

Wage And Hour Compliance: Key Issues Affecting The HealthCare Industry



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TABLE OF CONTENTS

	Page
I. The Basics – Highlights of FLSA and State Law Requirements.....	2
A. Minimum Wage and Overtime	2
B. Exemptions from Overtime.....	2
1. Salary Basis Test.....	2
2. Duties Test	2
a. Executive Exemption	2
b. Administrative Exemption	3
c. Learned Professional Exemption	3
d. Computer Professional Exemption	4
C. Compensable Hours	4
D. Calculating Overtime – The “Eight and Eighty” System	4
E. Calculating Regular Rate of Pay.....	5
1. Components of the Regular Rate	5
2. Exclusions from the Regular Rate	6
3. Regular Rate for Employees Working Two or More Jobs	6
F. Enforcement/Private Causes of Action.....	6
G. Recordkeeping	7
H. State Wage and Hour Laws.....	7
II. ISSUES OF SPECIFIC CONCERN.....	8
A. Are Exempt Employees Properly Paid on a Salary Basis?.....	8
1. Deductions from Wages for Exempt Employees.....	8
2. “Actual Practice” of Improper Deductions.....	9
B. Are Exemption Categories Properly Applied?	9
1. Highly Compensated Employees.....	9
2. Application of the Learned Professional Exemption to Nurses and Respiratory Therapists	9
a. Nurses.....	10
b. Respiratory Therapists	10
C. Are Hours Worked Properly Calculated?	11
1. Unscheduled Time Worked – “Off the Clock” Work.....	11

TABLE OF CONTENTS

(continued)

	Page
a. When does the clock start and stop?	12
(1) Pre-Shift and Post-Shift.....	12
(2) Training	12
(3) Travel	12
(4) Donning and Doffing and Section 203(O) Exemption for Unionized Employers.....	13
2. On-Call and Call-Back Issues.....	13
3. Meals and Breaks.....	15
4. Volunteer Work	15
5. Rounding Errors.....	16
D. Is Overtime Properly Calculated?.....	16
1. Regular Rate of Pay – #1 Compliance Issue in the Healthcare Industry	16
a. Failure to Include Non-Discretionary Bonuses and Commissions	16
b. Failure to Include Shift, Unit, Educational, and Other Differentials	17
c. Failure to Properly Calculate Regular Rate Where Employee Works Two or More Different Jobs in the Same Workweek	17
2. Single Enterprise/Joint Employer Issues Aggregation of Hours Worked.....	17
a. Aggregation of Hours Worked.....	18
b. Joint Employment Analyses	18
c. Aggregation of Hours in Healthcare Industry.....	19
3. Application of the Eight and Eighty Overtime System	19
E. Home Health Employee Compensation Issues.....	20
F. Overlap with FMLA Leave Requirements	20
G. Minimum Wage Violations -- Uniforms.....	21
H. Private Duty Nurses	21
III. LEGISLATIVE INITIATIVES ON THE HORIZON.....	22
A. Family-Friendly Workplace Act (H.R. 933).....	22
B. Living American Wage (LAW) Act of 2009 (H.R. 3041).....	22
C. Wage Theft Prevention Act (H.R. 3303)	23

TABLE OF CONTENTS
(continued)

	Page
D. Working Families Flexibility Act (H.R. 1274).....	23
IV. COMPLIANCE TIPS AND BEST PRACTICES	24
A. Goals of a Self-Audit	24
B. Tips to Avoid Misclassification Errors	25
C. Tips to Avoid Overtime Calculation Errors.....	25
D. Tips to Avoid Meal and Break Rule Errors	26
E. Tips to Avoid Recordkeeping Errors	26

**WAGE AND HOUR COMPLIANCE:
KEY ISSUES AFFECTING THE HEALTHCARE INDUSTRY
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Hospitals and other healthcare entities can no longer afford to overlook wage and hour compliance issues. As a recent spate of lawsuits demonstrates, the plaintiffs' bar has launched a nationwide campaign to target wage and hour violations in the healthcare industry. The bar's tactics are aggressive and seek to maximize the exposure afforded by modern technologies; one plaintiffs' firm, for example, has created a website, <http://hospitalovertime.com>, to encourage hourly employees at hospitals and healthcare facilities to join lawsuits alleging employers' failure to compensate employees for all of the hours they "were permitted to work." As the firm boasts on the website, its efforts have already met with success. In 2006, the firm reached a \$9 million settlement with the University of Rochester and its affiliates, including several hospitals and healthcare facilities, in a lawsuit alleging that employees were not paid for missed or interrupted breaks.

Similar lawsuits have been filed throughout the country — with similar big-ticket results. In March 2009, Tenet Healthcare, which owns three hospitals in Orange County, California, agreed to pay \$85 million to settle claims that nurses and other twelve-hour-shift employees were improperly denied overtime pay to which they allegedly were entitled under California law. In November 2007, Total Health Home Care Corporation agreed to pay \$2.2 million to settle a class action lawsuit filed by home health care workers who claimed that they should have been paid for time spent traveling from one client to another. And in 2005, HCA, Inc. agreed to a \$4.75 million settlement in a case brought on behalf of employees who alleged that their employer hospital failed to pay them for missed rest periods and lunch breaks.

The plaintiffs' bar is not alone in concentrating on such hour issues. The Department of Labor (DOL) Wage and Hour Division (WHD), which is tasked with enforcement of the Fair Labor Standards Act (FLSA), has signaled that it, too, is paying close attention to the healthcare industry. In January 2008, the WHD issued a bulletin entitled "The Health Care Industry and Hours Worked," for the express purpose of helping hospitals and healthcare employers avoid what the WHD characterized as "common FLSA violations" found in the course of its investigations of healthcare facilities. Employers ignore such edicts at their own peril. In July 2009, the DOL announced that Partners HealthCare Systems agreed to pay more than \$2.7 million to settle a lawsuit alleging that Partners had violated the FLSA by failing to pay overtime to employees who worked at more than one of its facilities for a total of more than 40 hours in a single workweek.

Fortunately, there are many steps that employers can take to avoid ending up on the wrong end of a multi-million dollar lawsuit. To minimize this risk, employers must navigate a complex and comprehensive statutory and regulatory landscape. Compliance with the FLSA thus begins with an understanding of the law's basic requirements, which are outlined in the next section. This article then highlights specific areas of concern, including special state law rules,



as well as new issues that may arise as a result of pending wage and hour legislation. It closes with an overview of compliance tips targeting the most common FLSA violations.

I. The Basics – Highlights of FLSA and State Law Requirements

A. Minimum Wage and Overtime

The FLSA establishes federal minimum wage and overtime requirements. Under the FLSA, employers must pay employees no less than the federal minimum wage, which increased to \$7.25/hour on July 24, 2009, for all hours worked in a workweek. 29 U.S.C. § 206(a)(1)(C). In addition, employers must pay overtime compensation to employees for all hours worked over 40 in a workweek. *Id.* § 207(a)(1). Overtime compensation must be at least 1.5 times the employee’s regular rate of pay. *Id.*

B. Exemptions from Overtime

Not all employees are entitled to overtime, however. Employers are not required to pay overtime to employees employed in a “bona fide executive, administrative, or professional capacity.” 29 U.S.C. § 213(a)(1). To qualify for any of these white-collar exemptions, an employee must meet the salary basis test and “customarily and regularly” perform any one or more of the exempt duties of an executive, administrative, or professional employee. 29 C.F.R. § 541.601

1. Salary Basis Test

The salary basis test is met if the employee receives total annual compensation of at least \$100,000 and/or is paid at least \$455/week on a salary or fee basis. Generally, an employee is paid on a salary basis when he or she receives a predetermined amount of compensation “constituting all or part of the employee’s compensation,” which compensation “is not subject to reduction because of variations in the quality or quantity of work performed.” *Id.* § 541.602. Employees who are paid on a “salary basis” must receive their entire salary for any week in which they perform work, regardless of the number of days or hours they work. *Id.* They do not, however, need to be paid for any workweek in which they perform no work.

