

# WARNING

Effective August 23, 2004, some of the materials found in the FLSA portion of this document have changed.

For updated information, please see **Recent Changes to the Fair Labor Standards Act.**

# **STANDARDIZATION OF STATE ISSUES TRAINING**

## **FAIR LABOR STANDARDS ACT AND INDEPENDENT CONTRACTORS**

**OCTOBER 4, 2001**

**OHIO DEPARTMENT OF ADMINISTRATIVE SERVICES  
HUMAN RESOURCES DIVISION**

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# **IN APPRECIATION OF THEIR CONTRIBUTION TO THIS MANUAL**

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# **STANDARDIZATION OF STATE ISSUES TRAINING**

## **FAIR LABOR STANDARDS ACT AND INDEPENDENT CONTRACTORS**

**OCTOBER 4, 2001**

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|--------------------------------|--|
| <b>8:30 A.M. – 9:00 A.M.</b>   | <b>REGISTRATION</b>  |
| <b>9:00 A.M. – 9:15 A.M.</b>   | <b>INTRODUCTION</b><br><b>CHARLES L. WHEELER, DEPUTY DIRECTOR</b><br><b>DEPARTMENT OF ADMINISTRATIVE SERVICES</b><br><b>HUMAN RESOURCES DIVISION</b><br><br><b>WILLIAM A. KLATT, CHIEF LEGAL COUNSEL</b><br><b>OFFICE OF THE GOVERNOR</b>  |
| <b>9:15 A.M. – 9:50 A.M.</b>   | <b>REQUIREMENTS/FLSA</b><br><b>DON COLLINS, ASSISTANT ATTORNEY GENERAL</b><br><b>CHIEF OF EMPLOYMENT LAW</b><br><b>ATTORNEY GENERAL</b>  |
| <b>9:50 A.M. – 10:05 A.M.</b>  | <b>BREAK</b>   |
| <b>10:05 A.M. – 10:35 A.M.</b> | <b>LEGAL UPDATE/FLSA</b><br><b>ROBERT GRIFFIN, ASSISTANT ATTORNEY GENERAL</b><br><b>EMPLOYMENT LAW SECTION</b><br><b>ATTORNEY GENERAL</b>  |
| <b>10:35 A.M. – 11:30 A.M.</b> | <b>EXEMPTIONS/BEST PRACTICES/FLSA</b><br><b>LEWIS GEORGE, CHIEF OF LEGAL COUNSEL</b><br><b>DEPARTMENT OF YOUTH SERVICES</b><br><br><b>KATHRYN NOWACK, EXECUTIVE ASSISTANT</b><br><b>DEPARTMENT OF ADMINISTRATIVE SERVICES</b><br><br><b>JIM TURNER, CHIEF LEGAL COUNSEL</b><br><b>DEPARTMENT OF COMMERCE</b> |
| <b>11:30 A.M. – 12:30 P.M.</b> | <b>LUNCH</b>   |



**STANDARDIZATION  
OF STATE ISSUES  
TRAINING**

**OCTOBER 4, 2001**

**FAIR LABOR  
STANDARDS ACT**



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## **PART 1: REQUIREMENTS OF THE FLSA**

### **History of the FLSA**

The Congress of the United States enacted the Fair Labor Standards Act of 1938, 29 U.S.C. 207 (FLSA), as part of President Roosevelt's "New Deal" legislation, to ease the impact of the economic depression that had been plaguing the country. Two components of the FLSA were designed to improve employment opportunities for the American worker. The act established a minimum wage standard and created an overtime pay standard with the intention of encouraging employers to hire additional employees rather than pay the premium pay for overtime hours worked. In addition to setting standards for a minimum wage and overtime pay, the FLSA created laws for equal pay, record keeping and child labor standards for employees who are covered by the Act and are not exempt from specific provisions.

The FLSA is a federal law. However, no provision of FLSA will excuse noncompliance with any state law or municipal ordinance establishing a minimum wage higher than the federal minimum wage established by FLSA. Ohio Revised Code Chapter 4111 sets minimum fair wage standards in Ohio.

Initially, the Supreme Court held that FLSA covered state and local government employees, except those exempted or excluded from coverage. Conversely, private action was deemed to be not available under FLSA, even though that is what it was initially drawn up to regulate.

In 1976, the Court ruled that application of FLSA to state and local governments was unconstitutional. The Court reasoned that "integral or traditional state and local government functions" should be controlled by those governmental entities. It held that nontraditional or propriety functions (government acting in a business function) were still covered by FLSA.

Subsequently, nine years later, in 1985, the Court reversed its' position and held that state and local governments were covered in toto by FLSA. The Court stated that the "traditional governmental function" test was unworkable and gave little guidance to state and local governments. The end result is that state and local governments must be in complete compliance with federal minimum wage and overtime laws and regulations.

The Wage and Hour Division of the Department of Labor administers and enforces the FLSA with respect to private employment, state and local government employment, and Federal employees of the Library of Congress, U.S. Postal Service, Postal Rate Commission, and the Tennessee Valley Authority. The FLSA is enforced by the U.S. Office of Personnel Management for employees of other Executive Branch agencies, and by the U.S. Congress for covered employees of the Legislative Branch.

Special rules apply to state and local government employment involving fire protection and law enforcement activities, volunteer services, and compensatory time off instead of cash overtime pay.

## **Basic Provisions/Requirements**

Effective September 1, 1997, covered nonexempt workers are entitled to a minimum wage of not less than \$5.15 an hour. Overtime pay at a rate of not less than one and one-half times their regular rates of pay is required after 40 hours of work in a workweek. Youths under 20 years of age may be paid a minimum wage of not less than \$4.25 an hour during the first 90 consecutive calendar days of employment with an employer. Employers may not displace any employee to hire someone at the youth minimum wage. Employers may pay employees on a piece-rate basis, as long as they receive at least the equivalent of the required minimum hourly wage rate. Employers of tipped employees, i.e., employees who customarily and regularly receive more than \$30 a month in tips, may consider the tips of these employees as part of their wages, but must pay a direct wage of at least \$2.13 per hour if they claim a tip credit.

The Act also permits the employment of certain individuals at wage rates below the statutory minimum wage under certificates issued by the Department:

- Student learners (vocational education students);
- Full-time students in retail or service establishments, agriculture, or institutions of higher education;
- Individuals whose earning or productive capacity is impaired by a physical or mental disability, including those related to age or injury, for the work to be performed.

The Act requires that covered employees, unless otherwise exempt, be paid not less than one and one-half times their regular rates of pay for all hours worked in excess of 40 in a workweek. There is no limit in the Act on the number of hours employees aged 16 and older may work in any workweek. The Act does not require overtime pay for work on Saturdays, Sundays, holidays, or regular days of rest, as such. These matters are for agreement between the employer and the employees or their authorized representatives.

Employers are required to keep records on wages, hours and other items as set out in the Department of Labor's regulations. Most of this information is of the type generally maintained by employers in ordinary business practice. An explanation of the record keeping requirements is detailed later in this manual. Additionally, Employers are required to display an official poster outlining the provisions of the Act, available at no cost from local offices of the Wage and Hour Division.

Wages required by FLSA are due on the regular payday for the pay period covered. Deductions made from wages for such items as cash or merchandise shortages, employer-required uniforms, and tools of the trade, are not legal to the extent that they reduce the wages of employees below the minimum rate required by FLSA or reduce the amount of overtime pay due under FLSA.

The FLSA contains some exemptions from these basic standards. Some apply to specific types of businesses and others apply to specific kinds of work. While FLSA does set basic minimum wage

and overtime pay standards and regulates the employment of minors, there are a number of employment practices which FLSA does not regulate.

For example, FLSA does not require:

- (1) Vacation, holiday, severance, or sick pay;
- (2) Meal or rest periods, holidays off, or vacations;
- (3) Premium pay for weekend or holiday work;
- (4) Pay raises or fringe benefits; and
- (5) A discharge notice, reason for discharge, or immediate payment of final wages to terminated employees.

The FLSA does not provide wage payment or collection procedures for an employee's usual or promised wages or commissions in excess of those required by the FLSA. Some states do have laws under which such claims (sometimes including fringe benefits) may be filed.

The Act applies on a workweek basis. An employee's workweek is a fixed and regularly recurring period of 168 hours -- seven consecutive 24-hour periods. It need not coincide with the calendar week, but may begin on any day and at any hour of the day. Different workweeks may be established for different employees or groups of employees. Averaging of hours over two or more weeks is not permitted. Normally, overtime pay earned in a particular workweek must be paid on the regular payday for the pay period in which the wages were earned.

The regular rate of pay cannot be less than the minimum wage. The regular rate includes all remuneration for employment except certain payments excluded by the Act itself. Payments which are not part of the regular rate include pay for expenses incurred on the employer's behalf, premium payments for overtime work or the true premiums paid for work on Saturdays, Sundays, and holidays, discretionary bonuses, gifts and payments in the nature of gifts on special occasions, and payments for occasional periods when no work is performed due to vacation, holidays, or illness.

Earnings may be determined on a piece-rate, salary, commission, or some other basis, but in all such cases the overtime pay due must be computed on the basis of the average hourly rate derived from such earnings. The calculation is made by dividing the total pay for employment (except for the noted statutory exclusions) in any workweek by the total number of hours actually worked.

Where an employee in a single workweek works at two or more different types of work for which different straight-time rates have been established, the regular rate for that week is the weighted average of such rates. To calculate, the earnings from all such rates are added together and the total is divided by the total number of hours worked at all jobs. Where non-cash payments are made to employees in the form of goods or facilities, the reasonable cost to the employer or fair value of such goods or facilities must be included in the regular rate.

## Typical Problems

Fixed Sum for Varying Amounts of Overtime: A lump sum paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium even though the amount of money paid is equal to or greater than the sum owed on a per-hour basis. For example, no part of a flat sum of \$90 to employees who work overtime on Sunday will qualify as an overtime premium, even though the employees' straight-time rate is \$6.00 an hour and the employees always work less than 10 hours on Sunday. Similarly, where an agreement provides for 6 hours pay at \$9.00 an hour regardless of the time actually spent for work on a job performed during overtime hours, the entire \$54.00 must be included in determining the employees' regular rate.

Salary for Workweek Exceeding 40 Hours: A fixed salary for a regular workweek longer than 40 hours does not discharge FLSA statutory obligations. For example, an employee may be hired to work a 45 hour workweek for a weekly salary of \$300. In this instance the regular rate is obtained by dividing the \$300 straight-time salary by 45 hours, resulting in a regular rate of \$6.67. The employee is then due additional overtime computed by multiplying the 5 overtime hours by one-half the regular rate of pay ( $\$3.335 \times 5 = \$16.68$ ).

Overtime Pay **May Not** Be Waived: The overtime requirement may not be waived by agreement between the employer and employees. An agreement that only 8 hours a day or only 40 hours a week will be counted as working time also fails the test of FLSA compliance. An announcement by the employer that no overtime work will be permitted, or that overtime work will not be paid for unless authorized in advance, also will not impair the employee's right to compensation for compensable overtime hours that are worked.

## Volunteer Work

An employee cannot be both a "paid" employee and a "non-paid" volunteer while performing the same type of work for the same employer. This prevents the Employer from mandating true work time as volunteer time. However, the FLSA does not require public agencies to compensate volunteers who perform services for a government agency if:

- (i) The individual receives no compensation for the services provided AND
- (ii) Such services provided are not the same type of services which the individual is employed to perform for such public agency. 29 U.S.C. 203(e)(4).

The Wage and Hour Division of the Department of Labor has promulgated a set of regulations elaborating on the circumstances in which an individual may volunteer to perform work for a public agency without compensation.

First, an employer may not coerce or pressure an employee into 'volunteering'. If an employer coerces or pressures an employee into volunteering, then the employer must compensate the employee for that time which the employee 'volunteered'. 29 C.F.R. 553.101(b).

More specifically, the regulations define a volunteer as “an individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation, or receipt of compensation for services rendered.” 29 C.F.R. 553.101(a). However, a public agency may pay an individual who otherwise qualifies as a volunteer expenses, reasonable benefits, etc. without negating that individual’s volunteer status. 29 C.F.R. 553.106.

Additionally, an individual is not a volunteer for purposes of the FLSA if the individual ‘volunteers’ to perform the same type of services which the employee normally performs for that same public agency. 29 C.F.R. 553.101(d). The Regulations define the term “same type of services” as similar or identical services. The determination of whether an employee performs the same type of services is to be determined on a factual basis, including a determination as to whether the volunteer service is closely related to the actual duties performed by the employee. 29 C.F.R. 553.103(a). The inquiry into whether an employee is volunteering for the same public agency is determined on a case-by-case basis. 29 C.F.R. 553.102.

In one example, city fire fighters volunteered on a rescue squad run by a non-profit corporation. *Benschoff v. City of Virginia Beach*, 180 F. 3d 136 (4<sup>th</sup> Cir. 1999). The fire fighters volunteered freely with no coercion or pressure from the city. The motivation to volunteer came from personal and civic-minded initiatives. Although the city fire department required them to have certain basic emergency medical care training, this did not amount to the “same type of services” to which 29 U.S.C. § 203(e)(4) refers. Therefore, the firefighters were not to be treated as employees and were not to receive overtime compensation for their services on the rescue squad. If accepted, the firefighters’ reasoning would have amounted to an absolute prohibition against a public agency ever allowing its employees to volunteer similar services if the services would benefit the public agency. The court mentioned that Congress never intended to discourage volunteering one’s expertise and experience.

## **Who is Covered**

The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, record keeping and child labor standards that affect over 100 million full and part-time workers in the private sector and in federal, state and local governments.

The Act applies to enterprises that have employees who are engaged in interstate commerce, producing goods for interstate commerce, or handling, selling or working on goods or materials that have been moved in or produced for interstate commerce. For most firms, an annual dollar volume of business test of \$500,000 applies (i.e., those enterprises under this dollar amount are not covered).

The following entities are covered by the Act regardless of their dollar volume of business: hospitals, institutions primarily engaged in the care of the sick, aged, mentally ill or disabled who reside on the premises; schools for children who are mentally or physically disabled or gifted; preschools, elementary and secondary schools and institutions of higher education; and federal, state and local government agencies.

Employees of firms that do not meet the \$500,000 annual dollar volume test may be individually covered in any workweek in which they are individually engaged in interstate commerce, the production of goods for interstate commerce, or an activity which is closely related and directly

essential to the production of such goods. Domestic service workers, such as day workers, housekeepers, chauffeurs, cooks, or full-time baby-sitters, are also covered if they receive at least \$1,000 in cash wages from one employer in a calendar year, or if they work a total of more than 8 hours a week for one or more employers.

Any enterprise that was covered by the Act on March 31, 1990, and that ceased to be covered because of the increase in the annual dollar volume test to \$500,000, as required under the 1989 amendments to the Act, continues to be subject to the overtime pay, child labor and record keeping requirements of the Act.

## **Exemptions**

Some employees are exempt from the overtime pay provisions or both the minimum wage and overtime pay provisions. Exemptions are generally narrowly defined under FLSA and an employer should carefully check the exact terms and conditions of the exemption. Detailed information regarding exemptions is provided later in this manual. Below are examples of exemptions which are illustrative, but not all-inclusive. These examples do not define the conditions for each exemption.

The following are examples of employees exempt from both the minimum wage and overtime pay requirements:

- Executive, administrative and professional employees (including teachers and academic administrative personnel in elementary and secondary schools), outside sales employees, and certain skilled computer professionals (as defined in Department of Labor regulations);
- Employees of certain seasonal amusement or recreational establishments;
- Employees of certain small newspapers and switchboard operators of small telephone companies;
- Seamen employed on foreign vessels;
- Employees engaged in fishing operations;
- Employees engaged in newspaper delivery;
- Farm workers employed on small farms (i.e., those that used less than 500 "man-days" of farm labor in any calendar quarter of the preceding calendar year);
- Casual baby-sitters and persons employed as companions to the elderly or infirm.

The following are examples of employees exempt from the Act's overtime pay requirements only:

- Certain commissioned employees of retail or service establishments;

- Auto, truck, trailer, farm implement, boat or aircraft sales workers, or parts-clerks and mechanics servicing autos, trucks or farm implements, who are employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers;
- Railroad and air carrier employees, taxi drivers, certain employees of motor carriers, seamen on American vessels, and local delivery employees paid on approved trip rate plans;
- Announcers, news editors and chief engineers of certain non-metropolitan broadcasting stations;
- Domestic service workers who reside in their employer's residence;
- Employees of motion picture theaters;
- Farm workers.

Certain employees may be partially exempt from the Act's overtime pay requirements. These include:

- Employees engaged in certain operations on agricultural commodities and employees of certain bulk petroleum distributors;
- Employees of hospitals and residential care establishments which have agreements with the employees to work a 14-day work period in lieu of a 7-day workweek (if the employees are paid overtime premium pay within the requirements of the Act for all hours worked over 8 in a day or 80 in the 14-day work period, whichever is the greater number of overtime hours);
- Employees who lack a high school diploma or who have not completed the eighth grade may be required by their employer to spend up to 10 hours in a workweek in remedial reading or training in other basic skills that are not job-specific, as long as they are paid their normal wages for the hours spent in such training. These employees need not be paid overtime premium pay for their remedial training hours.

It is a violation of the Act to fire or in any other manner discriminate against an employee for filing a complaint or for participating in a legal proceeding under the Act. The Act also prohibits the shipment of goods in interstate commerce which were produced in violation of the minimum wage, overtime pay, child labor, or special minimum wage provisions.

## **Enforcement and Penalties**

The Wage and Hour Division's enforcement of FLSA is carried out by investigators stationed across the U.S. They conduct investigations and gather data on wages, hours, and other employment

conditions or practices, in order to determine compliance with the law. A variety of remedies are available to the Department to enforce compliance with the Act's requirements. When investigators encounter violations, they recommend changes in employment practices in order to bring the employer into compliance and request the payment of any back wages due employees.

It is a violation to fire or in any other manner discriminate against an employee for filing a complaint or for participating in a legal proceeding under FLSA. Willful violations may be prosecuted criminally and the violator fined up to \$10,000. A second conviction may result in imprisonment. Violators of the child labor provisions are subject to a civil money penalty of up to \$10,000 for each employee who was the subject of a violation. Employers who willfully or repeatedly violate the minimum wage or overtime pay requirements are subject to a civil money penalty of up to \$1,000 for each such violation.

When a civil money penalty is assessed, employers have the right, within 15 days of receipt of the notice of such penalty, to file an exception to the determination. When an exception is filed, it is referred to an administrative law judge for a hearing and determination as to the appropriateness of the penalty. If an exception is not filed, the penalty becomes final. The Secretary of Labor may also bring suit for back pay and an equal amount in liquidated damages and obtain injunctions to restrain persons from violating the Act. Employees may also bring suit, where the Department has not done so, for back pay and liquidated damages, as well as attorney's fees and court costs.

The FLSA prohibits the shipment of goods in interstate commerce which were produced in violation of the minimum wage, overtime pay, child labor, or special minimum wage provisions.

## **Recovery of Back Wages**

Listed below are methods which FLSA provides for recovering unpaid minimum and/or overtime wages.

- (1) The Wage and Hour Division of the Department of Labor may supervise payment of back wages.
- (2) The Secretary of Labor may bring suit for back wages and an equal amount as liquidated damages.
- (3) An employee may file a private suit for back pay and an equal amount as liquidated damages, plus attorney's fees and court costs.
- (4) The Secretary of Labor may obtain an injunction to restrain any person from violating FLSA, including the unlawful withholding of proper minimum wage and overtime pay.

An employee may not bring suit if he or she has been paid back wages under the supervision of the Wage and Hour Division or if the Secretary of Labor has already filed suit to recover the wages. A 2-year statute of limitations applies to the recovery of back pay, except in the case of willful violation. With a willful violation, 3-year statute of limitations applies.

## Computing Overtime Pay

Overtime must be paid at a rate of at least one and one-half times the employee's regular rate of pay for each hour worked in a workweek in excess of the maximum allowable in a given type of employment. Generally, the regular rate includes all payments made by the employer to or on behalf of the employee (except for certain statutory exclusions). The following examples are based on a maximum 40-hour workweek.

(1) Hourly rate -- (regular pay rate for an employee paid by the hour). If more than 40 hours are worked, at least one and one-half times the regular rate for each hour over 40 is due.

Example: An employee paid \$8.00 an hour works 44 hours in a workweek. The employee is entitled to at least one and one-half times \$8.00, or \$12.00, for each hour over 40. Pay for the week would be \$320 for the first 40 hours, plus \$48.00 for the four hours of overtime--a total of \$368.00.

(2) Piece rate -- The regular rate of pay for an employee paid on a piecework basis is obtained by dividing the total weekly earnings by the total number of hours worked in that week. The employee is entitled to an additional one-half times this regular rate for each hour over 40, plus the full piecework earnings.

Example: An employee paid on a piecework basis works 45 hours in a week and earns \$315. The regular rate of pay for that week is \$315 divided by 45, or \$7.00 an hour. In addition to the straight-time pay, the employee is also entitled to \$3.50 (half the regular rate) for each hour over 40 -- an additional \$17.50 for the 5 overtime hours -- for a total of \$332.50.

Another way to compensate pieceworkers for overtime, if agreed to before the work is performed, is to pay one and one-half times the piece rate for each piece produced during the overtime hours. The piece rate must be the one actually paid during non-overtime hours and must be enough to yield at least the minimum wage per hour.

(3) Salary -- the regular rate for an employee paid a salary for a regular or specified number of hours a week is obtained by dividing the salary by the number of hours for which the salary is intended to compensate.

If, under the employment agreement, a salary sufficient to meet the minimum wage requirement in every workweek is paid as straight time for whatever number of hours are worked in a workweek, the regular rate is obtained by dividing the salary by the number of hours worked each week. To illustrate, suppose an employee's hours of work vary each week and the agreement with the employer is that the employee will be paid \$420 a week for whatever number of hours of work are required. Under this agreement, the regular rate will vary in overtime weeks. If the employee works 50 hours, the regular rate is \$8.40 (\$420 divided by 50 hours). In addition to the salary, half the regular rate, or \$4.20 is due for each of the 10 overtime hours, for a total of \$462 for the week. If the employee works 60 hours, the regular rate is \$7.00 (\$420 divided by 60 hours). In that case, an additional \$3.50 is due for each of the 20 overtime hours, for a total of \$490 for the week.

In no case may the regular rate be less than the minimum wage required by FLSA. The reasonable cost or fair value of board, lodging, or other facilities customarily furnished by the employer for the employee's benefit may be considered part of wages.

If a salary is paid on other than a weekly basis, the weekly pay must be determined in order to compute the regular rate and overtime pay. If the salary is for a half month, it must be multiplied by 24 and the product divided by 52 weeks to get the weekly equivalent. A monthly salary should be multiplied by 12 and the product divided by 52.

## **Relation to State, Local and Other Federal Laws**

State laws also apply to employment subject to this Act. When both this Act and a state law apply, the law setting the higher standards must be observed.

## **State and Local Governments Under the FLSA**

State and local government employers consist of those entities that are defined as public agencies by the FLSA. "Public Agency" is defined to mean the Government of the United States; the government of a state or political subdivision thereof; any agency of the United States, a state, or a political subdivision of a state, or any

interstate governmental agency. The public agency definition does not extend to private companies that are engaged in work activities normally performed by public employees. 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.

Under certain prescribed conditions, employees of state or local government agencies may receive compensatory time off at a rate of not less than one and one-half hours for each overtime hour worked, instead of cash overtime pay. Police and fire fighters, emergency response personnel, and employees engaged in seasonal activities may accrue up to 480 hours of comp time; all others, 240 hours.

In locations with concurrent state wage laws, some states may not recognize or permit the application of some or all of the following exemptions. Since an employer must comply with the most stringent of the state or federal provisions, it is strongly recommended that the state laws be reviewed prior to applying any of the exclusions or exemptions discussed herein.

Certain employees in the following examples **may** be exempt from the overtime requirements of the FLSA:

- Employees who solely at their option occasionally or sporadically work on a part-time basis for the same public agency in a different capacity than the one in which they are normally employed
- Employees at their option with approval of the agency, who substitute for one another during scheduled work hours in the same work capacity

- Employees that meet exemption requirements for Executive, Administrative, Professional or Outside Sales occupations
- Hospital or residential care establishments **may** with agreement or understanding with employees adopt a fixed work period of 14 consecutive days and pay overtime after 8 hours in a day or 80 in the work period, whichever is greater
- Mass transit employees' time spent in charter activities **may** be excludable from the regular rate
- Minimum wage and overtime may not be required for employees working in separate seasonal amusement or recreational establishments such as swimming pools, parks, etc.

### **State Government Immunity Under The Eleventh Amendment**

In the summer of 1999, the Supreme Court decided the case of **Alden v. Maine**, 527 U.S. 706 (1999) wherein the court clarified the principle underlying Eleventh Amendment immunity that a private citizen may not bring a lawsuit against a state for damages in federal court unless that state has waived its sovereign immunity. In Ohio, the state has waived its sovereign immunity for claims brought in the court of claims. The concept of immunity under the Eleventh Amendment only applies to states and does not apply to local government or political subdivisions of the states.

This means state employees may not sue for violations of Fair Labor Standards Act in federal court. State employees pursuing damages under the FLSA, i.e., liquidated damages, may only sue in the Ohio Court of Claims. If they are pursuing compensation only, with no damages, they may sue in the court of claims or in courts of common pleas. For employees who only want prospective relief, i.e., future relief, and not requesting past compensation or damages, the employee may pursue their claim in the federal court. In addition, the Department of Labor, if bringing a lawsuit on behalf of an employee may pursue backpay plus liquidated damages in federal court. Thus, an employee as a practical matter is limited to the court of claims where they may bring their claim.

### **Special Exemptions for Employees Engaged in Fire Protection and Law Enforcement Activities**

- Employees may at their own option perform special duty work in fire protection and law enforcement for a separate and independent employer without including wages and hours in regular rate or overtime determinations
- Fire Departments or Police Departments may establish a work period ranging from 7 to 28 days in which overtime need be paid only after a specified number of hours in each work period

- Any employee who in any workweek is employed by an agency employing less than 5 employees in fire protection or law enforcement may be exempt from overtime

## **Sub-minimum Wage Provisions**

The FLSA provides for the employment of certain individuals at wage rates below the statutory minimum. Such individuals include student-learners (vocational education students), as well as full-time students in retail or service establishments, agriculture, or institutions of higher education. Also included, are individuals whose earning or productive capacity is impaired by a physical or mental disability, including those related to age or injury, for the work to be performed. Employment at less than the minimum wage is authorized to prevent curtailment of opportunities for employment. Such employment is permitted only under certificates issued by the Wage and Hour Division.

## **Youth Minimum Wage**

A minimum wage of not less than \$4.25 an hour is permitted for employees under 20 years of age during their first 90 consecutive calendar days of employment with an employer. Employers are prohibited from taking any action to displace employees in order to hire employees at the youth minimum wage. Also prohibited are partial displacements such as reducing employees' hours, wages, or employment benefits.

## **Child Labor Provisions**

The FLSA child labor provisions are designed to protect the educational opportunities of minors and prohibit their employment in jobs and under conditions detrimental to their health or well-being. The provisions include restrictions on hours of work for minors under 16 and lists of hazardous occupations orders for both farm and non-farm jobs declared by the Secretary of Labor to be too dangerous for minors to perform. Further information on prohibited occupations is available from local Wage and Hour Division offices.

## **Nonagricultural Jobs (Child Labor)**

Regulations governing youth employment in non-farm jobs differ somewhat from those pertaining to agricultural employment. In non-farm work, the permissible jobs and hours of work, by age, are as follows:

- (1) Youths 18 years or older may perform any job, whether hazardous or not, for unlimited hours;
- (2) Youths 16 and 17 years old may perform any non-hazardous job, for unlimited hours; and
- (3) Youths 14 and 15 years old may work outside school hours in various non-manufacturing, non-mining, non-hazardous jobs under the following

conditions: no more than 3 hours on a school day, 18 hours in a school week, 8 hours on a non-school day, or 40 hours in a non-school week. Also, work may not begin before 7 a.m., nor end after 7 p.m., except from June 1 through Labor Day, when evening hours are extended to 9 p.m. Under a special provision, youths 14 and 15 years old enrolled in an approved Work Experience and Career Exploration Program (WECEP) may be employed for up to 23 hours in school weeks and 3 hours on school days (including during school hours).

Fourteen is the minimum age for most non-farm work. However, at any age, youths may deliver newspapers; perform in radio, television, movie, or theatrical productions; work for parents in their solely-owned non-farm business (except in manufacturing or on hazardous jobs); or, gather evergreens and make evergreen wreaths.

### **Farm Jobs (Child Labor)**

In farm work, permissible jobs and hours of work, by age, are as follows:

- (1) Youths 16 years and older may perform any job, whether hazardous or not, for unlimited hours;
- (2) Youths 14 and 15 years old may perform any non-hazardous farm job outside of school hours;
- (3) Youths 12 and 13 years old may work outside of school hours in non-hazardous jobs, either with a parent's written consent or on the same farm as the parent(s);
- (4) Youths under 12 years old may perform jobs on farms owned or operated by parent(s), or with a parent's written consent, outside of school hours in non-hazardous jobs on farms not covered by minimum wage requirements.

Minors of any age may be employed by their parents at any time in any occupation on a farm owned or operated by their parents.

