CLARK HILL

Legal and Professional Services

WAGE AND HOUR PRIMER

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I. OVERVIEW OF WAGE AND HOUR LAW

The Fair Labor Standards Act ("FLSA" or "Act") was enacted in 1938 as part of the federal government's effort to lift the country out of the Great Depression. Seventy years later the Act still serves as the centerpiece of wage and hour laws in this country.

The FLSA has three major provisions:

1. It requires that employers pay a statutory minimum hourly wage

2. It requires that employers pay employees additional compensation for overtime work, calculated at 1½ times the employee's regular rate for all hours actually worked over 40 in one week.

3. It requires that employers keep track of the hours worked by employees.

Michigan has a statute similar to the FLSA providing for minimum wages, called the Workforce Opportunity Wage Act, M.C.L. § 408.411 *et. seq.* However, Michigan law applies only where the federal minimum wage provisions would result in a lower minimum hourly wage than provided under the Michigan statute. This is in fact the case with respect to the minimum wage. The federal minimum hourly wage increased to $7.25 on July 24, 2009. The Michigan minimum hourly wage is currently $9.25. Thus, Michigan employers are subject to the higher state minimum hourly wage. However, with respect to an employer's obligation to pay overtime and keep payroll records, in almost all cases federal rather than Michigan law will apply.

The basic FLSA concepts of a minimum hourly wage and the payment of overtime for hours worked in excess of 40 in a week are very simple. However, in the 70 years the FLSA has been in effect, there have been numerous exceptions to these simple rules, and how they are enforced. The United States Department of Labor, which enforces the FLSA, has issued regulations and guidelines numbering in the thousands of pages in applying the Act. The result is that violating the FLSA is easier and more common than most people realize.

Unfortunately, the consequences are severe. An employer's liability for FLSA violations includes back wages, liquidated damages equal to the amount of back wages owed, interest, and attorney fees if the matter is brought in court and the employee prevails. The Department of Labor also has the authority to assess a $1,100 civil monetary penalty per employee for each repeated or willful violation of the law.

Apart from civil penalties, the Department of Labor may also pursue criminal penalties for "willful" violations. Establishing a "willful" violation is relatively easy, as the standard is whether the employer "knew" or had a "reckless disregard" for knowing whether its conduct violated its overtime obligations under the Act. An employer may be fined $10,000 for a first willful offense of the Act. A second conviction may result in incarceration for up to six months. Finally, individual supervisors may be held liable under the Act subject to the penalties above.

The statute of limitations on FLSA claims are generally two years; however, the limitations period is three years for "willful" violations.

Given the harsh consequences of violating the Act, it is prudent for every employer to familiarize itself with the requirements of both federal and state minimum wage laws to avoid running afoul of any legal requirements. The materials that follow will address the most common pitfalls that face employers and offer some suggestions for avoiding them.

II. COVERAGE UNDER THE FLSA

Employees are covered by the FLSA minimum wage and overtime provisions if their work is performed in the United States or a possession or territory of the United States; a true employment relationship exists between the employee and the employer; and the business is covered by the enterprise coverage rule, or the employee is covered under the individual employee coverage rule.

A. Covered Employers

1. The FLSA defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). The provisions of the FLSA apply to almost all employers, as it covers a liberal spectrum including businesses with annual gross sales or revenue of $500,000 or more and governmental entities, including public schools and hospitals, regardless of their sales or business volume.

2. Where an employee works for two or more employers, the time worked for any one employer is treated separately for FLSA purposes, as long as the employers operate independently from one another and have not hired the employee jointly. 29 U.S.C. § 207(g)(2).

3. Under the FLSA, two companies or persons can be "joint employers." A joint employer relationship exist where;

    a. An arrangement exists between employers to share the employee's services,

    b. One employer is acting directly or indirectly in the interest of the other employer in relation to the employee, or

    c. The employers share control of the employee because one employer controls or is under common control with the other employer. 29 C.F.R. § 791.2.

4. Because "employer" is defined so broadly by the FLSA, certain corporate officers, participating shareholders, supervisors, managers or other employees may be considered individually liable under the Act. 29 U.S.C. § 203(a), -(d).

B. Covered Employees

1. The Act applies to all employees of a covered employer. The Act defines employee as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). The term employ includes arrangements where one party allows another person to "suffer or permit to work." 29 U.S.C. § 203(g).

2. Coverage is excluded for *bona fide* independent contractors. The term independent contractor is not defined in the Act. In determining whether a person qualifies as an independent contractor, the courts apply an "economic reality" test to decide whether the individual is economically dependent upon the employer's business, or whether the individual is in business for himself/herself. The courts look to a number of factors in making this determination, and no single factor is controlling. The factors include:

    a. The degree of control exercised by the employer over the manner in which the work is performed;

    b. the extent of relative investments of the putative employee and employer;

    c. the degree to which the employee's opportunity for profit or loss is determined by the employer;

    d. the skill and initiative required in performing the job;

    e. the permanency of the relationship; and

    f. whether the service rendered is an integral part of the alleged employer's business. *Donovan v. Brandel*, 736 F.2d 1114 (6th Cir. 1984).

3. Certain persons are not employees.

    a. Courts have used the "primary beneficiary test" to determine whether an intern or student is, in fact, an employee under the FLSA. In short, this test allows courts to examine the "economic reality" of the intern-employer relationship to determine which party is the "primary beneficiary" of the relationship. Courts have identified the following seven factors as part of the test:

        (1) The training is similar to training offered by vocational schools;

        (2) The trainees do not displace regular employees and work under close observation;

(3) The training is for the trainees' primary benefit;

(4) The employer receives no immediate benefit from the training, and, in fact, its operations occasionally might be disturbed by the training program;

(5) The trainees are not necessarily entitled to a job at the end of the training; and

(6) The employer and the trainees understand that no wages will be paid for the training. Persons who are in training for an employer may or may not be employees under the Act, depending upon the circumstances under which the training is performed. Where the training primarily benefits the employer rather than the trainee, the trainee will be considered an employee.

Courts have described the "primary beneficiary test" as a flexible test, and no single factor is determinative. Accordingly, whether an intern or student is an employee under the FLSA necessarily depends on the unique circumstances of each case. If analysis of these circumstances reveals that an intern or student is actually an employee, then he or she is entitled to both minimum wage and overtime pay under the FLSA. On the other hand, if the analysis confirms that the intern or student is not an employee, then he or she is not entitled to either minimum wage or overtime pay under the FLSA. *See* U.S. DEPT. OF LABOR FACT SHEET #71 (2018).

b. Volunteers

(1) Workers who volunteer their time or work for their own advantage without an express or implied pay agreement are not considered employees.

(2) There is no permissible volunteering of services to a for-profit employer in the private sector. All work must be paid work.

(3) Volunteers at food banks for humanitarian purposes are specifically excluded from the definition of "employee" under the FLSA, even if they have received groceries, which could be considered compensation. 29 U.S.C. § 203(e)(5).

C. Coverage of Public Sector Employers

1. Originally, state and local government employees were not covered by the Act. However, by 1974 Congress had extended the Act's coverage to apply to all state and local political subdivisions, including public schools.

In *National League of Cities v Usery*, 426 U.S. 833; 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976), the United States Supreme Court ruled that the amendments were unconstitutional. However, in *Garcia v San Antonio Metropolitan Transit Authority*, 469 U.S. 528; 83 L. Ed. 2d 1016; 105 S. Ct. 1005 (1985), the Supreme Court reversed itself and ultimately held that Congress could constitutionally expand FLSA coverage to state and local governments.

2. The enactment of the 1985 amendments to the FLSA minimized the impact of ***Garcia*** by exempting certain public employees from minimum wage and overtime regulations. Pub. L. No. 99-150, 99 Stat. 787 (1985).

III. MINIMUM WAGE REQUIREMENTS OF THE FLSA

A. Minimum Wage

1. The FLSA requires payment of a minimum hourly wage to all covered employees not exempt or otherwise qualified for a sub-minimum wage rate. 29 U.S.C. § 206.

2. The federal minimum wage for covered nonexempt employees is $7.25 per hour effective July 24, 2009.

3. Because Michigan's Workforce Opportunity Act, M.C.L. § 408.411 *et. seq.*, is higher than the federal minimum wage, employers who employ employees in Michigan must pay $9.25 per hour as the minimum wage. M.C.L. § 408.414. Employers who are subject to the Michigan minimum wage solely because Michigan's minimum wage exceeds the federal minimum wage remain exempt from Michigan's overtime provisions, except for certain child care and domestic elder care employees. M.C.L. § 408.420.

B. Sub-Minimum Wages

1. The Small Business Job Protection Act of 1996 established an "opportunity wage" available to employees less than 20 years old during their first 90 calendar days of employment. The sub-minimum or "opportunity wage" rate is equal to $4.25 per hour. Michigan's Workforce Opportunity Wage Act adopts the same provision. M.C.L. § 408.414b(1).

2. There are certain restrictions on the availability of the opportunity wage by employers. Employers are not permitted to displace other employees in order to take advantage of the opportunity wage. 29 U.S.C. § 206(g), *See also* M.C.L. § 404.414b(3).

