

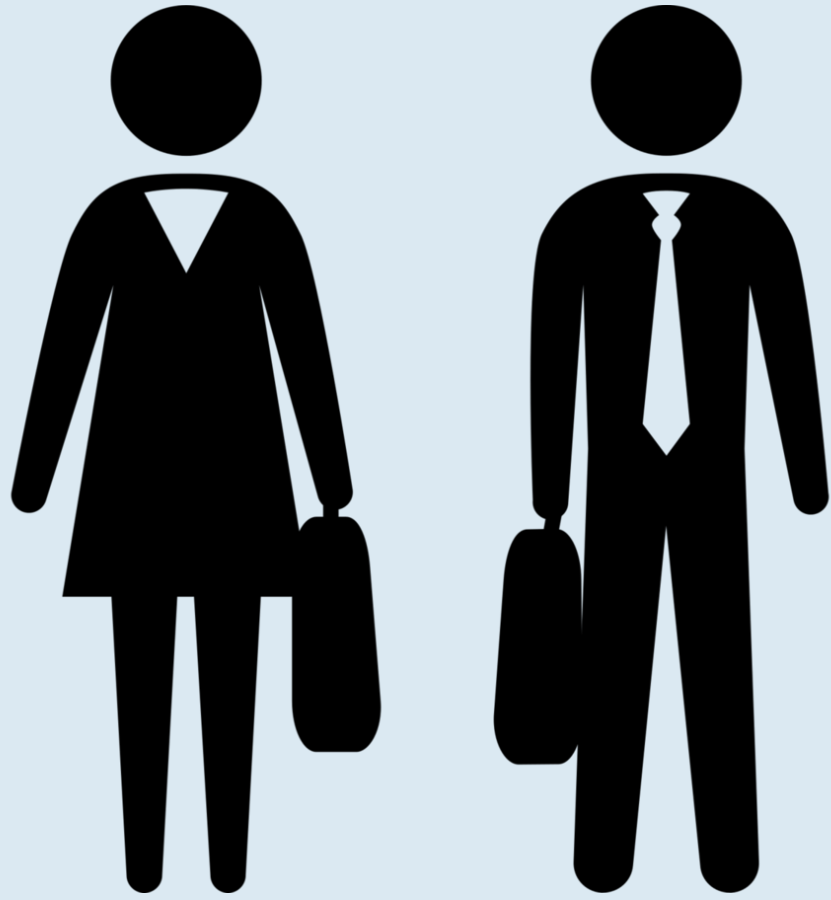


# **CELEBRATING 75 YEARS OF HR EXCELLENCE**

**TMHRA ANNUAL CONFERENCE**  
May 7-9, 2025 ★ San Antonio Marriott Rivercenter

## **FLSA: Getting the Details Right**

Presented By:  
**Julia Gannaway, JD**



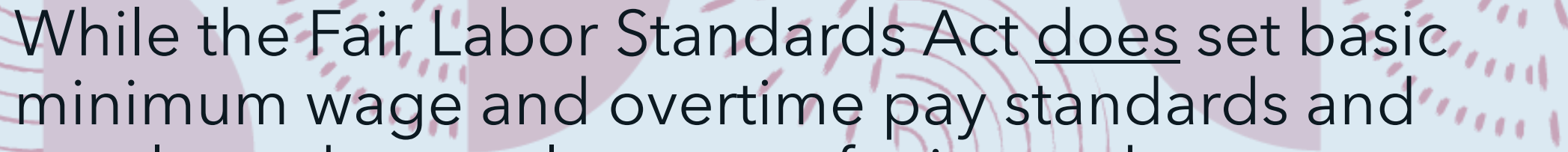
## FLSA and Texas wage laws

- FLSA/DOL
  - Minimum wage and overtime
- Texas
  - Special laws for police and fire in Texas Local Government Code



# **Fair Labor Standards Act**

- Minimum Wage
- Overtime Pay
- Child Labor Law
- Recordkeeping Requirements
- Applies to Public and Private Employers
- 40-Hour is Basic Work Week
- Applies to Full Time and Part-Time Employees



While the Fair Labor Standards Act does set basic minimum wage and overtime pay standards and regulates the employment of minors, there are a number of employment practices which the Act does not regulate. For example, the Act does not require:

- Vacation, holiday, severance, or sick pay
- Meal or rest periods, holidays off, or vacations
- Premium pay for weekend or holiday work
- Pay raises or fringe benefits
- A discharge notice, reason for discharge, or immediate payment of final wages to terminated employees
- Any limit on the number of hours of work for persons 16 years of age and over.

# **Payday Act Does Not Apply to Cities!**

- Texas Labor Code §61.003

GOVERNMENTAL ENTITIES EXCLUDED. This chapter does not apply to the United States, this state, or a political subdivision of this state.

