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This booklet should not be construed as legal advice or legal opinion on any specific facts or circumstances. You are urged to consult competent counsel concerning your particular situation and any specific legal questions you may have. Employers are specifically encouraged to consult an attorney to determine whether they are subject to state requirements that extend beyond the scope of this booklet.

T

his is one of two booklets in our series dealing with the Fair Labor Standards Act. The other covers the basics of the minimum wage and overtime requirements. In this booklet, we look at several of the key exemptions from the law's requirements and explain the enforcement and recordkeeping provisions.

As with any brief overview of a complex subject, this is no substitute for competent legal counsel. Rather, our goal is to provide a clear explanation, in non-technical language, of the highlights of this important area of the law.

EXEMPTIONS FROM THE FLSA'S REQUIREMENTS

The FLSA exempts certain types of employees from some or all of its requirements. The U.S. Labor Department and the courts apply these exemptions very narrowly. If an exemption is challenged, it is the employer's burden to prove that every element of a claimed FLSA exemption applies to the employee for whom it is asserted. There are many misconceptions about how exemptions work, and improperly applied exemptions are among the most-common FLSA violations.

Here is a summary of the exemptions most frequently relied upon — and most often in dispute.

A. The “White Collar” Exemptions

The so-called “white collar” exemptions from the FLSA's minimum wage, overtime, and timekeeping provisions apply to those employed in a bona fide executive, administrative, or professional capacity, to certain computer employees, or to “outside” salespersons. Whether these exemptions apply to a particular person depends in part upon what kind of work he or she actually performs, rather than whether the employee is well-paid, well-educated, well-thought-of or highly skilled, or whether the employee has a high-sounding job title or is in a position covered by an impressive-looking job description. Effective August 23, 2004, the requirements for these exemptions were changed significantly.

Whether a person is an exempt “white collar” employee also depends upon how he or she is paid, with few exceptions. Exempt individuals generally must be paid on a “salary basis,” described below, at a rate of at least \$455 per week. But the reverse is not true: Salaried employees are *not* necessarily exempt.

1. Executive Employees

Generally, an executive employee's primary duty (as a rule of thumb, more than 50% of his or her time) must be managing the organization or a customarily recognized department or other subdivision of the organization. “Management” can mean lots of different things, but it generally includes activities such as being involved in hiring, directing, evaluating, disciplining, and firing employees; deciding what work will be done; planning, assigning, and prioritizing work; determining what

materials will be used, bought, stocked, or sold; and so on.

The executive must customarily and regularly direct the work of at least two or more other full-time employees or the equivalent (“full-time” usually means 40 hours a week but can be less in particular instances).

The executive must also have the authority to hire or fire, or must at least make suggestions and recommendations that are given particular weight as to the hiring, firing, advancement, promotion, or any other significant change of status of other employees.

2. Administrative Employees

A person whose primary duty is performing office or nonmanual work directly related to the employer’s management or general business operations (or to the management or general business operations of the employer’s customers) can be an administrative employee.

This work might include things like advising management, being responsible for long-term planning, consulting, negotiating, participating in the formulation of business policy, making decisions affecting business policy, executing or carrying out business policy, and the like. The work must affect matters of consequence or of substantial importance.

The administrative employee’s work must also include the exercise of discretion and independent judgment with respect to matters of significance. This is usually said to consist of evaluating possible courses of action and then, free from immediate direction, taking or effectively recommending one of those actions. Judgment and discretion must involve more than simply applying well-established techniques, clear procedures, or specific or set standards.

A person can also be an exempt administrative employee if his or her primary duty consists of performing administrative functions directly related to academic instruction or training in an educational establishment or in a department or subdivision of that establishment.

Administrative employees generally must be paid on a “salary basis,” but they can instead be paid on a “fee basis,” a

method that is both highly arcane and rarely used (and which is therefore not covered in this booklet). An alternative for academic administrative employees is payment on a “salary basis” at a level which is at least equal to the entrance salary for teachers in that educational establishment.

3. Professional Employees

The professional exemption applies to an employee who has as his or her primary duty 1) work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction (the “learned” professional), or 2) work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor (the “creative” professional). The work of a learned professional must be predominantly intellectual and must include the consistent exercise of discretion and judgment.

