

# **Elite 2019**

## **Pro Service Leadership Conference**

### **Complying with Wage-Hour Regulations**

Conducted by



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# Fair Labor Standards Act

## INTRODUCTION

Trying to understand the complexities and seeming contradictions of Federal Wage-Hour regulations is a challenge that has plagued automotive service dealer executives for years. Those of us in and close to the automotive service industry are worried by the increased incidences of large back wage liabilities being computed against automotive service dealers nationwide. Failure to meet prescribed Wage-Hour guidelines is resulting in serious consequences, including back wage liabilities, fines, court-ordered compliance, and jail terms. Recent cases of back wage liability have shown that liability in tens of thousands of dollars is possible even for a single company.

This manual is designed to provide resource material to assist automotive service dealers in determining and maintaining Wage-Hour Compliance. Included are the possible exemptions, which are available, as well as methods of compensation, which meet Federal Wage-Hour requirements.

It is possible to develop and maintain a Wage-Hour Compliance Program -- one that doesn't compromise good business or personnel practice. The fact that you are reading this manual is an excellent beginning toward that goal.

The staff of SESCO Management Consultants of Bristol, Tennessee has developed this management guide. Providing Wage-Hour compliance systems to management for over 70 years has given the staff a vast range of firsthand knowledge of how Wage-Hour compliance can be implemented without compromising good business practices. Should you have any question understanding any portion of this guide, don't hesitate to contact a member of the SESCO staff for further clarification.

It should be noted that some state standards might prove more restrictive than federal guidelines for compliance purposes. In such cases, the more stringent regulations apply (i.e., California requires overtime over eight [8] hours per day. This would prevail over the federal 40-hour weekly standard.)

## DETERMINING COVERAGE

The Fair Labor Standards Act of 1938 is the basis for coverage and compliance standards of the Federal Wage-Hour Division. This Act has been amended many times to increase the minimum wage level and include more and more workers under the definition of "coverage". Simply stated, coverage will extend to your organization in the following ways:

1. **Enterprise Coverage** – If a business has two or more employees engaged in Interstate Commerce or the production of goods for commerce or the handling, selling, or otherwise

working on goods that have moved in interstate commerce, and has gross annual sales volume of \$500,000 or more, then **all** employees of the enterprise are covered under the Fair Labor Standards Act.

This coverage is on an enterprise basis, meaning if an organization had two establishments, each doing \$350,000 per year in sales; they **would** be covered since their combined volume exceeded \$500,000. If a business does less than \$500,000, the individual coverage would apply.

2. **Individual Coverage** – Any employee is covered who is engaged in Interstate Commerce. The term engaged in commerce means that the individual employee's work involves the movement of persons, goods or information across state lines. This includes workers who purchase or order goods from businesses in other states, those who unload, unpack, check or otherwise goods on receipt directly from outside the state, those who maintain records on such interstate activity, and those who regularly use channels of commerce such as the telephone or mails for interstate communication.

## **THE IMPACT OF COVERAGE**

From these definitions, we can see that virtually every employee of an automotive service dealer is covered under the Fair Labor Standards Act. This will mean that **all** employees must:

1. Record their true and accurate hours of work on a daily basis.
2. Receive minimum wage for all hours worked.
3. Receive time and one-half for all hours worked over forty (40) in a workweek,

**... unless otherwise exempt.**

The phrase "unless otherwise exempt" is of key importance to you and your organization. We will now begin a search to see what exemptions can apply to your organization -- freeing employees from the requirements of recording hours, receiving minimum wage, or overtime pay. Whether or not you choose to use any of these exemptions is voluntary. In addition, unless **all standards or tests** of a given exemption are met, an exemption would be considered invalid.

## **A SEARCH FOR EXEMPTIONS (FROM OVERTIME)**

We will now explore the application of every exemption that is currently available to automotive service dealers. There are essentially two classes of exemptions – “COMPLETE EXEMPTIONS” and “PARTIAL EXEMPTIONS”. In the application of a complete exemption, the individual would be exempt from recording hours, receiving minimum wage, or overtime pay. A partial exemption means the individual is exempt only from overtime, but still must

record hours and receive minimum wage for all hours worked. The following is a condensed summary of each of these complete exemptions:

## **EXPANDED EXPLANATION OF COMPLETE EXEMPTIONS**

### **The “Executive” Salary Classification Tests**

#### **Executive Exemption**

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than \$455 per week;
- The employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

#### **Primary Duty**

“Primary duty” means the principal, main, major or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.

#### **Management**

Generally, “management” includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees’ productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

## **Department or Subdivision**

The phrase “a customarily recognized department or subdivision” is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function.

## **Customarily and Regularly**

The phrase “customarily and regularly” means greater than occasional but less than constant; it includes work normally done every workweek, but does not include isolated or one-time tasks.

## **Two or More**

The phrase “two or more other employees” means two full-time employees or their equivalent. For example, one full-time and two half-time employees are equivalent to two full-time employees. The supervision can be distributed among two, three or more employees, but each such employee must customarily and regularly direct the work of two or more other full-time employees or the equivalent. For example, a department with five fulltime nonexempt workers may have up to two exempt supervisors if each supervisor directs the work of two of those workers.

## **Particular Weight**

Factors to be considered in determining whether an employee’s recommendations as to hiring, firing, advancement, promotion or any other change of status are given “particular weight” include, but are not limited to, whether it is part of the employee’s job duties to make such recommendations, and the frequency with which such recommendations are made, requested, and relied upon. Generally, an executive’s recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include occasional suggestions. An employee’s recommendations may still be deemed to have “particular weight” even if a higher level manager’s recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee’s change in status.

## **Exemption of Business Owners**

Under a special rule for business owners, an employee who owns at least a bona fide 20-percent equity interest in the enterprise in which employed, regardless of the type of business organization (e.g., corporation, partnership, or other), and who is actively engaged in its management, is considered a bona fide exempt executive.

## **Highly Compensated Employees**

Highly compensated employees performing office or non-manual work and paid total annual compensation of \$100,000 or more (which must include at least \$455 per week paid on a salary

or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

## **The "Administrative" Salary Classification Tests**

### **Administrative Exemption**

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

### **Primary Duty**

"Primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

### **Directly Related to Management or General Business Operations**

To meet the "directly related to management or general business operations" requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example from working on a manufacturing production line or selling a product in a retail or service establishment. Work "directly related to management or general business operations" includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, Internet and database administration; legal and regulatory compliance; and similar activities.

### **Employer's Customers**

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

## **Discretion and Independent Judgment**

In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term must be applied in the light of all the facts involved in the employee's particular employment situation, and implies that the employee has authority to make an independent choice, free from immediate direction or supervision. Factors to consider include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval, and other factors set forth in the regulation. The fact that an employee's decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.

## **Matters of Significance**

The term "matters of significance" refers to the level of importance or consequence of the work performed. An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly.

Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

## **Educational Establishments and Administrative Functions**

The administrative exemption is also available to employees compensated on a salary or fee basis which is at least equal to the entrance salary for teachers in the same educational establishment, and whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment. Academic administrative functions include operations directly in the field of education, and do not include jobs relating to areas outside the educational field. Employees engaged in academic administrative functions include: the superintendent or other head of an elementary or secondary school system, and any assistants responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program; the principal and any vice-principals responsible for the operation of an elementary or secondary school; department heads in institutions of higher education responsible for the various subject



matter departments; academic counselors and other employees with similar responsibilities. Having a primary duty of performing administrative functions directly related to academic instruction or training in an educational establishment includes, by its very nature, exercising discretion and independent judgment with respect to matters of significance.

### **Highly Compensated Employees**

Highly compensated employees performing office or non-manual work and paid total annual compensation of \$100,000 or more (which must include at least \$455 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

### **The “Computer Employee” Salary Classification Tests**

#### **Computer Employee Exemption**

To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated **either** on a salary or fee basis at a rate not less than \$455 per week,

**or**, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;

- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- The employee’s primary duty must consist of:
  - 1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
  - 2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
  - 3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
  - 4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in the primary duties test described above, are also not exempt under the computer employee exemption.

### **Primary Duty**

“Primary duty” means the principal, main, major or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.

### **The "Outside Salesperson" Salary Classification Tests**

#### **Outside Sales Exemption**

To qualify for the outside sales employee exemption, all of the following tests must be met:

- The employee’s primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- The employee must be customarily and regularly engaged away from the employer’s place or places of business. The salary requirements of the regulation do not apply to the outside sales exemption. An employee who does not satisfy the requirements of the outside sales exemption may still qualify as an exempt employee under one of the other exemptions allowed by Section 13(a)(1) of the FLSA and the Part 541 regulations if all the criteria for the exemption is met.

### **Primary Duty**

“Primary duty” means the principal, main, major or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.

### **Making Sales**

“Sales” includes any sale, exchange, contract to sell, consignment for sales, shipment for sale, or other disposition. It includes the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property.

## **Obtaining Orders or Contracts for Services or for the Use of Facilities**

Obtaining orders for “the use of facilities” includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies. The word “services” extends the exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order.

## **Customarily and Regularly**

The phrase “customarily and regularly” means greater than occasional but less than constant; it includes work normally done every workweek, but does not include isolated or one-time tasks.

## **Away from Employer’s Place of Business**

An outside sales employee makes sales at the customer’s place of business, or, if selling door-to-door, at the customer’s home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer’s places of business, even though the employer is not in any formal sense the owner or tenant of the property.

## **Promotion Work**

Promotion work may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee’s own outside sales or solicitations is exempt work. However, promotion work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work.

## **Drivers Who Sell**

Drivers who deliver products and also sell such products may qualify as exempt outside sales employees only if the employee has a primary duty of making sales. Several factors should be considered in determining whether a driver has a primary duty of making sales, including a comparison of the driver’s duties with those of other employees engaged as drivers and as salespersons, the presence or absence of customary or contractual arrangements concerning amounts of products to be delivered, whether or not the driver has a selling or solicitor’s license when required by law, the description of the employee’s occupation in collective bargaining agreements, and other factors set forth in the regulation.

