

TOP TWENTY WAYS TO GET IN WAGE AND HOUR TROUBLE

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ISSUES CONCERNING NONEXEMPT EMPLOYEES:

- 1. Failing to record and pay for all compensable hours of work between the first and last principal activities of the day.**

For example: Logging in to computer programs or preparing a work area before the shift; changing into work clothes or putting on protective equipment; traveling between work locations; smoking breaks.

Both large and small employers face potential liability when off-the-clock violations occur. The terms “off-the-clock” is used to refer to work that employees perform for which they do not receive payment from the employer. When off-the-clock work claims are proven to be true, they typically have one of three root causes: (1) fundamental misconceptions regarding what constitutes compensable working time, (2) inadequate or improper recordkeeping practices, and/or (3) supervisory misconduct. These cases have arisen in the meat and poultry industries, industrial workplaces in which employees must put on or take off protective clothing prior to entering the workplace and telephone call centers where employees must turn on computers before beginning their work. Recently, the DOL has made clear its intention to expand its investigations to many other industries, especially those industries with low-wage workers. As a result, off-the-clock claims have become the primary focus of FLSA and state wage and hour lawsuits initiated by employees, often involving the aggregated claims of hundreds or thousands of employees.

Although the FLSA requires an employer to compensate employees for all time which the employer requires or permits employees to work, the Portal-to-Portal Act “exempts from compensation activities which are preliminary or postliminary to an employee’s principal activity or activities unless they are an ‘integral and indispensable part of the principal activities for which covered worker[s] are employed and not specifically excluded by section 4(a)(1) [of the Portal-to-Portal Act].”¹ In a recent decision by the First Circuit Court of Appeals, the court affirmed the district court’s decision that donning and doffing gear employees are required to wear by the employer or the government is an integral and indispensable part of the employees’ principal activities and thus, compensable. By contrast, the court held that the following activities are not integral parts of the employees’ principal activities and thus, are noncompensable: (1) donning and doffing nonrequired gear; (2) walking to obtain additional

¹ 29 U.S.C. § 254; *Tum v. Barber Foods, Inc.*, 360 F.3d 274, 279-82 (1st Cir. 2004) (citations omitted).

clothing and to the area where they dispose of clothing and equipment after punching out; and (3) waiting in line for required clothing and equipment and at time clocks.

In light of the increasing number of lawsuits involving off-the-clock work claims and the announced intention of the DOL to aggressively pursue more investigations, employers should take proactive steps to ensure that they are in compliance with both federal and state wage and hour laws. Such steps may include a clearly defined and publicized policy prohibiting off-the-clock work and associated training of both supervisors and employees. Moreover, the employer should not only actively enforce the policy, but also adopt a structured reporting system for violations. Other routes employers may pursue include conducting self-audits and self-reporting to the DOL or creating a compensable grace period prior to shift commencement. With lawsuits for off-the-clock violations moving up into multimillion dollar numbers, it is time for employers to actively address the issue.

2. Using improper rounding policies and systems at the beginning and ending of work shifts and meal periods.

Despite the DOL's broad mandate that an "employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time," the DOL allows employers to maintain minor discrepancies between the number of hours recognized in time clock records and hours actually paid.² In allowing for minor discrepancies, the DOL specifically has acknowledged and accepted the continued use of "rounding" practices where those practices averaged out so that employees were fully compensated for all the time they actually worked. According to the DOL, employers must set a certain interval which serves as the minimum block of time that will be recognized as a unit of time worked or not worked. Time missed or worked within that interval will not be deducted or added to the time worked, whereas time missed or worked outside that interval will result in that interval being deducted from or added to the time worked.

Various rounding practices have been examined by the courts and the DOL. For example, an Arizona district court upheld the employer's rounding practices where the claim involved 24 instances, each involving time differences of less than 15 minutes and occurring over a period of three years, when the employer compensated the plaintiff for less than the full time she actually worked. The court reasoned that the rounding system, which did not credit employees for all the time they actually worked on a specific day or days but also credited employees for time they did not actually work on other days, worked to the mutual advantage and detriment of both the employer and the employee.³

² 29 C.F.R. § 785.47.

³ *East v. Bullock, Inc.*, 34 F. Supp. 2d 1176 (D. Ariz. 1998).

Moreover, in past opinion letters, the DOL has supported an employer's practice of rounding to the nearest one-half hour and an employer's use of a "five minute leeway rule," where the employer rounded the employees' time up to the next hour if they worked five or less minutes short of the next hour and down to the prior hour if they worked five minutes or less past that prior hour.⁴ On the other hand, a Florida district court held that an employer's rounding system did not comply with the FLSA when the employer utilized a policy of rounding off the daily time record to the nearest one-quarter hour when employees were tardy.⁵ The problem in this case was that the rounding policy lacked mutuality because it did not also round in an employee's favor if the employee began work early.

The DOL has opined that rounding off to the nearest five minutes, one-tenth of an hour, or even one-quarter of an hour is permissible, so long as it produces only minor discrepancies between time records and hours actually paid; (2) it works both to the advantage and disadvantage of the employees; and (3) it averages out so that employees are fully compensated for all the time they actually worked. If these conditions are met, employers may engage in rounding practices.

3. Failing to record and pay for work the employer knew or had reason to know was performed before or after the scheduled work day, or at home or at other remote locations.

The FLSA requires employers to provide overtime compensation to their employees for any hours worked beyond a 40-hour workweek, regardless of whether an employee works at the office, at home or while traveling. Laptop computers, palm pilots, Blackberries, cellular telephones, pagers, remote access programs and other technological advancements (many provided or subsidized by employers) now enable employees to make work portable. In many instances, employees who do not finish their work at the office now may have the option of bringing that work home with them to finish later in the evening or over the weekend. With respect to overtime compensation, a potential difficulty arises due to the inability of the employer effectively to control and monitor the amount of overtime being worked by its employees. Because employees may perform overtime work in hotels, airports, and even in the comfort of their own homes, the employer may be unaware that a particular employee is working overtime until the employee turns in his/her time record for the week indicating those overtime hours. At that point, however, the employer already may be liable for overtime compensation.

