WAGE AND HOUR LAWS

234 Mall Blvd., Suite G-50, King of Prussia, PA 19406 | 800.662.6238 | www.meainfo.org

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MEA Knowledge Guide: Wage and Hour Laws

1) What are "Wage and Hour" laws?

Federal and State wage and hour laws govern various issues related to payment of wages, including:

- Payment and calculation of overtime pay, and related record-keeping requirements;
- Classification of workers as "non-exempt" or "exempt" from the relevant overtime pay requirements;
- Salary deductions of "exempt" employees;
- What constitutes "compensable" working time for "non-exempt" employees;
- Restrictions on the use of child labor;
- Breaks, lunch, and other rest periods;
- Definitions of those not covered by the relevant wage requirements, such as "independent contractors", "interns", and "volunteers";
- Pay requirements, including timing for making wage payments, and permissible wage deductions; and
- Wage and payment requirements relative to federal government contract workers.

Note: This knowledge guide primarily covers issues governed by the federal wage and hour law, the Fair Labor Standards Act ("FLSA"). Where applicable, reference is made to state law differences, with a link to relevant jurisdictions. Some wage and hour issues are only governed by state law (to the extent a relevant state law applies), such as laws governing the timing of when payment must be made and permissible wage deductions. Importantly, some wage and hour issues are governed by both federal and state law, such as establishment of the minimum wage, and classification of employees as "non-exempt" or "exempt" from the overtime pay requirements. Caution: In all cases, if the issue is governed by both federal and state law, employers must apply the law which is more favorable to the employee.

a) The Federal Wage and Hour Law: the Fair Labor Standards Act ("FLSA")

This knowledge guide primarily covers the federal FLSA, and other federal laws. However, whenever appropriate, reference is made to relevant state law (see State Law Differences with Federal Law: Wage and Hour Laws).

b) State Wage and Hour Laws

State wage and hour laws primarily govern time within which payment must be made, permissible wage deductions, rules governing the use and payment of paid time off (including vacation and PTO), whether paid (or unpaid) sick leave must be provided and the relevant rules of those surrounding sick leave. Depending on the jurisdiction, state wage and hour laws may also address issues covered by the FLSA, including breaks, rest, meal periods, classification of workers and "exempt" and "non-exempt" from the overtime requirements, establishment of a minimum wage, and laws governing the use of child labor. In all cases, if the issue is governed by both federal and state law, employers must apply the law which is more favorable to the employee.

2) Why is it important to understand wage and hours laws?

Compliance with wage and hour laws is particularly important, since the various wage requirements are aggressively enforced by the federal and state Departments of Labor, through random and targeted audits, and through enforcement actions of suspected violations. Violations of wage and hour laws can result in hefty civil fines and penalties, and in some cases can also include criminal fines, and even jail time. Damages for wage violations also include automatic liquidated damages, which can be as much as twice the monetary amount of the actual money owed (e.g., if employer fails to properly pay overtime in the amount of $1,000, they will automatically be liable for $2,000, which does not include any potential civil or criminal fines or other penalties).

In addition, employees who file suit in court of wage violations will usually be entitled to receive their attorney fees from the employer if the employee prevails, meaning the employer will be required to pay both their own attorney fees, as well as that of the employee.

Misclassification of workers as "independent contractors", which is wide-spread, carries significant penalties, and is the subject of targeted enforcement by federal and state Departments of Labor. Caution: The term "independent contractor" is a legal term, and it is up to the law to define who is, or is not, an independent contractor (and conversely, who is, or is not an "employee", which is also a legal term). Even if a worker and employer mutually agree the worker is not an "employee", the law will disregard this mutual agreement and will make its own determination. Misclassification of workers as "independent contractors" can result in back payment of employment and other taxes, including IRS fines and penalties, back payment of unemployment and workers' compensation insurance premiums, back overtime pay and related penalties and damages, and retroactive coverage under an employer's benefit plans.

Finally, violations of the rules governing the treatment and classification of "exempt" employees can also result in employers losing their ability to classify its exempt employees as exempt, meaning that even properly classified exempt employee would become non-exempt and subject to the overtime pay requirements.