## **Highly-Compensated Employees**

### **Highly-Compensated Workers**

The regulations contain a special rule for “highly-compensated” workers who are paid total annual compensation of \$100,000 or more. A highly compensated employee is deemed exempt under Section 13(a)(1) if:

1. The employee earns total annual compensation of \$100,000 or more, which includes at least \$455 per week paid on a salary basis;
2. The employee’s primary duty includes performing office or non-manual work; and
3. The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

Thus, for example, an employee may qualify as an exempt highly-compensated executive if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements in the standard test for exemption as an executive.

### **Total Annual Compensation**

The required total annual compensation of \$100,000 or more may consist of commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period, but does not include credit for board or lodging, payments for medical or life insurance, or contributions to retirement plans or other fringe benefits.

### **Make-up Payments and Prorating**

There are special rules for prorating the annual compensation if employees work only part of the year, and which allow payment of a single lump-sum, make-up amount to satisfy the required annual amount at the end of the year and similar make-up payments to employees who terminate before the year ends.

### **Customarily and Regularly**

“Customarily and regularly” means greater than occasional but may be less than constant, and includes work normally and recurrently performed every workweek but does not include isolated or one-time tasks.

## **TECHNICAL REQUIREMENTS OF THE “GUARANTEED SALARY” FOR WHITE-COLLAR EXEMPT CLASSIFICATIONS**

A week is the shortest period over which the minimum guaranteed salary payments can be made in deciding whether or not the minimum salary test has been met. However, the salary requirements for "Executive," "Administrative," and "Professional" salaried employees can be paid in equivalent amounts for periods longer than a week as outlined in the following table:

	<i><b>Weekly Guarantee</b></i>	<i><b>Bi-Weekly Guarantee</b></i>	<i><b>Semi-Monthly Guarantee</b></i>	<i><b>Monthly Guarantee</b></i>
Executive	\$455	\$910	\$985.83	\$1,971.66
Administrative	\$455	\$910	\$985.83	\$1,971.66
Computer Related	\$455	\$910	\$985.83	\$1,971.66
	OR \$27.63 per hour or more, if paid hourly.			
Professional	\$455	\$910	\$985.83	\$1,971.66
Outside Sales	No minimum salary requirement.			

## **PRACTICAL APPLICATIONS OF “COMPLETE” WAGE-HOUR EXEMPTIONS FOR AUTOMOTIVE SERVICE DEALERS**

The most confusing of guidelines is the application of white-collar exemptions -- classifying who can be on a straight salary without the necessity of recording hours or receiving overtime. The white-collar exemption tests previously stated give the exact tests required for compliance. We will now explore the application of these tests and what it means from a practical standpoint.

The following job classifications are usually found to meet one of the complete white-collar exemptions without difficulty. This listing does not mean or infer automatic exemption based on the title alone, since all tests must always be met on an individual basis. However, generally speaking, these positions tend to be exempt:

<b>Position</b>	<b>Exemption Test</b>	<b>Remarks</b>
Chief Executive Officer/Owner	Executive	
Operations Manager/ Operations Supervisor	Executive	
Store Manager	Executive (with caution)	
Outside Sales	Outside Sales	Employees must be away from premises soliciting sales or service.

**Note:** Assistant Store Managers usually cannot be paid a straight salary without overtime compensation. See further information about compensation for this position under “Positions Which Usually Require Overtime Compensation.”

### **SUMMARY ANALYSIS OF PARTIAL EXEMPTIONS** (Exempt From Overtime Only)

<b>Title of Exemption</b>	<b>Typical Positions Exempted</b>	<b>Qualifications for Exemptions</b>
Retail Commission Sales 7(i)	Commission employees such as mechanics, salespersons, counter- persons, assistant store managers	<ol style="list-style-type: none"> <li>1. Establishment must be retail</li> <li>2. Employee’s regular rate must exceed one and one-half the minimum wage or \$10.88 an hour for a representative period of at least one month.</li> <li>3. Employee must receive more than 50% of earnings from commissions for a representative time.</li> </ol>

## EXPANDED EXPLANATION OF PARTIAL EXEMPTIONS

### Retail Commission Sales 7(i)

If you are classified as a “retail” organization, you would be eligible to consider the application of the retail - commission exemption. A retail organization is a business that engages in the selling of goods and services, and 75% of its annual dollar volume of sales of goods and services is not for resale and is recognized as sales or services in its particular industry.

With this exemption, employees would be exempt from overtime compensation if:

1. The employee receives more than one half of his/her earnings from commissions, and
2. His/her average hourly rate exceeds one and one-half times the minimum wage. ( $\$7.25 \times 1\frac{1}{2} = \$10.88$ )

The employee would still have to record his true and accurate hours of work on a daily basis. Then, over a chosen representative period of at least one month (three-to-six months is commonplace), the above two tests must be met. If the yield does not provide time and one-half the minimum wage as an average hourly rate, the employer must subsidize the difference.

Many positions within an automotive service establishment can meet the commissioned program as noted above to include flat rate technicians, sales counter personnel and other positions.

However, there are a number of states that do not allow the application of the Retail 7(i) Overtime exemption (for any position) as well as states that do not recognize the flat rate system as a true commissioned program.

### STATES NOT RECOGNIZING FLAT RATE AS A COMMISSION SYSTEM

The following states, either by regulation or case law, have prohibited use of the Exemption or have in some way qualified its use.

- **Alaska** – Employee must make 100% of their earnings from commission, while still earning time and a half of minimum wage.
- **Arizona** – May not be applied retroactively - only prospectively with employee knowledge.
- **California** –
  - Flat Rate Not a Commission. Employees paid via flat rate system must be paid for overtime hours worked. These employees are not selling a product or services and therefore are not being paid a commission.
  - Tools. If the employer does not provide tools, technician must be paid double the minimum wage rate.

- While Retail 7(i) is not expressly prohibited, to determine if the employee's "earnings exceed one and one-half times the minimum wage," the employer must actually pay sufficient wages (base pay and/or commissions) each pay period.
- **Connecticut** – Employee must earn twice minimum wage and cannot work more than 54 hours in a workweek.
- **Hawaii** – Not allowed.
- **Maine** – Not allowed.
- **Massachusetts** – Not allowed.
- **New Jersey** – Employee must earn at least \$400 per week.
- **New York** – Employees paid via flat rate system must be paid for overtime hours worked. These employees are not selling a product or services and therefore are not being paid a commission.
- **South Carolina** – Employer must provide a written agreement of the pay plan.
- **Tennessee** –
  - Flat rate is not a commission. To qualify as a “commission”, the employer must compensate employees at a rate that is proportionally related to the amount it charges its customers.
  - Courts have found that computing flat rate hours “according to predetermined standards as to how long each job should take to complete”, and that if “the price charged to the customer is not related to the number of hours the employee actually took to complete a particular task undermines “any notion of a proportional relationship between employee compensation and customer price, either overall or for labor alone.”



## POSITIONS WHICH USUALLY REQUIRE OVERTIME COMPENSATION

The following job classifications will usually **NOT** qualify for a straight-salary method of payment. Individuals in these classifications must record their true and accurate hours of work on a daily basis and receive minimum wage and some form of overtime compensation for hours worked in excess of forty (40). (Save a partial exemption possibility on those noted with an asterisk.)

Store Manager  
Assistant Store Manager\*(1)  
Mechanics\*(1)  
Tire Changers

Office Personnel  
Counter Sales  
Custodial  
Service Writers

Compliance implies an hourly method of payment. However, additional forms of compensation are also permissible such as commissions, spiffs, daily, weekly, monthly, and annual bonuses. The important necessity for Wage-Hour compliance is:

1. Total earnings divided by hours worked must always yield minimum wage;
2. All forms of compensation must be included in the calculation for computing overtime.  
Overtime is based not on the minimum wage, but on the employee's regular rate.

Regular rate constitutes all monies earned in a pay period for reimbursement of services rendered, including but not limited to:

- hourly rate,
- spiffs,
- commissions,
- bonuses,
- (weekly, monthly, and annually).

\*Overtime relief may be possible with previously-stated "Partial Exemptions".

(1) Retail Commission Sales Exemption 7(i)

## OVERTIME CALCULATION

Unless employees are exempt from overtime under one of the previously-listed partial or complete exemptions, then overtime compensation must be paid on all earnings in a workweek, should actual hours worked exceed 40. (Some states require overtime compensation over eight [8] hours per day.)

Overtime is calculated on an employee's regular rate -- **NOT ON MINIMUM WAGE**. Thus, to obtain the regular rate, we must total all earnings in a workweek and divide this by the hours actually worked. This average rate or regular rate is essentially the straight-time rate paid for all hours worked in a workweek. We now must pay one-half of this rate for all hours worked in

excess of forty (40) hours to obtain proper overtime calculations. Consider the following example:

**Weekly Settle-Up** -- An assistant store manager makes \$10.00 per hour and worked a fifty (50) hour workweek. In addition, he made \$80 in commissions.

50 hours x \$10.00 =	\$500
Commissions =	<u>\$ 80</u>

**Total Straight-Time Earnings** = \$580

$\$580 \div \text{by } 50 \text{ hours} = \$11.60$  regular rate (average hourly rate for the week)

$\$11.60 \div 2 = \$5.80$  half-time rate

$\$5.80 \times 10 \text{ hours worked over } 40 = \$58.00$  overtime for the week

STRAIGHT-TIME =	\$580.00
OVERTIME =	<u>\$ 58.00</u>

**\$638.00 Total Earnings Including Overtime**

### **Alternative Method**

Another acceptable method would be to pay this individual forty (40) hours @ \$10.00/hour and 10 hours @ \$15.00/hour -- for a total of \$550.00. Then, overtime on commissions would be calculated by dividing \$80 by 50 hours and half of this rate times the hours over 40 -- i.e.,  $\$80 \div 50 = \$1.60/\text{hour} \div 2 = .80$  (half time rate)  $\times 10 \text{ hours} = \$8.00$  (commission overtime) for a total of \$88.00 in commissions. This could then be added to hourly earnings of \$550 for a total of \$638.