⁴ 1994 DOLWH LEXIS 89 (Maria Echaveste, Nov. 7, 1994); Op. of Acting Administrator FLSA-253 (Feb. 7, 1977).

⁵ *Hodgson v. Leeco Gas & Oil Co.*, No. 71-562-Civ.-T-H, 1972 U.S. Dist. LEXIS 11750 (M.D. Fla. Oct. 2, 1972).

The decision in *Hellmers v. Town of Vestal*,⁶ is instructive. Hellmers, a police officer, brought suit against his employer under the FLSA to recover overtime compensation for hours spent grooming and training his police dog, and cleaning his firearm and police vehicle while at home. The court stated that “with respect to work performed away from the job site or at home, the employer must credit the employee’s claim for hours worked only ‘if the employer knows or has reason to believe that work is being performed.’”⁷ The court further noted that it is the employer’s responsibility to prevent the overtime work when such work is not desired; the employer cannot merely sit back and accept the benefits without compensating for them.⁸

As a result, activities that the employer believes are preliminary or postliminary to an employee’s principal activity and thus, noncompensable may in fact be compensable if they follow the first principal activity of the day. For example, employees who check their Blackberries before brushing their teeth, might start the workday and turn personal grooming, commuting and other noncompensable preliminary activities into compensable work. In order to avoid potential overtime compensation claims for hours that the employer never authorized and probably did not know were worked until after the fact, every employer should implement a clear written policy requiring employees to get written permission from superiors before taking work home to be completed during overtime hours.

4. Failing to record and pay for all meal periods of less than 30 uninterrupted minutes.

The federal regulations do not consider bona fide meal periods to be work time; thus, employees do not have to be compensated during these periods. A bona fide meal period is one in which the employee is completely relieved from work duties for the purpose of eating regular meals. Normally 30 minutes or more is sufficient for a bona fide meal period. Activities such as coffee breaks or time for smoking do not qualify as bona fide meal periods and thus, the employee must be compensated during these periods. Furthermore, if the employee is required to perform any duties, whether active or inactive, while eating, he is not relieved.⁹ Although an employer is not required to permit the employee to leave the premises during the meal period, courts have held that requiring office employees to eat at their desks or factory workers to be at their machines

⁶ 969 F. Supp. 837 (N.D.N.Y. 1997).

⁷ *Id.* at 838 (citations ommitted).

⁸ 29 C.F.R. § 785.13.

⁹ 29 C.F.R. § 785.19.

constitutes working while eating and thus, does not qualify as a bona fide meal period.¹⁰

5. Failing to include all remuneration (except the statutory exclusions) in the regular rate of pay before calculating the overtime rate of pay.

For example, shift differentials, cash payouts from cafeteria benefit plans, call back pay, nondiscretionary bonuses, some forms of profit- or gain-sharing, supplemental compensation, deferred compensation, commissions, etc.

Under the FLSA, overtime premium payments are based upon time and one-half the “regular rate” of pay. All remuneration for employment paid to, or on behalf of, an employee must be included in calculating the regular rate of pay, unless it fits within one of eight statutory exclusions.¹¹ The eight exclusions are: (1) gifts given as a reward for service which are not merit based—e.g., holiday gifts; (2) payments for occasional periods when no work is performed—e.g., vacation or failure of employer to provide enough work—and reimbursement for travel expenses; (3) discretionary bonuses, talent fees, or profit-sharing payments; (4) employer contributions to a trustee or third person pursuant to a bona fide plan for providing such coverage as old-age, retirement, life, accident, or health insurance; (5) overtime premiums for extra hours worked during the workweek; (6) overtime premiums for extra hours worked on the weekend or holidays; (7) overtime premiums for extra hours worked beyond the original terms of the employment contract or collective-bargaining agreement; and (8) any value derived from employer-provided stock option, stock appreciation right, or bona fide employee stock purchase program.

Employers frequently misunderstand, and misapply the “discretionary bonus exclusion. In the past, the DOL has found the following types of bonus programs to be inconsistent with the concept of a discretionary bonus: (1) bonuses announced to employees to induce them to work more steadily, rapidly, or efficiently; (2) bonuses announced to employees to induce them to remain with the employer; (3) attendance bonuses; (4) individual or group production bonuses; (5) bonuses for quality and accuracy of work; and (6) bonuses contingent upon the employee continuing his or her employment until the payment is to be made.¹²

Recently, there has been some as questions to whether cash disbursements from “cafeteria” benefit plans qualify for exclusion. The DOL regulations state that “contributions irrevocably made by an employer to a trustee or third person

¹⁰ *N.L.R.B. v. Frigid Storage, Inc.*, 934 F.2d 506 (4th Cir. 1991); *Alexander v. City of Chicago*, 994 F.2d 333 (7th Cir. 1993).

¹¹ 29 U.S.C. § 207(e).

¹² June 25, 1990 DOL Opinion Letter FLSA 1990-1715.

pursuant to a bona-fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees” may be excluded.¹³ A bona fide plan may allow incidental cash payments to employees. Cash payments are “incidental” if: (1) no more than twenty percent of the employer’s contribution can be paid out in cash and (2) the cash is paid under circumstances that are consistent with the plan’s overall primary purpose of providing benefits.

A cafeteria plan may qualify as a bona fide benefits plan if it satisfies the above criteria. As an example, a cafeteria plan that provides a wide-range of health, dental, disability and life insurance benefits may qualify if nominal payments of cash in lieu of redundant health and/or dental coverage are both “incidental” and not inconsistent with the purpose of ensuring that employees have health insurance and other benefits. To illustrate that no more than twenty percent of the company’s contributions are paid out in cash, only a portion of employees opt for “flex credits” over coverage. Moreover, the company’s cost to provide health coverage for an employee and his/her family is approximately \$800.00/month, while an employee who elects to waive the coverage, because (s)he has coverage available through a spouse, receives only \$50.00/month in flex credits. Further, the flex credits the employee receives are not always taken in the form of a cash payment, as they may also be used to purchase optional benefits, such as accidental death and dismemberment insurance coverage. The purpose of the plan to provide health, dental, disability and life insurance benefits is met despite the flex credit option, because employees may waive company-paid health insurance only if they have coverage through another source. And, as noted above, the flex credits may be used to purchase other employee benefits. As both of the requirements of 29 C.F.R. § 778.215 are met, the nominal cash payments an employee receives for waiving health and/or dental insurance coverage under the cafeteria plan should not be included in his or her regular rate of pay.¹⁴

6. Compensating nonexempt employees for overtime in paid time off rather than premium wages.

Neither the FLSA nor its regulations make any provision for compensatory time off in lieu of overtime for private employers. Nonetheless, there are certain methods of dealing with overtime hours that satisfy the FLSA, even though, at first glance, they seem to be no more than compensatory time off programs.