### **Recordkeeping**

The FLSA requires employers to keep records on wages, hours, and other items, as specified in Department of Labor record keeping regulations. Most of the information is of the kind generally maintained by employers in ordinary business practice and in compliance with other laws and regulations. The records do not have to be kept in any particular form and time clocks need not be used. With respect to an employee subject to the minimum wage provisions or both the minimum wage and overtime pay provisions, the following records must be kept:

1. Employee's full name and social security number.

2. Address, including zip code.
3. Birth date, if younger than 19.
4. Sex and occupation.
5. Time and day of week when employee's workweek begins.
6. Hours worked each day.
7. Total hours worked each workweek.
8. Basis on which employee's wages are paid (e.g., "\$6 an hour", "\$220 a week", "piecework")
9. Regular hourly pay rate.
10. Total daily or weekly straight-time earnings.
11. Total overtime earnings for the workweek.
12. All additions to or deductions from the employee's wages.
13. Total wages paid each pay period.
14. Date of payment and the pay period covered by the payment.

*What About Time keeping?* Employers may use any time keeping method they choose. For example, they may use a time clock, have a timekeeper keep track of employee's work hours, or tell their workers to write their own times on the records. Any time keeping plan is acceptable as long as it is complete and accurate. The following is a sample time keeping format employers may follow but are not required to do so:

Employee Name \_\_\_\_\_

<b>DAY</b>	<b>DATE</b>	<b>IN</b>	<b>OUT</b>	<b>TOTAL HOURS</b>
Sunday	5/2/93	-----		
Monday	5/3/93	8:00	12:02	
		1:00	5:03	8
Tuesday	5/4/93	7:57	11:58	
		1:00	5:00	8

Wednesday	5/5/93	8:02	12:10	
		1:06	5:05	8
Thursday	5/6/93	-----		
Friday	5/7/93	-----		
Saturday	5/8/93	-----		
Total Workweek Hours				24

*Employees on Fixed Schedules:* Many employees work on a fixed schedule from which they seldom vary. The employer may keep a record showing the exact schedule of daily and weekly hours and merely indicate that the worker did follow the schedule. When a worker is on a job for a longer or shorter period of time than the schedule shows, the employer must record the number of hours the worker actually worked, on an exception basis.

*How Long Should Records Be Retained?* Each employer shall preserve for at least three years payroll records, collective bargaining agreements, sales and purchase records. Records on which wage computations are based should be retained for two years, i.e., time cards and piece work tickets, wage rate tables, work and time schedules, and records of additions to or deductions from wages. These records must be open for inspection by the Division's representatives, who may ask the employer to make extensions, computations, or transcriptions. The records may be kept at the place of employment or in a central records office.

## **Workweek**

A workweek is a period of 168 hours during 7 consecutive 24-hour periods. It may begin on any day of the week and at any hour of the day established by the employer. Generally, for purposes of minimum wage and overtime payment each workweek stands alone. No averaging of 2 or more workweeks is permitted. Employee coverage, compliance with wage payment requirements, and the application of most exemptions are determined on a workweek basis.

## **Hours Worked**

Covered employees must be paid for all hours worked in a workweek. In general, "hours worked" includes all time an employee must be on duty, or on the employer's premises or at any other prescribed place of work. Also included is any additional time the employee is allowed to work.

## **Typical Problems Associated with Hours Worked**

Problems arise when employers fail to recognize and count certain hours worked as compensable hours. For example, an employee who remains at his/her desk while eating lunch and regularly

answers the telephone and refers callers is working. This time must be counted and paid as compensable hours worked because the employee has not been completely relieved from duty.

## **Definition of "Employ"**

By statutory definition the term "employ" includes "to suffer or permit to work." The workweek ordinarily includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place. "Workday", in general, means the period between the time on any particular day when such employee commences his/her "principal activity" and the time on that day at which he/she ceases such principal activity or activities. The workday may therefore be longer than the employee's scheduled shift, hours, tour of duty, or production line time.

## **Employees "Suffered or Permitted" to Work**

Work not requested but suffered or permitted to be performed is work time that must be paid for by the employer. For example, an employee may voluntarily continue to work at the end of the shift to finish an assigned task or to correct errors. The reason is immaterial. The hours are work time and are compensable.

## **Waiting Time**

Whether waiting time is time worked under the Act depends upon the particular circumstances. Generally, the facts may show that the employee was engaged to wait (which is work time) or the facts may show that the employee was waiting to be engaged (which is not work time). For example, a secretary who reads a book while waiting for dictation or a fireman who plays checkers while waiting for an alarm is working during such periods of inactivity. These employees have been "engaged to wait."

## **On-Call Time/Pagers**

An employee who is required to remain on call on the employer's premises is working while "on call." An employee who is required to remain on call at home, or who is allowed to leave a message where he/she can be reached, is not working (in most cases) while on call. Additional constraints on the employee's freedom could require this time to be compensated.

The crucial distinction used to determine the compensability of time spent by employees in on-call status is whether "the time is spent predominately for the employer's benefit or for the employee's." *Amour & Co. v. Wantock*, 323 U.S. 126, 133 (1944). The Department of Labor has indicated that this principle applies to employees required to carry pagers. *Wage and Hour Opinion Letter* (December 9, 1985). Courts determine the compensability of on-call time on a case-by-case basis. If an employer requires an employee to remain on call while on or close to the employer's premises, then that employee is considered working. 29 C.F.R. 785.17.

When a public employer permits an employee to leave the premises, the inquiry focuses on the amount of freedom an employee has while in on-call status. If an employer places severe restrictions on the behavior of an on-call employee, then the employer must compensate the

employee for the time spent on call. 29 C.F.R. 553.221©. If not, the time spent on-call is not considered hours worked.

Courts have applied these principles in a number of opinions. Below is a summary of a few of those opinions.

- An electric utility was not required to compensate linemen for time spent on-call, even though the linemen were required to be available 24 hours per day on a stand-by basis to work during storms and emergencies. *Boehm v. Kansas City Power & Light Co.*, 868 F. 2d 1182 (10<sup>th</sup> Cir. 1989).
- Two city employees—one who worked for the water department and had to be accessible through a pager and respond within one hour—and one who worked for the sewer department and had to respond within 30 minutes. The employees were not free to consume alcohol, and both believed they had to stay within city limits. The court found the restrictions placed on them were not so prohibitive that the on-call time was spent predominantly for the employer's benefit. *Gilligan v. Emporia, Kansas*, 1 WH Cases2d 425 (10<sup>th</sup> Cir. 1993).
- The Tenth Circuit ruled that firefighters were entitled to compensation for a 24-hour on-call shift following their regularly scheduled tour of duty. There were three to five callbacks per 24-hour shift, it was difficult, if not impossible, for firefighters to obtain secondary employment or trade shifts, and they could not effectively use the on-call time for personal pursuits since they had to report to the station within 20 minutes of being paged. *Renfro v City of Emporia, Kansas*, 948 F.2d 1529 (10<sup>th</sup> Cir. 1991)
- Electronic technicians were required to be available 24 hours a day, every day that they were not on a shift, and were given a certain amount of time by which they were required to respond to an alarm, the frequency of which was great. The court held that compensation was warranted because of the special nature of the on-call time and the frequency of calls. *Pabst v. Oklahoma Gas & Electric Co.*, 228 F. 3d 1128 (10<sup>th</sup> Cir. 2001).
- Phone calls to a funeral home were forwarded to the funeral director's home during his off hours. He answered approximately 15-20 calls per night which amounted to approximately 1 hour of phone time. The 6<sup>th</sup> Circuit held that he should be compensated for the hour since he was actually working and because it was primarily for the benefit of the employer. The other on-call time was not restricted so as to prevent him from freely using his time for personal pursuits although he was required to remain at home. *Rutlin v. Prime Succession, Inc.*, 220 F. 3d 737 (6<sup>th</sup> Cir. 2000).
- Officers for the City of Milwaukee were required to stay at home when they were out of the office on sick leave or injury leave. Only with permission were they permitted to leave their homes. This permission was easily obtained for leaving the house under certain circumstances, such as shopping at the grocery store, attending religious services, or visiting the doctor. The 7<sup>th</sup> Circuit held that since they were not actually fit for work they were not

“engaged to wait” at their homes in order to work, and their time was not spent for the benefit of the employer. *Debraska v. City of Milwaukee*, 189 F. 3d 650 (7<sup>th</sup> Cir. 1999).

## **Rest and Meal Periods**

Rest periods of short duration, usually 20 minutes or less, are common in industry (and promote the efficiency of the employee) and are customarily paid for as working time. These short periods must be counted as hours worked. Bona fide meal periods (typically 30 minutes or more) generally need not be compensated as work time. The employee must be completely relieved from duty for the purpose of eating regular meals. The employee is not relieved if he/she is required to perform any duties, whether active or inactive, while eating.

## **Sleeping Time and Certain Other Activities**

An employee who is required to be on duty for less than 24 hours is working even though he/she is permitted to sleep or engage in other personal activities when not busy. An employee required to be on duty for 24 hours or more may agree with the employer to exclude from hours worked bona fide regularly scheduled sleeping periods of not more than 8 hours, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. No reduction is permitted unless at least 5 hours of sleep is taken.

## **Lectures, Meetings and Training Programs**

Under the FLSA, a workweek is to consist of 40 hours. 29 USC § 207 (a)(1). Employees who work more than 40 hours a week, must be paid at a rate one and one-half times his or her regular rate of pay for those hours over 40 worked. *Id.* Normally, time spent in training counts in the calculation of hours worked. According to regulations promulgated by the Wage and Hour Division of the Department of Labor, attendance at lectures, meetings, training, and similar activity, need not be counted as working hours if certain criteria are met. 29 C.F.R. 785.27(A). Four criteria must be met for training not to count as hours worked under the Regulations. These four criteria are:

1. Attendance is outside of the employee's regular working hours. 29 C.F.R. 785.27(A)
2. Attendance is in fact voluntary. 29 C.F.R. 785.27(B)
3. The course, lecture, or meeting is not directly related to the employee's job. 29 C.F.R. 785.27(C)
4. The employee does not perform any productive work during such attendance. 29 C.F.R. 785.27(D)

If one of the four criteria are not met, than the requirements are not satisfied, and the training will count as hours worked.

It is easy to determine whether the attendance is outside of the employee's regular working hours. However, the second criteria, voluntariness of attendance, is more complex. A regulation has been promulgated concerning the voluntariness prong of the test. 29 C.F.R. 785.28 states:

Attendance is not voluntary, of course, if it is required by the employer. It is not voluntary in fact if the employee is given to understand or led to believe that his present working conditions or the continuance of his employment would be adversely affected by his nonattendance.

The Wage and Hour Division of the Department of Labor has promulgated a regulation addressing the third prong of the analysis to aid in the determination of whether the training is directly related to the job. Directly related training is defined as that training which is "designed to make the employee handle his job more effectively as distinguished from training him for another job, or to a new or additional skill." 29 CFR 785.29. Training is not work related if it is designed for the purpose of training for advancement, even if it incidentally improves the employee's performance in their current position. *Id.*

The final prong of the test relates to "productive work". The regulations do not specifically define the meaning of the term "productive work". It seems logical that productive work would involve work that the employee is actually required to perform for his or her position. Presumably, the training sessions would not involve work of this nature, and would instead focus on job skills.

The Regulations make clear two important exceptions to this Rule, either one of which may excuse the state from paying the employees for their time spent in training. The first is 29 C.F.R. 785.30, "Independent training." This regulation states:

Of course, if an employee on his own initiative attends an independent school, college, or independent trade school after hours, the time is not hours worked for his employer even if the courses are related to his job.

The second exception is designated as "Special Situations." 29 C.F.R. 785.31. This exception states that there are some special situations where the time spent is not regarded as hours worked, even if the training is directly related to the job. *Id.* To illustrate this proposition, the Department of Labor states that "an employer may establish for the benefit of his employees a program of instruction which corresponds to courses offered by independent bona fide institutions of higher learning." *Id.* Voluntary attendance at such training is not hours worked even if job related. *Id.* ***(Additional information on compensability of training time is found at Training tab)***

## **Travel Time**

The principles which apply in determining whether time spent in travel is compensable time depends upon the kind of travel involved.

## **Home To Work Travel**

An employee who travels from home before the regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel, which is not work time.

## **Home to Work on a Special One Day Assignment in Another City**

An employee who regularly works at a fixed location in one city is given a special one day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that the employer may deduct/not count that time the employee would normally spend commuting to the regular work site.

## **Travel that is all in the Day's Work**

Time spent by an employee in travel as part of his/her principal activity, such as travel from job site to job site during the workday, is work time and must be counted as 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 time is not only hours worked on regular working days during normal working hours but also during corresponding hours on non-working days. As an enforcement policy the Division will not consider as work time that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

## **Preliminary Activity**

In 1947, Congress passed the Portal To Portal Act largely in response to a Supreme Court decision that was viewed as overly broad in determining what tasks are compensable work time under the FLSA. Section 4(a) of the Portal Act excepts from coverage under the FLSA, "activities which are preliminary to or postliminary to said principal activity." 29 U.S.C. sec. 254(a). The Department of Labor regulations give some guidance as to what this means.

The regulations explain that "Congress intended the words 'principal activities' to be construed liberally...to include any work of consequence performed for an employer, no matter when the work is performed." 29 C.F.R. sec. 790.8(a). The Department of Labor regulations give meaning to the terms "preliminary" and "postliminary" activities by providing examples of these kinds of activities. In addition to many examples of non-compensable time related transportation, the following activities are also excluded from principal activities: checking in and out and waiting in line to do so, changing clothes, washing or showering, and waiting in line to receive paychecks. 29 C.F.R. sec. 790.7 (g).

Beyond the regulation, the case law follows a consistent analysis. The key question the cases look at is whether the preliminary or postliminary activities are integral and indispensable to the principal work performed. In *Steiner v. Mitchell*, 350 U.S. 247, 251 (1956), the Supreme Court held that the time spent changing into protective clothing by employees at a battery plant was an integral and indispensable part of the employees' principal work. The Court focused its analysis on whether the activity in question was necessary for the principal work performed, and whether it was done for the benefit of the employer. These two questions have become the standard for determining if the activity is "integral and indispensable".

A typical application of this test can be found in *Riggs v. United States*, 21 Cl.Ct. 664 (1990). The case involved firefighters who spent uncompensated time attending roll call and transferring protective clothing from their lockers to their assigned vehicles or a roll call site. Using the *Steiner* analysis, the employees were found to be engaging in principal activity.

### **The De Minimis Doctrine**

The FLSA does not require an employer to compensate an employee for time worked beyond scheduled hours when that amount of time is insubstantial. The Supreme Court announced the *de minimis* exception to the hours worked provisions found in the FLSA in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). In *Anderson*, 328 U.S. at 692, the Supreme Court stated:

“the workweek contemplated . . . must be computed in light of the realities of the industrial world. When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded . . . It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.”

Courts have not established a precise amount of time that may be denied compensation as *de minimis*. However, the court in *Lindow v. United States*, 738 F.2d 1057, 1062 (9th Cir. 1984), declared that “[m]ost courts have found daily periods of approximately 10 minutes *de minimis* even though otherwise compensable.” The *de minimis* doctrine should be applied on a case by case basis.

*Lindow* gives an exhaustive analysis of the *de minimis* doctrine. The case involved a claim by employees who arrived at work about 15 minutes early each day and sometimes used part of this time to read the log book and to exchange information. The court reached the conclusion that in determining whether otherwise compensable time is *de minimis*, “we will consider (1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work.” *Id.* at 1063.

The court explained that there was a wide variance in the amount of pre-shift time spent on compensable activities as opposed to social activities, and the employees were not required to report to work early. The court held that the activity was *de minimis* because of the administrative difficulty of recording the time and the irregularity of the additional pre-shift work. *Id.* at 1064.

Other courts have been less generous with the de minimis doctrine. *Mireles v. Frio Foods* 899 F.2d 1407 (5th Cir. 1990), involved employees who were required to wait at the beginning of their shifts until produce was available before actually beginning productive work. The waiting periods occurred after workers had signed in, although workers were not “clocked in” on master time cards controlled by the employer. The court rejected the employer’s argument that waiting periods of less than 15 minutes should be considered de minimis. The court held:

Where an employee is required by his employer to report to work at a specified time, and the ‘employee is there at that hour ready and willing to work but’ is unable to begin work for a period of time for some reason beyond his control, the employee is engaged to wait and is entitled to be paid for the time spent waiting. *Id.* at 1414.

The court also focused on the fact that there would be a minimal increase in the administrative difficulties of calculating the employee’s actual work time if the waiting periods were included. *Id.*

The Department of Labor’s position on the *de minimis* rule is expressed in 29 C.F.R. 785.47:

In recording working time under the Act, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are de minimis. This rule applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him. (citations omitted)

A few examples of the application of the *de minimis* doctrine follow:

- 3 minutes spent filling gas tank before the start of a shift is not compensable. *Goldberg v. Sullivan*, 15 WH Cases 664 (DC M.Ga. 1962).
- Recovery by employees required to report to work 10 minutes before shift not barred by the *de minimis* rule. *Marshall v. Fabric World*, 23 WH Cases 414 (DC M.Ala. 1977).
- Employees who reported to work 7 to 8 minutes early to perform work which they could have performed during their shift were denied recovery under the *de minimis* rule. *Lindow v. United States*, 26 WH Cases 1391 (9th Cir. 1984).

## **Deductions From Pay**

The state of Ohio, like many other states and private employers, has a policy that demand deductions be taken from FLSA exempt employees’ accrued sick leave or compensatory time for absences less than a day. If employees have not accrued any sick or compensatory time then the

deduction may be taken directly from the employees' pay. Many courts have been divided whether or not deductions taken on hourly increments are inconsistent with the FLSA salary test used to determine an employees' exempt status. The FLSA provision reads:

An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, . . . , the employee must receive his full salary for any week in which he performs any work **without regard to the number of days or hours worked.** (emphasis added)<sup>1</sup>

Prior to 1992, and the enactment of a new Department of Labor regulation, a number of courts held that the deduction of accrued time on an hourly basis was contrary to the "without regard to the number of days or hours worked" language in the FLSA salary test. On September 6, 1991, the Department of Labor adopted a new interim rule overruling those courts which held deduction of less than a day disqualifies employees from their exempt status under FLSA. The new regulation provides:

An employee of a public agency . . . shall not be disqualified from exemption . . . on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such an employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because; (1) permission for its use has not been sought or has been sought and denied; (2) accrued leave has been exhausted; or (3) the employee chooses to use leave without pay. (emphasis added)<sup>2</sup>

The rule became final on August 19, 1992. However, this regulation only protects those "who otherwise meets the requirements of § 541.118" (salary test) from being disqualified for reductions in time or pay of less than a full day after September 6, 1991. This issue is now moot as the statute of limitations for any union or employee to bring a claim is two years for a violation of the FLSA or three years if the violation is willful.

The special provision enacted by the Department of Labor only serves to clarify the salary test, but in no way abolishes it. The other provisions of the salary test, § 541.118, have been clearly decided to be binding on states. In *Ramson v. City of Jackson*, 883 F. Supp 182 (E.D. Mich. 1995) (in the Sixth Circuit), fire fighters brought an action against the City of Jackson claiming they were not paid on a "salaried basis" because two fire captains had been suspended without pay for minor infractions of fire department policy. The court cited the FLSA salary test that states an employee is considered to be paid on a salary basis if the amount is not "subject to

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<sup>1</sup> 29 C.F.R. § 541.118(a) (1994).

<sup>2</sup> 29 C.F.R. § 541.5d (1994).

reduction because of **variations in the quality or quantity** of the work performed.”<sup>3</sup> Since the deduction in pay was due to the quality of work performed, the court found the fire captains could not be considered exempt employees under FLSA.

While the state may suspend someone for one week without pay, any employee presently exempt from overtime under FLSA may not be suspended without pay for less than a week or fined wages. Such action will remove the employee from exempt status and the state may be liable for all overtime at time and a half accrued since the disciplinary action was taken, plus other damages. An exception to this rule is that an employer may suspend an overtime exempt employee for periods of less than 40 hours when the employee is being disciplined for committing a “*major safety infraction*.” An example of a major safety infraction that the Department of Labor would recognize is smoking in a coal mine.

Although a public employer is not able to suspend overtime exempt employees for periods of less than 40 hours without jeopardizing the overtime exempt status, other avenues are available to the public employer. In a wage and hour letter dated March 30, 1994, the Department of Labor suggested that employees could be appropriately disciplined in ways that do not involve a salary reduction. For example, the letter observed “it would appear that reducing accrued leave entitlement by a day or days for the infraction could achieve the desired disciplinary goal. In our view, such a practice would not affect the salary basis of payment described in 29 CFR 541.118, or otherwise adversely affect the application of 29 U.S.C. 213(a)(1).” As a result of this wage and hour letter, the Department of Administrative Services promulgated two memoranda that discuss the procedure for reducing leave balances, in lieu of suspensions, for overtime exempt employees. See “Addendum B - Directives” for copies of these memoranda.

## **Joint Employment**

Must the state pay overtime to an employee who splits his time between two state agencies under the Fair Labor Standards Act? The Wage and Hour Administrator has issued an Administrative Opinion on the subject of when separate state agencies are to be considered separate employers for FLSA purposes. (October 10, 1985). Opinions by the Administrator are not binding on the Courts. *Brock v. Louvers and Dampers, Inc.*, 28 WH Cases 133, 135 (6th Cir. 1987) citing *Boutell v. Wallig*, 327 U.S. 463 (1946). The opinions do, however, represent a body of experience and judgment that are granted great weight. *Brock v. Louvers and Dampers, Inc.*, 28 WH Cases at 135.

The Administrator’s opinion indicates a searching, two step inquiry. The first step consists of an inquiry into whether the two separate agencies operate as separate and distinct employers. If the answer to that question is no, then the state must pay overtime to the employee who works more than forty hours a week. Representative factors include: different funding and budgets for the agencies, participation by the agencies in separate employee retirement systems, agencies can sue in be sued under the own name, agencies are treated as separate employers for payroll purposes, etc.

If the agencies are considered separate and distinct using the first prong of the analysis, then the second prong of the analysis is utilized to determine if the employment relationship constitutes a

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<sup>3</sup> 29 C.F.R. § 541.118(a) (1994).

joint employment situation. If joint employment is found, then all of the employee's work for the joint employers is considered as one employment for FLSA purposes.

Courts have consistently held that the concept of joint employment under the FLSA is an expansive one and is to be applied with consideration given to the broad remedial purposes of the FLSA. *Karr v. Strong Detective Agency, Inc.*, 787 F.2d 1205 (7th Cir. 1985); *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748 (9th Cir. 1979). More specifically, in the context of joint employment with two or more state agencies, the Administrator's opinion letter warns:

“Because of the close connection among many state agencies, any arrangements under which the employees work for two or more state agencies during the same workweek must be examined with great care to determine if joint employment exists...”

The Wage and Hour Administrative Opinion dated October 10, 1985, is set forth below:

### **State Agencies as Separate Employers**

**Under certain conditions, two or more agencies of a state government may be determined to be separate employers under the FLSA.** The Department of Labor has stated that it will look to the overall operations state agencies in determining if they are separate employers for FLSA purposes, and while the following factors are not individually controlling, they tend to support such a determination:

1. The agencies are treated as separate employers from other state agencies for payroll purposes,
2. The agencies deal with other state agencies at arms' length concerning the employment of any individual,
3. The agencies have separate budgets or funding authorities,
4. The agencies participate in separate employee retirement systems,
5. The agencies are independent entities with full authority to perform all of the acts necessary to their functions under state statutes, and
6. The agencies can sue and be sued in their own names.

### **State Agencies as Joint Employers**

**Where it is determined that a state agency constitutes a separate and distinct employer under the FLSA, the possibility of joint employment involving two or more agencies still may exist.** If the facts of a particular case establish that employment by one agency is not completely disassociated from employment by one or more additional agencies, all of the employee's work for all of the joint employers during the workweek is considered as one employment for FLSA

purposes. In this event, all joint employers are responsible individually and jointly, for compliance with all of the applicable provisions of the FLSA.

To determine if a joint employment situation exists, the Department of Labor will consider the following questions:

1. When employed by one state agency, is the employment by another state agency completely voluntary on the part of the employee, or is the employee led to believe in any way that he or she should accept additional work at the other state agency?
2. When employed by one state agency, is the employee assured, promised, or led to believe that he or she will receive additional work from another state agency?
3. Are employees of one state agency given a special preference for additional work at another state agency?
4. Does the work for one state agency represent only part-time or irregular work?
5. What are the percentages of time in all workweeks in which the employee works for one state agency as compared to the employee's work for another state agency or agencies?
6. What effect does the employee's work in one job have on his or her other job or jobs? For example, has any employee ever been fired from or disciplined by one state agency because he or she failed to perform a job for another state agency?

Because of the close connections among many state agencies, any arrangements under which the employees work for two or more state agencies during the same workweek must be examined with great care and on a case-by-case basis to determine if joint employment exists.

## **Union Time**

Should time spent by Union stewards in adjusting grievances be counted as hours worked for the purpose of computing overtime when the work takes place after working hours?

The FLSA is clear on its treatment of hours worked adjusting grievances. Regulations issued by the Wage and Hour Administrator explain:

Time spent in adjusting grievances between an employer and employees during the time the employees are required to be on the premises is hours worked, but in the event a bona fide union is involved the counting of such time will, as a matter of enforcement policy, be left to the process of collective bargaining or to the custom or practice under the collective bargaining agreement.

29 C.F.R. Sec. 785.42

Since the present situation involves a bona fide Union, the collective bargaining agreement between the parties is controlling. Section 3.02 of the contract between the State of Ohio and OCSEA defines

Union stewards rights. The contract explains, “Stewards and chapter officers...shall be allowed a reasonable amount of time away from their regular duties to administer the Agreement..”. Therefore, the possibility of hours spent adjusting grievances counting towards overtime depends on the facts of a particular situation, the past practice of the parties, and perhaps arbitral interpretation of “reasonable amount of time” under the Collective Bargaining Agreement.

## **Police And Fire Fighters Under The FLSA**

Employees of state and local governments are covered by the FLSA (section 3(s)(1)(C)). Fire protection personnel are employees working for an organized fire department or fire district who have been trained for and have the legal authority and responsibility to engage in the prevention and control of fires. 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.

Hours of work 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. Section 13(b)(20) of the FLSA provides an overtime exemption to law enforcement or fire protection employees of a public agency which employs less than five employees 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 example, fire protection

## **Nursing Care Facilities Under The FLSA**

The FLSA covers all nursing care enterprises, public and private, whether operated for profit or not for profit.

Employers must also pay all non-exempt employees a rate of one and one-half the regular rate of pay for each hour of overtime worked. However, nursing care facilities may pay employees overtime after 40 hours in a 7 day workweek or alternatively, use the "8 and 80" system. Under the "8 and 80" system, the nursing care facility may pay employees -- with whom they have a prior agreement - - overtime for any hours worked after more than 8 hours in a day and more than 80 hours in a 14-day period.

## **Common Problems In The Nursing Care Industry**

The most common violation in the nursing care industry is the failure of employers to pay for all the hours that an employee works. This uncompensated time most frequently occurs when employers fail to pay for work performed:

- Before and after a worker's scheduled shift;

- During an employee's scheduled meal period; and
- While employees are attending staff meetings and compensable training sessions.
- Minimum wage and overtime pay violations also occur when employers make deductions or demand reimbursement for the cost of required uniforms or equipment.

Individuals not otherwise employed by the facility who volunteer – without expectation of pay – to attend to the comfort of nursing home residents in a manner not otherwise provided by the facility are not considered employees under the FLSA. However, individuals (including residents) who perform work of any consequential economic benefit to the facility are employees and entitled to FLSA minimum wage and overtime.

Overtime pay violations often occur when employers:

- Fail to pay overtime after 8 hours of work in a day for workers (both full time and part time) who are under the "8 and 80" system
- Pay overtime after 80 hours worked during a biweekly period rather than after 40 hours in a workweek to employees not under the "8 and 80" system
- Fail to combine hours worked in more than one department or at more than one facility when determining the total overtime hours worked
- Fail to include in calculating overtime hours the time spent or hours worked while performing on-call assignments
- Fail to include shift differential, bonuses or on-call fees in calculating an employee's regular rate
- Fail to pay overtime to improperly classified salaried but non-exempt employees (e.g., clerical staff, cooks, and activities directors)



## **PART 2: FLSA CONSIDERATIONS IN DISCIPLINARY SITUATIONS**

Whether a disciplinary measure is appropriate depends significantly on whether the employee is an overtime-exempt employee as defined in the Fair Labor Standards Act (FLSA). Therefore, before imposing discipline, it is important to first determine, for FLSA purposes, if the employee is overtime-exempt or overtime-eligible. Secondly, although those general principles apply to all employees covered by the FLSA, collective bargaining contracts must be followed when disciplinary bargaining unit employees.

### **Disciplining Overtime-exempt Employees**

#### **Fines**

A fine is an authorized form of discipline for employees. However, the FLSA's prohibition against reducing the weekly salary of an FLSA overtime-exempt employee still applies. Therefore, employees exempt from collective bargaining who are FLSA overtime-exempt should not be fined.

#### **Reduction of Accrued Vacation Leave**

A state agency can debit an FLSA overtime-exempt employee's vacation leave balance in increments of less than five (5) work days for discipline as long as that disciplinary action is called a *reduction* and is taken in compliance with Ohio Revised Code § 124.34, utilizing the *Order of Removal, Reduction, Suspension, Fine, Involuntary Disability Separation* form (ADM 4055).