3. The opportunity wage may also be available to classes of employees designated by the Secretary of Labor at 29 U.S.C. § 214 and 29 C.F.R. §

519-525 (2003). The classes include learners, student learners, apprentices, messengers, full-time students, and handicapped workers. Typically, the sub-minimum wages for these classes of workers ranges from between 50% to 85% of the regular minimum wage.

C. Payment of Wages and Fringe Benefits

1. Method of Payment.

   a. Under federal law, the employer must pay the minimum wage and overtime in cash or in a "negotiable instrument payable at par." A check satisfies this requirement. 29 C.F.R. § 531.27.

   b. Federal law allows an employer to pay wages through direct deposit but the employer must allow the employee to receive payment by cash or check. U.S. Department of Labor, Wage and Hour Division, *Field Operations Handbook* § 30c00b. However if state law is stricter, then the employer must follow state law. 29 C.F.R. § 531.26.

   c. Under Michigan's Payment of Wages and Fringe Benefits Act, M.C.L. § 408.476(1), an employer may pay employee wages:

      (1) In United States currency;

      (2) By negotiable check or draft in United States currency;

      (3) By direct deposit or electronic transfer to the employee's account at a financial institution; or

      (4) By issuing a payroll debit card. A "payroll debit card" means a stored-value debit card that provides an employee access to his or her wages, for withdrawal or transfer by the employee, through a network of automatic teller machines.

      (5) An employer or its agent may not deposit an employee's wages in a bank, credit union, or savings and loan association without the full, free, and written consent of the employee, obtained without intimidation, coercion, or fear of discharge or reprisal for refusal to permit the deposit. M.C.L. § 408.476(2).

      (6) An employer or agent of an employer may not issue a payroll debit card to an employee without the full, free, and written consent of the employee, obtained without intimidation, coercion, or fear of discharge or reprisal for refusal to accept the payroll debit card. However, an employer paying wages by payroll debit card to one or

more of its employees as of January 1, 2005 may pay wages to any of its employees by payroll debit card without obtaining the consent described in this subsection. M.C.L. § 408.476(3).

(7) An employer shall not require an employee to pay any fees or costs incurred by the employer in connection with paying wages or establishing a process for paying wages by direct deposit or payroll debit card. M.C.L. § 408.476(7).

(8) Employers may require employees to accept either direct deposit or to receive their pay on a payroll debit card if certain notices and protections are provided.

(9) In order to mandate direct deposit or a payroll debit card, employers must provide employees with all of the following:

(a) A written election notice that allows the employee the option of receiving wages through direct deposit or a payroll debit card; and

(b) A statement indicating that, except for employees who are currently receiving pay via direct deposit or a payroll debit card, employees who fail to return the election notice within 30 days along with the necessary account information will be presumed to consent to receive pay via a payroll debit card (note: for employees already paid by direct deposit, their method of payment may not be changed without their written consent).

(c) Written disclosure of all the following concerning a payroll debit card:

(i) The terms and conditions of use, including itemization of all fees;

(ii) The method(s) of accessing funds without charge;

(iii) A statement that if the debit card is used outside of a specified ATM network, both the card issuer and the ATM operator may impose fees;

(iv) The methods by which the employee can obtain free balance inquiries;

(v) The employee's right to change the method of receiving wages; and

(vi) A statement that the payroll debit card does not provide access to savings or checking accounts.

(10) Employers who pay by payroll debit card must ensure that the card has all of the following features:

(a) Employees can make at least 1 withdrawal or transfer without charge each pay period, but not more frequently than once a week, for any amount the employee elects up to the balance accessible on the card;

(b) Allows no changes in fees or terms of service unless the employee is provided with at least 21 days' written notice;

(c) Allows employees to make an unlimited number of balance inquiries—either electronically or by phone—without charge; and

(d) Is not linked to any other form of credit, including a loan against future pay or a cash advances against future pay.

(11) The law allows employees at any time to request a change between direct deposit or a payroll debit card. The employer may take no longer than 1 pay period to implement the change after receiving the employee's request and the necessary information. Any election to receive pay via direct deposit or a payroll debit card must be made freely, without intimidation, coercion or fear of discharge or other reprisal. § 408.476(5).

2. Payment "Free and Clear"

a. Wage payments must be made free and clear without any kickbacks directly or indirectly to the employer or to another person for the employer's benefit. 29 C.F.R. § 531.26 (2010).

b. Under Michigan law, an employer, agent or representative of an employer, or other person having authority from the employer to hire, employ, or direct the services of other persons in the employment of the employer shall not demand or receive, directly or indirectly from an employee, a fee, gift, tip, gratuity, or other remuneration or consideration, as a condition of employment or

continuation of employment. This does not apply to fees collected by an employment agency licensed under the laws of this state. M.C.L. § 408.478(1).

c. Under M.C.L. § 408.478, a tuition contract an employer required its employee to sign before the employee began employment providing that the employee had to repay the employer for the training the company provided him in the event the employee did not complete six years of employment was void and unenforceable under the wage and fringe benefits act because signing the contract was a precondition to employment. *Sands Appliance Servs. v Wilson*, 615 N.W.2d 241, 243-44 (2000).

d. Except for a contribution required or expressly permitted by law or by a collective bargaining agreement, an employer shall not require an employee or a person seeking employment to contribute directly or indirectly to a charitable, social, or beneficial purpose as a condition of employment or continuation of employment. M.C.L. § 408.478(2).

3. Time of Payment

a. Minimum wage payments must be made on the regular payday for each workweek. If a pay period is longer than one week then payment must be made on the regular payday for the workweek in which the pay period ends. U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION, FIELD OPERATIONS HANDBOOK § 30b04 (2000).

b. Under Michigan's Payment of Wages and Fringe Benefits Act, the employer must pay the employee, other than employees engaged in harvesting of crops by hand:

(1) On or before the first day of each calendar month, the wages earned during the first 15 days of the preceding calendar month.

(2) On or before the fifteenth day of each calendar month, the wages earned during the preceding calendar month from the sixteenth day through the last day.

(3) An employer who has established a regularly scheduled weekly or biweekly payday shall be deemed to be in compliance with subsection (1) and (2) provided that:

(a) The wages are paid to the employee on the established regularly recurring payday; and

(b) Such payday occurs on or before the fourteenth day following the end of the work period in which the wages are earned. M.C.L. §§ 408.472(1),-(3), -(4).

(4) An employer who establishes a monthly payday shall be deemed to be in compliance with subsection (1) and (2) provided that the employer pays to the employee on or before the first day of each calendar month all wages earned during the preceding calendar month. M.C.L. § 408.472(1),-(3),-(4).

c. Under Michigan law, an employer must pay to each individual engaged in any phase of the hand harvesting of crops all wages earned in a week on or before the second day following the work week unless another method of payment is agreed upon by written contract. M.C.L. § 408.472(2).

d. Sales Representative Commissions

(1) The terms of the contract between the principal and sales representative shall determine when a commission becomes due. If the time when the commission is due cannot be determined by a contract between the principal and sales representative, the past practices between the parties shall control or, if there are no past practices, the custom and usage prevalent in this state for the business that is the subject of the relationship between the parties. M.C.L. § 600.2961 (2)-(3).

(2) All commissions that are due at the time of termination of a contract between a sales representative and principal shall be paid within 45 days after the date of termination. Commissions that become due after the termination date shall be paid within 45 days after the date on which the commission became due. M.C.L. § 600.2961(4).

(3) "Sales representative" means a person who contracts with or is employed by a principal for the solicitation of orders or sale of goods and is paid, in whole or in part, by commission. Sales representative does not include a person who places an order or sale for a product on his or her own account for resale by that sales representative. M.C.L. § 600.2961(1)(e).

(4) "Principal" means a person that does either manufactures, produces, imports, sells, or distributes a product in this state

or contracts with a sales representative to solicit orders for or sell a product in this state. M.C.L. § 600.2961(1)(d).

(5) "Commission" means compensation accruing to a sales representative for payment by a principal, the rate of which is expressed as a percentage of the amount of orders or sales or as a percentage of the dollar amount of profits. M.C.L. § 600.2961(1)(a).

(6) If the principal fails to pay the commissions as required by the contract, the sales representative is entitled to actual damages. If the principal is found to have intentionally failed to pay the commission when due, an amount equal to two times the amount of commissions due but not paid as required by this section or $100,000.00, whichever is less. M.C.L. § 600.2961(5).

(7) The prevailing party in an action to collect commissions is entitled to costs and attorney fees. M.C.L. § 600.2961(6).

(8) A sales representative cannot waive his rights under the Act. M.C.L. § 600.2961(8).

e. In the case of employees' overtime earnings earned during the month of December, which in compliance with the Act would be paid to the employee after the sixteenth of December, an employer will be deemed to be in compliance with this section provided the employer meets all of the following:

(1) Employees receive all their wages, except overtime, for the month of December on or before the employees regularly scheduled payday; and

(2) All overtime wages earned during the month of December are paid on or before the next regularly scheduled payday following the payday in which the overtime would otherwise be paid. M.C.L. § 408.472(5).

f. Payment on Termination

(1) An employer must pay to an employee voluntarily leaving employment all wages earned and due, as soon as the amount can, with due diligence, be determined. However, an employer must pay all wages earned and due to an employee engaged in any phase of the hand harvesting of crops as soon as the amount can, with due diligence, be determined, but, in any event, not later than 3 days after the

employee's voluntary termination of employment. M.C.L. § 408.475(1).

