



- Atlanta
- Austin
- Berlin
- Birmingham
- Boston
- Charleston
- Charlotte
- Chicago
- Cleveland
- Columbia
- Dallas
- Denver
- Detroit (Metro)
- Greenville
- Houston
- Indianapolis
- Kansas City
- Las Vegas
- London
- Los Angeles
- Memphis
- Mexico City
- Miami
- Milwaukee
- Minneapolis
- Montréal
- Morristown
- Nashville
- New Orleans
- New York City
- Oklahoma City
- Paris
- Philadelphia
- Phoenix
- Pittsburgh
- Portland (ME)
- Portland (OR)
- Raleigh
- Richmond
- Sacramento
- San Antonio
- San Diego
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- St. Thomas
- Stamford
- Tampa
- Toronto
- Torrance
- Tucson
- Washington D.C.

# Exempt vs Non-Exempt: The Classification Showdown (and Other Wage & Hour Issues)

Presented by:

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Burton Garland is a Shareholder in Ogletree Deakins' St. Louis Office and has been practicing law for almost 30 years. As a management-side labor and employment lawyer, Burton:



Provides advice, counseling, and training, on myriad labor & employment law topics and is a nationally recognized speaker on such topics;



Represents clients before federal and state agencies and courts under Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Family and Medical Leave Act, Fair Labor Standards Act, the Federal False Claims Act, and the various state counterparts to these federal laws;



Has extensive experience litigating high stakes matters involving restrictive covenants (non-compete, non-solicit and confidentiality agreements); misappropriation of trade secrets; retaliation; tortious interference; unfair competition; and related claims;



Provides advice and counseling on union avoidance and campaigns, elections, objections to elections, R-Case strategy and litigation, collective bargaining, strikes and injunctions, arbitration, and unfair labor practice charges before the National Labor Relations Board.



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Sam Newman is an associate in Ogletree Deakins' St. Louis Office and has been practicing law since 2016. As a management-side employment lawyer, Sam:

 Represents employers in lawsuits involving claims of discrimination, retaliation, harassment, wrongful termination, trade secrets, and other employment-related claims.

 Represents employers in pre-litigation matters before administrative agencies and provides advice and counsel to employers, including drafting handbooks, personnel policies, and other employment-related documents.

 Received his undergraduate degree from the University of Missouri-Columbia, and his law degree from Saint Louis University School of Law. While in law school, Sam served as an editor for the SLU Law Journal.

 Previously practiced Missouri Workers' Compensation law for an insurance defense firm in St. Louis. Additionally, he gained experience interning for the Legal Services of Eastern Missouri, as well as a local civil plaintiff's firm.

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# Agenda

- 1 The DOL
- 2 FLSA "Back to Basics"
- 3 Exemptions Showdown (And The New Changes In The Law)
- 4 The Crystal Ball
- 5 Action Items
- 6 Top 10 Wage & Hour Mistakes

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# OVERVIEW OF THE DEPARTMENT OF LABOR (DOL)



## What is the DOL?

The DOL is a federal agency responsible for overseeing and enforcing labor laws in areas like workplace safety, wage standards, unemployment benefits, and collective bargaining.



## Key Responsibilities:

Enforcing **Fair Labor Standards Act (FLSA)** wage and overtime laws.

Overseeing **Occupational Safety and Health Administration (OSHA)** for workplace safety.

Regulating **unemployment insurance** and **workforce development** programs.

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# PRESIDENTIAL INFLUENCE ON THE DOL



## Appointment Power:

The President appoints the **Secretary of Labor**, who directs the department's priorities, regulatory focus, and enforcement actions.



## Policy Agenda:

**Democratic administrations** often push for stronger worker protections, increased wages, and robust enforcement.

**Republican administrations** tend to focus on reducing regulatory burdens on businesses, emphasizing economic growth and flexibility for employers.

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# KEY DOL AREAS AFFECTED BY THE DOL APPOINTMENTS



## Wage and Hour Standards:

Minimum wage laws and overtime protections under the **Fair Labor Standards Act (FLSA)**.



## Worker Classification:

Classification of workers as **employees** or **independent contractors**, which affects access to benefits like health insurance and unemployment. Exempt Versus Non-Exempt

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**ACTING SECRETARY OF LABOR  
JULIE A. SU**

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FLSA

Back To  
Basics

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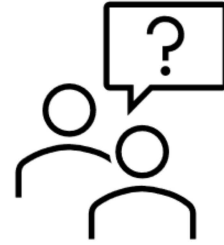
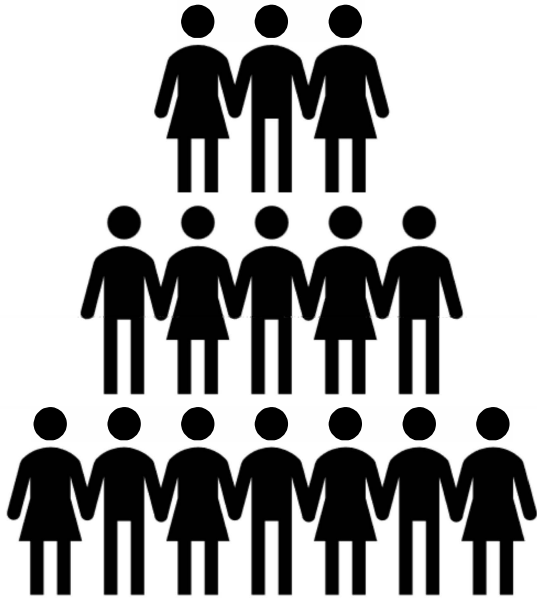
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Who is covered  
by the FLSA?

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# 2 TYPES OF COVERAGE

- Employer with at least two employees and at least \$500,000 a year in business (sales, for example). Multiple establishments, businesses, or corporations may be one “enterprise” under the FLSA if they perform related activities, through unified operation or common control, for a common business

## Enterprise Coverage



- Any employee who makes telephone calls, types letters, processes credit card transactions or travels to other states for work may be covered by the FLSA

## Individual Coverage



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## THE BOTTOM LINE

Almost every employee in the United States is covered by the FLSA

- Examples of employees who may not be covered
  - Employees working for small construction companies
  - Employees working for small independently owned retail or service businesses
  - Non-profits or charitable institutions
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# FLSA LITIGATION

- Misclassifications
  - Exempt vs. Non-Exempt
  - Independent Contractors
- Rounding practices
- Automatic meal deductions
- Use of mobile electronic devices
- Tip pooling issues
- DOL audits targeting certain industries
  - Construction, hospitals, housekeeping, in-home care, trucking services, insurance companies, mortgage/loan providers