It is an acceptable form of discipline to debit vacation leave in amounts greater than three days where warranted by the disciplinary offense. Because of a debit of any amount of vacation leave for disciplinary reasons is considered a reduction pursuant to R.C. § 124.34, all vacation leave debits are appealable through SPBR and a form ADM 4055 is required.

#### **Suspensions**

To preserve FLSA overtime-exempt status, overtime-exempt employees should be suspended (away from the workplace) in five-day increments only. However, the law now recognizes the use of a working suspension as a form of discipline. Because an employee's pay is not reduced when a working suspension is imposed, the employee's FLSA overtime-exempt status is not jeopardized. Therefore, working suspensions are appropriate for both overtime-exempt and overtime-eligible employees for whatever period of time is warranted by the disciplinary offense. Pursuant to R.C. § 124.34, suspensions of greater than three days (both working suspensions and suspensions away from the workplace) are appealable through SBPR and form ADM 4055 is therefore required. Since suspensions of FLSA overtime-exempt employees served away from the workplace must be for at least five days, form ADM 4055 is always required.



## PART 3: FACT SHEETS

### FLSA Quick Reference Guide

**OVERTIME** - Employees covered by the Fair Labor Standards Act (“FLSA”) must receive not less than one and one-half times their regular rate of pay for hours worked in excess of forty hours in one workweek.

- The employee may elect compensatory time in lieu of overtime payment, but the FLSA prevents the employer from avoiding the time and a half minimum overtime payment.
- **VOLUNTEERS** - An employee cannot be both a "paid" employee and a "non-paid" volunteer while performing the same type of work for the same employer. This prevents the Employer from mandating true work time as volunteer time.

**HOURS WORKED** - includes any hours that are **suffered or permitted**.

- Work may be suffered or permitted even if it is not requested, and when it is performed away from the employer's premises, including the employee's home.
- In order to show that they were suffered or permitted to work, employees must show that the employer had either actual or constructive knowledge of the overtime work.
- An Employer who knows or should have known through the exercise of reasonable diligence that an employee is working overtime must comply with the FLSA requirements.
- Constructive knowledge can be found due to the knowledge and acts of an employees' immediate supervisor. Constructive knowledge may also be established through proof of a pattern or practice of overtime work.
- An employer is not shielded from liability from the mere promulgation of a work rule against working unauthorized overtime.
- Even when overtime is not specifically authorized, an employee must be properly compensated for working overtime on the employer's behalf if the employer accepts the benefits of such work, regardless of whether the employee demands payment for working overtime.
- It is the duty of the employer to exercise its control and see that the work is not performed if it does not want it to be performed. The employer has the power to enforce the rule and must make every reasonable effort to do so.

**PROOF REQUIRED** - In order to prevail in an FLSA complaint, an employee must prove that "he has in fact performed work for which he was improperly compensated" and "produce

sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inferences."

- The fact that an employee is unable to prove the precise extent of the uncompensated work does not preclude recovery. Employees are not required to produce actual records or logs, but may establish the amount of overtime worked through their own testimony.
- Once the employee establishes that overtime was worked without adequate compensation for it, the burden shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the employee's evidence.
- If the employer fails to produce such evidence, the court may award damages to the employee even if the amount is only approximate. An employer cannot complain about the employee's calculation method unless it introduces specific evidence to the contrary of the hours actually worked or evidence that undermines the reasonableness of the estimate.

**DE MINIMIS EXCEPTION** - Under the "*de minimis* rule" employees generally cannot recover for otherwise compensable time if it amounts to only a few seconds or minutes of work beyond scheduled working hours.

- Most courts have found periods of approximately 10 minutes or less to be *de minimis*. However, a small but regular daily amount of time aggregated over a period may not be *de minimis*.

**DAMAGES** - Upon proof of an FLSA violation, an employer is liable for the amount of unpaid overtime for the previous two years, three years in the case of a willful violation, plus liquidated damages in an amount equal to the unpaid back wages.

- The employer may avoid liquidated damages, at the discretion of the court, if it shows that it acted in good faith.
- The employer can also be liable for attorney's fees and the cost of the action.
- An employer may not retaliate against an employee for filing an FLSA complaint. An employee may be reinstated or even promoted if a court determines that the employer retaliated, even if the employer's retaliation is based upon a mistaken belief that an employee filed an FLSA complaint.

**WINDOW OF CORRECTION** - There is a window of correction under 29 CFR 541.118(a)(6) which provides that "where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future."

## Examples Of FLSA Working And Non-Working Time

ACTIVITY	WORKING TIME REQUIRING OVERTIME IF OVER 40 HOURS	NON-WORKING TIME
Unauthorized overtime when the employer accepts the benefit of the employee's work, and takes no action to stop the performance of the unwanted work ( <i>Mumbower v. Callicott</i> , 526 F.2d 1183)	X	
Work performed at the employee's home when the employer accepts the benefit of the employee's work and has actual or constructive notice of the work (29 CFR §785.12)	X	
Changing clothes for the employee's benefit (29 CFR §785.24)		X
Changing clothes as required by work or employer (29 CFR §785.24(c))	X	
Charitable work at the employee's option (29 CFR §785.44)		X
Charitable work at the employer's discretion (29 CFR §785.44)	X	
Holidays on which an employee does not work (29 CFR §778.218(d))		X
Make-Ready Work such as caring for tools or machinery (29 CFR §785.24)	X	
Meals of one half hour or more where the employee is free to pursue personal activities (29 CFR §785.19)		X
Meal periods where the employee is not free to pursue personal activities (29 CFR §785.19)	X	
Medical attention at the employee's option (29 CFR §785.43)		X
Medical attention at the employer's discretion (29 CFR §785.43)	X	
On-call time where employee must remain at the employer's premise or so close thereto that the employee cannot use the time for own purposes (29 CFR §785.17)	X	
On-call time where the employee must simply leave a number where he or she may be reached, and is otherwise free to pursue personal activities (29 CFR §785.17)		X
Coffee breaks or rest periods of 20 minutes or less (29 CFR §785.18)	X	

ACTIVITY	WORKING TIME REQUIRING OVERTIME IF OVER 40 HOURS	NON-WORKING TIME
Actual sleeping time up to a maximum of 8 hours for employees on 24 hour duty, where 5 hours of uninterrupted sleep is guaranteed (29 CFR §785.22)		X
Sleeping time of employees who are on less than 24 hours duty (29 CFR §785.21)	X	
Travel time between an employee's home and the employer's premise (29 CFR §785.35)		X
Travel time from employer's premise to work site (29 CFR §785.38)	X	
Travel time between work sites during the normal work day (29 CFR §785.38)	X	
Emergency work/travel time (29 CFR §785.36)	X	
Driving van pools when the driver is chosen by the employer and under the employer's control (DOL Field Handbook §31b02)	X	
Periods of time which employees are relieved of all duties and are free to pursue personal activities (29 CFR §785.16)		X
Waiting time during which employees are required to remain prepared to work (29 CFR §785.15)	X	
Wash-up time for the employee's option (29 CFR §790.7(g))		X
Wash-up time required by employer or necessitated by the employee's duties or activities (29 CFR §790.7(g))	X	
Training in regular duties to increase efficiency, or training programs required by the employer (29 CFR §785.27)	X	
Labor-management meetings on daily operations or contract issues, unless a union contract provides otherwise.(29 CFR §785.42)	X	
Labor-management meetings on internal union affairs, unless a union contract provides otherwise. (29 CFR §785.42)		X
Grievance assistance during the time an employee is required to be on the premises, unless a contract provides otherwise (29 CFR §785.42)	X	

## FLSA References And Case Notes

The Fair Labor Standards Act of 1938, 29 U.S.C. 207 (FLSA) sets minimum wage, overtime pay, equal pay, record keeping and child labor standards for employees who are covered by the Act and are not exempt from specific provisions. It is a federal law. However, no provision of FLSA will excuse noncompliance with any state law or municipal ordinance establishing a minimum wage higher than the federal minimum wage established by FLSA. Ohio Revised Code Chapter 4111 sets minimum fair wage standards in Ohio.<sup>4</sup>

Initially, the Supreme Court held that FLSA covered state and local government employees<sup>5</sup>, except those exempted or excluded from coverage. Conversely, private action was deemed to be not available under FLSA, even though that is what it was initially drawn up to regulate.<sup>6</sup>

However, in 1976, the Court ruled that application of FLSA to state and local governments was unconstitutional.<sup>7</sup> The Court reasoned that "integral or traditional state and local government functions" should be controlled by those government entities; while holding that nontraditional or propriety functions (government acting in a business function) were still covered by FLSA. This effectively overruled *Maryland v. Wirtz*.

Subsequently, only nine years later, in 1985, the Court overruled *National League of Cities* and held that state and local governments were covered in toto by FLSA.<sup>8</sup> The Court stated that the "traditional governmental function" test of *National League of Cities* was unworkable and gave little guidance to state and local governments. The end result of *Garcia* was that state and local governments must be in complete compliance with federal minimum wage and overtime laws and regulations.

No employer shall employ any of his FLSA eligible employees for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.<sup>9</sup>

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<sup>4</sup> O.R.C. Section 4111.03 regarding overtime pay provides that "an employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's wage rate for hours worked in excess of forty hours in one workweek, *in the manner and methods provided in* and subject to the exemptions of section 7 and section 13 of the "*Fair Labor Standards Act* of 1938." 29 U.S.C. 207 (emphasis added).

<sup>5</sup> *Maryland v. Wirtz*, 392 U.S. 183 (1968).

<sup>6</sup> *Employees of the Dep't. of Public Health and Welfare, State of Missouri v. Dep't. of Public Welfare, State of Missouri*, 411 U.S. 279 (1973).

<sup>7</sup> *National League of Cities v. Usery*, 426 U.S. 833 (1976).

<sup>8</sup> *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

<sup>9</sup> 29 U.S.C. §207(a)(1)

While coverage under the FLSA is intended to be broad, there are numerous exemptions to the minimum wage and overtime pay requirements. For the most part, application of these exemptions is based upon the work actually performed by the individual employee. All exemptions are subject to the rule of strict construction.<sup>10</sup> Exemptions are narrowly construed against the employer.<sup>11</sup> The burden of proving the entitlement to an exemption falls upon the employer.<sup>12</sup>

To "employ" means to suffer or permit to work.<sup>13</sup> Work may be suffered or permitted even if it is not requested.<sup>14</sup> Work, may be suffered or permitted even if it is performed away from the employer's premises, even at home.<sup>15</sup> In order to show that they were suffered or permitted to work, employees must show that the employer had either actual or constructive knowledge of the overtime work.<sup>16</sup> An Employer who knows or should have known through the exercise of reasonable diligence that an employee is working overtime must comply with the FLSA requirements.<sup>17</sup> Constructive knowledge can be found due to the knowledge and acts of an employees' immediate supervisor.<sup>18</sup> Constructive knowledge may also be established through proof of a pattern or practice of overtime work.<sup>19</sup>

An employer is not shielded from liability from the mere promulgation of a work rule against working unauthorized overtime.<sup>20</sup> Such a policy, standing alone, does not establish that the employer did not suffer or permit the work where the nature of the work required overtime or the employer pressured the employees to work overtime.<sup>21</sup> Even where an employer has nor

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<sup>10</sup>. *Calaf v. Gonzalez*, 127 F.2d 934.

<sup>11</sup>. *Mitchell v. Kentucky Finance Co.*, 359 US 290 (1959); *A.H. Phillips Inc. v. Walling*, 324 US 290 (1945).

<sup>12</sup>. *Idaho Metal Works v. Wirtz*, 383 US 190 (1966).

<sup>13</sup>. 29 U.S.C. §203(g).

<sup>14</sup>. 29 C.F.R. §785.12

<sup>15</sup>. 29 C.F.R. §785.12

<sup>16</sup>. *Pfarr v. Food Lion, Inc.*, 851 F.2d 106 (4th Cir. 1988)

<sup>17</sup>. *Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413 (9th Cir. 1981)

<sup>18</sup>. see *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825 (5th Cir. 1973)

<sup>19</sup>. *Pfarr*, 851 F. 2d at 109.

<sup>20</sup>. *Wirtz v. Bledsoe*, 365 F.2d 277 (10th Cir. 1966)

<sup>21</sup>. *Reich v. Dept. of Conservation and Natural Resources*, 1994 U.S. App. LEXIS 20157 (11th Cir. 1994); *Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1984)

specifically authorized an employee to work overtime, an employee must be properly compensated for working overtime on the employer's behalf if the employer accepts the benefits of such work and does not act to stop performance of the work that it does not want performed, regardless of whether the employee demands payment for working overtime.<sup>22</sup>

An employer must pay for work suffered or permitted regardless of any agreement requiring authorization to work beyond a specified work period.<sup>23</sup> In all such cases, it is the duty of the employer to exercise its control and see that the work is not performed if it does not want it to be performed. The employer cannot sit back and accept the benefits without compensating for them. The Employer has the power to enforce the rule and must make every reasonable effort to do so.<sup>24</sup>

In order to prevail in an FLSA complaint, an employee must prove that "he has in fact performed work for which he was improperly compensated" and "produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inferences."<sup>25</sup> The fact that an employee is unable to prove the precise extent of the uncompensated work does not preclude recovery.<sup>26</sup> Employees are not required to produce actual records or logs, but may establish the amount of overtime worked through their own testimony.<sup>27</sup> Once the employee establishes that overtime was worked without adequate compensation for it, the burden shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference drawn from the employee's evidence. If the employer fails to produce such evidence, the court may award damages to the employees even if the amount is only approximate.<sup>28</sup> An employer cannot complain about the employees calculation method unless it introduces specific evidence to the contrary of the hours actually worked or evidence that undermines the reasonableness of the estimate.<sup>29</sup> Employees must prove that the overtime work they

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<sup>22</sup>. *Mumbower v. Callicott*, 526 F.2d 1183 (8th Cir. 1975).

<sup>23</sup>. *Burry v. National Trailer Convoy, Inc.*, 338 F.2d 422 (6th Cir. 1964); *Majczrzak v. Chrysler Credit Corp.*, 537 F. Supp. 33 (E.D. Mich. 1981).

<sup>24</sup>. 29 C.F.R. §785.13

<sup>25</sup>. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-688 (1946)

<sup>26</sup>. *Fegley v. Higgins*, 29 F. 3d 1126 (6th Cir. 1994); *Reich v. Waldbaum, Inc.*, 833 F. Supp 1037 (S.D.N.Y. 1993).

<sup>27</sup>. *Bueno v. Mattner*, 829 F.2d 1380 (6th Cir. 1987)

<sup>28</sup>. *Mt. Clemons Pottery*, 328 U.S. 687-688; *Bueno*, 829 F.2d at 1387.

<sup>29</sup>. *Waldbaum*, 833 F. Supp. at 1045

performed was for the benefit of the employer. Work is for the benefit of the employer if it is predominantly for the benefit of the employer.<sup>30</sup>

An employer is not required to pay overtime compensation in regard to "activities which are preliminary to or postliminary to" the principal activities which the employee is employed to perform "which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities."<sup>31</sup> However, employee activities performed either before or after the regular work shift are compensable under §254(a)(2) if those activities are an integral and indispensable part of the principal activities for which the person is employed.<sup>32</sup> To be considered an integral and indispensable part of a principal activity, a court must determine whether the activity is performed as part of the regular work of the employees in the ordinary course of business.<sup>33</sup> The term "principal activities" is liberally construed as including any work of consequences performed for an employer, no matter when the work is performed, as well as activities closely related to a principal activity which are indispensable to its performance.<sup>34</sup>

Under the "de minimis rule" employees generally cannot recover for otherwise compensable time if it amounts to only a few seconds or minutes of work beyond scheduled working hours.<sup>35</sup> Factors to be considered in determining whether a claim is de minimis include: 1) the practical administrative difficulty of recording the additional time; 2) the aggregate amount of compensable time; and 3) the regularity of the additional work.<sup>36</sup> Most courts have found periods of approximately 10 minutes or less to be de minimis.<sup>37</sup> However, a small but regular daily amount of time aggregated over a period of three years may not be de minimis.<sup>38</sup> Periods of less than thirty minutes cannot be arbitrarily designated as de minimis where the evidence does not show that the employee's activities during that time were not integral or indispensable to his or her principal work activities.<sup>39</sup>

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<sup>30</sup>. *Armour & Co. v. Wantock*, 323 U.S. 126 (1944); *Hill v. United States*, 751 F.2d 810 (6th Cir. 1984).

<sup>31</sup>. 29 U.S.C. §254(a)(2)

<sup>32</sup>. *Mitchell v. King Packing Co.*, 350 U.S. 260 (1956); *Steinder v. Mitchell*, 350 U.S. 247 (1956)

<sup>33</sup>. *Duchon v. Cajon Co.*, 1988 U.S. App. LEXIS 2167 (6th Cir. 1988).

<sup>34</sup>. 29 C.F.R. §790.8

<sup>35</sup>. *Mt. Clemens Pottery*, 328 U.S. at 692; *Lindow*, 738 F.2d at 1062.

<sup>36</sup>. *Lindow*, 738 F.2d at 1062-1063

<sup>37</sup>. *Lindow*, 738 F.2d at 1062

<sup>38</sup>. *Lindow*, 738 F.2d at 1063

<sup>39</sup>. *Duchon*, 1988 U.S. App. LEXIS at 2167\*11

Upon proof of a violation of §207(a)(1), an employer is liable for the amount of unpaid overtime.<sup>40</sup> Sums paid for occasional periods when no work is performed due to vacation, holiday, illness, payments for traveling and other reimbursable expenses, and other payments to an employee which are not made as compensation for hours of employment are not included in determining an employee's "regular rate" under §207(a)(1).<sup>41</sup> However, since such payments are not related to the performance of overtime, they are not creditable to the amount due from the employer as overtime.<sup>42</sup>

An award of liquidated damages in an amount equal to the unpaid back wages is mandated in the case of a violation of the statute. Under 29 U.S.C. §260, the court may decline to award liquidated damages "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation" of the FLSA. However, an award of liquidated damages is discretionary even where the employer shows that he acted in good faith.<sup>43</sup> Unlike 29 U.S.C. §259, which requires an employer to plead and prove the defense of good faith reliance on an administrative order or ruling, §260 does not specifically require that the defense of good faith be pleaded in the answer.

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<sup>40</sup>. 29 U.S.C. §216(b)

<sup>41</sup>. 29 U.S.C. §207(e)(2)

<sup>42</sup>. 29 C.F.R. §778.216; *Reich v. Lucas Enterprises*, 1993 U.S. App. LEXIS 20669 (6th Cir. 1993); *American Federation of Government Employees, Local 3721 v. District of Columbia*, 715 F. Supp. 391 (D.D.C. 1989); *Duplessis v. Delta Gas*, 640 F. Supp 891 (E.D. La. 1986).

<sup>43</sup>. *McClanahan v. Mathews*, 440 F.2d 320 (6th Cir. 1971)

Employees bear the burden of proving that a violation was willful so as to obtain the benefit of the three-year recovery period.<sup>44</sup> Proof of willfulness requires a showing that the employer either knew or showed reckless disregard for whether its conduct was prohibited under the FLSA.<sup>45</sup> Willfulness cannot be found on the basis of mere negligence or on a completely good faith but incorrect assumption that a pay plan complied with the FLSA, and an employer who does not act recklessly in determining its legal obligation does not act willfully.<sup>46</sup>

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<sup>44</sup>. *Waldbaum*, 833 F. Supp. at 1045

<sup>45</sup>. *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962 (6th Cir. 1991)

<sup>46</sup>. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988)

## **PART 4: EXEMPTIONS FROM THE FLSA**

Section 13(a)(1) of the FLSA exempts executive, administrative, professional, and outside sales employees from the minimum wage and overtime requirements of the FLSA, provided they meet certain tests regarding job duties and responsibilities and are compensated "on a salary basis" at not less than stated amounts. Subject to certain exceptions set forth in the regulations, in order to be considered "salaried", employees must receive their full salary for any workweek in which they perform any work without regard to the number of days or hours worked. This rule applies to each exemption that has a salary requirement. Outside sales employees, and certain licensed or certified doctors, lawyers and teachers have no salary requirement. For certain computer-related occupations under the professional exemption, they need not be paid a salary if they are paid on an hourly basis at a rate not less than \$27.63 per hour. The special requirements which apply to each category of employees are summarized below.

### **Executive Exemption**

Applicable to employees who have management as their primary duty; who direct the work of two or more full-time employees; who have the authority to hire and fire or make recommendations regarding decisions affecting the employment status of others; who regularly exercise a high degree of independent judgment in their work; who receive a salary which meets the requirements of the exemption; and who do not devote more than 20% of their time to non-management functions (40% in retail and service establishments).

### **Administrative Exemption**

Applicable to employees who perform office or non-manual work which is directly related to the management policies or general business operations of their employer or their employer's customers, or perform such functions in the administration of an educational establishment; who regularly exercise discretion and judgment in their work; who either assist a proprietor or executive, perform specialized or technical work, or execute special assignments; who receive a salary which meets the requirements of the exemption; and who do not devote more than 20% of their time to work other than that described above (40% in retail and service establishments).

### **Professional Exemption**

Applicable to employees who perform work requiring advanced knowledge and education, work in an artistic field which is original and creative, work as a teacher, or work as a computer system analyst, programmer, software engineer, or similarly skilled worker in the computer software field; who regularly exercise discretion and judgment; who perform work which is intellectual and varied in character, the accomplishment of which cannot be standardized as to time; who receive a salary which meets the requirements of the exemption (except doctors, lawyers, teachers

and certain computer occupations); and who do not devote more than 20% of their time to work other than that described above.

### **Computer Related Exemption**

In 1996 Congress amended the FLSA to provide for an exemption to the *minimum wage* and *overtime* requirements for certain computer related employees. Those who qualify are computer systems analysts, computer programmers, software engineers, or other similarly skilled workers whose primary duties are:

- (1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, and 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, and who, in the case of hourly employees, are compensated at a rate of not less than \$27.63 an hour. 29 U.S.C. 213(a)(17).

### **Outside Sales Exemption**

Applicable to employees who engage in making sales or obtaining orders away from their employer's place of business and who do not devote more than 20% of the hours worked by non-exempt employees of the employer to work other than the making of such sales.

### **Seasonal And Recreational Establishment Exemptions**

Section 13(a)(3) provides an exemption from the minimum wage and overtime provisions of the FLSA for "any employee employed by an establishment which is an amusement or recreational establishment, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33-1/3 per cent of its average receipts for the other six months of such year."

## Tests for the Exemption

- (a) An "amusement or recreational establishment" will be exempt under Section 13(a)(3) of the Act if it meets either Test (A) or Test (B) as explained in the following paragraphs.
- (b) "Does not operate for more than seven months in any calendar year.". Whether an amusement or recreational establishment "operates" during a particular month is a question of fact, and depends on whether it operates as an amusement or recreational establishment. If an establishment engages only in such activities as maintenance operations or ordering supplies during the "off season" it is not considered to be operating for purposes of the exemption.
- (c) 33-1/3 % Test. Because the language of the statute refers to receipts for any six months (not necessarily consecutive months), the monthly average based on total receipts for the six individual months in which the receipts were smallest should be tested against the monthly average for six individual months when the receipts were largest to determine whether this test is met. To illustrate:

An amusement or recreational establishment operated for nine months in the preceding calendar year. The establishment was closed during December, January and February. The total receipts for May, June, July, August, September and October (the six months in which the receipts were largest) totaled \$260,000, a monthly average of \$43,333; the total receipts for the other six months totaled \$75,000, a monthly average of \$12,500. Because the average receipts of the latter six months were not more than 33-1/3% of the average receipts for the other six months of the year, the Section 13(a)(3) exemption would apply.

## "Employed by" an Exempt Establishment

For purposes of applying Section 13(a)(3), the general principles set forth in IB 779.307 - 779.311 apply. Thus an employee, to be exempt, must be "employed by" the exempt establishment. If the concessionaire and host establishment constitute a single establishment, as is usually the case, the tests apply on the basis of all the operations of the establishment, including those of the concessionaire. Central functions of an organization operating more than one such establishment, as in the case of employees of a central office, warehouse, garage, or commissary which serves a chain of exempt "amusement or recreational" establishments would not be within the exemption under Section 13(a)(3).

"Receipts" of a publicly operated amusement or recreational establishment. Section 13(a)(3) contains certain percentage tests for "receipts" of the establishment. As used here, receipts are fees from admissions. A publicly operated amusement or recreational establishment whose operating costs are met wholly or primarily from tax funds would fail to qualify under Section 13(a)(3)(B).

## **Typical Problems**

Some problems and misconceptions which are commonly found in the application of the Section 13(a)(1) exemptions are:

- Employers without a formal sick leave policy docking salaried, exempt employees for time missed from work because of sickness.
- Employees not receiving full salary payments each week.
- Employees performing routine production type duties that seem related to general business operations but which have no bearing on setting of management policies.
- Employees who hold degrees performing jobs which are not professional in nature or to which the degree they hold is not applicable.
- Employers confusing job skills with the exercise of independent judgment and discretion.

Employees placed on salary and classified as exempt without regard to duties or percentage of time spent in exempt duties.

## Outline For Determining FLSA Status

### I. Overview

- A. No employer shall employ any of his FLSA eligible employees for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.
- B. While coverage under the FLSA is intended to be broad, there are numerous exemptions to the minimum wage and overtime pay requirements. For the most part, application of these exemptions is based upon the work actually performed by the individual employee. There are also many industry-wide exemption that have little or no impact on public employees.
  - 1. Exemptions are narrowly construed against the employer, and are subject to strict construction.
  - 2. The burden of proving entitlement to an exemption falls upon the employer.

### C. White-Collar Exemptions.

- 1. Although the designation of “white-collar employee” appears nowhere in the FLSA, the white-collar category comprises the most broad based of exemptions to the act, and cuts across the whole spectrum of industry classifications.
- 2. To qualify for a white-collar exemption, an employee must meet both the salary basis and duties tests.
  - a) An employee’s primary duty cannot be ascertained by applying a “clock” standard that contrasts the amount of time an employee spends each day on exempt and non-exempt work.
  - b) Of most importance is the determination of the employee’s chief or principal duty. The employee’s primary duty will be what that employee does that is of principal value to the employer, rather than the collateral tasks that are performed. This is true even if the collateral tasks consume the majority of an employee’s time.

## II. Exempt Employees (“Salary Test”)

### A. Salary Basis

#### 1. Basic Test

- a) *Employee regularly receives each pay period a predetermined amount constituting all or part of his compensation, which amount is not subject to reductions because of variations in:*
  - (1) quality or
  - (2) quantity of the work performed.
- b) *Employee must receive his full salary for any work without regard to the number of days or hours worked. This policy is also subject to the general*

*rule that an employee need not be paid for any workweek in which he performs no work.*

(1) **Special Exemption**

(a) *An employee of a public agency shall not be disqualified from exemption when the employee accrues personal leave and sick leave and the public agency requires the employee's pay to be reduced or the employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because:*

- (i) permission for its use has not been sought or has been sought and denied;
- (ii) accrued leave has been exhausted; or
- (iii) employee chooses to use leave without pay.

(b) *Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough will not disqualify the employee from being paid "on salary basis" except in the workweek on which the furlough occurs and for which the employee's pay is accordingly reduced.*

**2. General Exceptions to Basic Test**

- a) *An employee will not be considered to be "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.*
- b) *Deductions may be made when employee absents himself from work for a day or more for personal reasons, other than sickness or accident.*
- c) *Deductions may also be made for absences of a day or more occasioned by sickness or disability if the deduction is made according to a bona fide plan. If leave has been previously exhausted from a plan then deductions may be made from pay.*
- d) *Deductions may not be made for absences caused by jury duty, attendance as a witness, or temporary military leave. Employee may be offset any amount received by an employee as jury or witness fees or military pay against salary due without loss of the exemption.*
- e) Penalties imposed in good faith for infractions of safety rules of **major significance** will not affect the employee's salaried status.