The professional exemption also applies to an employee whose primary duty is teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge, who is employed and engaged in this activity in an educational establishment by which he or she is employed. A separate prong of the professional exemption applies to a holder of a valid license or certificate permitting the practice of law or medicine (or any of their branches) who is engaged in that practice, as well as to medical interns or residents holding the requisite degree.

Professional employees generally must be paid on a “salary basis,” although the little-used “fee basis” alternative exists for them as well. Employees qualifying for exemption as teachers, lawyers, or medical professionals need not be paid in any particular way.

4. Computer Employees

This exemption applies to computer systems analysts, computer programmers, software engineers, or similarly skilled employees whose primary duty consists of certain kinds of work.

The primary duty of such an employee must be:

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

- the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
- the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
- a combination of the above duties, the performance of which requires the same level of skills.

Exempt computer employees generally must be paid on a “salary basis,” although the little-used “fee basis” alternative also exists for them. However, exempt computer employees can also be paid on an hourly basis, if their hourly rate is at least \$27.63 per hour.

5. Outside Sales Employees

To be an exempt outside salesperson within the FLSA’s meaning, an employee’s primary duty must be making sales or obtaining orders or contracts either for services or for the use of facilities for which a client or customer will pay. The employee must also be customarily and regularly engaged away from the employer’s place(s) of business in doing those things.

The exemption relates only to *outside* selling. It generally does not include inside selling, telemarketing, sales made through the mail, sales made through the Internet, and so on.

An outside salesperson may engage in activities directly related to his or her own sales or solicitations, such as drawing up sales contracts in the office, telephoning customers to schedule sales visits, or making incidental deliveries and collections, without affecting the exemption. However, the exemption typically does not apply to employees who are delivering things someone else has sold, or to employees who are either promoting sales from a general standpoint or promoting sales to be made by other people.

A person qualifying for this exemption need not be paid in any particular way.

6. “Highly Compensated” Employees

An employee also qualifies for “white collar” exempt status if he or she:

- is paid on a “salary basis” or a “fee basis” at a rate of at least \$455 per week;
- has “total annual compensation” of at least \$100,000 (including both salary and commissions, nondiscretionary bonuses, and/or other nondiscretionary compensation earned in a 52-week period);
- has a primary duty that includes performing office or non-manual work; and
- customarily and regularly performs any one or more exempt duties or responsibilities of an executive, administrative, or professional employee.

7. “Combination” Exemptions

Sometimes, an employee’s primary duty is a combination of work which meets more than one of the primary-duty tests for the “white collar” exemptions. Work which is exempt under one of those exemptions does not undercut work qualifying for another one of them, so the employee might qualify for more than one of the “white collar” exemptions. Of course, the employee still has to meet all the other tests for exempt status for each of the claimed exemptions.

B. The “Salary Basis” Issue

Paying a person on a “salary basis” generally means that he or she regularly receives each pay period a fixed, predetermined amount of money for every workweek in which the employee performs *any* work, without regard to the number of days or hours worked. Ordinarily, salary deductions may not be made from the salaries of “white collar” exempt employees based upon the quality or quantity of the work they perform. On the other hand, the salary need not be paid for a workweek in which the employee performs *no* work.

The “salary basis” test is not met where the pay method is, for example, purely hourly or solely by commissions, or where impermissible deductions are made. However, U.S. Labor Department regulations outline certain circumstances under which deductions from the salary of an exempt employee *are* allowable:

1. Personal Days Off

Salary deductions may be made for absences of one or more whole days due to personal reasons other than the employee’s sickness, accident, or disability.

2. Sick Days Off

Salary deductions may be made for absences of one or more whole days caused by the employee’s sickness, accident, or disability, *if* this is done in conjunction with a bona fide sick-pay plan. Deductions may be made before the employee is qualified for compensation under the plan and after the employee has exhausted the plan’s benefits.

If there is no bona fide sick-pay plan, no deductions may be made for days missed due to sickness, accident, or disability, unless the employee is off for a whole workweek, or unless the absence falls under a special federal Family and Medical Leave Act exception.

3. First And Last Weeks Of Employment

Salary deductions may be made so as to pay only a proportionate part of an employee’s full salary for time actually worked in his or her first workweek or last workweek of employment.

