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FAIR LABOR STANDARDS ACT

1. INTRODUCTION

- a. The Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., establishes a minimum wage, provides for mandatory overtime compensation for covered employees who work more than 40 hours a week, and also contains equal pay, record keeping and child labor provisions.
 - i. FLSA's basic compensation requirements include:
 - (1) Currently, a minimum wage of \$5.15 per hour. 29 U.S.C. § 206(a)(1).
 - (2) Overtime must be paid at time and one-half of an employee's regular rate of pay for all hours worked in excess of 40 per week. 29 U.S.C. § 207(a)(1).
 - ii. The administration and enforcement of the FLSA are the responsibility of the U.S. Department of Labor ("DOL"). Within the DOL, the Wage and Hour Division of the Employment Standards Administration holds this responsibility. This Division issues rules, regulations, and interpretations under the Act and conducts inspections and investigations to determine compliance.
 - iii. It is crucial for employers to determine which of their employees are covered by the FLSA. The FLSA provides significant exemptions for certain employees. On the other hand, failure to comply with the FLSA may result in significant liability
 - iv. An employee cannot waive his/her rights under the FLSA...
 - (1) So even if the employee "agrees" to an unlawful arrangement, later s/he can still file a complaint with the DOL

2. WHAT IS A COVERED EMPLOYER?

- a. A business or “enterprise” is covered if it engages in interstate commerce 29 U.S.C. § 203(d) and has an annual gross volume of sales or business is less than \$500,000 is excluded. 29 U.S.C. ‘ 203(s)(1)(A)(ii)
- b. Lehigh University is a “covered employer”.

3. WHO IS A COVERED EMPLOYEE?

- a. The definition of “employees” covered by the FLSA is all encompassing
 - i. “any individual employed by an employer”
- b. However, Section 213 of FLSA provides a patchwork of exemptions to render certain employees exempt from the FLSA. 29 U.S.C. § 213.

4. WHAT MAKES AN EMPLOYEE “EXEMPT”?

- a. The most important exemptions are for “executive, administrative” and “professional” employees. 29 U.S.C. § 213(a)(1). Collectively, these are known as the “white-collar” exemptions.
- b. The DOL recently adopted new regulations setting out the tests for inclusion within these three categories, 29 C.F.R. §§ 541.1 et seq.
- c. General Definitions
 - i. Primary duty.
 - (1) To qualify for exemption under this part, an employee’s “primary duty” must be the performance of exempt work.
 - (2) The term “primary duty” means the principal, main, major or most important duty that the employee performs.
 - (3) Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.

- (4) Factors to consider when determining the primary duty of an employee include, but are not limited to:
 - (a) the relative importance of the exempt duties as compared with other types of duties;
 - (b) the amount of time spent performing exempt work;
 - (c) the employee's relative freedom from direct supervision;
 - (d) and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.
 - (5) The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee.
 - (a) Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement.
 - (6) Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work.
 - (7) Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion.
- ii. Customarily and regularly
- (1) The phrase "customarily and regularly" means a frequency that must be greater than occasional but which, of course, may be less than constant.
 - (2) Tasks or work performed "customarily and regularly" includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.
- iii. Directly and closely related.
- (1) Work that is "directly and closely related" to the performance of exempt work is also considered exempt work.

- (2) The phrase “directly and closely related” means tasks that are related to exempt duties and that contribute to or facilitate performance of exempt work.
- (3) Thus, “directly and closely related” work may include physical tasks and menial tasks that arise out of exempt duties, and the routine work without which the exempt employee’s exempt work cannot be performed properly.
- (4) Work “directly and closely related” to the performance of exempt duties may also include recordkeeping; monitoring and adjusting machinery; taking notes; using the computer to create documents or presentations; opening the mail for the purpose of reading it and making decisions; and using a photocopier or fax machine.
- (5) Work is not “directly and closely related” if the work is remotely related or completely unrelated to exempt duties.

iv. Use of manuals.

- (1) The use of manuals, guidelines or other established procedures containing or relating to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills does not preclude exemption.
 - (a) Such manuals and procedures provide guidance in addressing difficult or novel circumstances and thus use of such reference material would not affect an employee’s exempt status.
- (2) Exemptions are not available, however, for employees who simply apply well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances.

v. Occasional tasks.

- (1) Occasional, infrequently recurring tasks that cannot practicably be performed by nonexempt employees, but are the means for an exempt employee to properly carry out exempt functions and responsibilities, are considered exempt work.

- (2) The following factors should be considered in determining whether such work is exempt work:
 - (a) Whether the same work is performed by any of the exempt employee's subordinates;
 - (b) practicability of delegating the work to a nonexempt employee;
 - (c) whether the exempt employee performs the task frequently or occasionally; and
 - (d) existence of an industry practice for the exempt employee to perform the task.

vi. Combination exemptions.