**Month-End Settle-Up - Bonus Payment** -- Assume a salesman earns \$175 in bonus or commissions payable by the 10th of the month for the preceding month. This is in addition to his total earnings with overtime that was paid during the previous month. We must now compute overtime due on commission earnings by prorating the bonus over the number of hours worked in the preceding workweeks. This calculation has been computed in the following example:

### A Month-End Bonus of \$175 -- Showing Overtime Calculations

Previous Mo. Workweek	Hours Worked	Prorated Monthly Bonus 4 Weeks	Equivalent Hourly Rate	Half-Time Rate	Hours Worked Over 40	Additional Overtime Due	TOTAL BONUS PAYMENT	
1	50	43.75	.875	.4375	10	4.38	175.00	Bonus
2	45	43.75	.972	.486	5	2.43	<u>9.66</u>	Additional Overtime
3	46	43.75	.95	.475	6	2.85	184.66	Total Bonus Payment
4	40	43.75	1.09	.545	0	0		
<b>TOTAL</b>		<b>175.00</b>				<b>9.66</b>		

Note: Some months may have five workweeks. A workweek with less than 40 hours worked has no overtime liability, thus no calculation.

A more efficient method of computing overtime is to use the enclosed Overtime Bonus Table Chart. Additional overtime is computed by taking the weekly amount of earnings and multiplying this amount by the decimal corresponding to the number of hours in the workweek. Using the above example, consider the following:

(a) Week	(b) Weekly Bonus Equivalent	(c) Hours Worked	(d) Decimal	(e) Additional Overtime
1	43.75	50	.10000	4.38
2	43.75	45	.05556	2.43
3	43.75	46	.06522	2.85
4	43.75	40	-0-	-0-
				9.66 Total Overtime

•Column (d) x Column (b)

# COEFFICIENT TABLE FOR COMPUTING EXTRA HALF-TIME FOR OVERTIME

U.S. DEPARTMENT OF LABOR  
EMPLOYMENT STANDARDS ADMINISTRATION

WAGE AND HOUR DIVISION

Hours	Even	1/4	1/2	3/4	1/10	2/10	3/10	4/10	6/10	7/10	8/10	9/10
40	0.000	0.003	0.006	0.009	0.0012	0.0025	0.0037	0.0049	0.0074	0.0086	0.0098	0.0110
41	0.012	0.015	0.018	0.021	0.0134	0.0146	0.0157	0.0169	0.0192	0.0204	0.0215	0.0227
42	0.024	0.027	0.029	0.032	0.0249	0.0261	0.0272	0.0283	0.0305	0.0316	0.0327	0.0338
43	0.035	0.038	0.040	0.043	0.0360	0.0370	0.0381	0.0392	0.0413	0.0423	0.0434	0.0444
44	0.045	0.048	0.051	0.053	0.0465	0.0475	0.0485	0.0495	0.0516	0.0526	0.0536	0.0546
45	0.056	0.058	0.060	0.063	0.0565	0.0575	0.0585	0.0595	0.0614	0.0624	0.0633	0.0643
46	0.065	0.068	0.070	0.072	0.0662	0.0671	0.0680	0.0690	0.0708	0.0717	0.0726	0.0736
47	0.074	0.077	0.079	0.081	0.0754	0.0763	0.0772	0.0781	0.0798	0.0807	0.0816	0.0825
48	0.083	0.085	0.088	0.090	0.0842	0.0851	0.0859	0.0868	0.0885	0.0893	0.0902	0.0910
49	0.092	0.094	0.096	0.098	0.0927	0.0935	0.0943	0.0951	0.0968	0.0976	0.0984	0.0992
50	0.100	0.102	0.104	0.106	0.1008	0.1016	0.1024	0.1032	0.1047	0.1055	0.1063	0.1071
51	0.108	0.110	0.112	0.114	0.1086	0.1094	0.1101	0.1109	0.1124	0.1132	0.1139	0.1146
52	0.115	0.117	0.119	0.121	0.1161	0.1169	0.1176	0.1183	0.1198	0.1205	0.1212	0.1219
53	0.123	0.124	0.126	0.128	0.1234	0.1241	0.1248	0.1255	0.1269	0.1276	0.1283	0.1289
54	0.130	0.131	0.133	0.135	0.1303	0.1310	0.1317	0.1324	0.1337	0.1344	0.1350	0.1357
55	0.136	0.138	0.140	0.141	0.1370	0.1377	0.1383	0.1390	0.1403	0.1409	0.1416	0.1422
56	0.143	0.144	0.146	0.148	0.1435	0.1441	0.1448	0.1454	0.1466	0.1473	0.1479	0.1485
57	0.149	0.151	0.152	0.154	0.1497	0.1503	0.1510	0.1516	0.1528	0.1534	0.1540	0.1546
58	0.155	0.157	0.158	0.160	0.1558	0.1564	0.1569	0.1575	0.1587	0.1593	0.1599	0.1604
59	0.161	0.162	0.164	0.165	0.1616	0.1622	0.1627	0.1633	0.1644	0.1650	0.1656	0.1661
60	0.167	0.168	0.169	0.171	0.1672	0.1678	0.1683	0.1689	0.1700	0.1705	0.1711	0.1716
61	0.172	0.173	0.175	0.176	0.1727	0.1732	0.1737	0.1743	0.1753	0.1759	0.1764	0.1769
62	0.177	0.179	0.180	0.181	0.1779	0.1785	0.1790	0.1795	0.1805	0.1810	0.1815	0.1820
63	0.183	0.184	0.185	0.186	0.1830	0.1835	0.1840	0.1845	0.1855	0.1860	0.1865	0.1870
64	0.188	0.189	0.190	0.191	0.1880	0.1885	0.1890	0.1894	0.1904	0.1909	0.1914	0.1918

Hours	Even	1/4	1/2	3/4	1/10	2/10	3/10	4/10	6/10	7/10	8/10	9/10
65	0.192	0.193	0.195	0.196	0.1928	0.1933	0.1937	0.1942	0.1951	0.1956	0.1960	0.1965
66	0.197	0.198	0.199	0.200	0.1974	0.1979	0.1983	0.1988	0.1997	0.2001	0.2006	0.2010
67	0.201	0.203	0.204	0.205	0.2019	0.2024	0.2028	0.2033	0.2041	0.2046	0.2050	0.2054
68	0.206	0.207	0.208	0.209	0.2063	0.2067	0.2072	0.2076	0.2085	0.2089	0.2093	0.2097
69	0.210	0.211	0.212	0.213	0.2106	0.2110	0.2114	0.2118	0.2126	0.2131	0.2135	0.2139
70	0.214	0.215	0.216	0.217	0.2147	0.2151	0.2155	0.2159	0.2167	0.2171	0.2175	0.2179
71	0.218	0.219	0.220	0.221	0.2187	0.2191	0.2195	0.2199	0.2207	0.2211	0.2214	0.2218
72	0.222	0.223	0.224	0.225	0.2226	0.2230	0.2234	0.2238	0.2245	0.2249	0.2253	0.2257
73	0.226	0.227	0.228	0.229	0.2264	0.2268	0.2271	0.2275	0.2283	0.2286	0.2290	0.2294
74	0.230	0.231	0.232	0.232	0.2301	0.2305	0.2308	0.2312	0.2319	0.2323	0.2326	0.2330
75	0.233	0.234	0.235	0.236	0.2337	0.2340	0.2344	0.2347	0.2354	0.2358	0.2361	0.2365
76	0.237	0.238	0.239	0.239	0.2372	0.2375	0.2379	0.2382	0.2389	0.2392	0.2396	0.2399
77	0.240	0.241	0.242	0.243	0.2406	0.2409	0.2413	0.2416	0.2423	0.2426	0.2429	0.2433
78	0.244	0.244	0.245	0.246	0.2439	0.2442	0.2446	0.2449	0.2455	0.2459	0.2462	0.2465
79	0.247	0.248	0.249	0.249	0.2472	0.2475	0.2478	0.2481	0.2487	0.2491	0.2494	0.2497
80	0.250	0.251	0.252	0.252	0.2503	0.2506	0.2509	0.2512	0.2519	0.2522	0.2525	0.2528
81	0.253	0.254	0.255	0.255	0.2534	0.2537	0.2540	0.2543	0.2549	0.2552	0.2555	0.2558
82	0.256	0.257	0.258	0.258	0.2564	0.2567	0.2570	0.2573	0.2579	0.2582	0.2585	0.2587
83	0.259	0.260	0.261	0.261	0.2593	0.2596	0.2599	0.2602	0.2608	0.2611	0.2613	0.2616
84	0.262	0.263	0.263	0.264	0.2622	0.2625	0.2628	0.2630	0.2636	0.2639	0.2642	0.2644
85	0.265	0.265	0.266	0.267	0.2650	0.2653	0.2655	0.2658	0.2664	0.2666	0.2669	0.2672

**TO CONVERT INTO WEEKLY EQUIVALENT:** Multiply SEMIMONTHLY salary by 0.4615; MONTHLY salary by 0.2308; ANNUAL salary by 0.01923.

**TO CONVERT INTO STRAIGHT-TIME HOURLY EQUIVALENT FOR 40 HOURS:** Multiply WEEKLY salary by 0.025; SEMIMONTHLY by 0.01154; MONTHLY salary by 0.00577; ANNUAL by 0.00048.

**TO CONVERT INTO TIME AND ONE-HALF HOURLY RATE BASED ON 40 HOUR WEEK:** Multiply WEEKLY salary by 0.0375; SEMIMONTHLY by 0.0173; MONTHLY salary by 0.00866; ANNUAL by 0.000721.