4. Offsets For Jury/Witness/Military Pay

Salary deductions may be made to offset any amounts received by an employee as jury fees or witness fees, or as military pay. However, deductions may not be made for *absences* caused by jury duty, attendance as a witness, or temporary military leave, unless the employee is off for one or more entire workweeks.

5. Safety-Rule Violations

Disciplinary salary deductions may be made as penalties imposed in good faith for violating safety rules of *major significance*.

6. Conduct-Rule Violations

Salary deductions may be made to reflect an unpaid disciplinary suspension of one or more whole days imposed in good faith for infractions of workplace conduct rules, if the suspension is imposed under a written policy applicable to all employees. The U.S. Labor Department says that the exception is a narrow one having to do only with “serious” misconduct.

7. FMLA Leave

Salary deductions may be made so as to pay only a proportionate part of an employee’s full salary for time actually worked in a workweek in which he or she takes unpaid leave under the federal Family and Medical Leave Act.

8. Rules Applying To All Salary Deductions

Most deductions permitted by these exceptions may be computed at the hourly or daily equivalent of the exempt employee’s full weekly salary, or in another amount proportional to the time missed. Major-safety-rule penalties can be imposed in any amount, and deductions to offset sums received as jury or witness fees or as military pay are, of course, to be made in those amounts.

One question employers sometimes ask about salary deductions is, “What happens if we make improper ones?” The general answer is that this causes the exemption to be lost if the circumstances show that the employer did not intend to pay on a “salary basis.” And an “actual practice” of making improper deductions shows that the employer had no such intent. Among the factors relevant to the “actual practice” issue are:

- the proportion of improper deductions made as compared to the occasions on which they might have been made;

- the time period during which the deductions are made;
- the number and geographic location of the employees whose salaries were improperly reduced;
- the number and geographic location of the managers responsible for making the improper deductions; and
- whether the employer has a “clearly communicated policy” permitting or prohibiting the improper deductions.

Isolated or inadvertent improper deductions will not destroy these exemptions if the employer reimburses employees for them.

In addition, under a regulatory “safe harbor,” improper deductions will not destroy these exemptions if:

- there is a clearly communicated policy that both 1) prohibits the improper pay deductions specified in the general “salary basis” rule, and 2) contains a mechanism for making complaints about such deductions;
- employees are reimbursed for any improper deductions; and
- the employer makes a good-faith commitment to comply with the “salary basis” rules in the future.

As one would expect, the safe harbor is unavailable if the employer fails to reimburse the improper deductions or willfully violates its policy by continuing to make improper deductions after receiving employee complaints.

Improper deductions which are neither 1) isolated or inadvertent, nor 2) covered by a valid safe harbor will destroy these exemptions for the time period during which the deductions were made for employees in the same job classification(s) working for the same managers responsible for the actual deductions.

You should be very careful to see that the “salary basis” of pay is properly maintained. A failure to do so can mean that employees treated as exempt will later be found to have been non-exempt, which typically results in substantial liability.

C. Other Exemptions

There are a number of other exemptions from one or more of the FLSA's requirements. Some of these are available only in obscure industries (such as the one applying to people making particular kinds of wreaths, for example). These exemptions typically are subject to multiple conditions, limitations, and interpretations. It is not possible to do more than briefly list some of the exemptions here.

1. Exemptions From The Minimum Wage, Overtime, And Timekeeping:

- employees of certain amusement or recreational establishments, organized camps, or religious and nonprofit educational conference centers;
- employees working in certain fishing activities;
- certain agricultural employees;
- employees who are exempted by a proper regulation, order, or certificate as a learner, apprentice, messenger, worker with a disability, or as students employed under particular circumstances;
- employees engaged on a casual basis in domestic service employment to provide babysitting services, and employees employed in domestic service to provide companionship services for certain incapacitated individuals;
- employees who deliver newspapers to consumers.

2. Exemptions From Overtime Only

- drivers, drivers' helpers, loaders, and mechanics as to whom the U.S. Secretary of Transportation has the power to establish qualifications and maximum hours of service;
- employees of certain railroads;
- employees of certain air carriers;

- seamen;
- salesmen, partsmen, or mechanics primarily engaged in selling or servicing automobiles, trucks, or farm implements, if employed by a nonmanufacturing establishment primarily engaged in selling such vehicles or implements to ultimate purchasers;
- salesmen primarily engaged in selling trailers, boats, or aircraft if employed by a nonmanufacturing establishment primarily engaged in selling trailers, boats, or aircraft to ultimate purchasers;
- certain drivers or drivers' helpers making local deliveries;
- some employees employed in agriculture or forestry;
- taxicab drivers;
- persons employed in domestic service in a household and who reside in that household;
- persons employed by a motion picture theater.

