

NFIB GUIDE TO WAGE & HOUR LAWS

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WHAT YOU NEED TO KNOW ABOUT THE FAIR LABOR STANDARDS ACT

Developed by

 **NFIB**
SMALL BUSINESS
LEGAL CENTER



Dear NFIB Member:

Owning your own business is the achievement of a lifetime. At NFIB, we know you've put in countless long hours of hard work to make your dream a reality. Those hours are surely some of the most satisfying you spend when they help your business prosper; but they can easily end up some of the most frustrating, as well, when dealing with the complexities of changing government regulations.

In concert with our commitment to helping our members prosper and grow their businesses, I am pleased to provide the NFIB Guide to Wage and Hour Laws.

The stakes are high when dealing with the Fair Labor Standards Act. Enforced by the U.S. Department of Labor, noncompliance with the numerous requirements can result in expensive civil and criminal penalties. That's time and money that you cannot afford to waste.

Minimum wage laws and complicated formulas for determining employees' status (such as exempt or non-exempt) are issues at which few of us can claim to be experts. Developed by the NFIB Small Business Legal Center, the NFIB Guide to Wage and Hour Laws was written to help our members comply with the Fair Labor Standards Act. The NFIB Small Business Legal Center is the voice for small business in the nation's courts. Through litigation and education, the Legal Center is a resource for small-business owners nationwide.

Sharing our resources to make your world a bit simpler — it's just another way we're working to promote and protect your right to own, operate and grow your business.

Sincerely,

Elizabeth Milito

Elizabeth Milito
Executive Director

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ABOUT NFIB GUIDE TO WAGE & HOUR LAWS

The NFIB Guide to Wage and Hour Laws supplies you with the facts you need to stay in compliance with the Fair Labor Standards Act in an informative, easy-to-read format.

ABOUT NFIB

The National Federation of Independent Business is the nation’s leading small-business advocacy association, with offices in Washington, D.C., and all 50 state capitals. NFIB’s powerful network of grassroots activists send their views directly to state and federal lawmakers through our unique member-only ballot, thus playing a critical role in supporting America’s free enterprise system.

ABOUT NFIB SMALL BUSINESS LEGAL CENTER

The NFIB Legal Center is the voice for small business in the nation’s courts and the legal resource for small-business owners nationwide. A 501(c)(3), tax-exempt public-interest law firm, the Legal Center litigates and educates for small business. Founded in 2000, the Legal Center has become a critical component of NFIB’s influence.

GUIDE TO WAGE & HOUR LAWS FOR SMALL BUSINESS SUMMARY

What is this Guide?

This handbook seeks to give employers the nuts and bolts behind the Fair Labor Standards Act (FLSA), the federal wage and hour law. The handbook takes each major section of the FLSA and explains it in a practical way to help guide business decisions. This handbook is a guide, not definitive legal advice and does not address all situations that may arise under the FLSA — for some specific questions you may need to check with your attorney.

FLSA Overview

The FLSA lays out requirements for minimum wage, overtime pay, recordkeeping and child labor for full and part-time employees. The U.S. Department of Labor administers the FLSA. Keep in mind that states also have wage and hour laws that impose additional requirements on employers.

Who is Subject to FLSA requirements?

As a practical matter almost all businesses and employees in the United States are subject to the FLSA. Independent contractors are not covered, but defining independent contractor is up to the Department of Labor and its 'economic reality' test. Trainees and volunteers are also not considered employees for FLSA purposes.

Minimum Wage

The FLSA mandates employers to pay covered non-exempt employees no less than the current federal minimum wage, with several exceptions. Employers may pay various sub-minimum wage rates to employees under 20 years old, 'tipped' employees, full-time students, student learners and handicapped workers. Each exception has strict rules for who qualifies.

Overtime Pay

All covered employees who are non-exempt from the FLSA overtime pay requirements must be paid at one and a half times the regular rate of pay for all hours worked beyond 40 hours per workweek. Employers should be aware that designating an employee as 'salaried' instead of 'hourly' does not automatically qualify the employee as 'exempt' for overtime pay requirements.

There are several exemptions from

the overtime pay requirements, and they include:

- **WHITE COLLAR**
Executive, Administrative, Professional, Computer-related, Outside Sales
- **MISCELLANEOUS EXCEPTIONS**
Salesmen, mechanics, commissioned sales employees, drivers, newspaper deliverers, lumberyard employees, farm workers, seasonal workers (each under certain circumstances)

Each of these and other categories has specific criteria which must be met in order for an exemption. For the white-collar exception in particular there is a well developed set of tests, each of which must be met.

Child Labor Requirements

The FLSA includes provisions limiting the scope of employment for workers under 18 years old. The FLSA has specific requirements for youth ages 14–15 and youth ages 16–17. The requirements generally pertain to types of jobs allowed and for how much time during each workweek. After age 18 a person may perform any job, including hazardous jobs without restrictions. Usually there exist state and local laws further restricting under-18 employment.

Recordkeeping Requirements

For all non-exempt employees there are no less than 16 categories of information which must be retained. The categories range from social security numbers to date of wage payment and pay period covered by each payment. Much of the same information must be maintained for exempt

employees, too. Depending on the information, the FLSA requires retention for up to three years for items like payroll records.

Notice Posting

Covered employers must post an official FLSA notice issued by the U.S. Department of Labor explaining the pertinent provisions. This poster is called "Employee Rights Under the Fair Labor Standards Act" and is available without charge from the U.S. Department of Labor's website:
<https://www.dol.gov/agencies/whd/posters/flsa>

Potential Penalties for Noncompliance

There are potentially serious penalties for noncompliance with FLSA requirements. Employees may either contact the Department of Labor to report possible violations or bring suit on their own against the employer. Employers can be liable either civilly or criminally for FLSA violations.

Civilly, for overtime/minimum wage violations, an employer may be fined up to \$2,203 per minimum wage or overtime pay violation. Child labor laws can result in fines of \$14,050 for each child worker employed illegally. There is also potential personal liability for employers with substantial authority over operations and terms and conditions of employment.

Criminally, FLSA violators are subject to fines and multiple offenses may result in prison time. Also, the FLSA prohibits discriminating against or discharging workers who file a complaint or participate in any proceedings under the FLSA.



FLSA OVERVIEW

THE FAIR LABOR STANDARDS ACT (FLSA) sets minimum wage, overtime pay, recordkeeping and child labor requirements for full-time and part-time employees. It is administered by the U.S. Department of Labor (DOL). State and local laws may have different requirements, and should be consulted.