3) Companies and workers covered by the FLSA

a) Companies covered by the FLSA

The FLSA covers both private and public employers. Although the FLSA provides that only those companies who are "engaged in interstate commerce" are covered by the law, as a practical matter (i.e., in terms of how this requirement is applied by federal case law), nearly all businesses with the exception of small family-owned businesses are covered. Caution: Employers should never rely on the fact they are not covered by the FLSA because they are either a family-owned business, or because they believe they are not engaged in interstate commerce. Courts apply the law very broadly, and employers should only ever rely on a detailed analysis by a skilled attorney which finds the FLSA clearly does not apply.

b) Workers covered by the FLSA

Workers are not covered by the FLSA if the law deems them not "employees." Caution: The term "employee" is a legal term, and it is up to the law to define who is, or is not, an employee (and conversely, who is, or is not an "independent contractor", which is also a legal term). Even if a worker and employer mutually agree the worker is not an "employee", the law will disregard this mutual agreement and will make its own determination.

Workers who are not "employees" include independent contractors, interns, trainees, and volunteers. All of the foregoing are legal terms, and a proper determination must be made.

4) Federal and State Minimum Wage Requirements

The current federal minimum wage is $7.25 per hour. However, many states have adopted their own state minimum wage. Employers must always pay the minimum wage which is more favorable to the employee; i.e., they must pay the higher minimum wage.

5) Federal and State Overtime Pay Requirements

The FLSA requires that employee pay all employees not exempt from the overtime pay requirements (i.e., "non-exempt" employees) a rate of no less than 1.5 times their "regular rate" for all hour over 40 in a workweek. But there are some key issues to be aware of and thoroughly understand, since they often result in liability for employers.

a) State Laws may provide more favorable overtime (and "premium pay") requirements

Some states' laws provide more favorable overtime and "premium pay" requirements than under the FLSA ("premium pay" generally refers to additional payments for work performed on the weekend or on a holiday, or during other non-regular times). Premium pay can be 1.5 times an employee's regular rate, but in some cases can be higher (such as 2 times the regular rate). Some states also require that overtime (or "premium pay") be paid for every hour worked in excess of a certain number in any given day. For example, California requires that overtime be paid for all hours worked over eight in any given day. Caution: Employers need to know and understand the relevant overtime and premium pay requirements in their particular jurisdiction, and should never rely only on the requirements under the FLSA.

b) Employers must properly define the "workweek"

The "workweek" is a legal term, which refers to the seven (not five) day period which the employer uses to calculate overtime pay. While the employer is free to define its own workweek, it must be defined in

advance of making any payment and compensation arrangement with employees, and must be clearly communicated to employees (while there is no per se prohibition on changing the workweek, it must be done carefully and in conjunction with legal counsel in order to avoid legal liability).

c) The "Regular Rate" does not necessarily equal the employee's "hourly rate"

Employers often get in legal trouble by assuming that the "regular rate" (upon which the overtime calculation is based) equals an employee's agreed upon "hourly rate" – but this is not the case. The regular rate will only equal the hourly rate if no other relevant compensation is received. Specifically, there are various forms of compensation which, by law, must be included in the "regular rate" for the purposes of calculating overtime pay.

Under the FLSA, all of the following compensation must be included in the "regular rate" (which must then be added to the individual's hourly rate):

- Non-discretionary bonuses;
- Awards or prizes won for quality, quantity, or efficiency;
- Commissions;
- Reasonable costs of lodging, meals, and related payments to employees;
- Shift differentials (or other premium pay); and
- Lump sum on-call payment.