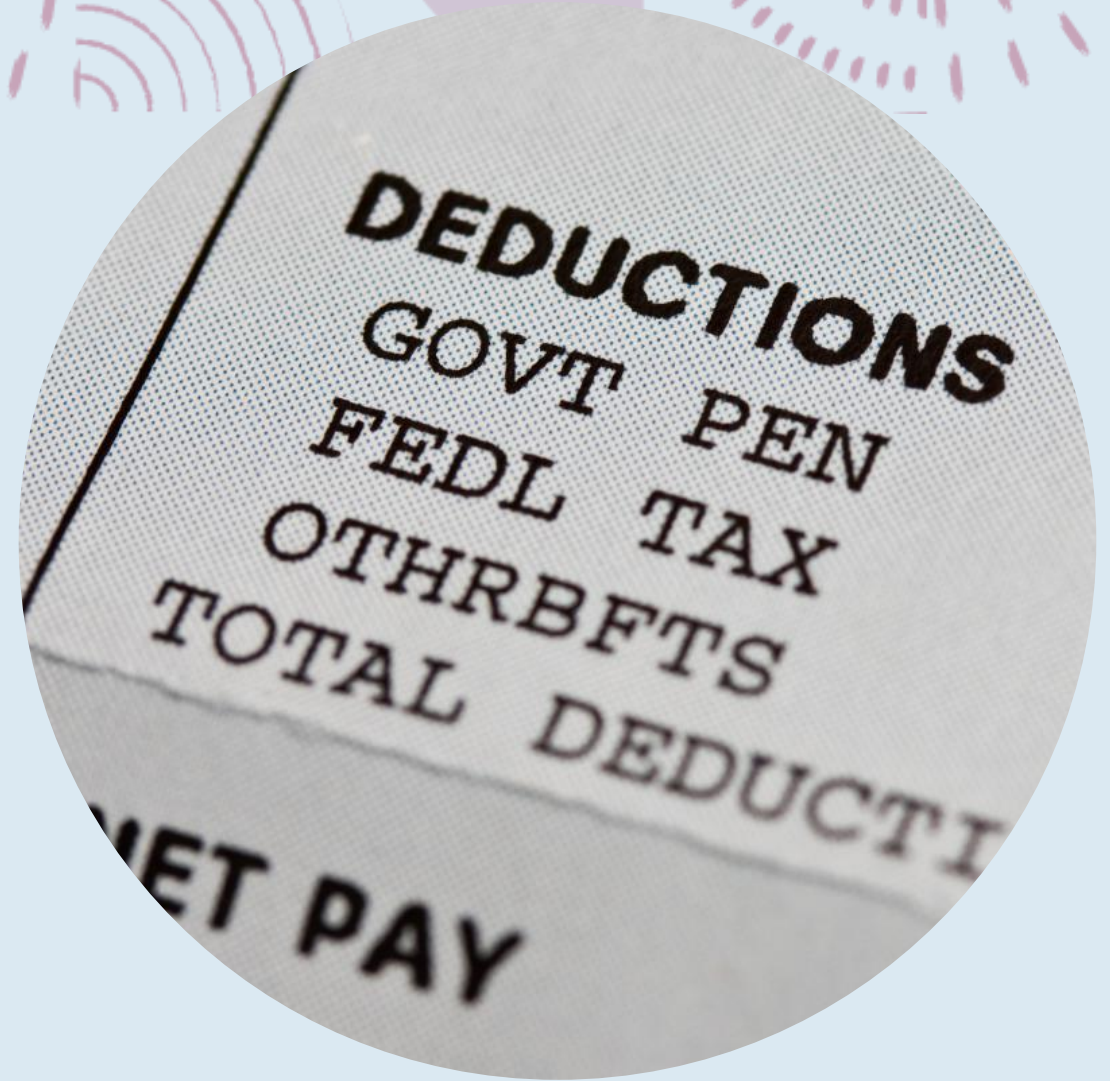
# Salary Basis Test

- Predetermined and fixed salary not subject to reduction because of variations in quality or quantity of work performed
- Partial-day or partial week deductions from an employee's pay *generally* do not satisfy salary basis test and will render employee non-exempt



# Deductions from Pay/Leave Bank

- Employer may dock employee's leave bank
- Leave bank docking does **not** constitute pay docking





# **Improper Deductions May Destroy FLSA Exemption**

- FLSA exemption is lost where an employer makes improper deductions from salary
- Regulations preserve “window of correction”
- Isolated or inadvertent deductions will not defeat exemption, if employee is reimbursed



# Exceptions To “No Deduction” Rule

- For absences from work for full day or more for personal reasons, other than sickness or disability
- For absences from work for full day or more occasioned by sickness or disability
- To offset jury or witness fees or military pay
- Hours not worked in first or last weeks of employment
- Hours taken as unpaid leave under Family and Medical Leave Act (“FMLA”)
- *Remember – requiring use of accrued leave is **NOT** pay docking!*

# Pay Docking - Other Considerations

- Employee owes the employer money for a pay advance or loan. *Make sure you have a written authorization!*
- Damage for wear and tear to equipment or even loss of equipment - no deduction from exempt employee pay.
- Unreturned employer property - generally, the employer may dock the exempt employee's final paycheck for the fair value of the unreturned items, up to the equivalent of minimum wage for their time worked in the final week. *Make sure you have a written authorization!*
- No disciplinary deductions to an exempt employee's -other than for violating safety rules of major significance or as a result of an unpaid suspension for serious misconduct (sexual harassment, workplace violence, drug violations). Otherwise, full workweek

# **PUBLIC EMPLOYER: SPECIAL RULE FOR “DOCKING” EXEMPT EMPLOYEES’ PAY**

## **PUBLIC ACCOUNTABILITY**

- Pay system established by statute, ordinance, regulation or policy/practice established per principles of public accountability

➤ 29 C.F.R. §541.701



# Weekly Timesheets

- Policy requiring all employees (exempt and non-exempt) to keep weekly timesheets
- For exempt, timesheets not kept for purposes of determining employee's wages, but for determining how much leave employee has taken
- Practice is permissible

# Recoveries under Federal Causes of Action

Statute of limitations

- 2 years
- 3 years if willful violation

Private cause of action exists

DOL can also bring suit for:

- Back pay
- Liquidated damages
- Injunction against employer

# **"Good Faith" Defense**

- If a court finds an employer did not pay minimum wage or overtime, it can assess "an additional amount as liquidated damages."
- Liquidated damages = double damages
- Some courts conclude that liquidated damages are mandatory if a violation is found . . . Except . . .
- Absolute Good Faith Defense and the Good Faith Defense as set out in Section 10 of the Portal to Portal Act

# **“Good Faith” Defense (cont.)**

- If an employer can show to the court that its actions were in *good faith* and that it had *reasonable grounds for believing* that the actions were not in violation of the FLSA, the court may, “in its sound discretion,” award no liquidated damages
- Has been found where employer relied on advice from a trade association’s attorney
- It’s not sufficient to consult an attorney---must actually follow the advice!



# Misclassification – Exempt v. Non-Exempt

- *Encino Motorcars, LLC, v. Navarro*,
  - Decided April 2, 2018; 5-4 decision,
  - Service advisors found to be exempt “salesmen of servicing”
  - Historically, courts have interpreted exemptions from overtime “narrowly” in favor of a right to overtime, but the DOL/courts found service advisors exempt – until DOL rule in 2011
  - In vacating the 9<sup>th</sup> Circuit’s decision, Justice Thomas, writing for the majority, observed that “the FLSA gives no ‘textual indication’ that its exemptions should be construed narrowly, ‘there is no reason to give [them] anything other than a fair (rather than ‘narrow’) interpretation.”

