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K&L Gates CLE Webinar, February 18, 2015

Avoiding Wage and Hour Violations in the Oil and Gas Industry

Written Materials by Amy L. Groff,
Michael A. Pavlick and Patrick M. Madden

Amy L. Groff
717.231.5876
amy.groff@klgates.com

Michael A. Pavlick
412.355.6275
michael.pavlick@klgates.com

Patrick M. Madden
206.370.6795
patrick.madden@klgates.com

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I. GENERAL WAGE AND HOUR PRINCIPLES (MINIMUM WAGE AND OVERTIME)

The federal Fair Labor Standards Act ("FLSA") was one of the earliest federal efforts to regulate the work environment and became effective on June 25, 1938. The FLSA is administered and enforced by the Wage and Hour Division of the United States Department of Labor ("DOL"). 29 U.S.C. § 204.

Among other things, the FLSA and many parallel state laws require the payment of a minimum wage for all hours worked. 29 U.S.C. § 206. The current federal minimum is $7.25 per hour. Many states have requirements that exceed this level.

Under the FLSA, employers must also generally pay nonexempt employees overtime at a rate of at least one and one half times the regular rate of pay for all hours worked in excess of 40 hours in a work week. 29 U.S.C. § 207. In contrast, the FLSA does not require an employer to provide premium pay for work beyond an employee's normal daily shift, work on holidays, or work on weekends. 29 C.F.R. § 778.102. For adults, there is no limit on overtime hours that employees may work, and overtime may be mandatory. 29 C.F.R. § 778.102. Some states have daily or other overtime requirements, and other states place limits on mandatory overtime.

Overtime requirements focus on the work week. The work week can be any fixed and recurring 168 hour period. 29 C.F.R. § 778.105. Because overtime requirements focus on the work week, hours cannot be averaged between work weeks. Thus, if an employee works 38 hours one week and 42 hours the next week, the employer must pay overtime for two hours in the second week even though the average number of hours worked during the two-week period is 40. 29 C.F.R. § 778.104.

Employers found liable for violations of the FLSA may be assessed damages for the unpaid overtime or minimum wages, liquidated damages equal to the amount of unpaid overtime or minimum wages, and reasonable attorneys' fees and costs. 29 U.S.C. § 216(b). Willful violations may carry criminal penalties upon conviction with fines of not more than $10,000 or imprisonment for not more than six months, or both. There are also civil money penalties (payable to the Secretary of Labor) for repeated and willful violations of minimum wage and overtime requirements. 29 U.S.C. § 216(e); 29 C.F.R. Part 578.

Employers must use caution when evaluating whether they comply with minimum wage and overtime requirements. Compliance with the FLSA may not be sufficient. Many states have requirements and those requirements do not always mirror FLSA standards. Thus, employers must be certain that they are complying with the FLSA and state-law requirements in every state where they have employees. A review of each state's specific laws and requirements is beyond the scope of these materials.

II. EMPLOYMENT RELATIONSHIP: INDEPENDENT CONTRACTORS VS. EMPLOYEES

The following factors, known as the "economic realities" test, should be considered when determining whether there is an employment relationship under the FLSA (and, thus, whether the requirements of the FLSA apply). These factors should be considered as a whole; no single factor is determinative.

1. The extent to which the work performed is an integral part of the employer's business. If the work performed by a worker is integral to the employer's business, it is more likely that the worker is economically dependent on the employer and less likely that the worker is in business for himself or herself. For example, work is integral to the employer's business if it is a part of its production process or if it is a service that the employer is in business to provide.

2. Whether the worker's managerial skills affect his or her opportunity for profit and loss. Managerial skill may be indicated by the hiring and supervision of workers or by investment in equipment. Analysis of this factor should focus on whether the worker exercises managerial skills and, if so, whether those skills affect that worker's opportunity for both profit and loss.

3. The relative investments in facilities and equipment by the worker and the employer. The worker must make some investment compared to the employer's investment (and bear some risk for a loss) in order for there to be an indication that he/she is an independent contractor in business for himself or herself. A worker's investment in tools and equipment to perform the work does not necessarily indicate independent contractor status, because such tools and equipment may simply be required to perform the work for the employer. If a worker's business investment compares favorably enough to the employer's that they appear to be sharing risk of loss, this factor indicates that the worker may be an independent contractor.

4. The worker's skill and initiative. Both employees and independent contractors may be skilled workers. To indicate possible independent contractor status, the worker's skills should demonstrate that he or she exercises independent business judgment. Further, the fact that a worker is in open market competition with others would suggest independent contractor status. For example, specialized skills possessed by carpenters, construction workers, and electricians are not themselves indicative of independent contractor status; rather, it is whether these workers take initiative to operate as independent businesses, as opposed to being economically dependent, that suggests independent contractor status.

5. The permanency of the worker's relationship with the employer. Permanency or indefiniteness in the worker's relationship with the employer suggests that the worker is an employee, as opposed to an independent contractor. However, a worker's lack of a permanent relationship with the employer does not necessarily suggest independent contractor status because the impermanent relationship may be due to industry-specific factors, or the fact that an employer routinely uses staffing agencies.

6. The nature and degree of control by the employer. Analysis of this factor includes who sets pay amounts and work hours and who determines how the work is performed, as well as whether the worker is free to work for others and hire helpers. An independent contractor generally works free from control by the employer (or anyone else, including the employer's clients). This is a complex factor that warrants careful review because both employees and independent contractors can have work situations that include minimal control by the employer. However, this factor does not hold any greater weight than the other factors. For example, a worker's control of his or her own work hours is not necessarily indicative of independent contractor status; instead, the worker must control meaningful aspects of the working relationship. Further, the mere fact that a worker works from home or offsite is not indicative of independent contractor status because the employer may exercise substantial control over the working relationship even if it exercises less day-to-day control over the employee's work at the remote worksite.

III. OVERTIME

Overtime must be paid to non-exempt employees who work more than 40 hours per week. It is a workweek standard; two weeks of a bi-weekly payroll cannot be averaged.

The overtime requirement is typically expressed as time and one-half (1.5x) of the "regular rate."

The key to calculating overtime is to accurately identify the regular rate. In the easiest case, the regular rate is the hourly rate; however, the regular rate often is not equivalent to the hourly rate.

A. Regular Rate

Characteristics of the regular rate:

It is not something to which the parties can agree in advance. The regular rate includes all remuneration for employment paid to, or on behalf of, the employee except payments specifically excluded by statute. 29 C.F.R. § 778.108

As the Supreme Court has explained, "Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate'…." *Id.* (quoting *Walling* v. *Youngerman-Reynolds Hardwood Co.,* 325 U.S. 419 (1945)).