On the other hand, the following compensation is excluded from the "regular rate":

- Gifts made for special occasions as a reward for service, which are not dependent on hours worked, production, or efficiency;
- Payments made for: (i) occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; (ii) reasonable traveling or other expenses incurred by the employee in furtherance of the employer's interests and properly reimbursable by the employer; and (iii) other similar situations;
- Discretionary bonuses;
- Payments to a bona fide profit-sharing plan, trust, or thrift savings plans;
- Contributions to bona fide benefits plans;
- Premium payments for work in excess of eight hours in a day, 40 hours in a week, or the employee's normal working hours (i.e., the actual weekly overtime pay);
- Premium payments of at least an additional one half of the employee's regular rate for work on weekends, holidays, regular days of rest, or the sixth or seventh day of the work week (i.e., any "premium pay");
- Premium payments of at least an additional one half of the employee's regular rate made under an employment contract or collective bargaining agreement for hours worked outside the normal workday or work week; and
- Value or income derived from certain stock options, stock appreciation rights, or bona fide employee stock purchase plans.

i) "Discretionary" versus "non-discretionary" bonuses

Employer often gets in trouble by not properly determining whether a bonus is "discretionary" (and thus excluded from the "regular rate") or "non-discretionary" (and thus included in the "regular rate").

A bonus is discretionary only if:

- The fact and amount of the payment are determined in the sole discretion of management; and
- The payments are not made under any contract, agreement or promise causing the employee to expect the payments regularly.

Moreover, a bonus may lose its discretionary" status if after sometime employees come to expect the payments. In addition, key to a bonus remaining discretionary is employer retaining discretion on its payment until the conclusion or near the end of the period it covers. If an employer decides at the beginning of the year to pay a bonus at year end and conveys the decision to employees, the bonus is nondiscretionary, even if employer retains discretion on the amount to be paid. In addition, if a bonus is intended to encourage employees to perform or to be productive, the bonus is nondiscretionary.

Caution: Since the misclassification of a bonus as "discretionary" can result in liability for overtime pay, employers are encouraged to seek advice from counsel whenever making this determination.

ii) State Laws may provide different requirements for what must be included in the "regular rate"

As with many wage and hour requirements, many states have laws which provide for more favorable protections of employee; in the case of what compensation must be included in the "regular rate", some states have laws which require that additional compensation must be included in the "regular rate", in addition to those required to be included under the FLSA.

6) Classifying employees as "exempt" from the minimum wage and overtime pay requirements

The FLSA requires that all employees be paid at least the federal minimum wage, and must be paid at least 1.5 times their "regular rate" for all hours over 40 in a workweek, unless they are properly classified as "exempt" from these requirements. Under the FLSA, employees may be properly classified as exempt under any of the following categories:

- Administrative;
- Executive;
- Professional ("learned" and "creative" professionals);
- Computer professionals;
- Outside sales employees; and
- Highly compensated employees (or "HCE").

Caution: Employers often end up in legal trouble because they incorrectly believe that "making a good argument" that an employee is properly classified under one of these categories is sufficient – it is not. This is because the law (as explained by many federal courts) "presumes" that "all employees are non-exempt" and an employee can only be legally classified as "exempt" by "clear and convincing evidence", and only if it is "clear and unmistakable" -- in other words: if there is even a small doubt, and unless it is absolutely clear, the employee must be classified as non-exempt. The law provides that a "good argument" in favor of exemption, unless it meets this high legal standard, is not good enough.

a) The "good faith" legal defense and other benefits of an FLSA audit

Employers can greatly benefit from conducting a self-audit of their exempt employees. For one, identifying an improperly classified employee can help employer avoid lawsuits and Department of Labor audits, and minimize the risk of fines, penalties, and damages resulting from these lawsuits or audits.

In addition, if an employer is ever audited or faced with a lawsuit related to classification, and even if employees are misclassified, employers may be able to minimize the damages, fines, and penalties by demonstrating it conducted a self-audit of its classifications (often referred to as an "FLSA audit"). Under what is called a "good faith" legal defense, an employer may be able to minimize its legal liability by conducting an audit because a self-audit demonstrates intent to comply with the law, and proactive self-initiative to do so. (see MEA Knowledge Guide, Federal and State Agency Audits).