- (1) Employees who perform a combination of exempt duties for executive, administrative, professional, outside sales and computer employees may qualify for exemption.
- (2) Thus, for example, an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption.
- (3) In other words, work that is exempt under one section of this part will not defeat the exemption under any other section.

d. General rule for executive employees

- i. The term "employee employed in a bona fide executive capacity" shall mean any employee:
 - (1) Compensated on a salary basis at a rate of not less than \$455 per week exclusive of board, lodging or other facilities;
 - (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision;
 - (3) Who customarily and regularly directs the work of two or more other employees; and
 - (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given

particular weight.

- ii. The term “employee employed in a bona fide executive capacity” in also includes any employee who owns at least a bona fide 20-percent equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization, and who is actively engaged in its management.
 - (1) Generally, “management” includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees’ productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.
- iii. The phrase “a customarily recognized department or subdivision” is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function.
 - (1) A customarily recognized department or subdivision must have a permanent status and a continuing function. For example, a large employer’s human resources department might have subdivisions for labor relations, pensions and other benefits, equal employment opportunity, and personnel management, each of which has a permanent status and function.
 - (2) When an enterprise has more than one establishment, the employee in charge of each establishment may be considered in charge of a recognized subdivision of the enterprise.
 - (3) A recognized department or subdivision need not be physically within the employer’s establishment and may move from place to place.

- (4) The mere fact that the employee works in more than one location does not invalidate the exemption if other factors show that the employee is actually in charge of a recognized unit with a continuing function in the organization.
 - (5) Continuity of the same subordinate personnel is not essential to the existence of a recognized unit with a continuing function. An otherwise exempt employee will not lose the exemption merely because the employee draws and supervises workers from a pool or supervises a team of workers drawn from other recognized units, if other factors are present that indicate that the employee is in charge of a recognized unit with a continuing function.
- iv. The phrase “two or more other employees” means two full-time employees or their equivalent. One full-time and two half-time employees, for example, are equivalent to two full-time employees. Four half-time employees are also equivalent.
- (1) The supervision can be distributed among two, three or more employees, but each such employee must customarily and regularly direct the work of two or more other full-time employees or the equivalent.
 - (a) Thus, for example, a department with five full-time nonexempt workers may have up to two exempt supervisors if each such supervisor customarily and regularly directs the work of two of those workers.
 - (b) An employee who merely assists the manager of a particular department and supervises two or more employees only in the actual manager’s absence does not meet this requirement.
 - (c) Hours worked by an employee cannot be credited more than once for different executives.
 - (i) Thus, a shared responsibility for the supervision of the same two employees in the same department does not satisfy this requirement.
 - (ii) However, a full-time employee who works four hours for one supervisor and four hours for a different supervisor, for example, can be credited as a half-time employee for both supervisors.

- v. To determine whether an employee's suggestions and recommendations are given "particular weight," factors to be considered include, but are not limited to:
 - (1) whether it is part of the employee's job duties to make such suggestions and recommendations;
 - (2) the frequency with which such suggestions and recommendations are made or requested;
 - (3) the frequency with which the employee's suggestions and recommendations are relied upon.
 - (4) Generally, an executive's suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include an occasional suggestion with regard to the change in status of a co-worker. An employee's suggestions and recommendations may still be deemed to have "particular weight" even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

- vi. Concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption if the requirements of Sec. 541.100 are otherwise met.
 - (1) Generally, exempt executives make the decision regarding when to perform nonexempt duties and remain responsible for the success or failure of business operations under their management while performing the nonexempt work.
 - (2) In contrast, the nonexempt employee generally is directed by a supervisor to perform the exempt work or performs the exempt work for defined time periods.

- vii. An employee whose primary duty is ordinary production work or routine, recurrent or repetitive tasks cannot qualify for exemption as an executive.
 - (1) For example, an assistant manager in a retail establishment may perform work such as serving customers, cooking food, stocking shelves and cleaning the establishment, but performance of such nonexempt work does not preclude the exemption if the assistant manager's primary duty is management. An assistant manager can supervise employees and serve customers at the same time without losing the exemption. An

exempt employee can also simultaneously direct the work of other employees and stock shelves.

- (2) In contrast, a relief supervisor or working supervisor whose primary duty is performing nonexempt work on the production line in a manufacturing plant does not become exempt merely because the nonexempt production line employee occasionally has some responsibility for directing the work of other nonexempt production line employees when, for example, the exempt supervisor is unavailable. Similarly, an employee whose primary duty is to work as an electrician is not an exempt executive even if the employee also directs the work of other employees on the job site, orders parts and materials for the job, and handles requests from the prime contractor.

e. General rule for administrative employees.