The regular rate is calculated to be an hourly rate.

B. Regular Rate: A Suggested Approach

Computation of regular rate can be viewed as a three-step process:

1. Identify total amount paid to the employee in a given work week.

2. Determine which amounts must be included in the regular rate and which amounts may be excluded.

3. Divide the total amount of "includible" compensation by the number of hours worked to determine the regular rate.

The focus of the regular rate calculation is on the second of these three steps. In particular, it is important to properly determine which payments must be included in the regular rate and which payments need not be included in the regular rate, which will be described in more detail below.

C. Regular Rate Calculations

Example 1:

Employee is paid $10/hour and works 50 hours

Employee is entitled to $500 straight time (50 hours x $10)

Employee is entitled to $50 OT (10 hours x half time or $5)

Total compensation for week: $550

Example 2:

Employee is paid $10/hour and works 50 hours

Employee also paid a bonus of $100, which is added to the straight-time compensation

Employee is entitled to $600 straight time (50 hours x $10 + $100)

New regular rate is $12 ($600 divided by 50 hours)

Employee is owed $60 for OT (10 hours x $6)

Total compensation for week: $660

D. Payments Included in the Regular Rate

The following are examples of payments that must be included in the regular rate:

- Wages (whether paid at an hourly rate, day rate, piece work, fee/task basis, etc.)
- Bonus and incentive payments based on quality, quantity or efficiency
- Bonuses that depend on hours worked
- Value of awards and prizes won by employees for quality, quantity or efficiency in performance of usual work activities during regular work hours
- Commission payments
- Payments for meals, lodging and facilities
- Shift differentials, hazard pay, dirty work pay

E. Payments Excluded from the Regular Rate

The following are payments which may be excluded from the regular rate:

- Suggestion plan awards
- Discretionary bonuses*
- Employee referral bonuses
- Percentage bonuses (paid as percentage of total wages, including overtime wages)
- Certain employee benefit plan contributions
- Gifts
- Paid leave from work
- Reimbursement of expenses

- Severance pay
- Subsistence pay
- Talent fees paid to performers
- Premium pay, at a rate of at least time and one-half, for work on weekends, holidays, sixth or seventh day of the week, and (pursuant to contract) work outside of regular work hours

F. Regular Rate: Exclusion of Discretionary Bonuses

Bonuses may be excluded from total compensation when calculating the regular rate in only certain limited circumstances. *See* 29 C.F.R. §§ 778.208 - 778.224. One of those circumstances is when the bonus qualifies as a discretionary bonus.

A bonus qualifies as a discretionary bonus if both the fact that the payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of a period and not pursuant to any contract, agreement, or promise causing the employee to expect such payments regularly. *See* 29 C.F.R. § 778.211. A bonus is not discretionary if is it announced to employees to induce them to work more efficiently or remain with the company. For example, bonuses that are based on individual or group production, performance, quality of work, or an employee's remaining with the company until the time of payment would not qualify as discretionary bonuses. *See* 29 C.F.R. § 778.211(c).

G. Regular Rate: Addressing Multiple Rates

What happens when an employee during the course of a workweek works at jobs with differing wage rates? The employee's regular rate for that week is the weighted average of such rates, *i.e.*, her total includible earnings are totaled to determine her straight time compensation during the work week from all such rates, and that total is then divided by the total number of hours worked at all jobs.

While an employee working at more than one wage rate is normally paid a blended rate, the "regular rate," the regulations permit an alternative. When an employee is performing different types of work at different rates, the employer and employee may agree in advance that the employee will be paid the time and a half of the rate for the work he is actually performing during the overtime hours. The employer should obtain an agreement to that effect.

H. Other Forms of Payment

Apart from an hourly rate or a salary, an employee may be paid in other forms, including the following:

- Piecework
- Job rate
- Day rate
- Fee
- Task payment

These payments cover straight time payment for all hours worked, so only the additional half-time component of the overtime rate needs to be paid.

For pieceworkers, the employer may, in lieu of calculating a regular rate, pay time-and-one-half for overtime pieces. The employer should obtain an agreement to that effect.

IV. EXEMPTIONS

The FLSA and state laws provide a multitude of exemptions to and exceptions from their minimum wage and overtime requirements. *E.g.*, 29 U.S.C. § 213. Employers are allowed to make initial determinations as to whether employees fall within one of these exemptions or exceptions or are subject to the general overtime rule. No specific application or certificate is necessary. Employers, however, have the burden of proving that their employees actually fall within any claimed exemption.

Proper classification of employees is important to both employees and employers. Employees who are properly classified as exempt from overtime requirements may receive higher and more predictable compensation, may benefit from greater flexibility in their work schedules, and may have greater status within a business. Likewise, employers may benefit from employees who take an ownership interest in their jobs, increased flexibility in their workforce, and decreased unanticipated labor costs.

In contrast, improper classification of employees can have severe consequences. If misclassified, employees may lose overtime compensation and other rights to which they may be entitled. These may sometimes be recouped through subsequent litigation. On the other hand, if employers misclassify employees, the employers may face substantial liability for unpaid overtime compensation, liquidated or double damages, prejudgment interest, and attorneys' fees. 29 U.S.C. § 216. In some circumstances, employers incur such liability because they attempt to apply the wrong exemption, even though they could have used a different exemption or exception to avoid overtime liability.

THE "WHITE COLLAR" EXEMPTIONS

The most important, and often most troublesome, exemptions to the minimum wage and overtime requirements under federal and state law are the white-collar exemptions. The FLSA and most state laws provide exemptions for "any employee employed in a bona fide executive, administrative, or professional capacity." *E.g.*, 29 U.S.C. § 213(a)(1). The statutes typically do not define these terms; however, DOL and many state agencies have issued extensive interpretive materials on the subject. *E.g*., 29 C.F.R. Part 541.

To qualify for the executive, administrative, or professional exemptions, employees must satisfy a minimum compensation requirement and both a duties test and a salary basis test. When evaluating whether these tests are satisfied, an employer should consider both its formal policies and job descriptions and its actual practices. If either policies or practices fail to meet the required tests, the exemption may be lost. In addition, the DOL has identified certain categories of workers who are excluded from the white-collar exemptions. DOL Fact Sheet #17A (July 2008) (manual laborers, other blue collar workers, police, firefighters, paramedics, and other first responders are categorically excluded).

A. The Duties Tests

Both federal and state regulations require an analysis of specific activities and duties to determine whether employees are properly classified as executive, administrative, or professional.