(2) An employer must immediately pay to an employee who has been discharged from employment all wages earned and due, as soon as the amount can, with due diligence, be determined. M.C.L. § 408.475(2).

(3) Where an employee is working under contract; either voluntary leaves employment or is discharged from employment; and the amount due in wages cannot be determined until the termination of the contract, the employer must pay to the employee all wages earned by the employee as nearly as they can be estimated at the time the employee leaves. Final payment shall be made in full at the termination of the contract. M.C.L. § 408.475(3).

4. Payment of a Deceased Employee

a. An employer must pay fringe benefits pursuant to this section on behalf of a deceased employee as designated by the terms set forth in the written contract, written policy, or written plan. M.C.L. § 408.480(1).

b. Except as provided in "c" below, an employer must pay the wages and fringe benefits not paid in accordance with "a" above due a deceased employee to 1 or more of the following persons in the priority listed:

(1) The deceased employee's surviving spouse.

(2) The deceased employee's surviving children.

(3) The deceased employee's surviving mother or father.

(4) The deceased employee's surviving sister or brother.

c. If the employee has established a designee or designees by a signed statement filed with the employer before the employee's death and letters of administration are not required to be issued for the estate of the deceased employee, the employer must make those payments to the designee or designees in the signed statement. M.C.L. § 408.480(3).

d. Payment under this section are a full discharge and release of the employer from the wages and fringe benefits due and owing the deceased employee. M.C.L. § 408.480(4).

5. Payment of Fringe Benefits

a. The FLSA does not contain provisions governing the payment of fringe benefits.

b. Under Michigan law, an employer must pay fringe benefits in accordance with the terms set forth in the written contract or written policy. M.C.L. § 408.473. Fringe benefits are defined as "compensation due an employee pursuant to a written contract or written policy for holiday, time off for sickness or injury, time off for personal reasons or vacation, bonuses, authorized expenses incurred during the course of employment, and contributions made on behalf of an employee." M.C.L. § 408.471(e).

c. An employer cannot withhold a payment of compensation due an employee as a fringe benefit to be paid at a termination date unless the withholding is agreed upon by written contract or a signed statement obtained with the full and free consent of the employee without intimidation or fear of discharge for refusing to agree to the withholding of the benefit. M.C.L. § 408.474.

6. Deductions From Wages

a. Federal Law

(1) An employer may deduct the "reasonable cost" of furnishing the employee with board, lodging or other facilities which are customarily furnished by the employer. 29 U.S.C. § 203(m).

(a) "Reasonable cost" is not more than the actual cost of the board, lodging or other facility and may not include a profit or benefit to the employer or an affiliated person. 29 C.F.R. § 531.3.

(b) The employee must receive the benefit of the facilities the employee receives, and it must be accepted voluntarily without coercion. 29 C.F.R. § 531.30.

(c) Other facilities include meals furnished at company restaurants or cafeterias, housing furnished for dwelling purposes; general merchandise furnished by company stores and commissaries, fuel, electricity, water and gas for the noncommercial personal use of the employee, transportation furnished to employees between their home and work where the travel time does not constitute time

worked under the Act and transportation is not an incident of and necessary to the employment. 29 C.F.R. § 531.32(a).

(d) Tools of the trade and materials and services incidental to carrying on the employer's business; the cost of construction by and for the employer; the cost of uniforms, their rental, and their laundering; safety caps, explosives, and miners' lamps; electric power used for commercial production in the interest of the employer; company police and guard protection; taxes and insurance on employer buildings not used for lodging furnished to the employee; transportation charges where transportation is incidental and necessary to the employment; and medical services and hospitalization that the employer is bound to furnish under workers' compensation acts or similar laws are not considered "other facilities." 29 C.F.R. § 531.32(c).

(e) Employers may deduct the reasonable cost for food. The "reasonable cost" of food includes the cost of the food, preparation and other related supplies, of meals supplied to the employees that are supplied for the convenience of the employees. 29 C.F.R. § 531.32(c).

(f) Colleges and universities may deduct the reasonable cost of tuition furnished to their student-employees.

(g) In weeks in which an employee works no overtime, his or her cash wage must meet the statutory minimum applicable to that employee.

(h) If deductions are made for items not included in the category of "board, lodging, or other facilities" and the result is a weekly wage less than the minimum, those deductions are illegal.

(i) Deductions for otherwise permissible board, lodging, and other facilities are illegal only if the charge made includes a profit to the employer and that profit reduces the employee's cash wage below the minimum. If the cash wage plus the "reasonable cost" (which may not include a profit) equals the minimum wage, there is no violation.

(2) Other Deductions

(a) Taxes owed by the employee such as social security and withholding.

(b) Deductions voluntarily authorized by the employee including union dues pursuant to a collective bargaining agreement; purchase of savings bonds; payment of insurance premiums; and voluntary contributions to church, charitable, fraternal, athletic or social organizations. 29 C.F.R. § 531.39 and 29 C.F.R. § 531.40.

(c) Deduction where the employer is legally obligated by court order to pay the sum to the creditor of an employee such as garnishments, wage attachments, trustee process or bankruptcy as long as the employer does not derive a benefit from the transaction. 29 C.F.R. § 531.39(a).

(3) Unlawful Deductions

(a) Deductions for cash register shortages resulting from unaccountable circumstances, mathematical errors, and customers leaving without paying checks are not allowed. When an employee admits to or is convicted of misappropriation of funds, it may be lawful to deduct the funds from the employee's wages even if it reduces the wages below the statutory minimum. U.S. Dept. of Labor, Wage & Hour Div., Opinion Letter (Oct. 1, 1973).

(b) Where the employer is a creditor of the employee deductions below the minimum wage is not allowed.

(c) Deductions for uniforms are not allowed where the wearing of a uniform is required by law, by the employer, or by the nature of the work. 29 C.F.R. § 531.3(d)(2); *See also* U.S. Dept. of Labor, Wage & Hour Div., Fact Sheet 16 (2009).

b. Michigan Law

(1) Except for those deductions required or expressly permitted by law or by a collective bargaining agreement, an employer must not deduct from the wages of an employee, directly or indirectly, any amount including an employee

contribution to a separate segregated fund established by a corporation or labor organization under the Michigan campaign finance act, without the full, free, and written consent of the employee, obtained without intimidation or fear of discharge for refusal to permit the deduction. M.C.L. § 408.477(1).

(2) Deductions for the benefit of the employer:

(a) A deduction for the benefit of the employer requires written consent from the employee for each wage payment subject to the deduction, and the cumulative amount of the deductions may not reduce the gross wages paid to a rate less than minimum rate. M.C.L. § 408.477(2).

(b) A nonprofit organization must obtain a written consent from an employee for deductions to that nonprofit organization that qualify as charitable contributions under federal law. However, this subsection does not require the nonprofit organization to obtain from an employee a separate written consent for each subsequent paycheck from which deductions that qualify as charitable contributions that benefit the employer are made. An employee at any time may rescind in writing his or her authorization to have charitable contributions deducted from his or her paycheck. As used in this subsection, "nonprofit organization" means an organization that is exempt from taxation under section 501(c)(3) of the internal revenue code. M.C.L. § 408.477(2).

(3) Within 6 months after making an overpayment of wages or fringe benefits that are paid directly to an employee, an employer may deduct the overpayment from the employee's regularly scheduled wage payment without the written consent of the employee if all of the following conditions are met:

(a) The overpayment resulted from a mathematical miscalculation, typographical error, clerical error, or misprint in the processing of the employee's regularly scheduled wages or fringe benefits.

(b) The miscalculation, error, or misprint described in subdivision (a) was made by the employer, the

employee, or a representative of the employer or employee.

(c) The employer provides the employee with a written explanation of the deduction at least 1 pay period before the wage payment affected by the deduction is made.

(d) The deduction is not greater than 15% of the gross wages earned in the pay period in which the deduction is made.

(e) The deduction is made after the employer has made all deductions expressly permitted or required by law or a collective bargaining agreement, and after any employee-authorized deduction.

(f) The deduction does not reduce the regularly scheduled gross wages otherwise due the employee to a rate that is less than the greater of either of the following:

(i) The minimum rate as prescribed by Michigan's minimum wage act.

(ii) The minimum rate as prescribed by the FLSA. M.C.L. § 408.477(4).

(g) An employee who believes his or her employer has violated this subsection may file a complaint with the wage and hour division within 12 months after the date of the alleged violation. M.C.L. § 408.477(6).

IV. CURRENT OVERTIME REQUIREMENTS OF THE FLSA

A. General Rule

1. Employers must pay overtime at the rate of one and one-half (1.5) times the "regular rate" of pay for each "hour worked" in excess of forty (40) hours in a seven-day workweek unless the employee is exempt from the overtime provisions or another exception is provided by the FLSA. 29 U.S.C. § 207(a)(1).

2. The determination of the "regular rate" and what constitutes an "hour worked" are heavily disputed topics and will be investigated below. This is the typical process of calculating overtime:

a. Determine how many hours in excess of forty (40) have been worked by non-exempt employee in a particular workweek.

b. Calculate the regular rate of pay for hours worked over forty (40) hours in a pay period.

c. Calculate special hourly rates on a weekly basis, if necessary.

d. Multiply the number of hours worked over forty (40) by one and one-half (1.5) times the regular rate and that amount equals the overtime premium due the employee.