# Supreme Court Clarifies Burden

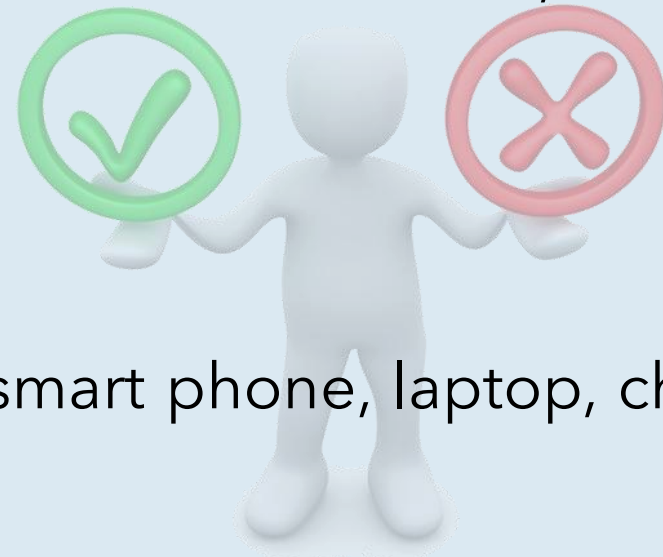
- E.M.D. Sales, Inc. v. Carrera, No. 23-217 604 U.S. \_\_ (2025)
- EMD argued some sales reps were “outside salesman” - exempt from OT pay
- District court and 4<sup>th</sup> circuit said “nope” because EMD did not prove exemption from OT rule by “clear and convincing” evidentiary standard
- Supremes unanimously reversed, finding preponderance of the evidence to be correct standard

# Weekly salary must be guaranteed

- *Pickens v. Hamilton-Ryker IT Solutions*, 6<sup>th</sup> Cir.
- Pipe inspector earning “guaranteed weekly salary” of \$800, equivalent of one eight-hour day at \$100/hour
- If worked more than 8 hours in any week, earned additional \$100/hour; said he was salaried, exempt so no OT
- Followed *Helix Energy Solutions Group, Inc. v. Hewitt* and held a daily rate is not “paid on a weekly salary basis” regardless of amount of money paid

# Outlays for Misclassifying Employees

- Employer typically does not maintain records or limit allowable work hours of independent contractors and exempts whereas, non-exempts must record all hours worked and overtime is prohibited without supervisor's approval.
- In misclassification cases employer is liable for all time worked, which may include:
  - Travel time
  - Commuting time
  - Training time
  - On-call time
  - "After-hours" or "off-day" time spent on smart phone, laptop, checking emails and voice mails, texting, etc.



# Compensable Time and Meal Breaks



- Compensability evaluated under “Completely relieved” v. “predominant benefit” standard
- Creating a policy that prohibits unauthorized work during meal breaks is not enough to avoid liability; policy must be consistently enforced
  - Liability triggered when employee is permitted or suffered to work
- Automatic meal break deductions are lawful
  - Challenge is to identify time actually worked and adjust automatic deduction; policy should place burden on employee to report exceptions to otherwise uninterrupted meal period
  - Can require workers to remain on site during a meal, but do not require them to remain at their post
- Employers should have strict meal break policies that either prohibit employees from eating at their desk or require them to notify supervisors if they are working through their meal breaks

# Travel During Or After Work Day

- Job-site to job-site travel is compensable
- Travel to employer's premises after work is compensable if required to drop off vehicle
- Travel to home to/from work is not compensable







# Overnight Out Of Town Trips

- Travel away from home during workday is compensable
- Travel during normal working hours on non-working days is compensable
- DOL letter opinion FLSA 2018-18



# On-Call Time

Cell phones and alcohol restrictions do not necessarily constitute inability to use free time



# Call Backs

- Is there a minimum amount of time Employer must pay for?
- Is call back time overtime?
- What about a telephone call to home of police officer to ask status of report?



# Factors to Evaluate Regarding Compensability of On Call time

- Terms of employment
- Physical restrictions placed on employee while on call
- The maximum period of “response time”
- Percentage of calls expected to be returned by on-call employee
- Frequency of actual calls during on-call periods
- Actual uses of on-call time by employee
- Disciplinary action, if any, against employees who fail to answer calls

# Training Time

- Compensable if during regularly scheduled work time
- Non-compensable only if all four are met:
  - Truly voluntary
  - No productive or “real” work performed
  - Not directly related to current job duties, and
  - Outside of regular work hours
- If not, then it is compensable



# Training & Study Time- Compensable?

## DOL Letter Ruling FLSA 2009-15

- City required certain employees to attend & pass training courses intended to make employees more proficient at existing jobs
- Attend training during regular work hours, but are assigned reading and assignments
- Study time? Compensable—but the City may establish a limitation on the amount of time expected to complete assignments/read chapters
- If exceeds that time, the employee must still be paid the overtime—but the employer may be able to discipline the employee for non-compliance with the policy

# No Exemption For Public Safety Employees


## **“White Collar” exemptions may not apply to:**

- Police officers
- Detectives
- Investigators
- Inspectors
- Firefighters
- Paramedics
- Emergency medical technicians
- Ambulance personnel
- Rescue workers
- Hazardous materials workers

# So long as they perform work such as:

- Preventing or controlling or extinguishing fires of any type
- Rescuing fire, crime or accident victims
- Preventing or detecting crimes
- Conducting investigations
- Inspections for violations of law
- Performing surveillance
- Pursuing, restraining and apprehending suspects
- Detaining or supervising suspected and convicted criminals
- Interviewing witnesses
- Interrogating and fingerprinting suspects
- Preparing investigative reports
- Or other similar work





**Does *not* mean  
that *all* police  
officers or  
firefighters are  
overtime eligible**

- Some high-level police and fire officials may be exempt executives or administrative employees, in limited situations
  - Must satisfy pertinent requirements of applicable exemption; *and*
  - Have as their primary duty performance of managerial tasks more in line with administering affairs of department or general business operations, as opposed to investigation
- ***But see: §142.0015 TLGC***

# Question

Does state law or federal law control regarding overtime?



# FLSA and Fire/Police Employees

- 7(k) exemption
- Components of 7(k) exemption select work period up to 28 day
- Pay overtime only if hours exceed chart
- Hourly versus salaried employees
- Police and some fire assignments: municipalities with over 10,000 population: §142.0015 TLGC

## Fact Sheet #8: Law Enforcement and Fire Protection Employees Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information concerning the application of the [FLSA](#) to law enforcement and fire protection personnel of State and local governments.

### Characteristics

Fire protection personnel include firefighters, paramedics, emergency medical technicians, rescue workers, ambulance personnel, or hazardous materials workers who:

1. are trained in fire suppression;
2. have the legal authority and responsibility to engage in fire suppression;
3. are employed by a fire department of a municipality, county, fire district, or State; and
4. are engaged in the prevention, control and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

There is no limit on the amount of nonexempt work that an employee employed in fire protection activities may perform. So long as the employee meets the criteria above, he or she is an employee "employed in fire protection activities" as defined in section 3(y) of the FLSA.