- i. The term “employee employed in a bona fide administrative capacity” shall mean any employee:
 - (1) Compensated on a salary or fee basis at a rate of not less than \$455 per week exclusive of board, lodging or other facilities;
 - (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and
 - (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.
- ii. Directly related to management or general business operations
 - (1) To qualify for the administrative exemption, an employee’s primary duty must be the performance of work directly related to the management or general business operations of the employer or the employer’s customers.
 - (2) The phrase “directly related to the management or general business operations” refers to the type of work performed by the employee.
 - (3) To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.

- (4) Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.
- (5) Some of these activities may be performed by employees who also would qualify for another exemption.
- (6) An employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers.
 - (a) Thus, for example, employees acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may be exempt.

iii. Discretion and independent judgment.

- (1) To qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.
- (2) In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered.
- (3) The term "matters of significance" refers to the level of importance or consequence of the work performed.
- (4) The phrase "discretion and independent judgment" must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to:
 - (a) whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices;

- (b) whether the employee carries out major assignments in conducting the operations of the business;
 - (c) whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business;
 - (d) whether the employee has authority to commit the employer in matters that have significant financial impact;
 - (e) whether the employee has authority to waive or deviate from established policies and procedures without prior approval;
 - (f) whether the employee has authority to negotiate and bind the company on significant matters;
 - (g) whether the employee provides consultation or expert advice to management;
 - (h) whether the employee is involved in planning long or short-term business objectives;
 - (i) whether the employee investigates and resolves matters of significance on behalf of management; and
 - (j) whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.
- (5) The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision.
- (a) However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level.
 - (b) Thus, the term "discretion and independent judgment" does not require that the decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review.
 - (c) The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action.

- (d) The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment.
 - (i) For example, the policies formulated by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies.
 - (ii) The management consultant who has made a study of the operations of a business and who has drawn a proposed change in organization may have the plan reviewed or revised by superiors before it is submitted to the client.
- iv. An employer's volume of business may make it necessary to employ a number of employees to perform the same or similar work. The fact that many employees perform identical work or work of the same relative importance does not mean that the work of each such employee does not involve the exercise of discretion and independent judgment with respect to matters of significance.
- v. The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.
- vi. The exercise of discretion and independent judgment also does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work.
 - (1) An employee who simply tabulates data is not exempt, even if labeled as a "statistician."
- vii. An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly.
 - (1) For example, a messenger who is entrusted with carrying large sums of money does not exercise discretion and independent judgment with respect to matters of significance even though serious consequences may flow from the employee's neglect.

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

viii. Administrative exemption examples.

- (1) Insurance claims adjusters generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.
- (2) Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products.
 - (a) However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.
- (3) An employee who leads a team of other employees assigned to complete major projects for the employer (such as purchasing, selling or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements) generally meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team.
- (4) An executive assistant or administrative assistant to a business owner or senior executive of a large business generally meets the duties requirements for the administrative exemption if such employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance.

- ix. Human resources managers who formulate, interpret or implement employment policies and management consultants who study the operations of a business and propose changes in organization generally meet the duties requirements for the administrative exemption.
 - (1) However, personnel clerks who “screen” applicants to obtain data regarding their minimum qualifications and fitness for employment generally do not meet the duties requirements for the administrative exemption.
- x. Purchasing agents with authority to bind the company on significant purchases generally meet the duties requirements for the administrative exemption even if they must consult with top management officials when making a purchase commitment for raw materials in excess of the contemplated plant needs.
- xi. Ordinary inspection work generally does not meet the duties requirements for the administrative exemption. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been catalogued and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They have some leeway in the performance of their work but only within closely prescribed limits.
- xii. Employees usually called examiners or graders, such as employees that grade lumber, generally do not meet the duties requirements for the administrative exemption. Such employees usually perform work involving the comparison of products with established standards which are frequently catalogued. Often, after continued reference to the written standards, or through experience, the employee acquires sufficient knowledge so that reference to written standards is unnecessary. The substitution of the employee’s memory for a manual of standards does not convert the character of the work performed to exempt work requiring the exercise of discretion and independent judgment.
- xiii. Comparison shopping performed by an employee of a retail store who merely reports to the buyer the prices at a competitor’s store does not qualify for the administrative exemption. However, the buyer who evaluates such reports on competitor prices to set the employer’s prices generally meets the duties requirements for the administrative exemption.

