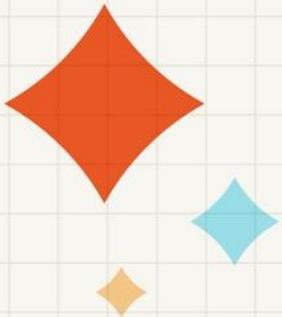


# Wage & Hour Done Right

Kara Govro, JD, SPHR | December 2023





# Welcome to the Webinar!

- We'll email a link to the recording + PDF of slides within 24 hours
- Please participate in our polls
- Use the Q&A box for questions for the presenter
- You can self-submit for HRSC/SHRM credit

# Agenda

- The Fair Labor Standards Act
- Employee Classifications
- Basic Requirements
- Non-Exempt Danger Zones

# The Fair Labor Standards Act

# What the FLSA Regulates

- Minimum wage
- Overtime
- Overtime exemptions
- Payroll records and record retention
- Child labor



# What the FLSA Doesn't Regulate

- Fringe benefits
- Meal and rest breaks
- Benefits
- Reimbursement
- Equal pay



# Are You Covered by the FLSA?



There are two kind of coverage – if either apply, follow the FLSA.

- **Enterprise Coverage:** Sales or business of at least \$500,000 and certain industries. If the business is covered, all employees are covered.
- **Individual Coverage:** If the employee is engaged in interstate commerce, even if the business doesn't have enterprise coverage.

# Poll Question



Have you ever dealt with a wage and hour claim or threat of claim?

# Employee Classification

# Do you have an employee or something else?

These relationships each have specific criteria and classifying workers in one of these ways carries risks.

- **Independent Contractors:** IRS and DOL tests
- **Unpaid Interns:** Primary Beneficiary Test
- **Volunteers:** Generally prohibited at for-profit organizations



# Independent Contractors

- IRS Control Test
- DOL Economic Realities Test
- Both are multi-part balancing, or factors tests
  - no single criteria will be determinative
- Both focus on who has the most control over the work and who bears the risk of profit or loss



# Unpaid Interns: Primary Beneficiary Test

- There is no expectation of compensation
- Provides training similar to that given in an educational environment
- Tied to the intern's formal education program
- Accommodates the intern's academic commitments
- Duration is limited to the period in which the intern is learning
- The intern's work complements, rather than displaces, the work of paid employees
- The intern and the employer understand there is no entitlement to a paid job after the internship

# If you have an employee, can they be exempt?

The FLSA provides exemptions from minimum wage, overtime, or both for specific kinds of employees.

- **Salary Level Test**
- **Salary Basis Test**
- **Duties Test**



# White Collar Exemptions: Minimum Salary Level Test

Executive, Administrative, Professional*, Salaried Computer	\$684 per week (proposed: <b>\$1,059</b> )
Hourly Computer	\$27.63 per hour (no proposed change)
Highly Compensated	\$107,432 per year (proposed: <b>\$143,988</b> )
Outside Sales	No minimum

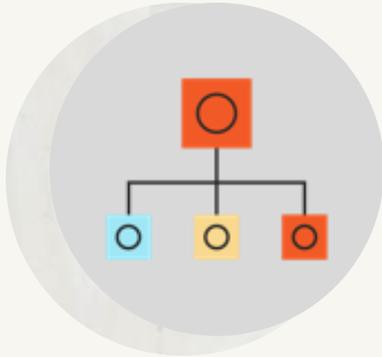
*\*Bona fide teachers and practicing doctors and lawyers are exempt from the minimum salary requirement*

# White Collar Exemptions: Salary Basis Test

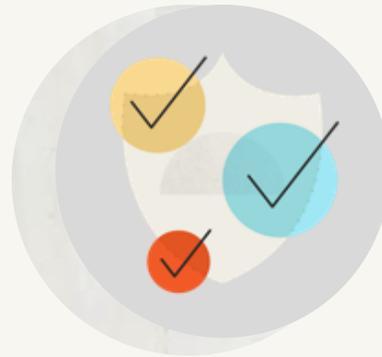


1. Paid a predetermined amount; and
2. On a weekly or less frequent basis; and
3. Amount must not be subject to reduction because of variations in the quality or quantity of the work performed