**III. Exempt Employees ("Duties Test")**

**A. Executive Employees**

**1. Long Test for Executive Employees (must meet all parts)**

- a) *Duties: Primarily management of the agency, department or subdivision;*
- b) *Supervision: Customarily and regularly directs two or more employees;*
- c) *Authority: Possesses the power to hire and fire employees, or whose suggestions are given substantial weight in such decisions, including promotions;*
- d) *Discretion: Customarily and regularly exercises discretionary power;*
- e) *Work Responsibility: Does not devote more than twenty percent of hours in a workweek to the performance of activities not closely related to items (a) through (d); and*
- f) *Compensation: Is paid not less than \$155 per week exclusive of board, lodging or other facilities. (\$8,060 per year).*

**2. Short Test for Executive Employees**

- a) *Compensation: Is paid not less than \$250 per week exclusive board, lodging or other facilities. (\$13,000 per year);*
- b) *Duties: Primarily management of the agency, department or subdivision; and*
- c) *Supervision: Customarily and regularly directs two or more other employees.*

**B. Administrative Employees**

**1. Long Test for Administrative Employees (must meet a, b, d, e, and part of c)**

- a) *Duties: Primarily consist of either:*
  - (1) non-manual or office work directly related to management policies or general business operations; or
  - (2) performance of administrative functions in an educational establishment in work related to academic instruction or training;
- b) *Discretion: Customarily and regularly exercises discretion and independent judgment;*
- c) *Supervision:*
  - (1) regularly and directly assists a person employed in an executive or administrative capacity; or
  - (2) performs under only general supervision work requiring special training, experience or knowledge; or
  - (3) executes special assignments and tasks under only general supervision;
- d) *Work Responsibility: Does not devote more than twenty percent of work time to activities not directly or closely related to performance of administrative work; and*

- e) *Compensation: Is paid not less than \$155 per week exclusive of board, lodging or other facilities. (\$8,060 per year).*

**2. Short Test for Administrative Employees**

a) *Compensation: Is paid not less than \$250 per week exclusive board, lodging or other facilities. (\$13,000 per year);*

b) *Duties:*

(1) primarily performance of office or non-manual work directly related to management policies or general business operation; or

(2) performance of functions in the administration of an educational establishment, or a department or subdivision thereof, in work directly related to the academic instruction or training; and

c) *Responsibilities: Primary duty includes work requiring the exercise of discretion and independent judgment.*

**C. Professional Employees**

**1. Long Test for Professional Employees (must meet b, c, d, e, and one part of a)**

a) *Duties - Primarily work requiring:*

(1) advanced learning acquired by a prolonged course of specialized intellectual instruction, as distinguished from general academic education, apprenticeships or routine training, or

(2) original or creative work depending primarily on invention, imagination or talent, or

(3) teaching, tutoring, instructing or lecturing for a school system or educational institution;

b) *Discretion: Work requiring the consistent exercise of discretion and judgment;*

c) *Work Product: Predominantly intellectual and varied in character and which cannot be standardized in relation to a given period of time;*

d) *Work Responsibility: Must devote not more than twenty percent of hours to activities not essential, part of or necessarily incident to the work; and*

e) *Compensation: Is paid not less than \$170 per week exclusive of board, lodging or other facilities. (\$8,840 per year).*

**2. Short Test for Professional Employees**

a) *Compensation: Is paid not less than \$250 per week exclusive board, lodging or other facilities. (\$13,000 per year);*

b) *Duties: Primarily consist of performing work requiring advanced learning or work as a teacher; and*

*c) Discretion: Must include work which requires the consistent exercise of discretion and judgment or consist of work requiring invention, imagination or talent in a recognized field or artistic endeavor.*

#### **D. Recreational Employees**

##### **1. Test for Recreational Employee**

*a) Any employee who is employed by an establishment which is an amusement or recreational establishment, organized camp or religious or non-profit educational conference center, if*

- (1) it does not operate for more than seven months in any calendar year; or
- (2) during the preceding calendar year, its average receipts for any six months of such year were not more than thirty-three and one-third percent of its average receipts for other six months of such year.

#### **IV. Exemption For Certain Computer Related Employees**

**A.** Those who qualify are computer systems analysts, computer programmers, software engineers, or other similarly skilled workers whose primary duties are:

1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, and 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, and who, in the case of hourly employees, are compensated at a rate of not less than \$27.63 an hour. 29 U.S.C. 213(a)(17).

**B.** Currently no regulations exist to interpret this amendment. HOWEVER, the language for the amendment is very similar to the language of 1992 Wage and Hour Division regulations 29 C.F.R. 541.3(a)(4) and 541.303.

1. These regulations state that the list of job titles is illustrative and not all-inclusive, and that job titles alone are not determinative for application of the exemption.
2. The regulations also specify that the exemption applies only to highly-skilled employees who have achieved a level of proficiency in a theoretical and practical application of a body of highly-specialized knowledge in computer systems analysis, programming, and software engineering.

3. The exemption does not include trainees or employees in entry level positions learning to become proficient in these areas.
4. The level of expertise required is normally acquired through a combination of education and experience in the field.
5. The exemption does not include employees engaged in operation of computers or in the manufacture, repair, or maintenance of computer hardware and related equipment.

## PART 5: COMPENSATION OF TRAINING TIME

The rules that address the compensability of training time are found in 29 C.F.R. Sections 785.27 through 785.32. All four of the following prongs must be met before time spent in a training program, lecture or meeting does not count as hours worked:

1. Attendance is outside of the employee's regular working hours. 29 C.F.R. 785.27 (A)
2. Attendance is voluntary. 29 C.F.R. 785.27 (B)
3. The course, lecture or meeting is not directly related to the employee's job. 29 C.F.R. 785.27 (C)
4. The employee does not perform any productive work during such attendance. 29 C.F.R. 785.27 (D)

The first two prongs of this test are self-explanatory. The most difficult prong to apply is 29 C.F.R. 785.27 (C). Most inquiries center around what it means for training to be "directly related" to an employee's job. Unfortunately, there is no case law interpreting exactly what it means for training to be "directly related" to an employee's job, but pertinent C.F.R. Sections, Wage & Hour Opinion Letters and Wage & Hour cases provide examples to assist with interpretation.

**Training is "directly related" to an employee's job when it aids the employee in better performing his/her current job, but not if it trains him or her to advance into another position.**

The C.F.R. attempts to clarify what it means for training to be directly related to an employee's job in 29 C.F.R. 785.29. This section provides that directly related training enables an employee to handle his or her job more efficiently, rather than providing the employee with a new or additional skill. Further, if the training is specifically designed to enable the employee to advance into another job, the training is not directly related even if the training also improves the employee's skill in his or her current job. Following is an example provided by the Section:

"A stenographer who is given a course in stenography is engaged in an activity to make her a better stenographer. Time spent in such a course given by the employer or under his auspices is hours worked. However, if the stenographer takes a course in bookkeeping, it may not be directly related to his job. Thus, the time spent voluntarily in taking such a bookkeeping course, outside of regular working hours, need not be counted as working time." 29 C.F.R. 785.29

In Wage & Hour Opinion Letter 127 (April 4, 1971), the Administrator of the Wage & Hour Division of the Department of Labor further illustrated that training is directly related to an employee's job if it enhances the employee's performance of his or her current job versus training him or her to perform a new one. The Opinion Letter provided that time spent by mechanics in voluntary coursework at an outside educational institution or home study course

was not compensable because the mechanics were learning to perform duties which they were not performing in their current jobs.

Two cases illustrate the principle that in order for training to be directly related to an employee's job it must improve an employee's skills in his or her own position. First, in *Price v. Tampa Electric Company*, 27 WH Cases 1615 (CA 11 1987), an electric utility meter man sued for overtime compensation for time he spent studying home electronics courses on new equipment his company planned to introduce. *Id.* The Court held that the study time was not subject to overtime because the home electronics courses were not directly related to his primary responsibility of testing rubber goods. *Id. at 1616.* Further, the utility company did not require meter men to take the course to continue working. Price only pursued the course so that he could advance in the company by upgrading his skills. *Id.*

Also, in *Dade County, Florida v. Alvarez*, 4 WH Cases 2d 225 (CA 11 1997), police officers in a specialized unit of the Metro-Dade Police Department, the Special Response Team (SRT), brought suit to recover overtime compensation for off-duty physical fitness training time. The officers had to pass a physical fitness examination in order to enroll in SRT training school, were subjected to rigorous physical training while at the school, and were monitored frequently after completing training to ensure that they remained in excellent physical condition. Therefore, the SRT officers argued that they should be compensated for off-duty physical fitness time because physical fitness standards were mandated by and directly related to the job. *Id.*

The Court's decision in *Dade County* relied heavily on a Wage & Hour Opinion Letter dated June 1, 1994, that had a similar fact pattern. In the letter, the Wage & Hour Administrator concluded that off-duty physical fitness training was not "required or directly related to the SRT job. Such physical training is of a general nature that is beneficial to any individual, whether or not he or she is an SRT officer." *Id.*

The Court in *Dade County* held that the time was not compensable because all four criteria in 29 C.F.R. 785.27 were satisfied. Off-duty physical training was found to be not directly related to the officers' employment for two reasons. First, the off-duty training was only necessary to assist the officers in maintaining a fitness level that each officer had already achieved. Also, consistent with the Opinion Letter, the Court found that fitness training "provides the individual officers with benefits that extend beyond their employment position." *Id.*

Based on the foregoing, in order for training to be considered directly related to an employee's job, the training must improve the employee's skill in performing his or her current position. If the training instead provides the employee with a new or additional skill and/or trains the employee to move into another job, the training is not considered to be directly related to the employee's current position.

As a final note, it is possible that training time is not compensable even if it is directly related to an employee's job. 29 C.F.R. 785.31 outlines special situations where training is not compensable. If the training is offered by an independent bona fide institution of learning and occurs outside of work hours, it is not compensable even if the training clearly relates to an employee's job or is paid for by the employer.

**For public safety-service employees, even if training is “directly related” to an employee’s job, it is not compensable if it qualifies as specialized or follow-up training which is required by law for certification.**

In addition to the regulations set forth in 29 C.F.R. Sections 785.27 through 785.32, the C.F.R. contains an exception regarding compensability of training time specifically involving public safety-service employees. 29 C.F.R. 553.226 provides that attendance at specialized or follow-up training which is required by law for certification is not compensable, although the training is taken outside of working hours and part of the cost of the training may be paid by the employer. Both certification training of public and private sector employees within a particular governmental jurisdiction (i.e. public and private emergency rescue workers) and training obligations imposed by a higher level of government (i.e. if a state or county law imposes an obligation on a city employee) are not compensable under this rule.

Several Wage & Hour Opinion Letters exist that clarify this regulation, and three specifically address the compensability of time spent by paramedics in recertification training. The first of these, Opinion Letter 504 (October 23, 1980), advised that time spent in recertification training was not compensable because recertification was required by State law, rather than by the individual employer. At the time the letter was issued, the State of Minnesota required that a paramedic fulfill certain continuing education requirements in order to be employed as an attendant on an advanced life support (ALS) ambulance. These requirements included 48 hours of refresher training every two years, including successful completion of Cardio-Pulmonary Resuscitation (CPR) training yearly and successful completion of instruction in advanced cardiac life support every two years. Although The Wage & Hour Administrator advised the time spent in training required by State law is not compensable under the FLSA, the Administrator also cautioned that the FLSA does not preempt State statutes that are more beneficial. Therefore, compensation for recertification training may be provided if compensation is mandated by State statute.

In the second Wage & Hour Opinion Letter (December 30, 1985), it was again advised that time spent by paramedics in recertification training was not compensable because the recertification was required by State law, rather than being required by the individual employer. Here, City paramedics were required to maintain a Mobile Intensive Care Certificate. This certificate was mandated by the State and required that 64 hours of training be completed in a two-year period in order to maintain the certification.

The third letter, dated February 5, 1990, remained consistent with the other two and advised that time spent by paramedics in recertification training mandated by the State is not compensable under the FLSA. In this letter, State law mandated that paramedics recertify every two years, and they could do so by completing a full 30-hour retraining course or by substituting 16 hours by completing an Advance Cardiac Life Support course. After looking at 29 C.F.R. 553, the Wage & Hour Administrator concluded that time spent in recertification training is not compensable as hours worked under the FLSA.

Finally, in a Wage & Hour Opinion Letter dated April 21, 1986, time spent by health clerks in a first aid recertification training class *was* found to be compensible. Health clerks employed by the School District were required by the District to have an active first aid certificate that had to be renewed every three years. This renewal required an 8-hour training class that took place outside of work hours, and a fee for enrollment in the class. The School District had initiated a first aid training program for support personnel (i.e. school secretaries, clerks, etc.) that took place during employees' normal working hours. However, health clerks have not yet been incorporated into this first aid training program offered during work hours. The Wage & Hour Administrator advised that the time was compensible because the work was "directly related" to the employees' jobs, and therefore did not meet the third prong of the criteria set out in 29 C.F.R. 785.31.

One case exists that interprets 29 C.F.R. 553.226. In *Moreau v. Klevenhagen*, 30 WH Cases 1438 (CA 5 1992), the Court reversed the grant of a summary judgment motion involving a Union's plea for overtime for specialized or follow-up training outside of work hours. Here, the deputy sheriffs covered by the Union were required by the County to train for proficiency qualifications twice each year. *Id.* at 1442. Texas law only required officers to meet firearms proficiency qualifications once each year. The Union and County agreed that the time spent by deputy sheriffs in training for the first qualification was not compensible, but disagreed as to whether time spent during training for the second qualification was compensible under the FLSA. The Appeals Court for the Fifth Circuit found that the County was liable for the second qualification, therefore implying that any certification requirement will be compensible if it reaches beyond what is required by State statute. *Id.*

In light of the language and examples provided by the C.F.R., Opinion Letters, and case law addressing the meaning of an employee's training being "directly related" to his or her job, it is apparent that training has to assist an employee in improving performance in his or her current position in order to qualify as "directly related." Training is not directly related if it teaches an employee a new skill that would enable the employee to obtain a different job in order to advance in the company. Additionally, if training is offered by an independent bona fide institution of learning and occurs outside of work hours, it is not compensible even if the training clearly relates to an employee's job or is paid for by the employer.

Regarding public safety-service employees, specialized or follow-up training to maintain a certification is not compensible if it is required by law for certification of public and private sector employees within a certain governmental jurisdiction or if it is specifically required by a higher government. For example, it is not compensible if a County employee is required by State law to maintain a certification.

## PART 6: SCENARIOS

### HOURS WORKED (see pages 4 and 18)

#### FACT SCENARIO 1

Red is an inspector who travels everyday between job sites. He has been issued a state vehicle; he works out of his home; and he has minimal interaction with his supervisor on a day to day basis. Red is a conscientious employee but is human. He is becoming weary of the many hours that he is working. Management appreciates Red for his good work and no one seems to question Red's hours. For years, Red has made a habit of completing his biweekly time sheet with terms such as, "approximately eight hours worked," or "projected eight hours worked." On most weeks, red actually "flexes" his schedule. For example, last week Red worked the following hours:

Monday - nine hours;

Tuesday - nine hours;

Wednesday - eight hours;

Thursday - eight hours;

Friday - six hours;

Total = 40 hours.

This has been the practice for many years. Recently, however, Red's fellow inspectors have been applying for disability at astounding numbers. Red's supervisors have ordered him to "do what it takes to get the job done." Red, being the conscientious employee that he is, will continue to "get the job done" by working long hours, including lunch hours if need be. The supervisor knows that it is impossible to maintain Red's current work load within an eight-hour, 40 hour workweek.

How would you handle this situation?

1. Should you pay Red for working beyond 8 hours when he flexes his schedule?
2. Should Red be paid overtime if he works during his lunch period? What if the Employer has a policy that prohibits work during lunch?
3. Is Red entitled to be paid overtime if he works beyond 40 hours in a week if he does not report the time? Should he be paid if his Supervisor has actual knowledge that he has worked the overtime? Should he be paid overtime if the Supervisor does not have actual knowledge of the overtime worked, but when it is unreasonable for the Supervisor to believe Red could have performed all of his duties during the 40 hour workweek?
4. What if Red does not want to be paid the overtime, and is willing to "volunteer" his time? (see page 4)

## **SUGGESTIONS**

- Determine Red's actual hours; pay him the overtime/compensatory time. Instruct Red to account for all of his time. Either hire additional staff (or interim staff), or receive approval to offer Red overtime when necessary.
- Field time sheets, including time in, time out for lunch, time in from lunch, and time out at the end of the day. This form must be an accurate account of actual hours worked. Terms such as, "approximately" and "estimated" have no business on the time sheet. There is always an opportunity to correct a time sheet in the case of an emergency. Make sure that the employee is documenting "actual" hours worked and that a supervisor reviews it.
- Flexible working schedules may be a helpful tool with field people. Again, make sure that they are recording actual hours worked. Consult your labor relations staff for bargaining unit agreements concerning flexible work schedules.
- Require manager's signature after the inspector's work has been performed.
- Spot check with field supervisors.
- If you allow employees to work through their lunch hours, you subject yourselves to overtime. If the supervisor tells you that the employee does that on his or her own, but allows the practice to continue, it is as good as signing a document expressly approving overtime or compensatory time.

## **FACT SCENARIO 2**

Red has been reading about the FLSA via the Internet and realizes that his supervisors are taking advantage of him. Last week Red's supervisor unilaterally issued an order to all inspectors that no longer would overtime be approved. It further stated that if an inspector needed to work over 40 hours in a week, he or she must flex out his or her time over the "pay period" (i.e., two weeks).

You, as the Human Resource professional, must provide advice to Red's supervisor -- what is that advice?

## **SUGGESTIONS**

- Pay the overtime or compensatory time and advise the supervisor that this practice violates the FLSA. When the supervisor says that there just are not enough employees to complete the work within a 40-hour workweek, inform that supervisor that he or she has two options: a) continue paying the overtime; or b) hire interim employees or additional full time staff to remedy the problem.
- Finally, your supervisors understand that their hands are somewhat tied, and that they must compensate Red for his extra time worked. Red's supervisor calls Red to explain that she needs

him to work at least four hours of overtime this Friday and he must accept compensatory time as opposed to overtime.

Red brings this to your attention. How do you handle it?

- Unless the collective bargaining agreement indicates otherwise, Red's supervisor cannot dictate to Red what type of compensation he will earn. Red may choose between compensatory time and overtime.

## **MEAL PERIODS (see pages 20 and 37)**

### **FACT SCENARIO 3**

Sandy is a secretary. She works for a state agency in an office setting downtown. She is to take a half hour lunch break every day. Most days she eats at her desk while she proofreads her typing. Occasionally during lunch, she answers the phone. Sometimes her immediate supervisor will have her type something up during part of her lunch. The agency automatically deducts one half hour from her daily hours for lunch.

1. Is she to be compensated for overtime for lunch breaks?
2. Does the employer have knowledge?
3. Does the fact that she has never asked for overtime or turned in any compensation/leave slip for lunch matter?

### **GENERAL RULE**

An employer must pay an employee for hours worked. Hours worked are those hours that an employee has been suffered or been permitted who work for the employer. Under FLSA, an employee must show that the employer had actual or constructive knowledge of the overtime worked, then the burden shifts to the employer to prove the employee did not work. Finally, constructive knowledge can be found due to the knowledge and acts of an employee's immediate supervisor or through a proof of work pattern or practice of overtime work.

## **PRELIMINARY AND POSTLIMINARY ACTIVITIES (see page 23)**

### **FACT SCENARIO 4**

Abe works in a state institution. He usually arrives twenty minutes before his actual assigned start time. His union contract says that he is to be paid when he arrives at his cottage. During the twenty minutes, he changes his clothes, gets his first aid kit, and keys. He also finds out about any problems at his cottage from his supervisor. He also gets a twinkie from the vending machine.

When he leaves after his shift, he is about ten minutes late on a regular basis. Abe is paid a straight 40 hours during his work.

1. Is he entitled to overtime for the extra time he is at work?

2. Would it make any difference if he did not change clothes, get his work items, or talk to his supervisor?

### **GENERAL RULE**

An employer must pay an employee for hours worked. Hours worked are those hours that an employee has been suffered or been permitted to work for the employer. Time that an employee engages in “preliminary” or “postliminary” activities that are not related to employees principle activities and are not normally compensable by contract, custom or practice are not normally compensable as work time under FLSA. For example, if the employer requires the employee to change clothes before beginning work or after finishing work, the employer must compensate the employee for that time. If the employee changes his clothes for his own benefit, the employer need not compensate for that time.

### **WAITING TIME (see page 18)**

#### **FACT SCENARIO 5**

Willy Shoemaker is a boiler operator for a state agency. The employer requires Willy to report for work promptly at 8:00 a.m. each morning. When Willy reports to work, the first thing he does is turn on the boiler. After he turns on the boiler, he must wait 20 minutes for the boiler to warm up so that he can begin his inspection of the machine. During this 20 minutes, Willy usually reads the paper and has a cup of coffee. Because of this down time, the employer requires Willy to work until 5:20 p.m. each night.

1. Is Willy’s time waiting for the boiler to warm up compensable?

#### **GENERAL RULE:**

The key factor for waiting time is whether the employee is “engaged to wait” or is “waiting to be engaged.” This means that if an employer requires the employee to report to work at a certain time, and after that time the employee must wait for work to become available, the employee is entitled to overtime compensation. However, if the employee shows up to work before his or her starting time and does not complete any work, then the employer need not compensate the employee.

### **ON-CALL TIME AND PAGERS (see page 19)**

#### **FACT SCENARIO 6**

Johnny Armstrong is an electrician at a state correctional institution. As a part of that job, he must carry a beeper when he is off-duty so that he can be reached in the case of an emergency. In addition, the institution requires him to be on-call one night each week and subject to immediate recall. On this night, Johnny cannot leave the immediate vicinity of his home.

Questions:

1. Must the employer compensate Johnny for the time he wears a beeper while off-duty?

2. Must the employer compensate Johnny for the one night each week that he is on-call?

**GENERAL RULE:**

The determining factor for on-call time or for employees with a beeper is whether the employee is free to pursue his or her own activities while on-call or wearing the beeper. The more restrictions placed on an employee during these times, the more likely that the employer will have to compensate the employee. For example, if an employee must only leave a number where he or she can be reached, the time is not compensable. However, if the employee is required to remain at home subject to immediate recall, that time will be compensable.

**OVERNIGHT CONFERENCE (see pages 20, 22 and 38)**

**FACT SCENARIO 7**

Martha is sent to a conference in Cleveland. She must stay overnight for two nights. Part of the agenda is a nice cocktail party thrown the first night. Through most conferees attend the gathering, most are expected to attend, and most really enjoy networking with their peers from other states, the party is not mandatory for Martha. That day, Martha left her home at her normal 7:00 a.m. and remained at the cocktail party until 10:00 p.m.

Her time sheet reads as follows:

Monday -- 8 hours;

Tuesday -- 8 hours;

Wednesday -- 8 hours;

Thursday -- 10 hours (accounting for the two hours at the cocktail party);

Friday -- 9 hours (accounting for travel time home after the conference);

Total -- 43 hours.

1. May Martha receive two hours for the time she attended the cocktail party?
2. What if Martha attended a training session after her normal working hours?
3. Does the FLSA require Martha to be paid for her travel time home, if she traveled alone? Should Martha be paid if she drove other employees from the conference? Should Martha be paid if she was a passenger and another employee drove home from the conference? Should Martha be paid if she took a bus? (see page 18)

## **GENERAL RULES**

- Martha should not be paid overtime for attending the cocktail party unless she was required to attend as an “official” work function.
- Commuting time is not compensable.
- Driving van pools is compensable time when the driver is chosen by the employer and under the employer's control.
- Traveling on common carriers after normal working hours is not compensable time.

## **TRAINING TIME (see pages 21, 38 and 55)**

### **FACT SCENARIO 8**

Flo Nightingale is employed as a Licensed Practical Nurse, (“LPN”) in a correctional facility. In order to keep her certification as an LPN, she must be able to perform CPR. The state of Ohio requires all LPNs to be recertified in CPR on a biannual basis.

Flo has been attending the Red Cross CPR recertification class on Thursday nights from 7:00 p.m. until 8:00 p.m. The course lasts a total of three (3) hours.

1. Does the time that Flo spends in the CPR class count as compensable hours?

### **FACT SCENARIO 9**

Bill Bedpan is employed in a state psychiatric hospital as a registered nurse, (“RN”). The Ohio Department of Mental Health is offering a course to all RN’s in Lotus. The classes will be offered in the evenings, not Mr. Bedpan’s normal working hours. The Department has emphasized that enrollment is entirely voluntary.

- Are the hours spent in Lotus training compensable?

## **GENERAL RULE**

Time spent in lectures, meetings, training programs and similar activities are compensable unless the following four criteria are met:

- 1) Attendance is outside of the employee’s regular working hours;
- 2) Attendance is voluntary;
- 3) The employee does not perform productive work for the employer;
- 4) The course, lecture, etc., is not directly related to the employee’s current job.

The “gray areas” are when attendance is in fact “voluntary” and when is the subject matter not “directly related” to the employee’s job.

The federal regulations state that attendance is not considered voluntary if it is required by the employer or if the employee believes that present working conditions or the continuation of employment would be adversely affected by non-attendance.

The training is directly related to the employee’s job if it is designed to help the employee perform his current job more efficiently. Training designed to teach the employee another job or to acquire new job skills would not be considered directly related.

## **TRAVEL TIME AND COMMUTING (see pages 22 and 38)**

### **FACT SCENARIO 10**

John Jett is employed as an armed agent of BCI. He leaves his home at 7:00 a.m. and arrives at the armory at 7:30 to obtain his weapon. At 7:34 he leaves the armory and arrives at his office at 8:10 a.m.

At 10:00 a.m. he leaves the office in London and travels to Dayton in order to assist the Dayton police in an investigation. He arrives in the vicinity of Dayton at 11:30 a.m. From 11:30 a.m. until 12:00 p.m., John will drive out of his way to eat donuts at his favorite little mom and pop bakery.

At 12:30 p.m., lunch is over and John must get back on I-75 in order to be at the Dayton police station by 1:15 p.m. John leaves at 12:30 p.m. and arrives at his destination promptly at 1:15 p.m.

At 3:30 p.m., John leaves Dayton and travels back to his office in London. At 4:30 p.m., John leaves his office and arrives at the armory at 4:45 p.m. in order to turn in his weapon. At 5:00 p.m. John leaves the armory for his 30 minute commute home.

- What portion of the travel time in the above scenario is compensable time?

## **GENERAL RULES**

### **Commuting** (see page 22)

General Rule is that time spent commuting to and from work is not counted toward hours worked. Only travel as part of the employer’s principal activity will be counted as hours worked. However, there are two narrow exceptions:

- The “Call Back or Emergency Call.” If an employee, after completing a day’s work, is called at home and must travel a “substantial distance” to perform the emergency job, the travel time is compensable.
- If in the course of commuting to work the employee must stop in route to pick up instructions, equipment, materials, etc., time becomes compensable when the employees arrives at the site to pick up the instructions, materials, or equipment.

### **Travel During the Workday** (see page 22)

As a general rule, time spent by an employee in travel as part of the employer's principal activity is compensable. Example, travel from work site to work site is compensable time.

### **Overnight Travel** (see page 22)

Only that travel which occurs during the employees regular working hours is counted as hours worked. This rule applies even if travel is done on days that the employee is not scheduled to work. This rule would not apply if the employee is required to drive. If the employee is required to drive, all time spent in travel must be counted. However, if an employee is a passenger on a common carrier, the employer need not compensate for this time. Of course, an employee must be compensated if he or she performs any work while traveling.

## **LABOR MANAGEMENT ISSUES (see pages 29 and 38)**

### **FACT SCENARIO 11**

Tom Smith is a union steward in the Dayton office of OBES. Ray Jones, another employee of OBES, faces disciplinary action in conjunction with an alleged assault on a supervisor. Ray Jones is employed in the Marion office of OBES.

There are no union stewards in the Marion area, consequently, Ray Jones must travel to Dayton in order to discuss his upcoming pre-disciplinary conference with Tom Smith, the steward. Due to a heavy claim load, Ray Jones' supervisor will not release him to travel to Dayton until 4:00 p.m. Ray Jones leaves the office at 4:00 p.m. and he returns to his home in Marion at 10:00 p.m.

1. Will the two hours spent in consultation with the union count as compensable hours?
2. Would your answer be different if Mr. Jones were traveling to Dayton to tally result in a union election?

### **GENERAL RULE**

Time spent on issues relating solely to internal union affairs is non-compensable. Look to the contract and past practice.

### **FACT SCENARIO 12**

Susie is a supervisor of a section with 25 employees. She works for a government agency. She frequently begins her day around 10:30 a.m. and works until around 7:30 p.m. The agency has a policy requiring supervisors to be in the office by 9:00 a.m. to answer questions from the public. On the days that Susie comes in late, the agency requires her to use some sort of leave time to cover the late period from 9 a.m. until 10:30 a.m. even though she works eight hours a day.

- 1) Assuming that Susie is overtime exempt, does the fact that the agency requires her to take leave, destroy her overtime exemption status?
- 2) Does it make any difference in the facts if she voluntarily uses leave balances in order to leave work at 5 p.m.?

### **GENERAL RULE**

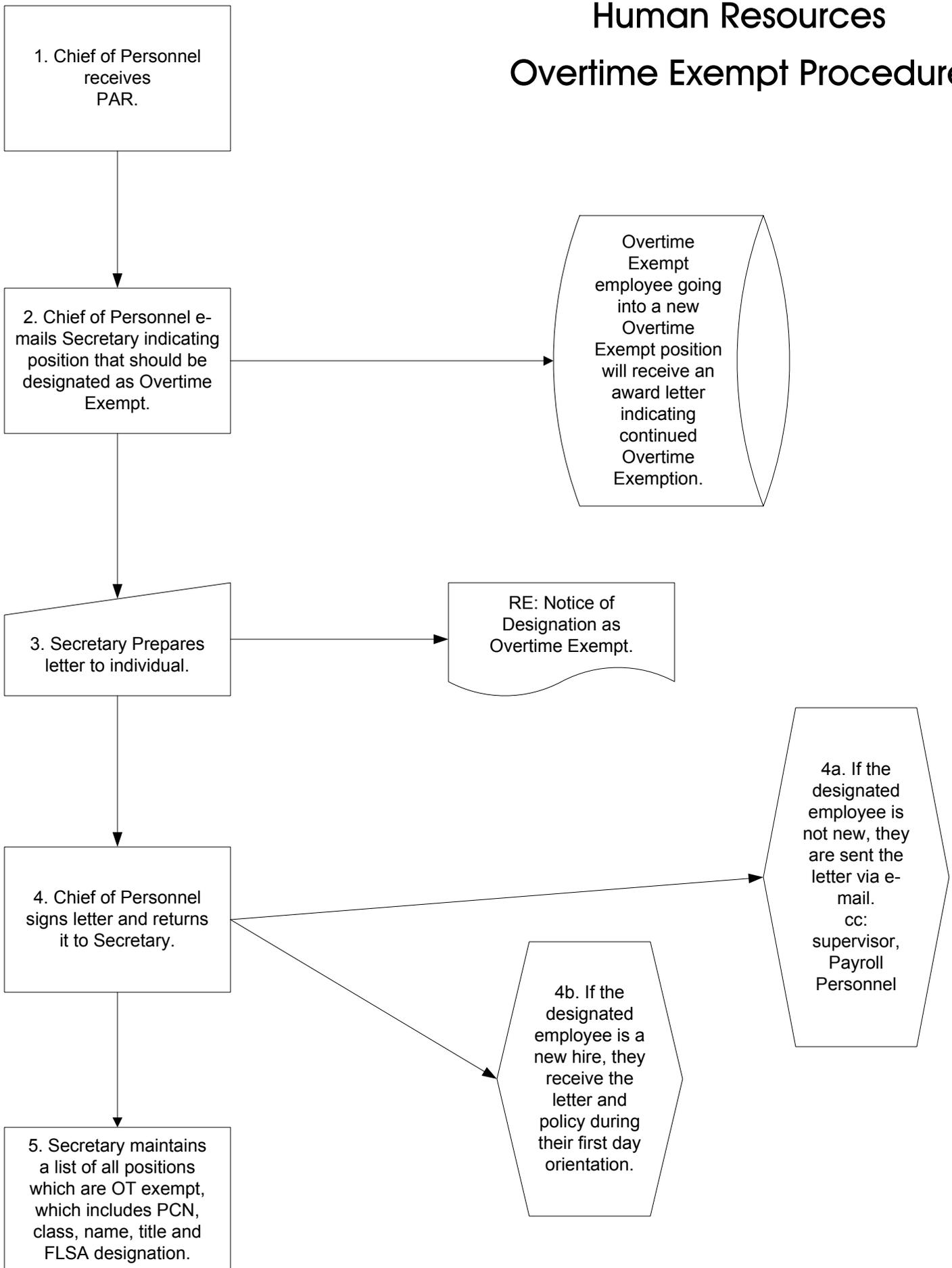
Governmental agencies can require overtime-exempt employees to use forms of leave to cover periods that the employee was late or tardy. The requirement would not destroy the employee's overtime-exempt status. However, a similar fact scenario is in front of the Ohio Supreme Court.