The FLSA requires only that an employer pay overtime when an employee works more than 40 hours in one workweek.¹⁵ The FLSA also allows an

¹³ 29 U.S.C. C.F.R. § 207(e)(4).

¹⁴ July 2, 2003 DOL Opinion Letter FLSA 2003-4; see *Madison v. Resources for Human Development, Inc.*, 39 F. Supp. 2d 542 (E.D. Pa. 1999).

¹⁵ 29 U.S.C. § 207(a)(1).

employer to establish when the workweek begins and to establish different workweeks for different groups of employees. Thus, for example, an employee who normally works five eight-hour days can work 12 hours in one day without earning overtime, so long as over the course of the week, he or she works no more than 40 hours. If an employee works 12 hours on Monday, and only four hours on another day during the week, the overtime provisions of the FLSA do not come into play. Note, however, that many states, including Alaska, California, Colorado, Nevada, Puerto Rico, Illinois, and Michigan, require that overtime be paid for hours worked in excess of a specific number of hours per day (eight or twelve) or for hours worked on a sixth or seventh day of the week (regardless of whether the employee has worked 40 hours in that week).

An employer may also implement a time off policy in the second week of a two-week pay period to recoup the cost of overtime earned in the first week. If an employee works more than 40 hours in the first workweek, compensatory time may not be used as a payment for the overtime hours. However, if during the second week of the same pay period the employee is required to take one and one-half hours off for each hour of overtime worked the previous week, the employee's overall pay for the pay period will be the same as what the employee would be entitled to if he or she worked 40 hours in each workweek. A time off practice cannot be applied to a salaried employee who is paid a fixed salary to cover all hours he or she may work in any particular workweek or pay period.¹⁶ We caution against using this method of controlling overtime because it is so susceptible to misunderstanding and misapplication.

7. Employing the fluctuating workweek method of paying for overtime without meeting the following conditions: (a) the hours must fluctuate, (b) there must be a clear and mutual understanding, before the work is performed how overtime will be calculated and (c) the salary may not be reduced in any workweek for any reason.

The FLSA provides that a salaried employee whose hours of work fluctuate from week to week may reach a mutual understanding with her employer that she will receive a fixed amount as straight-time pay for whatever hours she is called upon to work in a workweek, whether few or many, and that she will be compensated for his or her overtime work at a rate of fifty percent of his or her regular hourly pay.¹⁷ Fluctuating workweek overtime is legal as long as the following conditions are met:

(1) The employee must be on a guaranteed weekly salary which is paid to the employee as long as the employee performs any work in the workweek. No pay is required for a workweek in which the employee is

¹⁶ Nov. 19, 1998 DOL Opinion Letter FLSA 1998.

¹⁷ 29 C.F.R. § 778.114(a).

out for the entire workweek and performs no work in that workweek. Pay periods can still be bi-weekly, semi-monthly, or monthly; but the work hours must be computed weekly to determine the hours worked each workweek. For this reason, we suggest that pay periods be either weekly or bi-weekly when an employee is paid on a fluctuating workweek overtime system so that the pay periods will correspond with each workweek.

(2) The hours of the employee must fluctuate from workweek to workweek. However, there are no rules as to how much or how little the hours must fluctuate from workweek to workweek. For example, both the Fourth and Seventh Circuits have held that the fluctuating workweek method is appropriate if there are fluctuations in overtime hours even if an employee never works under 40 hours in a week. Further, employees who work alternating 40 and 43 hour weeks, for example, may still be considered to have fluctuating workweeks.¹⁸

(3) The regular hourly rate of pay which is used to calculate the half-time overtime rate must be at least the minimum wage. An employee's regular rate of pay may be calculated by dividing the employee's weekly salary by the number of hours actually worked. This amount is then multiplied by the number of hours worked over 40 in the workweek and paid to the employee in addition to the salary. The employer should be aware, however, that state wage and hour laws may not recognize or permit this method of calculating overtime. For instance, Pennsylvania courts take the position that the fluctuating workweek method does not apply to employees paid a weekly salary; rather it is only to be applied to day laborers, house painter, independent contractors, and other day-rate or job-rate workers.¹⁹

8. In the restaurant and hotel businesses, failing to properly inform non-exempt tipped employees that the employer uses the tip credit when computing regular and overtime rates of pay.

If certain conditions are met, an employer is permitted to pay a tipped employee lower wages. A "tipped employee" is one who is "engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips."²⁰ According to the DOL, an employer of a tipped employee is only required to pay \$2.13/hour in direct wages if that amount combined with the tips received at least equals the federal minimum wage. If the employee's tips

¹⁸ *Condo v. Sysco Corp.*, 1 F.3d 599 (7th Cir. 1993); *Aiken v. County of Hampton*, 172 F.3d 43 (4th Cir. 1998); *Griffin v. Wake County*, 142 F.3d 712, 715 (holding that employees who worked alternating 48- and 72-hour workweeks had fluctuating workweeks).

¹⁹ *Friedrich v. United States Computer Servs., Inc.*, 833 F. Supp. 470 (E.D. Pa. 1993).

²⁰ 29 U.S.C. § 203(m).

combined with the employer's direct wages of at least \$2.13/hour do not equal the federal minimum hourly wage, the employer must make up the difference.