1. Executive Exemption

- Must have a primary duty of management.
- Must supervise two or more full-time employees (or their equivalent).
- Must have authority to hire or fire (or determine the status of) other employees.

A determination of an employee's primary duty requires a consideration of all assignments and duties for which the employee is responsible and the amount of time dedicated to each of those responsibilities. Although an employee who spends over 50% of his or her time on exempt duties satisfies the primary duty requirement, time spent on exempt duties is not always a determinative factor. 29 C.F.R. § 541.700(b). Instead, under the regulations, primary duty means "the principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700(a). This requires a consideration of various factors other than time. An employer and the courts may also consider the relative importance of an employee's duties, the frequency with which the employee exercises discretion, whether the employee is relatively free from supervision, and whether the employee performs management and non-management duties concurrently. *See Baldwin v. Trailer Inns, Inc.*, 266 F.3d 1104 (9th Cir. 2001). For instance, a number of cases have found that managers in restaurants, small operations, and convenience stores are exempt even though they spend the majority of their time doing the same manual labor as other employees. *E.g.*, *Thomas v. Speedway Superamerica, LLC*, 506 F.3d 496 (6th Cir. 2007); *Palazzolo-Robinson v. Sharis Management Corp.*, 68 F. Supp. 2d 1186 (W.D. Wash. 1999) (finding that managers were exempt under the FLSA despite substantial manual work done while in charge); *Donovan v. Burger King Corp.*, 675 F.2d 516 (2d Cir. 1982); *Donovan v. Burger King Corp.*, 672 F.2d 221 (1st Cir. 1982); DOL Opinion Letter FLSA2006-29 (Sept. 8, 2006) (gasoline service station managers are exempt). But *see Pendlebury v. Starbucks Coffee, Inc.*, 2008 WL 763213 (S.D. Fla. Mar. 13, 2008) (conflicting evidence on the duties of store managers prevented summary judgment for either party).

An employee's primary duty must be management of the enterprise or a customarily recognized department or subdivision thereof. Management includes interviewing, selecting, and training employees; setting and adjusting rates of pay and hours of work; directing the work of employees; maintaining records for use in supervision or control; evaluating employees; handling employee complaints and grievances; disciplining employees; planning and assigning work; providing for the safety and security of employees; planning and controlling the budget; and monitoring or implementing legal compliance measures. 29 C.F.R. § 541.102. Management is a relatively broad term, *see Langley v. Gymboree Operations, Inc.*, 530 F. Supp. 2d 1297 (S.D. Fla. 2008) (finding that sales leadership is a managerial task), and employees may have a primary duty of management even though they are not the leaders of a department or subdivision, *Aguirre v. SBC Communications, Inc.*, 2007 WL 2900577 (S.D. Tex. Sept. 30, 2007) (finding that developmental and attendance coaches in a call center are exempt); 29 C.F.R. § 541.700(c) (assistant retail managers who spend more than 50% of time on nonexempt work may still have management as their primary duty).

Some courts have interpreted the requirement that an executive direct "two or more other employees" to require regular supervision of two full-time employees or the equivalent 80 hours of work. *Secretary of Labor v. Daylight Dairy Prods., Inc.*, 779 F.2d 784, 787-88 (1st Cir. 1985). However, both federal and state courts have concluded that this is not a rigid requirement, but should be applied flexibly. *Sattler v. Consolidated Food Management, Inc.*, 1999 WL 10664 (Wn. App. Jan. 11, 1999) (manager who stopped having two employees to supervise as operation shut down nevertheless met requirement); *Murray v. Stuckey's, Inc.*, 50 F.3d 564, 568-69 (8th Cir. 1995), *cert. denied*, 516 U.S. 863 (1995).

Finally, changes to the federal regulations in 2004 established an additional requirement that exempt executive workers must have the authority to hire or fire other employees, or their suggestions on employee status must be given particular weight. 29 C.F.R. § 541.100. Employee status means hiring, firing, promotion, and demotion and not merely disciplinary decisions.

2. Administrative Exemption

- Must have a primary duty of performing office or non-manual work directly related to management or general business operations of the employer or the employer's customers.

- Must exercise discretion and independent judgment on matters of significance.

- Does not apply to production workers.

An administrative employee's primary duty must involve office or non-manual work that is directly related to management or general business operations. This includes "work in functional areas such as tax; finance; accounting; 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." 29 C.F.R. § 541.201(b); *see Andrade v. Aerotek, Inc.*, 2010 WL 1244308 (D. Md. Mar. 30, 2010) (recruiter for staffing company was exempt). 29 U.S.C. § 541.203 provides examples of certain positions that typically meet this duties requirement, such as insurance claims adjusters, financial service employees, team leads on major projects, executive or administrative assistants to owners or senior management, human resources managers, and purchasing agents with authority to bind the company. *See Hein v. PNC Financial Servs. Group,* 511 F. Supp. 2d 563 (E.D. Pa. 2007) (securities brokers are exempt); Talbert v. American Risk Ins. Co., 2010 WL 5186768 (5th Cir. Dec. 20, 2010) (insurance agents are exempt); DOL Opinion Letter FLSA2009-28 (Jan. 16, 2009) (same). In addition, marketing and promotions (as compared to sales) work is also typically administrative in nature. *See Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010) (pharmaceutical sales representative is exempt); *Cash v. Cycle Craft Co*., 508 F.3d 680 (1st Cir. 2007) (customer service employee was exempt because his efforts went beyond sales work); DOL Opinion Letter FLSA2009-4 (Jan. 14, 2009). *But see Reiseck v. Universal Communications of Miami, Inc.*, 591 F.3d 101 (2d Cir. 2010) (advertising salesperson for free magazine is not exempt). In contrast, ordinary inspectors, examiners, graders, comparison shoppers, investigators, and employees engaged in production work usually do not qualify as administrative employees. 29 C.F.R. § 541.203.

The determination of whether administrative duties are an employee's primary duties parallels that discussed for executive employees. 29 C.F.R. § 541.206. Some courts have emphasized, however, that an employee's primary duty is not determined on a workweek by workweek basis. *Counts v. South Carolina Elec. & Gas Co*., 317 F.3d 453 (4th Cir. 2003). Thus, an administrative employee who happens to do non-exempt work for a few weeks does not lose his or her exempt status. *Id*.

