

AVOIDING WAGE AND HOUR PITFALLS

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TABLE OF CONTENTS

| | |
|---|----|
| Are Yo ur Salaried Employees Really Exempt? | 1 |
| Avoiding “Off the Clock” Work Traps | 15 |
| Bonuses and Other Payments to Employees - When Must They Be Part of the Regular Rate?..... | 22 |
| They Just Might Be Your Employees: Independent Contractors, Joint Employment, Trainees and “Volunteers”..... | 32 |
| Handling Deductions From Pay and Final Paychecks | 35 |
| “But They Don’t Do It That Way In Oregon!” – Avoiding Wage and Hour Problems With a Multi-State Workforce..... | 38 |

ARE YOUR SALARIED EMPLOYEES REALLY EXEMPT?

A. The “White Collar” Exemptions.

Of greatest significance to most employers are the “white collar” or managerial/supervisory/professional exemptions under the Act. These exemptions exempt many management and supervisory personnel, employees who perform administrative tasks and those with specific training in a specialized field. Teachers and academic administrative personnel are also exempt under these sections.

Very briefly, whether an employee qualifies under one or more of the “white collar” exemption sections depends upon:

- * The duties and responsibilities of the employee;
- * Whether the employee is paid on a “salary basis” and the amount of salary paid.

One aspect of any job that is not dispositive as to qualifying for the exemption is the title of the position.

In order for an employee to be considered as being “on a salary basis” and meet this qualification for exempt status, he must receive his regular salary for any week in which he performed any work, without regard to the number of days or hours worked or not worked. Deductions from salary may however be made for absences of one day or more for personal reasons. Deductions due to illness or disability for absences of less than a day may be taken in limited circumstances (see discussion below). Deductions from salary of exempt employees may not be made for absences occasioned by jury duty, service as a witness or for temporary military leave. The “salary basis requirement” is discussed more fully below.

1. Executive Positions.

Under the FLSA, in order to be considered an exempt employee employed in a bona fide executive capacity, the individual must meet all the requirements of either the “streamline” (“short”) or “long” tests discussed below. In order to be considered exempt under Oregon law, the requirements of the “long” test must be met. There is no “short” test in Oregon.

The “Streamline” or “Short” Test

- a. The Employee must be paid a weekly salary of \$250 or more (about \$1,075 per month).
- b. He must customarily and regularly direct the work of two or more employees.
- c. His primary duty must be management of the enterprise or a customarily recognized department or subdivision thereof. Whether or not an employee’s primary duty is managerial is based on all the facts in the case. In general, the

decision is based upon whether or not the employee spends more than 50% of his time functioning as a manager. This alone, however, is not the only test. Some other factors to consider are:

- * The relative importance of the managerial duties as compared with other types of duties; and,
- * The frequency with which the employee exercises discretionary powers; and,
- * The relative freedom from supervision.

Examples of recognized management duties are:

- * Interviewing, selecting, and training of employees.
- * Adjusting rates of pay and hours of work.
- * Directing work.
- * Maintaining production records for use in supervision or control
- * Appraising productivity or efficiency for the purpose of recommending promotions or other change in status.
- * Handling complaints or grievances and discipline.
- * Determining techniques to be used.
- * Apportioning work.
- * Planning the work.
- * Providing for safety of the employees.

Examples of non-exempt duties are:

- * Performing the same kind of work as the employees supervised.
- * Performing any production type work, even though not like that performed by subordinates, which is not a part of supervisory function.
- * Performing clerical duties, such as bookkeeping, billing, filing, operating business machines, preparing payrolls.

The “Long” Test

If the employee earns a salary of between \$155-\$249 per week (or a current minimum of \$1,126.66 per month under Oregon law)¹, he may be considered an exempt executive if all of the following tests are met:

- a. Primary duties consist of management (as above); and,
- b. Directs the work of two or more employees (as above); and,
- c. Has the authority to hire and fire or whose suggestions as to those decisions are given particular weight; and,
- d. Customarily and regularly exercises discretionary powers; and,
- e. Does not devote more than 20% of his workweek to activities other than those listed in a-d (40% if retail).

The 20% requirement (40% if retail) must only be met by those employees who are analyzed under the “long” test (those earning between \$155-\$249 per week).

An executive employee qualifying under the “streamline” test may retain his exempt status even if he works more than 50% of his time in a particular situation where his primary duties are not managerial. The courts have held that the 50% factor does not invariably have to be measured based upon a strict “work period” concept. Rather, all the factors that go into considering whether a person’s primary duties are those of management must be considered when making a decision regarding executive exemptions under the streamline test.

In determining whether an employee’s primary duties are managerial, the DOL regulations provide the following factors as a guide:

- a. The relative importance of managerial duties as compared with other types of duties;
- b. The frequency with which the employee exercises discretionary powers;
- c. The relative freedom from supervision.
- d. The relationship between the employee’s salary and the wages paid other employees for the same kind of work.

¹ Oregon law defines salary basis as not less than the minimum wage multiplied by 2,080 hours, divided by 12 months. ORS 653.010(10). Consequently, the minimum salary will increase as the Oregon minimum wage goes up.

If an exempt executive is forced to perform manual duties almost exclusively for a few weeks during a strike or emergency, the “executive” will not necessarily lose exempt status. The exempt status is not based purely on the 50% test in determining primary duty. And while the 20% (or 40%) requirement under the “long” test may change on a weekly basis, thereby causing a long test executive to lose the exempt status from time to time, the primary duty test for a “streamline executive” need not be based on a weekly determination. Marshall v. Western Union Telegraph, 621 F.2d 1246 (3rd Cir. 1980).

A Federal Appeals Court in Guthrie v. Lady Jane Collieries, Inc., 722 F.2d 1141 (3rd Cir. 1983), held that to meet the “primary duty of management” requirement for an exempt executive under the “streamline test,” the employer must demonstrate more than just the fact that the employee is “in charge.” The employees here were foremen in a coal mining operation. Their duties included:

- a. Overseeing the work done;
- b. Assuring that the work complied with the laws;
- c. Recognizing dangerous conditions;
- d. Maintaining proper ventilation;
- e. Controlling the work force;
- f. Giving out assignments to the crew;
- g. Checking the equipment;
- h. Training;
- i. Keeping records.

The Court considered these factors in determining whether the employees’ management duties were “critical to the successful operation of the enterprise,” which would indicate that the foremen’s primary duty was management.

In holding that the foremen were exempt executives, the Court pointed out that the requirement that an executive exercise discretion and judgment could be satisfied even where, as here, the employee does not have the power to hire and fire.

The Court also highlighted the fact that these employees were not supervised more than 50% of their workday and that, even though the salary of the foremen was close to the wages of the miners, the foremen had better benefits. This, along with the other considerations, indicated to the Court that the foremen were executives under the Act.

2. Administrative Positions.

Under the FLSA, in order to be considered an exempt employee employed in a bona fide administrative capacity, the individual must meet all the requirements of either the “streamline” (“short”) or “long” tests discussed below. In order to be considered exempt under Oregon law, the requirements of the “long” test must be met. There is no “short” test in Oregon.

The “Streamline” or “Short” Test

The employee must be paid a salary of \$250 or more per week; and

- a. The primary duty consists of responsible office or non-manual work directly related to management policies or general business operations requiring the exercise of discretion and independent judgment; or,
- b. Employee does responsible work in the administration of a school or educational establishment or institution or department or subdivision thereof that is directly related to academic instruction or training.

The “Long” Test

If the employee earns a salary of between \$155-\$249 per week (in Oregon a minimum per month of \$1,126.66), he may be considered an exempt administrative employee if all of the following criteria are met:

- a. The employee’s duty must be either:
 - * Responsible office or non-manual work directly related to the management policies or general business operations of the employer or the employer’s customers; or,
 - * Responsible work that is directly related to academic instruction or training carried on in the administration of a school system or educational establishment; and,
- b. The employee must customarily and regularly exercise discretion and independent judgment, as distinguished from using skills and following procedures, and must have the authority to make important decisions; and,
- c. The employee must:
 - * Regularly assist a bona fide executive or administrative employee; or,
 - * Perform work under only general supervision along specialized or technical lines requiring special training, experience, or knowledge; or,

- * Execute under only general supervision special assignments; and,
- d. The employee must not spend more than 20% of the time worked in the workweek on non-exempt work -- that is, work not directly and closely related to the administrative duties.

Typical examples of administrative employees include:

- a. Administrative assistants such as executive secretaries, assistant to a department manager, and confidential assistants. These employees assist an executive in responsible duties but do not themselves necessarily have executive authority.
- b. Staff employees who are advisory specialists for management, such as: tax, insurance, and research experts, and personnel analysts.
- c. Heads of one-employee departments -- such as purchasing agents, safety directors and personnel and labor relations directors.
- d. Those who perform special assignments, often away from their employer's offices, such as a field representative.

In Bauler v. Pressed Steel Car Co., 81 F. Supp. 172 (N.D. Ill. 1948), affirmed, 182 F.2d 357, a Federal District Court held that a sergeant of security guards at a war materials production plant was not an exempt administrator. The sergeant did not create rules for the guards; he merely made sure the guards followed the rules and reported any violations. He had no discretion as to hiring and firing. The employer was therefore ordered to pay back overtime to the sergeant.

Dispatchers for a barge fleeting business who had extraordinarily comprehensive responsibilities were held to be exempt as administrative employees in Donovan v. Flowers Marine, Inc., 545 F. Supp. 991 (E.D. La. 1982). The Federal District Court held that although the employees in question had the title "dispatcher," they actually performed duties that met the requirements of the long test for an exempt administrative employee. The Court pointed to such responsibilities as:

1. Coordinating boat and barge movements;
2. Maintaining communications with vessels;
3. Scheduling refueling of the vessels;
4. Recommendation of disciplinary action against other employees;
5. Acting as employee's representative during Coast Guard inspections;

All of these duties were directly related and essential to the general business operations of the employer. The Court also held that the employees in question exercised independent judgment and discretion in executing their duties.