- f. The term “employee employed in a bona fide administrative capacity” also includes employees:
- i. Compensated for services on a salary or fee basis at a rate of not less than \$455 per week exclusive of board, lodging or other facilities, or on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which employed; and
 - ii. Whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof.
 - iii. The term “educational establishment” means an elementary or secondary school system, an institution of higher education or other educational institution.
 - iv. The term “other educational establishment” includes special schools for mentally or physically disabled or gifted children, regardless of any classification of such schools as elementary, secondary or higher.
 - v. The phrase “performing administrative functions directly related to academic instruction or training” means work related to the academic operations and functions in a school rather than to administration along the lines of general business operations.
 - (1) Such academic administrative functions include operations directly in the field of education.
 - (2) Jobs relating to areas outside the educational field are not within the definition of academic administration.
 - (3) Employees engaged in academic administrative functions include:
 - (a) the superintendent or other head of an elementary or secondary school system, and any assistants, responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program;
 - (b) the principal and any vice-principals responsible for the operation of an elementary or secondary school;

- (c) department heads in institutions of higher education responsible for the administration of the mathematics department, the English department, the foreign language department, etc.;
 - (d) academic counselors who perform work such as administering school testing programs, assisting students with academic problems and advising students concerning degree requirements;
 - (e) and other employees with similar responsibilities.
 - (4) Jobs relating to building management and maintenance, jobs relating to the health of the students, and academic staff such as social workers, psychologists, lunch room managers or dietitians do not perform academic administrative functions.
 - (5) Although such work is not considered academic administration, such employees may qualify for exemption under any other regulation.
- g. General rule for professional employees.
- i. The term “employee employed in a bona fide professional capacity” shall mean any employee:
 - (1) Compensated on a salary or fee basis at a rate of not less than \$455 per week exclusive of board, lodging, or other facilities; and
 - (2) Whose primary duty is the performance of work:
 - (a) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction (“learned professionals”); or
 - (b) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor (“creative professionals”).
 - ii. Learned professionals
 - (1) To qualify for the learned professional exemption, an employee’s primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.

- (2) This primary duty test includes three elements:
 - (a) The employee must perform work requiring advanced knowledge;
 - (b) The advanced knowledge must be in a field of science or learning; and
 - (c) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.
- (3) The phrase “work requiring advanced knowledge” means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work.
 - (a) An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances.
 - (b) Advanced knowledge cannot be attained at the high school level.
- (4) The phrase “field of science or learning” includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.
- (5) The phrase “customarily acquired by a prolonged course of specialized intellectual instruction” restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession.
 - (a) The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree.
 - (b) However, the word “customarily” means that the exemption is also available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and

intellectual instruction.

- (i) Thus, for example, the learned professional exemption is available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry.
- (ii) However, the learned professional exemption is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes.
- (iii) The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction.

iii. Creative professionals.

- (1) To qualify for the creative professional exemption, an employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work.
- (2) The exemption does not apply to work which can be produced by a person with general manual or intellectual ability and training.
- (3) To qualify for exemption as a creative professional, the work performed must be "in a recognized field of artistic or creative endeavor."
 - (a) This includes such fields as music, writing, acting and the graphic arts.
- (4) The requirement of "invention, imagination, originality or talent" distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy.
- (5) The duties of employees vary widely, and exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Determination of

exempt creative professional status, therefore, must be made on a case-by-case basis.

- iv. The term “employee employed in a bona fide professional capacity” also means any employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed.

5. Computer Employees

- a. The professional exemption outlined above applies to computer employees compensated on a salary or fee basis at a rate of not less than \$455 per week whose primary duty consists of:
 - i. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
 - ii. 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;
 - iii. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
 - iv. A combination of the aforementioned duties, the performance of which requires the same level of skills.
 - v. Computer employees also may be eligible for the administrative and/or executive exemptions.
- b. Section 13(a)(17) of the Act also provides an exemption for computer employees who are paid no less than \$27.63 per hour so long as they are paid consistent with the salary basis test.

6. Outside Sales Employees

- a. General rule for outside sales employees.
 - i. The term “employee employed in the capacity of outside salesman” shall mean

any employee:

- (1) Whose primary duty is:
 - (a) making sales within the meaning of section 3(k) of the Act, or
 - (b) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
 - (c) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.
- ii. In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work.
- iii. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences.
- iv. The salary basis requirement does not apply to outside sales employees.

7. SALARY BASIS REQUIREMENT

- a. Not only does a position have to involve the requisite job duties to be exempt under the FLSA, with the exception of the "outside salesman" classification, the individual must also be compensated on a salary basis.
- b. General rule. An employee will be considered to be paid on a "salary basis" within the meaning of these regulations if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.
- c. Subject to the exceptions provided below, an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked.
- d. Exempt employees need not be paid for any workweek in which they perform no

work.