An administrative employee must also exercise "discretion and independent judgment" with respect to "matters of significance." The exercise of discretion and independent judgment involves the comparison and evaluation of possible courses of conduct and acting on or making a decision after the various possibilities have been considered. 29 C.F.R. § 541.202. There is a distinction between employees engaged in administrative activities and employees engaged in production activities. *E.g.*, *Davis v. J.P. Morgan Chase & Co*., 587 F.3d 529 (2d Cir. 2009) (loan underwriters are not exempt). Despite this production/administration dichotomy, employees whose decisions are subject to review or who use manuals and guidelines may still be exempt. 29 C.F.R. § 541.202 &

.704; *see Renfro v. Indiana Michigan Power Co*., 497 F.3d 573 (6th Cir. 2007) (finding technical writers for power plant exercised sufficient discretion); *Renfro v. Indiana Michigan Power Co.*, 370 F.3d 512 (6th Cir. 2004) (finding that work planners are exempt because they exercise judgment within a highly regulated area).

Matters of significance refers to the level of importance or consequence of the work performed. Although somewhat amorphous, matters of significance may include the ability to select potential clients, the preparation and presentation of bids, the execution of contracts, and check-writing authority. *E.g.*, *Robinson-Smith v. GEICO*, 590 F.3d 886 (D.C. Cir. 2010) (automobile insurance damage adjusters exercise sufficient discretion and judgment to be exempt); DOL Opinion Letter FLSA2009-4 (Jan. 14, 2009) (convention sales manager is exempt); DOL Opinion Letter FLSA2006-34 (Sept. 21, 2006) (events coordinator is exempt). In some cases, an employee may merely recommend actions rather than actually taking the actions. DOL Opinion Letter FLSA2009-28 (Jan. 16, 2009); *Talbert*, 2010 WL 5186768 (finding that insurance claims agents exercised sufficient discretion because they made recommendations on coverage). Regardless, employees who do not exercise discretion and judgment on matters of significance are not exempt. *E.g., McElmurry v. U.S. Bank Nat'l Ass'n,* 2007 WL 2363305 (D. Or. Aug. 14, 2007); DOL Opinion Letter FLSA2005-8 (Jan. 7, 2005) (accounts receivable clerk did not make decisions of consequence and is, thus, not administrative exempt); DOL Opinion Letter FLSA2005-2 (Jan. 7, 2005) (same for junior claims adjuster).

Although most administrative employees perform work related to the management or general business operations of their employer, employees who provide advice to their employer's clients may also satisfy the duties requirements for the administrative exemption. *Webster v. Public School Employees of Wash., Inc.*, 247 F.3d 910 (9th Cir. 2001); *see also* DOL Opinion Letter FLSA2002-5 (Aug. 6, 2002) (administrative exemption applies even if employer is in the business of providing administrative assistance to its customers). More recently, however, DOL concluded that the exemption is not available if such clients are individuals. DOL Administrator's Interpretation No. 2010-1 (Mar. 24, 2010).

3. Professional Exemption

- A learned professional must do work requiring advanced knowledge in a field customarily acquired through prolonged instruction.
- A creative professional must do work requiring invention, imagination, originality, or talent in a recognized artistic or creative field.
- Must consistently exercise discretion and independent judgment.

Learned professionals' primary duty must consist of work requiring knowledge of an advanced type in a field of science or learning customarily acquired through a prolonged course of specialized instruction and study, and which requires the consistent exercise of discretion and judgment. 29 C.F.R. § 541.301; *e.g.*, *Pippins v. KPMG LLP*, No. 13-889-cv (2d Cir. July 22, 2014) (entry level accountants fall within the professional exemption). This exemption does not turn on whether a particular individual actually engaged in a prolonged course of specialized instruction. Rather, the question is whether such prolonged study is traditionally necessary for the position held by the employee. *See Young v. Cooper Cameron Corp*., 586 F.3d 201 (2d Cir. 2009) (design specialist was not professional exempt because position did not have any education requirement); DOL Opinion Letter FLSA2009-6 (Jan. 14, 2009) (finding that licensed pilots do not fall within the learned professional exemption, but noting DOL's non-enforcement policy in relation to pilots). Thus, a unique individual who advances into the professional ranks through hard work, self training, and experience may still be characterized as a learned professional. *E.g.*, *Pinillia v. Northwings*

Accessories Corp., 2007 WL 3378532 (S.D. Fla. Nov. 13, 2007); *Leslie v. Ingalls Shipbuilding, Inc.*, 899 F. Supp 1578 (S.D. Miss. 1995). Likewise, an employee with impeccable educational credentials may not qualify as a learned professional if the employee is working in a job that does not require such credentials.

Creative professionals' primary duty must consist of work that is original and creative in nature in a recognized field of artistic endeavor. This includes fields such as music, writing, acting, and the graphic arts. 29 C.F.R. § 541.302(b). DOL draws a clear distinction between artistic professionals, who rely on invention, imagination, and talent, and regular employees, who may obtain the same results through the application of intelligence, diligence, and accuracy. Only those employees who rely on talent and invention fall within this exemption. DOL Opinion Letter FLSA2005-26 (Aug. 26, 2005) (employees who apply, but do not design, vinyl wraps using advanced graphic arts technology are not exempt).

The determination of an employee's primary duty under the professional exemption is similar to the determination of primary duty for exempt executive employees.

In 2004, the new federal regulations seemingly eliminated the discretion and judgment requirement for learned professionals. 29 C.F.R. § 541.301. However, the regulations expressly state that work requiring advanced knowledge includes work requiring the consistent exercise of discretion and judgment. 29 C.F.R. § 541.301(b). Thus, DOL states that the new regulations "clarify and make no substantive changes in the primary duty test requirements for the professional exemption." DOL Opinion Letter FLSA2005-9 (Jan. 7, 2005) (reemphasizing that paralegals are not exempt).

4. Combination Exemption

The federal regulations specifically provide that work that qualifies for exemption under the executive, administrative, professional, computer, and outside sales exemptions may be tacked together for employees who have mixed job duties and responsibilities. Such combination exemptions are discussed in 29 C.F.R. § 541.708. *See Schmidt v. Eagle Waste & Recycling, Inc.,* 599 F.3d 626 (7th Cir. 2010) (waste disposal account representative fell within outside sales or combination exemption); *IntraComm. Inc. v. Bajaj*, 492 F.3d 285 (4th Cir. 2007) (finding that combination exemption does not apply if salary requirements are not satisfied).

B. Minimum Compensation Requirement

- Must be paid a minimum of $455 per week on a salary basis.

Federal regulations require a base salary for exempt executive, administrative, and professional workers of $455 per week ($23,660 per year). This rate is a minimum and cannot be prorated for part-time employees. DOL Opinion Letter FLSA2008-1NA (Feb. 14, 2008); DOL Opinion Letter FLSA2006-10NA (June 1, 2006). The salary requirement does not apply to a few exempt workers, such as attorneys and doctors.