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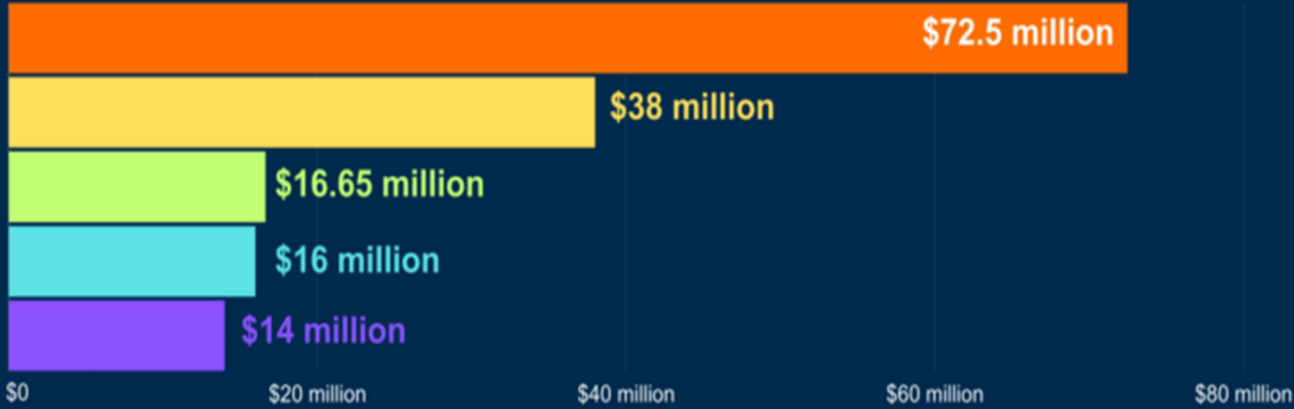


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### Top FLSA / Wage & Hour Class And Collective Action Settlements In 2024



## FLSA LITIGATION

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Easy And Inexpensive  
For Plaintiffs To File

Liability

...and i should care,  
why?

Tough For Employers To  
Comply

DOL Enforcement  
Continues

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## How to File a Complaint

**How to File a Complaint**

What Happens When You File a Complaint

What to Expect

What to Do

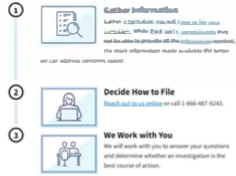
What to Do

What to Do

**What to Expect**

The Wage and Hour Division is responsible for enforcing some of the nation's most important federal labor laws. The workers who are protected by these laws often want to know what to do when an employer's actions violate these laws. Many investigations are initiated by complaints, which are confidential. The name of the complainant, the nature of the complaint, and whether a complaint must be filed to develop a complaint are available to the public. For more information, visit <https://www.dhs.gov/wage-hour>.

### Complaint Process



#### Information You Need to File a Complaint

What information you will need to file a complaint.

[Learn More](#)



#### Visits to Employers

Learn more about the investigation process and what to expect.

[Learn More](#)



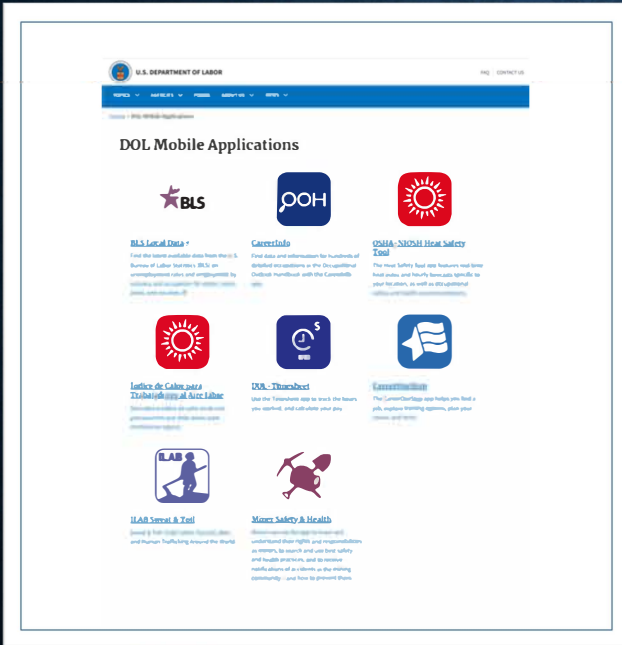
#### FAQs

Answers to common questions and answers about filing a complaint with WHD.

[Learn More](#)

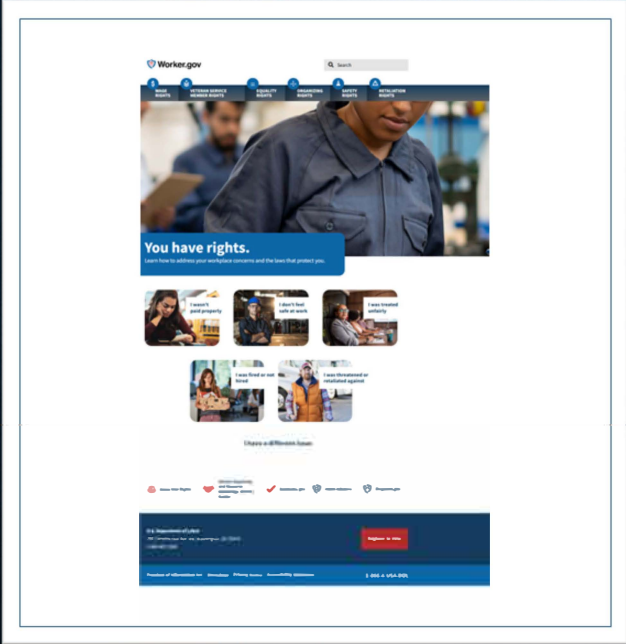
# THE DOL

Making it Easier for Employees to  
File Claims



“THERE’S AN APP FOR THAT!”





**WORKER.GOV**

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## OVERTIME 101

- The Fair Labor Standards Act (FLSA) establishes a federal minimum wage and sets requirements for entitlement to overtime pay
- Covered **nonexempt** workers are entitled to a minimum wage of not less than \$7.25 per hour\* and overtime pay at a rate not less than one and one-half times the regular rate of pay is required after 40 hours of work in a workweek.

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# EXEMPTIONS



FLSA contains exemptions for minimum wage and/or overtime requirements



Always consult the FLSA and its regulations to examine the factors to determine whether your employee is exempt!



Common exemption: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees

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# EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL (EAP)



To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis



For an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the regulations

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## THREE TESTS FOR EXEMPTION



Salary Level



Salary Basis



Job Duties

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**PAID ON A  
SALARY BASIS**

Paid on a "salary basis" means—

Employee must receive each pay period a predetermined amount constituting all or part of the employee's compensation; and

The predetermined amount may not be reduced because of variations in the quality or quantity of work performed

Subject to a few permissible deductions, employee must be paid full salary regardless of number of hours or days worked

Do not have to pay if no work performed during the workweek

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# NONDISCRETIONARY PAYMENT TO MEET SALARY THRESHOLD



10% of minimum standard salary may be nondiscretionary bonus, incentive, and commission payments



Nondiscretionary payments may be paid annually or more frequently



“Catch up” payment to meet 10% must be by made by next pay period after end of year, if annual minimum salary not met



HCE must receive full minimum standard salary each workweek, but remaining portion of threshold can be satisfied by nondiscretionary payments, including a “catch up” payment.