Caution: You can only make use of the "good faith" defense if the audit is conducted by a skilled and experienced professional, and the more expertise the individual has, the more likely the defense will apply, and to a greater extent. While the use of an attorney is not necessarily required, the use of an attorney will provide the greatest assurance that this defense will apply. This is particularly true since, as outlined below, the application of each exemption category is necessarily complex and, in fact, many of the determinations require an evaluation of case law. The use of an attorney will also allow employers to maintain attorney/client privilege over the findings, which is vital if employer uncovers potentially damaging misclassifications during the audit. If the audit is conducted by a non-attorney, the results will not be confidential, and will be required to be produced at trial, or submitted to the Department of Labor upon request.

b) Exemption categories may differ under state law

Again, as with many wage and hour requirements, many states have laws which provide for more favorable protections of employee; in the case of exemption categories, this means that some states' laws result in more employees being classified as "non-exempt." For example, some states have more narrow definitions of each relevant exemption category (i.e., fewer employees can be classified exempt under that particular category), while other state laws do not recognize the particular federal exemption category (e.g., since Pennsylvania law does not recognize either the FLSA "computer professional" or "HCE" exemption category, employees in Pennsylvania cannot be properly classified as exempt under either of these categories. See also MEA Knowledge Guide: Pennsylvania Wage and Hour Differences with Federal Law).

c) Legal Tests for each FLSA exemption category

Again, employers are strongly cautioned when classifying employees as exempt without the advice of counsel, particularly because the law "presumes" that "all employees are non-exempt" and an employee can only be legally classified as "exempt" by "clear and convincing evidence", and only if it is "clear and unmistakable" -- in other words: if there is even a small doubt, and unless it is absolutely clear, the employee must be classified as non-exempt.

Employers should also be aware that various federal courts have already made a definitive determination of whether particular job duties may be properly classified as exempt. This means that

although it may appear that an exemption category clearly applies, there may exist a case opinion which clearly states it does not.

Finally, employers must be aware that job titles are wholly irrelevant to the legal analysis. Employers should therefore never rely on job titles as part of their findings, including adopting the mistaken belief that merely providing an employee the title of "manager" will mean they are properly exempt.

i) FLSA legal test for the "Administrative" Exemption

Since this is the most common exemption category, but also the most legally complex and also the one most frequently misapplied, this guide will provide more detail in respect to this legal test than the other categories.

In order to be properly classified as an "administrative" employee, the position must:

- Be compensated on a salary or fee basis at a rate per week of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the federal government), exclusive of board, lodging or other facilities (note: Although a DOL Rule was supposed to take effect which increased this rate to $913 per week, business groups successfully filed an injunction in November, 2016, preventing the Rule from taking effect. Currently, there is no indication whether the injunction will be overturned);
- Have a "primary duty" involving the "performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers"; and
- Have a "primary duty" which includes the "exercise of discretion and independent judgment with respect to matters of significance."

(1) What does "primary duty" mean?

Although not a definitive rule, federal courts have explained that "primary duty" means that work which the employee does at least 50% of the time

(2) What does "directly related to management or general business operations" mean?

The phrase "directly related to the management or general business operations" refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.

Work directly related to management or general business operations includes, for example, work in functional areas such as:

- Tax;
- Finance;
- Accounting;
- Budgeting; Auditing;
- Insurance;
- Quality control;

- Purchasing or procurement;
- Advertising
- Marketing;
- Research;
- Health and safety;
- Human resources and personnel management, or employee benefits;
- Labor relations, public relations, or government relations; and
- Legal and regulatory compliance.

Caution: Just because an employee works in one of these functional areas, does not necessarily mean they are exempt, and employers should never rely simply on these examples of functional areas to make an exemption determination.

An employee may also qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Thus, for example, employees acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may be exempt.

(3) What does "discretion and independent judgment" mean?

Generally, the "exercise of discretion and independent judgment" involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term "matters of significance" refers to the level of importance or consequence of the work performed.

The phrase "discretion and independent judgment" must be applied in the light of all the facts involved in the particular employment situation in which the question arises.

Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, for example, whether the employee:

- Has authority to formulate, affect, interpret, or implement management policies or operating practices;
- Carries out major assignments in conducting the operations of the business;
- Performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business;
- Has authority to commit the employer in matters that have significant financial impact;
- Has the authority to waive or deviate from established policies and procedures without prior approval;
- Has the authority to negotiate and bind the company on significant matters;
- Provides consultation or expert advice to management;
- Is involved in planning long- or short-term business objectives;
- Investigates and resolves matters of significance on behalf of management; and/or
- Represents the company in handling complaints, arbitrating disputes or resolving grievances.