2. Duties Test

Assuming employees meet the salary basis test, they may be classified as exempt if they also perform the duties that fall within the definition of a “bona fide executive, administrative, or professional” employee. Simply because an employee’s job title identifies her or him as one of these categories does not mean that the employee qualifies as exempt.

a. Executive Exemption

To qualify as an exempt executive, three criteria must be met. First, the employee’s primary duty must be to manage the business, or a department or subdivision of the business. 29 C.F.R. § 541.100(2). Second, the employee must “customarily and regularly” direct the work of



two or more other employees. *Id.* § 541.100(3). Third, the employee must have the authority to hire or fire other employees or, alternatively, the employee’s suggestions and recommendations regarding hiring, firing, advancing and/or promoting other employees must be given “particular weight.” *Id.* § 541.100(4).

b. Administrative Exemption

Different criteria are used to determine whether an employee qualifies for the administrative exemption. Employees are eligible for the administrative exemption if two conditions are met. First, the employee’s primary duty must be to perform office or non-manual work “directly related to the management or general business operations of the employer and the employer’s customers.” 29 C.F.R. § 541.200. This condition may be met by employees working in a broad array of fields, including tax, finance, accounting, budgeting, insurance, purchasing, procurement, human resources, IT, and legal. *Id.* § 541.201(b). Second, the employee’s primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. *Id.* § 541.200(a)(3). It is often difficult to determine whether the second condition is met because it is a highly fact-intensive inquiry. Some factors to consider include whether the employee has the authority to commit the employer in matters that have significant financial impact; whether the employee is involved in planning long- or short-term business objectives; and whether the employee carries out major assignments. *Id.* § 541.202(b). The fact that an employee’s decision may be subject to review and, on occasion, even revision or reversal does not necessarily mean that the employee is not exercising discretion and independent judgment. *Id.* § 541.202(c). Examples of employees who generally qualify for the administrative exemption include insurance adjusters, financial analysts, and HR managers, provided the latter have the authority to formulate, interpret, or implement employment policies. *Id.* § 541.203.

c. Learned Professional Exemption

The third white-collar exemption applies to learned professionals. The primary duty test used to determine whether employees qualify for this exemption consists of three elements. First, the employee’s primary duty must be to perform work requiring advanced knowledge. 29 C.F.R. § 541.300. Work requiring advanced knowledge is work that is predominantly intellectual in character, which generally entails analyzing or interpreting varying facts and circumstances. *Id.* § 541.301(b). Employees with only a high school diploma do not qualify for this exemption because advanced knowledge cannot be attained at the high school level. *Id.* Next, the advanced knowledge must be in a field of science or learning. *Id.* § 541.301(a). Examples of such fields include medicine, pharmacy, accounting, and law, as well as various types of physical, chemical, and biological sciences. *Id.* § 541.301(c). Finally, the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. *Id.* § 541.301(a). Most of the time, employees will satisfy this requirement by possessing the appropriate academic degree. *Id.* § 541.301(d). Employees without that degree, however, may nevertheless qualify for the learned professional exemption provided they have substantially the same knowledge and perform substantially the same work as employees who possess the degree.

d. Computer Professional Exemption

A second subcategory of the professional exemption applies to computer professionals. 29 C.F.R. § 541.400. To qualify for the computer professional exemption, the employee must be compensated either on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour. *Id.* § 541.400(b). Second, the employee's primary duty must consist of (1) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; (2) the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; (3) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or (4) a combination of the aforementioned duties, the performance of which requires the same level of skills. *Id.* §§ 541.400(b)(1)-(4). Individuals performing first or likely second-tier help desk work, as well as routine maintenance work on hardware, generally do not satisfy this second prerequisite.

C. Compensable Hours

Employees who do not qualify for any of the exemptions from the FLSA's wage and overtime requirements are entitled to receive overtime compensation for all hours worked over 40 in any given workweek. 29 U.S.C. § 207(a)(1). To determine whether and how much overtime compensation is owed, an employer must, therefore, determine the amount of compensable hours each of its employees has worked. One of the FLSA's central purposes is to ensure that employees are compensated for all hours worked. *See id.* §§ 206–207. Thus, the law requires employers to compensate employees for hours worked both within and outside of their regularly scheduled shifts if the employer “knows or has reason to believe” that such work is occurring. 29 C.F.R. § 785.11. An employer may be deemed to know that work is occurring even if it is performed off-site, such as at an employee's home. *Id.* § 785.12. Significantly, employers cannot avoid paying employees for hours worked outside of their regularly scheduled shifts simply by promulgating a rule prohibiting such work. *Id.* § 785.13. Management must also make every effort to enforce the rule.

Whether time should be counted as compensable hours often depends upon the particular circumstances. For example, employers are required to compensate employees for attending events like training programs unless the employer can show that: (1) the training occurs outside normal hours; (2) the training is voluntary; (3) the training is not directly related to the employee's job; and (4) the employee does not perform any work during the training. *Id.* § 785.27. In addition, although employers are generally not required to compensate employees for meal breaks of thirty minutes or more, such breaks may constitute compensable hours if the employee is frequently interrupted by work during the break. *Id.* § 785.19. In the same vein, an employer is required to compensate an employee for waiting time if the facts show that the employee was required to remain on the employer's premises while on-call or otherwise “engaged to wait,” but not if the facts show that the employee was “waiting to be engaged.” *See*

id. § 785.14. These specific rules are more thoroughly discussed in the next section of the article.

D. Calculating Overtime – The “Eight and Eighty” System

Though overtime is usually calculated on a single (40 hour) workweek basis, the FLSA permits — but does not require — hospitals and other healthcare institutions to calculate overtime based on a fourteen-day period. 29 U.S.C. § 207(j). Under this arrangement, which is referred to as the “eight and eighty overtime system,” employees are entitled to receive overtime compensation for hours worked over eight in any workday and over eighty hours in the fourteen-day period. See *Parth v. Pomona Valley Hosp. Med. Ctr.*, No. 08-55022 (9th Cir. Oct. 22, 2009) (when nurses volunteered to work 12-hour shifts, hospital reduced hourly base wage rate to keep overall compensation the same; court held FLSA not violated since reduced rate was still above minimum wage and employees were paid that rate for first 8 hours, 1.5 times that rate for remaining 4 hours, and double time for hours worked beyond shift).

Like the seven-day workweek, the fourteen-day period must be fixed and regularly recurring. 29 C.F.R. § 778.601(c). A hospital or other healthcare institution cannot use the eight and eighty overtime system, however, unless it comes to an agreement or understanding with the affected employees that the system will be used *before* the employees perform the work to which the system is intended to apply.

According to DOL Fact Sheet #54 – The Health Care Industry and Calculating Overtime Pay (rev. July 2009), although a hospital or healthcare institution can use both the standard 40-hour overtime system and the eight-and-eighty overtime system for different employees in their workplace, they cannot use both systems for a single individual employee. Moreover, if the eight and eighty system is adopted, premium pay for daily overtime may be credited towards the overtime compensation due for hours worked in excess of 80 for that period. 29 C.F.R. § 778.601(d). Thus, an employee who works an eight-hour shift on nine of the fourteen days in the fourteen-day period and a ten-hour shift on the tenth day of the fourteen-day period would be entitled to just two hours of overtime compensation, assuming the employee did not work on the remaining four days.

E. Calculating Regular Rate of Pay

1. Components of the Regular Rate

Regardless of whether an employer uses the 40-hour or the eight and eighty overtime system, overtime compensation must still be equal to at least 1.5 times an employee’s regular rate of pay. 29 U.S.C. §§ 207(a)(1), 207(j). Employers cannot simply assume that an employee’s regular rate of pay is the same as the employee’s base rate of pay, however. Rather, the regular rate is the “hourly rate *actually* paid the employee for the normal, non-overtime workweek for which he is employed.” 29 C.F.R. § 778.108 (emphasis added). It “include[s] all remuneration for employment paid to, or on behalf of, the employee” with the exception of certain payments identified in the FLSA. 29 U.S.C. § 207(e). Thus, the regular rate includes payments such as shift differentials, commissions, and non-discretionary bonuses. Examples of

non-discretionary bonuses include promises in advance to pay a bonus (e.g., at the time of hiring or pursuant to a collective bargaining agreement), as well as “[b]onuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay.” *Id.* § 778.211(c). The latter group includes such payments as retention bonuses, attendance bonuses, individual or group production bonuses, and bonuses rewarding quality and accuracy of work.