- e. An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business.
 - i. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.
- f. Exceptions. The prohibition against deductions from pay in the salary basis requirement is subject to the following exceptions:
 - i. Deductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability. Thus, if an employee is absent for two full days to handle personal affairs, the employee's salaried status will not be affected if deductions are made from the salary for two full-day absences.
 - (1) However, if an exempt employee is absent for one and a half days for personal reasons, the employer can deduct only for the one full-day absence.
 - ii. Deductions from pay may be made for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability.
 - (1) The employer is not required to pay any portion of the employee's salary for full-day absences for which the employee receives compensation under the plan, policy or practice.
 - (2) Deductions for such full-day absences also may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted the leave allowance under the plan, policy or practice.
 - (a) Thus, for example, if an employer maintains a short-term disability insurance plan providing salary replacement for 12 weeks starting on the fourth day of absence, the employer may make deductions from pay for the three days of absence before the employee qualifies for benefits under the plan; for the twelve weeks in which the employee receives salary replacement benefits under the plan; and for absences after the employee has exhausted the 12 weeks of

salary replacement benefits.

- (b) Similarly, an employer may make deductions from pay for absences of one or more full days if salary replacement benefits are provided under a State disability insurance law or under a State workers' compensation law.
- (3) While an employer cannot make deductions from pay for absences of an exempt employee occasioned by jury duty, attendance as a witness or temporary military leave, the employer can offset any amounts received by an employee as jury fees, witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.
- (4) Deductions from pay of exempt employees may be made for penalties imposed in good faith for infractions of safety rules of major significance.
 - (a) Safety rules of major significance include those relating to the prevention of serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries and coal mines.
- (5) Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules.
 - (a) Such suspensions must be imposed pursuant to a written policy applicable to all employees.
 - (b) Thus, for example, an employer may suspend an exempt employee without pay for three days for violating a generally applicable written policy prohibiting sexual harassment.
 - (c) Similarly, an employer may suspend an exempt employee without pay for twelve days for violating a generally applicable written policy prohibiting workplace violence.
- (6) An employer is not required to pay the full salary in the initial or terminal week of employment.
 - (a) Rather, an employer may pay a proportionate part of an employee's full salary for the time actually worked in the first and last week of employment.

- (b) In such weeks, the payment of an hourly or daily equivalent of the employee's full salary for the time actually worked will meet the requirement.
 - (c) However, employees are not paid on a salary basis within the meaning of these regulations if they are employed occasionally for a few days, and the employer pays them a proportionate part of the weekly salary when so employed.
 - (7) An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act.
 - (a) Rather, when an exempt employee takes unpaid leave under the Family and Medical Leave Act, an employer may pay a proportionate part of the full salary for time actually worked.
 - (b) For example, if an employee who normally works 40 hours per week uses four hours of unpaid leave under the Family and Medical Leave Act, the employer could deduct 10 percent of the employee's normal salary that week.
 - iii. When calculating the amount of a deduction from pay allowed under the FLSA, the employer may use the hourly or daily equivalent of the employee's full weekly salary or any other amount proportional to the time actually missed by the employee.
 - iv. A deduction from pay as a penalty for violations of major safety rules may be made in any amount.
- g. Effect of improper deductions from salary.
 - i. An employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer did not intend to pay employees on a salary basis.
 - ii. An actual practice of making improper deductions demonstrates that the employer did not intend to pay employees on a salary basis.
 - iii. The factors to consider when determining whether an employer has an actual practice of making improper deductions include, but are not limited to:
 - (1) the number of improper deductions, particularly as compared to the number of employee infractions warranting discipline;

- (2) the time period during which the employer made improper deductions; the number and geographic location of employees whose salary was improperly reduced;
 - (3) the number and geographic location of managers responsible for taking the improper deductions; and
 - (4) whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.
- iv. If the facts demonstrate that the employer has an actual practice of making improper deductions, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions.
- (1) Employees in different job classifications or who work for different managers do not lose their status as exempt employees.
 - (2) Thus, for example, if a manager at a company facility routinely docks the pay of engineers at that facility for partial-day personal absences, then all engineers at that facility whose pay could have been improperly docked by the manager would lose the exemption; engineers at other facilities or working for other managers, however, would remain exempt.
- v. Improper deductions that are either isolated or inadvertent will not result in loss of the exemption for any employees subject to such improper deductions, if the employer reimburses the employees for such improper deductions.
- vi. If an employer has a clearly communicated policy that prohibits the improper pay deductions and includes a complaint mechanism, reimburses employees for any improper deductions and makes a good faith commitment to comply in the future, such employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints.
- vii. If an employer fails to reimburse employees for any improper deductions or continues to make improper deductions after receiving employee complaints, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions.
- viii. The best evidence of a clearly communicated policy is a written policy that was distributed to employees prior to the improper pay deductions by, for example, providing a copy of the policy to employees at the time of hire,

publishing the policy in an employee handbook or publishing the policy on the employer's Intranet.