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# PRIMARY DUTIES TEST



For each exemption, there are enumerated primary duties tests



“Primary duty” Definition



There were no changes to the primary duties test in the New Rule

No new specific occupational examples provided

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# PRIMARY DUTIES: EXECUTIVE

(1) engaging in management of: (a) the enterprise where the employee is employed; or (b) a customarily recognized department or subdivision of the enterprise;



(2) customarily and regularly directing the work of two or more full-time employees or their equivalent; and



(3) having the authority to hire or fire other employees or the employee's suggestions and recommendations are given particular weight regarding the status of other employees, including:

hiring

firing

advancement

promotion

other change  
of status

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# PRIMARY DUTIES: EXECUTIVE - MANAGEMENT

Interviewing, selecting, and training employees	Setting and adjusting employee rates of pay and hours of work	Directing work of other employees
Maintaining production or sales records for use in supervision or control	Appraising employee productivity and efficiency to recommend promotions or other changes in status;	Handling employee complaints and grievances
Disciplining employees	Planning work	Determining techniques to be used
Apportioning work among employees	Determining the type of materials, supplies, machinery, equipment, or tools to be used	Deciding on merchandise to be bought, stocked, and sold
Controlling flow and distribution of materials or merchandise and supplies	Providing safety and security of employees or property	Planning and controlling the budget
	Monitoring or implementing legal compliance measures	

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# PRIMARY DUTIES:ADMINISTRATIVE



(1) be 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 including, for example:

Assisting with running or servicing the business; or  
Working in certain functional areas of the business; or  
Advising or providing consultation to the employer's clients or customers, such as tax or financial information



(2) include the exercise of discretion and independent judgment regarding matters of significance including, for example:

Comparing and evaluating possible courses of conduct and acting or deciding after the various possibilities have been considered;  
Deciding or recommending actions, even if reviewable by higher-level authority; or  
Working in a way that involves more than skillfully applying well established techniques, procedures, or standards, as is the case with work that is clerical, secretarial, mechanical, repetitive, recurrent, or routine.

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# PRIMARY DUTIES: ADMINISTRATIVE

Areas directly related to management or general business operations typically include:

tax	finance	accounting	budgeting	auditing	insurance
quality control	purchasing	procurement	advertising	Marketing	safety and health
personnel management	human resources	employee benefits	labor relations	public relations	government relations
	computer network, internet, and database administration	legal and regulatory compliance	other similar activities		

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# PRIMARY DUTIES: PROFESSIONAL (LEARNED)



(1) requiring advanced knowledge, which is work that:

Is Predominantly Intellectual;  
Includes Work Requiring The Consistent Exercise Of Discretion And Judgment;  
Is Not Routine Mental, Manual, Mechanical, Or Physical Work; And  
Generally Involves Using The Advanced Knowledge To Analyze, Interpret, Or Make  
Deductions From Varying Facts Or Circumstances.



(2) in a field of science or learning (including law, medicine, theology, accounting, engineering, architecture, teaching, etc.); and



(3) Customarily acquired by a prolonged course of specialized intellectual instruction.



**NOTE:** Teachers, physicians, and attorneys employed in their field are exempt. The salary and salary basis requirements to do not apply to those professions.

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# COMPUTER PROFESSIONAL



Salary or fee basis of not less than \$455 per week, or hourly of not less than \$27.63



Computer systems analyst, computer programmer, software engineer or other similarly skilled worker performing the primary duty of

Systems analysis;  
System or program design;  
Programming; or  
A combination of these.



NOT help desk type positions!

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# OUTSIDE SALES EXEMPTION



## Primary Duty

Making sales; or  
Obtaining orders or contracts for  
services or for the use of facilities for  
which the client or customer pays



Generally, activities must occur away from  
employer's place of business

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**PRIMARY  
DUTIES:  
PROFESSIONAL  
(CREATIVE)**



(1) requires invention, imagination, originality or talent; and



(2) is in a recognized field of artistic or creative endeavor, such as music, writing, and the graphic arts



Examples of creative professionals:

Actors  
Musicians  
Composers  
Soloists  
Conductors  
Certain painters,  
cartoonists,  
writers,  
~~copyright~~ and  
journalists

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# HIGHLY COMPENSATED TEST



\$100,000/YEAR



SALARY OF AT LEAST  
\$455 PER WEEK



OFFICE OR NON-  
MANUAL WORK



CUSTOMARILY AND  
REGULARLY PERFORM  
ONE OR MORE OF  
THE EXEMPT DUTIES

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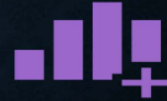
# NEW RULE EFFECTIVE DATES



The final rule has a two-step increase



First step: initial threshold increase took effect on July 1, 2024 (based on 2019 calculation methodology)



Second step: the full increase based on new percentages calculations will take effect on January 1, 2025

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# FIRST STEP: JULY 1, 2024, MINIMUM SALARY THRESHOLD

Old Rule	New Rule (First Step – 7/1/24)
\$684 per week \$35,568 annually	\$844 per week \$43,888 annually

- Increase uses 2019 percentages based on 2023 data
- Tied new threshold to the 20% percentile of weekly earnings of full-time salaried workers in the lowest wage census region (South)

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**SECOND STEP:  
 JANUARY 1, 2025, MINIMUM SALARY THRESHOLD**

Old Rule	New Rule (First Step – 7/1/24)	New Rule (Second Step – 1/1/25)
\$684 per week \$35,568 annually	\$844 per week \$43,888 annually	\$1,128 per week \$58,656 annually

Tied new threshold to the 35th percentile of salary in the lowest-wage census region (the South)

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# HIGHLY COMPENSATED EMPLOYEE (HCE) COMPENSATION

Old Rule	New Rule (First Step – 7/1/24)	New Rule (Second Step – 1/1/25)
\$107,432 annually	\$132,964 annually	\$151,164 annually

First step based on 80<sup>th</sup> percentile of weekly earnings and second step represents 85<sup>th</sup> percentile based on weekly earnings for all full-time salaried employees nationwide - not just the South

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## UPDATE TO MINIMUM THRESHOLDS



The final rule calls for the minimum thresholds to be recalculated **every three (3) years** based on up-to-date wage data

This will more than likely result in periodic increases absent a significant downturn in the economy



By February 1, 2027, DOL to publish updated salary for July 1, 2027



The new rule does not apply the standard EAP exemptions in the U.S. territories of Puerto Rico, Guam, the U.S. Virgin Islands, and the Northern Mariana Islands

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## DOL EMPHASIS ON PRE-2004 EXEMPTION TEST

- Final rule consists of extensive discussion of the pre-2004 exemption test which consisted of a short test and long test
- The short test had a higher minimum salary and less stringent duties test
- The long test had a lower salary with a more stringent duties test
- DOL notes that the 2025 increase to \$1,128 a week exceeds the long test salary but is less than the short test salary adjusted for current earnings data



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Effective Date	EAP Minimum Salary	Annual Salary HCE
Current	\$684 per week (\$35,568 per year)	\$107,432 (including at least minimum salary per week)
July 1, 2024	\$844 per week (\$43,888 per year)	\$132,964 (including at least minimum salary per week)
January 1, 2025	\$1,128 per week (\$58,656 per year)	\$151,164 (including at least minimum salary per week)
July 1, 2027, and every 3 years thereafter	Recalculation based on current data using 35% of lowest full-time salaried workers	Recalculation based on current data using 85% of all full-time salaried workers

## MINIMUM SALARY LEVELS SUMMARY CHART

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**NONDISCRETIONARY  
PAYMENT TO MEET  
SALARY THRESHOLD –  
REGULATORY  
LANGUAGE**

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Up to 10% of minimum salary may be in the form of nondiscretionary bonus, incentive, and commission payments

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Nondiscretionary payments must be paid annually or more frequently

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Employer should designate the 52-week period for measurement. If employer doesn't designate, the default is the calendar year

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"Catch up" payment to meet 10% must be made by next pay period after end of the 52-week period, if annual minimum salary not met

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Can't use this to count toward the HCE salary (but can use toward the HCE total compensation)

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# NONDISCRETIONARY PAYMENT TO MEET 2025 SALARY THRESHOLD



Effective January 1, 2025 - weekly salary threshold goes up to \$1,128 per week

10% of \$1,128 = \$112.80  
So minimum weekly salary before bonus/commission/incentive must be at least \$1,015.12



Annualized minimum salary would be \$52,790.40, with at least \$5,865.60 in annualized bonuses/commissions/incentives

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# LEGAL CHALLENGES TO THE RULE



On July 1, 2024, a Texas federal judge denied efforts to block the enforcement of the rule nationwide

Determined the employee at issue in that specific case may not have been exempt, even under the prior standard



A separate Texas federal judge did issue an injunction blocking the enforcement of the rule limited to the State of Texas as an employer

A third case is also pending in Texas, but briefing schedule indicates the court intends to rule before January 1, 2025

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# CRYSTAL BALL – WILL THE JANUARY 1 INCREASE GO INTO EFFECT, OR WILL IT BE BLOCKED?