Many states, however, require higher direct wage amounts for tipped employees. For example, Illinois requires that employers pay at least \$3.90/hour to tipped employees and Pennsylvania requires tipped employees to be paid at least \$2.38/hour. States such as California and Minnesota do not permit tip credit. Employers must be aware of their states' requirements because if the state law differs from the FLSA, the more generous state law governs. In states where the tip credit is permitted, if the employer elects to use the tip credit provision, the employer must: (1) inform each tipped employee about the tip credit allowance (including the amount to be credited) before the credit is utilized; (2) be able to show that the employee receives at least the minimum wage when direct wages and the tip credit are combined; and (3) allow the tipped employee to retain all tips, whether or not the employer elects to take a tip credit for tips received, except to the extent the employee participates in a valid tip pooling arrangement. The requirement that an employee must retain all tips, however, does not preclude tip splitting or pooling arrangements among employees who customarily and regularly receive tips, such as waiters, waitresses, bellhops, counter personnel (who serve customers), busboys/girls, and service bartenders. Tipped employees may not be required to share their tips with employees who have not customarily and regularly participated in tip pooling arrangements, such as dishwashers, cooks, chefs, and janitors. Only those tips that are in excess of tips used for the tip credit may be taken for a pool. Tipped employees cannot be required to contribute a greater percentage of their tips than is customary and reasonable.

Where tips are charged on a credit card and the employer must pay the credit card company a percentage on each sale, the employer may pay the employee the tip, less that percentage. This charge on the tip may not reduce the employee's wage below the required minimum wage. The amount due the employee must be paid no later than the regular pay day and may not be held while the employer is awaiting reimbursement from the credit card company. In the end, the employer must make sure that its wages comport with both the federal and state tip credit provisions.

9. Failing to take full advantage of industry specific exemptions in DOL regulations.

The newly revised white-collar exemptions and guidance from the DOL illustrate certain industry-specific exemptions that should not be overlooked.

For example:

- **Insurance Claims Adjusters:**

Insurance claims adjusters generally meet the duties requirements for the administrative exemption and are not entitled to overtime pay if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation. It must be noted that the title alone does not make the position exempt. DOL warns that there must be a case-by-case assessment to determine whether an employee's duties meet the requirements for exemption.

In an opinion letter issued by the DOL on August 26, 2005, the DOL analyzed the applicability of the administrative exemption to two different insurance claims adjuster positions.²¹ The first position, (Claims Specialist I) performed many exempt duties, including: interviewing the claimant, the claimant's employer, and the treating physician; setting the initial reserve; determining whether additional investigation would be needed; and attempting to resolve the claim through settlement. However, the DOL found that the positioned employee performed his or her duties under the close supervision of their supervisor. Because the positioned employee was required to consult his or her supervisor on most decisions regarding settlement, reserves, file completeness and investigation, the DOL found that the position did not meet the requirements for the exemption because the position did not exercise the requisite degree of discretion and independent judgment with regard to matters of significance.

The DOL's review of the second position (Claims Specialist II) proved more favorable for the employer. In this case, the DOL found that because the positioned employee's supervisor only "spot-checked" the employee's work and any discussions regarding individual files were at the positioned employee's discretion, this position had the ability to make an independent choice, free from immediate direction or supervision. Moreover, the Claims Specialist II's duties required more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. The DOL found that this position, in comparison to its more-junior counterpart (discussed above), was more likely to: handle more complex cases, evaluate independent medical evaluations and independent investigations of accident scenes, hire and interact with vocational rehabilitation specialists and nursing services, handle claims that were in court or arbitration, approve litigation strategy, and act as lead negotiator with Counsel in any settlement negotiations.

• **Employees in the financial services industry**

Generally, employees in the financial services industry meet the duties requirements for the administrative exemption and are not entitled to overtime

²¹ Aug. 26, 2005 DOL Opinion Letter FLSA 2005.

pay. An exempt employee in this industry will likely perform duties such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. In applying the exemption, it does not matter whether the employee's activities are aimed at an end user or an intermediary. It must be noted that this exemption does not apply to employees whose primary duty is selling financial products. However, employees who spend more than half of their time out of the employer's offices selling financial products directly to customers may fit within the outside sales exemption.

- **Registered Nurses (RNs) vs. Licensed Practical Nurses (LPNs)**

Registered nurses who are paid on an hourly basis should receive overtime pay. However, registered nurses who are registered by the appropriate state examining board generally meet the duties requirements for the learned professional exemption, and if paid on a salary basis of at least \$455/week, may be classified as exempt. Licensed practical nurses and other similar healthcare employees, however, 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; thus they are entitled to overtime pay.

ISSUES CONCERNING EXEMPT EMPLOYEES:

10. Misclassifying nonexempt employees as exempt under federal and/or state duties tests.

For example:

- **Inside sales people:** The newly revised white-collar exemptions *strengthen* overtime rights for inside sales employees. The DOL expressly states that it “does not have statutory authority to exempt inside sales employees from the FLSA minimum wage and overtime requirements under the outside sales exemption.” Moreover, as stated above, “[a]n employee whose primary duty is selling financial products does not qualify for the administrative exemption.”
- **Paralegals:** There is no case law precedent addressing the exempt status of paralegals. However, the DOL has taken the position on several occasions (the most recent opinion letter issued after the new white collar regulations) through opinion letters that paralegals do not meet the professional or the administrative exemption because they do not exercise a sufficient amount of discretion and independent judgment. One of the major reasons The DOL

reached this conclusion mainly because it believes that if paralegals had the amount of authority to exercise independent judgment with regard to legal matters that would be required to meet the exemption, they would likely be engaged in the unauthorized practice of law as described by the American Bar Association's Code of Professional Responsibility.

To the extent, however, that paralegals do not have as their primary duty "typical" paralegal work (i.e., those duties examined in the applicable opinion letters), and instead perform duties that are more akin to those of project managers and analysts, it is possible that courts and even the DOL would not find the opinion letters applicable to paralegals, and instead find such employees to be exempt administrative employees.

The DOL issued a pointed letter regarding the applicability of the professional exemption to paralegals. The employer in this case noted that the paralegal in question possessed a four-year college degree and a paralegal certificate, and had taken continuing legal education courses throughout her twenty-two-year paralegal career. Despite these facts, and noting that many commentators to the proposed rule changes lobbied for the DOL to make paralegals eligible for the exemption, the DOL reiterated its position that "paralegals and legal assistants do not qualify as exempt learned professionals because an advanced specialized degree is not a standard prerequisite for entry into the field." The letter ruling did not address whether paralegals qualify for the administrative exemption.