8. Minimum guarantee plus extras.

- a. An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis.
- b. Thus, for example, an exempt employee guaranteed at least \$455 each week paid on a salary basis may also receive additional compensation of
 - i. a one percent commission on sales, or
 - ii. a percentage of the sales or profits of the employer, or
 - iii. additional compensation based on hours worked for work beyond the normal workweek.
- c. Such additional compensation may be paid on any basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off.

9. WHAT IS MEANT BY "HOURS WORKED"

- a. In order to comply with the FLSA's overtime requirement to pay time and one-half the non-exempt employee's regular rate of pay, it is essential to correctly determine the number of hours the employee worked in a workweek.
- b. Usually there are few problems in determining the number of hours worked by employees who were performing their principal job duties during their normal work schedule.
 - i. "Principal work activities" includes "any work of consequence performed for an employer.
- c. Uncertainty can arise, however, over time spent on a wide variety of job-related activities.

d. Volunteer Activities

- i. Many times, particularly with non-profit employers, a question arises as to whether employees may volunteer their services during “off-duty hours.”
- ii. To the extent employees are volunteering to perform the same type of services they perform for pay, such practice violates the FLSA and exposes the employer to overtime liability because the purportedly “volunteer” hours are compensable hours worked within the meaning of the FLSA.
- iii. The DOL, in Adm. Op. Ltr. WH-369 (December 3, 1975), stated that it will not regard time spent by employees of a non-profit organization in voluntary activities as compensable working time under the following circumstances:
 - (1) the volunteered services or duties are performed outside the employee’s regular assignments such that the employee is not performing the same or similar type of services as during regular working hours;
 - (2) the services are entirely voluntary, with no coercion by the employer, no promise of advancement, and no penalty for not volunteering;
 - (3) the activities are predominantly for the employee’s own benefit;
 - (4) the employee does not replace another employee or impair the employment opportunities of others by performing work which would otherwise be performed by regular employees;
 - (5) the employee serves without contemplation of pay;
 - (6) the activity does not take place during the employee’s regular working hours or scheduled overtime hours; and
 - (7) the volunteer time is insubstantial in relation to the employee’s regular hours.
- iv. However, more recent guidance from DOL locally suggests that an employer may not allow a non-exempt employee to volunteer to perform any meaningful work for the employer even if the volunteer work is different from the work the employee is paid to perform.

- e. Waiting Or On-Call
 - i. Whether or not the time an employee is on-call may be counted as compensable working time depends upon the employee's freedom while on-call. See 29 C.F.R. § 785.17.
 - ii. An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call."
 - (1) An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call.
 - iii. In other words, the question is whether time is spent predominantly for the employer's benefit or for the employee's.
 - iv. In applying this test, courts look to the following factors:
 - (1) Whether there was an on-premises living requirement;
 - (2) Whether there were excessive geographical restrictions on the employee's movements;
 - (3) Whether the frequency of calls or interruptions was unduly restrictive;
 - (4) Whether a fixed time limit for response was unduly restrictive;
 - (5) Whether the on-call employee could easily trade on-call responsibilities;
 - (6) Whether use of a beeper or pager could ease restrictions, or whether employee was restricted to areas with a telephone or a two-way radio;
 - (7) The number of on-call employees at one time;
 - (8) Whether the employee had actually engaged in personal activities during "on-call" time;
 - (9) Whether the time to travel to the employer's worksite was unduly restrictive;
 - (10) The size of the community in which the on-call employee lives and works;
 - (11) Whether an on-call employee must wear a uniform; and