The FLSA and the Department of Labor regulations on wage and hour issues contain detailed and complex provisions. This Guide gives a general overview of these requirements, but does not cover every provision and situation that may arise. If you have

questions about how FLSA provisions apply to your business or employees, you should contact an attorney for legal advice.

For more information on FLSA provisions, you may also contact the authors of this Guide, or the DOL at 1-866-4USWage (1-866-487-9243) or on their website at <https://www.dol.gov/agencies/whd/state>. The following is an overview of the major components of the FLSA, which are described in more detail in this Guide.

MINIMUM WAGE (Section three)

The federal minimum wage is \$7.25 per hour.

State and local laws may require a higher minimum wage.

See <https://www.dol.gov/sites/dolgov/files/WHd/legacy/files/minwagep.pdf> for information regarding state minimum wage laws

OVERTIME PAY (Section four)

Employees must be paid overtime pay that is at least 1 ½ times their regular hourly pay rate for all hours worked over 40 hours in a workweek, with some exceptions.

CHILD LABOR (Section five)

Employees must be at least 16 years old to work in most non-agricultural jobs and at least 18 years old to work in non-farm jobs declared hazardous by the DOL. State and local laws may have additional child labor provisions. See <https://www.dol.gov/agencies/whd/state> for information regarding state child labor provisions.

RECORDKEEPING (Section six)

Employers subject to the federal minimum wage and overtime requirements must also keep certain payroll and personnel records.

NOTICE POSTING (Section seven)

Employers who have employees covered by the FLSA must post the notice "Your Rights Under the Fair Labor Standards Act." The notice must be posted in the workplace where covered employees can readily see it. Copies of the poster can be obtained from the DOL's website at <http://www.dol.gov/agencies/whd/flsa>

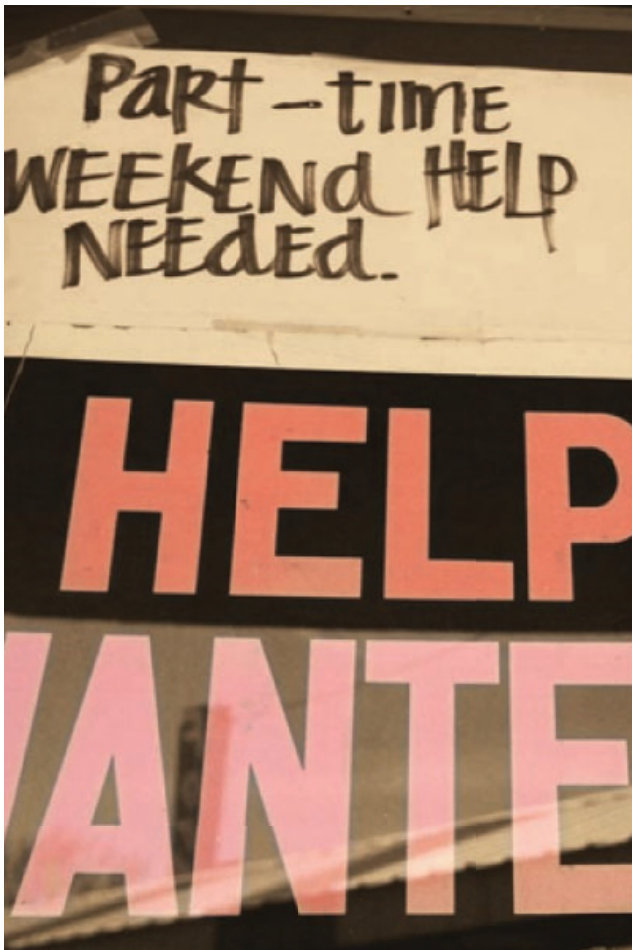
WHO IS SUBJECT TO FLSA REQUIREMENTS?

Are all employers subject to FLSA requirements? The FLSA requirements are triggered if the business is covered by the statute, or if employees of the business are covered. As a practical matter, virtually all businesses and employees are covered by the FLSA.

Covered Employers

In general, employers are subject to the FLSA if they have workers who are:

- engaged in interstate commerce;
- producing goods for interstate commerce; or
- handling, selling, or otherwise working on goods or materials that have been moved in or produced for interstate commerce by any person.



- engaged in hospital operations, primarily engaged in caring for the sick, the aged or the mentally ill who reside on-ground; a school for mentally or physically disabled or gifted children; elementary, secondary, or higher education
- a public agency's activity

Almost every business meets these requirements because some item it uses will come from a different state. Some businesses may actually ship items to other states or provide services to customers from out-of-state. For other businesses, the interstate commerce provision is triggered by something as simple as paper clips that are used in the back room that are manufactured in other states.

In addition to the requirements listed above, a business must have, for a common business purpose, related activities performed through unified operation or common control by any person(s) and also meet one of the following requirements to be subject to the FLSA:

- has total annual gross volume of sales made or business done of at least \$500,000 (not including excise taxes at the retail level that are separately stated) combined for all related businesses;
- was covered by the FLSA as of March 31, 1990, even though the business now does not meet the \$500,000 test, in which case the business is still subject to the overtime pay, child labor and record-keeping requirements of the FLSA, and must pay a minimum wage of \$3.35 per hour (which was the minimum wage as of March 31, 1990), rather than the current minimum wage.; or
- a construction/reconstruction business or laundry/drycleaning business, in which case the business is subject to the FLSA's requirements for overtime pay, child labor and recordkeeping, and must pay a minimum wage of \$3.35 per hour (which was the minimum wage as of March 31, 1990), rather than the current minimum wage.

Covered Employees

Even if a business is not covered by the FLSA, individual employees are still covered if they are individually engaged in interstate commerce or in the production of goods for interstate commerce or any process or occupation closely related and directly essential to such production. This type of work includes sending mail across state lines or speaking on the phone with people located in other states. Other examples include handling, shipping or receiving goods that come from other states or crossing state lines in the course of employment. For example, an employee who uses office or other supplies that were manufactured in other states will be engaged in interstate commerce and covered by the FLSA. Given that almost every business has some items that were manufactured in another state, almost all employees are covered by the FLSA. Moreover, even if an employee may not be covered by the FLSA, the employee may be covered by similar state wage and hour laws.