## **Addendum A – EXEMPTION PROCEDURE**

# Human Resources

## Overtime Exempt Procedure



## **Addendum B – DIRECTIVES**

# DAS Directive

Directive No. **01-06**  
Effective Date: **07-01-01**



To: All Appointing Authorities and Personnel Officers  
From: Scott Johnson, *Director of Administrative Services*  
Re: Compensatory Time

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## PURPOSE

To encourage all agencies to adopt a uniform compensatory time policy which complies with the Fair Labor Standards Act, section 124.18 of the Ohio Revised Code and Chapter 123:1-43 of the Ohio Administrative Code.

## GENERAL

This directive applies only to employees who are exempt from collective bargaining and are overtime exempt pursuant to section 124.18 of the Revised Code and the Fair Labor Standards Act. Compensatory time can be earned by {Insert agency name} employees only for work hours which are immediately necessary to the operation of the office. No compensatory time will be granted for office work, which could have been completed during a standard 40 hour week. An overtime exempt employee who is required by an administrative supervisor to be in an active pay status for more than 40 hours in any calendar week, may accrue compensatory time. For purposes of this directive, active pay status means the conditions under which an employee is eligible to receive pay and includes sick leave. Use of compensatory time is strictly at the discretion of the supervisor and requires prior approval.

The following criteria apply to the accrual and use of compensatory time:

1. Compensatory time accrues on an hour-for-hour basis and may be accrued in no less than one-half hour increments.
2. No compensatory time can accrue during an employee's lunch hour or for work completed at home.
3. Use of compensatory time requires prior approval by a supervisor and must be taken at a mutually convenient time. Compensatory time must be used in intervals of no less than one-half hour.
4. Compensatory time use must be documented on a leave form signed by the employee and the employee's supervisor prior to leave being taken.
5. The maximum amount of compensatory time, which an employee may accrue is 120 hours. Any compensatory time accrued must be used within 13 pay periods (approximately six months) after accrual.
6. Compensatory time balances will be kept by the {Insert title}. A report of compensatory time balances will be issued at the end of each month to each employee, as well as the {Insert name of director's designee(s)}. Compensatory time balances may be maintained and reported on the

employee's pay check stubs.

7. Cash payment for accrued compensatory time is not permitted. Employees may not convert compensatory time to any other form of leave. All compensatory time balances will be forfeited upon termination of employment in the {Insert agency name}. Compensatory time may not be used to extend an employee's date of resignation or date of retirement. No compensatory time accrued in another state department or agency will be transferable.

#### ENFORCEMENT

All agencies are responsible for implementation and enforcement of this directive, and are responsible for compliance with the Fair Labor Standards Act, Ohio Revised Code and any applicable collective bargaining agreements. This directive has been approved by Administrative Services pursuant to section 124.18 of the Revised Code and may be adopted by all agencies. No other directives will be approved absent direction by the Governor's office.

This directive supersedes any previously issued directive or policy and will remain effective until canceled or superseded.

#### AUTHORITY & REFERENCE

ORC 124.18  
OAC 123:1-45-01  
OAC 123:1-43-01 through 123:1-43-02  
OAC 123:1-32-07(G)

*Service, Support, Solutions for Ohio Government*

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To: All Appointing Authorities and Personnel Officers  
From: Scott Johnson, *Director of Administrative Services*  
Re: Overtime Compensation

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## PURPOSE

To encourage all agencies to adopt a uniform overtime compensation policy for overtime eligible employees which complies with the Fair Labor Standards Act, section 124.18 of the Revised Code and Chapter 123:1-43 of the Ohio Administrative Code.

## GENERAL

This directive applies only to employees who are exempt from collective bargaining and are overtime eligible pursuant to section 124.18 of the Revised Code and the Fair Labor Standards Act. Overtime compensation can be earned by {Insert agency name} employees only for work hours which are immediately necessary to the operation of this office. No overtime will be authorized for office work or other work which could have been completed during a standard 40 hour week.

The following provisions apply to the accrual and use of overtime compensation:

### Eligibility and Accrual

1. An overtime eligible employee who is required by an administrative supervisor to be in an active pay status for more than 40 hours in any calendar week, shall be entitled to overtime compensation or compensatory time. Active pay status does not include sick leave.
2. An employee entitled to overtime compensation shall be entitled to compensation for such time over 40 hours at one and one-half times his or her base rate of pay.
3. An overtime eligible, flexible hour employee is not entitled to compensation for overtime work unless his or her administrative supervisor requires him or her to be in an active pay status for more than 40 hours in a calendar week, regardless of the number of hours worked on any day in the same calendar week.

### Approval Process

1. An employee who desires to work or is required to work more than 40 hours in any calendar week must have the overtime work approved in advance by his or her administrative supervisor. All overtime work must be reflected on the employee time sheet.
2. Regardless of the time at which an employee arrives for work or leaves from work, no overtime eligible employee shall begin work prior to his or her scheduled work hours or continue to work after his or her scheduled work hours or during a scheduled lunch period, without prior approval of the

administrative supervisor.

3. In an emergency situation, when no administrative supervisor or other individual is available to authorize the overtime work, the employee may work the overtime he or she deems necessary.

4. An overtime eligible employee shall be paid for all overtime work whether or not it is reflected on the employee time sheet. The administrative supervisor shall be responsible for monitoring overtime work, and for documenting and/or assuring that all overtime worked is documented on the employee time sheet.

5. Employees who work overtime without approval (where prior approval is possible) are subject to disciplinary action for failure to follow the approval process outlined in this directive. Employees who deem it necessary to work overtime when prior approval is not possible are subject to disciplinary action for abuse of discretion if it is determined that the situation was not an emergency or the employee exercised poor judgment.

#### Compensatory Time

1. An overtime eligible employee may elect to take compensatory time off in lieu of overtime pay on a time and one-half basis, at a time mutually convenient to the employee and the employee's administrative supervisor.

2. An overtime eligible employee may accrue compensatory time to a maximum of 240 hours, except that the Department of Public Safety employees and other employees who meet criteria established under the Fair Labor Standards Act may accrue up to 480 hours of compensatory time. Any hours of compensatory time accrued in excess of these maximum amounts shall be paid to the employee as overtime compensation.

3. Compensatory time use must be documented on a leave form signed by the employee and the employee's administrative supervisor prior to leave being taken.

4. Compensatory time balances will be kept by the {Insert title}. A report of compensatory time balances may be issued at the end of each month to each employee, as well as the {Insert name of director's designee(s)} or compensatory time balances may be maintained and reported on the employee's paycheck stubs.

5. Upon termination of employment, any overtime eligible employee with accrued, but unused compensatory time shall be paid for that time at the rate that is the greater of the employee's final regular overtime eligible rate of pay or the employee's average regular overtime eligible rate of pay during the last three years of employment with the state. If an employee is promoted or otherwise transferred from an overtime eligible position to an overtime exempt position, any unused compensatory time shall be paid out based on the employee's overtime eligible rate of pay.

#### ENFORCEMENT

All agencies are responsible for implementation and enforcement of this directive, and are responsible for compliance with the Fair Labor Standards Act, Ohio Revised Code, Ohio Administrative Code and any applicable collective bargaining agreements. This directive has been approved by Administrative Services, pursuant to section 124.18 of the Revised Code and may be adopted by all agencies. This directive is approved for overtime eligible employees exempt from collective bargaining, various provisions may differ for bargaining unit employees, consult your contract.

This directive supersedes any previously issued directive or policy and will remain effective until canceled or superseded.

#### AUTHORITY & REFERENCE

ORC 124.18  
OAC 123:1-45-01  
OAC 123:1-43-01 through -02  
Fair Labor Standards Act



## MEMORANDUM

To: Chief Legal Counsels & Human Resource Administrators of all State Agencies, Departments, Institutions, Boards and Commissions

From: Charles L. Wheeler, Deputy Director  
Human Resources Division  
Department of Administrative Services

Date: October 4, 2001

Re: Guidelines for Certifying Employees as Overtime Exempt

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Each state agency is required to submit to the DAS Human Resources Division a list of positions that have been designated as overtime exempt. To be properly designated as overtime exempt, exempted from the overtime provisions of the federal Fair Labor Standards Act (FLSA), positions must meet certain criteria established by the FLSA. The following guidelines will help you to identify overtime-exempt positions:

1. In general, full-time positions that are exempt from a bargaining unit and are executive, administrative or professional in nature may be designated as overtime exempt.
2. Job titles are not sufficient to determine whether a position is overtime exempt. To determine whether the duties of a position are executive, administrative or professional in nature compare the actual duties of the position to the requirements of each category of employee as summarized below.

Executive Exemption: Applicable to employees who have management as their primary duty; who direct the work of two or more full-time employees; who have the authority to hire and fire or make recommendations regarding decisions affecting the employment status of others; who regularly exercise a high degree of independent judgment in their work; who receive a salary which meets the requirements of the exemption; and who do not devote more than 20% of their time to non-management functions (40% in retail and service establishments)

Administrative Exemption: Applicable to employees who perform office or non-manual work which is directly related to the management policies or general business operations of their employer or their employer's customers, or perform such functions in the administration of an educational establishment; who regularly exercise discretion and judgment in their work; who either assist a proprietor or executive, perform specialized or technical work, or execute special assignments; who receive a salary which meets the requirements of the exemption; and who do

not devote more than 20 % of their time to work other than that described above (40% in retail and service establishments)

Professional Exemption: Applicable to employees who perform work requiring advanced knowledge and education, work in an artistic field which is original and creative, work as a teacher, or work as a computer system analyst, programmer, software engineer, or similarly skilled worker in the computer software field; who regularly exercise discretion and judgment; who perform work which is intellectual and varied in character, the accomplishment of which cannot be standardized as to time; who receive a salary which meets the requirements of the exemption (except doctors, lawyers, teachers and certain computer occupations); and who do not devote more than 20% of their time to work other than at that described above.

If this comparison also indicates that the duties fall into one of the exempted categories, apply the attached FLSA short or long test, to make a final determination of exempt status.

3. Only salaried positions can be designated as overtime exempt under the FLSA. State employee exemptions are based on the assumption that such employees are treated as salaried employees, despite the fact that state pay schedules include hourly rates at all levels.
4. Once it is determined which positions are overtime exempt, a human resources official or other person with signature authority should complete a Certification Letter, a copy of which is attached, to be submitted with the list of overtime-exempt positions. This form certifies that the job duties of each position listed have been reviewed and the signing authority has verified that the duties of that position meet the FLSA overtime-exemption criteria. Lists submitted without this certification will not be considered official and will be returned to the agency for completion of the certification.
5. Overtime-exempt lists must include the Position Control Number (PCN) and FLSA exemption category for each position included on the list. Overtime-exempt lists are to be submitted to your agency's human resource analyst at:

Office of State Services  
DAS/Human Resources Division  
30 East Broad Street, 29<sup>th</sup> Floor  
Columbus, OH 43215

6. Whenever a position that is exempt from collective bargaining is created or reclassified, a review of the position utilizing the FLSA criteria mentioned above should be conducted. If it is determined that the duties exempt the position from overtime, a certification letter should be sent to DAS following the process above. Overtime at the rate of time and one-half will be paid to anyone filling a position until DAS has been notified of the overtime-exempt status.

If you have questions regarding the designation of a position as overtime exempt, please contact Policy Development at 728-8944.

## Attachments

## White-Collar Exemption Chart

### **EXECUTIVES**

#### **SHORT TEST**

(Streamlined test for employees with weekly salaries of at least \$250)

- 1) Primary duty is managing an enterprise of a customarily recognized department or subdivision.
- 2) Customarily and regularly direct the work of two or more employees.

#### **LONG TEST**

(Additional tests for lower-paid employees)

- 3) Have a weekly salary of at least \$155<sup>1</sup>, exclusive of board, lodging, or other facilities.
- 4) Have the authority to hire and fire other employees or to recommend hiring, firing, promotion, or change of status of employees.
- 5) Customarily and regularly exercise discretionary powers.
- 6) Do not devote more than 20 percent of their work time to activities that aren't directly and closely related to exempt work. (Exceptions include executives: a) in retail or service establishments, who may spend up to 40 percent of their work time on unrelated activities; b) who own at least a 20-percent interest in the enterprise; or c) who are in charge of an independent establishment or physically separated branch establishment.)

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<sup>1</sup> \$200 in Puerto Rico, Virgin Islands, American Samoa

## **ADMINISTRATIVE EMPLOYEES**

### **SHORT TEST**

(Streamlined test for employees with weekly salaries of at least \$250)

- 1) Primary duty is performing office or non-manual work directly related to management policies or general business operations of employer or its customers, administrative work in the academic field, or work relating to academic instruction.
- 2) Work requires the exercise of discretion and independent judgment.

### **LONG TEST**

(Additional tests for lower-paid employees)

- 3) Have a weekly salary of at least \$155<sup>2</sup>, exclusive of board, lodging, or other facilities. (In the academic field, employees must either meet this salary test or receive a salary at least equal to the starting salary for teachers in the same school system or academic institution.)
- 4) Regularly and directly assist a proprietor or a bonafide executive or administrative employee; perform under only general supervision specialized or technical work requiring special experience, training, or knowledge; or work on special assignments or tasks under only general supervision.
- 5) Do not devote more than 20 percent of workweek to activities not closely related to work described in tests 1, 2, and 4. (Retail or service workers may spend up to 40 percent of their time in unrelated activities.)

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<sup>2</sup> \$130 in Puerto Rico, Virgin Islands, American Samoa

## **PROFESSIONALS**

### **SHORT TEST**

(Streamlined test for employees with weekly salaries of at least \$250)

1) Primary duty is performing work that: (a) requires knowledge of advanced type in field of science or learning; (b) is original and creative in a recognized field of artistic endeavor; or (c) involves imparting knowledge as a certified or recognized teacher.

### **LONG TEST**

(Additional tests for lower-paid employees)

2) Have a weekly salary of at least \$170<sup>3</sup>, exclusive of board, lodging or other facilities; or (a) have a valid license to practice and are practicing law or medicine; (b) have a medical degree and are in an internship or resident program; or (c) work as a teacher.

3) Work consistently requires discretion and judgment.

4) Work is predominantly intellectual and varied, and output or results cannot be standardized in relation to a given time period.

5) Time spent on unrelated activities is not more than 20 percent of the workweek.

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<sup>3</sup> \$150 in Puerto Rico, Virgin Islands, American Samoa

# SAMPLE

## Certification Letter

Date

(Name, Title)

DAS/Human Resources Division  
Rhodes State Office Tower  
30 East Broad Street, 29<sup>th</sup> Floor  
Columbus, OH 43266-0405

Dear \_\_\_\_\_:

We hereby certify that the following list of employees have been evaluated pursuant to FLSA guidelines and have been determined to be overtime exempt. Each employee's exemption category is listed with his or her name and position control number. We further certify that in reviewing each employee's status, we completed the evaluation based on the job duties and not classification title alone.

These reviews were completed on \_\_\_\_\_, 20\_\_, and all affected employees have been notified of their status.

Sincerely,

\_\_\_\_\_  
Personnel Officer

\_\_\_\_\_  
Director, Deputy Director  
or Administrator



## MEMORANDUM

To: Chief Legal Counsels & Human Resource Administrators of all State Agencies, Departments, Institutions, Boards and Commissions

From: Charles L. Wheeler, Deputy Director  
Human Resources Division  
Department of Administrative Services

Date: October 4, 2001

Re: Guidelines for Completing Documents for Discipline of Overtime Exempt Employees

---

The purpose of this memorandum is to offer guidance for completion of the Order of Removal, Reduction, Suspension, Involuntary Disability Separation form (ADM 4055) and coding of the personnel action and payroll when an overtime exempt employee's leave accrual is reduced for disciplinary reasons.

1. Attached is a sample Order of Removal, Reduction, Suspension, Involuntary Disability Separation form that has been completed as required when reducing vacation accrual for disciplinary reasons. Also attached is a completed sample form for a normal suspension in five-day increments.
2. A personnel action (PA) must be completed each time an overtime-exempt employee's leave accrual is reduced for disciplinary reasons. The PA code I14 should be entered in the "Remarks" section of the PA. For example, if an overtime exempt employee's accrued leave is being reduced by 3 days for disciplinary reasons, enter the following information in the "Remarks" section:

I14 Vacation Leave Debit 3 Days

This action will result in a notation on the employee's history record indicating that there was a reduction in the employee's leave accrual for disciplinary reasons. Only vacation leave should be debited as a disciplinary action.

3. This action should be recorded on the payroll journal as follows:

REDUVXXXX (i.e., 3-day reduction (24 hours) = REDUV2400)

Attachments

# Order of Removal, Reduction, Suspension, Fine, Involuntary Disability Separation

M \_\_\_\_\_

This will notify you that you are;  removed;  suspended;  suspended (working);  fined;  
 involuntary disability separated;  reduced in pay, from your position of

\_\_\_\_\_ and/or reduced to new position of \_\_\_\_\_  
effective \_\_\_\_\_ (date) (if applicable)

The reason for this action is that you have been guilty of (List relevant R.C. 124.34 disciplinary offense(s)).  
(Section not applicable for involuntary disability separation.)

**Specifically:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Notice of pre-disciplinary/separation hearing given to employee: \_\_\_\_\_  
(date)

Pre-disciplinary/separation hearing held or waived: \_\_\_\_\_  
(date)

Employee allowed to meet with employer:  Yes  No

Order hand-delivered to employee: \_\_\_\_\_  
(date, if hand-delivered)

If employee is suspended, list dates of suspension: \_\_\_\_\_

Signed at \_\_\_\_\_ Ohio, \_\_\_\_\_  
(city) (date)

Counter signature, if applicable

Signature of Appointing Authority

Counter signature, if applicable

Type Name and Title of Appointing Authority

Counter signature, if applicable

Type Department, Agency, or Institution

# Order of Removal, Reduction, Suspension, Fine, Involuntary Disability Separation

M \_\_\_\_\_

This will notify you that you are;  removed;  suspended;  suspended (working);  fined;  
 involuntary disability separated;  reduced in pay, from your position of

\_\_\_\_\_ and/or reduced to new position of \_\_\_\_\_  
effective \_\_\_\_\_ (date) (if applicable)

The reason for this action is that you have been guilty of (List relevant R.C. 124.34 disciplinary offense(s)).  
(Section not applicable for involuntary disability separation.)

**Specifically:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Notice of pre-disciplinary/separation hearing given to employee: \_\_\_\_\_  
(date)

Pre-disciplinary/separation hearing held or waived: \_\_\_\_\_  
(date)

Employee allowed to meet with employer:  Yes  No

Order hand-delivered to employee: \_\_\_\_\_  
(date, if hand-delivered)

If employee is suspended, list dates of suspension: \_\_\_\_\_

Signed at \_\_\_\_\_ Ohio, \_\_\_\_\_  
(city) (date)

Counter signature, if applicable

Signature of Appointing Authority

Counter signature, if applicable

Type Name and Title of Appointing Authority

Counter signature, if applicable

Type Department, Agency, or Institution

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Ohio Department of Administrative Services  
Bob Taft, *Governor*  
Scott Johnson, *Director*

Human Resources Division  
Floor 28  
30 East Broad Street  
Columbus, Ohio 43266-0405

614.466.3455 voice  
614.466.5127 fax  
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## MEMORANDUM

To: Executive Officers, Chief Legal Counsels & Human Resource Administrators of all State Agencies, Departments, Institutions, Boards and Commissions

From: Charles L. Wheeler, Deputy Director  
Human Resources Division  
Department of Administrative Services

Date: October 4, 2001

Re: Designation and Discipline of Overtime Exempt Employees

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Generally, under the Fair Labor Standards Act (FLSA) guidelines, overtime-exempt employees must be paid for a 40-hour workweek regardless of the number of hours worked. An overtime exempt employee in the public sector may only have his or her salary reduced for absences when his or her accrued leave is exhausted, when the employee is placed on leave without pay status because leave was not requested or was requested and denied, or when the employee requests leave without pay. Therefore, docking of salary is not permitted when issuing a disciplinary suspension of less than five days. FLSA regulations and various court decisions have made it clear that suspensions for less than 40 hour increments jeopardize the overtime exempt status of the employee. The only exception is for suspensions given for infractions of safety rules of major significance.

### **Accrued Leave Debits**

The administration and enforcement of FLSA is the responsibility of the US Department of Labor (DOL). In accordance with the DOL's opinion in a wage and hour letter dated March 30, 1994, one alternative to suspension without pay for less than a week, may be to reduce leave banks by a day or days. In DOL's view, such reductions should not adversely affect the salary basis status of the employee.

As a consequence of DOL's salary basis test, DAS developed a process with the State Personnel Board of Review (SPBR) whereby a state agency can debit an FLSA overtime exempt employee's vacation leave balance for discipline as long as that disciplinary action is called a "reduction", is taken in compliance with ORC 124.34(B) and utilizes the Order of Removal, Reduction, Suspension, Involuntary Disability Separation form (ADM 4055).

Appointing authorities are advised to reduce an FLSA overtime-exempt employee's vacation leave balance only in situations where the infraction calls for discipline of four days or fewer. For example, if the severity of an employee's actions would normally warrant a two-day suspension, you would notify the employee that in lieu of a two-day suspension you are

reducing his or her vacation leave balance by sixteen hours. Offset of accrued leave can only occur if the employee has a sufficient leave balance. Discipline involving more than four days should be processed as a five-day suspension. Thus progressive discipline for an overtime-exempt employee may involve oral/written reprimands, a reduction of accrued leave up to four days and a full-five day or 40-hour suspension without pay. Note, for overtime-exempt employees whose workweek is not five days or 40 hours, the suspension must be tailored for the entire workweek in order to maintain the exemption. Depending upon the discipline being imposed, a pre-disciplinary meeting may be required.

Because a debit of any amount of vacation leave for disciplinary reasons is considered a reduction pursuant to R.C. §124.34, a form ADM 4055 is required and SPBR will review timely appeals from such vacation leave balance reductions. Since DOL has apparently approved the vacation leave balance-debiting scheme as complying with the FLSA, SPBR may modify these debit reductions as appropriate.

### **Suspensions**

In order to maintain FLSA overtime-exempt status, unpaid suspensions of overtime-exempt employees should be in five-day increments only. Working suspensions of any period of time that is warranted by the disciplinary offense are appropriate for overtime-exempt employees and will not jeopardize FLSA overtime-exempt status.

SPBR will review timely appeals from suspensions, and SPBR has authority to modify suspensions. If SPBR has determined that the offense merits discipline greater than a written reprimand but less than a five-day suspension, SPBR will state what discipline the offense does merit. However, SPBR will still affirm that suspension (i.e., five days), stating that SPBR's action is taken in accordance with the FLSA salary basis test.

If the overtime exempt status is removed due to inappropriate discipline given to an employee, you may be required to pay the employee time and one-half for any overtime worked from that day forward. Failure to do so may result in a DOL investigation with an award of additional overtime for the employee. Also, a review may be conducted of any other employees within State of Ohio employment who may be performing the same or similar duties. All violations found could result in backpay and penalties to all of the agencies with infractions. Each appointing authority has the burden of proving any of the exceptions and must show that the exemption "plainly and unmistakably" applies to the employee. Up-to-date guidelines are being issued to your chief legal counsel and human resource official regarding the review process and procedures for declaring a position overtime exempt. We recommend that your agency periodically review and, if necessary, update the position descriptions of those employees who have been designated overtime exempt in order to ensure that the job duties reflect the executive, administrative or professional exemption. The Department of Administrative Services will notify you of any changes in the requirement that weekly salaried employee suspensions be for the entire workweek.

### **Fines**

Section 124.34 of the Revised Code authorizes fines for classified employees. However, an FLSA overtime exempt employee should not be fined due to the FLSA restriction on docking an overtime exempt employee's wages.

**Addendum C – FAIR LABOR STANDARDS ACT**

# The Fair Labor Standards Act of 1938, as Amended



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U.S. Department of Labor  
Employment Standards Administration  
Wage and Hour Division

WH Publication 1318  
Revised July 1997

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\*Telecommunications Device for the Deaf.

**THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED**  
**(29 U.S.C. 201, et seq.)**

'This publication contains the original text of the Fair Labor Standards Act of 1938 as set forth in 52 Stat.1060, revised to reflect the changes effected by the amendments listed in this footnote, which may be found in official text at the cited pages of the Statutes at Large.

This publication contains 52 Stat. 1060, as amended by:

(1)	The Act of August 9,1939	53 Stat.	1266
(2)	Section 404 of Reorganization Plan No. II of 1939	53 Stat.	1436
(3)	Sections 3(c)-3(f) of the Act of June 26,1940	54 Stat.	615
(4)	The Act of October 29,1941	55 Stat.	756
(5)	Reorganization Plan No. 2 of 1946	60 Stat.	1095
(6)	The Portal-to-Portal Act of 1947	61 Stat.	84
(7)	The Act of July 20,1949	63 Stat.	446
(8)	The Fair Labor Standards Amendments of 1949	63 Stat.	910
(9)	Reorganization Plan No. 6 of 1950	64 Stat.	1263
(10)	The Fair Labor Standards Amendments of 1955	69 Stat.	711
(11)	The American Samoa Labor Standards Amendments of 1956	70 Stat.	1118
(12)	The Act of August 30,1957	71 Stat.	514
(13)	The Act of August 25,1958	72 Stat.	844
(14)	Section 22 of the Act of August 28,1958	72 Stat.	948
(15)	The Act of July 12,1960	74 Stat.	417
(16)	The Fair Labor Standards Amendments of 1961	75. Stat.	65
(17)	The Equal Pay Act of 1963	77 Stat.	56
(18)	The Fair Labor Standards Amendments of 1966	80 Stat.	830
(19)	Section 8 of the Department of Transportation Act	80 Stat.	931
(20)	The Act of September 11,1967, amending Title 5 of the U.S.C.	81 Stat.	222
(21)	Section 906 of the Education Amendments of 1972	86 Stat.	235
(22)	The Fair Labor Standards Amendments of 1974	88 Stat.	55
(23)	The Fair Labor Standards Amendments of 1977	91 Stat.	1245
(24)	Section 1225 of the Panama Canal Act of 1979	93 Stat.	468
(25)	The Fair Labor Standards Amendments of 1985	99 Stat.	787
(26)	The Act of October 16,1986	100 Stat.	1229
(27)	The Fair Labor Standards Amendments of 1989	103 Stat.	938
(28)	Omnibus Budget Reconciliation Act of 1990	104 Stat.	1388-29
(29)	The Act of November 15,1990	104 Stat.	2871
(30)	The Act of September 30,1994	108 Stat.	2428
(31)	Court Reporter Fair Labor Amendments of 1995	109 Stat.	264
(32)	The Act of August 6,1996	110 Stat.	1553
(33)	Small Business Job Protection Act of 1996	110 Stat.	1755

The original text of the Fair Labor Standards Act of 1938, as revised by the amendments through 1960, is set in the "Century" typeface. Added or amended language as enacted by subsequent amendments is represented by several different typefaces as follows:

<i>Amendments</i>	<i>Typeface Used</i>	<i>Public Law</i>	<i>Date Enacted</i>	<i>Statute Citation</i>
Pre-1961	Century Light			
<b>1961</b>	<b>Century Boldface</b>	<b>87-30</b>	<b>5/5/61</b>	<b>75 Stat. 65</b>
1966	<i>Century Light Italics</i>	89-601	9/23/66	80 Stat 880
<b>1972</b>	<b><i>Century Boldface Italics</i></b>	<b>92-318</b>	<b>6/23/72</b>	<b>86 Stat. 235 at 375</b>
<b>1974</b>	<b><i>Century Boldface Italics</i></b>	<b>93-259</b>	<b>4/8/74</b>	<b>88 Stat. 55</b>
1977	Helvetica Light	95-151	11/1/77	91 Stat. 1245
<b>1985</b>	<b>Helvetica Boldface</b>	<b>99-150</b>	<b>11/13/85</b>	<b>99 Stat. 787</b>
1986	<i>Helvetica Italics</i>	99-486	10/16/86	100 Stat 1229
<b>1989</b>	<b><i>Helvetica Boldface Italics</i></b>	<b>101-157</b>	<b>11/17/89</b>	<b>103 Stat 938</b>
<b>1990</b>	<b><i>Helvetica Boldface Italics</i></b>	<b>101-508</b>	<b>11/5/90</b>	<b>104 Stat 1388-29</b>
<b>1990</b>	<b><i>Helvetica Boldface Italics</i></b>	<b>101 583</b>	<b>11/15/90</b>	<b>104 Stat 2871</b>
1994	Eras	103-329	9/30/94	108 Stat. 2428
1995	Eras	104-26	9/6/95	109 Stat. 264
<i>1996</i>	<i>Eras Italics</i>	<i>104-174</i>	<i>8/6/96</i>	<i>110 Stat. 1553</i>
<i>1996</i>	<i>Eras Italics</i>	<i>104-188</i>	<i>8/20/96</i>	<i>110 Stat. 1755</i>

In cases where annual changes are to be made in provisions, as in the case of the gradual phase-out of exemptions, the changes are shown immediately following the provision to which they apply and are enclosed in brackets.