Recent federal appeals court decision held that the DOL can set a minimum salary level



But is the proposed January 1, 2025, level too high?



Lawsuits are pending in federal courts in Texas

Strong arguments exist in support of blocking the January 1 increase (similar to arguments that were successful in 2016)  
We hope we will get clarity by December 1, 2024, but there are no guarantees

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# ACTION ITEMS



Evaluate Jobs Impacted By  
New Regulations



Consider Whether  
Positions Below \$43,888  
Will Receive A Salary  
Increase Or Will Be  
Reclassified Now



Consider Whether  
Positions Below \$58,656  
Will Receive A Salary  
Increase Or Will Be  
Reclassified Before  
January 1, 2025



Be On The Look Out For  
Legal Challenges To The  
Final Rule



Consider Creation Of  
New Pay Grades/Job  
Titles



Consider  
Problems/Concerns  
Created By Compression



Consider How Change  
Will Impact Benefit  
Programs



Consider Other  
Responses To Raising The  
Salary Level



Ensure Proper Training  
For Affected Employees  
(And Managers) On  
Timekeeping And Other  
Policies

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# ACTIONS EMPLOYERS CAN TAKE NOW

Work closely with WorkSmart to address options

Prepare for the worst – but delay implementing changes until end of 2024 (lesson learned from 2016)

If you do convert people to non-exempt, need to:

- Analyze their work schedules
- Develop a communication plan
- Train them on timekeeping procedures

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**ACTIONS  
EMPLOYERS  
CAN TAKE  
NOW**

- If you are using incentives to meet the July 1, 2024 salary threshold, be sure that incentives for the time period running from July 1, 2024-December 31, 2024, actually allow you to meet the threshold, and make any needed catch-up payments during first payroll period in January

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## #1 SOLUTION: SELF-AUDIT OF EXEMPTIONS

1. Gather documents
  - a) Organizational Chart
  - b) Job Descriptions
2. Conduct interviews
  - a) Managers
  - b) Maybe employees
3. Review primary duties in order
  - a) Executive
  - b) Administrative
  - c) Professional
  - d) Outside Sales
4. Confirm salary-basis pay
  - a) No improper deductions
5. **PROTECT CONFIDENTIALITY OF THE AUDIT!!!**

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# OPTIONS FOR FIXING AN IMPROPER EXEMPTION



Do Nothing (Not A Good Idea ☹️);



Tell the affected employees to file a lawsuit so a Court can oversee the conversion; or



Convert employee and hope you don't get caught (probably not a good idea)



Convert employee, pay any back pay, and obtain a signed receipt of payment from them.

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# OGLETREE'S FLSA WHITE-COLLAR EXEMPTION AUDIT TOOL



- Ogletree's [Client Portal](#) is available to all Ogletree clients, with three subscription levels depending on your needs
- The FLSA White-Collar Exemption Audit Tool is available to Advanced and Premium subscribers
- All Ogletree Deakins clients may access additional information about this rule and state laws around exemptions in the Client Portal under our [Exempt and Non-Exempt](#) and [Overtime Rules](#) Law Summaries

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Start Audit

WHAT IS THE FLSA WHITE-COLLAR EXEMPTION AUDIT TOOL?

The Ogletree Deakins FLSA White-Collar Exemption Audit Tool (Audit Tool) is designed to assist users in evaluating the likelihood that a job position falls within one of the federal Fair Labor Standards Act (FLSA) "white collar" exemptions. These exemptions are defined and delineated by the United States Department of Labor (DOL) in 29 CFR Part 541 and sometimes also are referred to as the "Part 541" exemptions. If one or more of these exemptions applies, an individual would be exempt from the FLSA's minimum wage and overtime requirements. However, state minimum wage and overtime laws also would need to be considered, as various states have requirements that are more restrictive than those under the FLSA, which are not covered in the Audit Tool.

The Audit Tool consists of a series of screens with questions about the job position being evaluated. The questions contained in the tool track the requirements referenced in Part 541 as it currently exists and in relevant DOL Fact Sheets. Based on the answers provided, the Audit Tool will provide a preliminary finding of whether the position could qualify for exempt status.

DO YOU WANT THIS REPORT TO BE PRIVILEGED?

Depending upon your preference to involve Ogletree counsel in the review of the report generated through the use of this tool, the information provided and the report generated may or may not be subject to the attorney-client privilege. In any event, this tool is intended to be used as a starting point for further analysis, as actual determinations of exempt status under Part 541 can be highly nuanced and fact specific. Users also should be aware that the DOL issued a Final Rule in April 2024 that will increase the salary requirements and total compensation requirements that apply to several of these exemptions if and when that Final Rule becomes effective. Under the Final Rule, the DOL intends to increase the salary requirements and total compensation requirements effective July 1, 2024, and then to further increase them effective January 1, 2025. This Audit Tool uses existing salary and total compensation requirements, and it also gives users the option of using the salary and total compensation requirements intended to go into effect on July 1, 2024 under the Final Rule.

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# SCOTUS



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# mis·take

məˈstāk/ 

noun

1. an action or judgment that is misguided or wrong.

"coming here was a mistake"

*synonyms:* error, fault, inaccuracy, omission, slip, blunder, miscalculation, m  
oversight, misinterpretation, gaffe, faux pas, solecism; More

verb

1. be wrong about.