Employee versus Trainee or Volunteer

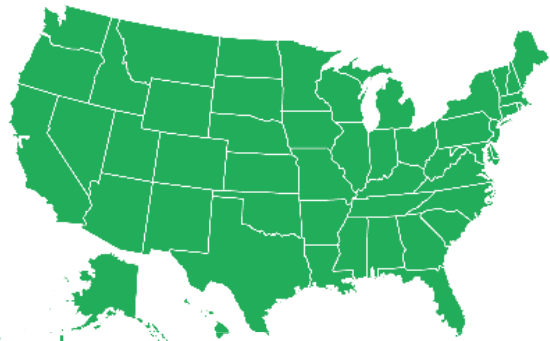
Only “employees” are covered by the FLSA. As a result, it is important for each business to understand which of its workers are considered “employees,” rather than independent contractors, trainees (such as through a School-to-Work program), or volunteers. The FLSA defines employ as “suffer or permit to work,” an extremely broad definition of employment. Workers who are not considered employees under the FLSA generally are not entitled to any minimum wage or overtime pay. As such, if you hire an independent contractor to perform work, you are not responsible for paying the contractor the minimum wage or overtime pay.

Are all Workers Considered “Employees” Under the FLSA?

There are two other categories of workers who are not subject to FLSA requirements: trainees and volunteers. Trainees are not considered “employees” under the FLSA if the work they do for the business is considered training that is primarily for their benefit, not the benefit of the business. The trainee or student must not displace regular employees and must understand that he or she is not entitled to wages for the training time. The trainee or student is also not entitled to a job at the conclusion of the training. Finally, the business should receive no immediate advantage from the trainee’s or student’s activities, and the business’ operations may even be impeded by the training.

Volunteers are also not considered “employees” so long as they are volunteering or donating their services for public service, religious or humanitarian objectives to a religious, charitable or similar non-profit organization.

Individuals who genuinely volunteer their services to for-profit businesses are generally not exempt from FLSA requirements. In other words, individuals who volunteer their time to the business without expectation of being paid — even if they are family members — nonetheless would generally be entitled to minimum wage and overtime pay and be protected by the child labor provisions.



Employee versus Independent Contractor

There is no one single characteristic that determines whether an individual worker is considered an “employee.” Instead, the DOL and the courts look at the “economic reality” of the situation. There are a number of factors that courts consider significant in determining an individual’s employment status for purposes of FLSA coverage, such as:

1. The extent to which the worker’s services are an integral part of the employer’s business. Work is integral to employer’s business if it is a part of its production process or if it is a service that the employer is in the business to provide.
2. Was the worker hired indefinitely or for some specified period of time to perform a specific project? It is important to note that this factor may not suggest independent contractor status as the impermanent relationship can be due to industry-specific factors or the employer’s routine use of staffing agencies. A worker is more likely to be an independent contractor if he or she was hired to perform a specific task.
3. The relative amount of the worker’s investment in facilities and equipment to perform his/her work. For example, a worker who uses his or her own equipment and supplies is more likely to be an independent contractor.
4. The nature and degree of control by the employer. A worker who sets his or her own work hours and also works for other companies is more likely to be an independent contractor.
5. The impact of the worker’s managerial skills on the worker’s and employer’s opportunities for profit and loss.
6. The degree to which the worker maintains an independent enterprise, such as through advertising for business, maintaining a separate business location, or providing invoices for work provided. For example, does the worker make investments into the work, such as providing his/her own insurance or bonding?

Simply labeling workers as “independent contractors” does not resolve the issue, even if the workers consent to being classified as contractors. If you are unsure whether certain workers are properly classified as employees or independent contractors for purposes of FLSA coverage or other applicable laws, you should consult an attorney.

MINIMUM WAGE

The FLSA requires employers to pay covered non-exempt employees at least the current federal minimum wage, with some exceptions.

Exceptions include the following instances in which federal law allows employers to pay “subminimum” wages, which are below the standard minimum wage:

>> **“TIPPED” EMPLOYEES:** Tipped employees are those who customarily and regularly receive more than \$30 per month in tips. Tips are the property of the employee. Employers are prohibited from using an employee’s tips for any reason other than as a credit against minimum wage obligations to the employee (“tip credit”) or in furtherance of a valid “tip pool.”

>> **Tip Credit:** Tipped employees may be paid by the employer a subminimum wage of \$2.13 per hour. However, if a tipped employee does not receive in tips and hourly wages an amount that equals at least the federal minimum wage, the employer must pay the difference to the employee. The maximum tip credit that an employer can currently claim under the FLSA is \$5.12 per hour (the minimum wage of \$7.25 minus the minimum required cash wage of \$2.13).

>> **Tip Pool:** The requirement that an employee must retain all tips does not preclude a valid tip pooling or sharing arrangement among employees who customarily and regularly receive tips, such as waiters, waitresses, bellhops, counter personnel (who serve customers), bussers, and service bartenders. A valid tip pool may not include employees who do not customarily and regularly receive tips, such as dishwashers, cooks, chefs, and janitors. An employer that pays the full minimum wage and does not take a tip credit, however, may allow non-tipped employees to participate in the tip pool.

Requirements for tip credit: The employer must provide the following information to a tipped

The federal minimum wage is \$7.25 per hour.



If state and federal laws provide for different minimum wage rates, the employee must be paid the higher of the wage rates.

employee before the employer may use the tip credit:

1. The amount of cash wage the employer is paying a tipped employee, which must be at least \$2.13 per hour;
2. The additional amount claimed by the employer as a tip credit, which cannot exceed \$5.12 (the difference between the minimum required cash wage of \$2.13 and the current minimum wage of \$7.25);
3. that the tip credit claimed by the employer cannot exceed the amount of tips actually received by the tipped employee;
4. that all tips received by the tipped employee are to be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and
5. that the tip credit will not apply to any tipped employee unless the employee has been informed of these tip credit provisions.

The employer may provide oral or written notice to its tipped

employees informing them of items 1–5 above. An employer who fails to provide the required information cannot use the tip credit provisions, must pay the tipped employee at least \$7.25 per hour in wages and allow the tipped employee to keep all tips received.

>> **EMPLOYEES UNDER 20 YEARS OLD** may be paid \$4.25 per hour during their first 90 consecutive calendar days of employment. After the first 90 days or the employee reaches the age of 20, the employee must be paid at the standard minimum wage. In order to be eligible for this exception, the employee must not displace other workers.