The footnotes in this revision show where prior changes have been made and refer to the specific amendments relied upon so that a comparison may be made with the official text.

This revised text has been approved by the Office of the Solicitor, U.S. Department of Labor.

**THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED**  
(29 U.S.C. 201, *et seq.*)

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the “Fair Labor Standards Act of 1938.”

### Finding and Declaration of Policy

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. ***The Congress further finds that the employment of persons in domestic service in households affects commerce.***

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.<sup>2</sup>

### Definitions

SEC. 3. As used in this Act —

(a) “Person” means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) “Commerce” means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.<sup>3</sup>

(c) “State” means any State of the United States or the District of Columbia or any Territory or possession of the United States.

<sup>2</sup> As amended by section 2 of the Fair Labor Standards Amendments of 1949.

<sup>3</sup> As amended by section 3(a) of the Fair Labor Standards Amendments of 1949.

(d) “Employer” includes any person acting directly or indirectly in the interest of an employer in relation to an employee ***and includes a public agency,<sup>4</sup> but does not include*** any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e) (1) ***Except as provided in paragraphs (2), (3), and (4), the term “employee” means*** any individual employed by an employer.

(2) ***In the case of an individual employed by a public agency, such term means —***

(A) ***any individual employed by the Government of the United States —***

(i) ***as a civilian in the military departments (as defined in section 102 of title 5, United States Code),***

(ii) ***in any executive agency (as defined in section 105 of such title),***

(iii) ***in any unit of the legislative or judicial branch of the Government which has positions in the competitive service,***

(iv) ***in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or***

(v) ***in the Library of Congress;***

(B) ***any individual employed by the United States Postal Service or the Postal Rate Commission; and***

(C) ***any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual —***

(i) ***who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and***

(ii) ***who —***

(I) ***holds a public elective office of that State, political subdivision, or agency,***

(II) ***is selected by the holder of such an office to be a member of his personal staff;***

<sup>4</sup> Public agencies were specifically excluded from the Act's coverage until the Fair Labor Standards Amendments of 1966, when Congress extended coverage to “employees of a State or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, or (2) in the operation of a railway or carrier referred to in such sentence \* \* \*.”

*(III) is appointed by such an office holder to serve on a policymaking level,*

*(IV) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office, or*

**(V)<sup>5</sup> is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.**

*(3) For purposes of subsection (u), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.<sup>6</sup>*

**(4)<sup>7</sup> (A) The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate government agency, if —**

**(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and**

**(ii) such services are not the same type of services which the individual is employed to perform for such public agency.**

**(B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.**

**(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of**

<sup>5</sup> As added by section 5 of the Fair Labor Standards Amendments of 1985, effective April 15, 1986.

<sup>6</sup> Similar language was added to the Act by the Fair Labor Standards Amendments of 1966. Those amendments also excluded from the definition of employee "any individual who is employed by an employer engaged in agriculture if such individual (A) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (B) commutes daily from his permanent residence to the farm on which he is so employed, and (C) has been employed in agriculture less than thirteen weeks during the preceding calendar year." These individuals are now included.

<sup>7</sup> As added by section 4(a) of the Fair Labor Standards Amendments of 1985, effective April 15, 1986.

the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, furbearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, **or other activity, or branch or group thereof**, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character; or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.<sup>8</sup>

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation,<sup>9</sup> or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor<sup>10</sup> shall find and by order

<sup>8</sup> As amended by section 3(b) of the Fair Labor Standards Amendments of 1949.

<sup>9</sup> As amended by section 3(c) of the Fair Labor Standards Amendments of 1949.

<sup>10</sup> Reorganization Plan No. 2 of 1946 provided that the functions of the Children's Bureau and of the Chief of the Children's Bureau under the Act as originally enacted be transferred to the Secretary of Labor.

declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor<sup>11</sup> certifying that such person is above the oppressive child labor age. The Secretary of Labor<sup>12</sup> shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor<sup>13</sup> determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) “Wage” paid to any employee includes the reasonable cost, as determined by the Secretary of Labor,<sup>14</sup> to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees: **Provided, That the cost of board, lodging or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: *Provided further, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee. In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee’s employer shall be an amount equal to —***

(1) *the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on the date of the enactment of this paragraph; and*

(2) *an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (1) and the wage in effect under section 6(a)(1).*

<sup>11</sup> Reorganization Plan No. 2 of 1946 provided that the functions of the Children’s Bureau and of the Chief of the Children’s Bureau under the Act as originally enacted be transferred to the Secretary of Labor.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> As amended by Reorganization Plan No. 6 of 1950, set out under section 4(a).

*The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding two sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.*<sup>15</sup>

(n) “Resale” shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: *Provided, That the sale is recognized as a bona fide retail sale in the industry.*<sup>16</sup>

(o) Hours worked. — In determining for the purposes of sections 6 and 7 the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.<sup>17</sup>

(p) “American vessel” includes any vessel which is documented or numbered under the laws of the United States.

(q) “Secretary” means the Secretary of Labor.

(r) (1) “Enterprise” means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor. Within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement,

**(A) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or**

<sup>15</sup> As amended by section 2105(b) of the Small Business Job Protection Act of 1996 (110 Stat. 1755). The required cash wage, \$2.13, is 50% of the \$4.25 minimum wage specified in section 6(a)(1) on the “date of enactment” of the paragraph, August 20, 1996. Tip credit was restricted to not more than 50% of the minimum wage between April 1, 1991 and October 1, 1996; 45% between April 1, 1990 and March 31, 1991; and 40% prior to April 1, 1990.

<sup>16</sup> Section 3(d) of the Fair Labor Standards Amendments of 1949. (The original language of section 3(n) was restored by the Fair Labor Standards Amendments of 1966.)

<sup>17</sup> *Ibid.*

**(B)** that it will join with other such establishments in the same industry for the purpose of collective purchasing, or

**(C)** that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.

**(2) For purposes of paragraph (1), the activities performed by any person or persons —**

**(A)** in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, **a preschool**,<sup>18</sup> elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is operated for profit or not for profit), or

**(B)** in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a state or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit, or

**(C)** in connection with the activities of a public agency, shall be deemed to be activities performed for a business purpose.

**(s) (1) “Enterprise engaged in commerce or in the production of goods for commerce” means an enterprise that —**

**(A) (i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and**

**(ii) is an enterprise whose annual gross volume of sales made or business done is not less than \$500,000 (exclusive of excise taxes at the retail level that are separately stated);<sup>19</sup>**

**(B) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or**

**(C) is an activity of a public agency.**

**(2) Any establishment that has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise. The sales of such an establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection.**

**(t) “Tipped employee” means any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips.<sup>20</sup>**

**(u) “Man-day” means any day during which an employee performs any agricultural labor for not less than one hour.**

**(v) “Elementary school” means a day or residential school which provides elementary education, as determined under State law.**

**(w) “Secondary school” means a day or residential school which provides secondary education, as determined under State law.**

**(x) “Public agency” means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State, or any interstate governmental agency.**

## Administration<sup>21</sup>

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act

<sup>18</sup> “A preschool” was added by the Education Amendments of 1972.

<sup>19</sup> As amended by section 3(a) of the Fair Labor Standards Amendments of 1989. Prior to April 1, 1990, the dollar volume test for enterprise coverage (except in the case of an enterprise comprised exclusively of one or more retail or service establishments; or one engaged in construction or reconstruction; or one engaged in laundering, cleaning, or repairing clothing or fabrics; or one described in section 3(s)(1)(B) or (C)) was \$250,000. For retail enterprises, the dollar volume test was \$362,500. There was no dollar volume test for the other enterprises.

<sup>20</sup> As amended by section 3(a) of the Fair Labor Standards Amendments of 1977, effective January 1, 1978. Prior to January 1, 1978, the dollar amount was \$20.

<sup>21</sup> Heading revised to reflect changes made by Reorganization Plan No. 6 of 1950.

referred to as the “Administrator”). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of \$ \_\_\_\_\_<sup>22</sup> a year.

***Excerpts From Reorganization Plan No. 6 of 1950, 64 Stat. 1263***

“Except as otherwise provided [with respect to hearing examiners], there are hereby transferred to the Secretary of Labor all functions of all other officers of the Department of Labor and all functions of all agencies and employees of such Department\* \* \*. The Secretary of Labor may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of Labor of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan.”

(b) The Secretary of Labor<sup>23</sup> may, subject to the civil service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1949<sup>24</sup> as amended. The Secretary<sup>25</sup> may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Secretary<sup>26</sup> in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Secretary,<sup>27</sup> no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Secretary<sup>28</sup> shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

(d) (1) The Secretary<sup>29</sup> shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable. Such report shall contain an evaluation and

appraisal by the Secretary of the minimum wages **and overtime coverage** established by this Act, together with his recommendations to the Congress. In making such evaluation and appraisal, the Secretary shall take into consideration any changes which may have occurred in the cost of living and in productivity and the level of wages in manufacturing, the ability of employers to absorb wage increases, and such other factors as he may deem pertinent.<sup>30</sup> ***Such report shall also include a summary of the special certificates issued under section 14(b).***

(2) ***The Secretary shall conduct studies on the justification or lack thereof for each of the special exemptions set forth in section 13 of this Act, and the extent to which such exemptions apply to employees of establishments described in subsection (g) of such section and the economic effects of the application of such exemptions to such employees. The Secretary shall submit a report of his findings and recommendations to the Congress with respect to the studies conducted under this paragraph not later than January 1, 1976.***

(3) ***The Secretary shall conduct a continuing study on means to prevent curtailment of employment opportunities for manpower groups which have had historically high incidences of unemployment (such as disadvantaged minorities, youth, elderly, and such other groups as the Secretary may designate). The first report of the results of such study shall be transmitted to the Congress not later than one year after the effective date of the Fair Labor Standards Amendments of 1974. Subsequent reports on such study shall be transmitted to the Congress at two-year intervals after such effective date. Each such report shall include suggestions respecting the Secretary’s authority under section 14 of this Act.***

(e) Whenever the Secretary has reason to believe that in any industry under this Act the competition of foreign producers in United States markets or in markets abroad, or both, has resulted, or is likely to result, in increased unemployment in the United States, he shall undertake an investigation to gain full information with respect to the matter. If he determines such increased unemployment has in fact resulted, or is in fact likely to result, from such competition, he shall make a full and complete report of his findings and determinations to the President and to the Congress: ***Provided, That he may also include in such report information on the increased employment resulting from additional exports in any industry under this Act as he may determine to be pertinent to such report.***

<sup>22</sup> Pursuant to 5 U.S.C. 5316, the Administrator of the Wage and Hour Division is classified under Level V of the Executive Schedule, for which the annual rate of basic pay is determined under 2 U.S.C. Chapter 11, as adjusted by 5 U.S.C. 5318.

<sup>23</sup> As amended by section 404 of Reorganization Plan No. 11 of 1939 (53 Stat. 1436) and by Reorganization Plan No. 6 of 1959 (64 Stat. 1263).

<sup>24</sup> As amended by section 1104 of the Act of October 23, 1949 (63 Stat. 972).

<sup>25</sup> See footnote 23.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> As amended by Reorganization Plan No. 6 of 1950.

<sup>29</sup> Ibid.

<sup>30</sup> Section 2 of the Fair Labor Standards Amendments of 1955.

*(f) The Secretary is authorized to enter into an agreement with the Librarian of Congress with respect to individuals employed in the Library of Congress to provide for the carrying out of the Secretary's functions under this Act with respect to such individuals. Notwithstanding any other provision of this Act, or any other law, the Civil Service Commission<sup>31</sup> is authorized to administer the provisions of this Act with respect to any individual employed by the United States (other than an individual employed in the Library of Congress, United States Postal Service, Postal Rate Commission, or the Tennessee Valley Authority). Nothing in this subsection shall be construed to affect the right of an employee to bring an action for unpaid minimum wages, or unpaid overtime compensation, and liquidated damages under section 16(b) of this Act.*

### Special Industry Committees for American Samoa

SEC. 5.<sup>32</sup> (a) The Secretary of Labor<sup>33</sup> shall as soon as practicable appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to employees in **American Samoa**<sup>34</sup> engaged in commerce or in the production of goods for commerce **or employed in any enterprise engaged in commerce or in the production of goods for commerce**, or the Secretary<sup>35</sup> may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce **or employed in any enterprise engaged in commerce or in the production of goods for commerce** in particular industries. An industry committee appointed under this subsection shall be composed of residents of **American Samoa** where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of **American Samoa**. In determining the minimum rate or rates of wages to be paid, and in determining classifications, such industry committees<sup>36</sup> shall be subject to the provisions of section 8.

<sup>31</sup> The Civil Service Commission was renamed the Office of Personnel Management by Reorganization Plan No. 2 of 1978 (92 Stat. 3783).

<sup>32</sup> Section 5 as amended by section 3(c) of the Act of June 26, 1940 (54 Stat. 615); by section 5 of the Fair Labor Standards Amendments of 1949; by section 4 of the Fair Labor Standards Amendments of 1961; by section 5 of the Fair Labor Standards Amendments of 1974; by section 4(a) of the Fair Labor Standards Amendments of 1989; and as further amended as noted. Paragraphs (b), (c), and (d), (except for the substitution of "Secretary" for "Administrator") read as in the original Act.

<sup>33</sup> See footnote 28.

<sup>34</sup> As amended by section 4(a)(1) of the Fair Labor Standards Amendments of 1989. Prior to November 17, 1989, special industry committee procedures also applied to Puerto Rico and the Virgin Islands, until such time as the mainland minimum wage level was reached.

<sup>35</sup> See footnote 28.

<sup>36</sup> As amended by section 5(a) of the Fair Labor Standards Amendments of 1955.

(b) An industry committee shall be appointed by the Secretary<sup>37</sup> without any regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Secretary<sup>38</sup> shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Secretary<sup>39</sup> shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Secretary<sup>40</sup> shall by rules and regulations prescribe, for each day actually spent in the work of the committee, and shall in addition be reimbursed for their necessary traveling and other expenses. The Secretary<sup>41</sup> shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Secretary<sup>42</sup> shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Secretary<sup>43</sup> to furnish additional information to aid it in its deliberations.

### Minimum Wages

SEC. 6. (a) Every employer shall pay to each of his employees who **in any workweek** is engaged in commerce or in the production of goods for commerce, *or is employed in an enterprise engaged in commerce or in the production of goods for commerce*, wages at the following rates:

(1) *except as otherwise provided in this section, not less than \$4.25 an hour during the period ending on September 30, 1996, not less than \$4.75 an hour during the year beginning on October 1, 1996, and not less than \$5.15 an hour beginning September 1, 1997;*<sup>44</sup>

<sup>37</sup> See footnote 28.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> As amended by the Minimum Wage Increase Act of 1996 (Section 2104 of the Small Business Job Protection Act of 1996).

(2) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Secretary of Labor,<sup>45</sup> or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term “home worker”; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers;<sup>46</sup>

(3) if such employee is employed in American Samoa, in lieu of the rate or rates provided by this subsection or subsection (b), not less than the applicable rate established by the Secretary of Labor in accordance with recommendations of a special industry committee or committees which he shall appoint pursuant to sections 5 and 8. The minimum wage rate thus established shall not exceed the rate prescribed in paragraph (1) of this subsection;<sup>47</sup>

(4) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement); or

(5) if such employee is employed in agriculture, not less than the minimum wage rate in effect under paragraph (1) after December 31, 1977.

(b) *Every employer shall pay to each of his employees (other than an employee to whom subsection (a) (5) applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this Act by the Fair Labor Standards Amendments of 1966, title IX of the Education Amendments of 1972, or the Fair Labor Standards Amendments of 1974, wages at the following rate: Effective after December 31, 1977, not less than the minimum wage rate in effect under subsection (a)(1).*

(c) \* \* \* (Repealed)

[Note: Section 6(c), relating to minimum wage requirements in Puerto Rico, was phased out by section 4(b)(2) of the Fair Labor Standards Amendments of 1989 (103 Stat. 940), which raised the minimum wage rate for all covered employers in Puerto Rico up to the rate prescribed by section 6(a)(1), effective no later than April 1, 1996, and was stricken by the Minimum Wage Increase Act of 1996 (Section 2104(c) of the Small Business Job Protection Act of 1996).]

(d)<sup>48</sup>(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees

<sup>45</sup> See footnote 28.

<sup>46</sup> Section 3(f) of the Act of June 26, 1940 (54 Stat. 616).

<sup>47</sup> Section 2 of the American Samoa Labor Standards Amendments of 1956, as amended by section 5 of the Fair Labor Standards Amendments of 1961, and by section 4(b)(1)(A) of the Fair Labor Standards Amendments of 1989.

<sup>48</sup> Subsection (d) added by Equal Pay Act of 1963, 77 Stat. 56 (effective on and after June 11, 1964 except for employees covered by collective bargaining agreements in certain cases).

subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this Act.

(4) As used in this subsection, the term “labor organization” means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(e) (1) Notwithstanding the provisions of section 13 of this Act (except subsections (a)(1) and (f) thereof), every employer providing any contract services (other than linen supply services) under a contract with the United States or any subcontract thereunder shall pay to each of his employees whose rate of pay is not governed by the Service Contract Act of 1965 (41 U.S.C. 351–357) or to whom subsection (a)(1) of this section is not applicable, wages at rates not less than the rates provided for in subsection (b) of this section.

(2) Notwithstanding the provisions of section 13 of this Act (except subsections (a)(1) and (f) thereof) and the provisions of the Service Contract Act of 1965, every employer in an establishment providing linen supply services to the United States under a contract with the United States or any subcontract thereunder shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (b), except that if more than 50 per centum of the gross annual dollar volume of sales made or business done by such establishment is derived from providing such linen supply services under any such contracts or subcontracts, such employer shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (a)(1) of this section.

(f) **Any employee —**

(1) **who in any workweek is employed in domestic service in a household shall be paid wages at a rate not less than the wage rate in effect under section 6(b) unless such employee’s compensation for such service would not because of section 209(g) of the Social Security Act constitute wages for the purposes of title II of such Act, or**

(2) **who in any workweek —**

(A) **is employed in domestic service in one or more households, and**

(B) **is so employed for more than 8 hours in the aggregate,**

**shall be paid wages for such employment in such workweek at a rate not less than the wage rate in effect under section 6(b).**

(g)<sup>49</sup> (1) *In lieu of the rate prescribed by subsection (a)(1), any employer may pay any employee of such employer, during the first 90 consecutive calendar days after such employee is initially employed by such employer, a wage which is not less than \$4.25 an hour.*

(2) *No employer may take any action to displace employees (including partial displacements such as reduction in hours, wages, or employment benefits) for purposes of hiring individuals at the wage authorized in paragraph (1).*

(3) *Any employer who violates this subsection shall be considered to have violated section 15(a)(3).*

(4) *This subsection shall only apply to an employee who has not attained the age of 20 years.*

## Maximum Hours

SEC. 7.<sup>50\*</sup> (1) Except as otherwise provided in this section, no employer shall employ any of his employees who **in any workweek** is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) *No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweeks is brought within the purview of this subsection by the amendments made to this Act by the Fair Labor Standards Amendments of 1966 —*

<sup>49</sup> Subsection (g) added by section 2105(e) of the Small Business Job Protection Act of 1996, effective August 20, 1996.

<sup>50</sup> Section 7 as amended by section 7 of the Fair Labor Standards Amendments of 1949, and as further amended as noted. Single asterisk (\*) indicates provision amended by the 1949 Act; double asterisk (\*\*) indicates provision added by the 1949 Act. Bold face type indicates amendment made by the Fair Labor Standards Amendments of 1961. Italic type indicates amendment made by the Fair Labor Standards Amendments of 1966. Bold face italic type indicates amendment made by the Fair Labor Standards Amendments of 1974. Helvetica boldface type indicates amendment made by the Fair Labor Standards Amendments of 1985. Helvetica boldface italic type indicates amendment made by the Fair Labor Standards Amendments of 1989.

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed —

\* (1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks, or

\* (2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also **in excess of the maximum workweek applicable to such employee under subsection (a)** or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3)<sup>51</sup> by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the whole-

sale or bulk distribution of petroleum products if —

(A) the annual gross volume of sales of such enterprise is less than \$1,000,000 exclusive of excise taxes,

(B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale,

and such employee receives compensation for employment in excess of forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to him under section 6,

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) \* \* \* (Repealed)

[Note: Section 7(c) (relating to employers employing employees in an industry found by the Secretary to be of a seasonal nature) was repealed by Section 19 of the Fair Labor Standards Amendments of 1974, effective December 31, 1976.]

(d) \* \* \* (Repealed)

[Note: Section 7(d) (relating to employers who do not qualify for the exemption in subsection (c) who employ employees in an industry found by the Secretary "(A) to be characterized by marked annual recurring peaks of operation \* \* \*, or (B) to be of a seasonal nature and engaged in the handling, packing, storing, preparing, first processing, or canning of any perishable agricultural or horticultural commodities in their raw or natural state \* \* \*") was repealed by Section 19 of the Fair Labor Standards Amendments of 1974, effective December 31, 1976.]

\*\* (e) As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include —

\*\* (1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

\*\* (2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other

<sup>51</sup> Section 212 of the Fair Labor Standards Amendments of 1966 substituted this provision for the complete exemption from overtime contained in former section 13(b)(10) enacted in the 1961 amendments. Former clause (3) of section 7(b) as enacted in the 1938 Act was replaced by new section 7(c) as enacted by section 204(c) of the Fair Labor Standards Amendments of 1966.

similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

\*\* (3) sums paid in recognition of services performed during a given period if either; (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Secretary of Labor<sup>52</sup> set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Secretary<sup>53</sup>) paid to performers, including announcers, on radio and television programs;

\*\* (4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

\*\* (5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or **in excess of the maximum workweek applicable to such employee under subsection (a)** or in excess of the employee's normal working hours or regular working hours, as the case may be;

\* (6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;<sup>54</sup> or

\* (7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable

employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding **the maximum workweek applicable to such employee under subsection (a)**), where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.<sup>55</sup>

\*\* (f) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of **the maximum workweek applicable to such employee under subsection (a)** if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in **subsection (a) or (b) of section 6 (whichever may be applicable)** and compensation at not less than one and one-half times such rate for all hours worked in excess of **such maximum workweek**, and (2) provided a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

\*\* (g) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of **the maximum workweek applicable to such employee under such subsection** if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of **the maximum workweek applicable to such employee under such subsection** —

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or

<sup>52</sup> See footnote 28.

<sup>53</sup> Ibid.

<sup>54</sup> Paragraphs (6) and (7) together with section 7(h) continued in effect provisions of section 1 of the Act of July 20, 1949 (63 Stat. 446), which Act was repealed as of the effective date of the Fair Labor Standards Amendments of 1949.

<sup>55</sup> Ibid.

understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided*, That the rate so established shall be authorized by regulation by the Secretary of Labor<sup>56</sup> as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

\* (h) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) shall be creditable toward overtime compensation payable pursuant to this section.<sup>57</sup>

(i) **No employer shall be deemed to have violated subsection (a) by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 6, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commission, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.**

(j) **No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated subsection (a) if, pursuant to an agreement or understanding arrived at between the employer and employee before performance of the work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.**

(k)<sup>58</sup> **No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if —**

(1) **in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to Section 6(c)(3) of the Fair Labor Standards Amendments of 1974)<sup>59</sup> in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or**

(2) **in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,**

**compensation at a rate not less than one and one-half times the regular rate at which he is employed.**

(l) **No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a).**

(m) **For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if such employee —**

(1) **is employed by such employer —**

(A) **to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco.**

<sup>56</sup> See footnote 28.

<sup>57</sup> Amendment provided by section 7 of the Fair Labor Standards Amendments of 1949. See also footnote 54.

<sup>58</sup> Effective January 1, 1975, the complete overtime exemption provided by section 6(c)(2)(A) of the Fair Labor Standards Amendments of 1974 was replaced by the more limited exemption in section 7(k). The present overtime standard — the lesser of 216 hours or the average number of hours (as determined by the Secretary of Labor) in tours of duty of employees in work periods of 28 consecutive days — became effective January 1, 1978. During calendar year 1977 the overtime standard was 216 hours, during 1976 the overtime standard was 232 hours, and during 1975 the overtime standard was 240 hours. The complete overtime exemption remains applicable only to public agencies employing less than 5 employees in fire protection or law enforcement activities. See section 13(b)(20), *infra*.

<sup>59</sup> The results of the Secretary's study were published in the Federal Register on September 8, 1983. The Secretary determined hours standards for law enforcement employees at 171 and for fire protection employees at 212 in a 28-day period (48 FR 40,518).

*(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or*

*(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and*

*(2) receives for —*

*(A) such employment by such employer which is in excess of ten hours in any workday, and*

*(B) such employment by such employer which is in excess of forty-eight hours in any workweek, compensation at a rate not less than one and one-half times the regular rate at which he is employed.*

*An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.*

*(n) In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment.*

**(o)<sup>60</sup>(1)** Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

**(2)** A public agency may provide compensatory time under paragraph (1) only —

**(A) pursuant to —**

**(i) applicable provisions of a collective bargaining agreement, memorandum**

**of understanding, or any other agreement between the public agency and representatives of such employees; or**

**(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and**

**(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).**

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

**(3) (A)** If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employees engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

**(B)** If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

**(4)** An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than —

**(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or**

**(B) the final regular rate received by such employee, whichever is higher.**

<sup>60</sup> As added by section 2(a) of the Fair Labor Standards Amendments of 1985, effective April 15, 1986.

**(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency —**

**(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and**

**(B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.**

(6)<sup>61</sup> The hours an employee of a public agency performs court reporting transcript preparation duties shall not be considered as hours worked for the purposes of subsection (a) if —

(A) such employee is paid at a per-page rate which is not less than —

(i) the maximum rate established by State law or local ordinance for the jurisdiction of such public agency,

(ii) the maximum rate otherwise established by a judicial or administrative officer and in effect on July 1, 1995, or

(iii) the rate freely negotiated between the employee and the party requesting the transcript, other than the judge who presided over the proceedings being transcribed, and

(B) the hours spent performing such duties are outside of the hours such employee performs other work (including hours for which the agency requires the employee's attendance) pursuant to the employment relationship with such public agency.

For purposes of this section, the amount paid such employee in accordance with subparagraph (A) for the performance of court reporting transcript preparation duties, shall not be considered in the calculation of the regular rate at which such employee is employed.

**(7)<sup>62</sup> For purposes of this subsection —**

**(A) the term “overtime compensation” means the compensation required by subsection (a), and**

**(B) the terms “compensatory time” and “compensatory time off” mean hours during which an employee is not working, which are**

not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

**(p)<sup>63</sup> (1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency —**

**(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,**

**(B) facilitates the employment of such employees by a separate and independent employer, or**

**(C) otherwise affects the condition of employment of such employees by a separate and independent employer.**

**(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.**

**(3) If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for an-**

<sup>61</sup> As added by the Court Reporter Fair Labor Amendments of 1995, effective September 6, 1995 (109 Stat. 264).

<sup>62</sup> Redesignated as paragraph (7) of section 7 (o) by the Court Reporter Fair Labor Amendments of 1995.