"because I was inexperienced, I mistook the nature of our relationship"

*synonyms:* misunderstand, misinterpret, get wrong, misconstrue, misread M

**WAGE & HOUR TOP 10 MISTAKES**

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**Failing to Prevent  
(or to pay for)  
Unauthorized Overtime  
Work**

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## OVERTIME PAY

Covered, non-exempt employees must receive one and one-half times the regular rate of pay for all hours worked over forty in a workweek

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## WORKWEEK

- Compliance is determined by workweek, and each workweek stands by itself
- Employer must define the workweek
- Workweek is 7 consecutive 24-hour periods (168 hours)

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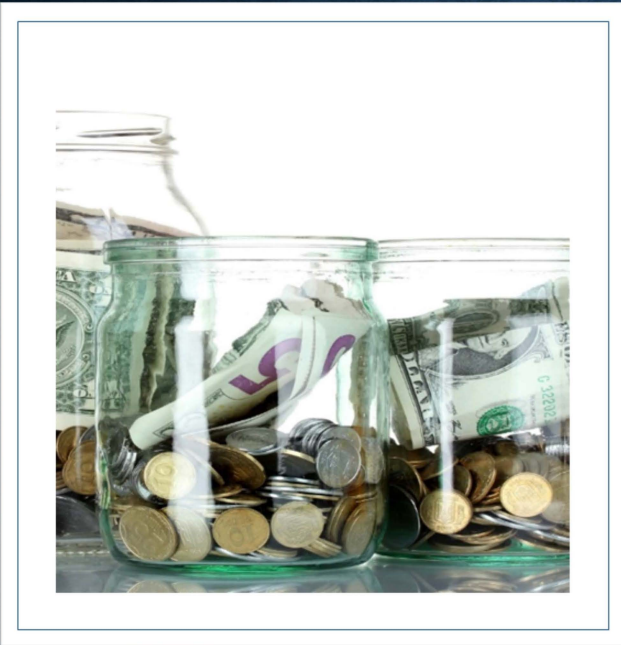
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## REGULAR RATE

- Is determined by dividing total earnings in the workweek by the total number of hours worked in the workweek
- May not be less than the applicable minimum wage

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# UNAUTHORIZED OVERTIME - THE TRAPS



Knew or Should  
Have Known Issue:



Seeing employee on  
premises  
before/after shift



Directing work that could  
only be accomplished by  
working off the clock ("this  
must get done before you  
leave")



Observing more work being  
accomplished than could be  
expected while on the clock  
(for example, performance  
reviews at home)

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## #10 SOLUTION: CLEAR OVERTIME POLICIES

- Management approval required to work overtime
- No working off the clock
- Never punch in/out for another employee
- Discipline for violators

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**Failing to Pay for “Off the Clock” Work (Including Non-recorded, Extra Office, Plant and/or At-home Work)**

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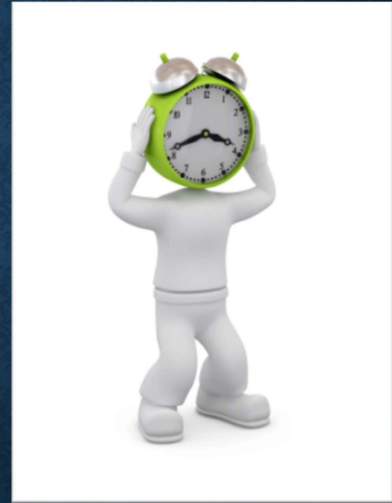
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# SUFFERED OR PERMITTED

Work not requested but suffered or permitted is work time



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## EXAMPLES OF ACTIVITIES NECESSARY TO PERFORM WORK

- Donning and doffing protective equipment
- Sharpening knives
- Setting up machine before clocking in
- Booting up computer before clocking in
- Clocking out before shutting down computer system

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## TECHNOLOGY TRAPS



Answering e-mails via mobile device or computer at home



Answering work-related calls while driving



Frequency of calls, emails, or pagers

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## WORK INCLUDES:

- Work done "at home," or at a place other than the normal work site
- Work done on the way home, such as stopping by the post office to drop off company mail

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## TRAVEL TIME

- Commuting time to/from work is not work time
- Travel time which is "all in a day's work" is work time
  - Travel to first job site not work time
  - Travel between job sites is work time
  - Example: employee who travels to the office, picks up equipment, then goes to a work site to perform the day's activities is working from the time s/he first arrives at the office until he/she returns to the office

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# ON-CALL TIME

- “Engaged to be waiting” (compensable) vs. “waiting to be engaged” (not compensable)
- Ultimate question is whether employee can effectively use on call time for his/her own purposes
- Some restrictions on employee permissible without the time becoming compensable

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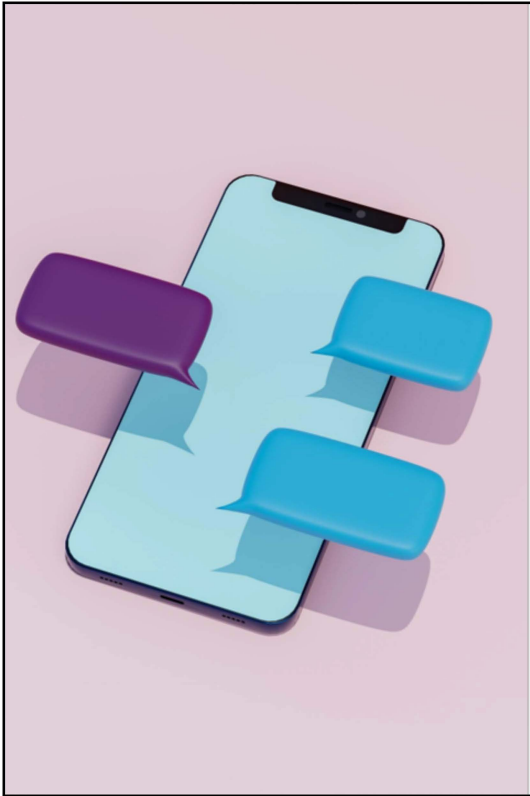
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## ON-CALL TIME

- On-call time is hours worked when
  - Employee has to stay on the employer's premises
  - Employee has to stay so close to the employer's premises that the employee cannot use that time effectively for his or her own purposes

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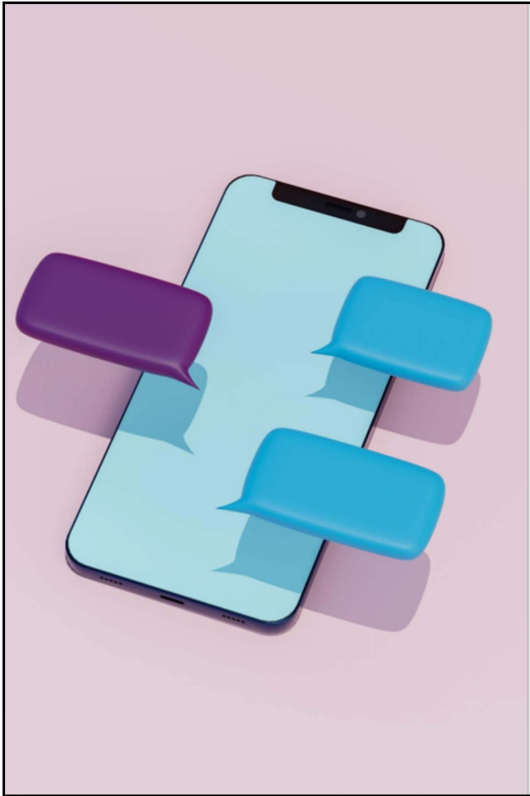
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## ON-CALL TIME

- On-call time is not hours worked when
  - Employee is required to carry a pager
  - Employee is required to leave word at home or with the employer where he or she can be reached

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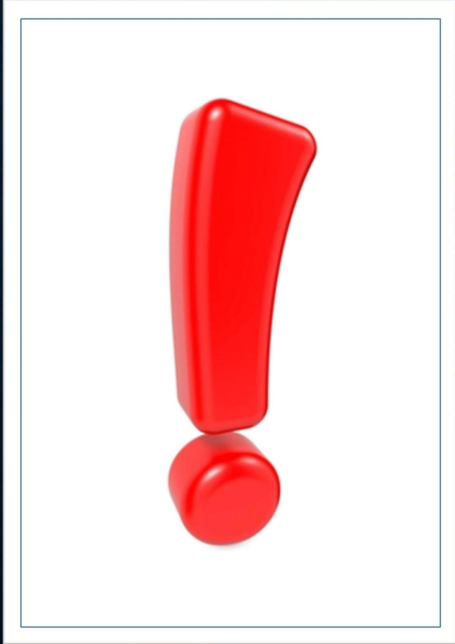
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## #9 SOLUTION