B. Computing the "Regular Rate" of Pay

1. A workweek is the focus of overtime pay requirements. A workweek is generally a fixed period of 168 hours – seven consecutive 24-hour periods – which is established by the employer for each employee. It may begin on any day of the week and at any hour of the day; it need not coincide with the calendar week.

2. Each workweek stands alone even if the employee is paid on a bi-weekly or monthly basis. The regular rate of pay is an hourly rate of pay. Even where earnings are determined on a piece rate, salary rate, commission or some other basis, overtime pay due must be computed on the basis of an hourly rate derived from such earnings.

3. The regular hourly rate of pay is determined by dividing the total remuneration from employment (except the statutory exclusions) in any work week by the total number of hours actually worked in that workweek.

4. The regular rate of pay may be more than the minimum wage, but it cannot be less.

C. Statutory Exclusions from Regular Rate

1. The FLSA lists certain remuneration that should not be considered when figuring the regular rate of pay for an employee. 29 U.S.C. § 207(e). The list of items excluded includes:

a. Sums paid as gifts. Payments made as gifts at holidays or for other special occasions or as a reward where the amounts of the gifts are not measured by or dependent upon hours worked, production, or efficiency are excluded from the calculation of the regular rate of pay.

b. Discretionary bonus payments. Bonus payments can be excluded from the regular rate if they are truly discretionary: i.e. both the

payment itself and the amount of the payment must be determined at the sole discretion of the employer at or near the end of a period of time for which the bonus is provided, and the payments are not made under any prior contract agreement or promise causing the employee to expect such payments regularly. Payments made pursuant to a bona fide profit-sharing plan or a bona fide thrift or savings plan meeting the requirements of the Department of Labor can also be excluded from the regular rate.

c. Payments made for occasional period when no work is performed. This includes vacation, holiday, illness, or time off for the failure of the employer to provide sufficient work, which payments are not made as compensation for actual hours of employment.

d. Travel and other expenses. These payments are not included in the regular rate if incurred by an employee in the furtherance of the business of the employer and are properly reimbursable by the employer.

e. Overtime compensation. Extra compensation provided by a premium rate for hours worked in excess of eight (8) hours in one day (per an agreement or collective bargaining agreement) or forty (40) hours per week is excluded, unless another exception applies.

f. Premium pay for certain days. Extra compensation provided by a premium rate for work on Saturdays, Sundays, holidays or other regular days of rest may be excluded if the premium rate is not less than one and one-half (1.5) times the rate established in good faith for like work performed on other days or non-overtime hours.

g. Insurance or retirement plan payments. Irrevocable contributions by an employer to a trustee or a third party pursuant to a bona fide plan for providing retirement benefits or health, life or accident or similar benefits for employees.

h. Contractual premium rate. Extra compensation provided by a premium rate pursuant to a collective bargaining agreement or employment contract for work outside of the normal hours established in good faith by the agreement as the basic or regular work day where the premium rate is not less than one and one-half (1.5) times the rate established in good faith for like work performed during the workday or workweek.

i. Call back premium pay. Under the same logic and rules as other overtime or premium pay.

j. Severance pay.

k. "Belo" Plans. Special plans are available such as "Belo" plans, which are a form of guaranteed compensation including a predetermined amount of overtime. These plans allow the employee the security of set weekly income and allow the employer to anticipate and control labor costs and bookkeeping calculations. There are four specific requirements for enforceable Belo plans including:

(1) a specific agreement between the parties:[1]

(2) a guarantee of overtime work;

(3) a guaranteed number of weekly hours (which cannot exceed 60 per week); and

(4) the employees' duties must necessitate irregular hours of work.

D. Inclusions in the Hourly Rate

The definition of the "regular rate" of pay includes "all remuneration" for employment that is paid to or on behalf of an employee. Among the items to be included in the regular rate of pay (other than salary or wages) are:

1. Non-cash Payments. Payments made other than in the form of cash, including goods, board, lodging, prizes etc. 29 C.F.R. § 778.116.

2. On-call pay. 29 C.F.R. § 778.223.

3. Non-discretionary bonuses. Bonuses promised for accuracy of work, good attendance, continuation of the employment relationship, incident, production, or quality of work and bonuses announced at the beginning of a term. 29 C.F.R. § 778.208.

4. Commission payments. 29 C.F.R. § 778.117.

5. Non-overtime premium payments. 29 C.F.R. §§ 778.207-209.

6. Lunch, meal, or traveling expenses. Unless the expense is incurred on the employer's behalf or for the employer's benefit. (e.g., supper money while working late or travel expenses due to temporary movement of work location). 29 C.F.R. § 778.217.

[1] While a writing is not technically required, it is prudent to create a written agreement to eliminate any ambiguities and show the existence and terms of the agreement.

E. Special "Regular Rate" Rules

1. Piece rate

    a. Where an employee is compensated on a piece rate basis (so much per item, gross or dozen), the regular rate is computed by adding the total earnings for the work week to all other piece rate earnings (such as bonuses) and any sums paid for waiting time. This amount is then divided by the number of hours worked that week to obtain the regular hourly rate of pay.

    b. There is an alternative method for calculating regular rate for a piece worker (29 C.F.R. § 778.418), where there is a prior agreement and certain conditions are met.

    c. Generally the employer will have to maintain very exhaustive and detailed records of production and worked in case overtime pay is ever called into question.

2. Day or job rate

    An employee may be paid a flat sum for a days work or for doing a particular job without regard to the number of hours worked. In that case the employee's regular rate is the total of all sums received (at such day rates or job rates) in the workweek divided by the total number of hours actually worked.

3. Salaried employees (non-fluctuating workweek)

    Divide the salary by the number of hours worked to convert to a regular hourly rate.

4. Salaried employees (fluctuating workweek)

    To determine the regular rate for a salaried employee paid on a fluctuating workweek, divide the salary by the number of hours worked in the week. If the calculated rate is below the minimum wage, the employer must make up the difference.

5. Employees working at two or more rates

    a. For example, covering for absent workers in another classification for part of the workweek.

    b. Add up all amounts earned from the two pay rates and divide by the number of hours worked. This weighted average constitutes the hourly rate for that week.

c. Alternatively, if agreed to by the employee, the employer can be paid overtime based on the rate paid for the job actually worked in the overtime hours.

6. Bonuses, commissions and incentive pay in the regular rate

a. Such payments are added in to calculate the total straight-time pay.

b. If a workweek in the commission or bonus pay period did not have any overtime hours, such allocations have no effect with respect to overtime pay.

c. Subsequent payment of bonuses, commissions, or incentive pay will necessitate a recalculation of the regular rate of pay plus an additional overtime payment, which may be well after the overtime hours were actually worked.

F. Special Hourly Rates Calculated On A Weekly Basis May Be Necessary

1. Where an employee works in two job classifications (receiving different hourly rates in a given workweek) overtime is based upon a blended (weighted) average wage earned for that week unless prior arrangements have been made with the employee or a union.

2. Non-exempt salary employees may agree to be paid at a regular rate equal to the salary divided by forty (40) hours or a rate equal to the salary divided by the number of hours worked. 29 C.F.R. § 778.114.

3. Wages can be paid in any combination of cash, check, (or similar medium), lodging, board, other facilities, and tips. There are specific rules for using any alternate forms of compensation.

G. Compensable Time Under the FLSA and the Portal-To-Portal Act

1. The Portal-to-Portal Act, 29 U.S.C. §§ 251 *et seq*., was passed in 1947 in response to the judicial expansion of the term "hours worked" in the FLSA. After the FLSA's enactment in 1938, the courts began to include in the definition of "hours worked" a number of incidental job-related activities, such as time spent by employees walking between the entrance to a manufacturing plant and the employee's actual work location. The Portal-to-Portal Act specifically excludes from the FLSA's minimum wage and overtime pay requirements the following:

a. time spent by an employee "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities" of the employee, unless such activities are paid for in accordance with a contract, custom or practice; and

b. time spent on activities that are performed before or after the employee's principal work activities, unless such activities are paid for pursuant to a contract, or custom or practice. 29 U.S.C. § 254.

2. Thus, travel between home and work is not considered compensable time, even in situations where employees work at more than one job site. However, such time is compensable if the employer has a practice of paying for such time or if payment is required by a contract, such as a collective bargaining agreement. Travel that is part of an employee's workday, such as traveling from one job site to another, is considered part of the employee's hours worked, and must be paid.

3. More recently, the Supreme Court unanimously held that time spent donning and doffing protective gear and walking from the locker rooms to the floor of a meat processing plant was working time regardless of the employer's practice of paying such time or if payment is required by a contract. The Court reasoned that donning safety gear is a "principal activity" because it is an "integral and indispensable" part of the employees' "principal activities." *IBP, Inc., v. Alvarez*, 546 U.S. 21, 42 (2005).

H. Employees "Suffered Or Permitted" To Work Beyond The Normal Workday

Generally, an employee who is "suffered or permitted" to work should be compensated for their time spent actually working. The employer must know or have a reason to know that the employee is working or the time will not be compensable.