- **Help desk operators and desk-side support technicians:** The FLSA Computer Employee exemption applies to an employee who earns \$455/week or \$27.63/hour whose primary duties consists of: (1) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional applications; (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. Help desk operators and desk-side support technicians do not meet this exemption test.

Simply because an employee can fix computers, install software or troubleshoot computer issues, it does not follow that the employee is exempt under the computer employee exemption. The Sixth Circuit recently recognized the distinction by noting that a lower court made an "understandable mistake [in classifying a position exempt under the computer-related exemption], one that arises from the common misperception that all jobs involving computers are necessarily highly complex and require exceptional expertise."²² There, the court noted that because the position in

²² *Martin v. Ind. Mich. Power Co.*, 381 F.3d 574 (6th Cir. 2004). Although the *Martin* case was decided

question was not a *systems analyst, computer programmer, software engineer or other similarly skilled worker* in the *software field*, as required under the FLSA regulations, the computer employee exemption did not apply.

In another recent case, however, the exemption was met. There, the plaintiff, a network administrator, claimed that he did little more than “help desk” work and, thus, he should be paid as a non-exempt employee.²³ However, the plaintiff had listed extensive hardware and software experience on his resume, with a focus on Cisco networking experience.²⁴ Moreover, the plaintiff held a certificate issued by Cisco that entitled him the designation of a Cisco Certified Network Associate.²⁵ In practice, the plaintiff was expected to design and implement the defendant’s regional network, configure the network, and test and modify the related hardware, software and connectivity between that network and others.²⁶ In sum, the plaintiff was found to have “sophisticated knowledge of computing that went beyond that of a non-exempt Help Desk employee.”²⁷

- **Accountants vs. bookkeepers and accounting clerks:** Generally, certified public accountants meet the duties requirements for the learned professional exemption. In addition, many other accountants who are not certified public accountants but perform similar job duties may qualify as exempt learned professionals. However, entry level accountants, accounting clerks, bookkeepers and other employees who normally perform a great deal of routine work generally *will not* qualify as exempt professionals.
- **Production workers:** The so-called “production vs. staff dichotomy” has been the focus of much litigation over the years, and as a result, the DOL clarified in its new regulations that the production worker test is one factor, but not the only test, that should be used in determining a worker’s exemption status. However, despite a general consensus that the production standard would be deemphasized moving forward from the August 23, 2004 regulations, the DOL has recently released an opinion letter showing that the dichotomy was alive and well. An August 19, 2005 opinion letter reemphasized that “non-manufacturing employees can be considered ‘production’ employees if their job is to generate (i.e., “produce”) the product

under the regulations as written before August 23, 2004, the substance of the regulations applied did not materially change. Despite a change in the regulations, in denying a request for a rehearing, the Sixth Circuit determined that all issues presented were fully considered upon the original submission and decision of the case.

²³ *Bobadilla v. MDRC*, No. 03 Civ. 9217, 2005 WL 2044938 (S.D.N.Y. Aug. 24, 2005).

²⁴ *Id.* at *2.

²⁵ *Id.*

²⁶ *Id.* at *5.

²⁷ *Id.* at *7.

or service that the employer's business offers to the public."²⁸ There, despite the employees' substantial duties, the DOL found a background investigator to be a production worker for a company contracted by the government to perform background checks.

In addressing the proper calculation of overtime when an employee has been misclassified as exempt, both the First and Fifth Circuits have determined that the fluctuating workweek method is the proper method of calculation. When applying the fluctuating workweek method to calculate the overtime due a misclassified employee, the First Circuit rejected the notion that, because the employer had made clear its intent to not pay overtime for hours worked over 40 in a given week, the employer could not employ the fluctuating workweek method to calculate the overtime due to the plaintiff. Instead, the court held, "The parties must only have reached a 'clear mutual understanding' that while the employee's hours may vary, his or her base salary will not."²⁹ Similarly, in discussing the proper method for calculating overtime due to a misclassified employee, the Fifth Circuit stated, "The correct method calls for dividing the actual hours worked each workweek into the fixed salary [to arrive at the regular rate of pay] The overtime payment for that week is then determined by multiplying all hours over 40 in the workweek by ½ the regular rate for that workweek."³⁰ In the end, employers may use the fluctuating workweek method as long as certain conditions are satisfied.

11. Treating trainees as exempt before they fully qualify under the applicable exempt duties tests.

An employee who must undergo a period of training and who is not able or expected to operate at full capacity until that period of training is complete may not qualify for exemption immediately, despite the position he or she is training for (e.g., district manager, computer systems administrator, vice-president, etc.). The trainee is not exempt because her or she will not likely perform all of the duties of the position for which she is being trained or will not do so with the requisite independent discretion and judgment necessary to meet the white-collar exemptions. It is important to remember that an employee who is training to be in an exempt position may need to be paid as a non-exempt employee until the training is complete and the employee assumes the full responsibilities of the position.

²⁸ Aug. 19, 2005 DOL Opinion Letter FLSA 2005-21.

²⁹ *Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35, 40 (1st Cir. 1999).

³⁰ *Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135, 1138-39 (5th Cir. 1988).

In *Catlett v. Eltra Corp.*,³¹ the court held that an employee in training was not disqualified from exempt status as a “trainee” when he actually performed exempt work while in training. The employee in *Catlett* was hired to promote the company’s product. He underwent a three month training program where he was actively engaged in telephoning and otherwise contacting customers to discuss the company’s product. The court held that, *from the very beginning of his employment*, the plaintiff was “actually performing the duties of an administrative employee, namely the promotion of Converse’s products.” In addition, the court noted that although the employee operated with a higher degree of supervision during his first three months of employment than he did after he completed his training, he still performed his duties with the required discretion and independent judgment. Therefore, the court concluded, at all times from the inception of his employment through his training and beyond, the employee was an exempt administrative employee and not a “trainee.”