2. Exclusions from the Regular Rate

Notwithstanding the breadth of the statutory definition, employers are permitted to exclude from regular rate calculations certain “extra compensation,” such as premiums paid for overtime, weekend, and/or holiday work, as well as payments made for occasional periods when no work is performed due to vacation, holiday, or illness. *Id.* §§ 207(e)(6)-(8). Discretionary bonuses are also excluded from the regular rate. 29 U.S.C. § 207(e)(3). For a bonus to qualify as discretionary under the FLSA, the employer must retain discretion as to both the fact of payment and the amount of payment “until a time quite close to the end of the period for which the bonus is paid.” 29 C.F.R. 778.211(b). Thus, where an employer pays its employees a share of the profits of its business or a lump sum at the holidays, without having previously promised, agreed, or arranged to pay such a bonus, that bonus is discretionary and does not need to be taken into account when computing the employee’s regular rate. A referral bonus likewise is considered discretionary, provided the employer can show that: (1) participation is strictly voluntary; (2) recruitment efforts do not involve significant time; and (3) the activity is limited to after-hours solicitation done only among friends, relatives, neighbors, and acquaintances as part of the employees’ social affairs. DOL Fact Sheet #54.

3. Regular Rate for Employees Working Two or More Jobs

It can be particularly difficult to calculate an employee’s regular rate of pay when the employee works two or more different jobs – at one or more facilities and/or for a single or joint employer – in the same workweek, especially where the employee is paid a different hourly rate for each job. In that case, the employer must use the weighted average of the rates to compute the employee’s regular rate. 29 C.F.R. § 778.115. To calculate the weighted average, employers must add together the earnings from all of the employee’s jobs and divide the total by the total number of hours worked at those jobs. If more than one facility is involved, overtime may be allocated between the entities on a pro-rated basis. Employers may avoid this calculation, however, by agreeing in advance with employees that they will be paid no less than 1.5 times the hourly rate established for the type of work they actually perform during the overtime hours. 29 U.S.C. § 207(g).

F. Enforcement/Private Causes of Action

The FLSA is enforced through a combination of public and private lawsuits. The DOL may bring a lawsuit seeking an injunction requiring the employer to comply with the provisions of the law. 29 U.S.C. § 216(c). The DOL may also request that the employer be required to pay back wages and an equal amount as liquidated damages, provided the back wages are not barred by the two-year statute of limitations. The statute of limitations extends to three years, however,



if the employer is deemed to have willfully violated the Act. *Id.* § 255(a). In addition, aggrieved employees may bring a private cause of action in federal district court to recover back wages and an equal amount as liquidated damages, plus attorneys' fees and court costs. *Id.* § 216(b).

G. Recordkeeping

Under the FLSA, employers are required to establish and maintain records for each non-exempt employee that identify all hours worked and the wages the employee has been paid. 29 U.S.C. § 211(c); 29 C.F.R. § 516.2(a). Employers must also establish and maintain certain records for exempt employees, including those containing personal information, the time of day and day of week the workweek begins, total wages paid each pay period, and the date of payment and the pay period covered by each payment. *Id.* § 516.3. Employers must preserve payroll and like records for at least three years, while all records reflecting the bases for all wage computations – *e.g.*, basic employment and earnings records like time cards, work schedules – must be kept for at least two years. *Id.* §§ 516.5, 516.6.

There is no private right of action for an employee to enforce FLSA's recordkeeping requirement, as it is enforced solely by the DOL. However, when an employee brings a claim for overtime or another violation of FLSA, it is the employer's burden to come forward with evidence to challenge the employee's claim. Records that an employer is required to maintain are key to an employer's ability to satisfy this burden. When an employer has not retained records of hours worked, an employee's calendar, diary, or testimony may be considered evidence of hours worked.

H. State Wage and Hour Laws

Employers must also be mindful of applicable state wage and hour laws and regulations, as certain state laws impose requirements that exceed the federal rules. For example, under the Prohibition of Excessive Overtime in Health Care Act of 2009, the State of Pennsylvania prohibits the scheduling of mandatory overtime in all private sector, nonprofit, and state and local government healthcare facilities. *See* Prohibition of Excessive Overtime in Health Care Act, 43 P.S. §§ 932.1–932.6. The law also prohibits employers from disciplining or discriminating against a healthcare professional for refusing to work beyond a scheduled work shift. California law also exceeds federal requirements governing the healthcare industry, imposing strict staffing ratios that are enforced by penalties and sanctions for non-compliance. *See* Cal. Code Regs. tit. 22, § 70217. Other state laws, such as those of the State of New Jersey, render corporate directors and officers personally liable for unpaid base wages, vacation pay, and severance pay. *See* New Jersey State Wage Payment Law, N.J. Stat. Ann. § 34:11-4.1, *et seq.* *See also* N.Y. Bus. Corp. Law § 630 (imposing personal liability for unpaid wages on ten largest shareholders of every privately held corporation).

II. ISSUES OF SPECIFIC CONCERN

A. Are Exempt Employees Properly Paid on a Salary Basis?

As discussed, the FLSA exempts bona fide executive, administrative, and professional employees from minimum wage and overtime pay if, among other requirements, the employees are paid on a salary basis of not less than \$455 per week. 29 C.F.R. § 541.600. Being paid on a “salary basis” means that an employee regularly receives a pre-determined amount of compensation each pay period, which cannot be reduced because of variations in the quality or quantity of the employee’s work. If the employer makes unauthorized deductions from an employee’s predetermined compensation, the employee is not considered to be paid on a “salary basis” and the exemption can be lost.

1. Deductions from Wages for Exempt Employees

As a general rule, if an employee is ready, willing and able to work, deductions may not be for time when work is not available. 29 C.F.R. § 541.602. Accordingly, an employer cannot make deductions from an employee’s predetermined salary because of absences caused by the employer or the operating needs of the business. The regulations do allow deductions from pay in limited circumstances, however, without violating the salary basis test. For example (*id.* § 541.602(b)):

- Deductions from pay can be made when an exempt employee is absent from work for one or more *full* days for personal reasons, other than sickness or disability.
- Deductions from pay can be made for absences of one or more *full* days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability. Thus, the employer is not required to pay any portion of the employee’s salary for the full-day absences if the employee receives compensation for those days under the plan, policy or practice, such as short-term disability insurance. Deductions for such absences also can be made before the employee has qualified for the plan and after the employee has exhausted the leave allowance under the plan. Likewise, the employer can make deductions for absences if the salary replacement benefits are provided under state disability insurance law or under a state worker’s compensation law.
- Deductions can be made for penalties imposed, in good faith, for infractions of safety rules of major significance, such as safety rules relating to the prevention of serious danger in the workplace or to other employees.
- Deductions can be made for unpaid disciplinary suspensions of one or more *full* days, imposed in good faith, for infractions of workplace conduct rules. However, such suspensions must be imposed pursuant to a written policy applicable to all employees.



2. “Actual Practice” of Improper Deductions

An employer will also violate the test if it has an “actual practice” of making improper deductions from salary. The regulations set out the following factors which will be considered in determining whether an employer has such a practice: (1) the number of improper deductions, particularly as compared to the number of employee infractions warranting discipline; (2) the time period during which the employer made improper deductions; (3) the number and geographic location of employees whose salary was improperly reduced; (4) the number and geographic location of managers responsible for taking the improper deductions; and (5) whether the employer has a clearly communicated policy permitting or prohibiting improper deductions. 29 C.F.R. § 541.603.

If an “actual practice” of making improper deductions is found, the exemption is lost during the time period of the deductions for all employees in the same job classification working for the same managers responsible for the improper deductions. Isolated or inadvertent improper deductions, however, will not result in a loss of exemption if the employer reimburses the employee for the mistake. Moreover, the regulations provide a safe harbor for employers. If an employer (1) has a clearly communicated policy that prohibits the improper pay deductions and includes a complaint mechanism; (2) reimburses employees for improper deductions; and (3) makes a good faith commitment to comply in the future, the employer will not lose the exemption unless it willfully violates the policy by continuing the improper deductions after receiving employee complaints. 29 C.F.R. § 541.603(d).

B. Are Exemption Categories Properly Applied?

1. Highly Compensated Employees

In addition to the specific categories of exemptions discussed above, the regulations provide an exemption from overtime requirements for highly compensated employees. Because a high level of compensation is a strong indicator of an employee’s exempt status, there is no need for a detailed analysis of an employee’s job duties. Thus, employees with a total annual compensation of at least \$100,000 are exempt if they customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee. 29 C.F.R. § 541.601. The total annual compensation must include at least \$455 per week paid on a salary or fee basis. The total annual compensation may include bonuses and other nondiscretionary compensation, but cannot include board, lodging, or payments for medical insurance, life insurance or contributions to retirement plans. If an employee works less than a full year, the employee can still qualify for the exemption if he or she receives a pro-rata portion of the salary requirement based on the number of weeks worked.

