion to violations he finds. Nevertheless, it is recommended that the investigator be treated with courtesy. You should conduct yourself in a manner that will indicate you have nothing to hide and that you do desire to comply. A record of cooperation may be helpful later in avoiding or defending against an injunction suit by the Secretary of Labor.

Choose a Competent Office Employee To Assist

The person you select should reflect a pleasant attitude. She should have patience and show a willingness to cooperate in helping the investigator obtain the proper records he needs and other personnel data he may request during his investigation.

The investigator will want to see those records which reflect the number of hours worked and the appropriate payroll records. Records of sales volume or business done may also be required to determine the extent of your annual dollar volume of business for purposes of finding out whether you come within the Wage-Hour coverage tests.

All records given to the investigator are to be treated confidentially by him.

You are not required to allow the investigator to remove records from your office or your premises. He may remove your records from your establishment only with your consent. If you do consent, make sure that he carefully identifies each record and that he gives you a receipt for them. Unless it is a most unusual situation, it is recommended that permission not be granted any investigator to take your records off your premises. There is no requirement that an investigator be permitted to make a Xerox or Thermofax copy of your records.

How to Deal With Requested Employee Interviews

A Wage-Hour investigator has the authority to interview any employees and to take a statement from them about their job duties, responsibilities, hours of work, and other details concerning their wages and working conditions. Employers are not permitted to be present during these interviews. There is no right granted to have a copy of any employee's statement given to the investigator. The investigator's interviews with employees are for the purpose of verifying the accuracy of your payroll and time records, to better understand the employees' duties and exemption status, and to develop information not available in your records.

Employee interviews are conducted in private and are considered confidential. Investigators normally will not interview all employees, only take a representative sampling. Interviews are usually conducted in your establishment and with your permission. If you do not grant permission to the investigator to interview employees during working hours, the investigator will usually contact these employees at their homes.

SESCO recommends that you permit these employee interviews to take place on your premises. There is nothing wrong with requesting these interviews be held immediately before and after the employees' scheduled shift or work schedule. Most investigators will try to comply with your request to avoid as much lengthy interruption as possible.

Wage-Hour investigators usually interview all "*borderline*" salaried personnel and find out whether they have the proper authority and responsibility to meet the additional accounting tests for the various "*white collar*" salary exemptions from overtime. At this point, it is usually too late to go to the employees that you have been worried about and "*instruct*" them in what to say to the investigator.

In the first place, it isn't fair to place your employees in an embarrassing situation. If your employees are not in the habit of making false or misleading statements, they certainly wouldn't want to do so when questioned by an investigator. Most employees will be "*rattled*" when interviewed by an investigator. If he "*detects*" in your employee that he is being misled or given false information, both the employee and your organization could be in possible "*deep trouble*" if perjury or falsification of information can be proven by the investigator.

It is recommended that you request from the investigator the names of those employees he wishes to interview. It is your privilege to schedule interviews at the most convenient time to avoid disrupting your organization excessively. Once you have the employees' names to be interviewed, we recommend that a member of management escort them to the office where the interview is to take place. This enables you to talk to the employee and explain what is happening before the Wage-Hour interview can take place.

You should let the employee know that he should "*tell the truth*" to the best of his ability. He should also be told that this investigation is "*routine*" and does not mean your organization has violated any rule or done anything wrong. If the employee to be interviewed has been paid on a salary, then the investigator will be trying to verify his responsibilities and the amount of time he devotes to non-supervisory or non-administrative duties. It is recommended that you caution the employee, before the interview, not to minimize his responsibilities in talking with the investigator.

You should also inform the employee that he is not required to sign any statement prepared by the investigator unless he really wants to do so. Should he sign a statement, tell him to be absolutely

certain to read it carefully and if it is not correct to make it so before signing it. In addition, the employee should be told that he has a right to a copy of his signed statement and that he should request a copy *"as a condition"* for signing. The Wage-Hour Division will not furnish employers with copies of any signed statements by their employees.

Cooperate but Don't Volunteer Facts or Records Not Specifically Requested

It's always best to answer only those questions directly asked by the investigator. Cooperate with the investigator and furnish him with exactly what he requests in terms of personnel, payroll, and time records. You must not refuse any requested records. Remember, the investigator can subpoena any records needed to complete the investigation. However, don't give him more than he specifically requests. If you have concern with any present payroll policy, method of payment of any employee or job descriptions, check them out in advance with your SESCO Wage-Hour consultant. Don't wait until the investigator gets to your office to begin making changes. By then it is too late. A good rule is to supply the investigator with exactly what he requests but do not volunteer anything.