In addition, the regulations establish a highly compensated employee exemption. This exemption applies to any worker who is paid $100,000 or more per year in total compensation and who performs any one or more exempt duties or responsibilities. 29 C.F.R. § 541.601; *see Ogden v. CDI Corp*., 2010 WL 2662274 (D. Ariz. July 1, 2010).

C. The Salary Basis Test

- Must pay a predetermined salary that is not subject to reduction based on the quality or quantity of work performed.

Employers that claim employees as exempt under the executive, administrative, and professional exemptions must, with minor exceptions, pay those employees on a salary basis. Payment on a salary basis involves more than simply payment of a salary. The salary basis test requires that a white-collar exempt employee be paid a predetermined amount, on a weekly or less frequent basis, that is not subject to reduction because of variations in the quality or quantity of work performed. 29 C.F.R. § 541.600 to .606.

The salary basis test rests on two basic premises. First, employees must receive their full salary for any week in which they perform any work without regard to the number of days or hours worked. Second, employees need not be paid for any work week in which they perform no work.

In the 1990s, class actions focused on violations of the salary basis test. This was true primarily because salary basis violations were often amenable to class determinations. Although the likelihood of class-wide litigation was reduced by the Supreme Court decision in *Auer v. Robbins*, 519 U.S. 452 (1997), class litigation is still likely if employers have explicit policies or established practices that violate the salary basis requirements. *See Block v. City of Los Angeles,* 253 F.3d 410 (9th Cir. 2001). If such violations exist, employers run the risk that certain groups or all of their white-collar employees will be treated as hourly employees and entitled to overtime compensation.

D. Correcting Improper Deductions

Even if an employer makes improper deductions in violation of the salary basis test, DOL has established a window of correction that provides two avenues to avoid the loss of exempt status. First, if the improper deductions "are either isolated or inadvertent," an exemption is not lost if the employer reimburses the employees for any improper deductions. 29 C.F.R. § 541.603(c). Second, if an employer has a clearly communicated policy prohibiting improper deductions and includes a complaint mechanism, reimburses employees for any improper deductions, and makes a good faith commitment to comply in the future, the employer will not lose the exemption unless the employer "willfully violates the policy by continuing to make improper deductions after receiving employee complaints." 29 C.F.R. § 541.603(d).

E. Tips to Avoid Salary Basis Issues

Employers should always expect to pay salaried exempt employees their full salary for any work week during which they engage in any work. Reductions in salary should not occur unless explicitly and unambiguously allowed.

An employer should be very cautious with any deductions from pay. Any incremental work (even for one-half hour) during a period of deduction will require payment of the employee's entire salary.

Employers should establish an overriding policy that explicitly states that no other employment policy shall be construed to allow any act, including any deduction from pay, that is inconsistent with or would defeat the salary basis of payment for exempt employees. The Ninth Circuit found that an employer may use such an overarching policy as a defense to establish that instances when deductions in pay do occur are incidental and not the policy or practice of the employer. *Hackett v. Lane County*, 91 F.3d 1289 (9th Cir. 1996).

JEOPARDIZING EXEMPTIONS: MISTAKES TO AVOID

A. Deductions

1. Permitted Deductions From Pay

The federal salary basis regulations provide that an employer may make certain deductions in a salaried exempt employee's pay without negating that employee's salaried status. Permitted deductions include:

Personal Absences — Deductions for personal absences from work of one day or longer are allowed. Personal absences do not include absences caused or engendered by the employer. Deductions for personal absences should be made in full day increments. DOL Opinion Letter FLSA2005-7 (Jan. 7, 2005).

Sickness Or Disability — Deductions for absences due to sickness or disability lasting one day or longer are permitted if done in accordance with a bona fide plan, policy, or practice of providing compensation for loss of salary occasioned by both sickness and disability. If an employee's absence is covered by a bona fide sick leave policy, the employee's pay may be reduced in one day increments and compensation under the sick leave policy substituted for the relevant days. Thus, if sick leave benefits are provided at a level equivalent to full time pay, then this provision will often have no impact on an employee's actual pay. If sick leave benefits are provided at a fraction of an employee's regular pay, then actual pay is impacted. Moreover, employees who exhaust benefits pursuant to a bona fide sick leave or disability plan may be subject to deductions in pay even though they are not eligible for replacement compensation. *See* DOL Opinion Letter FLSA2005-7 (Jan. 7, 2005); DOL Opinion Letter FLSA2003-3NA (May 5, 2003).

Disciplinary Suspensions — Deductions for unpaid disciplinary suspensions of one or more full days "imposed in good faith for infractions of workplace conduct rules" are allowed under federal law. 29 C.F.R. § 541.602(b)(5). However, many states do not allow such deductions. This exception focuses on employee misconduct and not on basic performance and attendance issues. *E.g., Watkins v. City of Montgomery, Alabama,* No. 13-11718 (11th Cir. Dec. 24, 2014).

Initial And Terminal Weeks — Deductions that result in partial payments for the initial and terminal weeks of employment are allowed. Employers need not pay exempt employees their full salary during the first and last week of employment. An unresolved issue, however, is what constitutes the terminal week of employment. Employers who suspend an exempt employee pending an investigation that ultimately results in termination should not adjust the employee's compensation for the last week during which the employee worked if the termination decision is made beyond the conclusion of that work week. The issue here is whether the employee's terminal week is the week when the employee is removed from the work site (the last week of work) or the week when the employee is notified of termination (the last week of employment).

FMLA Intermittent Leave – When an employee is eligible for intermittent leave under the FMLA, an employer may make deductions for partial day absences taken in accordance with that law. 29 C.F.R. § 825.206.

Week During Which An Employee Performs No Work — One of the general premises underlying the salary basis test is that an "employee need not be paid for any workweek in which he performs no work." Note, however, that if a salaried-exempt employee does any work (even for one-half hour) during the week, they must be paid for the entire workweek.

2. Prohibited Deductions From Pay

The federal salary basis regulations also identify certain circumstances where the white-collar exemptions may be lost if an employer makes deductions from an employee's established pay. Such prohibited deductions include:

Employer Shutdowns — Deductions for absences caused by the employer or its operating requirements are prohibited. DOL Opinion Letter FLSA2009-18 (Jan. 16, 2009). Note, however, that if employers shut down operations for an entire work week, employers may choose not to pay exempt employees their entire weekly salary pursuant to the general rule that employers need not pay exempt employees for any work week in which the employees perform no work. *Leslie v. Ingalls Shipbuilding, Inc*., 899 F. Supp. 1578 (S.D. Miss. 1995).