In Pezzillo v. General Telephone and Electronics Information Systems, Inc., 414 F. Supp. 1257 (M.D. Tenn. 1976), affirmed, 572 F.2d 1189 (6th Cir. 1978), a Federal District Court held that under the “long” test, the computer programmers in question did not meet the requirements of an exempt administrative employee because more than 20% of their workweek was spent on non-exempt duties. In making its decision, the Court relied on the fact that the employees in question merely entered the computer programs created by other employees. The Court commented that in this particular employer’s situation, the system analysts and the employees who created the programs were exempt administrators, but the following employees were not exempt: tape librarians, keypunch operators, computer operators, junior programmers and programmer trainees. The non-exempt employees in this case were too closely supervised to qualify as using the required amount of discretion and independent judgment.

In Horne v. Singer Business Machines, Inc., 413 F. Supp. 52 (W.D. Tenn. 1976), a Federal District Court held that a computer programmer and systems analyst was an exempt administrator under the Act. After Horne left his job as a computer programmer and systems analyst for Singer (a business machines company) to become a law student, he brought suit against his former employer claiming he had not been paid overtime. The employer’s defense was that Horne was exempt from the provisions of the Act because he was an employee employed in a bona fide administrative capacity. The Court agreed with the employer, holding that Horne met the requirements of the “Long Test” in that he:

1. Performed non-manual duties and was essentially a “white collar employee;”
2. Was involved in a job that required responsibility and judgment and was not merely clerical or “run of the mill;”
3. Modified computer programs to meet specific needs;
4. Devised computer systems for customers;
5. Explained computer operations to customers;
6. Participated in company policymaking;
7. Customarily and regularly exercised discretion and judgment in that he did not merely apply acquired skills, or make decisions of little consequence, but worked directly with customers in an important position demanding responsibility, judgment and discretion;
8. Worked under only general supervision.

Note that since these cases were decided, Congress enacted a specific exemption for computer professionals. However, employees who do not qualify under this specific exemption may qualify under the administrative or executive exemption.

An employee who was primarily responsible for the supervision of inventory for a piping supply operation was held to be an administrative employee in Gilstrap v. Synalloy Corp., 409 F. Supp. 621 (S.D. La. 1976). After Gilstrap was terminated from his position with Synalloy, he brought suit against his former employer claiming that he had not received overtime benefits. Synalloy claimed that Gilstrap was exempt as an administrative employee. The Court found for the employer. Gilstrap was an administrative employee because he had complete control over the inventory, he implemented a new system of inventory control and his duties were therefore of great significance to the management of the business. The Court further commented that Gilstrap met the requirements of the “streamline test” for an administrative employee even though many of his discretionary decisions were reviewed by a superior before being implemented.

In Hodgson v. Penn Packing Co., 335 F. Supp. 1015 (E.D. Pa. 1971), a Federal District Court found two employees of a meat packing plant to be non-exempt based upon the nature of their duties. The Court held that employee Brown, whose duties included some inside sales work, production work, pricing of invoices and correlating of orders was not an exempt administrator under the Act. Brown performed all of these functions each week and had no job title. In finding Brown non-exempt, the Court pointed out that Brown’s work did not call for the regular exercise of independent judgment and was largely clerical in nature. The Court further commented: “Employees engaged in general clerical or bookkeeping work are not executive or administrative personnel under the Act.”

The Court held that another employee, Kessler, who was an inside salesman, was not an exempt administrative employee. Kessler’s only exercise of independent judgment was an “occasional deviation from the standard pricing sheet.” The Court held that in order to be considered an exempt administrator under the Act, an employee must “exercise more than those small discretions which normally inhere in the type of work one does.” The Court also said that occasional exercises of discretion fall short of the required “customary and regular exercise of discretionary powers.”

3. Professional Positions.

Under the FLSA, in order to be considered an exempt employee employed in a bona fide professional capacity, the individual must meet all the requirements of either the “streamline” (“short”) or “long” tests discussed below. In order to be considered exempt under Oregon law, the requirements of the “long” test must be met. There is no “short” test in Oregon.

“Streamline” or “Short” Test

- a. The employee must be paid a salary of \$250 or more per week; and,
- b. The employee’s primary duty must consist of either:

- * Work requiring knowledge of an advanced type in a field of science or learning, or work as a teacher in an activity imparting knowledge which requires consistent exercise of discretion and judgment; or,
- * Artistic work that requires invention, imagination, or talent in a recognized field of artistic endeavor.

The “Long” Test

If the employee earns a salary of between \$170-\$249 per week (\$1,126.66 per month for Oregon employers), he will be considered an exempt professional employee if all of the following requirements are met:

- a. The primary duty must be either:
 - * Work requiring knowledge of an advanced type in a field of science or learning, customarily obtained by a prolonged course of specialized instruction and study; or,
 - * Work that is original and creative in character in a recognized field of artistic endeavor and the result of which depends primarily on the employee’s invention, imagination, or talent; or,
 - * Work as a teacher certified or recognized as such in the school system or educational institution by which employed; and,
- b. The employee must consistently exercise discretion and judgment; and,
- c. Must do work that is predominantly intellectual and varied, as distinguished from routine or mechanical duties; and,
- d. Must not spend more than 20% of the time worked in the workweek on activities not essentially a part of or necessarily incident to the professional duties.

Under Federal law, the following are exempt irrespective of the above tests:

- a. An employee who is the holder of a valid license or certificate permitting the practice of law or medicine and is actually engaged in such practice; or,
- b. An employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program; or,
- c. An employee employed and engaged as a teacher in a school or other educational institution.

Oregon law differs in one respect – the salary basis requirements must be met for employees in the above categories.

Generally speaking, the professions which meet the requirement for a prolonged course of specialized intellectual instruction and study include law, medicine, nursing, accountancy, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, including pharmacy and registered or certified medical technology. The typical symbol of the professional training and the best prima facie evidence of its possession is the appropriate academic degree, and in these professions an advanced academic degree is a standard prerequisite. In the case of registered (or certified) medical technologists, successful completion of three academic years of pre-professional study in an accredited college or university plus a fourth year of professional coursework in a school of medical technology approved by the Council of Medical Education of the American Medical Association will be recognized as a prolonged course of specialized intellectual instruction and study. Registered nurses have traditionally been recognized as professional employees by the Wage/Hour Division in its enforcement of the Act. Although, in some cases, the course of study has been shortened (but more concentrated), nurses who are registered by the appropriate State examining board will be recognized as having met the requirement.

The areas in which the professional exemption may be available are expanding. As knowledge is developed, academic training is broadened, degrees are offered in new and diverse fields, specialties are created and the true specialist, so trained, who is given new and greater responsibilities, comes close to meeting the tests. However, these technical specialists must be more than highly skilled technicians. To qualify for the professional exemption, employees customarily attain the status based on a prolonged course of specialized intellectual instruction and study.

B. The Salary Basis Requirement.

1. What is the Salary Basis Requirement?

The salary basis requirement has been a source of considerable employer confusion, and expensive litigation. An employer must pay strict attention to the requirements of the salary basis in structuring its compensation programs. If the salary basis requirement is not met, then even highly compensated employees who may otherwise meet the duties requirements discussed above, may be entitled to overtime compensation. Thus in Abshire v. County of Kern, 908 F2d 483 (9th Cir. 1990), battalion chiefs who were employed by fire department, and earning \$60,000-\$70,000 per year, were held entitled to recover overtime compensation because their salaries were “subject to” a deduction for absences of less than a day, even though none of the employees had actually suffered such a deduction.

The federal regulations define a salary as a fixed amount paid to the employee for all of his hours of work in a week, irrespective of the hours worked by the employee. Thus, an employee might work only a few hours in a week, or many (e.g., over 40), and his salary may not vary if the salary basis requirement is to be met. See, 29 CFR § 541.118(a). A regular fixed salary is expected to provide full compensation for customary hours of work in a week. Payment

of a guarantee which meets the minimum necessary to meet the requirements for an exemption will not meet the salary basis requirement if the employee is compensated on an hourly basis. In some cases, however, payment of employees on a shift or daily basis, with a minimum guarantee, may satisfy the requirements for the salary basis test. 29 CFR § 541.118(b).

The Department of Labor regulations and the courts have imposed strict limitations on when a deduction may be taken from a salary. The following are situations in which a salary cannot be reduced or prorated, and still meet the salary basis requirement.

- a. Absences of less than a day;
- b. Absences for days or part of a day for purposes of jury duty, serving as a witness, or in the military;
- c. Any absence resulting from insufficient work;
- d. Any deduction for a disciplinary purpose (except major safety violations).

The regulations permit a deduction from salary in the following circumstances:

- a. Complete days of absence which are voluntary (e.g. unpaid vacation);
- b. After exhaustion of sick leave benefits, or before sick leave benefits have been credited to the employee;
- c. Initial or final week of employment;
- d. Reduction in salary due to a major safety violation.

29 CFR § 541.118(a).

2. Paid Leave Benefits and Their Possible Affect on the Salary Basis.

In Abshire v. County of Kern, *supra*, the Ninth Circuit held that battalion chiefs whose salaries were subject to a possible deduction (even though no deduction had ever been taken) from their salary due to absences of less than a day if their leave pay was exhausted, were not compensated on a salary basis. In a later case, the Ninth Circuit apparently narrowed the holding in Abshire so that loss of exempt status would not occur when an employee had not actually suffered a deduction, or when there was no express policy requiring a deduction. Barner v. City of Novato, 17 F.3d 1256 (9th Cir. 1994). Courts in other jurisdictions have not been entirely uniform in their treatment of this issue. The Supreme Court's decision in Auer v. Robbins, 117 S. Ct. 905 (1997) (see discussion below) appears to apply the requirement that an employee must actually suffer a deduction from salary, or the employer's policy must create a "specific likelihood" that a deduction will be taken, in order to invalidate salary basis status. However, the law is by no means clear on this point.

Employers which maintain a policy whereby paid leave benefits will be drawn in cases of partial days of absence run some risk that the salary basis will be invalidated, and face possible exposure to overtime claims. If an employer is looking for a “safe harbor”, it should consider adopting and complying with a policy specifying that no deduction from actual salary will ever be taken from an exempt employee in the event of an absence of less than a day.