Moreover, the exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However,

employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level.

Thus, the term "discretion and independent judgment" does not require that the decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment.

For example, the policies formulated by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies. The management consultant who has made a study of the operations of a business and who has drawn a proposed change in organization may have the plan reviewed or revised by superiors before it is submitted to the client.

The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. The exercise of discretion and independent judgment also does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work. An employee who simply tabulates data is not exempt, even if labeled as a "statistician."

(4) What does "matters of significance" mean?

The terms "matters of significance" is defined largely by case law, and requires examination of all of the facts and circumstances related to the employee's duties. However, the job does not involve "matters of significance" merely because the employer will experience financial losses if the employee fails to perform the job properly. For example, a messenger who is entrusted with carrying large sums of money does not exercise discretion and independent judgment with respect to matters of significance even though serious consequences may flow from the employee's neglect. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

(5) Positions that are never exempt under the administrative exemption (the "office or non-manual" work part of the legal test)

Per the regulations, the administrative exemption does not apply to "blue collar" workers who perform work "involving repetitive operations with their hands, physical skill and energy." Such non-exempt "blue collar" employees gain the skills and knowledge required for performance of their routine manual and physical work through apprenticeships and on-the-job training, not through the prolonged course of specialized intellectual instruction required for exempt learned professional employees such as medical doctors, architects and archeologists.

Thus, for example, non-management production-line employees and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the FLSA, and are not exempt under the regulations no matter how highly paid they might be.

As explicitly set forth in the FLSA regulations, the administrative exemption also does not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

ii) FLSA legal test for the "Executive" exemption

In order to be properly classified as an "executive" employee, the position must:

- Be compensated on a salary or fee basis at a rate per week of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the federal government), exclusive of board, lodging or other facilities (note: Although a DOL Rule was supposed to take effect which increased this rate to $913 per week, business groups successfully filed an injunction in November, 2016, preventing the Rule from taking effect. Currently, there is no indication whether the injunction will be overturned);
- Have a "primary duty" that is management of "the enterprise in which the employee is employed" or "a customarily recognized department or subdivision of the enterprise";
- Customarily and regularly direct the work of two or more other employees; and
- Have the authority to hire or fire other employees or provide input on the hiring, firing, advancement, promotion, or any other change of status of other employees.

iii) Positions (almost) never exempt under the "executive" exemption because not managing "customarily recognized department or subdivision of the enterprise"

The types and categories of positions which do not qualify under the "administrative" exemption because they are deemed "blue collar", will also almost never qualify under the executive exemption because the work does not involve the "management of the enterprise in which the employee is employed or a customarily recognized department or subdivision thereof" as required under the FLSA regulations (while there are a small handful of cases stating otherwise, this is a very rare exception).

Thus, for example, a police officer or fire fighter whose primary duty is to investigate crimes or fight fires cannot be exempt as an "executive" under the FLSA merely because the police officer or fire fighter also directs the work of other employees in the conduct of an investigation or fighting a fire.

d) The FLSA legal test for the "Professional" exemption ("learned" and "creative" professionals)

In order to be properly classified as an "professional" employee, the position must:

- Be compensated on a salary or fee basis at a rate per week of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the federal government), exclusive of board, lodging or other facilities (note: Although a DOL Rule was supposed to take effect which increased this rate to $913 per week, business groups successfully

filed an injunction in November, 2016, preventing the Rule from taking effect. Currently, there is no indication whether the injunction will be overturned); and

- Have a "primary duty" that is the performance of work, either:
    - Requiring advanced knowledge in a field of science or learning, customarily acquired by a prolonged course of specialized intellectual instruction (i.e., the "learned" professional); or
    - Requiring invention, imagination, originality, or talent in a recognized field or artistic or creative endeavor (i.e., the "creative" professional).

i) "Learned" Professional

Although this exemption may seem relatively straightforward to apply, it is not; this is because a determination of which positions can be classified under this category are largely governed by court cases. Most issues arise when employers attempt to apply this exemption to persons who may have a degree in a recognized field of science or learning (such as engineering), but who do not actually utilize this knowledge as part of their work. The most common example is an engineer (with a B.S. degree or higher in engineering) who does primarily drafting work, such as CAD drawings. Courts have held that, since drafting does not require "advanced knowledge" in engineering, engineers who primarily perform this type of work (regardless of their degree) cannot be exempt under this category.