Civic Responsibilities — Deductions for absences involving responsibilities such as jury duty, attendance as a witness, and temporary military leave are prohibited. Under these provisions, employers may offset any compensation employees receive for their activities against the salary employers would otherwise pay.

Partial Day Absences — Deductions for partial day absences are generally not allowed. The implicit message in the personal absence and sick leave deduction provisions is that such deductions must be made in full day increments. Deductions for partial day absences are thus generally prohibited. Note, however, that special provisions allow for partial day deductions by public employers under prescribed circumstances.

Overpayment — Deductions for overpayments may be limited with respect to exempt employees. Generally, employers may deduct from or reduce pay for non-exempt employees for the purpose of recouping overpayments. In those instances, the employer can usually reduce the pay of a non-exempt employee at its discretion (subject to state law, including wage payment laws). Where there is an overpayment of wages, the principal may be deducted from the employee's earnings even if such deduction cuts into the minimum wage or overtime pay. An employer may not make, however, an assessment for administrative costs or charge any interest that brings the employee below the minimum wage. DOL Opinion Letter FLSA2004-19NA (October 8, 2004). However, with respect to exempt employees, deductions for amounts overpaid pursuant to a short term disability plan are not permitted pursuant to the salary basis test. It would be possible, though, for the employer to recover such overpayments from later disability payments, or through reductions in the employee's accumulated sick leave. DOL Opinion Letter FLSA (July 30, 1996). Additionally, there is some suggestion that deductions for overpayment of wages would not implicate the salary basis determination. DOL Opinion Letter FLSA (March 20, 1998) ("The overpaid employee's status as a pilot relative to the professional exemption . . . and the [Railway Labor Act] exemption would not affect [the employer's] ability to recoup money due to it because of previous advances of wages by reducing the employee's paychecks.").

B. Reductions in Leave Banks

Federal courts have generally drawn a distinction between deductions from pay and reductions in accrued leave banks. Thus, courts interpreting the salary basis regulation have generally agreed that employers may require salaried exempt workers to use leave time to offset their partial day absences. *E.g., Barner v. City of Novato*, 17 F.3d 1256 (9th Cir. 1994); *McDonnell v. City of Omaha*, 999 F.2d 293 (8th Cir.), *cert. denied,* 510 U.S. 1163 (1994). Similarly, an employer may require employees to use accrued leave time for absences due to plant shutdowns or operational concerns. DOL Opinion Letter FLSA2009-2 (Jan. 14, 2009); DOL Opinion Letter FLSA2009-18 (Jan. 16, 2009). This analysis applies to private employers under federal law. *Webster v. Public School Employees of Wash., Inc.,* 247 F.3d 910 (9th Cir. 2001).

An important issue that must be addressed by all employers is what happens when salaried exempt employees have exhausted their leave time and take further partial day absences. If the employer then allows for deductions from pay, the salary basis test is violated. *E.g., Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993). Moreover, at least one court has found that employers violate the salary basis test by maintaining records of negative compensatory time caused by partial day absences that an employee must pay back to the company. *See Klein v. Rush-Presbyterian-St. Luke's Medical Ctr.*, 990 F.2d 279 (7th Cir. 1993). Despite the *Klein* decision (which can be limited on its facts), employers should not run afoul of the federal salary basis test if they require reductions in leave banks but specifically assure that no deductions in pay will occur even if leave banks are exhausted. DOL Opinion Letter FLSA2009-2 (Jan. 14, 2009); DOL Opinion Letter FLSA2005-7 (Jan. 7, 2005).

C. Payment of Additional Compensation

The salary basis regulations require that white collar exempt employees be paid all or part of their compensation on a salary basis. Federal law expressly allows compensation in addition to an exempt employee's base salary. Although there was once some dispute as to whether salaried exempt employees may be paid additional compensation on an hour-for-hour basis, *e.g., Brock v. Claridge Hotel & Casino*, 846 F.2d 180 (3d Cir.), *cert. denied*, 488 U.S. 925 (1988), it is now clear that payment of straight-time or overtime wages to salaried exempt employees is permissible under the FLSA. *See Boykin v. The Boeing Co.*, 128 F.3d 1279 (9th Cir. 1997); *Fairris v. City of Bessemer*, 2007 U.S. App. LEXIS 25245 (11th Cir. Oct. 25, 2007). Similarly, payment of bonuses or commissions in addition to a base salary amount is consistent with the salary basis requirement. *See Hogan v. Allstate Ins. Co*., 361 F.3d 621 (11th Cir. 2004) (finding that insurance agents who received a guaranteed minimum plus commissions fell within the administrative exemption).

D. Furloughs and Other Reductions in Pay and Hours

As noted above, furloughs will not impact exempt status so long as the furlough is for an entire work week or a multiple thereof. However, if an employee performs any work during the furlough period, he or she must be paid his or her full salary.

The issue of reducing work weeks and/or hours worked with a corresponding reduction in salary is more opaque. As a general rule, employers may reduce the work week or the number of hours to be worked, with a corresponding reduction in salary, during a given week.

It goes without saying that such reductions should be prospective and not retroactive, and should not reduce the salary for that week below the statutory minimum. Importantly, any such reductions should not be a reaction to short-term business needs, nor should they be recurrent. Reductions done on a day-to-day or week-to-week basis will be closely scrutinized and are likely to run afoul of the salary basis requirement.

A leading case is *In re Wal-Mart Stores, Inc*., 395 F.3d 1177 (10th Cir. 2005). There, the employer paid exempt pharmacists a salary, but it sometimes reduced their base hours and correspondingly reduced their salaries. The court approved the practice relative to the issue of salary basis because the changes were not so frequent as to make the salary the functional equivalent of an hourly wage. In that case, the court determined that the employer rarely reduced salaries and the practice was not designed to circumvent the salary basis requirements of the FLSA. The court cited with approval several DOL opinion letters which permitted similar reductions. In one, DOL approved of an aerospace employer's plan, in an effort to reduce costs after already extensive layoffs, to have five four-day workweeks per year, with a corresponding reduction in salaries for exempt employees. DOL Opinion Letter FLSA (Nov. 13, 1970). In another, a mental health provider

proposed, in response to reductions in state spending, to reduce the work week from 40 to 32 hours with a commensurate reduction in pay. The DOL opined that such a reduction will not defeat an otherwise valid exemption. DOL Opinion Letter FLSA (March 4, 1997).