Law enforcement personnel are employees who are empowered by State or local ordinance to enforce laws designed to maintain peace and order, protect life and property, and to prevent and detect crimes; who have the power to arrest; and who have undergone training in law enforcement.

Employees engaged in law enforcement activities may perform some nonexempt work which is not performed as an incident to or in conjunction with their law enforcement activities. However, a person who spends more than 20 percent of the workweek or applicable work period in nonexempt activities is not considered to be an employee engaged in law enforcement activities under the FLSA.

### Coverage

Section 3(s)(1)(C) of the FLSA covers all public agency employees of a State, a political subdivision of a State, or an interstate government agency.

### Requirements

[Hours of work](#) generally include all of the time an employee is on duty at the employer's establishment or at a prescribed work place, as well as all other time during which the employee is suffered or permitted to work for the employer. Under certain specified conditions time spent in sleeping and eating may be excluded from compensable time.

The FLSA requires that all covered nonexempt employees be paid the statutory [minimum wage](#) of not less than \$7.25 per hour effective July 24, 2009.

The FLSA requires that all covered nonexempt employees be paid [overtime pay](#) at no less than time and one-half their regular rates of pay for all hours worked in excess of 40 in a workweek.

Section 13(b)(20) of the FLSA provides an overtime exemption to law enforcement or fire protection employees of a public agency that employs less than five employees during the workweek in law enforcement or fire protection activities.

Section 7(k) of the FLSA provides that employees engaged in fire protection or law enforcement may be paid overtime on a "work period" basis. A "work period" may be from 7 consecutive days to 28 consecutive days in length. For work periods of at least 7 but less than 28 days, overtime pay is required when the number of hours worked exceeds the number of hours that bears the same relationship to 212 (fire) or 171 (police) as the number of days in the work period bears to 28. For example, fire protection personnel are due overtime under such a plan after 106 hours worked during a 14-day work period, while law enforcement personnel must receive overtime after 86 hours worked during a 14-day work period.

Under certain prescribed conditions, a State or local government agency may give compensatory time, at a rate of not less than one and one-half hours for each overtime hour worked, in lieu of cash overtime compensation. Employees engaged in police and fire protection work may accrue up to 480 hours of compensatory time.

An employee must be permitted to use compensatory time on the date requested unless doing so would "unduly disrupt" the operations of the agency.

At the time of termination an employee must be paid the higher of (1) his or her final regular rate of pay or (2) the average regular rate during his or her last three years of employment for any compensatory time remaining "on the books" when termination occurs. For more information on state and local governments under the FLSA, see [Fact Sheet #7](#).

No covered employer may employ any minor in violation of the [youth employment provisions](#) of the FLSA. The Act establishes specific provisions concerning prohibited occupations and/or hours of employment of minors under age 18.

Covered employers must make, keep and preserve payroll-related records as described by regulations [29 CFR Part 516](#).

### Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: <http://www.wagehour.dol.gov> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

U.S. Department of Labor  
Frances Perkins Building  
200 Constitution Avenue, NW  
Washington, DC 20210

1-866-4-USWAGE  
TTY: 1-866-487-9243  
[Contact Us](#)



# Fire Fighters in Academy



- **§553.214 Trainees.**

- The attendance at a bona fide fire or police academy or other training facility, when required by the employing agency, constitutes engagement in activities under section 7(k) only when the employee meets all the applicable tests described in §553.210 or §553.211 (except for the power of arrest for law enforcement personnel), as the case may be. If the applicable tests are met, then basic training or advanced training is considered incidental to, and part of, the employee's fire protection or law enforcement activities.

Certified Fire fighters going to paramedic school stay on shift.  
Paramedics going to fire academy do not go on shift, they stay on  
days.

# How is Overtime Managed?

- Kelly Days – scheduled days off – no work performed
  - Helpful when you have sufficient staff; no one works more than the OT threshold
- Comp Time – max for public safety is 480 hours
  - What schedule is desirable?
  - Not a one-size-fits-all

# Overtime for Non-Exempt Employees

- Pre-Shift and Post-Shift Work
- Roll Call
- Report Writing
- Training
- Breaks/Call-back/On call
- Furloughs
- Travel





# Scheduling Fire Fighters

How many hours do they work in a year?

If three shifts: **2920** ( $365 \text{ days} \times 24 \text{ hours} / 3 \text{ shifts}$ )

Why do some departments use 2756?

53 hours is a fiction for a workweek; firefighters are not usually scheduled to work 53 hours in a 7-day week



# Sleep Time

**Duty:** Shifts of less than 24 hours:

- Employee on duty for less than 24 hours is considered *working* even if allowed to sleep, engage personal pursuits; no sleep time deduction permitted

**Duty:** Shifts of 24 hours or more:

- Parties can agree to exclude bona fide sleep periods, up to 8 hours, and only if certain conditions are met

# Regular Rate of Pay

- “Regular Rate of Pay” generally exceeds hourly rate
- Must include add-ons:
  - Longevity
  - Educational
  - Shift differential
  - Assignment
  - Certification
- Does Not Include:
  - Comp time/Overtime payments