Many states also have minimum wage laws, including laws specific to tipped employees. If state and federal laws provide for different minimum wage rates, the employee must be paid the higher of the wage rates. You should check state and local laws to ensure that you are paying your employees the required wage.

¹ See Section IV for information regarding exempt and non-exempt classifications of employees.



OVERTIME PAY

All covered employees who are “non-exempt” from the FLSA overtime pay requirements must be paid at a rate of one and one-half times the employee’s regular rate of pay for all hours worked over 40 hours per workweek. “Exempt” employees are not entitled to overtime pay.

An employer must determine whether each of its covered employees qualifies as “exempt” or “non-exempt” from the overtime pay requirements of the FLSA, and this determination is very fact-specific and often complicated. In general, employees who perform certain types of “white-collar” work, are paid at least \$684 per week, and are compensated on a salary rather than hourly basis are exempt from the overtime pay requirements. The employee’s job title or position is not determinative. Employers often use the terms “salaried” and “exempt” interchangeably; however they mean two different things. While many,

Employers should be aware that designating an employee as “salaried” rather than “hourly” does not automatically qualify the employee as “exempt” for overtime pay requirements.

and possibly even most, employees who are paid on a salary basis will qualify as “exempt,” it is possible to be a “salaried” non-exempt employee who is entitled to overtime pay.

The FLSA regulations expressly protect the overtime pay of union members who receive overtime pay pursuant to a collective bargaining agreement, even if the individuals meet all of the requirements to qualify

for exemption.

White-Collar Exemptions:

The following sections will walk you through the major categories of exemptions under the FLSA. An employee is considered “exempt” only if he/she meets all of the criteria in a particular exemption category. The major “white-collar” exemptions, which are described in FLSA section 13(a)(1), include:

- Executive
- Administrative
- Professional
- Computer-related
- Outside sales

Miscellaneous Exemptions:

There are a number of other categories of exempt employees, such as:

- Salesmen, partsmen and mechanics employed by automobile dealerships
- Commissioned sales employees of retail or service establishments
- Drivers, driver’s helpers, loaders and mechanics under certain circumstances
- Local delivery drivers and driver’s helpers
- Newspaper deliverers and other employees
- Lumber operations employees of businesses with less than nine employees
- Farm workers
- Seasonal and recreational establishment employees

Three-Part Test for “White-Collar” Exemptions starts on the next page. . .



Three-Part Test for “White-Collar” Exemptions

There is a three-part test for the following exemption categories under FLSA section 13(a)(1): executive, administrative, professional, outside sales and computer-related professionals. In order to qualify for any of these exemptions, an employee must meet each of the three components of the test: (1) salary basis (or in some cases, fee basis) test; (2) salary level (or in some cases, fee level) test; and (3) the duties test. If an employee meets all three parts of the test, the employee will be considered exempt from both minimum wage and overtime pay requirements of the FLSA.

Part 1: Salary Basis Test

To meet the salary basis test, an employee must regularly receive a predetermined, fixed salary for each pay period in which he/she performs any work. The general concept is that the employee is paid a flat rate regardless of the quantity or quality of the work they actually perform. For example, a company accountant is likely busy around tax season, and may work well over forty hours per week. During other times of the year, the company accountant is not as busy, but her salary is not reduced because she works fewer hours during those times. As a result, the accountant is paid on a salary basis.

In the case of computer employees, the FLSA provides for a salary basis or fee basis test. In order to meet the fee basis test, a computer employee must be paid a set fee for each job performed (e.g., per computer program developed) regardless of the time it takes to complete the job.

Outside sales employees do not need to meet the salary basis or salary level tests, but instead must meet only the duties test to qualify for exempt status under the FLSA.

WHAT DOES THIS MEAN?

- The employer may not reduce an employee's salary paid in a given pay period due to variations in quality or quantity of work performed.
- The employer may not reduce an employee's salary when the employer has no work available but the employee is ready, willing and able to work.

Limited reductions in salary are allowed, such as:

- An employer does not have to pay an employee for any workweek in which the employee performs no work at all.
- If the employer has a policy or practice allowing employees a certain number of paid days off for sickness or disability, then the employer may reduce the employee's salary for full-day absences that occur after the employee has exhausted his or her sickness or disability leave.
- An employer may reduce an employee's salary for full-day absences that are paid for through accrued vacation leave or Paid Time Off (PTO).
- An employer may reduce an employee's salary for

hours taken as unpaid leave under the federal Family and Medical Leave Act (FMLA), if the employee qualifies for such leave.

- Reductions from an exempt employee's salary may also be taken for amounts paid to the employee for jury service or witness fees received or military service pay received by the employee.
- An employer may make full-day salary deductions for “infractions of safety rules of major significance” or for disciplinary suspensions of a full day or more for violations of workplace conduct rules pursuant to a written policy (such as a policy against sexual harassment) so long as the policy is “applied uniformly to all workers.”
- In limited instances, an employer may also make partial-day salary deductions, such as for infractions of safety rules of major significance, FMLA leave absences, paid time off, or in the first or last weeks of employment.

WHY IS IT SO IMPORTANT NOT TO MAKE IMPROPER DEDUCTIONS FROM AN EXEMPT EMPLOYEE'S SALARY?

- An employer runs the risk of having the exempt employee's exemption lost due to improper deduction because the employee would no longer be considered paid on a salary basis. If that happens, the employer would then owe overtime pay to the employee.
- In order to prevent the loss of exemption due to inadvertent deductions, employers should clearly communicate to employees a policy prohibiting improper deductions and inviting employees to notify the employer in the event that they believe an improper deduction has been taken.
- If an employer learns that an improper deduction has been taken, the employer should promptly reimburse the affected employee for the improper deduction.
- In the event of an isolated and inadvertent improper deduction, the DOL generally will not consider the deduction to be a “violation” of the salary basis rule, so long as the employer reimburses the employee.

Part 2: Salary Level Test

To meet the salary level test, an employee must earn a minimum salary of \$684 per week, or \$35,568 per year.

Computer employees must meet either the salary level test or the fee level test. Under the fee level test, a computer employee must be paid a set fee that would result in a rate of at least \$684 per week if the employee worked 40 hours. For example, a computer employee who earns \$400 for a project that takes 20 hours would meet the salary level test since 40 hours of work at this rate would result in a weekly salary of \$800. Alternatively, the fee level test is met if the computer employee is paid an hourly rate of at least \$27.63.