- Review routines of all workers
- Review technology and expectations
- Train all managers and employees about expectations
- Create rules and ENFORCE them
- Get as much information as you can (there is no ostrich defense)

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**Failing to Monitor and  
Maintain Accurate  
Timekeeping Records**

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## RECORDKEEPING

- An accurate record of the hours worked each day and total hours worked each week is critical to avoiding compliance problems
- The FLSA requires that all employers subject to any provision of the Act make, keep, and preserve certain records

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# EMPLOYER HAS THE BURDEN



IN THE EVENT OF AN AUDIT OR A  
LAWSUIT, EMPLOYERS HAVE THE  
BURDEN OF ESTABLISHING  
COMPLIANCE WITH WAGE AND HOUR  
LAWS



IF YOU DO NOT HAVE RECORDS  
SUPPORTING YOUR POSITION, IT WILL  
BE ASSUMED THAT YOU HAVE NOT  
COMPLIED WITH THE FLSA

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## RECORDKEEPING

- Records need not be kept in any particular form
- Time clocks are not required

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## RECORDKEEPING

- Every covered employer must keep certain records for each non-exempt worker

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# EMPLOYEE RIGHTS UNDER THE FAIR LABOR STANDARDS ACT

## FEDERAL MINIMUM WAGE

**\$7.25** PER HOUR  
EFFECTIVE JULY 24, 2009

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

### OVERTIME PAY

At least 1 1/2 times the regular rate of pay for all hours worked over 40 in a workweek.

### CHILD LABOR

All employees must be at least 16 years old to work in most non-farm jobs and at least 18 to work in non-farm jobs declared hazardous by the Secretary of Labor. Youth 14 and 15 years old may work certain school hours in certain non-manufacturing, non-mining, non-hazardous jobs with certain work-hour restrictions. Different rules apply in agriculture employment.

### TIP CREDIT

Employees of "tipped employees" who meet certain conditions may claim a partial wage credit based on tips received by their employers. Employers must pay tipped employees a cash wage of at least \$2.12 per hour if they claim a tip credit against their minimum wage obligation. If an employer's tip credit with the employer's cash wage of at least \$2.12 per hour do not equal the minimum hourly wage, the employer must make up the difference.

### NURSING

### MOTHERS

The FLSA requires employers to provide reasonable break time for a nursing mother employee who is subject to the FLSA's overtime requirements or care for the employee to express breast milk for her nursing child for one year after the child's birth each time such employee has a need to express breast milk. Employers are also required to provide a place, other than a bathroom, that is enclosed from view and free from intrusion from customers and the public, which may be used by the employee to express breast milk.

### ENFORCEMENT

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

### ADDITIONAL INFORMATION

- Certain occupations and establishments are exempt from the minimum wage, and/or overtime pay provisions.
- Special provisions apply to workers in American Samoa, the Commonwealth of the Northern Mariana Islands, and the Commonwealth of Puerto Rico.
- State laws may provide greater employee protections; employers must comply with both.
- Some employers are exempt from the FLSA, or are exempt from the minimum wage and overtime pay provisions and certain record-keeping requirements, etc.
- Employers for three children, disabled persons, apprentices, and workers with disabilities may be paid less than the minimum wage under special conditions issued by the Department of Labor.



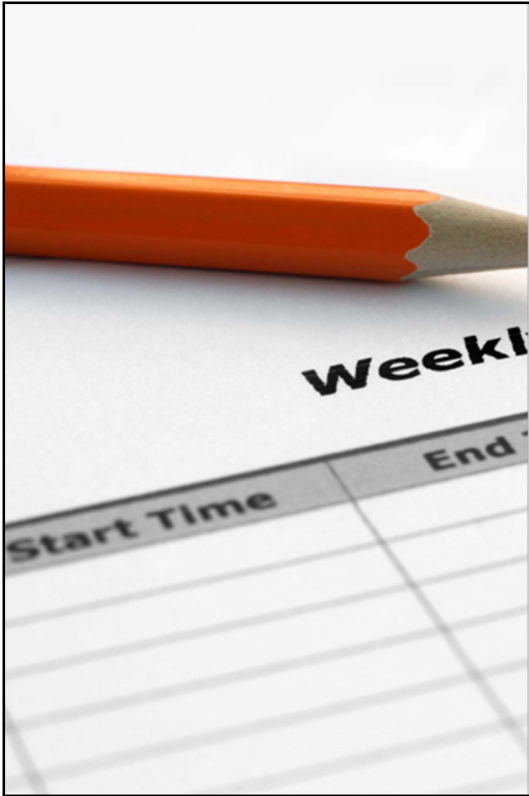
**DOL** U.S. DEPARTMENT OF LABOR  
OFFICE OF THE ASSISTANT SECRETARY FOR  
EMPLOYEE STANDARDS AND WORKS

1-866-486-9000  
TDD 1-866-486-9000  
www.dol.gov



## REQUIRED POSTING

- Covered employers must post a notice explaining the FLSA, as prescribed by the Wage and Hour Division, in a conspicuous place



## PROPER TIME RECORDS

Must maintain following records:

- Employee's full name and social security number
- Address, including zip code
- Birth date, if younger than 19
- Sex and occupation
- Time and day of week when employees workweek begins
- Hours worked each day
- Total hours worked each workweek

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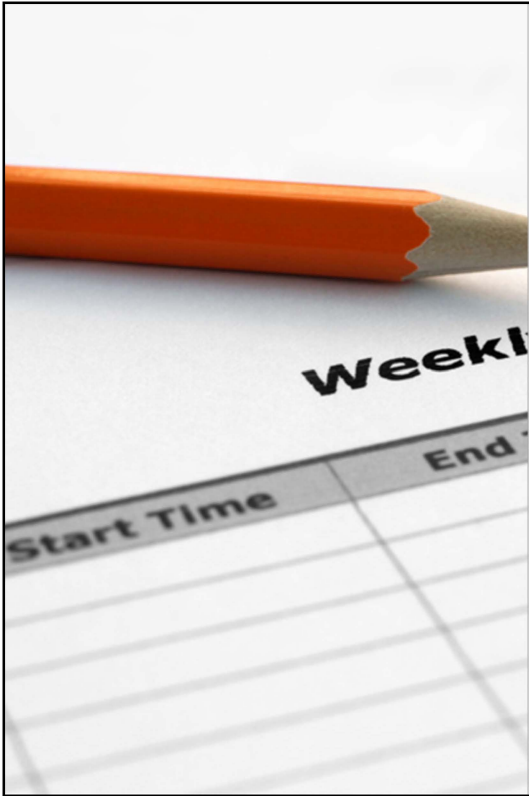
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## PROPERTIME RECORDS

- Must maintain following records:
  - Basis on which employee's wages are paid (e.g., "\$9 per hour", "\$440 a week", "piecework")
  - Regular hourly pay rate
  - Total daily or weekly straight-time earnings
  - Total overtime earnings for the workweek

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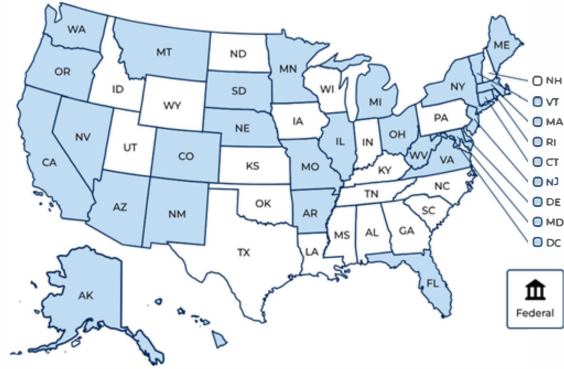
Unless otherwise specified, these materials do not cover (1) industry-specific (e.g., healthcare, education, finance, etc.) requirements or (2) requirements that apply to only government/public or federal contractor employers.