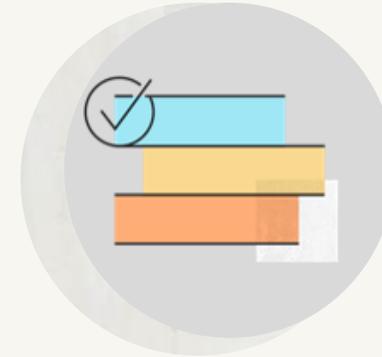
# White Collar Exemptions: Duties Tests



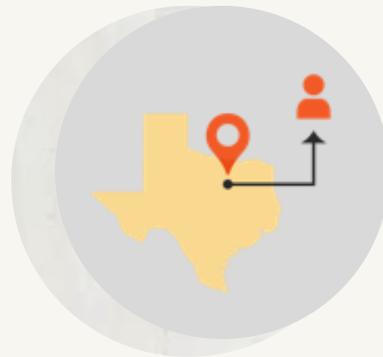
Executive



Administrative



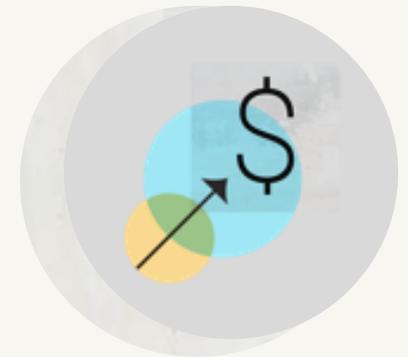
Professional  
(Learned and  
Creative)



Outside  
Sales



Computer



Highly  
Compensated

# Poll Question



How confident are you  
that your employee  
classifications are correct?

# The Basics

Minimum Wage, Overtime, Recordkeeping, Posting



# Minimum Wage

- **Federal:** \$7.25 per hour or \$2.13 with tip credit
- **State:** More than half of the states have a higher than federal wage
- **City:** Many with significantly higher rates

*Always pay the highest applicable minimum wage!*

# Recordkeeping

Store for three years from the date of creation of the record

- Personal information from W-4
- Hour and day workweek begins
- Total hours worked each workday and each workweek
- Date of payment and pay period covered
- Total wages each pay period, broken down by day, week, straight time and overtime
- Regular hourly pay rate for any week when overtime is worked
- Deductions from or additions to wages

# Overtime

- Hours over 40 hours in a workweek are paid at 1.5x regular rate of pay
- Workweek: the 168-hour period (7 days) during which you track employee time to see if they do more than 40 hours of work, e.g., Sunday at 12:00am through Saturday at midnight
- Payroll periods are irrelevant!

Hours	Su	M	Tu	W	Th	F	Sa	Total
Week 1	0	8	8	10	10	8	6	50
Week 2	0	5	5	8	6	6	0	30

Total payroll period hours: 80

Pay: 70 straight time, 10 overtime

# Mandatory Poster

**EMPLOYEE RIGHTS**  
**UNDER THE FAIR LABOR STANDARDS ACT**

**FEDERAL MINIMUM WAGE**  
**\$7.25** PER HOUR  
BEGINNING JULY 24, 2009

**The law requires employers to display this poster where employees can readily see it.**

**OVERTIME PAY** At least 1½ times the regular rate of pay for all hours worked over 40 in a workweek.

**CHILD LABOR** An employee must be at least 16 years old to work in most non-farm jobs and at least 18 to work in non-farm jobs declared hazardous by the Secretary of Labor. Youths 14 and 15 years old may work outside school hours in various non-manufacturing, non-mining, non-hazardous jobs with certain work hours restrictions. Different rules apply in agricultural employment.

**TIP CREDIT** Employers of "tipped employees" who meet certain conditions may claim a partial wage credit based on tips received by their employees. Employers must pay tipped employees a cash wage of at least \$2.13 per hour if they claim a tip credit against their minimum wage obligation. If an employee's tips combined with the employer's cash wage of at least \$2.13 per hour do not equal the minimum hourly wage, the employer must make up the difference.

**PUMP AT WORK** The FLSA requires employers to provide reasonable break time for a nursing employee to express breast milk for their nursing child for one year after the child's birth each time the employee needs to express breast milk. Employers must provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by the employee to express breast milk.

**ENFORCEMENT** The Department has authority to recover back wages and an equal amount in liquidated damages in instances of minimum wage, overtime, and other violations. The Department may litigate and/or recommend criminal prosecution. Employers may be assessed civil money penalties for each willful or repeated violation of the minimum wage or overtime pay provisions of the law. Civil money penalties may also be assessed for violations of the FLSA's child labor provisions. Heightened civil money penalties may be assessed for each child labor violation that results in the death or serious injury of any minor employee, and such assessments may be doubled when the violations are determined to be willful or repeated. The law also prohibits retaliating against or discharging workers who file a complaint or participate in any proceeding under the FLSA.