Outside sales employees do not need to meet the salary basis or salary level tests, but instead must meet only the duties test to qualify for exempt status under the FLSA.

WHAT DOES THIS MEAN?

- Even if an employee works part-time, the salary test must be met. There is no provision in the FLSA for reducing or prorating the required salary level of \$684 per week, with few exceptions (see right column). Even if the other parts of the test are met, an employee who is paid less than the minimum salary level will not qualify as “exempt,” and the employer will be required to pay overtime. This should rarely

be an issue however, because most part-time employees do not work more than 40 hours per week.

- In addition to salary, the following compensations are included in calculating an employee’s salary: commission on sales, percentage of sales or profits, flat sums, bonus payments, paid time off (PTO), and any other hourly, flat or piece pay rate.

SOME EXCEPTIONS:

- In addition to computer and outside sales employees, there are other categories of workers who do not have to meet the salary level test in order to qualify as exempt, including doctors, lawyers, and teachers.
- Employees who own at least a 20% bona fide equity interest in the business and who are actively engaged in management of the business are considered “exempt” without having to satisfy the salary basis (Part 1) or salary level (Part 2) tests. Employees who own smaller interests in the business will qualify as exempt only if they meet all three parts of one of the “white-collar” exemption tests.

Part 3: Duties Tests

The third part of the “white-collar” exemption test (to qualify for an exemption as an executive, administrative, professional, computer-related or outside sales employee) requires that an employee pass at least one of the duties tests.²

WHAT DOES THIS MEAN?

- Even if the salary basis and salary level tests are met, a white-collar employee will not qualify as “exempt” unless he or she meets one of the duties tests.³
- These “white-collar” exemptions do not apply to any “blue-collar” workers who perform work involving physical skill or repetitive work with their hands.
- “Primary duty” means the principal, main, major or most important duty that the employee performs. Time is not the only indicator, but it is significant. The DOL advises if an employee spends 50% of his or her time on a specific job duty, that is a helpful guideline for determining the employee’s primary duty.⁴



² Consideration of whether an employee qualifies for one of the “white-collar” exemptions is highly fact specific. If an employer is unsure whether an employee qualifies as exempt, the employer should consult an attorney.

³ “Highly compensated” employees with annual salaries of \$107,432 or more in nondiscretionary compensation (which may include payments received under certain profit sharing programs with set terms for timing and amount of payment) are automatically exempt from overtime requirements, so long as the employees are paid at least \$684 per week on a salary or fee basis, perform office or non-manual work, and “customarily and regularly” perform any one or more of the exempt duties identified in the duties tests for executive, administrative or professional exemptions. The \$107,432 annual salary may be prorated for an employee who has not yet been employed for a full year.

⁴ If an exempt employee’s work is largely or wholly filled with non-exempt tasks for a limited period of time during the year (e.g., 5 weeks of the year), the employee does not necessarily lose his or her exempt status. However, this may vary from jurisdiction to jurisdiction, and therefore employers should consult an attorney.



Part 3: Duties Tests (cont'd)

Executive Duties Test

1. Primary duty is management of the business or a customarily recognized department or subdivision of the business;
2. Customarily and regularly directs the work of two or more employees (or the equivalent of at least two full-time employees); and
3. Authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion or any other change of employment status of other employees are given particular weight.



WHAT DOES THE EXECUTIVE DUTIES TEST MEAN?

Examples of activities that are considered “management” of the business include supervising other employees; directing the work of employees; disciplining employees; conducting performance reviews of employees; planning and controlling the budget; apportioning work among employees; planning the work of the business; determining the techniques to be used; and determining the materials to be used or merchandise to be bought or sold. For a smaller business, an employee may perform many of these duties, most or all of which are considered exempt executive duties.

Employees who oversee a business or department with less than two full-time employees (or the equivalent) generally do not qualify for the executive exemption. These employees may nonetheless attempt to qualify for one of the other white-collar exemptions.

Administrative Duties Test

1. Primary duty is performance of office or non-manual work directly related to the management or general business operations of the business or its customers; and
2. Primary duty is also the exercise of discretion and independent judgment with regard to matters of significance.



WHAT DOES THE ADMINISTRATIVE DUTIES TEST MEAN?

Examples of “management or general business operations” performed or serviced by an administrative exempt employee may include: tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; public relations; research; safety and health; personnel management; human resources; employee benefits; labor relations; computer network, internet or database administration; or legal or regulatory compliance.

Within each of the above-mentioned types of operations, the administrative exempt employee must exercise discretion and independent judgment on matters of significance, such as formulating management policies or negotiating and entering into contracts on behalf of the business. As with the executive duties test, in a smaller business, the administrative exempt employee may perform many of these duties, most or all of which are considered administrative exempt tasks. To the extent that the employee spends most of his or her time on these types of tasks, the employee will likely meet the administrative duties test.

Computer-Related Duties Test

1. Employment as a skilled worker in the computer field; and
2. Primary duty is application of systems analysis techniques and procedures and/or work with computer systems or programs related to user or system design specifications or machine operating systems.



WHAT DOES THE COMPUTER-RELATED DUTIES TEST MEAN?

Employees qualify for this exemption if their primary duty is 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. Also covered by the exemption are employees whose primary duty is the design, documentation, testing, creation or modification of computer programs related to machine operating systems. This may include computer systems analysts, computer programmers, or software engineers if they meet the duties test.

Employees who manufacture or repair computer hardware and related equipment or work at a “help desk” are NOT exempt under this provision.

Professional Duties Test

1. Primary duty is performance of work requiring knowledge of an advanced type (which is defined as predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment) in a field of science or learning customarily acquired by a prolonged course of specialized instruction; or
2. Primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

WHAT DOES THE PROFESSIONAL DUTIES TEST MEAN?



Examples of professions that may qualify under the professional exemption are: doctors, lawyers, pharmacists, accountants, teachers, architects, engineers, chemical or biological scientists, certified athletic trainers, chefs, licensed funeral directors or embalmers, registered or certified nurses, physician assistants, medical technologists and dental hygienists.

The following types of creative professionals may qualify under the professional exemption, depending on the content of the work performed: musicians, composers, writers, actors, graphic artists and journalists.