Select a jurisdiction on the map or from the menu to view a snapshot and go to the law summary page.

Minimum Wage

Select a Jurisdiction

### Minimum Wage



- State minimum wage > federal minimum wage
- Federal minimum wage (\$7.25) applies—either (a) no state minimum wage, or (b) state minimum wage < or = federal minimum wage

- Home
- Compliance Hub
- Benchmarking & Claims Hub
- Handbook Builder
- Insights
- Clientlink
- Ogletree.com

# PROPERTIME RECORDS

- Must maintain following records:
  - All additions to or deductions from the employee’s wages
  - Total wages paid each pay period
  - Date of payment and the pay period covered by the payment



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## #8 SOLUTION – IMPECCABLE RECORDS

- Maintain accurate timekeeping records
- Even if things are “policy” or “standard practice”, make sure they are documented and supported by time records
- Even better – have employees sign off on time sheets every pay period
- Backup all electronic records and make sure you keep records for a minimum of 3 years.
- We recommend keeping records for 6 years.

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# Impermissible Rounding

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## THE RULES ON ROUNDING

- Permissible to round time to nearest quarter hour
- Rounding must not be one-sided
- Records must accurately reflect time worked (time shaving/alteration of time worked)

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# THE RULES ON ROUNDING

- When rounding to the nearest quarter hour:
  - Time Clocks
    - 5:53 –can be rounded forward to 6:00
    - 5:52 – can be rounded back to 5:45
  - Units clock: 25 units equals 15 minutes
    - 88 units – round forward to 100
    - 87 units – round back to 75

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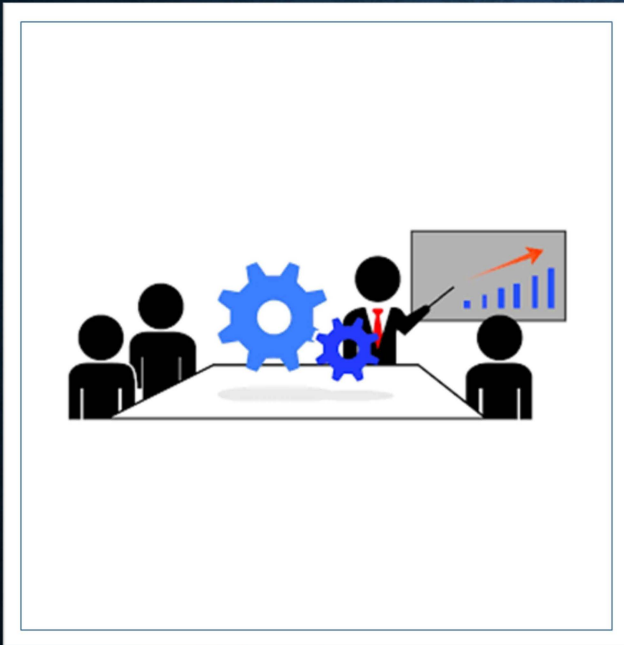
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## #7 SOLUTION – CLARIFY ROUNDING RULES

- Train employees, managers, and auditors
- If you are rounding – be transparent about it!
- Keep clear records so that correct rounding can be verified

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**Failing to Properly  
Record and/or Pay for  
Lunch or Break Times  
and Training Periods**

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## REST PERIODS AND BREAKS

- Rest periods of short duration, usually 20 minutes or less, are considered working time which must be paid

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# MEAL PERIODS



- Meal periods are not considered working time and need not be paid if:
  - 30 minutes or more in duration (but sometimes less) and
  - employee is completely relieved of all duties
- It's not just formal working lunches – eating at your desk can be working time

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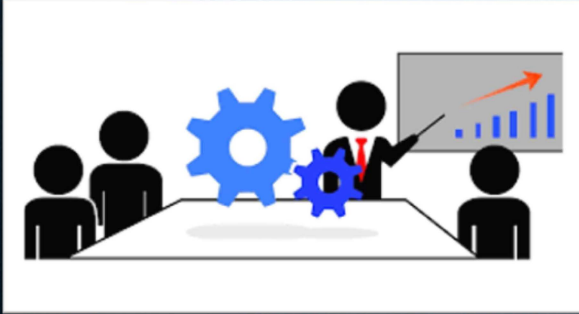
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# TRAININGS, MEETINGS LECTURES



- Training (and meetings, lectures, etc.) is work time, unless:
  - It is held outside of employee's regular work hours;
  - Attendance is truly voluntary;
  - The training is not directly related to the employee's current job; and
  - Employee performs no productive work while attending

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## TRAININGS, MEETINGS LECTURES

- “Directly related” prong – intended to improve performance in current job (working time) vs. mere incidental benefit to current job (not working time)
- “Voluntary attendance” prong – no threat of discipline or other adverse consequences
- Open enrollment meetings, 401k plan meetings, etc???
- Time spent traveling to training???



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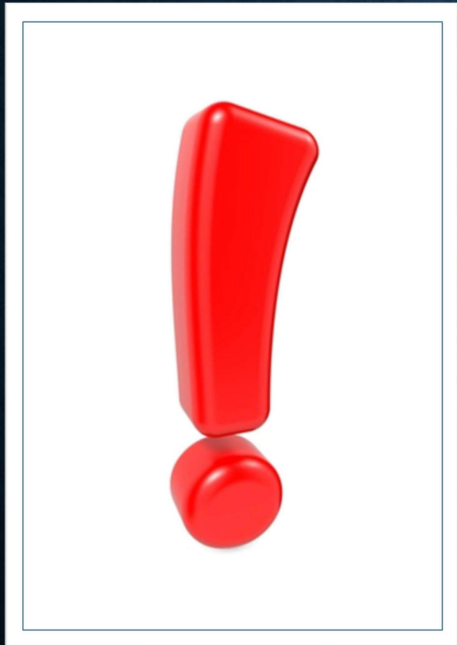
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## #6 SOLUTION – EDUCATION AND DOCUMENTATION

- Educate employees and managers about expectations about breaks, meals, and training
- Document your policies
- Be wary of any “automatic” deductions for meals or breaks
- Ask employees to clock in/out for meal breaks

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**Paying “Comp Time” to  
a Private,  
Non-governmental  
Employee**

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## THE RULE ON “COMP TIME”

- While many employees may prefer to accumulate extra time off rather than receiving overtime pay, the FLSA currently allows only government employers to provide comp time in lieu of actual compensation.