**CAUTION:** Be sure straight-time earnings are not below legal minimum.

## INSTRUCTIONS

**General:** In determining the extra half-time that is due for overtime pay after 40 hours, the method of calculation commonly used is to divided the straight-time earnings by the total number of hours worked and multiply the result by the number of overtime hours divided by two (2). For instance, the

Computation for 48 hours would be  $\frac{\text{Earnings}}{48} \times \frac{8}{2}$ ; for 50 hours,  $\frac{\text{Earnings}}{50} \times \frac{10}{2}$ ; for  $47\frac{3}{4}$  hours,

$\frac{\text{Earnings}}{47\frac{3}{4}} \times \frac{7\frac{3}{4}}{2}$ . The table on the reverse side contains the decimal equivalents of the fraction,

$\frac{\text{O.T. Hours}}{\text{Total Hr.} \times 2}$ .

For example, the decimal for 48 hours is  $\frac{8}{48 \times 2} = \frac{1}{12} = .083$ ; for 50 hours it is  $\frac{10}{50 \times 2} = \frac{1}{10} = .1$ ;

and for  $47\frac{3}{4}$  hours  $\frac{7\frac{3}{4}}{47\frac{3}{4} \times 2} = \frac{7.75}{95.5} = .081$ .

**How to use:** (a) Multiply the straight-time earnings for an overtime week by the application decimal and the result will be the extra half-time due. Thus, by using the decimals in the table (on the reverse side) the computations performed are, in effect, exactly the same as if the equivalent fractions were used, with the advantage of having eliminated the long division necessitated by the fractions. For example:

1. A pieceworker earns varying wages each week. In a  $43 \frac{9}{10}$  hour week he earned \$153.65 straight-time. The coefficient for  $43 \frac{9}{10}$  hours is .0444.  $.0444 \times \$153.65 = \$6.82$ , additional half-time due.  $\$153.65 + \$6.82 = \$160.47$ , the pieceworker's total pay for the week.
  2. Jones is paid a weekly salary of \$180.25. He worked  $51\frac{1}{2}$  hours. The coefficient for  $51\frac{1}{2}$  hours is .112.  $.112 \times \$180.25 = \$20.19$ .  $\$180.25 + \$20.19 = \$200.44$ , Jones' total pay for the week.
- (b) The decimal table can also be used effectively when back wages are due because of additions to wages (such as a weekly bonus) that were not included in the regular rate in computing overtime. For example:
1. An employee worked 48 hours and received a production bonus of \$9.60 which was not included in the regular rate. Thus,  $\$9.60 \times .083 = \$0.80$ , the additional half-time due on the bonus.
  2. Jones in the same week (example (a), 2 above) received a production bonus of \$25.00.  $.112 \times \$25.00 = \$2.80$ , the additional half-time due on the bonus.  $\$180.25 + \$20.19 + \$25.00 + \$2.80 = \$228.24$ , Jones' total earnings. A further short-cut (combining (a), 2, and (b), 2) would be:  $\$180.25 + \$25.00 = \$205.25 \times .112 = \$22.99 + \$205.25 = \$228.24$ , Jones' total earnings.

- (c) Short-cuts For Computing Back Wages. When both the overtime hours and the earnings vary, individual weekly computations must be made. However, if an employee is paid at a constant hourly rate, time can be saved by adding the unpaid overtime hours during the period and multiplying the total by one-half the hourly rate. When the weekly hours vary and the straight-time earnings are constant, add the decimals for the overtime weeks and multiply the total by the earnings for one (1) week. When the weekly hours are constant but the earnings vary, add the earnings for the overtime weeks and multiply the total by the decimal for one (1) week. For example:

#### VARYING HOURS – CONSTANT EARNINGS

<u>Hours</u>	<u>Decimal</u>	<u>Earnings</u>
42	.024	\$180.25
43	.035	\$180.25
46	<u>.065</u>	<u>\$180.25</u>
	.125 x \$180.25 =	\$22.35

#### CONSTANT HOURS – VARYING EARNINGS

<u>Hours</u>	<u>Earnings</u>
47	\$164.50
47	\$159.80
47	<u>\$162.15</u>
	\$486.45 x .074 = \$36.00

### FLUCTUATING WORKWEEK METHOD OF PAYMENT

You may be faced with the problem of wanting to put someone on a guaranteed straight salary without overtime. However, meeting the salary exemption tests is a problem. An alternative possibility is to place this individual on a fluctuating workweek method of payment. This person must record their true and accurate hours of work on a daily basis, but could be placed on a guaranteed salary. The salary would cover any and all hours worked in a workweek, but when divided by the number of hours worked, the pay rate must not go below the applicable minimum wage. The current federal minimum wage is \$7.25 (effective July 24, 2009).

Using the Overtime Factor Chart on page 13, you would compute additional "half-time" compensation for all hours worked in excess of forty (40). An example of the calculation of weekly earnings under the fluctuating workweek method of payment would be:

Assume the employee's guaranteed base salary is \$400, and he works the schedule shown below for a four (4) week period. Using the Overtime Factor Chart on page 13, refer to the decimal factor for the hours worked each week, and multiply by the weekly guaranteed salary to determine the overtime pay due for that week.

<b>Work Week</b>	<b>Hours Worked</b>	<b>Guaranteed Base Salary</b>	<b>Factor Based On Hours Worked</b>	<b>Overtime Due For Week</b>	<b>Total Weekly Pay</b>
1	50	\$400	.10000	\$40.00	\$440.00
2	47	\$400	.07447	\$29.79	\$429.79
3	43	\$400	.03488	\$13.95	\$413.95
4	40	\$400	--	--	\$400.00

### **Alternative Method**

To calculate overtime due on the fluctuating workweek method of payment without utilizing the Overtime Factor Chart, you would divide the guaranteed base salary by the total number of hours worked in the week to obtain the straight-time rate. You would then take half of this rate and multiply by the actual number of overtime hours worked to obtain the overtime pay due.

Work Week	Hours Worked	Guaranteed Base Salary	Straight-Time Rate	Half-Time (Overtime Hours)	Overtime Due (Half-Time x Overtime Hours)	Total Weekly Pay
1	50	\$400	\$8.000	\$4.000	\$40.00	\$440.00
2	47	\$400	\$8.511	\$4.256	\$29.79	\$429.79
3	43	\$400	\$9.302	\$4.651	\$13.95	\$413.95
4	40	\$400	\$10.000	\$5.000	--	\$400.00

You will note from the above that the hourly rate decreases as the total number of hours worked increases.

The fluctuating workweek pay plan provides the opportunity to pay a salary without the penalty of **high** overtime cost. However, since the average hourly rate decreases as the hours increase, as well as the overtime being computed on "half-time", this plan does not endear itself to employees. Accordingly, it is a deterrent to excessive hours being worked.

In addition, the employees must be paid their base salary in any week they perform any number of hours of work. For example, if the employee works 10, 20, 30, or 40 hours, the employee must still receive the guaranteed base salary. This could be a concern if the employee tends to have an absenteeism problem. The Wage-Hour Division has ruled that employees paid by the Fluctuating Workweek Method of Payment cannot be paid additional premium amounts such as incentive bonuses and other non-overtime premiums.

It should be noted that the Federal Wage-Hour Division requires that an employee must understand and accept the fluctuating workweek method of payment.

The following states, either by regulation or case law, have prohibited the use of the Fluctuating Workweek Method of Payment:

- Alaska;
- California;
- Missouri;
- New Mexico; and
- Pennsylvania

For more information on the application of this pay plan, contact a member of the SESCO staff.



### **What is a Workweek?**

A workweek for Wage-Hour purposes consists of seven consecutive days or seven consecutive 24 hour periods. It need not coincide with the calendar week – it may begin on any day and at any time of any day. A workweek may be set for the organization as a whole, or different workweeks may be set for separate groups of employees. The beginning of the workweek may be changed if the change is intended to be permanent and not to avoid the overtime requirements.

One of the 13 recordkeeping requirements under the FLSA is that there be an official statement of the workweek represented with the permanent earnings record. Consequently, we recommend you complete the following statement on a 3 x 5 card and have it taped to the inside of your earnings record binder and/or have it contained in your employee handbook. The statement is:

*The official workweek for all employees of (organization) begins at 12:01 a.m., (day) and ends at 12:00 p.m. the following (day). All employees are paid on (day) for work performed during the previous workweek.*

### **What is a Workday?**

The “day” for Wage-Hour, and more specifically for overtime pay purposes, is a period of 24 consecutive hours. The first day of the workweek starts at the time the workweek begins and ends 24 hours later. Each succeeding day starts at the same hour. Under this definition, the beginning of the “day” does not necessarily coincide with the time the employee starts work. Thus, you will incur no overtime liability because of a change in the time an employee’s work begins and ends, so long as no part of the period falls within a different 24-hour “day” and hours of work are not increased.

### **Determining and Paying for Hours Worked**

The Federal Wage-Hour Division requires that each employee, not specifically exempt, who is engaged in interstate commerce or in the production of goods for commerce, receives a minimum hourly wage of at least \$7.25 per hour (effective July 24, 2009). The Wage-Hour Division also requires that no employee can be employed for more than 40 hours per week without receiving at least time and one-half his/her regular rate of pay for the overtime hours (unless specifically exempt). The amount of money an employee should receive cannot be determined without knowing the number of hours worked.

### **General Meaning of Hours Worked**

As a general rule, hours worked include 1) all time during which an employee is required to be on your premises, on duty or at a prescribed workplace, and 2) all time during which an employee is suffered or permitted to work, whether or not he/she is required to do so. Thus, working time which is to be paid for includes all time spent during the workweek in physical or mental exertion, whether burdensome or not and whether controlled or required by you.

Working time will include time spent by the employee on a voluntary basis even if you are not aware of it.

### **Time Clocks Not Required**

In accordance with Federal Wage-Hour guidelines, employers are required to keep accurate records of hours worked by employees (not specifically exempt from record-keeping requirements), but there is no requirement to use time clocks or timecards as a means for doing so. However, if an employer does use a time clock, early or late punching by employees who voluntarily come in early or remain late may be ignored if the employees do not work before or after their regular hours.