Caution: Since application of this category, in particular, requires a review of various court cases to make a proper determination, employers are strongly encouraged to only apply this exemption in conjunction with legal counsel.

ii) "Creative" professional

Just like the "learned" professional exemption, this category also requires a review of various court cases to make a proper determination, and employers are therefore strongly encouraged to only apply this exemption in conjunction with legal counsel. Problems most often arise because employers do not correctly apply the requirement that the employee actually exercise "invention, imagination, originality, or talent" relative to a recognized field or artistic or creative endeavor. For example, many employers incorrectly apply this exemption to persons with graphic design degrees, but who merely build web pages which are largely designed by other employees. Even if the employee exercises "some" creativity in their work, this will usually not be sufficient.

e) The FLSA legal test for the "Computer Professional" exemption

In order to be properly classified as a "computer professional" employee, the position must:

- Be compensated on:
    - A salary or fee basis at a rate per week of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the federal government), exclusive of board, lodging or other facilities (note: Although a DOL Rule was supposed to take effect which increased this rate to $913 per week, business groups successfully filed an injunction in November, 2016, preventing the Rule from taking effect. Currently, there is no indication whether the injunction will be overturned); or

    - An hourly basis at a rate not less than $27.63 per hour; and
- Have a "primary duty" that is the performance of work related to:
    - The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
    - The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
    - The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; and/or
    - A combination of these duties, the performance of which requires the same level of skills.

Caution: Because job titles vary widely and change quickly in the computer industry, employers must be particularly careful when relying on job titles to determine whether this exemption applies.

(1) Help desk or other related trouble-shooting functions

Employers must also be very careful not to classify help desk or IT support positions as exempt, unless they involve *very* high-level work. The computer professional exemption almost only ever applies to persons creating and designing programs or systems, rather than fixing systems, or performing any manual labor related to computers, or assisting employees or employer's customers regarding computer problems.

ii) The FLSA legal test for the "Outside Sales" exemption

Note: Unlike the other exemption categories, there is no minimum salary or fee basis requirement.

In order to be properly classified as a "Outside Sales" employee, the position must:

- Have a primary duty that is:
    - "Making sales"; or
    - Obtaining purchase orders or contracts from customers paying for services or the use of facilities; and
- Be "customarily and regularly" engaged away from the employer's place or places of business in performing this primary duty (a very fact-sensitive analysis).

iii) What does "making sales" mean?

Under the FLSA, "making sales" means "the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property." A sale and selling includes a: sale, exchange; contract to sell; consignment for sale; shipment for sale; or other disposition.

iv) What other duties satisfy the exempt "outside sales" activities?

Other activities which are regarded as exempt "outside sales" activities because they are either "making sales" or involve "obtaining purchase orders or contracts from customers paying for services or the use of facilities" include, for example:

- Performing work incidental to and in conjunction with own outside sales or solicitations, including incidental deliveries and collections;
- Drafting sales reports;
- Updating or revising the employee's sales or display catalog;
- Planning itineraries; and/or
- Attending sales conferences.

v) What does "customarily and regularly" engaged away from the employer's place of business mean?