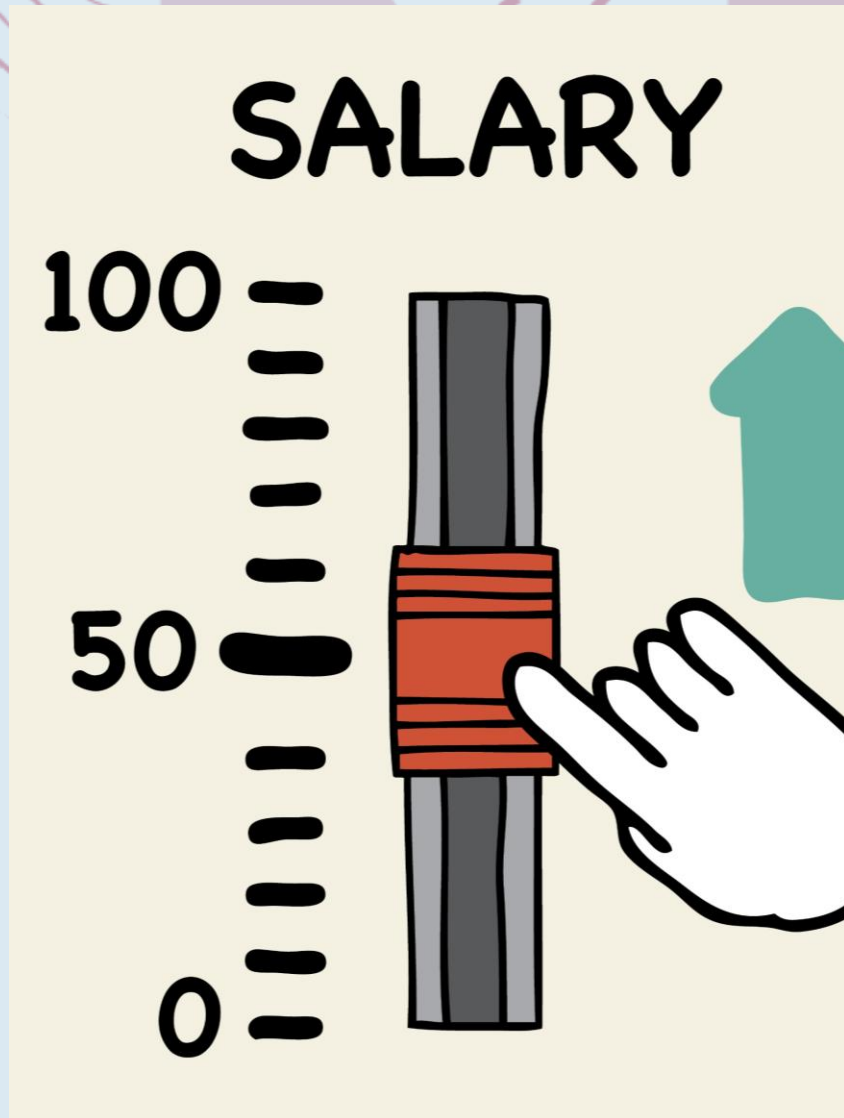


# If Employee is NOT Exempt, Calculate Regular Rate

- Must be more than minimum wage
- Overtime - 1 ½ times regular rate
- "Regular rate" must be an hourly rate
- Calculation: All remuneration earned in week ÷ total number of hours worked
- Remember, if the employer does not have any time records-the DOL/judge/jury will take the employee's word for it!



# What about Two Different Rates of Pay?



- Step up Pay: TLGC Sections 141.033(b) (non civil service) and 143.038 (civil service)
- Police Officer – K9
- 29 C.F.R. §778.115 “Employees Working at Two or More Rates”
  - Add all amounts earned at different rates and divide by number of hours worked in pay period, include add-on pays, to calculate new RROP



# **How Do We Calculate OT?**

# Regular Rate of Pay

## Regular Rate

- Determined by dividing total earnings in workweek (except for statutory exclusions) by total number of hours worked in workweek

**Total Compensation (except for statutory exclusions)**

÷

**Total Hours Worked = RR**

- *Regular Rate* may not be less than the applicable minimum wage
- ***Total earnings include commissions, certain bonuses, and cost of room, board, and other facilities provided primarily for the employee's benefit***



# Regular Rate of Pay

## Regular Rate and Premium Pay for OT Hours

**STEP 1:** Total compensation paid in a workweek  
(except for statutory exclusions)

divided by total hours worked in the workweek

**Total Compensation (except for statutory exclusions)**

÷

**Total Hours Worked = RR**

**STEP 2:** **RR** x .5 = Half-time Premium Pay per OT Hour

**STEP 3:** (Half-time) Premium Pay Rate x Overtime Hours in the Workweek =  
Overtime Compensation Due

# How Do We Calculate OT Pay?

Base rate of pay (hourly) + the pay attributable for that work period

Divided by

*Compensable Hours worked\**

*\*Many entities use the hours scheduled to work in the work period, otherwise it's an ever-changing divisor*

# Exclusion - Payments for time not worked

## Sick leave buybacks

Statute 29 U.S.C. § 207(e)(2)	2019 Final Rule
<ul style="list-style-type: none"><li>Employers may exclude from the regular rate certain payments made for occasional periods when no work is performed due to vacation, holidays, or illness.</li></ul>	<ul style="list-style-type: none"><li>Updates this exclusion to include payments for not taking sick leave and other paid time off.<ul style="list-style-type: none"><li>The payment must be approximately equivalent to the employee's normal earnings.</li><li>The payment is excludable regardless of whether it is paid during the same pay period in which the previously scheduled leave is forgone or during a subsequent pay period as a lump sum.</li></ul></li></ul>

# Firefighter/7K exemption

- *Patterson, et al v. Dallas/Fort Worth Int'l Airport Board*, 490 F. Supp.3d 1034 (N.D. Tex. 2020)
  - Both parties moved for summary judgment
  - FF in four different divisions: Fire Rescue, EMS, Career Development, and Fire Prevention and Planning
  - Applicability of 207(y) – expanded definition of employee in fire protection activities
- 
- Check with your City Attorneys and Fire Chiefs regarding job duties/job descriptions

# **TEXAS GOVERNMENT CODE**

## **Chapter 419**

### **Texas Commission on Fire Protection**

#### **WHO ARE FIREFIGHTERS?**



# **§ 419.021 – Definition of Firefighter**

- Permanent, full-time law enforcement officers designated as fire and arson investigators.
- Aircraft rescue and fire protection
- Permanent, full-time fire department employees who are not secretaries, stenographers, clerks, budget analysts, or similar support staff persons or other administrative employees and who are assigned duties in one or more of the following categories:
  - Fire suppression and inspection;
  - Fire and arson investigation;
  - Marine and aircraft rescue & fire fighting
  - Fire training and education;
  - Fire administration; and
  - Any other position necessarily or customarily related to fire prevention.


# Article 2A.001 CCP

## WHO ARE PEACE OFFICERS?

- Police officers of a city, town or village, and reserve municipal police officers who hold a permanent peace officer license.
- Members of an arson investigation unit.
- Municipal park and recreational patrolmen and security officers.
- School districts and higher education
- And thirty-two others . . .







**§142.0015**

# **HOURS OF LABOR & VACATION**

**(In cities with population greater than 10,000)**

## **Overtime Ratio for Firefighters & EMS**

A firefighter or EMS employee (*excluding chief, assistant chief, or an equivalent*) who works more than the same ratio to 212 hours in a 28-day work period, is entitled to overtime.

## **Overtime Ratio for Other Fire Employees**

A member of fire department who does not provide EMS services or fight fires (*excluding chief, assistant chief, or an equivalent*) who works more hours in a week than a majority of other city employees (*excluding firefighters, EMS and police officers*) is entitled to overtime.