- (12) Whether there is any agreement between the parties concerning the compensability of on-call time.
- v. Courts apply a balancing test, without any one of the above factors being dispositive, in determining whether on-call time is compensable.
- vi. The test focuses not on the importance of the on-call work to the employer, but rather on the burden on the employee and whether he or she is so restricted during on-call hours so as to be effectively engaged to wait.
- vii. Another important factor considered by the DOL, and the courts in determining the compensability of on-call time is whether there is any agreement between the parties concerning the compensability of on-call time.
- viii. There are three different types of agreements between employers and employees which may be relevant to the issue of on-call compensation:
 - (1) A constructive agreement may arise if employees have been informed of the overtime compensation policy and continued to work under the disclosed terms of the policy.
 - (2) An implied agreement is created if the employees voluntarily accept the terms of the policy by becoming employed after an overtime compensation policy has been implemented.
 - (3) An express agreement (e.g. collective bargaining agreement) which provides compensation for actual call-in work, but not for other off-duty time.
- f. Sleeping
 - i. Employees may have to be compensated for on-the-job time spent sleeping or engaging in other personal business, depending on the schedules they are required to work.
 - ii. Different compensability rules apply to employees who are working a schedule or shift of:
 - (1) Less than 24 hours--Employees, such as telephone operators or hotel desk clerks, who are on duty for less than a 24-hour period and who are permitted to sleep or engage in other personal activities when not busy must be paid for the sleeping time or personal activity they engaged in during their required tour of duty. (29 CFR 785.21)
 - (2) Twenty-four or more hours--Where an employee is required to be on

duty for 24 hours or more, the employer and worker may agree to exclude from time worked a regularly scheduled sleeping period of not more than eight hours, provided adequate sleeping facilities are furnished by the employer and the worker can usually enjoy an uninterrupted night's sleep. If the employee's regular sleeping period is interrupted by a call to duty, the time involved in the interruption must be counted as hours worked. The entire sleeping period must be counted if the employee is so interrupted that a reasonable night's sleep is impossible. If the employee cannot get at least five hours' sleep during the scheduled time, the entire time must be counted as hours worked.

- iii. Sleep and meal times can be excluded from the compensable hours of work of an employee working more than a 24-hour shift if there is an agreement to this effect. However, whether such an agreement exists depends on the facts of the case.

g. Meal Periods

- i. A "bona fide meal period" is not compensable work time under the FLSA. See 29 C.F.R. § 785.19 (1995).
- ii. In order to be non-compensable, the regulations state that an employee must be completely relieved from duty.
- iii. In general, these meal periods should be 20 minutes or longer.
- iv. The employee is not "relieved" if he or she is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his or her desk or a factory worker who is required to be at his or her machine is working while eating.
- v. It is not necessary that an employee be permitted to leave the premises if he or she is otherwise completely free from duties during the meal period.
- vi. Although the regulations state an employee must be completely relieved of duty during meal time, most courts have rejected this test and found meal time non-compensable even if the employee performs some minimal duties for the employer.
- vii. Instead, the courts focus on whether the meal time was spent predominantly for the benefit of the employer.

- h. Rest Periods
 - i. The DOL regulations recognize that rest periods of short duration (between 5 and 20 minutes in length) are common. 29 C.F.R. § 759.18.
 - ii. The regulations specifically state that these rest periods must be counted as compensable time under the FLSA, consistent with common practice.
 - iii. The regulations also stated that this compensable time may not be offset against other working time such as compensable waiting time or on-call time.
- i. Meetings and Training
 - i. Time spent attending lectures, meetings, and training programs need not be counted as hours worked, provided the following conditions are met:
 - (1) The meetings are held outside working hours.
 - (2) Attendance is voluntary.
 - (a) Attendance is not voluntary if the employee is led to believe that non-attendance would adversely affect his employment.
 - (3) The course, lecture, or meeting is not directly related to the employee's job.
 - (a) Training is directly related to an employee's job if it is designed to make him more effective in the present job, not if it teaches a different job.
 - (4) The employee does no productive work during the meeting or training.
 - ii. If an employee on his or her own initiative attends school, college, or trade school after hours, that time is not hours worked even if the courses are job-related.
- j. Travel Time To/From Work and Preparatory and Finishing Activities
 - i. The general rule under the FLSA is that ordinary home to work travel by employees does not count as hours worked under the Act.
 - ii. On the other hand, once employees start the workday all time spent traveling as part of the principal activities must be counted as hours worked.