In contrast, the DOL recently determined an employer's hours reduction program to be contrary to the salary basis requirement. The employer, in some instances, required employees to take time off due to short-term business needs (low patient census). DOL disapproved of the scheme because it derived from short-term needs and the operating requirements of the employer's business. The reductions in salary, reasoned DOL, were due to day-to-day or week-to-week determinations of the employer's operating requirements. DOL Opinion Letter FLSA2009-14 (Jan. 15, 2009).

To summarize, reductions in salary which correspond with reductions in hours of work will not defeat an exemption unless a direct reaction to short-term business needs.

E. Fee Payments

Administrative and professional employees may be paid on a fee basis. A fee, generally speaking, is an agreed-to sum for a single job regardless of the amount of time it takes to complete the job. It resembles a piecework rate, but a fee differs in that it is paid for a kind of job that is unique rather than for a series of jobs repeated indefinitely and for which payment on an identical basis is made over and over again. Payments based on the number of hours or days worked and not on the accomplishment of a single task are not considered fees.

Determining what is and what is not a fee may be difficult. Consider two cases, each which involve similar payment schemes. In *Elwell v. University Hosp. Home Health Care Servs.*, 76 F.Supp.2d 805 (N.D. Ohio, 1999), the court held that the defendant was not compensating the plaintiff on a fee basis within the meaning of 29 C.F.R. §541.313 (which was where the former fee regulation was codified). The plaintiff was required to travel to patients' homes to administer nursing care and was paid on a per visit basis. She was also compensated at an hourly rate of pay for attending required meetings and during on call duty. The pay per visit arrangement paid the plaintiff an agreed sum for each patient she visited, as well as for related activities, including travel time, documentation time and discussions with medical and health personnel, the patient, and the patient's family. Evidence showed that the employer did not pay the plaintiff an agreed sum regardless of time spent on a particular task, but used time estimates for a flat payment amount with an enhancement by an hourly rate if a visit took over two hours. In a decision consistent with opinion letters which hold that a "per visit" payment is not a fee, the court held that the payment was not a fee. The court considered the nature of plaintiff's job and determined that her performance varied from day to day but she was basically doing the same nursing care depending on the needs of the patient. Consequently, the court found that the performance of the job, while it may have differed from day to day, was not unique.

However, in *Fazekas v. Cleveland Clinic Foundation Health Care Ventures, Inc.,* 204 F.3d 673 (6th Cir. 2000), the court held that home healthcare nurses paid on a per visit basis were paid a fee. The plaintiffs were required to make at least 25 patient visits and be on call at least 15 hours per week, and each nurse was compensated on a per visit basis. Each nurse received a different fee based upon the extent of each visit. The nurses received $30 for each home visit when not on call and $32 per visit when on call. The nurses received $37 for each home visit requiring any infusion therapy and $50 for each initial assessment of a new patient. These payments included compensation for all attendant transportation and administrative duties connected with the actual visits themselves. The court found that various factors contributed to making each patient's course of treatment unique, stating, "[I]t appears to us that the work performed during each home health care visit, given the number of different circumstances unique to each patient's treatment plan, …, is

closer to the work performed by a singer, …, or that of an illustrator, …, than it is to the payments for "piecework" described in the regulations as payments not on a fee basis." *Id*. at 679. The court stated that not all home healthcare nurses perform unique duties or provide unique services, but that based on the facts, the home healthcare nurses at issue had unique occupations and concluded that the fee per visit compensation fit within the meaning of fee basis.

F. Additional Job Duties

An employee who is deemed exempt is not exempt "for life." Rather, the employee's job duties may develop or change over time in such a manner as to affect the employee's exempt status. Employers should be cognizant of changes in job duties and consistently evaluate positions relative to the "primary duty" requirement for white collar exemptions. The primary duty rule requires that the employee's primary duty be the performance of exempt work. A duty is primary if it is the principal, main, major, or most important of the employee's duties. Factors to consider include: relative importance of the exempt duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid others for the non-exempt work.

A useful (but not dispositive) rule of thumb is the 50 percent test—is the employee performing 50 percent or more exempt work? If so, the employee will generally satisfy the primary duty requirement. Keep in mind, though, that the 50 percent rule of thumb is a guideline, and there may be instances where an employee performs significantly less exempt work than 50 percent and still be exempt.

Occasional, infrequently recurring tasks that are non-exempt in nature but cannot practically be performed by non-exempt employees will be considered exempt work if they are considered the means for an exempt employee to carry out his or her exempt work.

V. RECORDKEEPING

The DOL has adopted regulations that address recordkeeping requirements. *See* 29 C.F.R. Part 516; 29 C.F.R. §§ 785.46 to .48. When adopting time recording policies and procedures, employers should consider both what is legally permissible and what is necessary to minimize the likelihood and severity of class litigation.

An employer has a duty to assure that these records are detailed and accurate. 29 C.F.R. § 785.13. This duty may not be delegated to employees. Thus, policies regarding time entry, reporting of time, and following posted schedules are helpful but are not a defense to claims for uncompensated hours. Neither are policies that prohibit unauthorized work or overtime. Likewise, time cards or time records by themselves are not necessarily sufficient evidence of hours actually worked. 29 C.F.R. § 785.48.

Under federal law, employers must maintain most records for three years, 29 C.F.R. § 516.5, although some source documents and other basic information may be discarded after two years, 29 C.F.R. § 516.6. ***Even though the FLSA allows employers to discard some source materials after two years, employers should maintain all records for three years if this is practicable.*** Because the statute of limitations may not run after the two-year period, it is important for employers to maintain source materials to defend against possible wage claims. These materials may include records created or signed by the employee that can be used for impeachment purposes.

If employers fail to maintain required (or accurate) records, then courts shift the burden of proof in subsequent litigation. Essentially, courts allow employees to provide generalized and

unsubstantiated testimony as to the hours they believe they worked and require that employers disprove the testimony. *E.g., Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680 (1946). Thus, a court or jury may award damages even though the measure of damages is imprecise. *E.g., Reich v. Stewart*, 121 F.3d 400 (8th Cir. 1997).