3. Disciplinary Actions Resulting in Loss of Pay.

The Department of Labor regulations provide that a deduction may be taken from an exempt employee’s salary only for a violation of a major safety rule. This means that a suspension, except in cases of violation of a major safety rule, may invalidate an employee’s status as a salary compensated employee. Discipline which does not involve a loss of pay, such as reprimands, demotion, or termination, are not inconsistent with salary basis compensation and would be permitted by the regulations.

Either: (1) actual deductions; or (2) an employment policy which creates a “significant likelihood” of such deductions will invalidate the salary basis. Auer v. Robbins 117 S.Ct 905, 911 (1997). In Auer, the Court held that a policy will create a “significant likelihood” if it is “clear and particularized” and “effectively communicates that deductions will be made in specified circumstances.” On the other hand, the Court observed, a vague or broadly worded policy which might apply to a whole range of personnel, may not be “significantly likely” to be invoked against salaried employees.

What these standards mean in practice is as yet unclear, as the following cases will illustrate.

In Stanley v. City of Tracy, 120 F.3d 179 (9th Cir. 1997), the Ninth Circuit concluded that an employer’s general policy providing for suspension as a disciplinary measure did not alter the salaried status of police sergeants employed in the police department. The Court noted that the policies did not specifically state that suspensions would be imposed in any particular circumstance and that there was no prior history of suspensions actually having been imposed. Accordingly, the Court concluded that the policy did not “effectively communicate” that a suspension would result in loss of pay, and that there was “not a significant likelihood” that salaried personnel would be subject to a suspension.

In Childers v. City of Eugene, 120 F.3d 944 (9th Cir. 1997), the Ninth Circuit held that employees were not rendered non-exempt by virtue of the one-time imposition of a disciplinary suspension on the exempt employee, even though the policy did not specifically prohibit disciplinary deductions in pay for exempt employees.

In MacGuire v. City of Portland, 159 F.3d 460 (9th Cir 1998), the Court concluded that a “significant likelihood” of deductions could not be based upon subjective views of employees that they believed they might be subject to a disciplinary pay deduction. The Court concluded that the objective facts must be examined. In this case, there was no history of suspensions actually having been carried out. The Court also noted that the broad disciplinary policy included a range of possible disciplinary actions, some of which would be consistent with

salaried status. Consequently, the policy did not “effectively communicate” that impermissible suspensions would be made as to salaried employees.

On the other hand, in Hernandez v. City of Santa Ana, 134 F.3d 377 (table), 1998 WL23207 (9th Cir., 1998) (not officially published), the Court concluded that a disciplinary policy which set out the specific circumstances under which disciplinary pay deductions would be made was sufficient to destroy exempt status. The Court also focused on the employer’s refusal to unequivocally state that it would not apply the disciplinary rules providing for suspensions to the employees.

In another case, a U.S. District Court in Oregon concluded that a disciplinary warning given to a supervisor, on which there was a notation which suggested that the employee might be suspended for a future violation, was sufficient to create a significant likelihood of an improper salary deduction for disciplinary reasons. Accordingly, the trial court concluded that the employee was not exempt. Moorehead v. City of Gresham, 1997 WL419358 (D.Or. 1997) (not officially published).

As a practical matter, employers are advised to carefully examine their disciplinary rules to insure that exempt employees are not subject to disciplinary provisions which authorize suspensions. The rules should specify that exempt employees will not be subject to suspensions except in cases of major safety violations. This should prevent loss of salary basis status, unless an employee who is otherwise exempt under the executive/administrative/ professional exemption is actually subjected to a suspension. Even in such a case, the employer may have available to it the “window of correction” discussed below.

4. Other Problem Areas.

a. Jury and Witness Duty.

Neither state nor federal law requires that employees receive pay on days that they are absent through jury duty. However, if an exempt employee serves on a jury, and works part of a week, he must receive his full salary for that week. The same analysis would hold true with respect to an employee who is subpoenaed to appear as a witness. See, 29 CFR § 541.118(a)(4).

b. Payment of Additional Compensation.

Some courts had held that paying an employee additional compensation based upon the actual number of hours worked may invalidate their salary basis status. These decisions appear to be no longer persuasive. In Boykin v. Boeing Co., 128 F.3d 1279 (9th Cir. 1997), the Ninth Circuit concluded that payment of additional compensation for hours worked in excess of 40 in a workweek did not, in and of itself, defeat their exempt status under the FLSA. The Court indicated that the DOL regulations specifically contemplate that payment of additional compensation besides the salary is not inconsistent with the salary basis of payment. 128 F.3d at 1282. Oregon law does not prohibit the payment of additional compensation, so long as the predetermined base salary is paid. OAR 839-020-0004(29)(b). The safest way of handling extraordinary effort made by an exempt employee is to provide a performance based bonus.

c. Records and Restrictions on Leave.

The courts have identified other employer practices areas which may threaten salary basis status. These include:

1. Requiring exempt employees to obtain permission for leave for short periods of time;
2. Maintaining detailed hourly records of work;

5. Window of Correction

The federal regulations provide a “window of correction.” 29 CFR § 541.118(a)(6). The key language in the window of correction is: “Where a deduction not permitted by these regulations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future. Until recently, the window of correction has been given a very narrow reading, and has been limited by the courts to those situations in which the employer makes an inadvertent deduction. However, in an important case decided in February, 1997, the U.S. Supreme Court appears to permit much broader application of the “window of correction.”

In Auer v. Robbins, 117 S. Ct. 905 (1997), the Supreme Court held that an employee who had been subjected to a suspension (and consequent loss of pay) was not compensated on a salary basis for purposes of the administrative exemption. The Court observed however that the “window of correction” was available when the deduction was either “inadvertent” or for “lack of work”. Since the deduction had been due to a disciplinary action (and was therefore not due to lack of work) the “window of correction” was available. Significantly, the Court rejected the employee’s argument that the “window of correction” was unavailable because the employer had not yet reimbursed the employee. The Court instead observed that the regulation contained no time requirement, and approved the interpretation that the regulation did not require “immediate” payment. The Court thus permitted the employer to rely on the “window of correction” even though it had not yet reimbursed the employee and its invocation of the window of correction occurred long after the deduction was taken.

AVOIDING “OFF THE CLOCK” WORK TRAPS

A. What is Meant by “Hours Worked”?

Wage claims can be avoided by paying employees correctly for all hours worked. But identifying hours worked can be difficult. For wage and hour purposes, “hours worked” includes more than just hours actually worked. Such things as waiting time, on-call time, preparatory time and travel time can be considered hours worked. Even unauthorized time worked, such as time spent at the employee’s desk eating lunch and “working” constitutes “hours worked.”

An employer must always know its employee’s “hours worked” if it is to comply with the minimum wage and overtime requirements. That is why it is so important for employers to keep required records. Remember, “hours worked” can encompass more than “required” or “authorized” time spent on the job.

Under the state and federal wage and hour laws, “hours worked” includes all time during which an employee is engaged in physical or mental exertion controlled or required by the employer in pursued necessarily and primarily for the benefit of the employer and the business.

B. Volunteer Activities.

Employees may not volunteer free time to their employer. If an employee voluntarily continues to work at the end of the shift because of a desire to finish an assigned task, or for any other reason, they must be paid. The reason is immaterial. When an employer knows or is reasonably aware that the employee is continuing to work, the time is “hours worked” for wage and hour purposes.

C. Waiting or On-Call Time.

1. Waiting Time.

“Waiting time” can be hours worked under certain circumstances. The facts may show that the employee was “engaged to wait,” in which case the time is “hours worked.” On the other hand, if the employee was “waiting to be engaged,” the time is not part of “hours worked.” An employee “waiting” may be on duty even if allowed to leave the premises or job site if the waiting periods are unpredictable and of short duration and the employee is unable to use the time effectively for his or her own purposes. In such cases, waiting is an integral part of the job. The employee is “engaged to wait.” And the time is “hours worked.”

On the other hand, an “off duty” period, during which an employee is completely relieved from duty and which are long enough to enable him or her to use the time effectively for the employee’s own purposes, are not hours worked.

An employee is not completely relieved from duty and cannot use the time effectively for his/her own purposes unless he/she is definitely told in advance that he/she may leave the job and that he/she will not have to commence work until a definitely specified time. For example, a truck driver who has to wait at or near the job site for goods to be loaded is working during the loading period. Whether the time is long enough to enable the employee to use the time effectively for their own purposes, depends upon all the facts and circumstances of the case.

2. On Call Time.

Generally, under federal and Oregon law an employee (1) must be paid for on-call time if the employee is not free to use the time for the employee's own purposes, and (2) in addition, courts also will look to whether or not there is an agreement between the employer and the employee to pay for the on-call time.

- General rule: If excessive restrictions on time (must be at work, must return within five minutes; must answer page in two minutes) then must be paid).

In addressing whether the employee is free to engage in personal activities, the following factors should be considered: whether there is an on-premises living requirement or excessive geographical restrictions on the employee's movements; whether the frequency of calls are fixed; whether time limits for the employee to respond are unduly restricted; whether the on-call employee could easily trade his or her responsibilities; and whether the use of a pager/beeper will ease restrictions.

Although no one factor is dispositive, a general rule of thumb is that on-call time need not be paid if the employee is required to be reachable by beeper or phone, during specified hours.

Note that employees must be paid when actually called to work. If calls are so frequent or the conditions are so restricted that an employee cannot use the time effectively for his or her own purposes, the time spent waiting will be compensable.

For example, coroners were denied compensation for on-call time because they were parties to various overtime compensation agreements and it was clear the coroners could and did use on-call time for personal pursuits. Berry v. County of Sonoma, 30 F3d 1174 (9th Cir 1994), cert denied, 513 US 1150 (1995). The Ninth Circuit in Berry applied a two-part test in determining whether an employee must be paid for on-call time: (1) the degree to which the employee is free to engage in personal activities; and (2) the agreements between the parties. The court also recited a non-exhaustive list of factors to be examined in determining the degree of freedom to engage in personal activities while on-call, including:

- Whether there was an on-premises living requirement;
- Whether there were excessive geographic limits on employee's movements;
- Whether the frequency of calls was unduly restrictive;

- Whether a fixed time limit for response was unduly restrictive;
- Whether the on-call employee could easily trade on-call responsibilities;
- Whether the use of a pager could ease restrictions; and
- Whether the employee had actually engaged in personal activities during call-in time.