### **No Averaging of Weeks**

In accordance with Federal Wage-Hour requirements, an employee may not average hours worked in more than one workweek. Each workweek must be treated as a separate unit in computing pay.

### **Voluntary Overtime**

It should be remembered that overtime performed voluntarily by an employee must be included in computing total hours worked. For example, an employee may voluntarily continue to work at the end of his scheduled workday. The reason for working additional overtime is immaterial. If it is known or the supervisor has reason to believe the employee is continuing to work, the time is working time. This rule also applies to work performed away from the premises or the job site or even at home. If you know or have reason to believe that work is being performed, you must count such time as hours worked for the employee.

### **Homework**

Any work performed at home by any employee should be counted as time worked. This is true whether or not you require the work to be done at the employee's home. Such homework should be paid at the employee's regular rate and the hours should be added to the timecard the following day. Here we recommend the employee place the total number of hours on the timecard for the homework. Then, both the employee and the supervisor should place their initials by this written-in entry or hours worked. This will normally apply to office clerical employees who are accustomed to taking work home.

### **Waiting Time**

Some employees may spend time waiting for work, waiting to record their time on timesheets, waiting to get paychecks. Whether such waiting time is to be counted as hours worked depends on the facts in such case. If the waiting time takes place during the regular workday, this waiting time may be hours worked. If the waiting time takes place outside the regular workday, that is

preliminary or postliminary to the employee's principal activities, it is not hours worked unless specifically made so by a contract custom, or practice.

If an employee is required to report to work at a certain time and then told to wait until you actually put the employee to work, you should start paying the employee for the time he/she actually reports to work. The reason for this is that you have engaged him/her to wait and the employee cannot use any of that time for their use.

### **Waiting While on Duty**

A secretary who reads a novel while waiting for dictation, or a stock clerk who plays checkers while waiting on delivery men, is still working during their period of inactivity. The rule also applies to employees who work away from your premises. For example, a transport driver is working while waiting for your vehicle to be loaded. The periods during which such waiting time occurs are unpredictable. They are usually of short duration. In either event, the employee is unable to use the time effectively for their own purposes. It belongs to and is controlled normally by the organization. In all such cases, waiting time is an integral part of the job.

### **Standby Time**

Employees who are required to stand by their posts, ready for duty (*whether during lunch periods, during equipment breakdowns, or during temporary facility shutdowns*) must be paid for the time.

### **Meal Periods**

**Bona fide meal periods are not work time.** (*Bona fide meal periods do not include coffee breaks or time for snacks; these are rest periods of short duration and must be counted as "hours worked."*)

The employee must completely be relieved from duty for the purposes of eating regular meals. Ordinarily, 30 minutes or more is long enough for a bona fide meal period. An employee is not relieved if he/she is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his/her desk, or a truck driver who is required to drive a vehicle while eating, is working while eating. Under such circumstances, it is recommended that there be no deduction made for the meal period because such time would have to be paid for as hours worked.

It is not necessary that an employee be permitted to leave the premises if he/she is otherwise completely freed from duty during the meal period for at least 30 full minutes.

Permitting employees to forego punching time clocks during lunch periods does not require the lunch periods be counted as hours worked -- if the employees are relieved of all duties and if the lunch period occurs at a regularly-appointed time.

## **Fractional Hours Worked**

Employees must be paid for all time worked including fractional parts of an hour. Federal Wage-Hour guidelines require that all time actually worked by employees must be counted as time worked; arbitrary formulas or estimates are not permissible in determining compensable working time. There is one exception to the rule -- a practice of recording the employee's starting and stopping time to the nearest five (5) minutes, the nearest tenth of an hour or the nearest quarter of an hour will be accepted if it is shown that, over a period of time, the averages result in the employees getting paid for all the time they actually work.

The most common practice and one that is readily accepted by the Federal Wage-Hour Division is the use of the 7/8 minute rule. Under this procedure, the employee's time record is rounded off to the nearest quarter of an hour -- determined by whether he/she works the major portion of that quarter hour.

Accordingly, if an employee records an arrival time at 8:07 a.m., this would be considered 8:00 a.m. If the person arrived at 8:08 a.m., the adjusted starting time for compensation purposes would be 8:15 a.m.

This practice, likewise, would apply to department times. However, normally-deducted lunch breaks of thirty (30) minutes or longer would be computed right to the minute.

## **General Guides on Pay Requirements for Incidental Activities**

The following outline is a general guide on whether or not employees are to be paid for time spent on activities incidental to their principal duties -- generally, time spent by employees on incidental activities which are part of their principal duties is compensable, regardless of when the activities are performed (whether during the workday, before the workday begins, or after the workday ends), and regardless of any contrary contract, custom, or practice.

- **Show-up, Call-in, or Reporting Time**

Under contracts guaranteeing employees' pay for minimum number of hours when they report to work, only the time actually worked generally needs to be counted as hours worked under Federal Wage-Hour guidelines. However, if the employee is required to wait 10 or 15 minutes before being advised that no work is available, the 10 or 15 minutes are compensable working time.

- **Call-back or Call-out Time**

Time not worked by an employee under guaranteed pay for a minimum number of hours, when he/she is called back to work after his/her regular workday, can be excluded from hours worked. However, time spent in traveling to a customer's premises, as well as time devoted to regular work while there, is compensable working time.

- **On-call Time**

Whether or not the time an employee is on call need be counted as part of his/her compensable working time depends on his/her freedom while on call. If he/she must remain on the employer's premises or so near thereto that he/she cannot use the time as he/she pleases, this would be compensable time. If on the other hand the employee is free to come and go, even though he/she must leave a telephone number where they may be reached, the time can be excluded from hours worked.

- **Travel from Home to Work**

An employee who travels from home before his/her regular workday, and returns to his/her home at the end of the workday, is engaged in ordinary home-to-work travel which is a normal incident of employment. This is true whether he/she works at a fixed location or at different job sites. **Normal time from home to work is not work time.**

- **Home-to-Work in Emergency Situations**

There may be instances when travel from home to work is work time. For example, if an employee who has gone home after completing his/her day's work is subsequently called out at night to perform a service or emergency work, all time spent on such travel is working time. Under such circumstances, the employee should record his/her total time spent from the time he/she receives the telephone call at home until the time he/she returns home after performing the emergency or service work.

- **Travel Time**

The guidelines which apply in determining whether or not time spent in travel is working time depends upon the kind of travel involved.

It is the position of the Wage-Hour Division that an employee who is required by their employer to drive an automobile or a truck for the transportation of other employees to or from work at any time is working while traveling. It makes no difference whether the vehicle is the employee's own car, the employer's car, a rented car, or a truck.

- **Travel During Workday**

Traveling by an employee from job site to job site during a workday is compensable work -- so is traveling to an outlying job at the end of the scheduled workday. However, if the employee goes directly home from the job instead of returning to the employer's premises, the trip home is not compensable home-to-work travel.

- **Portal-to-Portal Act**

- **Travel that is all in the Day's Work** – The walking, riding, or time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, the travel from the designated place to the workplace is part of the day's work and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked.
- **Travel Away from Home Community** – Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly work time when it cuts across the employee's workday. The employee is simply substituting travel for other duties. The time is not only hours worked on regular working days during normal working hours, but also during the corresponding hours on non-working days. Thus, if an employee regularly works from 9 a.m. to 5 p.m. from Monday through Friday, the travel time during these hours is work time on Saturday and Sunday, as well as on the other days. Regular meal period time is not counted. As an enforcement policy, the Divisions will not consider as work time that is spent in travel away from home outside of regular working hours as passenger on an airplane, train, boat, bus, or automobile.
- **Home to Work on Special One-Day Assignment in Another City** – A problem arises when an employee who regularly works at a fixed location in one city is given a special one-day work assignment in another city. For example, an employee who works in Washington, DC, with regular working hours from 9 a.m. to 5 p.m. may be given a special assignment in New York City, with instructions to leave Washington at 8 a.m. He arrives in New York at 12 noon, ready for work. The special assignment is completed at 3 p.m., and the employee arrives back in Washington at 7 p.m.

Such travel cannot be regarded as ordinary home-to-work travel occasioned merely by the fact of employment. It was performed for the employer's benefit and at his special request to meet the needs of the particular and unusual assignment. It would thus qualify as an integral part of the "principal" activity which the employee was hired to perform on the workday in question; it is like travel involved in an emergency call or like travel that is all in the day's work. All the time involved, however, need not be counted. Since, except for the special assignment, the employee would have had to report to his regular work site, the travel between his home and the transportation source may be deducted, it being in the "home-to-work" category. Also, of course, the usual mealtime would be deductible.

- **Lectures, Meetings, and Training Programs**

Attendance at lectures, meetings, training programs, and similar activities need not be counted as working time if all of the following four (4) criteria are met:

1. Attendance is outside employee's regular working hours.
2. Attendance is voluntary (*it is not voluntary if required by the employer or if the employee is **led to believe** that non-attendance will prejudice working conditions or employment standing.*)
3. Employee does no productive work while attending.
4. Program, lecture, or meeting is not directly related to the employee's job (*it is directly related to the job if it aids in handling the present job better as distinguished from teaching another job or a new or additional skill*).

### **Holidays and Vacations**

Employers are **not required** by the Federal Wage-Hour Division to pay for unworked holidays, but union or employment agreements may provide otherwise. If an employee does not work on a holiday, the day is not counted as time worked in figuring whether the employee has worked over forty (40) hours for overtime pay purposes. Only the hours **actually worked** have to be counted even if the employee is paid for the unworked holiday.

Some employers not only give employees a day's pay for an unworked holiday, but also credit the employees with hours of work just as if they had worked the holiday, so that their employees will not lose overtime pay during weeks in which a holiday occurs. This means that the employee will be paid overtime during such a week even though he actually worked less than forty (40) hours.

### **Uniforms**

It is the position of the Wage-Hour Division that if uniforms are required by an organization or if a majority of the employees in a particular department do wear uniforms, it is then considered to be of benefit to the employer. Accordingly, any deductions for these uniforms which bring the employee's regular hourly rate below the current minimum wage will be considered a violation.