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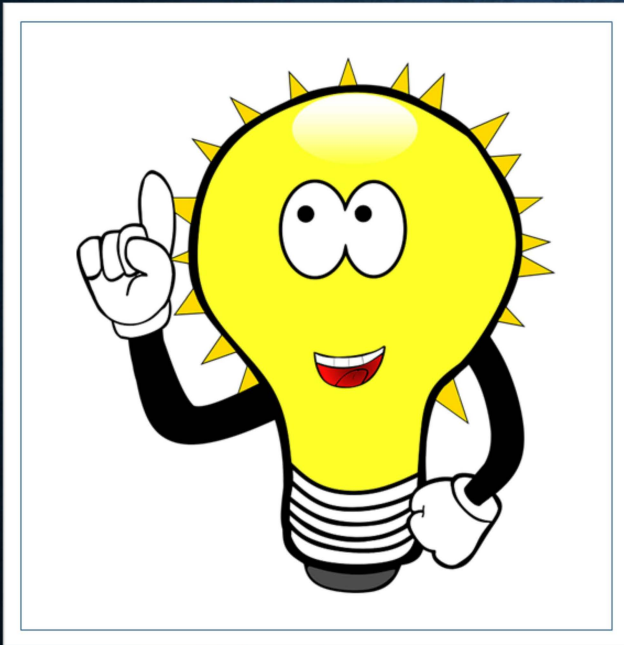
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## #5 SOLUTION FOR COMP TIME

- Eliminate any attempt to provide comp time

**OR**

- Allow an employee time off at the end of the workweek – to avoid exceeding 40 hours worked in that week. Otherwise, an employee working over 40 hours in a workweek for a private employer is entitled to compensation in the form of wages, not time off.

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**Casual Dealings and Business Relationships with Independent Contractors**

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## THE PROBLEM WITH INDEPENDENT CONTRACTORS

- YOU thought the individuals were employed by someone else
- THEY claim they are your employees, and you violated the FLSA

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# EMPLOYEE OR INDEPENDENT CONTRACTOR (ECONOMIC REALITIES TEST)



Opportunity for profit or loss depending on managerial skill,



Investments by the worker and the employer,



Permanence of the work relationship,



Nature and degree of control,



Whether the work performed is integral to the employer's business, and



Skill and initiative.

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# Fact Sheet 13: Employment Relationship Under The Fair Labor Standards Act (FLSA) | U.S. Department Of Labor

<https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship>



## #4 SOLUTION – MAINTAINING INDEPENDENCE

- At the outset – put it in writing
  - Intent of the parties
  - Issues of control
  - Clear identification of the work
  - Compensation
  - How contractor's employees are paid
- Create an indemnification agreement in the event the contractor fails to abide by terms and conditions

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**Taking Impermissible  
Deductions from the Pay of  
Non-exempt Employees**

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## DEDUCTIONS

- Deductions from pay illegal if
  - For item considered primarily for the benefit or convenience of the employer; and
  - Deduction reduces employee's earnings below required minimum wage

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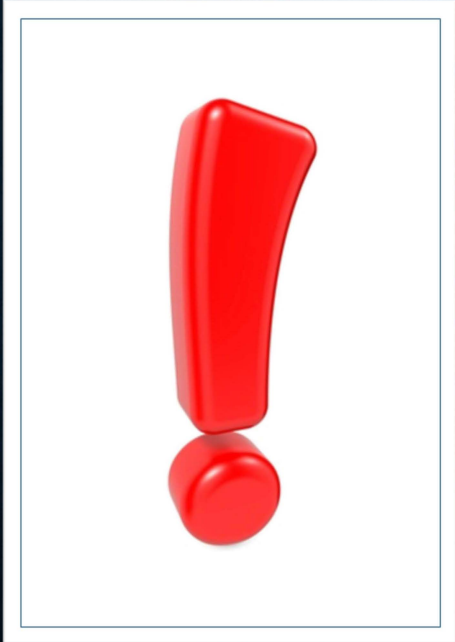
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## BE CAREFUL OF SLIPPING BELOW MINIMUM WAGE

Common traps:

- Uniform expenses
  - Deposit discrepancies
  - Cash shortages
  - Tools
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## #3 SOLUTION

- Determine if employees are purchasing their own uniforms, tools, nametags, etc.
- Determine if there are any disciplinary measures that fine non-exempt employees
- Make sure any deductions do not reduce wages below the minimum wage
- Some employers will pay an increased “training wage” for the first month of work to cover uniforms and other expenses

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**Taking Impermissible  
Deductions from the  
Pay of Exempt  
Employees**

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## DEDUCTIONS FROM SALARY



- An employee is not paid on a salary basis if deductions from the predetermined salary are made for absences occasioned by the employer or by the operating requirements of the businesses
- If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

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# EXCEPTIONS TO THE “NO PAY-DOCKING” RULE

Absence from work for one or more full days for personal reasons, other than sickness or disability

Absence from work for one or more full days due to sickness or disability if deductions made under a bona fide plan, policy, or practice of providing wage replacement benefits for these types of absences

To offset any amounts received as payment for jury fees, witness fees, or military pay

Penalties imposed in good faith for violating safety rules of “major significance”

Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of written workplace conduct rules

Proportionate part of an employee’s full salary may be paid for time actually worked in the first and last weeks of employment

Unpaid leave taken pursuant to the Family and Medical Leave Act

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## EFFECT OF IMPROPER DEDUCTIONS

An actual practice of making improper deductions from salary will result in the loss of the exemption

During the time period in which improper deductions were made

For employees in the same job classifications

Working for the same managers responsible for the actual improper deductions



Isolated or inadvertent improper deductions, however, will not result in the loss of exempt status if the employer reimburses the employee

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## SAFE HARBOR

The exemption will not be lost if the employer:

- Has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism
- Reimburses employees for any improper deductions; and
- Makes a good faith commitment to comply in the future
- Unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints

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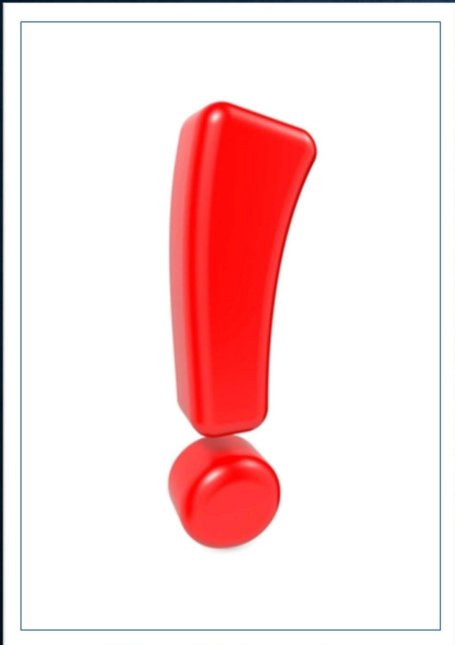
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## #2 SOLUTION

- Remember that a salaried employee is not necessarily an exempt employee
- Review all policies – even the *possibility* of improper salary docking can be enough to destroy the exemption
- Audit all positions to determine if “safe harbor” payments should be made

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**Falling in Love with  
Job Titles and the  
Word “Salaried”**

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# Thank you for attending!

Here are your credits for today's program:



Activity ID: 681925  
4 HR Credit Hour Awarded



Activity ID: 24-PR4ZW PDC  
4 SHRM PDC Awarded

Brought to you by:



**Missouri**  
12851 Manchester Road  
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