<sup>63</sup> As added by section 3 of the Fair Labor Standards Amendments of 1985, effective April 15, 1986.

other individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(q)<sup>64</sup> *Any employer may employ any employee for a period or periods of not more than 10 hours in the aggregate in any workweek in excess of the maximum workweek specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if during such period or periods the employee is receiving remedial education that is —*

*(1) provided to employees who lack a high school diploma or educational attainment at the eighth grade level;*

*(2) designed to provide reading and other basic skills at an eighth grade level or below; and*

*(3) does not include job specific training.*

### **Wage Orders in American Samoa**

SEC. 8<sup>65</sup> (a) The policy of this Act with respect to industries or enterprises in **American Samoa** engaged in commerce or in the production of goods for commerce is to reach as rapidly as is economically feasible without substantially curtailing employment the objective of *the minimum wage rate which would apply in each such industry under paragraph (1) or (5) of section 6(a) but for section 6(c).*

The Secretary of Labor<sup>66</sup> shall from time to time convene an industry committee or committees, appointed pursuant to section 5, and any such industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers in **American Samoa** engaged in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce in any such industry or classification therein, *and who but for section 6 (a)(3) would be subject to the minimum*

*wage requirements of section 6 (a)(1).* Minimum rates of wages established in accordance with this section which are not equal to *the otherwise applicable minimum wage rate in effect under paragraph (1) or (5) or section 6(a)* shall be reviewed by such a committee once during each biennial period, beginning with the biennial period commencing July 1, 1958, except that the Secretary,<sup>67</sup> in his discretion, may order an additional review during any such biennial period.<sup>68</sup>

(b) Upon the convening of any such industry committee, the Secretary<sup>69</sup> shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, shall after due notice hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act.<sup>70</sup> The committee shall recommend to the Secretary<sup>71</sup> the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry, and will not give any industry in **American Samoa** a competitive advantage over any industry in the United States outside of **American Samoa**; *except that the committee shall recommend to the Secretary the minimum wage rate prescribed in section 6(a) or 6(b), which would be applicable but for section 6(a)(3), unless there is evidence in the record which establishes that the industry, or a predominant portion thereof, is unable to pay that wage due to such economic and competitive conditions.*<sup>72</sup>

(c) The industry committee shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of that *in effect under paragraph (1) or (5) of section 6(a) (as the case may be)*) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classifications shall be

<sup>64</sup> As added by section 7 of the Fair Labor Standards Amendments of 1989.

<sup>65</sup> Section 8 as amended by section 8 of the Fair Labor Standards Amendments of 1949; by section 7 of the Fair Labor Standards Amendments of 1961; by section 5(d) of the Fair Labor Standards Amendments of 1974; by section 2(d)(3) of the Fair Labor Standards Amendments of 1977; by section 4(c) of the Fair Labor Standards Amendments of 1989; and as further amended as noted. Prior to November 17, 1989, wage order procedures also applied to Puerto Rico and the Virgin Islands until such time as the mainland minimum wage level was reached. Paragraphs (b), (c), (d), (e), and (f) as amended by the 1949 Act read substantially the same as paragraphs (b) and (c) (except for the parenthetical reference to the minimum wage rate provided in section 6(a), (d), (f) and (g) in the original Act).

<sup>66</sup> See footnote 28.

<sup>67</sup> Act of August 25, 1958 (72 Stat. 844).

<sup>68</sup> As amended by Act of August 25, 1958 (72 Stat. 844).

<sup>69</sup> See footnote 28.

<sup>70</sup> As amended by section 5(b) of the Fair Labor Standards Amendments of 1955.

<sup>71</sup> See footnote 28.

<sup>72</sup> As amended by section 1 of the Act of November 15, 1990.

made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee<sup>73</sup> shall consider among other relevant factors the following:

- (1) competitive conditions as affected by transportation, living, and production costs;
- (2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and
- (3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Secretary a report containing its findings of fact and recommendations with respect to the matters referred to it. Upon the filing of such report, the Secretary shall publish such recommendations in the Federal Register and shall provide by order that the recommendations contained in such report shall take effect upon the expiration of 15 days after the date of such publication.<sup>74</sup>

(e) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Secretary<sup>75</sup> finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein.<sup>76</sup>

(f) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Secretary<sup>77</sup> deems reasonably calculated to give general notice to interested persons.

### Attendance of Witnesses

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of section 9 and 10 (relating to the attendance of witnesses and the production of books, papers and documents) of the Federal Trade Commission Act of September 16, 1914 as amended (U.S.C., 1934 edition, title 15, sec. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Secretary of Labor<sup>78</sup> and the industry committees.

<sup>73</sup> As amended by sections 5(c) and 5(d) of the Fair Labor Standards Amendments of 1955 (eliminating review by the Secretary of Labor of the recommendations of the industry committee).

<sup>74</sup> Ibid.

<sup>75</sup> See footnote 28.

<sup>76</sup> As amended by section 5(e) of the Fair Labor Standards Amendments of 1955.

<sup>77</sup> See footnote 28.

<sup>78</sup> Ibid.

### Court Review

SEC. 10.<sup>79</sup> (a) Any person aggrieved by an order of the Secretary issued under section 8 may obtain a review of such order in the United States Court of Appeals for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within 60 days after the entry of such order a written petition praying that the order of the Secretary be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to the Secretary, and thereupon the Secretary shall file in the court the record of the industry committee upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have exclusive jurisdiction to affirm, modify (*including provision for the payment of an appropriate minimum wage rate*), or set aside such order in whole or in part, so far as it is applicable to the petitioner.<sup>80</sup> The review by the court shall be limited to questions of law, and findings of fact by such industry committee when supported by substantial evidence shall be conclusive. No objection to the order of the Secretary shall be considered by the court unless such objection shall have been urged before such industry committee or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceedings before such industry committee, the court may order such additional evidence to be taken before an industry committee and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. Such industry committee may modify the initial findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28 of the United States Code.

(b) the commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Secretary's<sup>81</sup> order. The court shall not

<sup>79</sup> Section 10(a) as amended by section 5(f) of the Fair Labor Standards Amendments of 1955, and as further amended as noted.

<sup>80</sup> Section 22 of the Act of August 28, 1958 (72 Stat. 948).

<sup>81</sup> See footnote 28.

grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order; in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

### Investigations, Inspections, Records, and Homework Regulations

SEC. 11. (a) The Secretary of Labor<sup>82</sup> or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Secretary<sup>83</sup> shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Secretary<sup>84</sup> shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Secretary of Labor<sup>85</sup> may, for the purpose of carrying out his functions and duties under this Act, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Secretary<sup>86</sup> as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder. **The employer of an employee who performs substitute work described in section**

### **7(p)(3) may not be required under this subsection to keep a record of the hours of the substitute work.**<sup>87</sup>

(d) The Secretary is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act, and all existing regulations or orders of the Administrator relating to industrial homework are hereby continued in full force and effect.<sup>88</sup>

### Child Labor Provisions

SEC. 12. (a) No producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That any such shipment or delivery for shipment of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer, manufacturer, or dealer that the goods were produced in compliance with the requirements of this section, and who acquired such goods for value without notice of any such violation, shall not be deemed prohibited by this subsection: *And provided further*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.<sup>89</sup>

(b) The Secretary of Labor;<sup>90</sup> or any of his authorized representatives, shall make all investigations and inspections under section 11(a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor; and shall administer all other provisions of this Act relating to oppressive child labor.

(c) No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce **or in any enterprise engaged in commerce or in the production of goods for commerce.**<sup>91</sup>

<sup>82</sup> See footnote 28.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> See footnotes 10 and 28.

<sup>86</sup> See footnote 28.

<sup>87</sup> Added by section 3(c)(2) of the Fair Labor Standards Amendments of 1985, effective April 15, 1986.

<sup>88</sup> Section 9 of the Fair Labor Standards Amendments of 1949, as amended by Reorganization Plan No. 6 of 1950.

<sup>89</sup> As amended by section 10(a) of the Fair Labor Standards Amendments of 1949.

<sup>90</sup> See footnotes 10 and 28.

<sup>91</sup> Section 10(b) of the Fair Labor Standards Amendments of 1949 as amended by section 8 of the Fair Labor Standards Amendments of 1961.

*(d) In order to carry out the objectives of this section, the Secretary may by regulation require employers to obtain from any employee proof of age.*

## Exemptions

SEC. 13.<sup>92</sup> (a) The provisions of sections 6 (*except section 6(d) in the case of paragraph (1) of this subsection*)<sup>93</sup> and 7 shall not apply with respect to —

(1) any employee employed in a bona fide executive, administrative, or professional capacity (*including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools*), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

(2) \* \* \* (Repealed)

**[Note: Section 13(a)(2) (relating to employees employed by certain retail or service establishments) was repealed, effective April 1, 1990, by section 3(c)(1) of the Fair Labor Standards Amendments of 1989.]**

(3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center,<sup>94</sup> if (A) it does not operate for more than seven months in any calendar year; or (B) during the preceding calendar year; its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year; except that the exemption from sections 6 and 7 provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 6, a private entity engaged

in providing services and facilities directly related to skiing) in a national park or a national forest or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture,<sup>95</sup> or

(4) \* \* \* (Repealed)

**[Note: Section 13(a)(4) (relating to employees employed by certain retail establishments) was repealed, effective April 1, 1990, by section 3(c)(1) of the Fair Labor Standards Amendments of 1989.]**

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor; (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year; (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer; is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock;<sup>96</sup> or

<sup>92</sup> Section 13 as amended by section 11 of the Fair Labor Standards Amendments of 1949; by Reorganization Plan no. 6 of 1950; and as further amended by the Fair Labor Standards Amendments of 1961, 1966, 1974, 1977, and 1989.

<sup>93</sup> As amended by the Education Amendments of 1972, 86 Stat. 235 at 375, effective July 1, 1972.

<sup>94</sup> Added by section 11 of the Fair Labor Standards Amendments of 1977, effective November 1, 1977.

<sup>95</sup> The last clause of section 13(a)(3) of the Act was added by section 4(a) of the Fair Labor Standards Amendments of 1977, effective January 1, 1978. See also section 13(b)(29) of the Act, as added by the 1977 Amendments.

<sup>96</sup> Prior to the Fair Labor Standards Amendments of 1966, the section 13(a)(6) exemption was applicable to all agricultural employees.

(7) any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under section 14; or

(8)<sup>97</sup> any employee employed in connection with the publication of any weekly, semi-weekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

(9) \* \* \* (Repealed)

[Note: Section 13(a)(9) (relating to motion picture theater employees) was repealed by section 23 of the Fair Labor Standards Amendments of 1974. The 1974 amendments created an exemption for such employees from the overtime provisions only in section 13(b)(27).]

(10) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

(11) \* \* \* (Repealed)

[Note: Section 13(a)(11) (relating to telegraph agency employees) was repealed by section 10 of the Fair Labor Standards Amendments of 1974. The 1974 amendments created an exemption from the overtime provisions only in section 13(b)(23), which was repealed effective May 1, 1976.]

(12) any employee employed as a seaman on a vessel other than an American vessel; or

(13) \* \* \* (Repealed)

[Note: Section 13(a)(13) (relating to small logging crews) was repealed by section 23 of the Fair Labor Standards Amendments of 1974. The 1974 amendments created an exemption for such employees from the overtime provisions only in Section 13(b)(28).]

(14) \* \* \* (Repealed)

[Note: Section 13(a)(14) (relating to employees employed in growing and harvesting of shade grown tobacco) was repealed by section 9 of the Fair Labor Standards Amendments of 1974. The 1974 amendments created an exemption for certain tobacco producing employees from the overtime provisions only in section 13(b)(22). The section 13(b)(22) exemption was repealed, effective January 1, 1978, by section 5 of the Fair Labor Standards Amendments of 1977.]

(15) any employee employed on a casual basis in domestic service employment to provide babysitting

services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary); or

(16)<sup>98</sup> a criminal investigator who is paid availability pay under section 5545a of Title 5, United States Code; or

(17)<sup>99</sup> any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is —

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

(B) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

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

(D) a combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills, and who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than \$27.63 an hour.

(b) The provisions of section 7 shall not apply with respect to —

(1) any employee with respect to whom the Secretary of Transportation<sup>100</sup> has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935<sup>101</sup>; or

(2) any employee of an employer engaged in the operation of a common carrier by rail and subject to the provisions of part I of the Interstate Commerce Act; or

(3) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or

<sup>98</sup> Added by section 633(d) of Public Law 103-329 (108 Stat. 2428), effective September 30, 1994.

<sup>99</sup> Added by section 2105(a) of the Small Business Job Protection Act of 1996, effective August 20, 1996.

<sup>100</sup> As amended by the Department of Transportation Act, 80 Stat. 931, which substituted "Secretary of Transportation" for "Interstate Commerce Commission."

<sup>101</sup> Section 204 of the original Motor Carrier Act is now codified at 49 U.S.C. 3102.

<sup>97</sup> As amended by the Fair Labor Standards Amendments of 1966 (which deleted the words "printed and" which formerly preceded the word "published").

## (4) \* \* \* (Repealed)

*[Note: Section 13(b)(4) (relating to employees in the canning, processing, marketing, freezing, curing, storing, packing for shipment, or distributing of any kind of fish, shellfish, or other aquatic forms of animal or vegetable life, or any byproduct thereof) was repealed, effective May 1, 1976, by section 11 of the Fair Labor Standards Amendments of 1974.]*

(5) any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state; or

(6) any employee employed as a seaman; or

## (7) \* \* \* (Repealed)

*[Note: Section 13(b)(7) (relating to any driver, operator, or conductor employed by an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier) was repealed, effective May 1, 1976, by section 21 of the Fair Labor Standards Amendments of 1974.<sup>102</sup>]*

## (8) \* \* \* (Repealed)

*[Note: Section 13(b)(8) (relating to any employee employed by a hotel, motel, or restaurant) was repealed, effective January 1, 1979, by section 14 of the Fair Labor Standards Amendments of 1977.]*

(9) any employee employed as an announcer, news editor, or chief engineer by a radio or television station the major studio of which is located (A) in a city or town of one hundred thousand population or less, according to the latest available decennial census figures as compiled by the Bureau of the Census, except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the Bureau of the Budget, which has a total population in excess of one hundred thousand, or (B) in a city or town of twenty-five thousand population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area; or

(10) (A) *any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or*

(B) *any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed*

*by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers,<sup>103</sup> or*

(11) any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 7(a); or

(12) *any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water for agriculture purposes,<sup>104</sup> or*

(13) *any employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee (A) is primarily employed during his workweek in agriculture by such farmer; and (B) is paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by section 6(a)(1);<sup>105</sup> or*

(14) *any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm, if no more than five employees are employed in the establishment in such operations;<sup>106</sup> or*

(15) *any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup;<sup>107</sup> or*

(16) *any employee engaged (A) in the transportation and preparation for transportation of fruits and*

<sup>103</sup> Boats were added by the Fair Labor Standards Amendments of 1974. Prior to these Amendments, the overtime exemption in subsection (B) also applied to partsmen and mechanics. An earlier minimum wage exemption for any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks or farm implements was repealed by the Fair Labor Standards Amendments of 1966.

<sup>104</sup> A minimum wage exemption for these employees was repealed by the Fair Labor Standards Amendments of 1966.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> The exemption applicable to the ginning of cotton and the processing of sugar beets and sugar cane was deleted from section 13(b)(15) by the Fair Labor Standards Amendments of 1974 and provision was made for such employees in sections 13(b)(25) and 13(b)(26). The exemptions in sections 13(b)(25) and 13(b)(26) were repealed, effective January 1, 1978, by the Fair Labor Standards Amendments of 1977, and provision was made for such employees in sections 13(i) and 13(j), which were added to the Act by those Amendments.

<sup>102</sup> Prior to the Fair Labor Standards Amendments of 1966, employees of local transit companies were exempt from both the Act's minimum wage and overtime requirements.

vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or (B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables;<sup>108</sup> or

(17) any driver employed by an employer engaged in the business of operating taxicabs;<sup>109</sup> or

(18) \* \* \* (Repealed)

[Note: Section 13(b)(18) (relating to any employee of a retail or service establishment who is employed primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs) was repealed, effective May 1, 1976, by section 15 of the Fair Labor Standards Amendments of 1974.]<sup>110</sup>

(19) \* \* \* (Repealed)

[Note: Section 13(b)(19) (relating to any employee of a bowling establishment) was repealed, effective May 1, 1976, by section 16 of the Fair Labor Standards Amendments of 1974.]

(20) any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be;<sup>111</sup> or

[Note: Section 6(c)(3) of the Fair Labor Standards Amendments of 1974 provided as follows: “The Secretary of Labor shall in the calendar year beginning January 1, 1976, conduct (A) a study of the average number of hours in tours of duty in work periods in the preceding calendar year of employees (other than employees exempt from section 7 of the Fair Labor Standards Act of 1938 by section 13(b)(20) of such Act) of public agencies who are employed in fire protection activities, and (B) a study of the average number of hours in tours of duty in work periods in the preceding calendar year of employees (other than employees

exempt from section 7 of the Fair Labor Standards Act of 1938 by section 13(b)(20) of such Act) of public agencies who are employed in law enforcement activities (including security personnel in correctional institutions). The Secretary shall publish the results of each such study in the Federal Register.” The results of the Secretary’s study were published in the Federal Register on September 8, 1983. The Secretary determined hours standards for law enforcement employees at 171 and for fire protection employees at 212 in a 28-day period (48 FR 40,518).]

(21) any employee who is employed in domestic service in a household and who resides in such household; or

(22) \* \* \* (Repealed)

[Note: Section 13(b)(22) (relating to employees employed in the growing and harvesting of shade grown tobacco<sup>112</sup>) was repealed, effective January 1, 1978, by section 5 of the Fair Labor Standards Amendments of 1977.]

(23) \* \* \* (Repealed)

[Note: Section 13(b)(23) (relating to any employee or proprietor in a retail or service establishment which qualifies as an exempt retail or service establishment under section 13(a)(2), who is engaged in handling telegraphic messages for the public<sup>113</sup>) was repealed, effective May 1, 1976, by section 10 of the Fair Labor Standards Amendments of 1974.]

(24) any employee who is employed with his spouse by a non-profit educational institution to serve as the parents of children —

(A) who are orphans or one of whose natural parents is deceased, or<sup>114</sup>

(B) who are enrolled in such institution and reside in residential facilities of the institution, while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such institution, and are together compensated, on a cash basis, at an annual rate of not less than \$10,000; or

(25) \* \* \* (Repealed)

[Note: Section 13(b)(25) (relating to any employee engaged in ginning cotton for market in any place of

<sup>108</sup> See footnote 104.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

<sup>111</sup> Prior to January 1, 1975, section 13(b)(20) exempted “any employee of a public agency who is employed in fire protection or law enforcement activities (including security personnel in correctional institutions).” A partial overtime exemption for public agencies having 5 or more such employees is provided by section 7(k) of the Act.

<sup>112</sup> A minimum wage exemption for these employees was repealed by the Fair Labor Standards Amendments of 1974.

<sup>113</sup> Ibid.

<sup>114</sup> 120 Cong. Rec. H8600 (March 28, 1974; statement of Congressman Dent) indicates that the word “and” was intended in place of “or.”

employment located in a county where cotton is grown in commercial quantities<sup>115</sup>) was repealed by section 6(a) of the Fair Labor Standards Amendments of 1977, and is replaced by new section 13(i), added by section 6(b) of those Amendments, which provides a more limited overtime exemption for such employees. Both changes were effective January 1, 1978.]

(26) \* \* \* (Repealed)

[Note: Section 13(b)(26) (relating to any employee who is engaged in the processing of sugar beets, sugar beet molasses, or sugarcane into sugar (other than refined sugar) or syrup was repealed by section 7(a) of the Fair Labor Standards Amendments of 1977, and is replaced by new section 13(j), added by section 7(b) of those Amendments, which provides a more limited overtime exemption for such employees. Both changes were effective January 1, 1978.]

**(27) any employee employed by an establishment which is a motion picture theater;<sup>116</sup> or**

**(28) any employee employed in planting or tending trees, cruising, surveying, or felling timber; or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight;<sup>117</sup> or**

(29)<sup>118</sup> any employee of an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System if such employee (A) is an employee of a private entity engaged in providing services or facilities in a national park or national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture, and (B) receives compensation for employment in excess of fifty-six hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or

(30)<sup>119</sup> a criminal investigator who is paid availability pay under section 5545a of Title 5, United States Code.

*(c) (1) Except as provided in paragraphs (2) or (4), the provisions of section 12 relating to child labor*

<sup>115</sup> A minimum wage exemption for these employees was repealed by the Fair Labor Standards Amendments of 1966.

<sup>116</sup> A minimum wage exemption for these employees was repealed by the Fair Labor Standards Amendments of 1974.

<sup>117</sup> Ibid.

<sup>118</sup> Added by section 4(b) of the Fair Labor Standards Amendments of 1977, effective January 1, 1978.

<sup>119</sup> Added by section 633(d) of Public Law 103-329 (108 Stat. 2428), effective September 30, 1994.

*shall not apply to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed, if such employee —*

**(A) is less than twelve years of age and (i) is employed by his parent, or by a person standing in the place of his parent, on a farm owned or operated by such parent or person, or (ii) is employed, with the consent of his parent or person standing in the place of his parent, on a farm, none of the employees of which are (because of section 13(a)(6)(A)) required to be paid at the wage rate prescribed by section 6(a)(5),**

**(B) is twelve years or thirteen years of age and (i) such employment is with the consent of his parent or person standing in the place of his parent, or (ii) his parent or such person is employed on the same farm as such employee, or**

**(C) is fourteen years of age or older.**

(2) *The provisions of section 12 relating to child labor shall apply to an employee below the age of sixteen employed in agriculture in an occupation that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen, except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.*

(3) *The provisions of section 12 relating to child labor shall not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.*

(4)<sup>120</sup> (A) An employer or group of employers may apply to the Secretary for a waiver of the application of section 12 to the employment for not more than eight weeks in any calendar year of individuals who are less than twelve years of age, but not less than ten years of age, as hand harvest laborers in an agricultural operation which has been, and is customarily and generally recognized as being, paid on a piece rate basis in the region in which such individuals would be employed. The Secretary may not grant such a waiver unless he finds, based on objective data submitted by the applicant, that —

(i) the crop to be harvested is one with a particularly short harvesting season and the application of section 12 would cause severe

<sup>120</sup> As added by section 8 of the Fair Labor Standards Amendments of 1977, effective November 1, 1977.

economic disruption in the industry of the employer or group of employers applying for the waiver;

(ii) the employment of the individuals to whom the waiver would apply would not be deleterious to their health or well-being;

(iii) the level and type of pesticides and other chemicals used would not have an adverse effect on the health or well-being of the individuals to whom the waiver would apply;

(iv) individuals age twelve and above are not available for such employment; and

(v) the industry of such employer or group of employers has traditionally and substantially employed individuals under twelve years of age without displacing substantial job opportunities for individuals over sixteen years of age.

(B) Any waiver granted by the Secretary under subparagraph (A) shall require that —

(i) the individuals employed under such waiver be employed outside of school hours for the school district where they are living while so employed;

(ii) such individuals while so employed commute daily from their permanent residence to the farm on which they are so employed; and

(iii) such individuals be employed under such waiver (I) for not more than eight weeks between June 1 and October 15 of any calendar year, and (II) in accordance with such other terms and conditions as the Secretary shall prescribe for such individuals' protection.

(5)<sup>121</sup> (A) *In the administration and enforcement of the child labor provisions of this Act, employees who are 16 and 17 years of age shall be permitted to load materials into, but not operate or unload materials from, scrap paper balers and paper box compactors*

—  
(i) *that are safe for 16- and 17-year-old employees loading the scrap paper balers or paper box compactors; and*

(ii) *that cannot be operated while being loaded.*

(B) *For purposes of subparagraph (A), scrap paper balers and paper box compactors shall be considered safe for 16- or 17-year-old employees to load only if —*

(i) (I) *the scrap paper balers and paper box compactors meet the American National Standard Institute's Standard ANSI Z245.5–1990 for scrap paper balers and Standard ANSI Z245.2–1992 for paper box compactors; or*

(II) *the scrap paper balers and paper box compactors meet an applicable standard that is adopted by the American National Standards Institute after the date of enactment of this paragraph and that is certified by the Secretary to be at least as protective of the safety of minors as the standard described in subclause (I);*

(ii) *the scrap paper balers and paper box compactors include an on-off switch incorporating a key-lock or other system and the control of the system is maintained in the custody of employees who are 18 years of age or older;*

(iii) *the on-off switch of the scrap paper balers and paper box compactors is maintained in an off position when the scrap paper balers and paper box compactors are not in operation; and*

(iv) *the employer of 16- and 17-year-old employees provides notice, and posts a notice, on the scrap paper balers and paper box compactors stating that —*

(I) *the scrap paper balers and paper box compactors meet the applicable standard described in clause (i);*

(II) *16- and 17-year-old employees may only load the scrap paper balers and paper box compactors; and*

(III) *any employee under the age of 18 may not operate or unload the scrap paper balers and paper box compactors.*

*The Secretary shall publish in the Federal Register a standard that is adopted by the American National Standards Institute for scrap paper balers or paper box compactors and certified by the Secretary to be protective of the safety of minors under clause (i)(II).*

(C) (i) *Employers shall prepare and submit to the Secretary reports —*

(I) *on any injury to an employee under the age of 18 that requires medical treatment (other than first aid) resulting from the employee's contact with a scrap paper baler or paper box compactor during the loading, operation, or unloading of the baler or compactor; and*

<sup>121</sup> Added by section I of Public Law 104–174, effective August 6, 1996 (110 Stat. 1553).

(II) on any fatality of an employee under the age of 18 resulting from the employee's contact with a scrap paper baler or paper box compactor during the loading, operation, or unloading of the baler or compactor.

(ii) The reports described in clause (i) shall be used by the Secretary to determine whether or not the implementation of subparagraph (A) has had any effect on the safety of children.

(iii) The reports described in clause (i) shall provide —

(I) the name, telephone number, and address of the employer and the address of the place of employment where the incident occurred;

(II) the name, telephone number, and address of the employee who suffered an injury or death as a result of the incident;

(III) the date of the incident;

(IV) a description of the injury and a narrative describing how the incident occurred; and

(V) the name of the manufacturer and the model number of the scrap paper baler or paper box compactor involved in the incident.

(iv) The reports described in clause (i) shall be submitted to the Secretary promptly, but not later than 10 days after the date on which an incident relating to an injury or death occurred.

(v) The Secretary may not rely solely on the reports described in clause (i) as the basis for making a determination that any of the employers described in clause (i) has violated a provision of section 12 relating to oppressive child labor or a regulation or order issued pursuant to section 12. The Secretary shall, prior to making such a determination, conduct an investigation and inspection in accordance with section 12(b).

(vi) The reporting requirements of this subparagraph shall expire 2 years after the date of enactment of this subparagraph.

[Note: Subsection 13(c)(5) shall not be construed as affecting the exemption for apprentices and student learners published in section 570.63 of Title 29, Code of Federal Regulations.]

(d) The provisions of sections 6, 7, and 12 shall not apply with respect to any employee engaged in the delivery of newspapers to the consumer **or to any homemaker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths).**

(e) The provisions of section 7 shall not apply with respect to employees for whom the Secretary of Labor is authorized to establish minimum wage rates as provided in section 6(a)(3), except with respect to employees for whom such rates are in effect; and with respect to such employees the Secretary may make rules and regulations providing reasonable limitations and allowing reasonable variations, tolerances, and exemptions to and from any or all of the provisions of section 7 if he shall find, after a public hearing on the matter, and taking into account the factors set forth in section 6(a)(3), that economic conditions warrant such action.<sup>122</sup>

(f) The provisions of sections 6, 7, 11, and 12, shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462); American Samoa; Guam; Wake Island; *Eniwetok Atoll*, *Kwajalein Atoll*; and *Johnston Island*.<sup>123, 124</sup>

**(g) The exemption from section 6 provided by paragraph (6) of subsection (a) of this section shall not apply with respect to any employee employed by an establishment (1) which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to, but materially support the activities of the establishment employing such employee; and (2) whose annual gross volume of sales made or business done, when combined with the annual gross volume of sales made or business done by each establishment which controls, is controlled by, or is under common control with, the establishment employing such employee, exceeds \$10,000,000 (exclusive of excise taxes at the retail level which are separately stated.)**

<sup>122</sup> Section 3 of the American Samoa Labor Standards Amendments of 1956.

<sup>123</sup> Section 1(l) of the Act of August 30, 1957 (71 Stat. 514), as amended by section 21(b) of the Act of July 12, 1960 (74 Stat. 417), and by section 213 of the Fair Labor Standards Amendments of 1966, and by Section 1225 of the Panama Canal Act of 1979 (93 Stat. 468).

<sup>124</sup> Pursuant to Public Law 99-239, 99 Stat. 1770, the Fair Labor Standards Act no longer applies to Eniwetok Atoll and Kwajalein Atoll, effective October 21, 1986. Additionally, pursuant to Public Law 94-241, 90 Stat. 263 (48 U.S.C. 1681, note), effective March 24, 1976, the Fair Labor Standards Act, except for section 6, applies to the Northern Mariana Islands.

*(h) The provisions of section 7 shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year to any employee who —*

*(1) is employed by such employer —*

*(A) exclusively to provide services necessary and incidental to the ginning of cotton in an establishment primarily engaged in the ginning of cotton;*

*(B) exclusively to provide services necessary and incidental to the receiving, handling, and storing of raw cotton and the compressing of raw cotton when performed at a cotton warehouse or compress-warehouse facility, other than one operated in conjunction with a cotton mill, primarily engaged in storing and compressing;*

*(C) exclusively to provide services necessary and incidental to the receiving, handling, storing, and processing of cottonseed in an establishment primarily engaged in the receiving, handling, storing, and processing of cottonseed; or*

*(D) exclusively to provide services necessary and incidental to the processing of sugar cane or sugar beets in an establishment primarily engaged in the processing of sugar cane or sugar beets; and*

*(2) receives for —*

*(A) such employment by such employer which is in excess of ten hours in any workday, and*

*(B) such employment by such employer which is in excess of forty-eight hours in any workweek; compensation at a rate not less than one and one-half times the regular rate at which he is employed.*

*Any employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section or section 7.*

(i)<sup>125</sup> The provisions of section 7 shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who —

(1) is engaged in the ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities; and

(2) receives for any such employment during such workweeks —

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek, compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.