# Fire Fighters & Other Members of Fire Dept.

## **ON-CALL TIME**

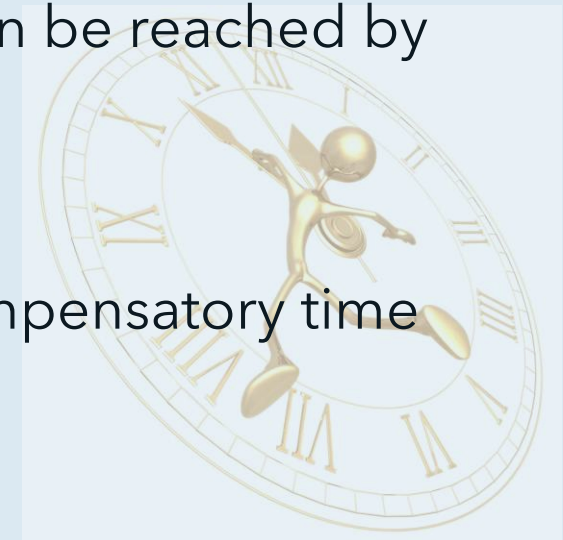
If employee on call at or near employer's premise & can't use time effectively for personal use, time is counted toward hours worked. If employee only required to leave telephone number or can be reached by radio or pager, hours not counted.

## **HOURS IN WORK WEEK OR WORK CYCLE**

Vacation, sick time, holidays, time in lieu of holidays & compensatory time may be excluded as hours worked.

## **OVERTIME**

A city may require fire fighters & other members of fire department to work overtime. Overtime is paid at the rate of 1 ½ times the regular rate.




# §142.001 - HOURS OF WORK & VACATION FOR POLICE & FIRE



- Defines “**work cycle**” as the period in a posted work schedule ending when the cycle begins to repeat itself. The cycle may span any number of days, weeks, or a part of a day or week.



- **Trade Time** - with the Chief’s consent, police officers and firefighters may work extra hours when exchanging hours with another police officer or fire fighter.



# **§142.0015- (f-j) Police Officers - Overtime: Not FLSA**

(f) With 2 exceptions, police officers can't be required to work more hours during a calendar week than the number of hours in the normal work week of the majority of city employees other than fire fighters and police officers.

## **2 Exceptions:**

- 1. Emergency**- if there is an unexpected happening or event or an unforeseen situation or crisis that calls for immediate action & Chief orders the officer to work overtime.
- 2. Written waiver** - if a majority of police officers sign a written waiver, city may require police officers to work more hours than permitted by sub. (f).

**Overtime** - Even with written waiver, officer who works more hours in normal calendar month than majority of city employees (other than police and fire), is entitled to overtime pay.

# Hours Worked

- Care, feeding & exercising of Police K-9s at home.
- Rest periods of 20 minutes or less
- Get ready to work prior to start of the shift
- Clean-up work after the conclusion of a shift
- The entire meal period if the employee is not completely relieved from all duties, and responsibilities. Example: A clerical employee who must sit at his/her desk and answer telephones during his/her lunch period
- Time spent in meeting a requirement to report prior to the official beginning of the shift
- Maintaining/washing government vehicles (cars, motorcycles) at home







# ***Christensen v. Harris County*** ***U.S. Supreme Court (May 1, 2000)***

A public employer may compel use of compensatory time

*\*But see § 142.0016 TLGC*

Remember, public safety can accrue up to 480 hours of comp time; regular government employees can accrue up to 240 hours of comp time

# § 142.0016 - Use of Comp Time (Population of more than 10,000)

- A police officer may, with city's approval, accept comp time in lieu of overtime pay, at rate of 1-1/2 times the regular rate.
- **Use of Comp Time** - A police officer may use comp time only when both employee and city agree.
- **Pay-out** - City may, at any time, pay all or part of employee's accumulated comp time if employee and city so agree
- If full payment of accumulated comp time would exceed 10% of annual salary, city may at its option, defer payment of excess amount until first pay period of next fiscal year.
- Accumulated comp time must be paid at employee's rate of pay at time payment is made, or at time payment requested, whichever is greater.
- If employee dies or is terminated for any reason, city pays accumulated



# 29 CFR §553.31 Substitutions

## Section 7(p)(3).

- (a) Section 7(p)(3) of the FLSA provides that two individuals employed in any occupation by the same public agency may agree, solely at their option and with the approval of the public agency, to substitute for one another during scheduled work hours in performance of work in the same capacity. The hours worked shall be excluded by the employer in the calculation of the hours for which the substituting employee would otherwise be entitled to overtime compensation under the Act. Where one employee substitutes for another, each employee will be credited as if he or she had worked his or her normal work schedule for that shift.
- (b) The provisions of section 7(p)(3) apply only if employees' decisions to substitute for one another are made freely and without coercion, direct or implied. An employer may suggest that an employee substitute or "trade time" with another employee working in the same capacity during regularly scheduled hours, but each employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision. An employee's decision to substitute will be considered to have been made at his/her sole option when it has been made (i) without fear of reprisal or promise of reward by the employer, and (ii) exclusively for the employee's own convenience.
- (c) A public agency which employs individuals who substitute or "trade time" under this subsection is not required to keep a record of the hours of the substitute work.
- (d) In order to qualify under section 7(p)(3), an agreement between individuals employed by a public agency to substitute for one another at their own option must be approved by the agency. This requires that the agency be aware of the arrangement prior to the work being done, i.e., the employer must know what work is being done, by whom it is being done, and where and when it is being done. Approval is manifest when the employer is aware of the substitution and indicates approval in whatever manner is customary.

# Question

Does work for an off-duty employer, scheduled through the department – count towards overtime?





# **TEXAS LOCAL GOVERNMENT CODE**

COMPENSATION &  
EXPENSES OF  
MUNICIPAL  
OFFICERS AND  
EMPLOYEES

# **§ 141.008 - PAYROLL DEDUCTIONS for ASSOCIATION DUES**

**(In cities with population greater than 10,000)**

## **ALL EMPLOYEES**

- City *may* deduct if employee requests in writing.

## **Police/Fire (1/1/2025)**

- City “shall” make deduction if requested in writing and officers are not members of a department covered by a CBA/M&C agreement, and city permits deductions for purposes other than charity, health insurance, taxes, or other purposes
- Deductions remain in effect until City receives written notice of revocation

# **\$141.032 - LONGEVITY PAY FOR POLICE**

**(In cities with population greater than 10,000)**



A police officer or fire fighter is entitled to an additional payment of \$4 a month for each year of service in the department, not to exceed 25 years.