Berry, 30 F3d at 1174. See also, Martin v. Ohio Turnpike, No. 94-3759, 1995 US App LEXIS 38441 (6th Cir 1995) (similar facts). Other cases:

- Owens v. Local No. 169, 971 F2d 347 (9th Cir 1992). The Court held that an employer was not required to pay mechanic employees overtime compensation under the FLSA for on-call waiting time. The Court focused on the fact that the mechanics were not required to remain on the premises and were free to pursue personal activities during the on-call time, only responded to an average of 5 to 6 callbacks per year, and were not required to affirmatively monitor radio dispatches. The Court also said that the test is not the importance of on-call work to the employer but rather whether the employee is so restricted during on-call hours as to be effectively “engaged to wait.”
- Gilligan v. City of Emporia, 986 F2d 410 (10th Cir 1993) (on-call time is non-compensable where the only restrictions placed on the employees were that they (1) had to wear a pager and stay within range or leave a phone number; (2) could not consume alcohol; and (3) were barred from activities that would prevent them from hearing their pagers); Paniagua v. City of Galveston, 995 F2d 1310 (5th Cir 1993) (upholding judgment for employer when employee required to wear pager and answer emergency service calls several times each week but who could go to movies, out to dinner, and travel within a 30 mile radius); Ingram v. County of Bucks, 114 F3d 265 (3rd Cir 1998) (overnight and weekend hours spent on call by 30 deputy sheriffs is not compensable where deputies’ personal pursuits – such as reading, watching television, doing housework, shopping – are not greatly restricted).
- Sarmiento v. City and County of Denver, No. 95-1225, 1996 US App LEXIS 7562, 131 Lab Cases P33366 (10th Cir April 11, 1996) (on-call restrictions placed on an employee were not so burdensome that the on-call time was predominantly spent for the benefit of the employer. Aside from giving up skiing because of the geographical limitation of his pager, the employee did not forego various activities. Most call-backs occurred during snow storms and were less frequent during other times. Although the employee was required to respond anywhere from 30 minutes to two hours depending on the type of call, there was no discipline for not answering the pager. The employee could ask not to be on call when he wished, and that request would be honored).

- In contrast, a Missouri district court held restrictions placed on an EMT while he was on-call sufficiently interfered with the employee's ability to effectively use his free time for personal activities to preclude summary judgment in favor of the employer. In this instance, the employee was on call for 24 hours per day, five days a week. Although employer policies permitted EMTs to trade shifts with each other, as a practical matter, this was difficult due to a shortage of qualified personnel. The employer's five-minute response time requirement restricted the employee's ability to leave the city limits and the employee had to wear his work uniform whenever he appeared in public while on-call. O'Brien v. Dekalb-Clinton Counties Ambulance District, Case No. 94-6121-CV-SJ-6, 1996 US Dist LEXIS 14636 (DC Mo June 24, 1996); see also, May v. Arkansas Forestry Comm'n, 993 F2d 632 (8th Cir 1993) (upholding jury award for employees required to be on-call 24 hours a day for emergency service).

D. Travel Time and Sleeping Time.

1. Travel Time.

Whether or not time spent in travel is working time depends upon the kind of travel involved.

a. Travel time to and from work is not hours worked, whether to a fixed location or to a different job site. (Exception: When the employee has completed his regular workday and is called back by an employer on emergency, travel to and from work is "hours worked.")

b. Travel that is part of the principal activity of the work, such as travel from job site to job site, is "hours worked."

c. On assignment to another city which do not include an overnight stay, all travel time is "hours worked" except:

- (i) the time required to travel from the employee's home to his/her regular base or from his/her regular base to home.
- (ii) the time the employee travels from home to a station to board public transportation or from the station to home.

d. On assignments to another city which include an overnight stay, all travel time which cuts across regular work hours (weekday or weekend) are "hours worked," except the time an employee travels from his home to board public transportation. For an employee driving a private or company vehicle, all time in transit is considered work time. Travel time for passengers in that vehicle outside normal work hours is not work time. If the employee is offered public transportation and drives his/her own car, the employer can count as "hours worked" either the amount of time spent driving or the amount of time it would have taken to travel by public transportation.

- Travel time concerns often overlap training time concerns: In Imada v. City of Hercules, 138 F3d 1294 (9th Cir 1998) the Ninth Circuit ruled that police officers did not have to be compensated for work-to-training travel time. The law only requires work-to-training travel time to be compensated if it involves “special requests” and “unusual assignments” by employer. In this case, the training was periodic and neither special nor unusual; the officers knew they would not be compensated for work-to-training travel time. The court found it was non-compensable, “home-to-work” travel time.

2. Sleeping Time.

Under certain conditions, an employee is considered to be working even though some of the time is spent sleeping. An employee who is required to be on duty for less than 24 hours is working even though he/she is permitted to sleep or engage in other personal activities when not busy. A telephone operator, for example, who is required to be on duty for specified hours, is working even though permitted to sleep when not busy answering calls. It makes no difference that the employee is furnished facilities for sleeping. The employee’s time is given to the employer. The employee is required to be on duty and the time is work time.

When an employee is required to be on duty for 24 hours or more, a regularly scheduled sleeping period of not more than eight hours may be excluded from hours worked. For the sleeping time to be excluded, however, there must be an express or implied agreement between the employer and employee, and the employer must furnish adequate sleeping facilities where the employee can usually enjoy an uninterrupted night’s sleep. If the sleeping period is interrupted by a call to work, the period of interruption must be counted as hours worked. If the employee does not get at least five continuous hours of sleep during the scheduled period, the entire time must be compensated as work time.

An employee who resides on the employer’s premises on a permanent basis or for extended periods of time is not considered to be working the entire time. All the time he/she is on the premises in normal private pursuits, with complete freedom from all duties, is not work time. To determine the exact hours worked, any reasonable agreement of the parties will be acceptable.

E. Preparatory and Finishing Activities.

Time spent preparing to work or completing work is “hours worked” where it is an integral and indispensable part of the employee’s work activities. For example, chemical plant employees can not perform principal activities without changing clothes on the employer’s premises at the begin and ending of the workday. This is an integral part of the employee’s principal activity and so is counted as “hours worked.” On the other hand, if changing clothes is merely a convenience to employees not directly related to principal employer activities, it would not be considered preparatory and finishing activity, and consequently, not “hours worked.”

F. Meetings, Training Classes and Professional Meetings.

Attendance at meetings and training programs and similar activities may not be counted as working time if all of the following criteria are met:

- Attendance is outside the employee's regular working hours;
- Attendance is, in fact, voluntary;
- The meeting is not directly related to the employee's job; and
- The employee does not perform any productive work during such attendance.

Attendance is not "voluntary" if it is directly or indirectly required by the employer. Nor is it "voluntary" if the employee is led to believe that his/her present employment would be adversely affected by non-attendance. Generally speaking, state required certification and training (such as medical certification training requirements) are considered to be "voluntary" and noncompensable.

Training is directly related to the employee's job if it is designed to make the employee perform their present job more effectively. This is distinguished from training for another job or to gain an additional skill. For example, a stenographer who is given a course in stenography is engaged in an activity to make the employee a better stenographer. Time spent in such a course, given by the employer or under its auspices, is "hours worked." However, if the stenographer takes a bookkeeping course, it may not be directly related to the job. The time the employee spends voluntarily taking such a bookkeeping course outside regular working hours need not be counted as working time. Where a training course is instituted for the bona fide purpose of preparing for advancement through upgrading the employee to a higher skill, it is not intended to make the employee more efficient in their present job and is not "hours worked." If an employee, on his/her own initiative, attends an independent school, college or trade school after hours, the time is not worked for his/her employer even if the courses are related to their job.

G. Jury Duty and Voting Time.

1. Jury Duty.

Under Oregon law, employers have no obligation to pay employees for time off to serve on jury duty. An employer may not, however, discharge or threaten to discharge, intimidate or coerce any employee by reason of the employee's service or scheduled service as a juror. ORS 10.090.

2. Voting Time.

Oregon employers are not required to provide employees with paid time off to vote.

H. Rest Periods and Meal Periods

1. Meal Periods.

In the absence of an industry practice or custom of shorter meal periods (20 minutes minimum), meal periods of not less than 30 minutes must be provided to employees who work shifts of six or more hours. For work periods of seven hours or less (but at least six), the meal period is to be taken between the second and fifth hour worked .. If the work period is more than seven hours, the meal period must be taken between the third and sixth hour worked. If an employee is required to remain on duty during the meal period or performs any task, the employee must be paid for the meal period. If the meal period is uninterrupted, it may be unpaid. OAR 839-20-050(2).

2. Rest Periods.

Oregon law requires a period of rest of not less than ten minutes (without deduction from the employee's pay) for every segment of four hours (or major part of four hours) worked in a work period. This time must be taken in addition to and separately from time allowed for meals. Insofar as feasible, the rest period should be taken approximately midway in the segment of work. The rest periods are included in the employee's "hours worked." Rest periods may not be used to offset against other working time such as compensable waiting time or on-call time. OAR 839-20-050(3).

I. Tips On Applying The Law.

Although there may be nothing an employer can do to eliminate the possibility of off-the-clock wage claims, employers should consider a number of steps to minimize the threat of such claims.

- Establish a policy against off-the-clock work. As part of that policy, the employer should create a direct avenue for complaints to a human resources or legal department separate and apart from immediate management.
- Discipline employees for working or allowing off-the-clock work. There may be a concern about claims of retaliation by employees who are disciplined after they felt compelled to work off-the-clock; however, an evenly and consistently applied discipline policy should avoid this concern.
- Promptly investigate and resolve all off-the-clock claims or complaints. It is important for employers to create a record of paying valid off-the-clock claims.
- Have employees verify their time entries and compensated time. If employees sign off on the number of hours that they have reported, they may be estopped from challenging those representations later. Yanoscheck v. Montgomery Ward, 176 Wash. 137 (1934).