3. Partial Exemptions From Overtime

- an employee of a retail or service establishment need not be paid overtime if:
 - a. his or her regular rate of pay in an overtime workweek is more than 1.5 times the minimum wage; and
 - b. over 50% of the employee's earnings in a representative period (of not less than one month) comes from commissions.
- a hospital or residential-care home need not pay overtime after 40 hours worked in 7-day workweek worked by healthcare employees:
 - a. who receive at least 1.5 times their regular rates of pay for hours worked over eight in a workday or over 80 hours in a 14-day work period, whichever is more; and

- b. who agree or understand that they will be paid in this way before the work is done.
- an employee being provided remedial education by an employer for a total of no more than 10 hours over 40 in a workweek if the education:
 - a. is provided to employees who lack a high-school diploma or educational attainment at the eighth-grade level;
 - b. is designed to provide reading and other basic skills at an eighth-grade level or below; and
 - c. does not include job-specific training.

RECORD-KEEPING

U.S. Labor Department regulations adopted under the FLSA impose recordkeeping obligations too numerous and detailed to be reproduced here. As an example, with respect to an employee subject to both the FLSA's minimum wage and overtime provisions, an employer must maintain the following information:

- personal information, including the employee's name, home address, occupation, sex, and birth date (if under 19 years of age);
- the hour and day when the workweek begins;
- total hours worked each workday and each workweek;
- the total daily or weekly straight-time earnings;
- the regular hourly pay rate for any workweek or work period when overtime is worked;
- the total overtime pay for the workweek or work period;
- any deductions from or additions to wages;
- total wages paid each pay period; and
- the date of payment and pay period covered.

Special provisions also exist, such as those applying to employees who are exempt in one way or another, or who work in certain occupations (such as homeworkers, for instance), or who work under particular kinds of pay arrangements, or who receive room or board.

The FLSA requires employers to keep the following records for three years: individual employment contracts; collective bargaining agreements; records on employees' wages and hours; and records showing the employees' sales and purchases.

Employers must keep the following for two years: basic employment and earnings records; wage-rate records; order, billing and shipping records; and records of deductions from or additions to wages paid. You generally do not have to keep records in any particular form.

ENFORCEMENT The FLSA prohibits an employer from:

- transporting or selling goods produced by employees working in violation of the FLSA's minimum wage, overtime, or child labor provisions;
- violating the FLSA's minimum wage, overtime, or child labor provisions;
- retaliating in any manner against an employee because the individual filed a complaint or instituted or testified in an FLSA proceeding; or
- violating any of the FLSA's recordkeeping provisions.

Employers who violate the FLSA can be liable for such things as:

- the unpaid minimum wage or overtime compensation;
- an equal amount as "liquidated damages";
- civil money penalties imposed by the U.S. Labor Department of up to \$1,100 for each "repeated" or "willful" minimum wage or overtime violation;

- civil money penalties imposed by the U.S. Labor Department of up to \$11,000 for each child labor violation;
- court injunctions requiring compliance with the FLSA and/or which prohibit an employer from shipping so-called “hot goods” made under FLSA-violating conditions until the FLSA problems are remedied;
- “reasonable” attorney’s fees and costs; and/or
- criminal penalties (up to a \$10,000 fine for the first conviction, imprisonment for up to six months if convicted again).

The U.S. Secretary of Labor is authorized to investigate alleged FLSA violations and does so through the U.S. Labor Department’s Wage and Hour Division. The Secretary of Labor may also sue an employer.

Perhaps the fastest-growing FLSA threat to employers is the prospect of private lawsuits by one or more current or former employees. These lawsuits may be pursued as “collective actions” in which multiple plaintiffs join. The individuals bringing the suit are often allowed to send out notices to other current or former “similarly situated” employees inviting them to enter the lawsuit. Through this mechanism, a lawsuit which begins with one employee can mushroom into a company-wide action involving tens, hundreds, or even thousands of employees.