# **§141.033 - CLASSIFICATION OF POSITIONS SALARY SCHEDULE**

## **Rank Structure**



The city is required to classify all positions in its police departments and specify the duties and salary of each classification.

## **Step-Up Pay**

If an employee is required to perform the duties of a particular classification, that employee must be paid the corresponding salary for the time the employee performs the duties.

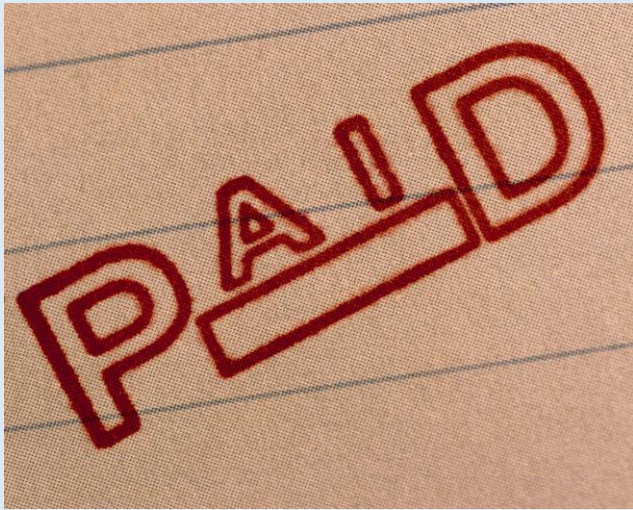


# Question

Can an employer pay overtime *before* the officer hits the 7k overtime threshold?



# **§142.008 - Salary Continuation & Subrogation**



- If a city pays an employee who has been injured, due to the tortious act of a third party, under a salary continuation program, the city may claim subrogation to the extent of such payments.
- A city is prohibited from denying salary continuation benefits because the employee has a cause of action against a third party for personal injuries.

# **\$142.009 - Payment for Court Appearances**

A city is required to pay a police officer for appearing as a witness in a criminal or civil suit if the city or another city or governmental agency is a party, if the employee's appearance is:

- required
- made on time off, and
- done in capacity as police officer

Payment is at the employee's regular rate of pay.



# Time Records & Overtime - Nonexempt Employees

- Require accurate reporting of time worked & time off
- Require advance authorization for overtime
- Prohibit “off-the-clock” work
- Mandatory reporting if “off-the-clock” work required or “encouraged”
- Working from home, emails, texts – how to handle
- Abuses





# **DEPARTMENT OF LABOR'S 2024 FINAL RULE - ENJOINED**

*Prior salaries remain in effect; duties tests are unchanged*  
*\$684/week; \$35,568 annual*

# DOL's Final Overtime Rule - Enjoined

## Appeal to 5<sup>th</sup> Circ. filed

- November 2024: Texas federal judge ruled DOL had exceeded its statutory jurisdiction by setting salary threshold so as to “effectively eliminate” the other considerations in the FLSA like job duties.
- Trump’s DOL appealed this ruling to the 5<sup>th</sup> Circuit; allows the DOL to defend its longstanding practice to set a salary threshold for OT eligibility.

***See also Mayfield v. U.S. Department of Labor, No. 23-50724 - 5<sup>th</sup> Cir. 2024*** (challenging the 2019 rule)



# **WHITE COLLAR EXEMPTIONS**

## **Duties Test**

# Key Terms Used In The Regulations

## Primary Duty

- Examine “primary duty:”
  - Principal
  - Main
  - Major or most important
  - Character of the employee’s job as a whole
  - “What does your daddy do?”





# **“Primary Duty” is Key**

- Replaces Percentage Limit on performance of exempt duties

Employees who spend less than 50% of their time performing exempt work can still be considered as having a primary duty that satisfies the standard duties test for exemption.

It is employer’s obligation to determine and communicate employee’s primary job duty

*Martin v. Indiana Mich. Power Co.*



# **EXECUTIVE EXEMPTION**



# Executive Exemption

- Compensated on salary basis
- Primary duty is management of test enterprise or a customarily recognized department or subdivision.
- Authority to hire or fire other employees; or recommendations as to hiring, firing promotion or any other change of status are given particular weight.
- Customarily and regularly directs work of two or more other employees.

# Elements Of Management of the Enterprise

- Interviewing, selecting and training
- Setting and adjusting employee pay and hours
- Directing employees' work
- Maintaining production records for use in supervision or control
- Appraising employees' productivity and efficiency
- Handling employee complaints and grievances
- Disciplining employees

# Elements of Management of the Enterprise (Cont.)

- Planning work and determining techniques to be used
- Apportioning work among employees
- Determining type of materials, supplies, machinery, equipment or tools
- Providing for safety and security of employees or property
- Controlling flow and distribution of materials
- Monitoring or implementing legal compliance measures

# Customarily Recognized Department or Subdivision

- Shifts can constitute a department or subdivision
- Teams or groups may constitute a department or subdivision
- Must have a permanent status and a continuing function

# **Directs Two or More Other Employees**

- Means two full-time employees or their equivalent
  - One full-time and two half-time employees, or four half-time employees, are equivalent
- Employees who assist manager of department and fill in as a supervisor only in manager's absence do not qualify for exemption
- Shared responsibility for same two employees: no exemption



# Authority to Hire or Fire Other Employees

- Suggestions Given Particular Weight Factors:
  - Making such suggestions and recommendations are part of employee's duties
  - Frequency with which employee's makes suggestions or recommendations
  - Frequency with which suggestions are relied on
- Executive must regularly supervise employees he/she makes recommendation about
  - Manager does not have to make ultimate decision



# **Concurrent Duties**

Concurrent performance of exempt and non-exempt work will not disqualify an employee from executive exemption if employee otherwise meets salary and duty requirements



# **ADMINISTRATIVE EXEMPTION**



# **Administrative Exemption**

- Compensated on salary basis
- Primary duty involves performance of office or non-manual work directly related to the management or general business operations of employer or of employer's customers and also includes exercise of discretion and independent judgment with respect to matters of significance



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

Directly related to running or servicing of business opposed to working on manufacturing production line or selling product.