- Establish an ongoing educational campaign. Employees should be trained as to what constitutes off-the-clock work and periodically reminded that federal and state laws prohibit off-the-clock work.
- Randomly verify time card accuracy. This is perhaps the most important step that an employer can take. Such random verification demonstrates that the employer is taking affirmative steps to limit off-the-clock work and the employer is not ignoring the realities of the work place. If necessary, hire someone to conduct compliance audits.

Document employee participation in any changes to time records. An employer should generally have employees sign off on any changes to time records. Moreover, if employees fail to initially record their time accurately, an employer may wish to issue warning letters to the employees about proper time reporting.

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| <p>BONUSES AND OTHER PAYMENTS TO EMPLOYEES - WHEN MUST THEY BE PART OF THE REGULAR RATE?</p> |
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A. Introduction: Overtime Requirements and Calculation.

1. Overtime Regulations Under State and Federal Law.

The general overtime standard of the FLSA requires that an employee who works overtime must be compensated for those overtime hours at a rate at least one and one-half times the “regular rate” at which the employee is actually employed. Because this regular rate is the basis of all overtime calculations, regulations accompanying the Act go into great detail regarding how to figure the regular rate. The regulations also describe which kinds of payments and compensation are to be included in the regular rate and which are to be excluded

Oregon Law

Oregon law is consistent with Federal law except in a few narrow areas.

Employees in any mill, factory or manufacturing facility cannot be employed more than 10 hours in any one day at straight time. Maximum hours per day are 13, three hours of which must be paid at time and a half the employee’s regular rate. ORS 652.020(3). As a result, an employee who works less than forty hours in a week, but over ten hours in a day, is entitled to time and a half for hours worked above ten in that day. Sawmills, planing mills, shingle mills and logging camps are currently not covered by this requirement. An exemption is provided for employees covered by a collective bargaining agreement which limits work hours or overtime payments. ORS 652.020(4). An exemption may also be obtained on an individual basis, upon application to the Labor Commissioner.

If this employee has certain extra amounts included in his paycheck, this must be included in the calculation. Take for example, an hourly employee being paid a \$20 bonus per week. If his hourly rate is \$5, and he worked 48 hours during the workweek, the calculation looks like this:

$$48 \times \$5.00 = \$240 + \$20 = \$260$$

$$260, 48 = \$5.42$$

His regular rate = \$5.42

The overtime calculation then goes like this:

$$40 \times \$5.00 = \$200.00$$

$$8 \times (\$5.42 \times 1\text{-}1/2) = 8 \times \$8.13 = \underline{65.04}$$

$$\$265.04$$

or

$$48 \times \$5.00 = \$240.00$$

$$8 \times (\$5.42 \times 1/2) = 8 \times \$2.71 = \underline{21.68}$$

$$\$261.68$$

b. Employees Paid on Basis Other Than Hourly

In general, the regular rate of pay for an employee paid on a weekly, semi-monthly, biweekly or monthly basis is calculated as follows: dividing into pay the number of hours that pay was intended to compensate. For instance, an employee that is paid \$300 per week for a 37.5 hour schedule has a regular rate of \$8.00. This arrangement, however, does not mean that the employee is entitled to \$12.00 per hour (\$8 x 1-1/2) for every hour over 37.5 hours per week. Under the FLSA, the standard is a 40-hour work period. If this employee works 39 hours, she will be entitled under the Act to only extra straight time payments for the extra 1-1/2 hours worked over her standard time.

$$39 \times \$8 = \$312$$

On the other hand, if the employee works 42 hours, she is entitled to her regular rate for every hour through 40 and 1-1/2 times her regular rate for any hours over 40.

$$40 \times \$8 = \$320$$

$$2 \times \$12 = \underline{24}$$

$$\$344$$

or

$$\begin{array}{r}
 42 \times \$8 = \quad \$336 \\
 2 \times \$8 \times 1/2 = \quad \underline{\quad 8} \\
 \quad \quad \quad \quad \$344
 \end{array}$$

If the employee is paid on other than a weekly basis, the pay must be reduced to a weekly basis before the hourly rate can be calculated.

If the employee is paid every other week, the weekly pay is figured by dividing the two-week amount in half. So a person paid \$500 every two weeks earns \$250 per week.

If the employee is paid twice per month, however, the calculation of the weekly rate is somewhat different. A person paid twice per month receives 24 paychecks per year. To figure the weekly rates, the yearly rate is divided by 52. For example,

$$\text{Twice monthly pay} = \$500$$

$$\text{Yearly Pay then is } 24 \times \$500 = \$12,000$$

$$\text{Weekly pay is therefore } \$12,000 \div 52 \text{ or } \$230.77.$$

Similarly, if an employee is paid on a monthly rate, his weekly pay is figured by multiplying the monthly pay by 12 and then dividing it by 52 weeks. For example, an employee who earns \$1500 per month:

$$12 \times \$1500 = \$18,000$$

$$\$18,000 \div 52 = \$346.15 \text{ per week.}$$

If an employee is paid on a monthly basis, the employer and employee may, by prior agreement, stipulate that the regular rate may be calculated by dividing monthly pay by the number of work days in the month and then dividing further by the number of hours on a regular work day. For example, an employee who is paid \$1000 per month in a 22 workday month for a normal eight-hour day:

$$\$1000 \div 22 = \$45.45$$

$$\$45.45 \div 8 = \$5.68 = \text{regular rate under this arrangement.}$$

4. Fixed Wages for Fluctuating Hours (“Belo” Agreements).

Where the nature of the job results in fluctuating hours of work then an employee (or employee organization) and employer may enter into an understanding that the employee is guaranteed certain wages no matter how many hours he works, and the regular rate can be calculated based on the actual number of hours worked rather than the intended amount. Take for example an employee who works as a tree trimmer in Portland. He is paid \$325 per week no matter how many hours he works. (If an employee chooses to take a full day off, he may be

“docked” for his time, depending on the employment contract.) One week it rains so the employee can only work 30 hours. He receives \$325. The next week is clear so the employee works 50 hours. The employee receives \$325, but must also be compensated for his overtime (over 40 hours). To figure his regular rate of pay for the 50-hour week, the weekly pay is divided by the time actually worked.

$$\$325 \div 50 = \$6.50$$

The employee must be paid $\$6.50 \times 1\text{-}1/2$ for all hours over 40. He has already been paid \$6.50 for all 50 hours, so the calculation looks like this:

$$10 \times \$6.50 \times 1/2 = \$32.50$$

$$\text{His total pay} = \$325 + \$32.50 = \$357.50$$

In order to qualify for this method of calculating overtime pay, there must be an understanding between employer and employee that the employee will be paid the same (non-overtime) pay for whatever hours he works.

The arrangement described above is commonly called a “Belo” agreement, named after a decision of the U.S. Supreme Court which authorized their use. Waling v. A.H. Belo Corp. 316 US 624 (1942). The DOL has issued regulations governing the use of “Belo” agreements. See, 29 CFR § 778.403 et. seq.

5. Employees Working at Two or More Rates.

Where an employee in a single workweek works at two or more different types of work for which different non-overtime rates of pay have been established (for example, an out-of-class assignment), his regular rate for that week is the weighted average of such rates. That is, his total earnings (except statutory exclusions) are computed to include his compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs.

For example, take a person who in one work period works as a lead person for 36 hours at \$6 per hour and as a maintenance worker for 10 hours at \$4 per hour. To determine this employee’s regular rate, first find his straight time pay: $(36 \times \$6) + (10 \times \$4) = \$256$. The total hours worked is 46 hours. The regular rate then equals $256 \div 46$ or \$5.57 per hour. To find the overtime rate, multiply \$5.57 times $1\text{-}1/2 = \$8.36$ per hour. Employee should be paid \$8.36 per hour for all hours over 40. The first 40 hours worked are paid as straight time at the agreed upon rate(s). Any hours over 40 are compensated at the overtime rate.

Therefore the employee earns:

$$\begin{array}{r} 36 \times \$6.00 = \$216.00 \\ 4 \times \$4.00 = 16.00 \\ 6 \times \$8.36 = \underline{50.16} \\ \$282.16 \end{array}$$

An exception to this weighted average rule allows an employee to agree, through an arrangement culminated before the overtime is worked, that the employee will be paid overtime at the rate of 1-1/2 times the regular rate of the work done during the hours over 40. For example, if during a work period an individual works the first 40 hours at a job paying \$5.00 per hour and then 8 more hours at a job that pays \$4.00 an hour, the calculation looks like this:

$$\begin{array}{r} 40 \times \$5.00 = \$200 \\ 8 \times (\$4.00 \times 1-1/2) = 8 \times \$6.00 = \underline{48} \\ \$248 \end{array}$$

If an employee works 38 hours at a job paying \$5.00 and then 8 hours at a job paying \$4.00 the calculation looks like this:

$$\begin{array}{r} 38 \times \$5.00 = \$190 \\ 2 \times \$4.00 = 8 \\ 6 \times (\$4.00 \times 1-1/2) = 6 \times \$6.00 = \underline{36} \\ \$234 \end{array}$$

If an employee works 42 hours at a job paying \$5.00 and then 4 hours at a job paying \$8.00 per hour, the calculation looks like this:

$$\begin{array}{r} 40 \times \$5.00 = \$200 \\ 2 \times (\$5.00 \times 1-1/2) = 2 \times \$7.50 = 15 \\ 4 \times (\$8.00 \times 1-1/2) = 4 \times \$12.00 = \underline{48} \\ \$263 \end{array}$$

This type of agreement obviously benefits the employer only if he can control the overtime so that the lower paying job is done toward the end of the work period.