In cases where courts have concluded that a trainee did not yet qualify for an exemption from the FLSA, the employee was not performing the work of an exempt employee. For example, in *Roberts v. Autotech, Inc.*³² the court held that the store manager trainee did not qualify for the exemption when he was not highest level manager in store, did not report to the Operations Manger, and did not “manage the store.” Similarly, restaurant chain “associate managers” who underwent an eleven-week training course were trainees and not exempt employees when a large majority of their duties involved manual tasks such as preparing pizzas, running the cash register, waiting on customers, and cleaning stores; duties also performed by regular crewmembers.³³

12. Failing to guarantee the proper salary amount to exempt employees.

- The minimum salary level for exemption is \$455 per week (\$910/biweekly; \$985.83/semi-monthly; \$1,971.66 monthly). Computer Employees may be paid this salary level OR an hourly wage of at least \$27.63. Exempt teachers and Outside Sales employees do not have to meet this salary level test.
- Note that some States have different salary levels that must be met (see topic 20 below).

13. Prorating the salary of a part-time exempt employee to less than \$455/week.

The salary level test is absolute. A part-time employee may is not exempt if she receives less than \$455/week. Therefore, an employer may not prorate an

³¹ No. 74 Civ. 9611-CSH, 1977 WL 1684 (S.D.N.Y. Jan. 23, 1977).

³² 192 F. Supp. 2d 672 (N.D.Tx. 2002).

³³ *Dole v. Papa Gino’s of Am., Inc.*, 712 F.Supp. 1038 (D. Mass. 1989).

exempt employee's salary to less than \$455/week. An employee either makes at least \$455/week or he or she does not.

14. Making improper deductions from the salaries of exempt employees.

For example:

- **Docking pay**
- **Recouping cost of lost or damaged equipment**
- **Recouping cost of employee errors**

In order to qualify for the professional, executive, and administrative exemptions, an employee must be paid on a "salary basis." The DOL has promulgated regulations explaining when an individual's compensation is on a salary basis. Generally, an individual is paid on a salary basis if he "regularly receives . . . on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation . . . not subject to reduction because of variations in the quality or quantity of the work performed."³⁴ The "no pay docking" rule prohibits, with a few specified exceptions, any reduction in compensation because of variations in the quality or quantity of work performed, and requires payment of a full week's salary for any week in which the employee performs any work. An employer who improperly docks pay from an exempt employee runs the risk of causing that employee to lose her exempt status.

The salary basis test, however, does permit an employer to make deductions from the salary of an exempt employee under specified circumstances without defeating the exemption. Under the new regulations there are seven exceptions from the no pay docking rule. Employers may deduct from an employee's pay for: (1) absences for one or more full days for personal reasons; (2) absence for one or more full days for sickness or disability if the deductions are made pursuant to a bona fide plan, policy or practice; (3) offsets for payments for jury fees, witness fees, or military pay; (4) penalties imposed in good faith for violating safety rules of major significance; (5) disciplinary suspensions imposed in good faith of one or more full days for violations of workplace conduct rules (such as a violation of a sexual harassment policy); (6) proportionate amount of salary deducted for days worked during the employee's first and last weeks of employment; and (7) partial-day deductions for absences that qualify under the Family and Medical Leave Act.³⁵ On the other hand, a New York district court interpreted its state's no pay docking rule to prohibit the employer from deducting from an account representative's total income for: (1) her assistant's salary and benefits; (2) finance charges; (3) errors and bad debt; (4) unbillables; and (5)

³⁴ 29 C.F.R. § 541.118(a).

³⁵ 29 C.F.R. § 541.602.

other amounts.³⁶ California also has special restrictions on docking exempt employees' salary. Employers should also be aware of the requirements of each state's wage payment laws.

15. Failing to promulgate and communicate a complaint mechanism employees may use to report improper deductions from salary so that prompt corrections can be made.

Under the new regulations, employers will jeopardize the exempt status of their employees only if they have an "actual practice" of making improper deductions. Employers may avail themselves of this new safe harbor provision if they satisfy certain conditions. First, employers must clearly communicate a policy prohibiting improper pay deductions. Although a written policy is not required, the best evidence of a clearly communicated policy is a written policy that was distributed to employees prior to the improper pay deductions. The policy can be distributed, for example, by providing a copy of the policy to employees at the time of hire, publishing the policy in an employee handbook or publishing the policy on the employer's Intranet. Second, the policy must provide a complaint procedure which an employee may use to report improper deductions. Third, if the employer makes an inadvertent improper deduction, it must reimburse employees for the improper deduction and make a good faith commitment to comply with the FLSA no docking rules in the future. Finally, if the employer "willfully" violates the policy by continuing to make improper deductions following a complaint, the employer will lose its exempt status for all employees in the same job classification working for the same managers responsible for the improper deductions for the time period in which the improper deductions were made.

This provision is more protective for employers than the holding in *Auer v. Robbins*³⁷ that a class of employees should not be exempt if the employer had an actual practice of making improper deductions. The new safe harbor provision is advantageous to employers for at least two reasons. First, for employers that make improper deductions but do not fall within the safe harbor, the exemption will not be lost for an entire class of employees, but rather only for those employees in the same job classification working for the same managers responsible for the improper deductions. Second, employers can avoid losing the exemption by simply following the safe harbor requirement. See the attached Model Policy.

³⁶ *Pachter v. Bernard Hodes Group, Inc.*, No. 03 Civ. 10239 (RPP).

³⁷ 519 U.S. 452 (1997).

ISSUES CONCERNING ALL EMPLOYEES:

16. Failing to meet recordkeeping requirements for both exempt and nonexempt employees.

For example: Failing to keep a record of the official workweek(s) for employees; failing to record all hours of work and wages paid; or failing to track meal and rest break

The FLSA requires employers to keep records for both exempt and nonexempt employees. The records must be kept on the employer's premises or in a place where they can be made available within seventy-two hours. A willful violation of the recordkeeping requirements is grounds for criminal prosecution. No particular order or form of records is prescribed by the regulations concerning FLSA recordkeeping. The regulations, however, provide the following with respect to the maintenance of records on electronic databases:

The records may be maintained and preserved on microfilm or other basic source document of an automatic word or data processing memory provided that adequate projection or viewing equipment is available, that the reproductions are clear and identifiable by date or pay period and that extensions or transcriptions of the information required by this part are made available upon request.³⁸

Certain records must be kept for all employees: (1) name and identifying number or symbol; (2) home address and zip code; (3) date of birth, if under 19; (4) sex; and (5) occupation in which employed.³⁹ In addition to the records listed above, the following records must be kept for employees subject to the FLSA minimum wage and overtime provisions: (1) time of day and day of week workweek begins; (2) rate of pay; (3) hours worked each workday and each workweek; (4) total daily and hourly straight-time earnings; (5) total weekly overtime earnings; (6) total additions or deductions to wages each pay period; (7) hourly rate of pay for each week overtime is worked; (8) total wages each pay period; and (9) date of payment and pay period covered by the payment.⁴⁰

17. Failing to stay informed of FLSA requirements by subscribing to publications, attending training courses, and seeking periodic advice regarding changes in the law or the interpretation of the law.