2. Application of the Learned Professional Exemption to Nurses and Respiratory Therapists

As explained, the learned professional exemption applies to any employee compensated on a salary basis at a rate not less than \$455 per week whose primary duty is the performance of work requiring knowledge of an advanced type in a field of science or learning customarily



acquired by a prolonged course of specialized intellectual instruction. The proper focus in determining whether an employee qualifies for this exemption is whether all the required elements have been satisfied, not upon any job title or status that an individual employee within an occupation might have or upon an individual employer's specified hiring preferences.

a. Nurses

A frequently litigated wage and hour issue within the healthcare industry is whether nurses qualify for the "learned professional" exemption. Because of their education and licensing requirements, registered nurses (RNs) generally meet the duties requirements for the "learned professional" exemption. Nonetheless, given the multi-faceted working environments within many healthcare institutions today, employers must still be aware of and apply the guidelines when classifying this job function. RNs who are registered by the appropriate State examining board generally perform duties that qualify them for the learned professional exemption. 29 C.F.R. § 541.301(e)(2). Such RNs should be classified as exempt so long as they are paid at least \$455/week on a salary basis. *Id.* §§ 541.300(a)(1), 541.301(e)(2). In contrast, RNs who are paid on an hourly basis do not qualify for the learned professional exemption and should, therefore, be paid overtime. *Id.* § 541.300(a)(1).

While RNs usually qualify for the exemption, licensed practical nurses and other similar healthcare employees generally do not. Regardless of the work experience and training of employees occupying these positions, possession of a specialized advanced academic degree is not a standard prerequisite for entry. Accordingly, the duties test is not satisfied. *Id.* § 541.301(e)(2).

Again, simply meeting the educational requirements of the "learned professional" exemption in the regulations is not enough to guarantee exemption, as this determination cannot be made without considering employees' day-to-day duties and tasks. For example, Kaiser Foundation Hospitals was recently sued in a class action in the Southern District of California because several nurses were both working as hospital administrators and performing non-exempt duties. *Verma v. Kaiser Foundation Hospitals*, 09-cv-2019 (S.D. Cal. filed Sept. 16, 2009). The complaint alleges that, because the nurses' primary job duties were to provide training and educational support to nurses, medical staff and patients, they should not have been classified as exempt. While these challenges have not yet been resolved, the suit illustrates the need to review the job duties of each individual employee – particularly those who are performing the duties of two different jobs that may have different levels of responsibility and independence – to ensure that he or she is properly classified.

b. Respiratory Therapists

In 2006, the Department of Labor analyzed whether a hospital's respiratory therapists (RTs) were properly classified as exempt professionals under the FLSA. 2006 U.S. DOL Op. Letter, W & H Division (Jul. 24, 2006). The DOL concluded that the RTs did not qualify for the "learned professional" exemption because, although the hospital required greater levels of academic and professional achievements from its RTs than the state's licensure, RT work can be performed by an individual who has completed an accredited respiratory care education program



that involves only two years of specialized instruction leading to an Associate's Degree. Though RTs may be highly skilled as a result of their training, this level of intellectual instruction and academic training thus did not qualify the occupation as one requiring advanced knowledge "customarily acquired by a prolonged course of specialized instruction." *Id.* (relying on the fact that four years of specialized post-secondary school instruction is not a standard prerequisite for entry into the field). The DOL pointed out that, "while certain occupations in the health care field are expressly recognized as meeting the duties requirements for the learned professional exemption, many other health care employees generally do not qualify as exempt learned professionals, regardless of work experience and training, because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations." *Id.* (citing 29 C.F.R. § 541.201(e)).

Consistent with this guidance, the "learned professional" exemption is restricted to professions in which prolonged specialized academic training is a standard prerequisite. The exemption is not available for occupations customarily performed with knowledge by any recipient of an academic degree, nor is it available to occupations in which most employees have acquired their skill by experience, rather than by advanced, specialized instruction. Accordingly, RTs should not be classified as exempt under the "learned professional" exemption.

C. Are Hours Worked Properly Calculated?

1. Unscheduled Time Worked – "Off the Clock" Work

For years, among the most publicized and costly areas of wage and hour litigation for healthcare and all other employers has concerned claims for failure to pay for off-schedule hours worked. As noted, non-exempt employees must be paid for *all* hours worked, which generally includes all time an employee must be on duty, on the employer premises, or at any other prescribed place of work. Additionally, non-exempt employees must be paid for work "suffered or permitted" by the employer even if the employer does not specifically authorize the work; if the employer knows or has reason to believe that the employee is continuing to work, the time is considered hours worked and must be compensated. 29 C.F.R. § 785.11. For example, nurses who stay beyond their scheduled shift to work on patients' charts must be compensated for the additional time worked, even if that additional time was not formally authorized.

Moreover, actual knowledge by the employer of unauthorized work is not required. Courts have found constructive knowledge when the evidence establishes a "pattern or practice of employer acquiescence" to off-the-clock work. *Pfarr v. Food Lion, Inc.*, 851 F.2d 106, 109 (4th Cir. 1988). Furthermore, mere promulgation of a rule against off-the-clock work without enforcement is insufficient to rebut evidence of FLSA violations. 29 C.F.R. § 785.13. Employers thus cannot sit back and accept the benefits of the extra hours without compensating employees for them; in order to avoid an off-the-clock challenge, the appropriate course is to establish *and enforce* policies prohibiting unauthorized work time through disciplinary action against employees who violate such policies. Nevertheless, the employees must still be paid if they actually work the hours.



a. When does the clock start and stop?

(1) Pre-Shift and Post-Shift

The Portal-to-Portal Act amendments to the FLSA exempt from compensation activities that are prior to or after an employee's principal activity unless they are an integral and indispensable part of the principal activities for which covered workers are employed. 29 U.S.C. § 254. For example, one court found that pre-shift activities performed by electricians that involved filling out time sheets, checking job locations, and cleaning and loading trucks were "principal activities" primarily benefiting the employer and compensable. *Dunlop v. City Elec., Inc.*, 527 F.2d 394 (5th Cir. 1976). Consistent with this standard, healthcare employers should ensure that employees are compensated for all pre-shift and post-shift work that meets this standard.

(2) Training

Employers also occasionally fail to count time spent attending training as hours worked. The FLSA requires payment for time spent attending lectures, meetings, or training programs unless all of the following criteria are met: (1) attendance is outside of the employee's regular working hours; (2) attendance is truly voluntary; (3) the course, lecture, or meeting is not directly related to the employee's job; and (4) the employee does not perform any productive work during such attendance. 29 C.F.R. § 785.27. Attendance is not voluntary, for example, if the employee is led to believe that his present working conditions or the continuance of his employment would be adversely affected by nonattendance. 29 C.F.R. § 785.28. Thus, even if an employer indicates that training is voluntary, if supervisors expect all employees to attend and schedule times for each employee to attend, time spent at such training is considered hours worked and thus compensable.

(3) Travel

Another common "hours worked" issue concerns travel time, which is especially important for healthcare employers who require nurses and other employees to travel to different facilities within the same network. Ordinary travel to and from work is not compensable, regardless of whether the employee works at a fixed location or jobsite. 29 C.F.R. § 785.35. However, time spent by an employee in travel as part of his principal activity must be considered hours worked. Therefore, time spent traveling from one jobsite to another during the same workday must be counted towards hours worked, as should travel to an outlying work site if the employee performs work at the central location before traveling off-site. 29 C.F.R. § 785.38. For example, if a licensed practical nurse who works at an assisted living facility, which has a sister facility 20 miles away, is asked to fill in for someone at the sister facility after she has begun her shift at her normal work site, her travel time must be paid.

(4) Donning and Doffing and Section 203(O) Exemption for Unionized Employers

As discussed, pre-shift and post-shift activities must be compensated if they are an integral and indispensable part of the employee's principal activities. A new and increasing area of litigation is the "donning and doffing" class action lawsuit in which employees seek compensation for the time spent putting on or taking off their uniforms, protective gear or other work-related clothing or safety equipment. In *IBP v. Alvarez*, the Supreme Court held that employees could not only be compensated for time spent donning and doffing, but also could be compensated for time spent walking to production areas after donning protective gear and walking back from production areas to doff protective gear. 546 U.S. 21 (2005). The Court determined that donning and doffing gear is a "principal activity" and thus time spent in those activities is a part of a continuous workday and is compensable.