Increases in an employee's wages to offset the cost of uniforms should equal one (1) hour at the current minimum wage for furnishing and a like amount for maintenance of uniforms. In other words, an allowance of 18¢ per hour ( $\$7.25 \div 40$  hours) must be made should an employee furnish a uniform and a like amount of 18¢ if the employee is expected to launder the uniform. The adjusted minimum wage for these examples would be \$7.43 or \$7.61 per hour.

**Caution:** If you furnish an employee a uniform at no cost to the employee but the employee is required to launder non-wash and wear clothing, even if it is a shirt or a smock, the 16¢-per-hour increase must be added for maintenance. Also if the employee is a part-time person, he/she must receive no less than 1/5 of the minimum wage for each day worked to cover maintenance and a like amount if furnishing is required.

A modification of the previous position has been taken by the Wage-Hour Division concerning reimbursement for uniform maintenance. The Division is now holding that no measurable costs are incurred in the maintenance of "wash-and-wear" uniforms which could be laundered with other personal garments.

Consequently, you would not be required to pay a uniform maintenance reimbursement for such wash-and-wear garments, providing that there are no unnecessary requirements for daily cleaning.

## **INDEPENDENT CONTRACTOR STATUS**

Sometimes there is the opportunity to exclude certain employees from Wage-Hour coverage by virtue of their status as "independent contractors". The Wage-Hour Division maintains for an individual to be an "independent contractor", he must meet the following tests:

1. Work in a vocation that is customarily recognized as independent.
2. Perform a definite piece of work and not merely the rendering of services in general.
3. Work performed is free of control of the person for whom the work is being done.
4. Individual furnishes the tools and equipment necessary for the performance of the work.
5. Individual takes normal business risks involved in the type of enterprise to which he/she is engaged (profit and loss).
6. Individual performs similar services for other companies or organizations.

Before you apply the independent contractor status to anyone in your organization, we recommend that the application be discussed with a member of the SESCO staff for more definitive details.



## **RECORDKEEPING INFORMATION REQUIRED BY THE FEDERAL WAGE-HOUR DIVISION**

Below is reproduced the recordkeeping requirements currently enforced by the Wage-Hour Division. This information should be maintained in as concise a manner as possible and easily accessible. Usually, all of this data may be kept in the payroll journal on a 3 x 5 card:

1. Name in full
2. Home address
3. Sex
4. Date of birth -- if under 19 years of age
5. Job title or primary occupation with the organization
6. Time of day and day of week the employee's workweek begins
7. Regular hourly rate of pay or amount of base salary per week
8. The basis on which wages are paid (e.g. commission) and regular rate exclusions.
9. Hours worked each day and total hours worked each week
10. Total weekly straight-time earnings
11. Total weekly overtime earnings for hours worked over 40
12. Total additions to or deductions from earnings each pay period
13. Total wages paid each pay period
14. Date of payment and period covered by the payment

Records are also required for employees who are exempt from minimum wage and overtime provisions. These records should be sufficient to prove that a worker actually qualifies for an exemption.

### **POSTER DISPLAY REQUIRED**

Recordkeeping regulations require that a minimum wage poster be displayed in a conspicuous place.

### **HOW LONG TO RETAIN THE RECORDKEEPING INFORMATION**

The following records are to be safely preserved for a period of at least three (3) years:

1. All payroll records. From the date of last entry all those payroll or other records containing the employees' compensation.
2. Age certificates, salary plans, and employee contracts.

The following records are to be preserved for at least two (2) years:

1. **All employment, timesheets, and earnings records.** From the date of the last entry, all time and earnings cards or timesheets of the company on which are entered the daily starting and stopping times of the individual employee, or separate workforces, or the employees' daily, weekly, or pay period amounts of work accomplished when these amounts determine in whole or in part the pay period earnings.
2. **All wage rate tables.** From their last effective date, all tables or schedules of the employer which provide the piece rates or other rates used in computing straight-time earnings, wages, salary, or overtime excess compensation.
3. **Work time schedules.** From the last effective date all schedules or tables used by the company which established the hours and days of employment of individual employees.
4. **All orders, shipping and billing records, including bills of lading to customers, invoices received, incoming and outgoing shipping records.**
5. **All records of additions to or deductions from wages of employees.** (Example, authorizations for payroll deductions.)

# Handling Federal Wage-Hour Investigations

## WHAT TO DO WHEN THE FEDERAL WAGE-HOUR INVESTIGATOR ARRIVES

### Introduction

#### What Causes A Federal Wage-Hour Investigation

*"Why am I being investigated?"* More and more employers are asking this question. There are several possible answers. A Federal Wage-Hour investigation will take place for one or a combination of the following reasons:

- A complaint filed by a former or present employee who feels he was paid improperly.
- A complaint of alleged non-compliance from competitors, labor unions, and other federal and state agencies. The organization or person filing a complaint is held in strict confidence. Rarely will you ever know who *"turned you in"*. An investigation is scheduled if it appears warranted by the Wage-Hour Division.
- You may have a competitor who believes that your establishment is not paying the required minimum wage and overtime pay. His complaint to the Wage-Hour Division goes something like this: *"You make me comply with the law; make my competitor comply also."*
- A labor union makes complaints to the Wage-Hour Division on behalf of employees they represent. Unions also file complaints against non-union firms where they have tried to unionize and have been unable to do so.
- Follow-up investigation since you were last investigated to see you are complying with the latest personnel, accounting, and recordkeeping requirements. They will check to be sure any violations found during the first investigation have been corrected. Investigations are scheduled to find out if you are complying with an earlier consent or court injunction agreement requiring certain Wage-Hour compliance and conduct.
- Particular industry investigations -- the Wage-Hour Division may be investigating you because you are in a particular industry and they are trying to find the extent of compliance of employers in that industry with the particular Wage-Hour accounting and recordkeeping requirements.

#### Why A Compliance Investigation Is "Serious Business"

Most investigations end up with the employer being found in violation of some Wage-Hour accounting or personnel requirement. Department of Labor officials report that an overwhelming majority of employers against whom they have computed back wages, levied fines, and

injunctions, actually believed they were in compliance with the complex Wage-Hour personnel and accounting regulations. The Federal Wage-Hour Division and their one thousand plus investigating staff of compliance officers have now computed over one billion dollars in back wages due employees. No industry is safe from an investigation. No employer subject to the regulations can be considered "*safe*".

Unfavorable newspaper publicity, penalties ranging from the payment of back wages over a two-and-three-year period, with fines of up to \$10,000, imprisonment up to six months, and permanent federal courts injunctions against future violations make Federal Wage-Hour investigations a serious matter.

The above enforcement policies and penalties can be very costly in dollars as well as extremely detrimental to employee morale and goodwill. The personnel unrest will not only affect those employees directly involved with "*alleged back wages due*", but also affect employees company-wide. Poor employee morale results from an investigation where back wages have been computed and employees interviewed.

### **How You Are Notified Of A Pending Investigation**

As a general practice, the Wage-Hour investigator feels **No** obligation to give you advance notice of an investigation. Usually you will be notified of his intent to make an investigation by his personal presence at your office or at one of your establishments. You may also receive a telephone call from the investigator advising you that an investigation will be made. He will suggest a time when he can be there. If you are going to be out of town or your payroll department is tied up on that particular date, most investigators will normally work with you in arranging a more convenient time for your business. However, there is no use to keep delaying the investigation since investigators will sooner or later come in with or without your consent. Once you have been notified, arrange for the presence of the investigator at a time when it is most convenient for your payroll clerk or bookkeeper. You should also notify your Wage-Hour consultant immediately of the pending investigation so that they can stand by and offer you additional recommendations as the need arises.

### **Authority Of Wage-Hour Compliance Officers**

Authorized compliance officers of the Federal Wage-Hour and Public Contracts Divisions have plenty of authority to conduct these investigations. The Federal Wage-Hour laws give investigators the power to investigate and gather data on your wages, hours, working conditions, and other employment practices. They may enter your establishment and inspect any and all payroll and personnel records, transcribe records, and interview as many employees as they feel necessary. The purpose is to find out whether an employer has violated any accounting or recordkeeping requirements.

Their extremely broad authority gives a Wage-Hour investigator virtually carte blanche authority to enter your establishment, talk to your employees, and look at any records the investigator may feel are appropriate to find out whether you are in compliance with all of the personnel and

payroll accounting requirements. This is an important reason for maintaining clear, complete, and accurate personnel and payroll records.

### **Vulnerability Areas To Be Investigated By Compliance Officer**

- Improper minimum wage and overtime payments
- Hours of work that have not been recorded or paid properly
- Improperly compensating employees on a straight salary method of payment
- Working employees who fail to meet the minimum age requirements
- Falsification of personnel, payroll or time-keeping records
- Possible grounds for charges of discrimination between the sexes on equal pay for equal work
- Possible grounds for discrimination charges because of discriminatory personnel and wage and salary policies affecting employees over the age of 40
- Improper payroll deductions on garnishees, tools, uniforms, and company merchandise

Within these broad categories, there are a host of loopholes and vulnerability areas that the investigator will be checking with a fine-tooth comb.

### **Important Questions To Ask Yourself**

If a Federal Wage-Hour investigator conducted an investigation of your organization today, would you be in full compliance?

If your employees were interviewed by an investigator, what would they tell him?

Are you absolutely certain your present pay methods, personnel policies, and payroll records meet all the latest requirements of the Federal Wage-Hour Division?

## **WHAT TO DO BEFORE THE INVESTIGATOR ARRIVES**

### **Have A Professionally Conducted Wage-Hour Accounting Compliance Audit**

Whether you are complying 100% with all aspects of the accounting and recordkeeping requirements depends upon your particular situation as well as the current interpretation of the Federal Wage-Hour Administrator and his enforcement policies. SESCO recommends an immediate in depth Wage-Hour accounting compliance audit be conducted to determine your current status under Federal Wage-Hour enforcement policy. It is recommended that all areas of non-compliance involving methods of payment, compensable work time, personnel records, compensable payroll records, payroll deductions and all other areas be corrected as soon as possible using professional guidelines on how to meet these requirements.