It is worth pointing out that the FLSA regulations specifically mandate overtime pay for carpenters and other

The DOL specifically has indicated that the following professions do NOT qualify as exempt professionals: accounting clerks, paralegals, engineering technicians and licensed practical nurses.

types of craftsmen, so long as they do not separately meet the criteria for one of the “white-collar” exemptions.



Outside Sales Duties Test

1. Primary duty is to make sales or obtain orders or contracts for services or the use of facilities; and
2. The work must be customarily and regularly away from the employer's place of business.

WHAT DOES THE OUTSIDE SALES DUTIES TEST MEAN?



Outside sales exempt employees sell products or services at the customer's place of business or home. Salespersons who sell by mail, telephone or the Internet do not qualify as outside salespersons unless the sales are made by “personal contact.” Sales made from the employer's location are considered “inside sales,” which may be exempt from overtime pay under a separate FLSA provision (see below).

WHAT ABOUT INSIDE SALES EMPLOYEES — ARE THEY EXEMPT FROM OVERTIME PAY?

Generally not. Inside sales employees are entitled to overtime unless they qualify separately under one of the white-collar exemptions or other exemptions (such as the exemption for employees working for a retail or service establishment and who are paid entirely or partially by commission, which is described below).

Inside sales employees include workers who may sell products or services via mail, phone or the internet, while physically working at the employer's facility.

FLSA regulations expressly state that an employee whose primary duty is “selling financial products” does not qualify for the administrative exemption.

WHAT ABOUT SALES EMPLOYEES WHO ARE PAID BY COMMISSION?

Employees who work for a retail or service establishment may qualify for exempt status if they meet the following criteria:

1. The employee's regular rate of pay exceeds one and one-half times the minimum wage for every hour worked in a workweek in which overtime hours are worked (i.e., more than 40 hours worked in a workweek); and
2. More than half of the employee's total earnings in a “representative period” (a set time period established by the employer which must be at least one month but not more than one year in duration) are through commissions or draws (but may not include tips paid to service employees).

It is important that the employer maintains records regarding the hours worked by employees per day and workweek, and the earnings paid to employees. This is necessary in order to substantiate that this “commissioned sales” exemption has been met.

Overtime Pay Requirements for All “Non-Exempt” Employees

All covered employees who do not qualify for a specific exemption are considered “non-exempt” from the FLSA’s overtime pay and minimum wage requirements. Employers must pay non-exempt employees overtime pay for all hours worked over 40 hours in a workweek at a rate not less than one and one-half times their regular hourly rate of pay.

WHAT DOES THIS MEAN?

- An employee may not waive his/her right to overtime pay. Even if an employee is instructed or agrees to work a maximum of 40 hours per week, any hours actually worked over 40 hours will be subject to overtime pay requirements. An employer generally may, however, discipline an employee who works unauthorized overtime.
- There is no limit to the number of hours that an employee may work in a workweek, so long as the employee is paid for all hours worked. But see Section V for limits on work hours for children who work. Also, some state laws may impose limitations.
- All hours actually worked over 40 hours in a workweek — no matter the particular day or hour — are subject to overtime pay. Employers should check state and local laws for broader overtime pay provisions, such as a requirement to pay overtime for all hours worked over 8 per day.
- Lump sum premium payments to employees for work performed during overtime, without respect to the number of overtime hours worked, do NOT satisfy the FLSA overtime pay requirements, even if the amount paid ends up being equal to or greater than one and one-half times the regular rate of pay. If, for example, the employer gives employees a bonus for working extra hours during the holiday season, this payment does not satisfy the overtime requirements. Instead, the employer must calculate the number of overtime hours worked and the corresponding amount of overtime pay due. The employer may then pay employees more than the required overtime premium pay, so long as the employer has accurately calculated the overtime pay due under the FLSA.
- What about compensatory (“comp”) time — can an employer give a non-exempt employee time off during a different workweek in lieu of overtime pay? No. Employers generally must pay all overtime pay due for any hours worked over 40 in a given workweek.

For example, in a two week pay period, an employee works 45 hours in Week One and 35 hours in Week Two. If the employee was given “comp” time for the 5 extra hours worked in Week One, then he or she would

have no change in his or her compensation for the pay period (because the total hours for the two-week pay period is 80 hours).

However, the FLSA requires that overtime be calculated on a weekly basis, not by pay period. As a result, the employee should be paid overtime compensation for the 5 extra hours in Week One, and the employer may reduce the employee’s pay by 5 hours for the hours shortage in Week Two:

Week One:

40 hours x \$10 hourly rate = \$400

5 hours x \$15 overtime hourly rate = \$75

Total for Week One: \$475

Week Two:

35 hours x \$10 hourly rate = \$350

Total for pay period: \$825

(instead of \$800 if “comp” time was allowed)



HOW DOES OVERTIME COMPENSATION WORK?

Step 1: Determine the employee's workweek



An employee's workweek is a fixed and regularly recurring period of seven consecutive 24-hour days (or more exactly, 168 hours). The set workweek may start on any day and hour. An employer may have different workweeks for different employees or groups of employees.

Employers are not allowed to average the hours worked over two or more workweeks. Even if employees are paid every two weeks, overtime pay is calculated based on a single workweek. Overtime pay normally must be paid on the regular payday for the pay period in which the overtime wages were earned.

Step 2: Determine hours worked



Employers should require non-exempt employees to provide the employer with information about the time they spend working. This usually takes the form of timesheets or time cards. (It is worth noting that employers may also require exempt employees to provide information regarding hours worked.) It is important that this information be accurate since it forms the basis of the employer's minimum wage and overtime pay calculations.

Hours worked generally do not include time spent commuting to or from work, breaks of more than 20 minutes or meal times of more than 30 minutes.

>> ON-CALL EMPLOYEES: Employees who reside on-site or are on-call for work are generally not considered to be "working" if they can use the time effectively for their own purposes while on-call or on-site. An employee who is required to remain on call on the employer's premises is considered to be working while "on call." An employee who is required to remain on call at home, or who is allowed to leave a message where he or she can be reached, is not working (in most cases) while on call. Additional constraints on an employee's freedom could require this time to be compensated.