This is a very fact-sensitive inquiry requiring an examination of all of the facts and circumstances surrounding the nature of the employee's work. Unlike the "primary duty" test, which can be roughly boiled down to at least 50% of the employee's time, the inquiry here involves additional considerations, such as looking at the employee's work over longer periods of time, and whether the employee's work requires being regularly away from the place of business, even though a particular employee may spend significant amount of time in the office. In this regard, even if an employee spends less than 50% of the time outside the office, this many not necessarily mean they cannot be properly classified under this exemption.

f) The FLSA test for "Highly Compensated Employee (or "HCE")" exemption

In order to be properly classified as an HCE employee, the position must:

- Be compensated a total of at least $100,000 per year (in total compensation);
- Be compensated on a salary or fee basis at a rate per week of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the federal government), exclusive of board, lodging or other facilities (note: Although a DOL Rule was supposed to take effect which increased this rate to $913 per week and $134,000 per year for HCEs, business groups successfully filed an injunction in November, 2016, preventing the Rule from taking effect. Currently, there is no indication whether the injunction will be overturned);
- Perform office or non-manual work; and
- Customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee.

7) Treating "exempt" employees correctly: unlawful salary deductions

Exempt employees who are paid on a "salary basis" must receive the full amount of the guaranteed salary in any workweek in which they perform any work, and with certain specified exceptions (listed below), employers cannot make any deductions based on the quality or quantity of work.

a) Permissible salary deductions: exceptions to the general rule

Employers are only permitted to make deductions from an exempt employee's salary for one of the following seven reasons:

- For one or more full-day absences for personal reasons, other than sickness or disability;
- For one or more full-day absences for sickness or disability in accordance with an employer's bona fide plan, policy or practice of providing compensation for those absences;
- To offset any amount employees receive as jury fees, witness fees or military pay while the exempt employee is on jury duty leave, witness leave or military leave;
- For penalties imposed in good faith for infractions of safety rules of major significance;
- For unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. The suspensions imposed must be based on a written policy applicable to all employees;
- For pro rata payment of the employee's salary in the first and last week of employment based on the time actually worked in those weeks; or
- Full-day or partial-day absences covered by the Family and Medical Leave Act (FMLA).

b) Improper deductions often lead to losing exemption status

In many cases, if an employer makes an improper deduction from an exempt employee's salary, the exemption will be lost, and the law will treat the employee as "non-exempt" (including the requirement that they receive back overtime pay). Moreover, the exemption is lost during the time when the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions.

8) What time is deemed "compensable" (meaning it must be paid)?

Non-exempt employees must be paid for all time that is deemed "compensable" by law. Sometimes, this is easy to determine, such as when the employee is clearly at work, and clearly performing work. Other times, determining what constitutes compensable time is very difficult, and complex. There are thousands of federal case opinions on various compensable time issues, involving such issues as "donning and doffing", security checks, attending lectures or seminars, travel time, and many other issues. While it would be impossible to cover even one of these issues in detail, this guide will provide an overview of the most common issues so that employers know when a potential issue could arise.

a) **When does the workday begin and end?/the "continuous workday" rule**

The U.S. Supreme Court ruled several decades ago that work "performed either before or after the regular work shift, on or off the production line" must be treated as work "if those activities are an integral and indispensable part of the principal activities" of an employee's position.

In a 2005 ruling, U.S. Supreme Court created what is called the "continuous workday" rule, which provides that "during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity" is compensable. The consequence of these two rulings means that many activities previously deemed not compensable, are now regarded as compensable if occurring after the workday begins. It is thus vital that employers understand precisely when each employee's workday actually begins.

Activities that can often signal the beginning (or the end) of a workday (for the purposes of the "continuous workday" rule) include: donning and duffing; checking voicemail or email from home (or from a coffee shop, or from anywhere else outside of work); security checks; travel to another worksite; among other activities.

Note: Per a recent U.S. Supreme Court case, however, the court emphasized that determining whether or not any pre- or post- shift activity must be compensated requires a careful and detailed legal analysis of whether the relevant pre- and post-shift activities are "integral and indispensable" to the employees' "principal activities." This decision made the determination of when the workday starts and ends, and thus what time is compensable, more difficult for employers to determine.

b) Donning and duffing

Whether time spent putting on (i.e., "donning") and removing (i.e., "doffing") protective gear, clothing and uniforms is compensable working time depends on the nature of the specific item; for example, time spent donning and doffing "specialized protective gear" is compensable; this gear can include, for example: ear plugs; protective outer garments; hard hats; specialized gloves; sleeves; safety boots; among other various "specialized protective gear."