It is far better for an investigator to observe "*good faith intention*" by observing that past mistakes are being corrected even though he may observe a period during the preceding two years in which you were not meeting all the requirements. One basic reason for a professional Wage-Hour Accounting Audit rests with your being able to initiate a record of compliance. If you're fortunate enough to avoid an investigation for the next two years, you will have saved yourself many thousands of dollars in that you self-corrected your areas of non-compliance.

It is recommended that job descriptions be completed on any "*gray*" employee classifications which you claim to be exempt from overtime pay before an investigation. It is also recommended that a "*letter of understanding*" outlining basic accounting tests, job duties, and responsibilities be acknowledged by salaried employees whom the investigator may look upon as occupying "*borderline*" positions with reference to the "*white collar*" salary classification. This will eliminate any confusion that may exist in the mind of an employee with regard to his "*job duties*" when questioned by a Federal Wage-Hour compliance investigator.

### **Communicate And Instruct Key People**

SESCO recommends that before any Federal Wage-Hour compliance investigation takes place that time be taken to instruct key personnel on "*what they should and should not do when the Wage-Hour investigator arrives.*" For example, SESCO recommends that you instruct your receptionist or secretary, office or business manager, and payroll supervisor on certain guidelines they should follow should you be faced with a Federal Wage-Hour investigation. SESCO's staff recommendations under the heading "*What To Do During The Wage-Hour Investigation*" would be very appropriate to go over with these key people. These recommendations can save you a great deal of money, doubt, uncertainty, confusion, and help you approach a future investigation with confidence.

### **Locate And Review Pertinent Personnel-Payroll Records**

Along with the previous recommendation on having a professionally-conducted Wage-Hour accounting audit, it is equally important to have a complete analysis and review of all present personnel and payroll accounting records subject to the scrutiny of a Federal Wage-Hour investigator. You should make certain that all required personnel and recordkeeping information is available and current on your records as specified by the Federal Wage-Hour Division. Furthermore, you should make certain in advance that you are meeting the present two-and-three-year retention requirements on the specified personnel and payroll records.

Needless to say, your payroll and personnel records should be centrally located in a neat order and available for inspection whenever the investigator asks for them. It is to your advantage to avoid having an investigator go on a "*hunting expedition*" in determining what he is looking for in this particular area or recordkeeping.

## **Prepare Audit Work Area For Investigator**

Look ahead and plan for a convenient location in your facilities for the investigator to perform his audit work. If possible, try to make a separate room available to the investigator where he can look at the requested records by himself. He then can be "*isolated*" from most employees. This tends to minimize the "*grapevine*" talking among your personnel and he will find it less easy to interrogate just anybody about a questionable area he may uncover.

## **WHAT DO TO DURING THE WAGE-HOUR INVESTIGATION**

### **Ask For The Investigator's Credentials**

When the investigator arrives and introduces himself, be certain he has the proper identification and credentials. All investigators are required to carry and show their federal credentials. It is an identification card containing his name, address, assignment location, along with his picture and signature. If he does not volunteer this to you, be sure to request it, and if his credentials and identification don't match, you should not permit any investigation to take place.

Request that the individual posing as an investigator leave. Let him know that once his credentials and identification are in order, he may return and perform an authorized investigation. This same recommendation applies to any investigator who does not have his proper credentials with him.

### **Communicate Investigator's Presence To Top Management**

Do not permit any Federal Wage-Hour investigator to perform any type of investigation, look at any records or interview any employee until permission has been granted from the head of the organization or his designated representative. The investigator can be requested to leave his card and to call back at a more convenient time if you or your designated manager is not available to assist him. Feel free to let the investigator know if his timing is not convenient to you nor to your payroll department. But you should have a good reason. Give him an alternative date when it would be more convenient for him to return and begin his investigation. It is wise to accommodate the investigator. Regardless of how you may feel about the Wage-Hour regulations or federal investigators, no useful purpose can be gained by dragging your feet or making it difficult for any investigator.

### **Treat Investigator With Courtesy And Give Him A Suitable Place To Work**

Try to create a reasonably friendly climate. Let the investigator know that you and your employees will cooperate with him in every possible way. During this first conference, arrangements will be made as to a place where he can sit down at a desk and inspect your personnel and payroll records. He will also explain to you that it will be necessary to interview various employees. You can expect many borderline questions to arise during his investigation. There is no point in creating any animosity or antagonistic feeling because of discourtesies.

But employers should not be fooled by outward appearances. A good working guideline we recommend is for you to assume that the investigator is not normally inclined toward management. Furthermore, it is natural for the investigator to want to find violations. In his eyes, the importance of his work increases in direct proportion to violations he finds. Nevertheless, it is recommended that the investigator be treated with courtesy. You should conduct yourself in a manner that will indicate you have nothing to hide and that you do desire to comply. A record of cooperation may be helpful later in avoiding or defending against an injunction suit by the Secretary of Labor.

### **Choose A Competent Office Employee To Assist**

The person you select should reflect a pleasant attitude. She should have patience and show a willingness to cooperate in helping the investigator obtain the proper records he needs and other personnel data he may request during his investigation.

The investigator will want to see those records which reflect the number of hours worked and the appropriate payroll records. Records of sales volume or business done may also be required to determine the extent of your annual dollar volume of business for purposes of finding out whether you come within the Wage-Hour coverage tests.

All records given to the investigator are to be treated confidentially by him.

You are not required to allow the investigator to remove records from your office or your premises. He may remove your records from your establishment only with your consent. If you do consent, make sure that he carefully identifies each record and that he gives you a receipt for them. Unless it is a most unusual situation, it is recommended that permission not be granted any investigator to take your records off your premises. There is no requirement that an investigator be permitted to make a Xerox or Thermofax copy of your records.

### **How To Deal With Requested Employee Interviews**

A Wage-Hour investigator has the authority to interview any employees and to take a statement from them about their job duties, responsibilities, hours of work, and other details concerning their wages and working conditions. Employers are not permitted to be present during these interviews. There is no right granted to have a copy of any employee's statement given to the investigator. The investigator's interviews with employees are for the purpose of verifying the accuracy of your payroll and time records, to better understand the employees' duties and exemption status, and to develop information not available in your records.

Employee interviews are conducted in private and are considered confidential. Investigators normally will not interview all employees, only take a representative sampling. Interviews are usually conducted in your establishment and with your permission. If you do not grant permission to the investigator to interview employees during working hours, the investigator will usually contact these employees at their homes.



SESCO recommends that you permit these employee interviews to take place on your premises. There is nothing wrong with requesting these interviews be held immediately before and after the employees' scheduled shift or work schedule. Most investigators will try to comply with your request to avoid as much lengthy interruption as possible.

Wage-Hour investigators usually interview all *"borderline"* salaried personnel and find out whether they have the proper authority and responsibility to meet the additional accounting tests for the various *"white collar"* salary exemptions from overtime. At this point, it is usually too late to go to the employees that you have been worried about and *"instruct"* them in what to say to the investigator.

In the first place, it isn't fair to place your employees in an embarrassing situation. If your employees are not in the habit of making false or misleading statements, they certainly wouldn't want to do so when questioned by an investigator. Most employees will be *"rattled"* when interviewed by an investigator. If he *"detects"* in your employee that he is being misled or given false information, both the employee and your organization could be in possible *"deep trouble"* if perjury or falsification of information can be proven by the investigator.

It is recommended that you request from the investigator the names of those employees he wishes to interview. It is your privilege to schedule interviews at the most convenient time to avoid disrupting your organization excessively. Once you have the employees' names to be interviewed, we recommend that a member of management escort them to the office where the interview is to take place. This enables you to talk to the employee and explain what is happening before the Wage-Hour interview can take place.

You should let the employee know that he should *"tell the truth"* to the best of his ability. He should also be told that this investigation is *"routine"* and does not mean your organization has violated any rule or done anything wrong. If the employee to be interviewed has been paid on a salary, then the investigator will be trying to verify his responsibilities and the amount of time he devotes to non-supervisory or non-administrative duties. It is recommended that you caution the employee, before the interview, not to minimize his responsibilities in talking with the investigator.

You should also inform the employee that he is not required to sign any statement prepared by the investigator unless he really wants to do so. Should he sign a statement, tell him to be absolutely certain to read it carefully and if it is not correct to make it so before signing it. In addition, the employee should be told that he has a right to a copy of his signed statement and that he should request a copy *"as a condition"* for signing. The Wage-Hour Division will not furnish employers with copies of any signed statements by their employees.

### **Cooperate But Don't Volunteer Facts Or Records Not Specifically Requested**

It's always best to answer only those questions directly asked by the investigator. Cooperate with the investigator and furnish him with exactly what he requests in terms of personnel, payroll, and time records. You must not refuse any requested records. Remember, the investigator can

subpoena any records needed to complete the investigation. However, don't give him more than he specifically requests. If you have concern with any present payroll policy, method of payment of any employee or job descriptions, check them out in advance with your SESCO Wage-Hour consultant. Don't wait until the investigator gets to your office to begin making changes. By then it is too late. A good rule is to supply the investigator with exactly what he requests but do not volunteer anything.

## **WHAT TO DO AFTER THE WAGE-HOUR INVESTIGATION**

### **Find Out How You Stand -- Listen -- Take Good Notes**

It is the general practice of federal investigators to hold a conference with you, your office manager, and your Wage-Hour consultant or accountant after he completes his investigation. Listen closely to all of his opinions made at this meeting. Take good notes during this meeting. If he says you are in violation in some area, find out exactly the reason for his findings. Ask him what he expects you to do to correct the violations. Obtain all information you can from him. *"Feel free"* to ask any questions, clarify and find out the reasons behind his claiming your non-compliance. Ask the investigator to document his findings in any Wage-Hour *"interpretive"* bulletin he can provide you. Have him underscore the pertinent sections.