As with all pre- and post-shift work, donning and doffing activities are compensable if they are "integral and indispensable" to employees' principle work activities. *Steiner v. Mitchell*, 350 U.S. 247 (1956). Most courts agree that highly specialized, cumbersome safety equipment will be "integral and indispensable" to the job in question, but courts are split on the compensability of donning and doffing of non-unique gear such as hairnets, goggles, hardhats, and smocks. The more specialized and safety-oriented the gear is, the more likely it will be found "integral and indispensable" to the work performed. The more common the gear is, on the other hand, the less likely the donning and doffing of such clothing will be found compensable.

Of particular relevance to healthcare institutions, the regulations state that clothes changing on the employer's premises is compensable if it is required by law, the employer, or the nature of work. 29 C.F.R. § 790.8, n.65. Notably, the DOL has issued specific guidance in this area, instructing that, if employees have the option and ability to change into the required gear at home, changing gear is not a considered a principal activity and is not likely to be compensable. U.S. Dep't of Labor, W.& H. Div., Adv. Mem. No. 2006-2 (May 31, 2006).

It is also important to note that, if employees are covered under a collective bargaining agreement, the employer may be able to avoid paying employees for donning and doffing time. The FLSA exempts employers from having to pay employees covered under a collective bargaining agreement for any time spent "changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved . . . by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee." 29 U.S.C. § 203(O).

2. On-Call and Call-Back Issues

On-call and waiting time may be compensable under the FLSA and also frequently present challenging questions. As a general rule, periods of inactivity while on duty count as hours worked and are compensable. 29 C.F.R. § 785.15. However, "[p]eriods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked." 29 C.F.R. § 785.16(a). The



relevant distinction is whether the employee is “engaged to wait” or “wait[ing] to be engaged;” the former is compensable, while the latter is not. 29 C.F.R. § 785.14.

With respect to on-call time, an employee who is required to remain on-call on the employer’s premises or so close thereto that he cannot use the time effectively for his own purposes is considered to be working and must be compensated. 29 C.F.R. § 785.17. For example, the DOL has opined that employees who must carry a cell phone, Blackberry or beeper but who are allowed to leave the premises are usually not considered to be working while on-call. 2008 U.S. DOL Op. Letter, FLSA 2008-14 (Dec. 18, 2008). Moreover, in an Eighth Circuit case, the court decided that nurses at a North Dakota hospital were not eligible to be paid for their on-call time under the FLSA because off-the-premises on-call hours were not spent predominately for the benefit of the employer and placed very few restrictions on them. *Reimer v. Champion Healthcare Corp.*, 258 F.3d 720 (8th Cir. 2001).

Consistent with this guidance, the following factors may be considered in determining whether on-call time is compensable: (1) geographic limitations placed on employees; (2) required time to respond; (3) ability to trade on-call responsibilities with another employee; (4) use of pager to ease restrictions; and (5) personal activities of employees while on-call. On a related note, where an employee is paid to be on-call, an employer may take full day deductions from an exempt employee’s salary when the employee is unavailable to be called. In a 2009 Opinion Letter, the DOL explained that a hospital could make deductions from a registered nurse’s salary for absences of one or more full days, without running afoul of the requirements for the professional exemption under the FLSA. However, deductions are not permissible if the employee is absent less than one full day of work. *See* 2009 U.S. DOL, FLSA 2009-25 (Mar. 2, 2009).

Finally, employers sometimes provide employees with “call-back” pay pursuant to an employment agreement. Typically, such payments consist of a specified number of hours’ pay at the applicable straight time or overtime rates which an employee receives on occasions when, after the employee’s scheduled hours of work have ended and without prearrangement, the employee responds to a call from his employer to perform extra work. 29 C.F.R. § 778.221. For example, if an employment agreement provides a minimum of three hours pay at time and one-half for an employee called back to work outside his scheduled hours, two issues may arise related to call-back pay. First, if the employee works only two hours out of three, only the hours he or she actually worked are counted for overtime purposes. Thus, in the previous example, if the employee worked 40 hours of regular time and was called-back once but only worked two of the three hours, his hours worked for the week are 42. The employee is therefore only entitled to two hours of overtime, not three. Second, in calculating the employee’s regularly rate, only the overtime for the two hours actually worked during the call-back should be included in the employee’s regular rate. The extra sum received, for which the employee did not actually work, is not regarded as paid for hours worked and therefore, can be excluded from the regular rate, but it cannot be credited toward overtime compensation owed. *See* 29 C.F.R. § 778.221.

3. Meals and Breaks

During this period of heightened FLSA enforcement, some of the most high-profile recent lawsuits have successfully challenged employers' failure to comply with FLSA and state law requirements regarding meal and break periods. As noted, federal law does not require that employers grant rest-periods, but when employers do offer short breaks (generally 5 to 20 minutes), those breaks must be counted towards hours worked and are compensable. 29 C.F.R. § 785.18. "Bona fide" meal or break periods that are typically 30 minutes or more do not count towards hours worked, provided employees actually take the break and are "completely relieved from duty" during that time. 29 C.F.R. § 785.18; 2008 U.S. DOL Op. Letter, FLSA 2008-14 (Dec. 18, 2008). Such breaks do have to be counted, however, to the extent that meal period is predominantly for the benefit of the employer. For example, an LPN must be compensated for her entire 30-minute meal break if she is frequently interrupted by requests to assist patients, or has to eat lunch at her desk in order to complete her charts or answer the phone.

Thus, when choosing to automatically deduct 30-minutes per shift, the employer must ensure that the employees are receiving the full meal break or the employer may be liable for a FLSA violation. 29 C.F.R. § 785.19. In 2009, one of Massachusetts' largest hospital chains was sued in a class action alleging that the employer failed to pay employees during 30-minute meal breaks while expecting them to work during at least a portion of the break time. At least 500 hourly employees have already signed up for the suit, which is seeking back wages, interest, attorneys' fees, and other damages. Similarly, in an earlier case, the Tenth Circuit Court of Appeals allowed hospital nurses and technicians to proceed to trial on a claim that they were unable to take meal breaks without being interrupted by patient care demands. *Beasley v. Hillcrest Medical Center*, 78 F. App'x 67 (10th Cir. 2003).

As noted, employers in California face particular challenges with respect to meal breaks. Under California law, employers are required to provide a 30-minute meal break for any person who works a period of more than five hours. Unless the employee is relieved of all duty during the 30-minute meal period, the meal period shall be considered time worked. Cal. Labor Code § 512.

4. Volunteer Work

While employees must be paid for all work that is "suffered or permitted" by the employer, the DOL recognizes that, while employees may not volunteer services to for-profit private sector employers, individuals may elect to perform work for charitable, civic, or religious non-profit enterprises without expectation of compensation from the enterprise that receives their service. Consistent with the guidance set forth in *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303 (1985), the DOL considers these individuals to be considered "volunteers" who are not included in the definition of "employee" subject to the requirements of the FLSA. In determining whether the individual has actually engaged in such "ordinary volunteerism," the DOL considers a variety of factors, including the nature of the entity receiving the services; the receipt by the worker (or expectation thereof) of any benefits from those whom the services are performed; whether the activity is less than a full-time occupation, whether regular employees are displaced; whether the services are offered freely



without pressure or coercion; and whether the services are of the kind typically associated with volunteer work. Though public sector employers may not allow their employees to volunteer additional time to do the same work for which they are employed, there is no prohibition on anyone employed in the private sector from volunteering in any capacity or line of work in the public sector.

Given the nature of the services provided by healthcare entities, the applicability of these rules is frequently at issue. In a 2001 opinion letter, for example, the DOL analyzed the compensability of time spent by nurses who perform volunteer activities at events or programs that are sponsored either by the hospital or other community organizations such as the Red Cross. *See* 2001 U.S. DOL Op. Letter, FLSA 2001-18 (Jul. 31, 2001). The DOL held that such time was compensable work time when it was performed under the direction and control of their employer, the hospital. Time spent by the nurses in activities under the control of the civic or charitable community organizations, however, could be considered ordinary volunteerism and thus not compensable.

5. Rounding Errors

Another potentially costly error occasionally occurs in employers' mathematical calculations of employee hours. Though the FLSA allows an employer to round employee time to the nearest quarter hour, an employer may violate minimum wage and overtime provisions if it always rounds down. Rounding is only acceptable where the practices average out so that the employees are fully compensated for all the time actually worked. Thus, employee time from 1 to 7 minutes may be rounded down (and not counted as hours worked) but employee time from 8 to 14 minutes must be rounded up. 29 C.F.R. 785.48(b). In 2004, Mt. Clemens General Hospital in Michigan was forced to pay \$907,247 in back wages to 2,083 employees following an investigation that revealed that the hospital was not paying employees when they worked early or beyond their shift unless they worked a full 15 minutes extra. U.S. DOL, W & D Div., Press Release No. 04-1315-CHI (Jul. 21, 2004).