c) Security checks

In most cases, time spent passing through security checks is compensable. Ultimately, however, whether or not this time must be compensated depends on whether the pre- or post- shift activity is "integral and indispensable" to the employees' "principal activities" (as per the recent U.S. Supreme Court ruling).

d) Checking email or voicemail before arriving to work

Various federal courts have ruled that checking e-mail or voicemails from home (or from a coffee shop, or from other areas outside of work, and before arriving to work), triggers the beginning of the workday for the purposes of the continuous workday rule. This means that, once the day starts, even the commuting time becomes compensable. Note: This makes it vital that employers take great care to establish rules governing the use of cell phones or computers outside of work.

e) Lecture, meetings, training, and similar activities

Attendance at lectures, meetings, training programs, and similar activities is compensable, and must be paid, unless all four of the following criteria are met:

- Attendance is outside of the employee's regular working hours;
- Attendance is truly voluntary;
- The event is not directly related to the employee's job; and
- The employee does not perform any productive work during the relevant time.

f) Travel time

Whether time spent traveling is compensable depends on several factors. However, the following general rules apply in most situations:

- Regular commuting to and from work, outside the employee's normal working hours, is not compensable (subject to a few exceptions, such as events that trigger the beginning of the workday under the "continuous workday" rule; e.g., checking email from home);
- Time spent going from home to work and back, outside normal working hours, on a special one-day assignment in another city is compensable to the extent that the time in transit exceeds the employee's usual commuting time;
- Time spent traveling during the employee's normal working hours, such as travel from job site to job site or travel after the first principal activity of the day, is compensable; and
- Travel that keeps the employee away from home overnight is working time if the travel is during the employee's normal working hours, including during those same hours on days, such as weekends, when the employee does not ordinarily work.

Note: However, any work performed during travel, even if it is not ordinarily compensable, must be compensated.

g) Breaks and meals

Generally, rest periods under 20 minutes are compensable. Where a rest period exceeds 20 minutes, the waiting time rules apply (see below). On the other hand, bona fide meal periods (such as lunch) are not compensable. However, the employee must have sufficient time to eat the meal (the DOL recommends at least 30 minutes), and they must be completely relieved of their work duties during the meal period.

h) Waiting time (also referred to as "on-call" time)

Waiting time (or "on-call" time) is compensable if the employer's control over the employee prevents the employee from using the time effectively for their own purposes, a very fact-sensitive inquiry, and depends on the circumstance surrounding the employee's job.

Generally, courts look at the following factors to determine whether waiting time is compensable:

- Whether employee must remain on the employer's premises;
- Whether there are excessive geographical restrictions;
- Whether the frequency of calls is unduly restrictive;
- Whether there is a fixed response time, and if so, whether it is unduly restrictive;
- Whether the employee can trade on-call responsibilities with another employee; and
- Whether the employee can engage, and does engage, in personal activities during on-call (or waiting) time, and to what extent.

9) Federal and state laws governing the use of child labor (i.e., workers under the age of 18)

Federal and state child labor laws impose voluminous and detailed restrictions on the use of child labor; that is, on employing workers under the age of 18. These laws not only govern the hours that children can work, but also the type of work they can perform. While federal law imposes some requirements, most of the child labor laws are governed by state law. These state laws often have specific detailed requirements for each age; i.e., different laws that apply to 14, 15, 16, and 17 year-olds. Employer who employ minors or who intends to employ minors should carefully review and understand the child labor laws in their particular jurisdiction.

10) Wage and hour laws for federal government contractors

Employers that are federal government contractors must also comply with prevailing wage requirements (including fringe benefits and other prevailing labor standards) under various federal statutes, including: the McNamara-O'Hara Service Contract Act; the Walsh-Healey Public Contracts Act; the Davis-Bacon Act; and other related "Davis-Bacon" related Acts. Employers should familiarize themselves with these laws, in addition to the federal and state wage and hour laws that apply in their particular jurisdiction. (See MEA Knowledge Guide: Federal Government Contractor Laws).