An employer may minimize the potential of violations of the FLSA by taking certain internal and external preventative steps. First, an employer should

³⁸ 29 C.F.R. § 516.1(a).

³⁹ 29 C.F.R. §§ 516.2, 516.11.

⁴⁰ 29 U.S.C. § 211(c); 29 C.F.R. § 516.2.

develop in-house awareness and expertise. The employer can accomplish this goal in a variety of ways, such as: (1) designating specific HR/Legal FLSA resource persons; (2) sending designated persons to FLSA training; (3) accessing FLSA reference treatises such as the BNA's "The Fair Labor Standards Act" and "Wage and Hour Laws: A State by State Survey"; (4) conducting periodic self-audits/compliance reviews; and (5) providing periodic training to HR staff and managers. Second, an employer should seek external validation of its compliance by: (1) monitoring the DOL website for updates and training aids; (2) monitoring DOL opinion letters and case law; and (3) subscribing to mailing lists of outside counsel and industry/HR associations. Furthermore, if an employer has a particular concern, the employer can always request an opinion letter addressing its specific issue from outside counsel or the DOL. Finally, the employer should actively make sure it is in compliance with the FLSA by encouraging its managers and other employees to ask questions and raise concerns. When problems arise, the employers should fix them and not simply ignore them.

18. Failing to conduct periodic, preventative compliance audits and to conduct periodic training of first-line managers and payroll staff, including in local offices/branches/facilities.

- **Failing to document compliance efforts or failing to document compliance actions to substantiate the good faith defense**

Documented internal and external preventative measures may mitigate an employer's FLSA liability. An employer who violates the provisions of the FLSA requiring payment of overtime at the rate of one and one-half times the regular rate is liable for the unpaid overtime compensation, as well as an equal amount in "liquidated damages" unless the employer shows to the satisfaction of the court that "the act or omission giving rise to such action was in good faith and that [the employer] had reasonable grounds for believing that [its] act or omission was not a violation" of the FLSA.⁴¹ It is important to note that only "wages lost" are doubled, not non-pecuniary damages such as those that may be awarded for claims for future losses, emotional distress, mental anguish and inconvenience.⁴²

The FLSA states that upon a finding of a violation of the minimum wage or overtime provisions, employers "shall be liable . . . [for unpaid wages and for] an additional equal amount as liquidated damages."⁴³ The Portal-to-Portal Act amended the FLSA to provide employers with a defense to the mandatory damages, and it permits the district court, in its sound discretion to award no, or less, liquidated damages.⁴⁴ However, before a district court can use its discretion

⁴¹ 29 U.S.C. § 260.

⁴² *Brown v. Pizza Hut of Am. Inc.*, 113 F.3d 1245 (10th Cir. 1997).

⁴³ 29 U.S.C. § 216(b).

⁴⁴ 29 U.S.C. § 260; *Williams v. Tri-County Growers, Inc.*, 747 F.2d 121, 128 (3d Cir. 1984).

to lower or eliminate liquidated damages, the employer must meet a “difficult” burden.⁴⁵ The employer has the burden of persuading the court by plain and substantial evidence that its failure to obey the law was in good faith and was predicated upon reasonable grounds, so that it would be unfair to impose more than a compensatory verdict.⁴⁶ The good faith requirement is subjective, and requires the employer to prove “an honest intention to ascertain and follow the dictates of the Act.”⁴⁷ The reasonableness requirement is objective and the determination is made by the judge. If the employer fails to meet its burden of proving good faith and reasonableness, the district court has no discretion and must award liquidated damages.⁴⁸

Merely proving that the employer did not act intentionally, had good intentions, or was ignorant of the law is not sufficient to avoid liability for liquidated damages once an initial violation of the overtime and wage provisions is found; rather, “the employer must affirmatively establish that he acted in good faith by attempting to ascertain the Act’s requirements.”⁴⁹ In fact, several circuits have held that a court has no discretion to deny liquidated damages if the employer has not demonstrated that it took affirmative steps to ascertain the legality of its pay practices before a DOL investigation.⁵⁰

19. Failing to post required materials.

Every employer covered by the FLSA must display the FLSA poster on minimum wage, overtime compensation, and child labor in a conspicuous place for employee review.⁵¹ Failing to display a poster advising employees of their wage rights may toll the statute of limitations under the FLSA. Under the Portal-to-Portal Act, claims arising under the FLSA for non willful violations are subject to a two-year statute of limitations, whereas claims for willful violations are subject to a three-year statute of limitations. For example, the Sixth Circuit has held that a district court did not abuse its discretion by tolling the statute of limitations for a class of mandatorily retired police officers alleging violations of the ADEA and related claims, where the officers had not been made aware through posting or distribution of their rights under the ADEA.⁵² Similarly, a Pennsylvania district court held that the statute of limitations was tolled in a suit

⁴⁵ *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 908 (3d Cir. 1991).

⁴⁶ *Tri-County Growers*, 747 F.2d at 129.

⁴⁷ *Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir. 1982) (citation omitted).

⁴⁸ *Tri-County Growers*, 747 F.2d at 129; *Brunner*, 668 F.2d at 753.

⁴⁹ *Tri-County Growers*, 747 F.2d at 129.

⁵⁰ *Cooper Elec.*, 940 F.2d at 910; see also *Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 70-72 (2d Cir. 1997).

⁵¹ 29 C.F.R. § 516.4.