I. Waiting Time

1. Whether or not waiting time is compensable is usually a function of the employment relationship. If the employee is engaged by the employer to wait for work, that time is usually compensable. On the other hand, if the employee is merely waiting to be engaged by the employer, that time is generally not compensable. If the time spent is time that the employee could use freely on his own, then that time is generally not compensable. Similarly, if the employer essentially controls the time spent waiting, the time spent waiting is generally compensable.

2. These determinations are dependent upon the facts of the employment relationship. Employers should investigate each case carefully to determine if waiting time spent by a particular employee is compensable.

J. "On-Call" Time

1. There are many similarities between "on-call" time and waiting time. Like waiting time, "on-call" time is usually determined by the restrictions on the employee with regard to the use of that time for personal reasons.

If the employer is essentially controlling the employees time spent "on-call", the time is generally compensable.

2. There is a list of factors used to determine whether an employee has the use of on-call time for personal reasons, so that the time is non-compensable under the FLSA. The list includes the following factors:

   a. whether the employee is required to remain on the employer's premises while on-call;

   b. whether the employee's movements are subject to "excessive" geographical restrictions while on-call;

   c. whether the frequency of calls received is unduly restrictive of the employee's time;

   d. whether a fixed time limit for response to calls received is unduly restrictive of the employee's time;

   e. whether employees can easily trade shifts or on-call responsibilities;

   f. whether restrictions placed on an employee's time while on-call may be eased through the use of a pager; and

   g. whether the employee actually engaged in personal activities during the on-call period."[2]

K. Sleeping Time

Generally, time spent sleeping on the job is not compensable. There are exceptions to the general rule, however. For example, where an employee works shifts of less than 24 hours' duration, he/she may receive credit for having worked all hours if they sleep part of the time. Absent an agreement to the contrary, where an employee is required to be on duty for 24 hours or more, sleeping periods of 8 hours or less may be excluded from "hours worked" if: 1) an express or implied agreement excluding sleeping time exists; 2) adequate sleeping facilities for an uninterrupted night's sleep are furnished by the employer, 3) at least five (5) hours of sleep is possible during the scheduled sleeping periods; and 4) interruptions to perform duties are considered hours worked. 29 C.F.R. §§ 785.21-.22.

L. Rest and Meal Periods

[2]See *Pabst v. Oklahoma Gas & Elec. Co.*, 228 F.3d 1128, 1132-33 (10th Cir. 2000); *Owens v. Local No. 169, Ass'n of Western Pulp & Paper Workers*, 971 F.2d 347, 351 (9th Cir. 1992).

1. Federal law does not require rest periods. Rest periods of 20 minutes or less, however, are included as hours worked. 29 C.F.R. § 785.18.

2. Bona fide meal periods (as opposed to coffee or snack breaks, which are generally compensable) are excluded from work time. 29 C.F.R. § 785.19. A meal period is bona fide if the employee is relieved of all duties and responsibilities for thirty (30) minutes or more to eat a meal. The regulations further provide that if the employee is required to perform any duties – whether active or inactive – while eating, the meal period is not bona fide and the time spent in eating is compensable. 29 C.F.R. § 785.19. All work that an employee performs voluntarily during meals periods need not be counted as compensable unless the employer knows or has reason to believe that work is being performed.

M. Travel Time

1. The time spent traveling between home and work is generally not compensable. There are exceptions to the general rule, however. Travel time of an employee caused by an emergency call to a distant location after having returned from the work location that same day is generally compensable. If the emergency call required the employee to return to the place of work, that travel time is generally not compensable.

2. Where travel to and from work is integral and indispensable to the employee's principal activity, the travel time is generally compensable, despite the Portal-to-Portal Act. Also, travel time that is part of the employee's principal activity during the workday is also compensable.

3. With the exception of normal commuting time, the general rule is that employees should be compensated for all travel unless it is

   a. overnight, and

   b. outside of regular working hours, and

   c. on a common carrier, and

   d. where no work is done.

N. Other Types of Working Time

The following is a list of other activities not construed as principal by means of employee function but, nevertheless, are compensable:

1. Fire drills or other disaster drills

2. Labor-management committee meetings

3. Roll calls occurring at the beginning of the workday

4. Grievance processing and assistance unless precluded by contract

5. Time spent in waiting for and receiving medical attention at work or at the employer's discretion during work hours.

V. EMPLOYEES WHO MAY BE EXEMPT FROM OVERTIME

A. Overview Of White Collar Exemptions

Employees must be paid overtime for all hours worked in excess of forty (40) hours in a workweek unless the employee is exempt from the overtime requirements. Certain employees, referred to as "white collar" (i.e., executives, administrative employees, professionals, and outside sales people), may be exempt from both the overtime and minimum wage requirements if they perform exempt work.

On August 23, 2004, new regulations promulgated by the Department of Labor (DOL) went into effect, which updated the white-collar exemptions to the overtime requirements of the FLSA. The new regulations comprised a comprehensive overhaul of the former rules, some of which had not been updated since 1949. The DOL's stated reasons for the changes were to update and simplify the administration of the regulations by employers and DOL investigators.

On May 18, 2016, the Department of Labor issued new updates to the white-collar exemptions, which will go into effect on December 1, 2016.

B. Highlights Of The Regulations

1. Revised the minimum salary requirement to qualify for the "white collar" exemptions to $455 per week ($23,660 annually);

2. Liberalized situations in which an employer may make full-day disciplinary deductions from the salary of exempt employees for serious workplace misconduct constituting violations of written policies,

3. Created a "safe-harbor" which enables employers to enact a policy and procedure which would permit it to retain employees' exempt status where inadvertent improper deductions are made from exempt employees' salary, which would otherwise destroy the employees' overtime exemption, and

4. Limited the classifications and number of employees who would lose their exempt status where improper deductions are made from exempt employees' salaries.

To help assure that employers comply with the new regulations, the DOL established the "Overtime Security Amicus Program". Under this program, the DOL is inviting attorneys who file lawsuits on behalf of workers under the new exemption rules to contact the DOL's chief attorney, the Solicitor of Labor. The Solicitor's Office will then consider whether to file a "friend of the court" brief in support of the plaintiffs' lawsuit.

C. The Salary Basis Tests

1. Salary-Level Test. The minimum salary level for executive, administrative or professional employees to qualify for exempt states was increased to $455 per week ($23,660 annually) in 2004. In order to qualify for the overtime exemption, an employee must earn at least $455 per week on a "salary or fee basis", perform office or non-manual work, and "customarily and regularly" perform the exempt duties identified in the standard tests for the executive, administrative or professional exemptions, discussed in more detail below. In addition, the regulations establish a separate test for highly paid employees, those earning more than $100,000 a year, discussed in more detail below.

2. Salary-Basis Test. In order for an employee to qualify for the executive, administrative and professional exemptions from the overtime requirements of the FLSA, the employee must be paid on a salary basis in addition to performing duties to qualify under those exemptions. To be paid on a salary basis means that the employee "regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount … which is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.602. Employers who make improper deductions from an employee's salary fail to satisfy this requirement, thereby losing the exemption and subjecting themselves to overtime liability.

3. Impermissible Deductions. Under the rules, deductions from an exempt employee's salary **may not** be made for the following:

    a. Absences "occasioned by the employer or by the operating requirements of the business." Deductions may not be made for periods of less than a week when work is not available. 29 C.F.R. § 541.602(a).

    b. Absences due to jury duty, attendance as a witness or temporary military leave. The employer may, however, offset any jury, witness or military pay received by the employee against the salary due for the week in question. 29 C.F.R. § 541.602(b)(3).

4. Permissible Deductions. Employers **may** deduct pay from the salary of exempt employees under the following circumstances:

a. Absences from work for one or more full days [note: not less than a full day] for personal reasons, other than sickness or disability. 29 C.F.R. § 541.602(b)(1). Deductions for absences, which must be of a day or longer, for reasons of illness or disability, can only be made pursuant to a bona fide sick leave plan [again, only in increments of full days]. 29 C.F.R. § 541.602(b)(2).

b. As a disciplinary penalty imposed in good faith for violating "safety rules of major significance." 29 C.F.R. § 541.602(b)(4). This exception is very narrow. It includes only those rules relating to the prevention of serious danger to the facility, or to other employees. The example given is a rule prohibiting smoking in explosive plants, oil refineries, and coal mines. 29 C.F.R. § 541.602(b)(4).

c. Deductions may be made for unpaid disciplinary suspension of one or more full days imposed in good faith for violations of workplace conduct rules. 29 C.F.R. § 541.602(b)(5). This is a new provision. Such suspensions must be imposed pursuant to a written policy applicable to all employees, and is intended to apply only to serious workplace misconduct. The regulation gives examples of deductions for violating an employer's sexual harassment policy or workplace violence policy.

d. A proportionate part of an employee's full salary may be paid for time actually worked in the first and last weeks of employment. 29 C.F.R. § 541.602(b)(6).

e. For leaves covered under and chargeable to employees covered by the FMLA, the employer may "dock" for partial days or worked missed. 29 C.F.R. § 541.602(b)(7).

f. For public sector employees, partial days missed for personal reasons due to illness or injury, but only if pursuant to a policy or practice established pursuant to principles of "public accountability". 29 C.F.R. § 541.710.

g. In addition, employers do not have to pay the salary of an exempt employee for any week in which the employee performs no work.