B. Examples of Payments Which Are Included In The Regular Rate.

1. Shift differentials
2. Retroactive pay increase
3. Educational and other incentive pay
4. "Controlled standby" pay

5. Payments for “uncontrolled standby” time - even though not counted as hours worked
6. Awards for performance on the job
7. Merit bonuses
8. Hazard pay
9. Bilingual pay
10. Longevity pay
11. Special assignment pay
12. Monthly payment which employee may designate be applied to group insurance, and/or salary.
13. “Push” money (i.e., promotional money paid by third parties as a sales incentive.)
14. Board, lodging or other facilities “customarily furnished” by the employer, so long as not excluded from wages by a collective bargaining agreement.
15. Piecework payments

C. Payments That May Be Excluded From the Regular Rate.

The regular rate must include all remuneration received by the employee, but the employer may exclude:

1. Gifts that are not dependent on hours worked;
2. Payments made for vacation, holiday, illness or other payments for time not worked such as extra pay for non-worked “show up” or minimum call back time;
3. Reasonable expenses;
4. Payments irrevocably made to a trustee for retirement, profit sharing, life, accident or health insurance or similar benefits;
5. Suggestion system awards;
6. Discretionary bonuses;

7. Sick leave payments;
8. Overtime payments, including those made pursuant to a state law, policy, rule or collective bargaining agreement provision (such as overtime pay for hours over 8 in a day or for work on a holiday); and
9. Overtime payments paid for the 6th and 7th days of a work period or the like as long as the extra pay is at least 1-1/2 times the regular rate.
10. Severance pay.

Any overtime payments included in number 8 and 9 above can be credited toward overtime due under the FLSA. In other words, if a work period runs from Monday through Sunday, the employee works 12 hours on Monday and a total of 44 hours for the week period, the employer need not compensate the employee both for the extra 4 hours on Monday (assuming that the collective bargaining agreement calls for time-and-a-half for hours over 8 in any one day) and for the 4 hours over 40. As long as the employee's pay is at least as much as it should be for the 4 hours over 40 under the FLSA, the employer need not compensate the employee twice.

D. Discretionary Bonuses.

Bonuses that are truly "discretionary" are exempted from the calculation of the "regular rate". 29 USC § 207(e)(3)(a). To qualify under this exemption, the bonus must be both discretionary in fact and in amount, i.e., the employer must possess sole and absolute discretion over: (1) whether the bonus is given at all, and (2) the amount of any bonus to be given. Id. See also 29 CFR § 778.211. The existence of a contract, agreement, promise, or even advance announcement of a bonus destroys the employer's discretion as to whether to give a bonus. The regulations specifically provide that if an employer announces to his employees that he intends to pay them a bonus later in the year, he has thereby abandoned his discretion regarding the fact of payment. A bonus designed as an incentive to improve productivity, work quality, or attendance is also not 'discretionary. " If a bonus is not considered discretionary, when the amount of the bonus is finally determined and paid, such payment must be retroactively accounted for in the employees' "regular rate". 29 CFR § 209. Overtime payments due because of a new higher regular rate must then be calculated and paid.

The following are examples of different types of bonuses and whether they must be included or excluded from the regular rate:

Example 1: Company decides to pay a year-end bonus based on 10 percent of an employee's wages for the year, including overtime.

Need not be included. DOL regulations provide that the regular rate of pay does not include bonuses based on a percentage of the person's total earnings for the bonus period *provided* the earnings include overtime pay.

Example 2: Company decides in mid-month to pay all employees a bonus because the company is doing well.

Need not be included. Bonuses that are discretionary are not included in the regular rate of pay. A bonus is discretionary if you decided whether it will be paid and, if so, how much will be paid. A key factor is when in relationship to payment of the bonus the employees were told they would receive it.

Example 3: Company tells employees at beginning of the year it will give all employees a bonuses at end of year.

Must be included. The bonus is not discretionary because the Company has promised to pay it. Also, the long advance notice evidences it is not discretionary.

Example 4: Company gives a few employees a bonus for hard work without any advance notice.

Need not be included. Bonuses for past work need not be included.

Example 5: Company tells employee that if she continues to work hard, she will receive a bonus of \$100 per week. Employee works hard and receives the bonus.

Must be included. Whether a bonus is paid is discretionary based on performance. This is a typical incentive bonus.

E. Stock Options.

Earlier this year, the Wage and Hour Division issued an advisory letter which indicated that the value of stock options would have to be considered part of the regular rate when computing overtime compensation. Understandably, the letter generated a flurry of controversy, as well as considerable interest from Congress. Legislation was recently passed which addresses this issue. Effective August 16, 2000, the FLSA was amended to exclude the value of broad-based stock compensation in calculating overtime for hourly employees. The amendment excludes any value or income derived from stock option programs, stock purchase plans or stock appreciation right programs, from the regular rate of pay when calculating overtime.

F. Regular Rate of Pay Checklist.

___ Regular rate includes all remuneration based on hours worked, productivity or efficiency.

___ To calculate hourly rate for employees paid on a weekly, biweekly or monthly basis, divide the pay by the number of hours which it is intended to compensate.

___ Regular rate excludes:

___ Paid time not worked, including vacation, holidays, sick leave.

___ To extent pay exceeds time worked, such as minimum call-out pay, show-up time, minimum time between shifts.

___ End-of-year bonuses that are totally discretionary as to whether paid and amount paid.

___ Unused accumulated sick leave payouts.

___ Travel, uniform and other bona fide reasonable expense reimbursements.

___ Suggestion system awards.

___ Severance pay

___ Premium payments for working more than 8 hours per day or working more than another number of scheduled hours per day, or for working more than a weekly number of hours less than 40.

___ Premium payments, if premium is at least half the regular rate, for working Saturdays, Sundays, holidays, regular day off.

Note: The premium exclusions under the last two items are also creditable against FLSA overtime due. Such credit is not allowable for paid time not worked items.

___ Regular rate includes:

___ Any pay for work actually performed, or for productivity or efficiency.

___ Shift differentials.

___ Retroactive pay adjustments.

___ Educational or other incentive payments.

___ “Controlled” and “Uncontrolled” stand-by time payments.

___ Hazard, dirty work pay.

___ Bilingual pay.

- ___ Special assignment pay.
- ___ “Push” money (i.e., promotional money paid by third parties as a sales incentive.)
- ___ Board, lodging or other facilities “customarily furnished” by the employer, so long as not excluded from wages by a collective bargaining agreement.
- ___ Piecework payments

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| <p>THEY JUST MIGHT BE YOUR EMPLOYEES: INDEPENDENT CONTRACTORS, JOINT EMPLOYMENT, TRAINEES AND “VOLUNTEERS”</p> |
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A. Non-Employees?

There are two principal categories of persons providing services to an employer that are not covered by the Act because they do not fit into the statutory definition of employee -- independent contractors and trainees. Non-profit and charitable organizations and public entities may also use volunteers. If an individual fits into one of these non-employee categories, the employer may not be constrained by the FLSA or state wage and hour law. However, an employer may find itself unwittingly responsible for wage payments to persons it never considered to be its employees.

1. Independent Contractors.

In order to be held liable for minimum wage or overtime payments under the Act, an employer must be involved in an employment relationship with the worker in question.

An employer cannot avoid compliance with the Act by merely referring to someone as an “independent contractor.” If the DOL or BOLI holds that a worker is an employee, the employer is governed by the Act with regard to that employee whether the employer refers to that person as an independent contractor or employee.

The DOL has offered some guidelines for distinguishing an employee/employer relationship (potentially covered under the Act) and an independent contractor/customer relationship (never covered under the Act). In general an employee, as distinguished from an independent contractor who is engaged in a business of his own, is one who “follows the usual path of an employee” and is dependent on the business which he serves. Significant factors (no single factor is controlling) include:

- a. The extent to which the services in question are an integral part of the employer's business; and,
- b. The permanence of the relationship; and,
- c. The amount of the alleged contractor's investment in facilities and equipment; and,
- d. The nature and degree of control by the principal; and,
- e. The alleged contractor's opportunities for profit and loss; and
- f. The amount of initiative, judgment or foresight in open-market competition with others is required for the success of the claimed independent enterprise.

The employer has the burden of proof in showing that the alleged independent contractor is not actually an employee. If the DOL should find that the worker is indeed an employee, the employer will be exposed to liability for the minimum wage and overtime hours of the employee. If, on the other hand, the employee or employees in question are determined to be independent contractors then there is no liability for minimum wage or overtime pay. An independent contractor is paid according to whatever contract is agreed to by the contractor and the employer.

2. Joint Employment.

An employee of an independent contractor is exempt from the provisions of the Act as to the contracting entity. However, if an employee of an independent contractor comes under the control of the contracting entity for a significant period of time, the independent contractor's employee begins to look more and more like an employee of the contracting entity. At the point where the control by the contracting entity employer becomes so significant as to convert the independent contractor's employee into the contracting entity's employee, that entity becomes responsible for complying with the minimum wage and overtime provisions of the Act.

3. Trainees.

Sometimes an employer may offer an opportunity to a student or trainee to gain experience in the employer's offices or other operations. If this person is not paid, he may qualify as a non-employee "trainee." If this person can qualify as such, he need not be paid and is not entitled to the protections of the Act. Note: The FLSA contains a limited exemption from minimum wage coverage for employees who are trainees and under the age of 20.

To be considered a non-employee trainee, the person in question must receive no wages from the employer, and must meet all six of the following tests:

- a. The training must be similar to that which would be given in a vocational school; and,

- b. The training is for the benefit of the trainees involved; and,
- c. The trainees do not displace regular employees, but work under their close supervision; and,
- d. The employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion his operations may actually be impeded; and,
- e. The trainees are not necessarily entitled to a job at the conclusion of the training period; and,
- f. The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

DOL Wage and Hour Field Operations Handbook, § 10b11.

The employer may provide for nominal expenses of the trainee without such payments being considered wages.

If an alleged “trainee” is actually hired by the employer and then provided with a training program, the “trainee” will have become an employee and will be covered under the Act.

To qualify as a “non-employee trainee,” it is advisable that the trainee never have been employed by the employer in question.

4. Volunteers.

Individuals who volunteer their services for civic, charitable or humanitarian reasons, without contemplation of pay, and who do so freely (without direct or implied pressure from an employer), are not considered to be employees of the entities for which they render services. An employee of a public entity cannot, as a matter of law, volunteer to perform the same type of services which he/she performs as an employee for that entity.

While an individual cannot be a volunteer if he/she expects or receives compensation for services rendered, status as a volunteer is not precluded where the entity reimburses the individual for out-of-pocket expenses, and/or provides the individual with “reasonable benefits” and/or a “nominal fee.”