D. Is Overtime Properly Calculated?

1. Regular Rate of Pay – #1 Compliance Issue in the Healthcare Industry

As noted, the FLSA requires covered employers to pay nonexempt employees at least 1.5 times their regular rate of pay for all hours worked over 40 in the workweek. Again, the “regular rate” includes an employee’s hourly rate plus the value of other types of compensation. Given the intense scrutiny on this issue, healthcare employers must exercise particular care when calculating an employee’s regular rate of pay.

a. Failure to Include Non-Discretionary Bonuses and Commissions

A common error made by healthcare and other employers is the failure to include non-discretionary bonuses and commissions in calculating an employee’s regular rate of pay. Again, the FLSA requires that non-discretionary bonuses must be included in the regular rate of pay, while discretionary bonuses may be excluded. 29 C.F.R. §§ 778.200; 778.208. Non-



discretionary bonuses include those that are announced to employees to encourage them to work more steadily, rapidly, or efficiently. On the other hand, discretionary bonuses are bonuses determined at the sole discretion of the employer, at or near the end of the period, which are not made pursuant to any prior contract, agreement or promise which caused the employee to expect such payments regularly. 29 C.F.R. § 778.211. For example, if an employer announces to his employees in January that he will pay them a bonus in June, he has abandoned his discretion regarding the fact of payment and such bonus would not be excluded from the regular rate. Very few bonuses are considered discretionary under the FLSA; most bonuses thus must be included in the regular rate.

Similarly, employers must include commissions in calculating an employee's regular rate. Commissions are considered payments for hours worked and, therefore, must be included in the regular rate regardless of whether the commission is the sole source of the employee's compensation or is paid in addition to a guaranteed rate. 29 C.F.R. § 778.117.

b. Failure to Include Shift, Unit, Educational, and Other Differentials

Healthcare employers often provide employees with shift differential pay to compensate those working a less-than desirable shift. Employers must include such pay when determining an employee's regular rate. 29 C.F.R. § 778.207; *Thomas v. Howard Univ. Hosp.*, 39 F.3d 370 (D.C. Cir. 1994) (holding hospital liable for liquidated damages for failing to include shift differentials and Sunday and holiday premium pay in calculating employees' regular rates of pay). Specifically, the FLSA requires inclusion in the regular rate all extra premiums such as nightshift differentials, premiums paid for hazardous, arduous or dirty work, and additional compensation paid as an incentive for the rapid performance of work. To calculate overtime for an employee receiving a shift differential, the employer must add the extra compensation paid for the shift differential to other forms of compensable pay. The regular rate is then calculated by dividing the total remuneration received for the period by the total hours worked. If an employee receives two different shift differentials – for example, by working an evening shift and a night shift – both shift differentials must be included in the regular rate.

c. Failure to Properly Calculate Regular Rate Where Employee Works Two or More Different Jobs in the Same Workweek

An increasingly litigated topic concerns regular rate calculations for healthcare employees who work two different jobs for which they receive two different rates of pay. As noted, if the employee works two or more different jobs in a single workweek, his or her employer may use a weighted average of the two rates to compute the regular rate. Alternatively, the parties may agree in advance that the employee will be paid for overtime at a rate of not less than 1.5 times the hourly rate established for the type of work he or she is performing during the overtime hours. 29 C.F.R. § 778.419.

2. Single Enterprise/Joint Employer Issues Aggregation of Hours Worked

When counting hours worked for purposes of overtime compensation, an often overlooked requirement that increasingly is targeted by both DOL investigations and private



enforcement actions directs that employers must include all hours worked for the same “enterprise.” 29 U.S.C. § 203(r)(1). Thus, in certain circumstances, employee hours worked at separate facilities must be aggregated for purposes of calculating overtime.

a. Aggregation of Hours Worked

The DOL generally employs a fact-intensive approach to determining whether to aggregate work hours. As a general rule, if a joint employer relationship exists, all of the employee’s work for the all of the joint employers during the workweek is considered as one employment for purposes of the FLSA. DOL regulations provide that such a relationship exists where the employers are not completely disassociated with respect to the employment of the particular employee and may be deemed to share direct or indirect control of the employee by reason of the fact that one employer controls, is controlled by, or is under the common control with the other employer. 29 C.F.R. § 791.2.

b. Joint Employment Analyses

In assessing the joint employer issue, courts have considered a variety of factors, such as common ownership, common officers or directors of the companies and/or common executive functions; common management; whether one entity controls the other through stock ownership; common oversight of employees; the degree of integration of operations (including shared payroll systems, shared human resources systems, and other administrative services); common hiring, seniority, promotional systems (including priority for vacancies at other companies); common employee benefits (insurance, pension, etc.); and common employment policies (such as employee handbooks or sexual harassment policies, etc.).

Recently however, courts appear to be analyzing joint employment issues differently depending on whether they present “horizontal” or “vertical” employment situations. A “vertical” situation is one in which a company has contracted for workers who are directly employed by an intermediary company. For example, in *Barfield v. New York City Health & Hospital Corp.*, the Second Circuit held that a certified nursing assistant who signed up through three staffing agencies for work in a New York hospital and accumulated more than 40 hours of work per week was an employee of the hospital under FLSA and the hospital must therefore pay her overtime. 537 F.3d 132 (2d Cir. 2008). Courts usually employ an “economic realities” test to assess a vertical employment relationship.

On the other hand, “horizontal” joint employment occurs where an employee works for two different entities that may be subject to common control or ownership. *See Chao v. A-One Medical Services, Inc.*, 346 F.3d 909, 917-18 (9th Cir. 2003) (analyzing whether the employees’ hours worked should be aggregated where employees worked for two separate home healthcare businesses with common control and management). In determining whether a “horizontal” relationship exists, courts apply the factors set forth in the regulations at 29 C.F.R. § 791.2(b), which generally consider whether (1) there is an arrangement between the employers to share the employee’s services (*i.e.*, to interchange employees); (2) one employer is acting directly or indirectly in the interest of the other employer in relation to the employee; or (3) the employers are not completely disassociated with respect to the employment of a particular employee and



may be deemed to share direct or indirect control of the employee by reason of the fact that one employer controls, is controlled by, or is under common control of the other.

c. Aggregation of Hours in Healthcare Industry

Aggregation of hours is particularly relevant within the healthcare industries, where employees often work for two different hospitals in the same network. In many circumstances, an individual's employment with one hospital will not be completely disassociated from his or her work for other hospitals operating within the same network. Notably, in a 2005 opinion letter, the DOL concluded that facilities of a healthcare system consisting of two acute-care hospitals, a nursing home and one combined long-term hospital and nursing home were under common control of the parent company and that all hours worked within the system should have been aggregated on a weekly basis for purposes of overtime calculations. *See* 2005 U.S. DOL Op. Letter (Apr. 11, 2005).

3. Application of the Eight and Eighty Overtime System

A third potentially problematic aspect of calculating employee's regular rate arises from determinations of the appropriate overtime period. As discussed, the FLSA provides that hospitals and residential care establishments may use a fixed work period of fourteen days instead of a 40 hour workweek. The exception allows employers to pay overtime for all hours worked over eight in any workday and eighty hours in the fourteen-day period. 29 C.F.R. § 778.601. Again, however, in order to qualify for this exception, the employer must follow specific guidelines. First, the employer must have a prior agreement or understanding with the affected employees before the work is performed. Second, the employer must ensure that an employer's work period under the eight and eighty overtime system be a fixed and regularly recurring 14-day period. The 14-day period may only be changed if the change is intended to be permanent and it may not be changed to evade the overtime requirements. Last, the employer can use both the standard 40 hour overtime system and eight and eighty overtime system for different employees in the workplace, but cannot use both for a systems single employee.

So long as these guidelines are followed, the eight and eighty exception is available for all types of employees who work in a hospital. Because the exemption is based on the type of employer, the DOL thus recognizes that the exemption may be used not only for typical hospital employees such as LPNs and medical technicians, but also for hospital employees who are engaged in performing services such as public relations, payroll, accounting, administrative services, engineering, architecture, and planning. For example, in a 2004 opinion letter, the DOL stated that a hospital could use the eight and eighty overtime system for its information technology employees even though the department was located off-site. 2004 U.S. DOL Op. Letter (Oct. 8, 2004).