**ADDITIONAL INFORMATION**

- Certain occupations and establishments are exempt from the minimum wage, and/or overtime pay provisions.
- Special provisions apply to workers in American Samoa, the Commonwealth of the Northern Mariana Islands, and the Commonwealth of Puerto Rico.
- Some state laws provide greater employee protections; employers must comply with both.
- Some employers incorrectly classify workers as "independent contractors" when they are actually employees under the FLSA. It is important to know the difference between the two because employees (unless exempt) are entitled to the FLSA's minimum wage and overtime pay protections and correctly classified independent contractors are not.
- Certain full-time students, student learners, apprentices, and workers with disabilities may be paid less than the minimum wage under special certificates issued by the Department of Labor.

  WAGE AND HOUR DIVISION  
UNITED STATES DEPARTMENT OF LABOR 1-866-487-9243  
[www.dol.gov/agencies/whd](http://www.dol.gov/agencies/whd)  WH1088 REV 04/23

- Employers subject to the FLSA must conspicuously post a notice explaining the key points of the FLSA and indicating the current federal minimum wage
- The Department of Labor offers the posting in multiple formats
- If your state has their own minimum wage, they no doubt have a required poster as well

# Wage and Hour Danger Zones

# Calculating the “Regular Rate”

If an employee earns more than one rate of pay in the same workweek their “regular rate of pay” should be computed before their overtime rate is calculated (and often overtime will need to be adjusted retroactively).

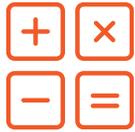
## Overtime rates are affected by:

- Commissions
- Piece-rate pay
- On-call pay
- Non-discretionary bonuses
- Shift differentials



# Calculating the “Regular Rate”

**Example:** Anna earns **\$10/hour** for inside sales work and **\$15/hour** for bookkeeping work. This week, she worked 24 hours in inside sales and 20 hours as a bookkeeper. She also received \$50 in commissions attributable to this workweek. Her pay is calculated as follows:



- **Step 1 – Regular Rate:**

$$[(\$10/\text{hour})(24 \text{ hours}) + (\$15/\text{hour})(20 \text{ hours}) + \$50]/44 \text{ hours} = \mathbf{\$13.41}$$

- **Step 2 – Overtime:**

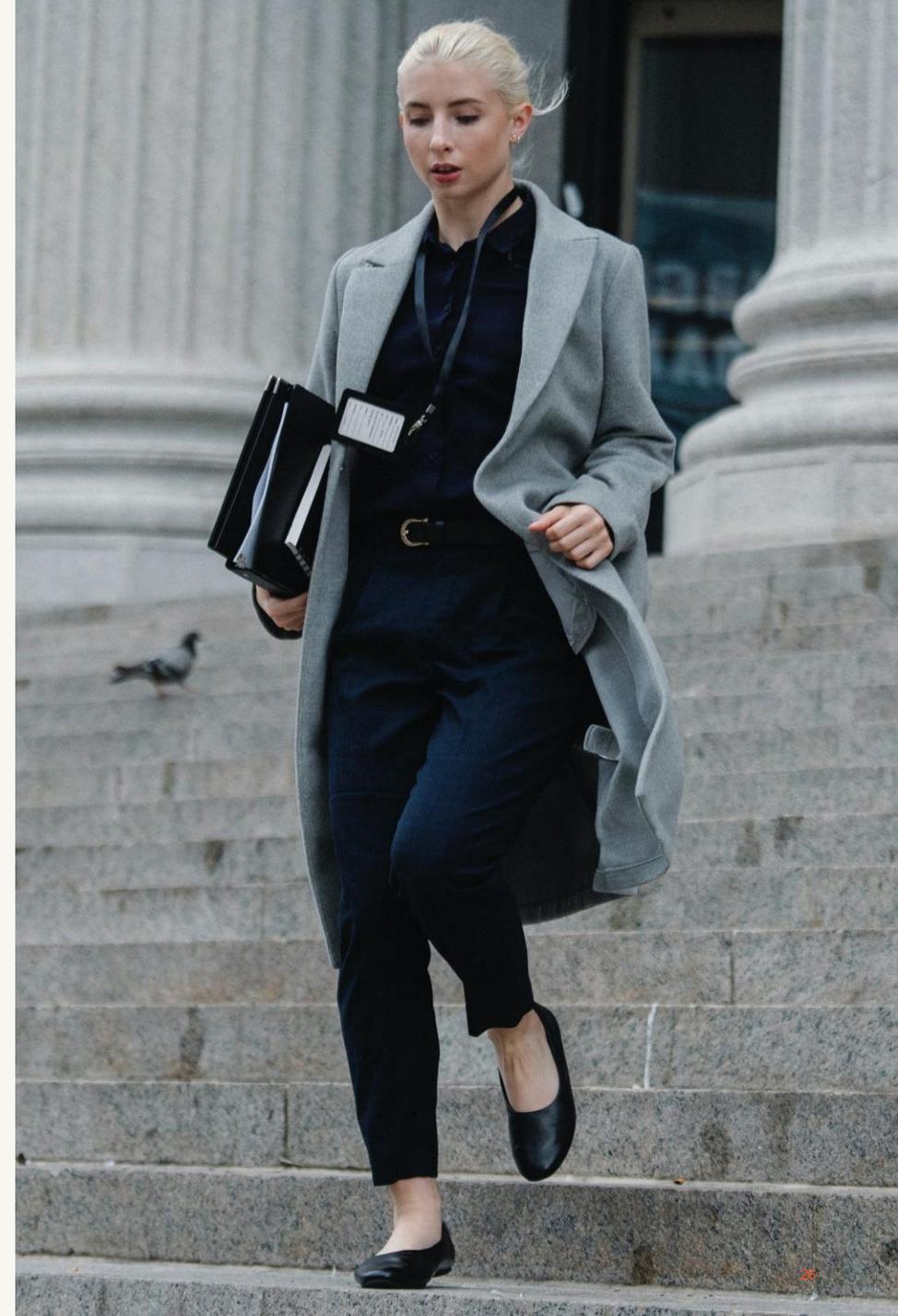
$$\$13.41/\text{hour} \times 1.5 \text{ overtime premium} = \mathbf{\$20.11/\text{hour}}$$