5. Effect of Making an Improper Deduction

a. An employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer did not intend to pay the employees on a salary basis. The factors to consider when determining whether an employer has an actual practice of making improper deductions include, but are not limited to:

(1) The number of improper deductions;

(2) The time period during which the employer made improper deductions;

(3) The number and geographic location of employees whose salary was improperly reduced; and,

(4) Whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.

b. In the event that an employer makes improper deductions from an exempt employee's salary, the impact of such deduction is limited. The exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions. 29 C.F.R. § 541.603.

6. Safe Harbor Provision.

a. An employer can take advantage of a "safe harbor" provided for in the rule so that an exempt employee would not lose his exempt status because an employer makes an "isolated or inadvertent" error. 29 C.F.R. § 541.603(c).

b. The requirements of this "safe harbor" provision are:

(1) The employer reimburses the employee for such deductions;

(2) The employer has a clearly communicated policy that prohibits the improper pay deductions specified in 29 C.F.R. § 541.602(a), and includes a complaint mechanism; and,

(3) The employer makes a good faith commitment to comply in the future. 29 C.F.R. § 541.603(c)-(d).

c. Even if such a procedure is in place, in the event the employer is found to have willfully violated the salary-basis requirement by continuing to make improper deductions after receiving complaints, or failing to reimburse employees who have made proper complaints, then the exemptions will be lost during the applicable time period as to all employees in that same job classification working for the same managers. 29 C.F.R. § 541.603(d).

d. Employers should adopt a policy to comply with the new safe-harbor provision, including a complaint procedure.

e. Exceptions to Salary-Basis Test.

(1) Administrative, professional and computer employees may be paid on a "fee basis" rather than a "salary basis". The employee must be paid on an agreed-upon sum. Generally, a "fee" is paid for the type of job that is unique and not repeated. The time worked on the job must amount to at least $455 per week if the employee worked 40 hours. 29 C.F.R. § 541.605.

(2) The salary-level and salary-basis tests do not apply to certain computer-related occupations paid at least $27.63 per hour, outside sales employees, doctors, lawyers and teachers.

D. The White-Collar Exemption Tests

1. Executive Employees.

a. The regulations outline the following requirements to qualify as an exempt executive employee:

(1) Earn at least $455 per week on a salary basis;

(2) The employee's primary duty is managing the enterprise or a customarily recognized department or subdivision of the enterprise;

(3) Customarily and regularly directing the work of two or more employees;

(4) Having the authority to hire or fire (or such recommendations are given particular weight to hiring, firing, advancement, promotion, or any other change of status of other employees). 29 C.F.R. § 541.100.

b. The regulations also recognize as exempt an executive employee who owns at least a twenty percent (20%) equity interest in the business and is actively engaged in the management of the enterprise. Examples of "management of the enterprise" requirement include the following:

(1) Interviewing, selecting and training employees;

(2) Setting and adjusting pay and work hours;

(3) Directing the work of employees;

(4) Maintaining production or sales records for use in supervision or control;

(5) Appraising employees' productivity and efficiency;

(6) Handling employee complaints and grievances;

(7) Disciplining employees;

(8) Planning the work;

(9) Determining the techniques to be used;

(10) Apportioning the work among employees.

(11) This list is not meant to be exhaustive and other types of functions could constitute "management" activities. For example, management of processes, projects, or contracts are also appropriately considered exempt duties. 29 C.F.R. § 541.102.

c. The rules recognize that if more than 50% of one's "primary duties" are exempt, then the employee will likely be exempt.

2. Administrative Employee.

a. To qualify as an exempt administrative employee under the regulations, the employee must:

(1) Earn at least $455 per week on a salary basis;

(2) The employee's primary duty consists of the performance of office or non-manual work directly related to the management or general business operations of the employer or its customers; and

(3) Exercise discretion and independent judgment with respect to a matter of significance. 29 C.F.R. § 541.200.

b. The regulations contain a list of non-exclusive factors to consider when determining whether an employee exercises "discretion and independent judgment" with respect to matters of significance. Some of those factors are:

(1) Whether the employee has authority to formulate, affect, interpret, or implement management or operating practices;

(2) Whether the employee carries out major assignments in conducting the operations of the business;

(3) Whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business;

(4) Whether the employee has authority to commit the employer in matters that have significant financial impact;

(5) Whether the employee has authority to waive or deviate from established policies and procedures without prior approval;

(6) Whether the employee has authority to negotiate and bind the company on significant matters;

(7) Whether the employee provides consultation or expert advice to management; and

(8) Whether the employee acts on behalf of the employer with some degree of settlement authority. 29 C.F.R. § 541.202

c. One of the most significant changes in the administrative employee test is that the primary duty need only relate to management of the business, not management policies. The preamble to the revised regulations stated that such employees may engage in work that affects the operations of the business or a segment of the business, yet have nothing to do with management policies. They too should be exempt.

d. The regulations includes a non-exclusive list of "functional areas" that generally are directly related to management or general business operations. They are:

(1) Tax;

(2) Finance;

(3) Accounting;

(4) Budgeting;

(5) Auditing;

(6) Insurance;

(7) Quality control;

(8) Purchasing;

(9) Procurement;

(10) Advertising;

(11) Marketing,

(12) Research;

(13) Safety and health;

(14) Personnel management;

(15) Human resources;

(16) Employee benefits;

(17) Labor relations;

(18) Public relations;

(19) Government relations;

(20) Computer network,

(21) Internet and database administration; and

(22) Legal and regulatory compliance. 29 C.F.R. § 541.201(b).

3. Professional Employees.

The field of professional employees is broad. Although most professional employees will fall under the "learned professional" category, specific categories have been carved out of the regulations for certain exempt employees who may not otherwise qualify under this exemption. 29 C.F.R. §§ 541.300-304.

a. Learned Professional.

(1) To qualify as an exempt learned professional employee under the regulations:

(a) The employee must earn at least $455 per week on a salary or fee basis;

(b) His or her primary duty is the performance of work requiring knowledge of an advanced type in a field of science or learning (an appropriate academic degree for entrance into the particular profession);

(c) His or her knowledge is customarily acquired by a prolonged course of specialized intellectual instruction. 29 C.F.R. § 541.301.

(2) This test is similar to the old regulations. The phrase "work requiring advanced knowledge" means work which is predominately intellectual in character and which requires the consistent exercise of discretion and judgment. Additionally, the phrase "field of science or learning" includes the traditional professions of medicine and law, but also includes various types of chemical, physical, and biological sciences, teaching, architecture and other similar occupations. 29 C.F.R. § 541.301(c).

b. Creative Professional.

(1) The "artistic" or "creative" professionals must:

(a) Earn at least $455 per week on a salary or fee basis;

(b) Have his or her primary duty the performance of work requiring invention, imagination, originality or talent;

(c) Perform such work in a recognized field of artistic or creative endeavor such as music, writing, acting or graphic arts. 29 C.F.R. § 541.302.

(2) Determination of exempt creative professional status depends on the extent of the invention, imagination, or originality and is done on a case-by-case basis. Actors, musicians, composers, painters, novelists and other similar professionals, generally meet this requirement.

c. Computer Employees.

(1) Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption as professionals under the professional employee category. As job titles vary widely and change quickly in the computer industry, job titles are not determinative of the applicability of this exemption. This exemption applies only to computer employees whose primary duties consist of:

(a) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;

(b) 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;

(c) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or,

(d) A combination of the aforementioned duties, the performance of which requires the same level of skills. 29 C.F.R. § 541.400(b).

(2) Additionally, section 13 (a)(1) exemption applies to any computer employee compensated on a salary basis of not less than $455 per week. The computer employee exception, found in Section 13(a)(17), applies to any computer employee compensated on an hourly basis at a rate not less than $27.63 an hour. The exemption for employees in computer occupations does not include employees engaged in the manufacture or repair of computer hardware and related equipment or employees whose jobs require the ongoing use of computers. 29 C.F.R. § 541.401 Computer employees may also have executive and administrative duties which otherwise qualify the employees for exemption under the regulations. 29 C.F.R. § 541.402. Help desk personnel are rarely eligible for the computer exemption.

4. Outside Sales Employees.

a. The term "employee employed in the capacity of outside salesman" means any employee whose primary duty is:

(1) making sales that include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property; or

(2) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer. 29 C.F.R. §§ 541.500-.501.

The regulations define "sales" to include "any sale, exchange, contract to sell, consignment for sale, or other disposition." 29 C.F.R. § 541.501.

b. Additionally, the outsides sales employee must be "customarily and regularly engaged away from the employer's place or places of business in performing such primary duty." 29 C.F.R. § 541.500(a)(2).

c. The salary test requirements do not apply to outside sales employees. They are also exempt from minimum wage requirements.

d. Significant change in rules: DOL eliminated the rule that exempt outside sales employees may not perform work unrelated to outside sales for more than 20 percent of the hours worked in a workweek. The requirement was eliminated because the specific percentage limitations on the amount of time have been eliminated from other exemptions, the prior rule was hard to administer and it was difficult to track time of outside sales employees.

e. An outside sale means that the sale is made at the customer's place of business or home. It does not include sales made by mail, telephone or the Internet, unless it is an adjunct to personal calls. Thus, if a salesperson is using his home as his office and sales are made from there, he is not an outside salesperson exempt from the overtime requirement. 29 C.F.R. § 541.502. A real estate agent may qualify, but not if he/she spends a significant amount of time at the real estate office. The inquiry should be whether outside sales are the realtor's primary duty.