Authorized Expenses, Benefits and/or Fees

- a. **Expenses:** An allowance to reimburse the individual for purchasing, maintaining and replacing uniform items, or reimbursement for out-of-pocket expenses for meals, transportation, and costs incident to training will not preclude volunteer status.

- b. **Reasonable Benefits:** Group health, life, disability, workers compensation and liability insurance and pension plans are deemed reasonable benefits for volunteers.
- c. **Nominal Fee:** Nominal fees may be paid on a “per call” or similar basis, and in the form of a nominal monthly or annual stipend in the case of individuals who volunteer to provide periodic services on a year-round basis. As to what would constitute “nominal,” the DOL regulations and accompanying commentary provide little guidance. It is pointed out that a nominal fee may not be a disguised substitute for compensation for services rendered, and that whether the total payments made for expenses, benefits, and fees are not at odds with this prohibition will be determined based on the “economic realities” of each particular situation. The regulations refer to the following factors as being relevant as to whether a fee is nominal: the distance traveled, time and effort expended, and the degree to which the time made available for volunteer services is of limited or unlimited duration.

HANDLING DEDUCTIONS FROM PAY AND FINAL PAYCHECKS

A. **Timing.**

Under Oregon’s wage payment statute, definite pay periods must be established and cannot exceed 35 days apart. ORS 652.120.

B. **Deductions.**

Under Oregon’s wage payment statute, only the following deductions may be made:

1. Those required by law, such as taxes, social security, workers’ compensation and garnishments. ORS 652.610(3)(a).
2. Those which have been voluntarily authorized. ORS 52.610(3)(b).
 - (a) Employee must sign written authorization.
 - (b) The deduction must be for the employee’s “benefit.”
 - (c) The deduction is recorded in employer’s books. This would include such things as purely personal items purchased from the employer, deposits to credit unions, and salary advances.
3. Deductions in accordance with a collective bargaining agreement, i.e., union dues, insurance premiums. ORS 652.610(3)(d).

4. Deductions for repayment of a loan made to the employee by the employer pursuant to a written agreement between the employee and the employer. ORS 652.610(3)(e).

- (a) Employee must voluntarily sign the agreement.
- (b) The loan was paid to the employee in cash or other medium allowed by law. ORS 652.1 10.
- (c) The loan was solely for the employee's benefit and not used either directly or indirectly for any purpose required by the employer or connected with employee's employment with the employer or connected with employee's employment with the employer.
- (d) The amount of the deduction does not exceed the amount permitted to be garnished under law. ORS 23.185(1)(a) or (d).
- (e) The deduction-is recorded in the employer's books.

5. Other authorized deductions. ORS 652.610(3)(c).

- (a) Employee must sign a written authorization.
- (b) Employer cannot be the "ultimate recipient" of the money.
- (c) The deduction must recorded in the employer's books.

6. Deductions prohibited by law:

- (a) Breakage or loss by employees.
- (b) Uniforms or laundering of such. Minimum wage employees must be provided uniforms at no cost unless they are street clothes (i.e., white shirts/black pants). Employees earning above minimum wage can be required as a condition of employment to purchase uniforms, but the uniform may not be a deduction from the paycheck. The maximum the employee may be required to spend is the difference, in a payroll period, between the minimum wage and their hourly wage.
- (c) Cash shortages.
- (d) Loss of expected business.

C. Payment of Wages on Termination.

Under the Oregon wage payment statute, wages on termination must be paid as follows:

1. **When an employee quits without notice.** The final paycheck is due within five days, excluding Saturdays, Sundays and holidays. Exception: If a regular payday occurs within the five-day period, the employee must receive all wages due at that time. ORS 652.140(2).

2. **When an employee has given notice.** When at least 48 hours of notice is given, excluding Saturdays, Sundays and holidays, the paycheck is due on the final day worked. If the final day worked falls on a Saturday, Sunday or holiday, the paycheck is due not later than the end of the next business day. ORS 652.140(2)(3).

3. **When an employer terminates an employee, or if termination is by mutual agreement.** The final paycheck must be paid not later than the end of the first business day after the termination. ORS 652.140(1).

4. **The employee may request check be mailed or deposited.** If an employee so requests, the employer must mail the final check to any address the employee designates. Wages may be deposited in the employee's bank account if the direct deposit is mutually agreeable to employer and employee. ORS 652.140(4).

5. **Exception for collective bargaining agreements.** If a collective bargaining agreement provides for payment of wages upon termination, the statutory provisions do not apply. ORS 652.140(5).

6. **Layoffs/Strikes.** If an employee is laid off and will return at a later date, the final paycheck may be paid the next regular payday. Wages earned by employees who are going on strike are due on the next regular payday or 30 days after the strike begins, whichever occurs first. ORS 652.170.

7. **If employee dies.** Upon employee's death, all wages earned up to \$3,000 must be paid to the surviving spouse, or, if there is no surviving spouse, to dependent children. ORS 652.190.

D. Vacation Pay.

Vacation pay is considered to be "wages" or "compensation" within the meaning of the Oregon statutes governing payment of employee wages or compensation. Oregon law does not, however, mandate that vacation benefits be vested. Whether or not the vacation payments are payable at the time of termination is governed by contract. In most cases, this requires examination of the employer's personnel policies or employee handbooks. In the absence of written policies, the employer's practices concerning vacation should be examined. If, for example, the policies provide that vacation may be taken only after the employee reaches an anniversary date, a separation before that date would not entitle the employee to vacation pay.

If, on the other hand, the policies provide that employees shall accrue a certain amount of vacation for each month or year of employment, this indicates that vacation vests on a continuous, accrual basis. In order to avoid potential liabilities for penalties for unpaid or underpaid vacation, employers should communicate to employees regarding its determination of any vacation pay which is due and obtain from the employee their agreement to that determination.

“BUT THEY DON’T DO IT THAT WAY IN OREGON !”
AVOIDING WAGE AND HOUR PROBLEMS WITH A MULTI-STATE
WORKFORCE

A. Introduction

Managing a multi-state workforce can present significant challenges for human resource and compensation managers. Managers often incorrectly assume that compliance with the requirements of Federal and Oregon law will satisfy their obligations in other states. In so doing, they may create unintended liability, or assume obligations that could be avoided

In this section, we will examine problem areas which frequently arise when laws in other states differ from federal or Oregon requirements. Although our focus will be on the law of California and Washington, these issues and problems may arise in any number of other states.

B. Daily Overtime.

Except for employees working in mills, manufacturing, canneries and when performing work pursuant to contracts with a local or state government entity, Oregon law does not impose any overtime obligations on private sector employers based on the number of hours worked in a day. However, California, and some other states require employers to pay overtime based on the number of hours worked in a day, even though the employee works less than 40 hours in week.

Effective January 1, 2000, California law requires payment of overtime compensation to non-exempt employees for all hours worked in excess of 8 hours in a day or 40 hours in a week. Daily overtime is payable at the rate of time and a half for hours worked in excess of 8 and at double time for hours worked over 12 (or over 8 on the seventh day of a workweek).

There are limited exceptions to these requirements as they apply to non-exempt employees. The key exceptions are:

(1) California law authorizes a work schedule of up to 10 hours a day (but no more than 40 hours a week), if a secret ballot election is conducted in which two-thirds of the employees vote to adopt an alternative schedule.

(2) If an employee wishes to make up work time lost due to a personal obligation, he can work up to 11 hours in a day without entitlement to overtime. There are requirements that the request be made in writing and that the employer not “solicit” or “encourage” such requests.

(3) Compensatory Time Off (CTO). At the mutual agreement of the employer and the employee, California law permits accrual of CTO. The employee must be permitted to take CTO at the overtime rate at which it was earned, election of CTO by the employee must be completely voluntary, and other formal requirements must be met. Note that CTO cannot be used to avoid liability for overtime compensation under Federal law (i.e., work in excess of 40 hours in a week). Consequently, the utility of CTO is limited to reducing the possible expense of daily overtime.

Last, note that an employee who is not exempt under the FLSA may be exempt under California law (see discussion below in the next section). If an employee meets the requirements for the exemption under state law, daily overtime is not payable.

C. Exemptions For Administrative, Executive And Professional Employees.

1. Washington.

In Drinkwitz v. Alliant Techsystems, 140 Wn. 2d 291, ___ P.2d ___ (2000), the Washington Supreme Court recently addressed the issue of whether an employer’s policies and practices defeated the “salary basis” test for its exempt engineers. The decision created a split between what is permitted under state law and the FLSA. The Court concluded the employees were not paid on a salary basis, based on the following analysis of the employer’s policies:

| POLICY | CONTRIBUTE TO LOSS OF SALARY BASIS? |
|---|---|
| Requiring employees to record hours worked. | No. Such a policy serves many valuable functions in the workplace without causing harm to the fundamental principle of salaried employment. |

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| <p>Requiring employees to work the schedules established by managers.</p> | <p>Not necessarily. Although there are many legitimate reasons why a business or professional organization would want its salaried employees to be present during its business hours, requiring work by salaried employees during certain hours of operation, which conveniently adds up to 40 hours, can be a subterfuge for hourly employment.</p> <p>In this case, employer did not violate salary basis by requiring schedules, but taken with other factors the court concludes the employees were paid on an hourly basis.</p> |
| <p>Calculating and recording the monthly hours of employees into hourly rates.</p> | <p>No. The policy may be a useful tool for employers for many legitimate reasons, including client billing, financial information analysis, and fringe benefit calculations.</p> |
| <p>Requiring that employees work a weekly quota of between 40 and 45 hours each week.</p> | <p>Yes. While it is reasonable for an employer to expect that a full-time salaried employee's work-related responsibilities will occupy a normal workweek, employers should not be permitted to impose a rigid workweek hour requirement with pay deductions as a consequence for failure to meet such a quota. Because we find below that Alliant engaged in such a practice, Alliant's rigid requirement of hourly quotas, together with its disciplinary "docking" practices, violated the MWA.</p> |
| <p>Requiring employees to "make up" the difference between the time worked and the expected workweek by (a) working longer hours; (b) applying credits from comp time banks; or (c) deducting from earned vacation time.</p> | <p>Depends. Working longer hours may defeat salary basis depending on employer's expectations. Applying credits from "comp time" bank is permitted. Deducting from accrued vacation bank is inconsistent with salary basis.</p> |
| <p>Discipline plan that allowed suspension for one or two days when hourly quotas were not met.</p> | <p>Yes. Any discipline plan which sanctions an employee with an unpaid suspension of less than a week violates the "salary basis" test because a salaried employee must be paid his full salary "for any week in which he performs any work."</p> |

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| <p>Pay deductions for employees who failed to meet their quota requirements of 40-45 hours per week.</p> | <p>Yes. Making deductions in pay when employees fail to meet hourly work quota requirements is inconsistent with salaried employment. It is improper under the MWA to “dock” employees’ pay when they fail to meet hourly work quota requirements.</p> |
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Drinkwitz is inconsistent with Ninth Circuit precedent interpreting the FLSA. In light of Drinkwitz, Washington employers who dock accrued vacation or sick leave or who dock employee’s pay in increments of less than one-week risk defeating the salary basis test. This is a significant change in the law that creates a substantial risk for employers with employees in Washington. Watch for legislation in this area as employer groups seek to pass laws to overturn Drinkwitz.