WHAT TO DO AFTER THE WAGE-HOUR INVESTIGATION

Find Out How You Stand -- Listen -- Take Good Notes

It is the general practice of federal investigators to hold a conference with you, your office manager, and your Wage-Hour consultant or accountant after he completes his investigation. Listen closely to all of his opinions made at this meeting. Take good notes during this meeting. If he says you are in violation in some area, find out exactly the reason for his findings. Ask him what he expects you to do to correct the violations. Obtain all information you can from him. *"Feel free"* to ask any questions, clarify and find out the reasons behind his claiming your non-compliance. Ask the investigator to document his findings in any Wage-Hour *"interpretive"* bulletin he can provide you. Have him underscore the pertinent sections.

If You Are Found In Violation, Pledge Future Wage-Hour Compliance

If the investigator tells you that you are not in compliance and that you owe back wages to employees, ask him to give you the names of the employees involved, the amounts allegedly due them, and the basis for his computations. The investigator will provide you this information on a *"computation"* sheet, entitled *"Summary of Back Wages Due"*. Some investigations will not compute back wages themselves but will outline the procedures for you to follow and ask that you make these computations yourself. This is tending to be a new enforcement policy of the Wage-Hour Division. But no matter who computes the alleged wages due, be certain you tell the investigator that you will need to review the computations and the reason for them with your Wage-Hour consultant.

At this point, the investigator will want to find out your intentions for future compliance. Assuming that you (1) clearly understand the reason for your alleged discrepancies, and (2) you are convinced that your payroll or personnel procedures have not been in compliance with the latest federal regulations, then it is recommended that you pledge future compliance with the accounting requirements to the best of your ability. If you have any doubt at all as to where you stand, **tell the investigator that you will give his recommendations and suggestions careful consideration, but you need to discuss his findings and recommendations with your Wage-Hour consultant.**

HOW TO SAY "NO"

Review Findings Before Agreeing To Pay Back Wages

If he tries to pressure you into writing a check for the back wages at that moment, politely decline. Let him know that you will get back in touch with him after you have had a chance to review the whole matter of his investigation which took X number of days or X number of hours with your management group. This will take a little time. Thank him for his assistance. Again, pledge to him **your desire to comply in the future with the federal Wage-Hour accounting requirements to the best of your ability. Don't let yourself be rushed into agreeing with the investigator on his findings. Investigators are not infallible and often make mistakes in computations of back wages as well as in their collection of data and information from employee interviews. Take time and review the total results of the investigation with competent professional help.**

Call Your SESCO Wage-Hour Consultant

Provide him with all details concerning the investigator's findings and recommendations. He may wish to meet with the investigator and review his findings in depth before giving you recommendations on the proper steps to take in the immediate future.

If You Are Found In Wage-Hour Compliance, Document Results

If the investigator concludes that your methods of payment, payroll computations, personnel policies, and records are in compliance with the latest requirements, you should document this for your future protection. What happens if a different investigator comes back two years later and disagrees? If the investigator gives you a clean bill of health, nail him down on specifics. Ask to verify the exemption status of any employee you have been concerned about. Have him verify that your overtime computation procedures on bonuses are meeting the Wage-Hour requirements. **ASK THE QUESTIONS ONLY AFTER HE HAS TOLD YOU THAT ALL YOUR PAYROLL PROCEDURES ARE SATISFACTORY.**

If he gives you an affirmative answer to each of your questionable areas, request that he give you a letter stating that he did find you in compliance as a result of his investigation. Normally, most investigators will decline, telling you that they are not authorized to put the results of a compliance investigation in a letter since it's not their practice to do so. If you are fortunate enough to get such a letter, make several copies and file it for safe keeping.