5. Highly Compensated Employees.

The regulations carve out a special test for highly compensated employees. An employee with a total annual salary of at least $100,000 is deemed exempt if the employee customarily and regularly performs any one or more of the exempt duties of an executive, administrative, or

professional employee and, as part of the total annual salary, receives at least $455 per week paid on a salary or fee basis. 29 C.F.R. § 541.601.

E. Other Exemptions

1. Seasonal Amusement or recreational establishment

2. Agriculture and other Related Exemptions

3. Motor Carrier Exemption—exempt from overtime but not minimum wage. This exemption applies to many DOT drivers.

4. Other Transportation Exemptions

5. Domestic Employees

6. Police, Firefighter and Public Safety Personnel

7. Communications Exemptions

8. Commission Sales Exemption - inside sales if the employee is employed by a retail or service establishment, the regular rate of pay exceeds one and one-half (1.5) times the minimum wage, and more than half of the employee's compensation for a representative period (not less than one month) covers commissions on goods and services. Several requirements must be met.

F. Best Practices To Comply With The Regulations

We recommend that employers consider taking the following steps to ensure compliance with the new FLSA regulations, and take advantage of the provisions which help limit employers' potential liability under the Act.

1. Conduct Salary-Level and Salary-Basis Tests Reviews.

   a. The most obvious step is to ensure that your executive, administrative, and professional employees meet the salary-level test of receiving a weekly salary of at least $455.00. Equally important is to assure that your executive, administrative and professional employees are in fact paid on a salary or fee basis, and that deductions are not being made for reasons which establish that these employees are not in fact being paid on a salary basis, thus destroying their exemption from overtime.

   b. The most effective way to review these issues and ensure that they will not occur in the future is to train your payroll department in the basic principles of the salary-level and salary-basis tests. By training your payroll department to conduct these reviews, you

help assure that potential future problems are more likely to be avoided all together.

2. Review White-Collar Employee Duties To Ensure They Meet The FLSA Requirements.

    a. The Human Resources/Personnel Department of each employer should periodically conduct reviews to ensure that there are no changes in salary and duties, especially for certain administrative and professional positions that are more likely to be affected. For example, positions more likely to be exempt under the regulations include insurance claims adjusters, financial service industry employees, team leaders assigned to complete a major project for the employer, executive or administrative assistants, human resource managers, and purchasing agents. Positions that are less likely to qualify for a white-collar exemption under the regulations include inspectors or examiners of products, inspectors, or investigators in the public sector, as well as persons in the public "first responder" positions, such as police, fire, and emergency workers.

    b. In addition, employers should be sure to review the job descriptions of employees earning over $100,000 a year who have not previously been considered exempt. It is more than likely that such employees will be exempt under the new regulations.

3. Establish A New Policy To Qualify For The New "Safe-Harbor" Rule.

    a. The regulations permit employers to avoid liability from making improper deductions in the salary of exempt white-collar employees, and employers should enact a policy to take advantage of this "safe-harbor" provision. This means establishing a written policy prohibiting improper deductions from exempt employee salaries, establishing a complaint mechanism regarding the same, reimbursing employees for any wrongful deductions, and committing to future compliance with FLSA requirements.

    b. Employers should also periodically review the "safe harbor" policy with their employees to ensure that they understand the policy and are complying with it.

4. Review And Revise Employment Policies And Handbooks To Provide For Salary Deductions For Major Misconduct, And Record And Keep Track Of Hours Of Work.

    a. In conjunction with the salary-level and salary-basis tests reviews conducted by your Payroll Department, have your Human

Resources/Personnel Department review and revise your employment policies and handbook to bring them into compliance with the FLSA regulations.

b. Establish a policy that indicates that all employees, including exempt employees, may be subject to disciplinary suspensions of one or more full days, as well as discharge, for major workplace misconduct, including but not limited to, sexual harassment, drug and alcohol abuse, or violations of state or federal laws.

c. Employers should consider reviewing their policy regarding recording and tracking hours of work of employees, and possibly requiring even exempt white-collar employees to record their time. Perhaps the single biggest factor contributing to significant employer liability under the FLSA are situations where the employer did not have a reliable system to record and keep track of employee work hours. In these cases, the DOL and courts permit employees to provide their own estimates as to how much time they worked. Not surprisingly, in these situations employees typically recall their working hours to be much more substantial than employers believe to be true. One of the best ways to limit liability for potential overtime problems is to ensure that there is a reliable system in place accurately recording the hours worked by all employees.

5. Consider Revising Job Descriptions To Help Document Exempt Status Of White Collar Employees.

a. Consider reviewing job descriptions to better reflect the actual job duties of exempt employees, using terminology consistent with that used in the regulations.

b. The revised job descriptions should elaborate upon an employee's primary duty, which can in effect document why the employer classified the position as exempt.

VI. CHILD LABOR REQUIREMENTS

A. Oppressive Child Labor

The FLSA prohibits the employment of "oppressive child labor" in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce. 29 U.S.C. § 212(c). Child labor is deemed "oppressive" when a minor is *employed* below the minimum age specified for a particular occupation. 29 C.F.R. § 570.1(b). The minimum age is generally 16 years, although it may be 18 year in certain hazardous occupations. 29 C.F.R. § 570.2. Prudent employers should obtain a proof of age for all employees under the age of 19. 29 C.F.R. § 570.5.

B. Employee Activities – By Ages

The following is a breakdown of the minimum ages and activities permitted by specific age groups:

1. No Minimum Age Required for Some Work

    a. Farm work if the work is performed outside of school hours for the school district where they live. 29 C.F.R. § 570.122(a)(1).

    b. Newspaper delivery

    c. Homework making wreaths of natural evergreens

    d. Theatrical employment

2. Minors 14 and 15 Years of Age

    a. Permitted to work in most non-hazardous non-agricultural occupations as long as employment does not interfere with the minor's schooling, health, or well-being. *See* 29 C.F.R. § 570.34.

    b. Employment is outside of school hours, except that children enrolled in work-training programs may participate during school hours if certain requirements are met. 29 C.F.R. § 570.35-.36.

    c. All work is performed between the hours of 7:00 a.m. and 7:00 p.m., except during summer (June 1-Labor Day) when minors may work until 9:00 p.m. 29 C.F.R. § 570.35(a)(6).

    d. Employment does not exceed 3 hours on any school day and 8 hours on any non-school day, and does not exceed 18 hours in a week during any part of which school is in session or 40 hours in other weeks. 29 C.F.R. § 570.35(a)(1)-(5).

e. Workers may not drive on public roads as part of employment. 29 C.F.R. § 570.52.

3. Between the Ages of 16 and 18 Years Old

a. Manufacturing, mining or processing of goods and occupations requiring any duties in workplaces where such operations take place.

b. Operation of hoisting apparatus or power-driven machinery other than office machines unless forbidden by hazardous occupation orders.

c. Operation of or helper service on motor vehicles

d. Public Messenger Service. Occupations connected (except office or sales work) with:

(1) Transportation of persons or property by rail, highway, air, water, pipeline, or other means. Exception for office or sales work is inapplicable to work on media transportation.

(2) Warehousing and storage.

(3) Communications and public utilities.

(4) Construction, including demolition and repair. Exception for office or sales work is inapplicable to work at actual site of construction operations.

e. Hazardous farm work, except on a farm owned or operated by a parent or guardian or if the minor is a vocational agricultural student learner where lesser minimum ages apply.

f. Employment in agriculture during school hours.

g. Workers aged 16 may not drive on public roads as part of employment. 29 C.F.R. § 570.52(b).

h. Workers aged 17 may drive cars and trucks as work, if:

(1) the driving is only during daylight hours;

(2) the employee has a valid license and no moving violations;

(3) the vehicle has a seat belt that the employee is directed to use;

(4) the vehicle weighs 6,000 pounds or less;

(5) the driving does not include towing of vehicles, urgent, time-sensitive deliveries or route deliveries or sales, or the transportation of goods or passengers;

(6) the driving is done within 30 miles of the employer's business;

(7) the driving does not entail traveling more than twice a day from the employer's business; and

(8) the driving is no more than one third of the employee's working time in one day and no more than twenty percent (20%) of the employee's time in a workweek. 29 C.F.R. § 570.52.

4. 18 Years and Up. A minimum age of 18 years applies for employment in any occupation that the Secretary of Labor has designated as hazardous. The following nonagricultural occupations have been declared hazardous:

a. Occupations in or about plants manufacturing or storing explosives or articles containing explosive components. 29 C.F.R. § 570.51.

b. Occupations of motor-vehicle driver and outside helper, with exemptions for incidental, occasional and school-bus driving. 29 C.F.R. § 570.52.

c. Coal-mine operations. 29 C.F.R. § 570.53.

d. Logging operations and occupations in the operation of any sawmill, lath mill, shingle mill, or cooperate-stock mill. 29 C.F.R. § 570.54.

e. Occupations involved in the operation of power-driven woodworking machines. 29 C.F.R. § 570.55.

f. Occupations involving exposure to radioactive substances. 29 C.F.R. § 570.57.

g. Occupations involved in the operation of elevators and other power-driven hoisting apparatus. 29 C.F.R. § 570.58.

h. Occupations involved in the operation of power-driven metal forming, punching, and shearing machines. 29 C.F.R. § 570.59.

i. Occupations involving in mining, other than coal. 29 C.F.R. § 570.60.

j. Occupations in or about slaughtering and meat packing establishments and rendering plants. 29 C.F.R. § 570.61.

k. Occupations involved in the operation of power-driven bakery machines. 29 C.F.R. § 570.62.

l. Occupations involved in the operation of power-driven paper-products machines. 29 C.F.R. § 570.63.

m. Occupations involved in the manufacture of brick, tile, and similar products. 29 C.F.R. § 570.64.

n. Occupations involved in the operation and maintenance of circular and band saws and guillotine shears. 29 C.F.R. § 570.65.

o. Occupations involved in the work of wrecking, demolition, and shipbreaking operations. 29 C.F.R. § 570.66.

p. Occupations involved in roofing operations on or about a roof. 29 C.F.R. § 570.67.

q. Occupations involved in excavation work. 29 C.F.R. § 570.68.