WHAT SHOULD AN EMPLOYER DO?

More than ever before, compliance and prevention is the key to dealing with the FLSA's requirements. Every employer should immediately evaluate how it is doing in those areas that commonly lead to compliance problems and potential liability:

A. Pay Every Nonexempt Employee The Required Minimum Wage

Review all payroll deductions or employee payments, repayments, or work-related purchases to ensure that they do not cut your employees' pay to below the required minimum wage. For example, determine how your organization handles the cost of required uniforms and uniform maintenance, and be aware of whether your organization requires deductions or repayments for cash shortages or inventory shortages. If so, evaluate whether these sums unlawfully reduce your employees' wages below the required minimum wage.

B. Pay Every Nonexempt Employee All Required Overtime

Make sure that overtime pay is being figured correctly for every nonexempt employee. Check to see whether all bonuses, commissions, shift differentials, and other payments for work either are properly included in computing overtime or may be lawfully excluded from that calculation.

Evaluate all payroll deductions or employee payments, repayments, or work-related purchases to ensure that your organization is not unlawfully reducing employees' time-and-one-half overtime pay.

Ensure that you can identify *all* overtime hours as such and properly pay for them, including, for example, work done at different locations or in different jobs.

Determine whether your organization has any formal or informal "comp time" systems because they might be unlawful.

C. Ensure That Employees Accurately Record All "Hours Worked"

Pay special attention to whether employees are recording pre- and post-shift work; shift-change overlap; opening or closing activities; compensable training time; compensable meeting

time; compensable travel time; compensable “on-call” work; and time spent doing work at home.

Analyze time records to determine accuracy: for instance, do the records show highly repetitive starting or stopping times; do they appear to mirror only scheduled or “expected” hours; are there recurring corrections, strike-outs, or white-outs; are there unexplained additions to or subtractions from employee worktimes; do the times and totals seem to be reasonable in light of organization or employee work patterns or unusual situations?

D. Justify *Every* Exemption

Decide whether you can prove that every requirement is met as to each employee you are treating as exempt.

Be careful about exemption decisions that may have been made simply based upon job titles, position descriptions, or vague ideas about what employees do or how they are paid.

Thoroughly review the exemptions’ requirements in light of a *candid* assessment of each employee’s day-to-day duties and responsibilities.

E. Pay Exempt Employees Properly

Make sure that individuals treated as exempt “white collar” employees are paid on a “salary basis” or in another way that the rules require or permit.

Find out whether the salaries of “white collar” employees are subject to any impermissible deductions.

Ensure that the pay of employees treated as exempt under some other exception meet any pay-related requirement for that exemption (such as the exemption concerning commissions).

F. Ensure Compliance With The Child Labor Provisions

Identify every employee who is 16, 17, or 18, verify his or her age, determine his or her exact duties, and then evaluate whether the minor’s duties include hazardous work which requires an age-18 minimum.

Identify every employee who is 14 or 15, verify his or her age, determine his or her exact duties and hours and times of work, and then evaluate 1) whether the minor's duties consist only of permissible kinds of work; and 2) whether the minor's work hours comply with the FLSA's applicable limitations upon a minor's hours worked and times-of-day worked.

Identify every employee under the age of 14, verify his or her age, and evaluate whether the minor's employment is subject to one of the limited exceptions.

G. Check State And Local Requirements

Remember that the FLSA does not preempt tougher state or local wage-hour or wage-payment provisions, and many states do, in fact, have more stringent requirements.

These other laws might well include such things as a higher minimum wage; a daily-overtime requirement; a lower weekly-overtime threshold; minimum pay for reporting to work; strict limitations on deductions from wages; time limits for paying employees who resign or are fired; specific terms upon which bonus, incentive, or commission payments can be paid, lost, or forfeited; rules concerning accumulation and payment of vacation or leave; or requirements that certain employees be paid in cash.

Moreover, state and local laws might not recognize all of the exemptions available under the FLSA or might recognize them only on different or more-limited terms.

You might think that compliance with a law that has been around as long as the FLSA would be almost second nature for employers by now. As you can see, nothing could be further from the truth. Being sure that all your payroll practices and procedures will pass legal scrutiny requires a lot of careful review and concern — but compliance is definitely worth it.

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