# Functional Areas:

- Tax
- Finance
- Accounting
- Budgeting
- Auditing
- Insurance
- Purchasing
- Procurement
- Marketing
- Research
- Personnel Management
- Employee benefits
- Human Resources
- Labor relations
- Public relations
- Government relations
- Internet and database administration
- Legal and regulatory compliance
- Similar activities

# Discretion and Judgment Factors

- Matter of Significance
  - Level of impact; or
  - Consequences of work performed
- Employee has authority to make an independent choice without immediate direction or supervision
- Employee can still exercise discretion and independent judgment even if supervisor reviews decisions or recommendations



# Factors--Administrative Exemption

- Even if many employees perform same or similar work, does not mean that their work does *not* involve exercise of discretion and independent judgment with respect to matters of significance
- Factors to evaluate exercise of “discretion and independent judgment:
- Authority to formulate, affect, interpret, or implement management policies or operating practices
- Carries out major assignments
- Performs work that affects business operations to substantial degree, even if employee’s assignments are related to operation of particular segment of business
- Authority to commit employer in matters that have significant financial impact

# **Factors-Administrative Exemption (Cont.)**

- Authority to waive or deviate from established policies and procedures without prior approval
- Authority to negotiate and bind city on significant matter
- Provides consultation or expert advice to management
- Involved in planning long or short-term business objectives
- Investigates and resolves matters of significance on behalf of management
- Represents the city in handling complaints, arbitrating disputes, or resolving grievances

# Using Manuals Does Not Negate Exemption

Use of manuals, guidelines or other established procedures containing or relating to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by employees with advanced or specialized knowledge or skill *does not* preclude exemption

- Manuals can provide guidance in addressing difficult or novel circumstances
- Employees who apply well-established techniques or procedures described in manuals within closely prescribed limits to determine correct response to an inquiry or set of circumstances are likely *not* exempt.



## ***How Many Factors?***

Employees who meet at least two or three of these factors are generally exercising discretion and independent judgment, although case-by-case analysis is required

# Other Factors Found Relevant

- Freedom from direct supervision
- Personnel responsibilities
- Troubleshooting or problem-solving activities on behalf of management
- Use of personalized communication techniques
- Authority to handle atypical or unusual situations
- Authority to set budgets responsibility for assessing customer needs
- Primary contact to public or customers on behalf of the employer
- Advertising or promotion work
- Coordination of departments
- Requirements or other activities for or on behalf of employer or employer's clients or customers

# Examples of Generally Exempt Positions

- Insurance claims adjusters
- Risk managers
- Marketing representatives
- Team Leaders
  - Team of other employees assigned to complete major projects

# **Administrative Exemption Purchasing Agent-FLSA2008-1**

**Main job duties include: ensuring that materials, equipment, and supplies are timely ordered and delivered so the manufacturing process functions smoothly; negotiating prices with vendors; placing orders, maintaining records and handling returned goods; and setting delivery times to maintain appropriate inventory level. Additionally, PAs play a primary role in vendor selection, researching vendors, requesting quotes, negotiating with potential vendors, and making a recommendation for vendor selection to the manager. PAs are authorized to make purchases up to \$25,000 without managerial review or authorization. 99% of purchasing orders are below \$25,000.**



# **Administrative Exemption Purchasing Agent-FLSA2008-1**

- **The DOL found that the PAs perform office/non-manual work and that their duties, ensuring that materials, equipment, and supplies are ordered and delivered and participating in the vendor selection process -*directly relate* to the functional areas of purchasing and procurement. Therefore the “primary duty” involves the “performance of office or non-manual work directly related to the management or general business operations of the employer.” 29 CFR §541.200(a)(2).**



## **Executive or Administrative Assistants**

Assistants to senior executives  
Exempt where they work without specific instructions or prescribed procedures, and have been delegated authority regarding matters of significance



## **Human Resource Managers**

Formulate, interpret or implement employment policies  
Management Consultants  
Propose changes in organization



## **Purchasing Agents**

Authority to bind city on significant purchases  
True, even if they must consult with top management officials when making purchase commitment for raw material in excess of contemplated plant needs

# Examples Of Generally Non-Exempt Positions

- Inspectors who rely on standard techniques and procedures, either catalogued in manuals or acquired by special training or experience, who have little discretion
- **Public sector inspectors or investigators who apply prescribed procedures and whose work does not directly relate to management or general business operations**
- Personnel clerks who screen applicants for minimum qualifications, but do not set minimum standards or interview



# **PROFESSIONAL EXEMPTION**



# Professional Employees

- Compensated on a salary basis
- Primary duty is performance of work
  - Requiring advanced knowledge in field of science or learning customarily acquired by prolonged course of specialized intellectual instruction
  - Requiring invention, imagination, originality or talent in “recognized field of artistic or creative endeavor”



# **Learned Professional**

Primary Duty – work involving:

Knowledge of advanced type in field of science or learning customarily acquired by prolonged course of specialized study



# Advanced Knowledge

- “Work requiring advanced knowledge” is work which is predominantly intellectual and which requires regular exercise of discretion and judgment, as distinguished from routine mental, manual, mechanical or physical work
- “Advanced knowledge” cannot be attained at high school level





# Field Of Science or Learning

Includes but not limited to:

- Law
- Medicine
- Theology
- Accounting/actuarial computation
- Engineering and Architecture
- Teaching
- Pharmacists
- “Other similar occupations,” as distinguished from “Mechanical arts” or “skilled trades” where knowledge may be advanced, but is not field of science or learning.

# Examples of “Learned Professionals”

- Registered nurses
- Certified public accountants
- Dental hygienists
- Physician assistants
- Athletic trainers
- Areas in which professional exemption applies are expanding:  
“As knowledge is developed, academic training is broadened and specialized degrees are offered in new and diverse fields”
- Create new specialists in particular fields of science or learning when advanced specialized degree has become standard requirement for any particular occupation.

# Computer Employees

- Section 13(a)(1) computer systems analysts, computer programmers, software engineers or other similarly skilled workers in computers filed are eligible for professional exemption
- Section 13(a)(1) exemption applies to any computer employee paid appropriate salary amount
- Section 13(a)(17) exemption applies to any computer employee paid \$27.63 per hour
- Exemptions apply only to computer employees whose primary duty consist of:
  - Application of systems analysis techniques and procedures
  - Design, development, documentation, analysis, creation, testing, modification of computer systems or programs based on and related to user or system design specification
  - Design, documentation, testing, creation or modification of computer programs related to machine operating systems, or
  - Combination of above duties



# Computer Exemption

- Exemption does not include those engaged in manufacture or repair of computer hardware and related equipment
- Exemption does not apply to employees whose work is highly dependent upon, or facilitated by, use of computers or software, but who are not primarily engaged in computer systems analysis and programming or other similar occupations



# **Executive and Administrative Computer Employees**

Computer employees may also have executive and administrative duties that qualify them for exemption

- Employees who work in many functional areas are exempt so long as their primary duty includes exercise of discretion and independent judgment with respect to matters of significance





*Questions?*





thank you!

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