VII. RECORDKEEPING REQUIREMENTS OF THE FLSA

A. General Requirements

1. Section 211(c) of the FLSA requires that employers subject to the Act maintain and preserve records for covered employees under guidelines established by the regulations. Although the form of the records is not outlined in the Act or the regulations, there are specifics concerning what types of information must be recorded.

2. The list of general information required to be maintained by employers is:

   a. The employee's full name used for Social Security purposes. 29 C.F.R. § 516.2(a)(1).

   b. The employee's residence address with zip code. 29 C.F.R. § 516.2(a)(2).

   c. The date of birth of employees less than 19 years of age. 29 C.F.R. § 516.2(a)(3)

   d. The employee's sex, and the occupation of the employee. 29 C.F.R. § 516.2(a)(4)

   e. The time of day and day of the week on which the employee's workweek begins. 29 C.F.R. § 516.2(a)(5).

f. For each workweek in which any overtime compensation is due, a statement of the employee's regular hourly rate, the basis on which wages are paid, and the nature and amount of each payment excluded from the regular rate under. 29 C.F.R. § 516.2(a)(6).

g. The number of hours worked each workday and the total number of hours worked each workweek. 29 C.F.R. § 516.2(a)(7).

h. The total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation. 29 C.F.R. § 516.2(a)(8)

i. The total weekly premium pay for overtime hours worked. 29 C.F.R. § 516.2(a)(9).

j. The total additions to or deductions from wages paid each pay period, including employee purchase orders or wage assignments. 29 C.F.R. § 516.2(a)(10).

k. The total wages paid each pay period. 29 C.F.R. § 516.2(a)(11).

l. The date of payment and the pay period covered by payment. 29 C.F.R. § 516.2(a)(12).

B. Records Regarding Exempt Employee

1. In addition to maintaining certain records for employees covered by the Act, the Act requires employers to keep certain records concerning exempt employees. 29 C.F.R. § 516.3.

2. These records include:

a. The employee's full name used for Social Security purposes.

b. The employee's residence address with zip code.

c. The date of birth of employees less than 19 years of age.

d. The employee's sex, and the occupation of the employee.

e. The time of day and day of the week on which the employee's workweek begins.

f. Total wages paid each pay period.

g. Date of payment and the pay period covered by payment.

3. We recommend that the employer also record the hours worked by exempt employees.

C. Time Limits For Maintaining Records

1. The employer must maintain the following records for three years from the date of last entry. 29 C.F.R. § 516.5; 29 C.F.R. § 1620.32.

    a. Employee name, home address, gender, occupation, and if a minor, date of birth

    b. Start time and date for workweek and length of work period—per employee, unless uniform schedule for all worker

    c. Payroll records required for each category of exempt/nonexempt worker under FLSA

    d. Regular hourly rate of pay used for overtime calculations and basis for pay rate

    e. Amount and nature of any payment excluded from regular rate

    f. Daily and weekly hours worked and total straight-time earnings per day/week

    g. Total premium pay for overtime hours, excluding straight-time pay for those hours

    h. Total additions to/deductions from pay per pay period, including employee records indicating dates, amounts, and nature of items added/deducted

    i. Total wages paid each pay period

    j. Date of payment and the pay period covered

    k. Schedule of daily and weekly hours normally worked by employee on fixed schedule, indicating actual daily/weekly hours for any week schedule not followed

    l. Records of retroactive wage payments

    m. Collective bargaining agreements, trusts, employment contracts, or written memos summarizing oral agreements relating to:

    n. Special payments not included in regular rate

    o. Irregular workweek hours

    p. Piece rates or commissions for retail/service employees

    q. Certificates and notices required under wage-hour regulations

r. Sales and purchase records documenting total volume of sales/business and total volume of goods purchased/received per week/month/quarter/other period used by business

2. The employer must keep additional records required for workers employed under special certificates for three years from last date of employment and/or expiration of certificate. 29 C.F.R. § 519.7; 29 C.F.R. § 520.203, -412; 29 C.F.R. § 525.16.

3. The employer must maintain the following records for two years from date of last entry or last effective date. 29 C.F.R. § 516.6; 29 C.F.R. § 1620.32.

   a. Daily work-time or production (e.g., units produced) for employees, if used for wage payments

   b. Wage-rate tables

   c. Order, shipping, and billing records

   d. Records of additions to or subtractions from wages paid

   e. Documentation of the basis for payment of any wage differential to employees of the opposite sex in the same establishment

4. Under the Equal Pay Act, the employer must maintain the following records for two years from date created. 29 C.F.R. § 1620.32.

   a. Wage payment and wage-rate records

   b. Job evaluations

   c. Job descriptions

   d. Merit or seniority systems

   e. Collective bargaining agreements

   f. Explanations of basis for any wage differential paid to employees of the opposite sex in the same job

5. Employers must maintain the age certificates for minors for the duration of employment. 29 C.F.R. § 570.6.

VIII. ADMINISTRATIVE ENFORCEMENT OF THE FLSA

A. The Act expressly prohibits an employer from retaliating against an employee for asserting his or her rights under the FLSA. A wrongfully discharged employee is entitled to receive back pay, attorney fees, and front pay, if reinstatement to employment is not appropriate.

B. Employees may not waive their right to the overtime or minimum wages required by the Act; attempts at such waivers are consistently rejected by the courts.

C. The fact that an employee's wage claims may be submitted to binding arbitration does not preclude the employee from bringing an action in court under the FLSA.

D. The Wage and Hour Division of the Department of Labor administers and enforces the FLSA. Department of Labor compliance officers have the right to inspect at any time records pertaining to the wages and hours worked of employees, although such investigations are typically triggered by an employee complaint. Employers have the right to be represented by an attorney at any time in a Department of Labor investigation.

E. The FLSA is enforced in a number of ways:

1. First, the Department of Labor may sue to recover back wages and liquidated damages in an amount equal to the back wages sought on behalf of aggrieved employees. The Department can also seek injunctive relief to restrain employers from violating the law.

2. Second, for willful violations of the law, the Department of Justice can bring a criminal action. Persons convicted of willful violations of the law can be subject to a fine of not more then $10,000, imprisonment for not more than six months, or both. 29 U.S.C. § 216(a).

3. Third, employees, either individually or collectively, may bring private suits to enforce the Act. As with the Department of Labor, employees may seek both back wages and liquidated damages. Such actions may be brought in either the state or federal courts, except that actions by state employees must be brought in the state court.

F. Enforcement of the Portal-to-Portal Act is the same as enforcement of the FLSA.

G. The statute of limitations for civil enforcement actions under the Act are two (2) years for inadvertent violation, and three (3) years for willful violations. A willful violation has been construed to mean a situation where the employer knew or had a reckless disregard for whether its conduct was prohibited by the FLSA. 29 U.S.C. § 255(d).

IX. TOP TEN PITFALLS UNDER THE FLSA

A. Maintain accurate time records signed by all employees. Remind and notify all employees that actual time worked must be reflected on time sheets. Include this information in employee handbooks with a clear explanation of FLSA laws.

B. Post the required FLSA rights posters where non-exempt employees can readily see them. The FLSA requires the posters to be in "conspicuous places."

C. Train supervisory staff about how records should be completed and how records should be maintained (note: all time records should be maintained for at least three years).

D. Review time records carefully to ensure that employees not being paid overtime are in fact working less than forty (40) hours in a week. Review should occur at least quarterly. Require written approval before overtime is authorized and require employees to sign time logs or records.

E. Remember the "combination" employee working for the employer and a possibly related entity. Examine the structure of possible joint-employer situations to avoid employment of any personnel for more than forty (40) hours a week.

F. Pay for all overtime at the end of the pay period in which it is worked, whether the overtime was properly approved or not.

G. Minimize (or, if possible, eliminate) dual assignments where the normal combined number of hours to be worked exceeds forty (40) per workweek. Adopt a system-wide policy regarding dual employment.

H. Require written approval before overtime is authorized. Discipline or take other appropriate action with respect to an employee who works overtime without prior written consent from a supervisor.

I. Adopt a policy to take advantage of the "safe harbor" rule with respect to the overtime exemption for white-collar employees.

J. When in doubt, consult an expert. The regulations are numerous and contain many nuances and exceptions.

Note: This document is not intended to give legal advice. It is comprised of general information. Employees facing specific issues should seek the assistance of an attorney.