2. California.

As discussed earlier, issues relating to exemptions are very fact sensitive and sometimes complex. Even though California employers must comply with the FLSA standards to secure exemption from overtime for work performed in excess of 40 hours in a workweek, they must also meet the State standards for exemption to avoid liability for both daily and weekly overtime under California wage and hour law. Two aspects of California law merit attention when dealing with the executive, administrative and professional exemptions.

First, with regards to the “primary duties” standard, California courts have appeared to adopt a purely quantitative approach. In other words, the employee’s executive, administrative or professional duties must occupy more than 50% of their working time. Note that this differs from the federal standard under the streamline test, which does not require strict adherence to meeting the duties requirement in each “work period” and permits evaluation of the importance of particular duties in determining whether or not an employee is primarily engaged in executive, administrative or professional duties. The lesson here is that to preserve the exemption, California employers should be particularly careful to ensure that they have documented the duties and responsibilities of their employees, and the amount of time they spend performing these duties.

A second area concerns the salary basis test. The Industrial Welfare Commission regulations simply require that the employee receive remuneration of not less than \$1,050 per month. The explicit requirements of the salary basis test adopted in the FLSA regulations are not referred to. At this time, there are no California court decisions which have specifically addressed the issue. However, departing from its previous policy, the California Division of Labor Standards Enforcement has within the last few years taken the position that the requirements of the federal salary basis test must be complied with. Whether this position will be adopted by the California courts remains uncertain.

D. Deductions From Pay.

1. Washington.

Washington law is slightly more forgiving than Oregon law with respect to deductions from employee paychecks.

Under RCW 49.52.060, employers are permitted to make deductions from an employee's paycheck without violating the minimum wage requirements of RCW 49.52.050 when (a) "required or empowered so to do by state or federal law or (b) when a deduction has been expressly authorized in writing in advance by the employee for a lawful purpose accruing to the benefit of such employee . . . (Emphasis added). The Department of Labor & Industries takes the position such deductions can be made at any time during an employee's employment and authorizes deductions that take the employee's wages below minimum wage.

Under RCW 49.48.010, employers can make deductions from an employee's paycheck (1) if required by state or federal law; (2) specifically agreed upon orally or in writing by the employee and employer; or (3) for medical, surgical or hospital care or service, pursuant to any rule or regulation. Unlike RCW 49.52.060, the Department of Labor & Industries takes the position this statute only applies to deductions taken out of the employee's final check and only relates to deductions relating to events during the employee's final pay period. Moreover, although the deduction does not have to accrue to the benefit of the employee, the employer cannot deduct an amount that would take the employee below the minimum wage.

In addition, under WAC 296-126-025(1), an employer may make deductions from an employee's pay due to cash shortages, customer walkouts, product breakages, or equipment failures only if the employer can show "the cash shortage, walkout, breakage or loss was caused by a dishonest or willful act of the employee." In addition, in order for an employer to establish loss by a dishonest employee, the employer must have pursued the alleged act to the fullest extent of the law. Similar standards apply for deductions for bad checks. WAC 296-125-025(2). In light of the Department of Labor & Industries' interpretation of RCW 49.48.010, the Department also prohibits such deductions unless the employee is terminated or quits and the deduction is out of the last check.

2. California.

California law specifically permits an employer to lawfully withhold amounts from an employee's wages when (1) required or empowered to do so by state or federal law; (2) when a deduction is expressly authorized in writing by the employee to cover insurance premiums for hospital or medical treatment, dues or other deductions not amounting to a rebate or deduction from the standard wage set; or (3) when a deduction for health, welfare or pension plan contributions is expressly authorized by a wage agreement or collective bargaining agreement.

Beyond these areas, California law severely limits the circumstances in which an employer may make deductions from an employee's wages. For example, an employer can deduct from an employee's paycheck a regular installment on a loan or a debt or an overpayment

of wages only where the employee has voluntarily consented in writing to such a deduction. Furthermore, if at the time of termination, a balance remains due on a loan, the employer may not accelerate the balance due to recoup the debt, but may only take the amount that would be deducted as a normal installment payment. The California courts have generally prohibited an employer from engaging in “self-help” by taking a setoff against an employee’s wages for a debt, or for an overpayment of compensation, in the absence of an express written authorization from the employee. Barnhill v. Robert Saunders & Co., 125 Cal App 3d 1 (1981).

Although an employer may make deductions from an employee’s wages for damages resulting from dishonesty, recklessness, gross negligence or willful misconduct, the employer ultimately must bear the burden of loss due to the employee’s ordinary negligence. Consequently, California law requires an employer, which makes a deduction for dishonesty, gross negligence or willful misconduct to prove that the employee was guilty. In case of doubt, the employer may incur waiting time penalty for failure to pay final compensation due in cases of termination or layoff.

E. Final Paycheck.

1. Washington.

Unlike some states, Washington employers are not obligated to provide paychecks on the day a person is terminated. Rather, payment must be made at the end of the pay period. RCW 49.48.010. Employers are prohibited from withholding paychecks from employees.

2. California.

California, like Oregon, imposes strict timelines on payment of final compensation. The rules are as follows:

a. Payment Upon Discharge. An employer that discharges an employee must pay the employee all compensation due immediately upon discharge. See Cal. Labor Code Section 201. There are exceptions to this rule in the food processing industry (72 hours), motion picture industry (payment to be made within 24 hours upon discharge, and by next regular pay day in the case of lay off), and oil drilling industry (within 24 hours of layoff, payment effective upon mailing). See Cal. Labor Code Sections 201, 201.5, 201.7.

b. Payment Upon Resignation. If an employee who does not have a written contract for a specified term quits without prior notice, final wages must be paid within 72 hours. If the employee has designated a mailing address for mailing payment, the employer may meet the deadline by depositing the final check in the mail within 72 hours after the employee has quit. If the employee has given at least 72 hours notice of his intention to quit, final pay must be given to the employee at the time he leaves employment. Cal. Labor Code Section 202.

Consequences of Delay in Payment. California law imposes a penalty of one day's wages for each day that final payment of full compensation is delayed. Cal. Labor Code Section 203.

F. Vacation Pay.

California, and several other jurisdictions (e.g., Nebraska, Georgia, Colorado), either by statute or case law, require that vacation pay is earned, and vests incrementally. California Labor Code Section 227.3 provides that vacation vests automatically when it is earned. California law also prohibits a "use it or lose it" provision in a vacation policy, or a rule which results in forfeiture of accumulated vacation upon termination for specified cause. These same rules apply to a policy or contract which combines vacation, sick leave and/or holiday pay; so-called Paid Time-Off (PTO) plans. Because California law requires an employer to "cash out" an employee for unused vacation at time of termination, a forfeiture provision in a handbook or vacation policy could result in a costly wage payment claim. California law imposes a "waiting time" penalty equal to a day of compensation (up to thirty days) until all compensation due at time of termination is paid. This penalty could be imposed if an employer does not pay at time of termination vacation that had previously been "lost" through application of a forfeiture provision in a policy or handbook.

California law permits an employer to impose a ceiling on accumulated vacation or to adopt a "use it or don't accrue it" vacation policy. Under such a policy, if an employee has unused vacation on the books at the end of the year, it carries over to the next year, and no new vacation is accrued until the employee has exhausted the vacation from previous years. Such a policy prevents an employee from accumulating a large amount of unused vacation and avoids the resulting sizable cash payment that the employer might otherwise have to make at termination.

G. Regular Rate.

The FLSA and Oregon law permit employers to use the so-called "fluctuating workweek" method of computing overtime pay. Interpreting the Washington Minimum Wage Act, the Washington Supreme Court also recently endorsed use of the fluctuating workweek method. Inniss v. Tandy Corporation __Wn. 2d __ (Aug. 31, 2000). Under this method, an employee who receives a salary, but whose hours vary, may have the regular rate of pay calculated by dividing the salary by the number of hours worked in each work week. Use of this method usually results in a reduction in the amount of the overtime premium payable to an employee.

However, use of the fluctuating work week method is not permitted under Alaska law, and it is apparently prohibited by California law. See e.g., Alcala v. Western Ag. Enterprises 182 Cal.App.3d 546 (1986)². Instead, the regular rate of pay of an employee who is paid a salary

² The rejection by the California courts of the fluctuating workweek method was based in part upon an interpretation of the law adopted by the California Division of Labor Standards

is determined by dividing the salary by 40. This has the effect of creating an artificially high hourly rate for straight time hours. Consequently, employers with a California workforce may wish to consider restructuring compensation programs for non-exempt salaried employees to a system which is based on an established hourly rate.

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Enforcement (DLSE). The California Supreme Court later held that DLSE could not adopt what amounted to interpretive regulations without complying with the requirements for adoption of formal regulations, thereby calling into question DLSE's view's concerning the fluctuating workweek method. Recently, however, the California Supreme Court commented favorably on those cases which had rejected the fluctuating workweek method. Ramirez v. Yosemite Water Co. 20 Cal.4th 785 (1999)