>> TIME SPENT "DONNING" AND "DOFFING": The U.S. Supreme Court issued a decision that addressed whether time spent putting on protective gear ("donning") and time spent removing protective gear ("doffing") is considered compensable work time. The Court held that that a worker's time spent walking from the required protective gear changing area to the production area is compensable time for FLSA purposes. Similarly, the Court held that a worker's time spent waiting to remove that required gear at the end of the workday is also compensable time under the FLSA. This means that employees are entitled to be paid for this time, and the time should also be included in hours worked for purposes of computing overtime eligibility and pay. On the other hand,

the Supreme Court held in the same case that the time employees spend waiting to receive protective gear before the work shift begins is generally NOT compensable under the FLSA.

>> ATTENDANCE AT LECTURES, MEETINGS OR

TRAINING PROGRAMS: Time spent by employees attending lectures, meetings or training programs related to work should be included in hours worked unless all of the following 4 criteria are met: (1) attendance is outside of normal working hours; (2) attendance is voluntary; (3) the program is not directly related to the employee's job; and (4) the employee does not perform any productive work during attendance.

>> TRAVEL TIME:

- An employee's time spent commuting from home to work is generally not considered compensable work time.
- Time spent traveling from home to a special one-day assignment in another city may be considered compensable time, except that the employer may deduct or not count that time the employee would normally spend commuting to his or her regular work site.
- Where travel is part of an employee's principal activity, such as traveling from one job site to another during the workday, the travel time is compensable work time.
- Time spent away from home on business is considered work time if it cuts across the employee's workday, and would include any time spent working, whether or not during normal working hours. However, the DOL will not consider as work time that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus or automobile.



Step 3: Determine employees' hourly rate of pay

What is included in "Wages" under the FLSA?

As discussed, "non-exempt" employees must be paid at 1 ½ times their regular rate of pay for all hours over 40 worked during a workweek. This section discusses how to determine the employee's regular rate of pay. For purposes of the FLSA, an employee's regular rate includes "all remuneration" for employment that the employee receives. This includes:

- Hourly or weekly wages, salary, and piece rate wages.
- The reasonable cost or fair market value of employer-furnished board, lodging or other facilities customarily furnished by the employer for the employee's benefit, including transportation in a company car or payments for public transportation used for commuting from home to work.

What is NOT included in calculating an employee's regular rate:

- The value of health or pension benefits and other similar bona fide plan benefits (death, legal services, unemployment).
- Monies paid as a gift, such as at holiday time.
- Rewards for service which are not based on hours worked, production or efficiency, such as a "perfect attendance" cash award.
- Discretionary bonuses.
- Reimbursement for an employee's travel expenses (as opposed to commuting expenses).
- Payment for other types of expenses incurred on behalf of the employer.
- Monies paid in recognition of an employee's service which are given in the sole discretion of the employer and not based on any contract, agreement or promise.

Employers need to understand what is included in "wages" in order to calculate each employee's regular rate of pay. Once the employer figures out the employee's hourly pay rate, it can then determine if the employee is being paid the federal minimum wage and the correct overtime rate of pay.

⁵ But note that for overtime pay purposes, these monies are credited toward overtime pay that is due to an employee. For example, if an employer decides, as a one-time special bonus, to pay employees \$100 extra for working over the weekend to finish a major project, the employer must still calculate whether overtime pay is due, and if so how much that would be. In that case, the employer should not include the \$100 in the computer employee's regular rate of pay. On the other hand, if the employer typically pays employees an extra \$100 for working on holidays, the \$100 must be included in employees' regular rate of pay.

⁶ For employees who work two or more jobs at different rates in a single workweek, the regular rate for that workweek will be the weighted average of the rates. Alternatively, the employer and employee can make an agreement in advance (in writing) about the employee's rate of pay for overtime purposes based on the type of work being performed during the overtime hours.

- Extra monies paid for evening, weekend, holiday or overtime work beyond 8 hours per day or 40 hours per week.⁵

Even though a non-exempt employee does not have to be paid on an hourly basis, the employer will still have to compute the overtime pay rate based on an hourly rate. In the case of employees who are paid on a piece-rate, salary, commission or other non-hourly basis, the employer must use an average hourly rate based on earnings as the basis for computing overtime pay. The employer should divide the employee's total pay by the total number of hours actually worked in the workweek in order to calculate an employee's hourly rate of pay.⁶

For employees who are paid a salary or flat fee, the employer should compute the regular rate of pay based on the number of hours actually worked. For example, an employee who is paid \$500 to work 50 hours in a workweek is being paid at a rate of \$10 per hour, and has an overtime pay rate of \$15 per hour for the 10 hours of overtime.

The same calculation would be used for an employee who is paid a flat fee of \$500 and spends 50 hours to complete the work for which the fee is being paid. This means that a salaried employee's rate of pay and overtime pay rate may fluctuate from workweek to workweek depending on the number of actual hours worked. Please see the discussion below about the "fluctuating workweek" method of overtime compensation.

Step 4: Calculating overtime pay

ORDINARY METHOD FOR COMPUTING OVERTIME:

EXAMPLE: Rate of pay for non-exempt employee is \$11.25 per hour, or \$450 per workweek. The overtime pay rate of one and one-half times the regular rate of pay would be



\$16.88 per hour.

In Week One, the employee works 45 hours (i.e., 5 hours of overtime) and in Week Two works 50 hours (i.e., 10 hours of overtime).

Even though the employer uses a two-week pay period, overtime must be calculated for each workweek and paid on the regular payday for the pay period.

Week One:

Regular pay of \$450 ($\11.25×40 hours)

Overtime pay of \$84.40 ($\16.88×5 hours)

Week Two:

Regular pay of \$450 ($\11.25×40 hours)

Overtime pay of \$168.80 ($\16.88×10 hours)

An alternate method for computing overtime for fixed salary employees is the “FLUCTUATING WORKWEEK METHOD”: By using this alternate method approved by the DOL, an employee receives the full amount of his or her fixed salary as straight time pay every week regardless of the number of hours worked, so long as the employee performs any work in the workweek.

Example of the Fluctuating Workweek Method:

Assume that employee is guaranteed a weekly salary of \$450 for all hours worked, regardless of the number of hours actually worked.

In Week One, the employee works 45 hours (i.e., 5 hours of overtime) and in Week Two works 50 hours (i.e., 10 hours of overtime).

Week One:

Hourly rate would be $\$450 \div 45 = \10 per hour.

Overtime premium would be $\$10 \div 2 \times 5$ hours = \$25.

Week Two:

Hourly rate would be $\$450 \div 50 = \9 per hour.

Overtime premium would be $\$9 \div 2 \times 10$ hours = \$45.