- **Step 3 – Calculate Weekly Pay:**

$$(\$13.41)(40 \text{ hours}) + (\$20.11)(4 \text{ hours}) = \mathbf{\$616.82}$$

# Late or Incomplete Timesheets

- You cannot withhold pay!
- Take your best guess as to hours worked and pay on regularly scheduled payday
- Discipline and document
- Be detailed about how time should be tracked and recorded
- Provide training and set expectations





## Unauthorized Work

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- All hours worked must be paid, whether you wanted the work done or not
- If the work was overtime, it must be paid at time and a half
- Discipline and document as needed

# Off-the-Clock Work and Personal Electronic Devices

- Again, all time worked must be paid
- Time worked away from the office should be tracked
- Beware the lure of smartphones
- Have clear policies



# Meal and Rest Breaks

- Breaks under 20 minutes should be paid, unless you offer a specific amount of paid break time and make it unambiguous that only that amount of time will be paid and that exceeding that rest period will lead to discipline
- Reasonable break time for lactation must be allowed, but can be unpaid subject to the above requirements



# Travel Time Issues

## *Extended Commutes*

- Travel during the workday should be paid
- Out-of-the-ordinary commuting time should be paid, e.g., if an employee's usual commute is 30 minutes and you ask them to leave early to visit a client 90 minutes away, pay the difference



# Travel Time Issues

## *Away for a Weekend*

- Time spent in transit or doing work during their normal work hours, regardless of the day of the week, should be paid, e.g., 8 a.m. - 5 p.m. Saturday
- Time after normal work hours should be paid if you've asked them to do work, or something work-related, like entertain clients
- If they are not in transit or working, and can use their time however they like, you don't need to pay for it



# Waiting Time



## **If the employee is “engaged to wait,” pay**

- Examples: Receptionist reading a book between customers, a fireman cooking between alarms.

## **If the employee is “waiting to engage,” you don’t have to pay**

- The employee must be completely relieved from duty and told in advance that they may leave the job and will not have to start work again until a specified time.

# On-Call Time

- Is the employee required to stay on the premises or very nearby? If yes, pay
- If no, evaluate whether the employee can effectively engage in personal activities. How close must they be? How often are they interrupted?
- All time spent responding to calls must be paid





# Pay Deductions

- Government-mandated deductions don't require employee approval
- Voluntary deductions for the benefit of the employee usually require written authorization
- Deductions for the benefit of the employer, e.g., uniform costs, are often illegal
- Any non-governmentally-approved deduction that takes an employee below minimum wage or cuts into their overtime pay is a violation of the Fair Labor Standards Act\*

\*With the exception of certain properly contracted personal loans, which will still be subject to state law

A low-angle, close-up photograph of a person's legs and feet walking on a paved road. The person is wearing blue denim jeans with the cuffs rolled up and brown leather loafers. They are walking on a yellow double line that runs down the center of the road. The background is a blurred asphalt surface.

Don't forget the federal Equal Pay Act and many "second wave" state pay equity laws.

# Q & A

Thank You