⁵² *EEOC v. Kentucky State Police Dep’t.*, 80 F.3d 1086 (6th Cir. 1996).

for failure to pay overtime wages under the FLSA where the employer failed to provide any information to employees regarding their rights under the FLSA.⁵³

20. Failing to know and comply with state wage and hour laws requirements (including salary levels) that differ from the FLSA.

For example: higher state/local “living wage” standards for nonexempt employees, state daily overtime requirements, absence of state computer employee or highly compensated exemptions; higher salary level test.

- **Higher state/local “living wage” standards for nonexempt employees:**

Alaska: \$7.15/hr

California: \$6.75/hr

San Francisco: \$8.50/hr

Connecticut: \$7.15/hr

Delaware: \$6.15/hr

District of Columbia: \$6.60/hr (\$7.00/hr as of 1/1/06)

Florida: \$6.15/hr

Hawaii: \$6.25/hr

Illinois: \$6.50/hr

Maine: \$6.35/hr

Massachusetts: \$6.75/hr

Minnesota:

Large employer (enterprise with annual receipts of \$625,000 or more): \$6.15/hr

Small employer (enterprise with annual receipts of less than \$625,000): \$5.25/hr

New Jersey: \$6.15/hr (\$7.15/hr as of 10/1/06)

New York: \$6.00/hr (\$6.75/hr as of 1/1/06)

⁵³ *Moss v. Crawford & Co.*, No. Civ. A 98-1350, 2001 WL 33292715 (W.D. Pa. Jan. 2, 2001).

Oregon: \$7.25/hr

Rhode Island: \$6.75/hr

Vermont: \$7.00/hr

Washington: \$7.35/hr

Wisconsin: \$5.70/hr

- **State Daily/Weekly Overtime Requirements:**

- **Alaska:** Overtime is due after eight hours per day or 40 hours per week. Under a voluntary flexible work hour plan approved by the Alaska Department of Labor, a 10-hour day, 40-hour workweek may be instituted with premium pay after ten hours a day instead of after eight hours.

The premium overtime pay requirement on either a daily or weekly basis is not applicable to employers of fewer than four employees.

- **California:** Overtime is due after eight hours per day or 40 hours per week unless an alternative workweek of no more than four days of ten hours was established prior to July 1, 1999.

Premium pay on the seventh day of work in a week is not required for employee whose total weekly work hours do not exceed 30 and whose total hours in any one work day thereof do not exceed six, in specific wage and hour orders.

- **Connecticut:** In restaurants and hotel restaurants, premium pay is required at time and one half the minimum rate for the seventh consecutive day of work.
- **Hawaii:** An employee earning a guaranteed monthly compensation of \$2000 or more is exempt from the state minimum wage and overtime law.
- **Kentucky:** The seventh day overtime law, which is separate from the minimum wage law differs in coverage from that in the minimum wage law and requires premium pay on the seventh day for those employees who work seven days in any one workweek.

Compensating time in lieu of overtime is allowed upon written request by an employee of any county, charter county, consolidated local government, or urban-county government, including an employee of a county-elected official.

- **Maryland:** Under the state minimum wage law, premium pay is required after 48 hours in bowling alleys and for residential employees of institutions (other than a hospital) primarily engaged in the care of the sick, aged, or mentally ill.
- **Missouri:** In addition to the exemption for federally covered employment, the law exempts, among others, employees of a retail or service business with gross annual sales or business done of less than \$500,000.

Premium pay is required after 52 hours in seasonal amusement or recreation businesses.

- **Nevada:** Overtime is due after eight hours per day or 40 hours per week. By mutual employer/employee agreement, a scheduled ten-hour day for four days a week may be worked without premium pay after eight hours.

The premium overtime pay requirement on either a daily or weekly basis is not applicable to employees who are compensated at not less than one and one-half times the minimum rate or to employees of enterprises having a gross annual sales volume of less than \$250,000.

- **North Carolina:** Premium pay is required after 45 hours a week in seasonal amusements or recreational establishments.
- **Oregon:** Premium pay is required after 10 hours a day in non-farm canneries, driers, or packing plants and in mills, factories or manufacturing establishments (excluding sawmills, planing mills, shingle mills, and logging camps).
- **Rhode Island:** Time and one-half premium pay is required for work on Sundays and holidays in retail and certain other businesses
- **Vermont:** The state overtime pay provision has very limited application because it exempts numerous types of establishments, such as retail and service; seasonal amusement/recreation; hotels, motels, restaurants and transportation employees to whom the federal FLSA overtime provision does not apply.

- **Washington:** Premium pay for overtime is not applicable to employees who request compensating time off in lieu of premium pay.

- **States Which Do Not Expressly Recognize the Computer Employee or Highly Compensated Employee Exemptions:**
 - Hawaii (both)
 - Illinois (both)
 - Kansas (both)
 - Kentucky (no highly compensated employee exemption)
 - Maine (both)
 - Maryland (both)
 - Massachusetts (both)
 - Michigan (both)
 - Minnesota (both)
 - Montana (both)
 - Nevada (no highly compensated **employee exemption**)
 - New Jersey (no highly compensated employee exemption)
 - New Mexico (no computer employee exemption)
 - New York (both)
 - North Carolina (no highly compensated employee exemption)
 - North Dakota (no highly compensated employee exemption)
 - Ohio (both)
 - Oregon (both)
 - Pennsylvania (both)
 - Rhode Island (both)
 - Vermont (both)
 - Washington (no highly compensated employee exemption)
 - West Virginia (both)
 - Wisconsin (no highly compensated employee exemption)

- **Higher Salary Level Test:**
 - Alaska:** Twice the minimum wage for the first 40 hours of work (\$7.15 x 40 x 2=\$572).

 - California:** Twice the minimum wage (\$6.75 x 40 x 2=\$540). Of interest is the fact that the minimum wage as it pertains to computer-related professional exemption is now in dispute. The DLSE (California's counterpart to the DOL) states that "Beginning Jan. 1, 2005, to qualify for exemption, computer professionals must earn an hourly wage of at least \$45.84 per hour." But, the new AB1093 states: \$41 per hour to go up from there."

Connecticut: Workers who earn between \$400-\$475 a week are subject to Connecticut's Long Test for exemption. Workers who earn more than \$475 a week are subject to Connecticut's Short Test for exemption.