Pros and Cons of the Fluctuating Coefficient Method:

- Pros: Employer pays less in overtime to employees. Employer does not have to use the method for all non-exempt employees.
- Cons: Employer must have a clear understanding with the employee before this method is used. Thus, it is recommended that the employer first obtain the employee's written agreement before using this method.

The employer must also conduct new overtime pay rate calculations each workweek, and ensure that the average hourly rate does not fall below the minimum wage. Most significantly, an employer is not allowed to make ANY deductions during the workweek (with the possible exception of “occasional disciplinary deductions”) — not even for paid time off or other absences. Thus if an employee works at all during a workweek, the employer must pay the employee the full salary for that workweek.

CHILD LABOR REQUIREMENTS

The FLSA includes provisions limiting the scope of employment for youth workers under 18 years of age. Employers are advised to consult state and local laws for other child labor provisions.

Youth ages 14 and 15 years old

Under the FLSA, a youth must be at least 14 years old in order to work in a non-farm job, which must also be non-mining and non-hazardous. Additional limitations for youth ages 14 and 15 include:

- maximum work of 3 hours per day on school days, including Fridays;
- maximum 18 hours per week during school weeks;
- maximum 8 hours per day on non-school days;
- maximum 40 hours per week when school is not in session;
- hours of work must be after 7:00 a.m. and before 7:00 p.m. from after Labor Day to May 31; and
- hours of work must be after 7:00 a.m. and before 9:00 p.m. from June 1 to Labor Day.

Youth ages 14 and 15 who are enrolled in an approved “Work Experience and Career Exploration Program” may work up to 23 hours during school weeks and up to 3 hours on school days, including during school hours.

Youth ages 16 and 17 years old

The FLSA allows for youth ages 16 or 17 to work in any non-hazardous job for an unlimited number of hours, provided all other requirements of the FLSA are met.

Upon reaching the age of 18, a youth may perform any job, including hazardous jobs, for an unlimited number of hours.

RECORDKEEPING REQUIREMENTS

Covered employers must retain the following types of records for each non-exempt employee:

1. Full name;
2. Social Security number or employee payroll number;
3. Home address, including zip code;
4. Birth date, if younger than 19 years old;
5. Sex;
6. Occupation;
7. Time and day of week when employee's workweek begins;
8. Hours worked each day;⁷
9. Total hours worked each workweek;
10. Basis on which employee's wages are paid, such as the hourly rate, weekly rate, or rate by piece;
11. Regular hourly pay rate;
12. Total daily or weekly straight-time earnings;
13. Total overtime earnings per workweek;
14. Any additions to or deductions from wages in a workweek;
15. Total wages paid each pay period; and
16. Date of wage payment and pay period covered by each payment.

Covered employers must also retain all of the above-listed items for exempt employees except item numbers 8–11, and 13.

Employers must retain payroll records, along with collective bargaining agreements, sales and purchase records, for 3 years. Employers may use any timekeeping system they choose, so long as the system is complete and accurate.

Employers must also retain for 2 years all records on which wage computations are based, such as time cards, piece work tickets, wage rate tables, work and time schedules, and records of additions to or deductions from wages.

The records must be made open for inspection by DOL Wage and Hour representatives upon request.

⁷ For a non-exempt employee who works on a "fixed schedule" that seldom varies, the employer may retain a record of the fixed schedule which shows the exact daily and weekly hours to be worked. The employer may indicate on the daily or weekly record that the employee followed the fixed schedule, or where the employee did not work all scheduled hours, the number of hours actually worked.

There is no particular form in which the records must be kept, but they must be kept in a "safe and accessible place" at the place of employment or in an established central records office.

NOTICE POSTING

Employers should consult with state and local authorities to determine if there are other notices that must be posted relating to employees' wages and hours.

Covered employers must display an official poster issued by the DOL which explains the provisions of the FLSA. The notice is entitled "Your Rights Under the Fair Labor Standards Act" and is available from the DOL's website at <http://www.dol.gov/whd/regs/compliance/posters/flsa.htm>, or by calling the DOL Wage and Hour Division at 1-866-4USWage (1-866-487-9243).



POTENTIAL PENALTIES FOR NONCOMPLIANCE

It is important for businesses to understand the serious potential penalties for failure to comply with FLSA requirements.

Employees may bring suit against an employer for violating the FLSA. Alternatively, employees may contact the DOL to report possible violations. The Wage and Hour Division of the DOL may initiate an investigation on its own or as a result of an employee complaint, and thereafter may file a suit against the employer for FLSA violations.

The statute of limitations for bringing a suit to recover back pay is 2 years, or 3 years for willful violations.

Civil Penalties

Employers who willfully or repeatedly violate the minimum wage or overtime pay requirements may be fined a civil penalty of up to \$1,100 per violation.

Employers who violate the child labor requirements may be fined a civil penalty of up to \$11,000 for each youth worker employed

in violation of the requirements. There is potential individual liability for individuals who have substantial authority over day-to-day operations and the terms and conditions of employment.

Criminal Penalties

In addition to civil penalties, employers who willfully violate the FLSA may be subject to criminal prosecution and fines. A second conviction may result in imprisonment.

“Hot Goods”

The FLSA prohibits the shipment, offer of shipment or sale in interstate commerce of goods produced by employees who were working in violation of the minimum wage or overtime pay provisions. The DOL may seek to restrain the shipment of such “hot goods” unless and until the employer voluntarily corrects the violations.

Retaliation

The FLSA prohibits discriminating against or discharging workers who file a complaint or participate in any proceedings under the FLSA.



Appendix A

NORTHEAST REGION

(Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Puerto Rico, Rhode Island, Vermont, Virgin Islands, Virginia, and West Virginia)
USDOL Wage and Hour Division
Philadelphia, PA
267-687-4031

SOUTHEAST REGION

(Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee)
USDOL Wage and Hour Division
Atlanta, GA
404-893-4541

MIDWEST REGION

(Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin, Iowa, Missouri, Kansas and Nebraska)
USDOL Wage and Hour Division
Chicago, IL
312-596-7208

SOUTHWEST REGION

(Arkansas, Colorado, Louisiana, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah, and Wyoming)
USDOL Wage and Hour Division
Dallas, TX
972-850-2627

WESTERN REGION

(Alaska, Arizona, California, Hawaii, Idaho, Nevada, Oregon, and Washington)
USDOL Wage and Hour Division
San Francisco, CA
415-625-7716