### **If You Are Found In Violation, Pledge Future Wage-Hour Compliance**

If the investigator tells you that you are not in compliance and that you owe back wages to employees, ask him to give you the names of the employees involved, the amounts allegedly due them, and the basis for his computations. The investigator will provide you this information on a *"computation"* sheet, entitled *"Summary of Back Wages Due"*. Some investigations will not compute back wages themselves but will outline the procedures for you to follow and ask that you make these computations yourself. This is tending to be a new enforcement policy of the Wage-Hour Division. But no matter who computes the alleged wages due, be certain you tell the investigator that you will need to review the computations and the reason for them with your Wage-Hour consultant.

At this point, the investigator will want to find out your intentions for future compliance. Assuming that you (1) clearly understand the reason for your alleged discrepancies, and (2) you are convinced that your payroll or personnel procedures have not been in compliance with the latest federal regulations, then it is recommended that you pledge future compliance with the accounting requirements to the best of your ability. If you have any doubt at all as to where you stand, **tell the investigator that you will give his recommendations and suggestions careful consideration, but you need to discuss his findings and recommendations with your Wage-Hour consultant.**

## HOW TO SAY "NO"

### Review Findings Before Agreeing To Pay Back Wages

If he tries to pressure you into writing a check for the back wages at that moment, politely decline. Let him know that you will get back in touch with him after you have had a chance to review the whole matter of his investigation which took X number of days or X number of hours with your management group. This will take a little time. Thank him for his assistance. Again, pledge to him **your desire to comply in the future with the federal Wage-Hour accounting requirements to the best of your ability. Don't let yourself be rushed into agreeing with the investigator on his findings. Investigators are not infallible and often make mistakes in computations of back wages as well as in their collection of data and information from employee interviews. Take time and review the total results of the investigation with competent professional help.**

### Call Your SESCO Wage-Hour Consultant

Provide him with all details concerning the investigator's findings and recommendations. He may wish to meet with the investigator and review his findings in depth before giving you recommendations on the proper steps to take in the immediate future.

### If You Are Found In Wage-Hour Compliance, Document Results

If the investigator concludes that your methods of payment, payroll computations, personnel policies, and records are in compliance with the latest requirements, you should document this for your future protection. What happens if a different investigator comes back two years later and disagrees? If the investigator gives you a clean bill of health, nail him down on specifics. Ask to verify the exemption status of any employee you have been concerned about. Have him verify that your overtime computation procedures on bonuses are meeting the Wage-Hour requirements. **ASK THE QUESTIONS ONLY AFTER HE HAS TOLD YOU THAT ALL YOUR PAYROLL PROCEDURES ARE SATISFACTORY.**

If he gives you an affirmative answer to each of your questionable areas, request that he give you a letter stating that he did find you in compliance as a result of his investigation. Normally, most investigators will decline, telling you that they are not authorized to put the results of a compliance investigation in a letter since it's not their practice to do so. If you are fortunate enough to get such a letter, make several copies and file it for safe keeping.

### Write The Investigator

As soon as the investigator leaves your office, sit down and dictate or write out the results of your concluding conference with him. Document his decision where he held all your present salaried employees to be exempt from overtime as well as any other "gray" situations you have been concerned about. Then, write the investigator a letter and put in it the highlights of his conference with you. Restate his position that you were found to be in compliance such as:

*"During your final conference with me and my office manager, we were glad to learn that you concluded our company was in complete compliance with all the Wage-Hour accounting and personnel recordkeeping requirements." Repeat what he told you. At the end of your letter to him, let the investigator know that: "As a result of your findings during the investigation, it is our intention to continue our present, existing methods of payment, payroll computations, and recordkeeping so that we may continue to remain in compliance with the latest Federal Wage-Hour accounting and recordkeeping requirements." Your SESCO Consultant will help draft this "position" letter for you.*

You should not expect to receive an answer from the investigator to your letter. You have at least protected yourself in the future should another investigation take place by a different investigator. If you should be challenged in the future by a change in the position of the Wage-Hour Division or by a different attitude of a new investigator, you will at least have a copy of this letter on file to use in your defense.

### **Correct Your Wage-Hour Violations**

After you verify the accuracy of the findings and recommendations of the Federal Wage-Hour investigator with your SESCO Wage-Hour consultant then you should begin correcting any mistakes immediately so you can gain full accounting compliance.

### **Have A Semi-Annual Wage-Hour Accounting Compliance Audit**

SESCO recommends periodic professional auditing of your personnel and payroll procedures, methods of payment, and payroll computations. This is the best approach to keeping informed of changes in the enforcement and investigative policies of the Wage-Hour Division, with the goal of staying in compliance with the complex accounting requirements.

Wage-Hour accounting has rapidly become a highly specialized field in which constant study and attention must be maintained in order to keep up with the ever-changing enforcement policies of the Labor Department. You can be meeting the requirements one week, and then the enforcement policies can change and immediately you begin accumulating financial liabilities the following week.

SESCO has served management for more than four decades in developing wage and salary programs, and personnel and payroll record systems that meet the Federal Wage-Hour Division's personnel and accounting requirements. Since 1945, no SESCO client has ever been fined by the Department of Labor for a single Wage-Hour violation.

We can provide you with the peace of mind from knowing you have absolutely nothing to fear from a thorough federal investigation of your payroll, time records, personnel practices, and employee interviews.

## **Penalties For Violations**

The teeth of enforcement of the law are injunctions, shipping bans, safeguards for employee informants, liability for attorneys' fees, court costs, and possible damages in wage suites filed by employees, and possible criminal penalties.

You can be legally restrained from future violations. In lawsuits, employees can recover minimum and overtime wages owed, plus damages in an amount equal to the back-wage recovery.

Fines for willful violations may be \$1,100 for each violation and for criminal violations may be \$10,000 for each violation, plus six (6) months in jail.

### **Contact:**

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(423) 764-4127  
Fax: (423) 764-5869**

**web site: [www.sescomgt.com](http://www.sescomgt.com)  
e-mail: [sesco@sescomgt.com](mailto:sesco@sescomgt.com)**



## Exclusive Human Resource Consulting Services for Elite Clients

As a valued client of Elite, the following professional human resource management consulting services are available to you through SESCO's Certified human resource management consulting and legal staff.

### Services Provided at No Charge

- **Telephone, E-mail and Research Assistance** – A hotline is provided with no maximum time limit to discuss HR/Employment Law questions and needs. 423-764-4127; bill@sescomgt.com
- **SESCO Communications** – You will receive SESCO's newsletter, SESCO's weekly updates and other timely and proactive communications on management and human resource matters.

### Services Provided at Reduced Fees

- **Analysis and Review of Your Personnel Policies, Work Rules and Employee Handbooks.** \$250.00 – includes a through follow-up report with staff recommendations.
- **Federal and State Posters** – Special pricing on federal and state poster kits (\$19.95 per federal poster, \$19.95 per state poster kit).
- **Priority service** at reduced fees for requested consulting projects.

### Become a Preferred Client

**Provides all the services for one low monthly fee**

Review and analysis of employee handbooks and policies	✓
Federal and state employment posters	✓
One onsite Human Resource Audit with report per year	✓
Harassment training provided to managers as required by law	✓
Industry Specific Human Resource Guide	✓
One low monthly fee	As low as \$40



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Founded in 1945, SESCO's client base includes employers in all industries and all states. We are very proud of our complete "toolbox" of consulting services which has been developed based on practical, hands-on experience.

**Please FAX this form to: (423) 764-5869**

**Attention: Bill Ford or [bill@sescomgt.com](mailto:bill@sescomgt.com)**

☐ **Yes, I would like to find out more.**

☐ **Have a professional consultant call me today.**

Name \_\_\_\_\_

Title \_\_\_\_\_

Organization \_\_\_\_\_

Address \_\_\_\_\_

City/State \_\_\_\_\_ Zip/Postal Code \_\_\_\_\_

Phone \_\_\_\_\_ Fax \_\_\_\_\_

E-mail \_\_\_\_\_ Website \_\_\_\_\_

**Please send me information on the following SESCO service(s):**

• **Service Agreement (Starting at \$40.00 per month)**

- ☐ Complete HR Services
- ☐ Products Catalog
- ☐ Training Catalog

• **Leadership Development**

- ☐ SESCO Leadership Series
- ☐ Vital Learning Training - Leadership
- ☐ Sales
- ☐ Customer Service
- ☐ Labor and Employment Law

• **Human Resource Management Systems**

- ☐ Customized Employee Handbooks
- ☐ Compensation Systems
- ☐ Performance Management/Appraisal
- ☐ Career Pathing/Succession Planning
- ☐ Criteria-based Job Descriptions

• **Workplace Culture**

- ☐ Culture Assessments/Identification
- ☐ Satisfaction Surveys/Benchmarking
- ☐ Diversity Awareness Training
- ☐ Change Management

• **Forms and Publications**

- ☐ Personnel Forms
- ☐ Employment Kits
- ☐ Federal and State Posters
- ☐ "Human Resources Guide"
- ☐ Compliance Manuals

• **Employment Law Compliance**

- ☐ Compliance Assessments
- ☐ Representation Before Department of Labor and EEOC
- ☐ Required Training (Sex Harassment)
- ☐ Wage-Hour Investigations
- ☐ Affirmative Action Programs/OFCCP Investigations

• **Recruitment and Retention**

- ☐ Turnover Analysis
- ☐ Screening and Hiring Systems/Training
- ☐ Industry Specific Applicant Assessment Tools
- ☐ Employee Satisfaction Surveys
- ☐ Retention Strategies

• **Organizational Development**

- ☐ Team Development
- ☐ Individual Assessment/Coaching
- ☐ Management Assessment/Appraisal
- ☐ Succession Planning
- ☐ Family Business Succession Planning

• **Labor Relations**

- ☐ Union Vulnerability Assessments
- ☐ Union Campaigns (96% Win Ratio)
- ☐ Labor Contract Negotiations
- ☐ Prevention/Management Training