A. Basic payroll recordkeeping requirements:

- Name in full
- Home address
- Date of birth
- Sex and occupation
- Workweek
- Regular rate
- Wage basis
- Hours worked (total each workday and workweek) by non-exempt employees
- Straight time earnings
- Weekly overtime pay
- Deductions from and additions to wages
- Pay period covered
- Wages paid
- Retroactive payments

B. Preservation of Records

Three-Year Retention Required:

- Payroll and other records containing information required by recordkeeping regulations
- Sales and purchase records relevant to determining whether an enterprise meets FLSA's "business volume" test
- Collective bargaining agreements that set terms under which facilities are provided to employees
- Plans, trusts, employment contracts and union contracts involving exclusions from regular pay rates
- Contracts and memoranda relating to "Belo" contracts that guarantee fixed weekly pay for fluctuating hours

- Agreements basing overtime pay on piecework, hourly or basic rates
- Certificates and notices mentioned in recordkeeping regulations

Two-Year Retention Required:

- Work Schedules
- Wage Rate Tables
- Order, Shipping and Billing Records

C. Posting Requirements (Federal)

NOTICE	POSTING REQUIREMENTS
Consolidated Omnibus Protection Act (COBRA) Job Loss	Employers engaged in interstate commerce; state and local governments, federal employees, employment agencies, and labor organizations with 20 or more members
Consolidated EEO "Equal Employment Opportunity Is the Law - Title VII of the Civil Rights Act of 1964 - The Americans with Disabilities Act of 1990 - The Age Discrimination in Employment Act of 1967 - The Equal Pay Act of 1963 - The Genetic Information Nondiscrimination Act of 2008	Employers engaged in interstate commerce; state and local governments, federal employees, employment agencies, and labor organizations with 15 or more members
Uniformed Services Employment and Reemployment Rights Act of 1994	Non-federal employers
Fair Labor Standards Act – Notice to Employees	Employers with employees subject to the Act
Employee Rights for Workers with Disabilities Paid at Special Minimum Wages (FLSA Section 14(c)	Employers paying special minimum wages
National Labor Relations Act	Most private-sector employers
Occupational Safety and Health Act – OSHA Job Safety & Health Protection	Most private-sector employers
Employee Polygraph Protection Act of 1988 - Notice	Most private-sector employers

Family and Medical Leave Act of 1993	Private employers with 50 or more employees and public employers
Combined EEOC-OFCCP	Federal government contractors and subcontractors
Notification of Employee Rights Under Federal Labor Law	Federal government contractors and subcontractors (federal contracts and subcontracts involving collective bargaining agreements and contracts involving purchases of $100,000 or more)
Executive Order 11246	Federal government contractors, subcontractors and contractors working on federally-assisted construction contracts
Executive Order 13201 – Beck Notice	Federal contractors and subcontractors with 15 or more employees
McNamara-O'Hara Service Contract Act	Private employers with government agency service contracts in excess of $2,500
Vietnam-Era Veterans' Readjustment Assistance Act	Employers with federal contracts of $100,000 or more
Davis-Bacon Act	Employers working on public construction projects in excess of $2,000
Walsh-Healey Act	Employers with federal contracts or subcontracts worth $10,000 or more

VI. WAGE AND HOUR INVESTIGATIONS: THE PROCESS

A. Background

DOL has authority to enter establishments and inspect records. It also has authority to investigate and gather data, transcribe records, question employees and investigate facts, conditions, practices and matters deemed necessary or appropriate to determine whether there has been a violation or to aid in its enforcement. 29 U.S.C. § 211.

An investigation (also referred to as an audit) can be initiated by a complaint, or an employer can be randomly selected for investigation. Issues that affect only one or a small number of employees (*e.g.*, payment of final paycheck) may be handled by what DOL refers to as a conciliation. An FLSA investigation will normally include all aspects of FLSA compliance, even thought the complaint may have been limited to a discreet issue.

In addition to review of minimum wage, overtime and recordkeeping issues, DOL will also investigate compliance with federal child labor standards.

B. Overview of the Investigation

The investigator will either schedule an appointment to begin an investigation or appear unannounced. It is advisable to consult with legal counsel at this point.

The investigation will likely include:

- an initial conference
- a tour of the establishment, depending on the type of business
- review of time and payroll records
- employee interviews
- a final conference

In addition to traditional payroll and employment records, the investigator might request order, shipping and billing records as proof of interstate commerce, to establish coverage under the FLSA.

Investigators may also look for compliance with posting requirements. Covered employers are required to display the minimum wage and overtime poster. 29 C.F.R. § 516.4.

At the close of the investigation, typically during the final conference, the investigator will present findings, discuss potential penalties and seek an agreement for future compliance and payment of back wages, if applicable. The employer may want to have legal counsel present at the final conference.

C. Payment of Back Wages and Penalties

It is not uncommon for investigators to ask the employer to calculate the back wages due to its employees. DOL supervises the payment of back wages to employees. If back wages are found due, the investigator will present (and if he or she does not, the employer should request), DOL's back wage receipt forms (Form WH-58), which contain a waiver of the employee's right to sue.

DOL is entitled to pursue and collect back wages even if the affected employee cannot be located.

DOL assesses civil penalties for repeat or willful violations of the minimum wage and overtime requirements and for any violation of the child labor standards.

Any subsequent violation of minimum wage or overtime standards can be considered a "repeat" violation, even though the violation resulted from a different practice. For example, the following situation would be considered a repeat violation. An employer improperly deducted time from hours worked when employees took short breaks of 15-minutes, resulting in a violation of minimum wage and overtime standards. Several years later, DOL finds that a couple employees are misclassified as salaried, exempt, resulting in unpaid overtime. DOL could assess a penalty for repeat FLSA violations.

Employers are notified of the amount of penalties by letter from the District Director. The assessment can be appealed, but the employer must pay close attention to the deadline for doing so, which is set forth in the assessment letter.

D. Court Proceedings

If the employer does not agree to pay back wages found due, DOL can bring suit on behalf of affected employees or can notify employees of their right to sue. There is an increasing trend in filing FLSA collective actions. These suits have tripled since the 1990's.

Damages in a civil suit can include the recovery of back wages, liquidated damages in an equal amount, and attorneys' fees. 29 U.S.C. § 216(b).

In a civil suit, liquidated damages must be awarded unless the court in its "sound discretion" concludes that the employer acted in "good faith." 29 U.S.C. § 260. This "good faith" is not as heavy a burden as the "absolute good faith" defense.

There is a very narrow "absolute good faith defense" for employers, which is difficult to prove. It is a complete defense that applies only when an employer acted in good faith in reliance on, and in actual conformity with, a written interpretation, approval, ruling, order or regulation of the Wage and Hour Division Administrator. *See* 29 C.F.R. §§ 790.13 - 790.19.

The statute of limitations is 2 years from the date suit is filed; however, it is 3 years if the violation is "willful." 29 U.S.C. §255(a). "Willful" means more than merely negligent. *McLaughlin v. Richland Shoe Co*., 486 U.S. 128 (1988).

DOL may also bring criminal actions. Potential criminal penalties include fines and up to 6 months imprisonment.

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