- iii. Therefore, when an employee's job involves traveling from one site to another after reporting for the day's work, the travel time must be counted as hours worked.
- iv. Non-compensable time also includes non-essential activities which are preliminary to or subsequent to in time to the employee's principal work activity or activities.
 - (1) However, all closely related duties and tasks, even preparatory and concluding activities, that are indispensable to the performance of a worker's principal activities are compensable time even if such activities are performed outside an employee's regularly scheduled hours.
- v. The FLSA contains only one specific exception to this rule--time spent changing clothes or washing up at the beginning or end of a workday may be excluded from compensable time under the terms of a collective bargaining agreement or a custom or practice under such a contract.
- k. Time Spent Attending Employer-Required Off-Site Events
 - i. The requirements with respect to overtime pay for non-exempt employees do not change simply because the work site has changed or because it is training rather than "work."
 - ii. If the employer is requiring the training and/or employee performs work, those hours are compensable and after 40 hours a week, the employee should receive time and a half for all hours in excess of 40 hours. This applies even if the work day is split. The employer should simply add up the hours at the end of the week and apply the usual rules concerning overtime.
- l. All Travel During Regular Working Hours Either On A Normally Scheduled Work Day Or A Non-Scheduled Work Day.
 - i. Travel time during an employee's regularly scheduled working hours is always compensable whether it is on a regularly scheduled work day or not.
 - (1) For example, if an employee is scheduled to work from 8:00 a.m. to 5:00 p.m., and travels to an out-of-town assignment/training from 10:00 a.m. to 11:30 a.m., the time spent in the travel is compensable.
 - ii. This is true even for a non-scheduled work day, such as a weekend day or a holiday. For example, if an employee normally works Monday through Friday, 8:00 a.m. to 5:00 p.m. and travels to or from a work assignment or seminar during those hours on a Saturday, the travel time is compensable.

- m. Travel Outside Of Regular Working Hours, Either On A Normally Scheduled Work Day Or On A Non-Scheduled Work Day, When There Is No Overnight Stay.
 - i. When there is no overnight stay, travel both before and/or after regularly scheduled working hours is compensable.
 - (1) This is so whether the travel occurs on a normally scheduled work day or a non-scheduled work day.
 - ii. The employer may, however, deduct from the travel time the time the employee would normally spend traveling to and from work during his normal work day, i.e., normal commuting time, as well as the employee's usual meal time.
 - iii. Thus, in a typical case in which an employee rises early in the morning, drives several hours to an out-of-town location to attend a seminar or to work and, following the end of the seminar or work drives home that same evening, the travel time in excess of the normal 8-hour work day would be compensable minus the usual commute of the employee and the regular meal period.
- n. All Travel Which Includes An Overnight Stay
 - i. When there is an overnight stay, if an employee travels either before or after normal working hours to a location where work is to be done or a seminar is to be attended, the travel time is not compensable. See 29 CFR § 785.39.
 - (1) The only exception to this is if a collective bargaining agreement provides otherwise.
 - ii. Thus, if an employee whose normal work hours are 8:00 a.m. to 4:30 p.m. takes a 5:30 p.m. Sunday flight to attend a week long seminar or work assignment, the employee is not entitled to compensation for his/her travel time because it is outside of his/her normal working hours and it is for an overnight stay.
 - iii. If that same employee returns the following Saturday traveling from 10:00 a.m. to 2:00 p.m. the employee would be entitled to compensation because the travel time is during the employee's regular working hours.
 - iv. If that same employee returns the following Saturday traveling from 6:00 to 9:00 p.m., the employee would not be entitled to compensation because the travel time is outside the employee's regular working hours, and the trip included an overnight stay.
- o. Unauthorized Work

- i. The FLSA does not define the term “work.”
- ii. Section 3(g) of the Act defines the term “employ” to mean “to suffer or permit to work.”
- iii. Thus an employer must compensate its employees for unauthorized work that, even though prohibited, is performed with the knowledge and acquiescence of management.
 - (1) All unrequested work that an employer “suffers or permits” is considered compensable time.
- iv. If an employee works unauthorized work, the employer’s only option is to discipline the employee.
 - (1) The time is compensable and must be paid.

10. Non-Exempt Employees: Compensatory Time in Exchange for Overtime

- a. Generally, in the private sector, “comp” or compensatory time may not be given to a non-exempt employee in lieu of overtime.
 - i. Generally, comp time must be in the same work week as the overtime hours.
- b. However, the Department of Labor has approved of “time-off” plans to permit a non-exempt employee to work more than 40 hours in week one and then work less than 40 hours in week two so the employer is permitted to not pay overtime for the OT time in week one.
 - i. When an employee works 4 hours overtime in week one of a biweekly payroll, that employer may occasionally avoid overtime pay by ordering/giving that employee 6 hours off in week two of the same payroll period.
 - ii. But if the employer codifies the practice into a regular schedule, such does not constitute a valid “time off plan”.

11. Potential Damages For An FLSA Violation

- a. Statute of limitations is generally 2 years
 - i. 3 years if the violation is “willful”
- b. Owe the employee the calculation of unpaid wages/hours
- c. If the employer does not have time records, the DOL assumes what the employee

states is accurate and the employer has the burden of proof to “disprove” what the employee claims.

- d. After a figure is determined, multiple times two for “liquidated damages”.
- e. The employer can also be required to pay the oxymoronic “reasonable attorneys’ fees”.