It is important to remember that overtime pay is required for hours worked over eighty in a fourteen-day period *and* for hours worked over 8 in any workday. In 2003, the DOL conducted an investigation of Mount Sinai Hospital Medical Center of Chicago and found the medical center had paid overtime after 80 hours but did not generally pay overtime pay after 8 hour a

day. As a result, the Medical Center was forced to pay \$614,914 in back pay for overtime hours worked by 939 of its workers.

E. Home Health Employee Compensation Issues

Employers who provide home health services for individuals who are unable to care for themselves because of age or infirmity face additional wage and hour challenges, as they may or may not be required to pay minimum wage and/or overtime depending on the type of services provided and the nature of the working relationship. The DOL addressed many of the pertinent issues in its Fact Sheet #25 – The Home Health Care Industry Under The Fair Labor Standards Act (FLSA) (rev. July 2008). The sheet instructs that employees providing “companionship services” in or around the home of the aged or infirm person do not need to be paid either minimum wage or overtime. 29 U.S.C. § 213(a)(15). Companionship services are defined as “those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs.” 29 C.F.R. § 552.6. Services falling within this definition include household work related to the care of the aged or infirm person, such as preparing meals, making beds, and washing clothes; general household work also falls within the scope of “companionship services,” but only if it does not exceed twenty percent of the total weekly hours worked by the employee. Companionship services do not, however, include services that require and are performed by trained personnel, such as RNs or LPNs. Nevertheless, RNs, certified nurse aides, and/or home health aides may be classified as exempt if they meet the salary basis test and their duties qualify them for either the administrative, professional, or executive exemption.

F. Overlap with FMLA Leave Requirements

The difficulties associated with navigating these complex wage and hour rules are further enhanced when FLSA requirements overlap with those of other state and federal statutes. A frequent, and potentially problematic, intersection concerns the intermittent leave rules under the Family and Medical Leave Act (FMLA) and the rules pertaining to deductions under the FLSA’s salary basis test.

Under the FMLA, eligible employees may take FMLA leave on an intermittent or reduced schedule basis when medically necessary due to the serious health condition of a covered family member or the employee or the serious injury or illness of a covered service member. 29 C.F.R. §§ 825.202, 825.203. Eligible employees may also take FMLA leave on an intermittent or reduced schedule basis when necessary because of a qualifying exigency. Because qualifying FMLA leave may be unpaid, a potential conflict arises with the FLSA’s salary basis test rules, which prohibit deductions for less than full days’ absences. However, FMLA regulations provide that, if an employee is otherwise exempt from minimum wage and overtime requirements of the FLSA as a salaried executive, administrative, professional, or computer employee, providing unpaid FMLA-qualifying leave to such an employee will not cause the employee to lose the FLSA exemption. *See* 29 C.F.R. §§ 825.206(a); 541.602(b)(7). The fact that an employer provides FMLA leave, whether paid or unpaid, and maintains records required by this part regarding FMLA leave, should not be relevant to the determination whether an employee is exempt within the meaning of 29 C.F.R. Part 541.



G. Minimum Wage Violations – Uniforms

In addition to the minefields presented by overtime rules, minimum wage calculations present their own potential troublesome issues for employers. One example arises in the context of pay for uniforms. The FLSA does not require that employees wear uniforms. If, however, wearing a uniform is required by some other law, the nature of a business, or the employer, the cost of providing the uniform is considered to be a business expense of the employer. The DOL addressed these issues in Fact Sheet #16 – Deductions From Wages for Uniforms and Other Facilities Under the Fair Labor Standards Act (FLSA) (rev. Jul. 2009), which advises that the FLSA does not allow the cost of uniforms that are considered to be primarily for the benefit or convenience of the employer to be included as wages. Thus, an employer may not treat the cost of uniforms as wages and thereby pay an employee less than the federal minimum wage of \$7.25/hour. Employers are, however, permitted to deduct the cost of providing and maintaining employee uniforms so long as the deduction does not reduce wages below the federal minimum wage or cut into overtime compensation. For example, if a LPN who is paid \$8.25/hour works 30 hours in a workweek, the employer may deduct up to \$30 $((\$8.25 - \$7.25) \times 30 \text{ hours})$ from the employee's paycheck to cover the cost of providing and maintaining the employee's uniform. Still, employers must reimburse employees for the cost of laundering uniforms that require dry cleaning, though they need not reimburse employees for laundry costs if the uniform is of a "wash and wear" quality. *See* U.S. Dep't of Labor, *Uniforms and Their Maintenance Under the Fair Labor Standards Act* (rev. Mar. 1984).

There are two principles to help employers determine whether a dress code constitutes a uniform for purposes of the FLSA. If an employer merely prescribes a general type of ordinary basic street clothing to be worn while working and permits variations in details of dress, the garments chosen by the employees would not be considered uniform. For example, where an employer only requires that employees wear dark colored pants and dark colored shoes, such items of clothing would not constitute a uniform. If, on the other hand, the employer prescribes a specific type or style of clothing to be worn at work, such as a jacket or a shirt of a specific or distinctive style, color, and quality, such clothing would be considered a uniform.

H. Private Duty Nurses

A final wage and hour challenge is presented by situations in which hospital patients are permitted to request private duty nurses to care for them during their hospital stay. Whether these private duty nurses should be considered employees of the hospital for purposes of the minimum wage and overtime provisions of the FLSA depends upon several factors, including the extent to which the hospital plays a meaningful role in hiring, firing, paying or controlling the nurses. *See* Wage and Hour Opinion Letter – Private-Care Nurses (Aug. 24, 1999). Other relevant factors include whether the hospital owns the facilities where the work occurs, whether the nurses perform a job integral to the hospital's business, and the relative investment in equipment and facilities. To the extent that these factors show that the private duty nurses are, as a matter of economic reality, dependent on the hospital, the nurses are more likely to be deemed hospital employees.

Hospitals must also be mindful that they may be deemed a joint employer of private duty nurses who are granted access to their facilities. In that case, both the hospital and the patient would be jointly and individually liable for complying with all applicable provisions of the FLSA with respect to the private duty nurse's employment for the particular workweek. As discussed, determination of joint employment status is a highly fact-intensive inquiry, but it generally exists where employment by the patient is not completely disassociated from employment by the hospital. *See* 29 C.F.R. § 791.2(a).

III. LEGISLATIVE INITIATIVES ON THE HORIZON

Complicating the employers' obligation to stay abreast of wage and hour rules is the prospect that the current Administration and Congress have indicated their intent to introduce legislation that modifies and/or increases requirements under the FLSA.

A. Family-Friendly Workplace Act (H.R. 933)

The Family-Friendly Workplace Act, previously introduced in the 110th Congress (H.R. 6025), was reintroduced in the 111th Congress by Representative Cathy McMorris Rodgers (R-WA) and 14 House cosponsors. The proposed legislation would amend the FLSA to give private sector employers the option of compensating employees for overtime work with paid time off rather than cash wages. Moreover, in the event that an employee wishes to receive cash wages rather than compensatory time for overtime work, the bill would allow the employee to file a written request to receive cash.

The forecast for this bill is unclear, as "comp time" proposals for the private sector have not found much legislative success in the past. However, given President Obama's support for flexible work initiatives, and H.R. 933's Republican sponsorship, it is possible that the bill will be given more attention than similar bills have in the past. If enacted as proposed, this legislation will compel employers to revise their recordkeeping and payroll practices. However, so long as the legislation allows employers to retain the flexibility of determining whether employees will receive compensatory time in lieu of wages for overtime, many employers could benefit from the increased flexibility.

B. Living American Wage (LAW) Act of 2009 (H.R. 3041)

The LAW Act was introduced in the 111th Congress by Representative Al Green (D-TX). It proposes amendments to section 6 of the FLSA, providing a calculation that would index the hourly minimum wage to 15 percent above the federal poverty threshold for a family of two with one child. The bill also requires that the minimum wage be indexed to this formula "[n]ot later than June 1, 2010, and once every 4 years thereafter." However, if a calculation under this formula would result in a decrease in the minimum wage, the then-applicable wage would stay in effect for another four years.

If enacted, the minimum wage would increase from the current rate of \$7.25 per hour to approximately \$8.20 per hour. The new law would require employers to alter their payroll policies and account for the increase in wages, which could be significant for employers struggling in the current economy.