Write the Investigator

As soon as the investigator leaves your office, sit down and dictate or write out the results of your concluding conference with him. Document his decision where he held all your present salaried employees to be exempt from overtime as well as any other "gray" situations you have been concerned about. Then, write the investigator a letter and put in it the highlights of his conference with you. Restate his position that you were found to be in compliance such as: *"During your final conference with me and my office manager, we were glad to learn that you concluded our company was in complete compliance with all the Wage-Hour accounting and personnel recordkeeping requirements."* Repeat what he told you. At the end of your letter to him, let the investigator know that: *"As a result of your findings during the investigation, it is our intention to continue our present, existing methods*

of payment, payroll computations, and recordkeeping so that we may continue to remain in compliance with the latest Federal Wage-Hour accounting and recordkeeping requirements." Your SESCO Consultant will help draft this "position" letter for you.

You should not expect to receive an answer from the investigator to your letter. You have at least protected yourself in the future should another investigation take place by a different investigator. If you should be challenged in the future by a change in the position of the Wage-Hour Division or by a different attitude of a new investigator, you will at least have a copy of this letter on file to use in your defense.

Correct Your Wage-Hour Violations

After you verify the accuracy of the findings and recommendations of the Federal Wage-Hour investigator with your SESCO Wage-Hour consultant then you should begin correcting any mistakes immediately so you can gain full accounting compliance.

Have A Semi-Annual Wage-Hour Accounting Compliance Audit

SESCO recommends periodic professional auditing of your personnel and payroll procedures, methods of payment, and payroll computations. This is the best approach to keeping informed of changes in the enforcement and investigative policies of the Wage-Hour Division, with the goal of staying in compliance with the complex accounting requirements.

Wage-Hour accounting has rapidly become a highly specialized field in which constant study and attention must be maintained in order to keep up with the ever-changing enforcement policies of the Labor Department. You can be meeting the requirements one week, and then the enforcement policies can change and immediately you begin accumulating financial liabilities the following week.

SESCO has served management for more than four decades in developing wage and salary programs, and personnel and payroll record systems that meet the Federal Wage-Hour Division's personnel and accounting requirements. Since 1945, no SESCO client has ever been fined by the Department of Labor for a single Wage-Hour violation.

We can provide you with the peace of mind from knowing you have absolutely nothing to fear from a thorough federal investigation of your payroll, time records, personnel practices, and employee interviews.

Penalties for Violations

The teeth of enforcement of the law are injunctions, shipping bans, safeguards for employee informants, liability for attorneys' fees, court costs, and possible damages in wage suites filed by employees, and possible criminal penalties.

You can be legally restrained from future violations. In lawsuits, employees can recover minimum and overtime wages owed, plus damages in an amount equal to the back wage recovery.

Fines for willful violations may be \$1,100 for each violation and for criminal violations may be \$10,000 for each violation, plus six (6) months in jail.



About SESCO

SESCO Management Consultants is the **oldest** and one of the largest human resource and employee relations consulting firms in the country. We are an employee-owned professional firm of management and employee relations specialists dedicated to providing results-oriented human resource solutions that contribute to our clients' people management goals.

Founded in 1945, SESCO's client base includes employers in all industries. We are very proud of our complete "toolbox" of consulting services which has been developed based on practical, hands-on experience.

Professional Service Agreement

SESCO's original service is that of our Professional Service Agreement. We have found over our sixty-three (63) years of providing professional service that clients and human resource professionals have the need to establish a reliable and cost effective, professional relationship to discuss day-to-day people problems, compliance issues, conduct special research, review systems, provide wage data and other information and resources on a daily basis.

SESCO clients appreciate this service because they can contact us as needed without additional charges or fees. It is truly an unlimited service and therefore, it is more cost effective than hiring a human resource assistant, paying legal fees or their personal time in performing these duties.

Although the Service Agreement can be customized per the client's needs, the Service Agreement typically provides the following:

- Unlimited telephone, e-mail, research, fax consulting services on a daily or as-needed basis. We are experts in federal and state employment regulations and offer assistance in handling issues such as terminations, discipline, performance, recruitment and retention, etc.
- *The SESCO Report*, SESCO's monthly newsletter to be mailed to all managers as elected.
- A free review of the organization's employee handbook on an annual basis to ensure that it remains legally attentive and people sensitive.
- Onsite visits. These visits can be customized to include onsite compliance assessments which is an assessment of all human resource functions and systems to determine compliance to federal and state employment regulations. The assessment is also designed to review current personnel systems to determine effectiveness and efficiency.

Other visits may include management training/round tables, mini employee surveys, special project work, etc.

- Free federal and state compliance posters.



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