C. Wage Theft Prevention Act (H.R. 3303)

Representative George Miller (D-CA), the Chairman of the House Committee on Education and Labor, introduced the Wage Theft Prevention Act in July 2009 along with two cosponsors. The proposed legislation seeks to amend section 6 of the Portal-to-Portal Act, which controls the statute of limitations for claims under the FLSA, as well as the Walsh-Healey Act and the Bacon-Davis Act. Specifically, the bill proposes to add a provision tolling the running of the statutory period of limitations for causes of action arising under these statutes from the date the Secretary of Labor provides notice to an employer of any investigation related to such cause of action until the date the investigation has concluded.

While the Wage Theft Prevention Act is a notably brief bill, it has a large potential impact. As Representative Miller noted in comments around the time of the bill's introduction, DOL investigations over FLSA complaints may take years, meaning that an employer who receives a notice of an investigation would be subjected to significantly increased liability to suit and, if in violation, backpay. Further, the bill gives no details as to a host of critical issues – for example, whether a complaint and investigation regarding one individual employee would toll causes of action across the entire workforce; how “related” an investigation and cause of action need to be in order for the tolling to apply; when an investigation “has concluded” and what obligation, if any, the DOL itself has to conclude investigations in a prompt manner. While Congress’s legislative docket is crowded, the Obama Administration has touted this issue as an important one. *See Solis Says Stronger Wage, Hour Enforcement Sends “Message” to Noncompliant Employers*, 140 Daily Lab. Rep. (BNA) A-14 (Jul. 24, 2009). Should this bill pass, employers who receive notice of an FLSA investigation will need to carefully consider their expanded liability and revise document retention policies to ensure that relevant materials are retained.

D. Working Families Flexibility Act (H.R. 1274)

Representative Carolyn B. Maloney (D-NY) introduced the Working Families Flexibility Act into the House along with 4 cosponsors. This bill is an identical version of the previously introduced bill of the same name in the 110th Congress. The current bill is modeled after practices in some European countries and would allow employees of employers with 15 or more employees to request a change in their terms and conditions of employment related to (1) the number of hours the employee is required to work; (2) the times when the employee is required to work; and (3) the location at which the employee is required to work. The bill further imposes duties on employers with respect to such requests, including the requirement to meet and discuss the request with the employee, to provide a written decision and, if denied, a reason for the denial, and an obligation to meet again with the employee upon receiving a request for reconsideration. The bill also allows employees to file a complaint with the Administrator of the WHD for violations of the law, who would have the authority to investigate the complaints and order civil penalties and equitable relief for any violations.

Positive action on this bill is likely, as President Obama was a cosponsor of the Senate version of the prior Congress’ version and has since voiced his strong support for legislation directed at improving the work/family balance. Many believe, however, that a first step might be

to make the federal government a model employer in terms of adopting flexible work schedules and permitting employees to petition to request flexible arrangements. If enacted as proposed, the bill will require employers to modify certain practices and policies, with an attendant potential escalation in DOL scrutiny and liability. Though employers have the right to consult on the request and ultimately deny the request, the bill still threatens to impose a substantial burden on employers, who would be required to review existing policy, create a change request policy and consultation procedure, confer with any requesting employees, and write out supported decisions, whether the requests are granted or denied.

IV. COMPLIANCE TIPS AND BEST PRACTICES

Given the number and complexity of federal and state wage and hour requirements, it is no easy task for employers to remain compliant with the rules discussed above. Nonetheless, steps taken in advance to prevent DOL enforcement actions and/or private causes of action for state and federal wage and hour violations usually are far cheaper and less burdensome than those that are compelled as a condition of settlement or judicial decision.

A. Goals of a Self-Audit

As an initial matter, employers should periodically conduct a self-audit addressing the federal and state wage and hour issues that are applicable to their workplace. Note that, prior to beginning this type of review, consideration should be given to privilege issues attached to the audit, such as the type of work product to generated, etc. The overall goals of such audits should be:

1. To ensure that exempt classifications are properly applied to each individual employee.
2. To ensure that exempt employees are paid on a “salary basis,” and that absence and leave policies comply with FLSA and state law rules regarding authorized and unauthorized deductions.
3. To ensure that all forms of compensable pay are included in overtime calculations.
4. To ensure that non-exempt employees are paid for all hours worked.
5. To ensure that complete and accurate records are created and kept for the requisite period.
6. To ensure that, to the extent state law requirements exceed those of the FLSA, such stricter requirements become the standard.

Any issues identified in a periodic audit should be addressed promptly. At the same time, specific employment policies and actions should also be implemented so as to create an environment in which compliance becomes the regular course of business. The following compliance strategies address the more common potential errors in the wage and hour context.



B. Tips to Avoid Misclassification Errors

To avoid misclassification challenges that threaten to lose exemptions for an individual employee and/or an entire job category, consider the following actions:

1. At the time of hiring, inform employees of their employment status (*i.e.*, salaried exempt or non-salaried non-exempt), review the requirements of the job – including a review of the job description for the position – and describe the terms of their payment, for straight time and overtime, in writing. An employer could even require that an employee read and sign such a document and keep the document in the employee’s personnel file.
2. Periodically review duties actually performed by exempt employees after hire to prevent such employees from performing non-exempt work. Compare such duties to the written job description for the position and modify the latter if necessary.
3. Do not institute policies docking salaried exempt employees’ pay for disciplinary reasons or for being absent from work in increments of less than a full work day.
4. Implement a safe harbor policy – *i.e.*, reimburse employees as soon as possible for inadvertent mistaken wage deductions. The law gives the employer a window of opportunity to remedy the situation without encountering liability under the FLSA. The quicker the employer remedies the situation, the less likely it is to find itself facing a class action FLSA suit.
5. If a classification mistake is identified, and an employee who is treated as exempt actually should be non-exempt, consult with counsel as to whether to correct the classification prospectively only or to pay the employee for any overtime due over the past two or three years. Whatever action is taken, care should be taken in communicating the error to the affected employee; for example, reclassifications can often be announced in conjunction with larger reorganization announcements to minimize the risk that the employee will file a complaint.

C. Tips to Avoid Overtime Calculation Errors

To ensure that overtime pay is correct and that regular rate of pay calculations include all appropriate forms of compensation, consider the following actions:

1. Adopt clear written policies concerning work schedules and hours of work and require approval for hours worked beyond the established schedules. Enforce disciplinary procedures for violations of such policies.

2. Instruct supervisors that they cannot pressure employees to meet deadlines or perform other assignments that can only be met by working off-the-clock. Workload expectations must be realistic.
3. Regularly review overtime records. If the review reveals that overtime inadvertently was not paid, pay it immediately, even if the hours were not authorized.
4. If employers do not want to include bonuses in regular rate of pay calculations, include multiple representations in employee handbooks, policies, and, to the extent possible, collective bargaining agreements that the bonuses are discretionary both as to whether they are to be paid and the amount of any payment. In addition, if possible, tie any bonus provided to employees to a percentage of both straight-time and overtime earnings. Such bonuses comply with the FLSA's overtime provisions and need not be included in the regular rate.
5. Carefully consider the requirements for "extra compensation" and premium payments from 29 U.S.C. §§ 207(e)(5)-(7), and understand that a mere shift differential must be included in the regular rate.

D. Tips to Avoid Meal and Break Rule Errors

To stay clear of challenges under meal and break rules, consider the following actions:

1. Implement clear and affirmative written policies regarding meal and break times of non-exempt employees and require approval for additional hours worked.
2. Permit employees to stop working entirely throughout any meal or other break period that extends 30 minutes or more.
3. Instruct supervisors that they cannot assign tasks to non-exempt employees or allow such employees to perform work on a reoccurring basis during such unpaid periods of time.

E. Tips to Avoid Recordkeeping Errors

To ensure accurate recording of hours employees actually work and the proper preservation of such records, consider the following actions:

1. Where appropriate, install a time keeping procedure and implement a written policy regarding its use. The policy should require non-exempt employees to make a notation immediately upon arrival at work and at their departure, as well as during all lunch or personal breaks. Administer consistent discipline for failures properly to use such.

2. Require that exempt and non-exempt employees complete time sheets on a weekly basis.
3. Require non-exempt employees to review and sign their time cards or time sheets every week and to initial any changes made to them. These steps will ensure that time records are accurate and will provide critical pro-employer evidence in the event of an off-the-clock claim.
4. Retain clear and accurate time and payroll records for all employees – exempt and non-exempt. This step will ensure that, if a court or DOL determines that an employee was improperly classified as exempt, the employer can use its own records in an effort to limit liability – without such records, the employee’s own notes and recollections will be credited.