(j)<sup>126</sup> The provisions of section 7 shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who —

(1) is engaged in the processing of sugar beets, sugar beet molasses, or sugar cane into sugar (other than refined sugar) or syrup; and

(2) receives for any such employment during such workweeks —

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek, compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.

### **Learners, Apprentices, Students, and Handicapped Workers**

*SEC. 14.*<sup>127</sup> (a) *The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for the employment of learners, of apprentices, and of messengers employed primarily in delivering letters and messages, under special certificates issued pursuant to regulations of the Secretary, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Secretary shall prescribe.*

*(b) (1) (A) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide, in accordance with subparagraph (B), for the employment, at a wage rate not less than 85 per centum of the*

<sup>125</sup> Added by section 6(b) of the Fair Labor Standards Amendments of 1977, effective January 1, 1978.

<sup>126</sup> Added by section 7(b) of the Fair Labor Standards Amendments of 1977, effective January 1, 1978.

<sup>127</sup> As amended by section 24 of the Fair Labor Standards Amendments of 1974.

*otherwise applicable wage rate in effect under section 6 or not less than \$1.60 an hour; whichever is higher; of full-time students (regardless of age but in compliance with applicable child labor laws) in retail or service establishments.*

*(B) Except as provided in paragraph (4)(B), during any month in which full-time students are to be employed in any retail or service establishment under certificates issued under this subsection the proportion of student hours of employment to the total hours of employment of all employees in such establishment may not exceed —*

*(i) in the case of a retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) were covered by this Act before the effective date of the Fair Labor Standards Amendments of 1974 —*

*(I) the proportion of student hours of employment to the total hours of employment of all employees in such establishment for the corresponding month of the immediately preceding twelve-month period,*

*(II) the maximum proportion for any corresponding month of student hours of employment to the total hours of employment of all employees in such establishment applicable to the issuance of certificates under this section at any time before the effective date of the Fair Labor Standards Amendments of 1974 for the employment of students by such employer; or*

*(III) a proportion equal to one-tenth of the total hours of employment of all employees in such establishment, whichever is greater;*

*(ii) in the case of retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) are covered for the first time on or after the effective date of the Fair Labor Standards Amendments of 1974 —*

*(I) the proportion of hours of employment of students in such establishment to the total hours of employment of all employees in such establishment*

*for the corresponding month of the twelve-month period immediately prior to the effective date of such Amendments,*

*(II) the proportion of student hours of employment to the total hours of employment of all employees in such establishment for the corresponding month of the immediately preceding twelve-month period, or*

*(III) a proportion equal to one-tenth of the total hours of employment of all employees in such establishment, whichever is greater; or*

*(iii) in the case of a retail or service establishment for which records of student hours worked are not available, the proportion of student hours of employment to the total hours of employment of all employees based on the practice during the immediately preceding twelve-month period in (I) similar establishments of the same employer in the same general metropolitan area in which such establishment is located, (II) similar establishments of the same or nearby communities if such establishment is not in a metropolitan area, or (III) other establishments of the same general character operating in the community or the nearest comparable community.*

*For purpose of clauses (i), (ii), and (iii) of this subparagraph, the term “student hours of employment” means hours during which students are employed in a retail or service establishment under certificates issued under this subsection.*

*(2) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide for the employment, at a wage rate not less than 85 per centum of the wage rate in effect under section 6(a)(5) or not less than \$1.30 an hour; whichever is the higher, of full-time students (regardless of age but in compliance with applicable child labor laws) in any occupation in agriculture.*

*(3) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide for the employment by an institution of higher education, at a wage rate not less*

than 85 per centum of the otherwise applicable wage rate in effect under section 6 or not less than \$1.60 an hour, whichever is the higher, of full-time students (regardless of age but in compliance with applicable child labor laws) who are enrolled in such institution. The Secretary shall by regulation prescribe standards and requirements to insure that this paragraph will not create a substantial probability of reducing the full-time employment opportunities of persons other than those to whom the minimum wage rate authorized by this paragraph is applicable.

(4) (A) A special certificate issued under paragraph (1), (2), or (3) shall provide that the student or students for whom it is issued shall, except during vacation periods, be employed on a part-time basis and not in excess of twenty hours in any workweek.

(B)<sup>128</sup> If the issuance of a special certificate under paragraph (1) or (2) for an employer will cause the number of students employed by such employer under special certificates issued under this subsection to exceed six, the Secretary may not issue such a special certificate for the employment of a student by such employer unless the Secretary finds employment of such student will not create a substantial probability of reducing the full-time employment opportunities of persons other than those employed under special certificates issued under this subsection. If the issuance of a special certificate under paragraph (1) or (2) for an employer will not cause the number of students employed by such employer under special certificates issued under this subsection to exceed six —

(i) the Secretary may issue a special certificate under paragraph (1) or (2) for the employment of a student by such employer if such employer certifies to the Secretary that the employment of such student will not reduce the full-time employment opportunities of persons other than those employed under special certificates issued under this subsection, and

(ii) in the case of an employer which is a retail or service establishment, subparagraph (B) of paragraph (1) shall not apply with respect to the issuance of special certificates for such employer under such paragraph.

The requirement of this subparagraph shall not apply in the case of the issuance of special certificates under paragraph (3) for the employment of full-time students by institutions of higher education; except that if the Secretary determines that an institution of higher education is employing students under certificates issued under paragraph (3) but in violation of the requirements of that paragraph or of regulations issued thereunder, the requirements of this subparagraph shall apply with respect to the issuance of special certificates under paragraph (3) for the employment of students by such institution.

(C) No special certificate may be issued under this subsection unless the employer for whom the certificate is to be issued provides evidence satisfactory to the Secretary of the student status of the employees to be employed under such special certificate.

(D)<sup>129</sup> To minimize paperwork for, and to encourage, small businesses to employ students under special certificates issued under paragraphs (1) and (2), the Secretary shall, by regulation or order, prescribe a simplified application form to be used by employers in applying for such a certificate for the employment of not more than six full-time students. Such an application shall require only —

(i) a listing of the name, address, and business of the applicant employer,

(ii) a listing of the date the applicant began business, and

(iii) the certification that the employment of such full-time students will not reduce the full-time employment opportunities of persons other than persons employed under special certificates.

(c)<sup>130</sup> (1) The Secretary, to the extent necessary to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment, under special certificates, of individuals (including individuals employed in agriculture) whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury, at wages which are —

(A) lower than the minimum wage applicable under section 6,

(B) commensurate with those paid to non-handicapped workers, employed in the vicinity in

<sup>128</sup> As amended by section 12 of the Fair Labor Standards Amendments of 1977, effective November 1, 1977. The 1977 amendments substituted "six" for "four."

<sup>129</sup> Added by section 13 of the Fair Labor Standards Amendments of 1977, effective November 1, 1977.

<sup>130</sup> As amended by the Act of October 16, 1986 (100 Stat. 1229).

which the individuals under the certificates are employed, for essentially the same type, quality, and quantity of work, and

(C) related to the individual's productivity.

(2) The Secretary shall not issue a certificate under paragraph (1) unless the employer provides written assurances to the Secretary that —

(A) in the case of individuals paid on an hourly rate basis, wages paid in accordance with paragraph (1) will be reviewed by the employer at periodic intervals at least once every six months, and

(B) wages paid in accordance with paragraph (1) will be adjusted by the employer at periodic intervals, at least once each year, to reflect changes in the prevailing wage paid to experienced non-handicapped individuals employed in the locality for essentially the same type of work.

(3) Notwithstanding paragraph (1), no employer shall be permitted to reduce the hourly wage rate prescribed by certificate under this subsection in effect on June 1, 1986, of any handicapped individual for a period of two years from such date without prior authorization of the Secretary.

(4) Nothing in this subsection shall be construed to prohibit an employer from maintaining or establishing work activities centers to provide therapeutic activities for handicapped clients.

(5) (A) Notwithstanding any other provision of this subsection, any employee receiving a special minimum wage at a rate specified pursuant to this subsection or the parent or guardian of such an employee may petition the Secretary to obtain a review of such special minimum wage rate. An employee or the employee's parent or guardian may file such a petition for and in behalf of the employee or in behalf of the employee and other employees similarly situated. No employee may be a party to any such action unless the employee or the employee's parent or guardian gives consent in writing to become such a party and such consent is filed with the Secretary.

(B) Upon receipt of a petition filed in accordance with subparagraph (A), the Secretary within ten days shall assign the petition to an administrative law judge appointed pursuant to section 3105 of title 5, United States Code. The administrative law judge shall conduct a hearing on the record in accordance with section 554 of title 5, United States Code, with respect to such petition within thirty days after assignment.

(C) In any such proceeding, the employer shall have the burden of demonstrating that the special minimum wage rate is justified as necessary in order to prevent curtailment of opportunities for employment.

(D) In determining whether any special minimum wage rate is justified pursuant to subparagraph (C), the administrative law judge shall consider —

(i) the productivity of the employee or employees identified in the petition and the conditions under which such productivity was measured; and

(ii) the productivity of other employees performing work of essentially the same type and quality for other employers in the same vicinity.

(E) The administrative law judge shall issue a decision within thirty days after the hearing provided for in subparagraph (B). Such action shall be deemed to be a final agency action unless within thirty days the Secretary grants a request to review the decision of the administrative law judge. Either the petitioner or the employer may request review by the Secretary within fifteen days of the date of issuance of the decision by the administrative law judge.

(F) The Secretary, within thirty days after receiving a request for review, shall review the record and either adopt the decision of the administrative law judge or issue exceptions. The decision of the administrative law judge, together with any exceptions, shall be deemed to be a final agency action.

(G) A final agency action shall be subject to judicial review pursuant to chapter 7 of title 5, United States Code. An action seeking such review shall be brought within thirty days of a final agency action described in subparagraph (F).

**(d) The Secretary may by regulation or order provide that sections 6 and 7 shall not apply with respect to the employment by any elementary or secondary school of its students if such employment constitutes, as determined under regulations prescribed by the Secretary, an integral part of the regular education program provided by such school and such employment is in accordance with applicable child labor laws.**

## Prohibited Acts

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person —

(1) to transport, offer for transportation, ship, deliver; or sell in commerce, or to ship, deliver; or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Secretary of Labor<sup>131</sup> issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier; and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the Act, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;<sup>132</sup>

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Secretary<sup>133</sup> issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;<sup>134</sup>

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11(c) or any regulation or order made or continued in effect under the provisions of section 11(d), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.<sup>135</sup>

(b) For the purposes of subsection (a)(1) proof that any employee was employed in any place of employment where

goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

## Penalties<sup>136</sup>

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 15(a)(3) of this Act shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3), including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained **against any employer (including a public agency)** in any **Federal or State** court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.<sup>137</sup> The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. **The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation as the case may be, owing to such employee under section 6 or**

<sup>131</sup> See footnote 28.

<sup>132</sup> As amended by section 13(a) of the Fair Labor Standards Amendments of 1949.

<sup>133</sup> See footnote 28.

<sup>134</sup> Section 8 of the Fair Labor Standards Amendments of 1985 contains special discrimination provisions applicable to public agencies.

<sup>135</sup> As amended by section 13(b) of the Fair Labor Standards Amendments of 1949.

<sup>136</sup> The Portal-to-Portal Act of 1947 relieves employers from certain liabilities and punishments under this Act in circumstances specified in that Act. See also section 2(c) of the Fair Labor Standards Amendments of 1985, which relieves certain public agencies of certain liabilities under this Act prior to April 15, 1986.

<sup>137</sup> Amendment provided by section 5(a) of the Portal-to-Portal Act of 1947.

section 7 of this Act by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 15(a)(3).<sup>138</sup>

(c) The Secretary<sup>139</sup> is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or 7 of this Act, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of *the unpaid minimum wages or overtime compensation and an equal amount as liquidated damages*.<sup>140</sup> *The right provided by subsection (b) to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 6 and 7 or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b), unless such action is dismissed without prejudice on motion of the Secretary.* Any sums thus recovered by the Secretary on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary under this subsection for the purposes of the *statutes*<sup>141</sup> of limitations provided in section 6(a) of the Portal-to-Portal Act of 1947, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent

date on which his name is added as a party plaintiff in such action.<sup>142</sup>

(d) In any action or proceeding commenced prior to, on, or after the date of enactment of this subsection, no employer shall be subject to any liability or punishment under this Act of the Portal-to-Portal Act of 1947 on account of his failure to comply with any provision or provisions of such Acts (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 13(f) is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in section 6(a)(3) at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.<sup>143</sup>

(e) *Any person who violates the provisions of section 12 or section 13(c)(5),<sup>144</sup> relating to child labor; or any regulation issued under section 12 or section 13(c)(5),<sup>145</sup> shall be subject to a civil penalty of not to exceed \$10,000 for each employee who was the subject of such a violation. Any person who repeatedly or willfully violates section 6 or 7 shall be subject to a civil penalty of not to exceed \$1,000 for each such violation.*<sup>146</sup> *In determining the amount of any penalty under this subsection, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of any penalty under this subsection, when finally determined, may be*

— (1) *deducted from any sums owing by the United States to the person charged;*

(2) *recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or*

(3) *ordered by the court, in an action brought for a violation of section 15(a)(4) or a repeated or willful violation of section 15(a)(2),<sup>147</sup> to be paid to the Secretary.*

*Any administrative determination by the Secretary of the amount of any penalty under this subsection shall*

<sup>138</sup> The Fair Labor Standards Amendments of 1977 amended subsection 16(b), effective January 1, 1978, to authorize a private right of action for violations of subsection 15(a)(3) of the Act. Prior to this amendment, only the Secretary of Labor was authorized to bring an action for violations of subsection 15(a)(3).

<sup>139</sup> See footnote 28.

<sup>140</sup> The provision for liquidated damages was added by the Fair Labor Standards Amendments of 1974. These Amendments also deleted the prior requirements that section 16(c) suits be brought only on the written request of the employee and if the case did not involve any issue of law which had not been finally settled by the courts.

<sup>141</sup> Amended by section 601 of the Fair Labor Standards Amendments of 1966.

<sup>142</sup> Section 14 of the Fair Labor Standards Amendments of 1949, as amended by Reorganization Plan No. 6 of 1950 and the Fair Labor Standards Amendments of 1966.

<sup>143</sup> Section 4 of the American Samoa Labor Standards Amendments of 1956, as amended by section 1(2) of the Act of August 30, 1957 (71 Stat. 514), effective November 27, 1957.

<sup>144</sup> As amended by section 2 of Public Law 104-174 (110 Stat. 1554).

<sup>145</sup> *Ibid.*

<sup>146</sup> As added by section 9 of the Fair Labor Standards Amendments of 1989, and amended by section 3103 of the Omnibus Budget Reconciliation Act of 1990.

<sup>147</sup> As added by section 9 of the Fair Labor Standards Amendments of 1989.

*be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of title 5, United States Code, and regulations to be promulgated by the Secretary. Except for civil penalties collected for violations of section 12, sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provision of section 2 of an Act entitled "An Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof, and for other purposes" (29 U.S.C. 9a). Civil penalties collected for violations of section 12 shall be deposited in the general fund of the Treasury.<sup>148</sup>*

### Injunction Proceedings

SEC. 17. The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 15, including in the case of violations of section 15(a)(2) the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 6 of the Portal-to-Portal Act of 1947).<sup>149</sup>

### Relation to Other Laws

SEC. 18. (a) No provisions of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the

standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

(b) *Notwithstanding any other provision of this Act (other than section 13(f)) or any other law —*

(1) *any Federal employee in the Canal Zone engaged in employment of the kind described in section 5102(c)(7) of title 5, United States Code, or<sup>150</sup>*

(2) *any employee employed in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,<sup>151</sup>*

*shall have his basic compensation fixed or adjusted at a wage rate which is not less than the appropriate wage rate provided for in section 6(a)(1) of this Act (except that the wage rate provided for in section 6(b) shall apply to any employee who performed services during the workweek in a work place within the Canal Zone), and shall have his overtime compensation set at an hourly rate not less than the overtime rate provided for in section 7(a)(1) of this Act.*

### Separability of Provisions

SEC. 19. If any provision of this Act or the application of such provision to any persons or circumstances is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Approved, June 25, 1938.<sup>152</sup>

<sup>150</sup> Paragraph (1), as amended by Public Law 90–83, 81 Stat. 222, omits reference to other employees covered under paragraph (1) of this subsection as enacted in the Fair Labor Standards Amendments of 1966, section 306, whose compensation requirements under such Amendments are now incorporated in 5 U.S.C. 5341 and 5 U.S.C. 5544.

<sup>151</sup> Paragraph (2) was formerly paragraph (3) of subsection (b) as enacted in the Fair Labor Standards Amendments of 1966, section 306. It was renumbered in the amendment by Public Law 90–83, 81 Stat. 222, which omitted the former paragraph (2) referring to employees described in 10 U.S.C. 7474 because of repeal of the latter provision by Public Law 89–554, 80 Stat. 663.

<sup>152</sup> The Fair Labor Standards Amendments of 1949 were approved October 26, 1949; the Fair Labor Standards Amendments of 1955 were approved August 12, 1955; the American Samoa Labor Standards Amendments were approved August 8, 1956; the Fair Labor Standards Amendments of 1961 were approved May 5, 1961; the Fair Labor Standards Amendments of 1966 were approved September 23, 1966; the Fair Labor Standards Amendments of 1974 were approved April 8, 1974; the Fair Labor Standards Amendments of 1977 were approved November 1, 1977; the Fair Labor Standards Amendments of 1985 were approved November 13, 1985; the Fair Standards Amendments of 1989 were approved November 17, 1989; and the Small Business Job Protection Act of 1996, which included the Employee Commuting Flexibility Act of 1996, the Minimum Wage Increase Act of 1996, and Fair Labor Standards Act Amendments, was approved on August 20, 1996.

<sup>148</sup> As amended by section 3103 of the Omnibus Budget Reconciliation Act of 1990.

<sup>149</sup> As amended by section 12 of the Fair Labor Standards Amendments of 1961.

**ADDITIONAL PROVISIONS OF THE SMALL BUSINESS JOB PROTECTION ACT OF 1996**  
(110 Stat. 1755)

[PUBLIC LAW 104-188]

[104TH CONGRESS] [SECOND SESSION]

AN ACT

To provide tax relief for small businesses, to protect jobs, to create opportunities, to increase the take home pay of workers, to amend the Portal-to-Portal Act of 1947 relating to the payment of wages to employees who use employer owned vehicles, and to amend the Fair Labor Standards Act of 1938 to increase the minimum wage rate and to prevent job loss by providing flexibility to employers in complying with minimum wage and overtime requirements under that Act.

**SEC. 2101. SHORT TITLE.**

This section and sections 2102 and 2103 may be cited as the “Employee Commuting Flexibility Act of 1996.”

\* \* \* \* \*

**SEC. 2103. EFFECTIVE DATE.**

The amendment made by section 2102 shall take effect on the date of enactment of this Act and shall apply in determining the application of section 4 of the Portal-to-Portal Act of 1947 to an employee in any civil action brought before such date of enactment but pending on such date.

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**LEGISLATIVE HISTORY — H.R. 3448:**

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**HOUSE REPORTS:** Nos. 104-586 (Comm. on Ways and Means) and 104-737 (Comm. of Conference).

**SENATE REPORTS:** No. 104-281 (Comm. on Finance).

**CONGRESSIONAL RECORD, Vol 142 (1996):**

May 22, considered and passed House.

July 8, 9, considered and passed Senate, amended.

Aug. 2, House and Senate agreed to conference report.

**WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 32 (1996):**

Aug. 20, Presidential remarks and statement.

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**ADDITIONAL PROVISIONS OF THE ACT OF NOVEMBER 15, 1990**  
(104 Stat. 2871)

[PUBLIC LAW 101-583]

[101ST CONGRESS] [FIRST SESSION]

AN ACT

To eliminate “substantial documentary evidence” requirement for minimum wage determination for American Samoa, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States in Congress assembled.*

[Section 1 of the Act of November 15, 1990 amends the Fair Labor Standards Act of 1938, and is incorporated in its proper place in the Act.]

**SEC. 2. REGULATIONS CONCERNING  
CERTAIN EMPLOYEES**

Not later than 90 days after the date of enactment of this Act, the Secretary of Labor shall promulgate regulations that permit computer systems analysts, computer programmers, software engineers, and other similarly skilled professional workers as defined in such regulations to qualify as exempt executive, administrative, or professional employees under section 13(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(1)). Such regulations shall provide that if such employees are paid on an hourly basis they shall be exempt only if their hourly rate of pay is at least 6 1/2 times greater than the applicable minimum wage rate under section 6 of such Act (29 U.S.C. 206).

Approved November 15, 1990.

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LEGISLATIVE HISTORY — S. 2930:

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CONGRESSIONAL RECORD, Vol. 136 (1990):

Aug. 4, considered and passed Senate.

Oct. 18, considered and passed House, amended.

Oct. 27, Senate concurred in House amendments.

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**ADDITIONAL PROVISIONS OF FAIR LABOR STANDARDS AMENDMENTS OF 1989**  
(103 Stat. 938)

[PUBLIC LAW 101-157]

[101ST CONGRESS] [FIRST SESSION]

AN ACT

To amend the Fair Labor Standards Act of 1938 to increase the minimum wage, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That this Act may be cited as the "Fair Labor Standards Amendments of 1989."*

*[Sections 2; 3(a), (c), and (d); 4; 5; 7; and 9 of the Fair Labor Standards Amendments of 1989 amend the Fair Labor Standards Act of 1938, and are incorporated in their proper place in the Act.]*

**PRESERVATION OF COVERAGE**

**SEC. 3. \* \* \***

**(b) PRESERVATION OF COVERAGE. —**

**(1) IN GENERAL. —** Any enterprise that on March 31, 1990, was subject to section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)) and that because of the amendment made by subsection (a) is not subject to such section shall —

**(A)** pay its employees not less than the minimum wage in effect under such section on March 31, 1990;

**(B)** pay its employees in accordance with section 7 of such Act (29 U.S.C. 207); and

**(C)** remain subject to section 12 of such Act (29 U.S.C. 212).

**(2) VIOLATIONS. —** A violation of paragraph (1) shall be considered a violation of section 6, 7, or 12 of the Fair Labor Standards Act of 1938, as the case may be.

\* \* \* \* \*

**(e) EFFECTIVE DATE. —** The amendments made by this section shall become effective on April 1, 1990.

**TRAINING WAGE**

**SEC. 6. TRAINING WAGE.**

**(a) IN GENERAL. —**

**(1) AUTHORITY. —** Any employer may, in lieu of the minimum wage prescribed by section 6 of the Fair Labor Standards Act of 1938 (29 U.S.C. 206), pay an eligible employee the wage prescribed by paragraph (2) —

**(A)** while such employee is employed for the period authorized by subsection (g)(1)(B)(i), or

**(B)** while such employee is engaged in on-the-job training for the period authorized by subsection (g)(1)(B)(ii).

**(2) WAGE RATE. —** The wage referred to in paragraph (1) shall be a wage —

**(A)** of not less than \$3.35 an hour during the year beginning April 1, 1990; and

**(B)** beginning April 1, 1991, of not less than \$3.35 an hour or 85 percent of the wage prescribed by section 6 of such Act, whichever is greater.

**(b) WAGE PERIOD. —** An employer may pay an eligible employee the wage authorized by subsection (a) for a period that —

**(1)** begins on or after April 1, 1990;

**(2)** does not exceed the maximum period during which an employee may be paid such wage as determined under subsection (g)(1)(B); and

**(3)** ends before April 1, 1993.

**(c) WAGE CONDITIONS. —** No eligible employee may be paid the wage authorized by subsection (a) by an employer if —

**(1)** any other individual has been laid off by such employer from the position to be filled by such eligible employee or from any substantially equivalent position; or

**(2)** such employer has terminated the employment of any regular employee or otherwise reduced the number of employees with the intention of filling the vacancy so created by hiring an employee to be paid such wage.

**(d) LIMITATIONS. —**

**(1) EMPLOYEE HOURS. —** During any month in which employees are to be employed in an establishment under this section, the proportion of employee hours of employment to the total hours of employment of all employees in such establishment may not exceed a proportion equal to one-fourth of the total hours of employment of all employees in such establishment.

**(2) DISPLACEMENT. —**

**(A) PROHIBITION. —** No employer may take any action to displace employees (including partial displacements such as reduction in hours, wages, or employment benefits) for purposes of hiring individuals at the wage authorized in subsection (a).

**(B) DISQUALIFICATION. —** If the Secretary determines that an employer has taken an action in violation of subparagraph (A), the Secretary shall issue an order disqualifying such employer from employing any individual at such wage.

**(e) NOTICE. —** Each employer shall provide to any eligible employee who is to be paid the wage authorized by subsection (a) a written notice before the employee begins employment stating the requirements of this section and the remedies provided by subsection (f) for violations of this section. The Secretary shall provide to employers the text of the notice to be provided under this subsection.

**(f) ENFORCEMENT. —** Any employer who violates this section shall be considered to have violated section 15(a)(3) of the Fair Labor Standards Act of 1938 (29 U.S.C. 215(a)(3)). Sections 16 and 17 of such Act (29 U.S.C. 216 and 217) shall apply with respect to the violation.

**(g) DEFINITIONS. —** For purposes of this section:**(1) ELIGIBLE EMPLOYEE. —**

**(A) IN GENERAL. —** The term “eligible employee” means with respect to an employer an individual who —

(i) is not a migrant agricultural worker or a seasonal agricultural worker (as defined in paragraphs (8) and (10) of section 3 of the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1802 (8) and (10)) without regard to subparagraph (B) of such paragraphs and is

not a nonimmigrant described in section 101(a)(15)(H)(ii)(a) of the immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii)(a));

(ii) has not attained the age of 20 years; and

(iii) is eligible to be paid the wage authorized by subsection (a) as determined under subparagraph (B).

**(B) DURATION. —**

(i) An employee shall initially be eligible to be paid the wage authorized by subsection (a) until the employee has been employed a cumulative total of 90 days at such wage.

(ii) An employee who has been employed by an employer at the wage authorized by subsection (a) for the period authorized by clause (i) may be employed by any other employer for an additional 90 days if the employer meets the requirements of subsection (h).

(iii) The total period, as authorized by clauses (i) and (ii), that an employee may be paid the wage authorized by subsection (a) may not exceed 180 days.

(iv) For purposes of this subparagraph, the term “employer” means with respect to an employee an employer who is required to withhold payroll taxes for such employee.

**(C) PROOF. —**

(i) **IN GENERAL. —** An individual is responsible for providing the requisite proof of previous period or periods of employment with other employers. An employer’s good faith reliance on the proof presented to the employer by an individual shall constitute a complete defense to a charge that the employer has violated subsection (b)(2) with respect to such individual.

(ii) **REGULATIONS. —** The Secretary of Labor shall issue regulations defining the requisite proof required of an individual. Such regulations shall establish minimal requirements for requisite proof and may prescribe that an accurate list of the individual’s employers and a statement of the

dates and duration of employment with each employer constitute requisite proof.

(2) **ON-THE-JOB TRAINING.** — The term “on-the-job training” means training that is offered to an individual while employed in productive work that provides training, technical and other related skills, and personal skills that are essential to the full and adequate performance of such employment.

(h) **EMPLOYER REQUIREMENTS.** — An employer who wants to employ employees at the wage authorized by subsection (a) for the period authorized by subsection (g)(1)(B)(ii) shall —

(1) notify the Secretary annually of the positions at which such employees are to be employed at such wage,

(2) provide on-the-job training to such employees which meets general criteria of the Secretary issued by regulation after consultation with the Committee on Labor and Human Resources of the Senate and the Committee on Education and Labor of the House of Representatives and other interested persons,

(3) keep on file a copy of the training program which the employer will provide such employees,

(4) provide a copy of the training program to the employees,

(5) post in a conspicuous place in places of employment a notice of the types of jobs for which the employer is providing on-the-job training, and

(6) send to the Secretary on an annual basis a copy of such notice.

The Secretary shall make available to the public upon request notices provided to the Secretary by employers in accordance with paragraph (6).

(i) **REPORT.** — The Secretary of Labor shall report to Congress not later than March 1, 1993, on the effectiveness of the wage authorized by subsection (a). The report shall include —

(1) an analysis of the impact of such wage on employment opportunities for inexperienced workers;

(2) any reduction in employment opportunities for experienced workers resulting from the employment of employees under such wage;

(3) the nature and duration of the training provided under such wage; and

(4) the degree to which employees used the authority to pay such wage.

## APPLICATIONS OF FLSA TO CONGRESSIONAL AND ARCHITECT OF THE CAPITOL EMPLOYEES

### SEC. 8. APPLICATION OF RIGHTS AND PROTECTIONS OF FAIR LABOR STANDARDS ACT OF 1938 TO CONGRESSIONAL AND ARCHITECT OF THE CAPITOL EMPLOYEES.

(a) **HOUSE EMPLOYEES.** —

(1) **IN GENERAL.** — Not later than 180 days after the date the minimum wage rate prescribed by section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)) is increased pursuant to the amendment made by section 2, the rights and protections under the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) shall apply with respect to any employee in an employment position in the House of Representatives and to any employing authority of the House of Representatives.

(2) **ADMINISTRATION.** — In the administration of this subsection, the remedies and procedures under the Fair Employment Practices Resolution shall be applied. As used in this paragraph, the term “Fair Employment Practices Resolution” means House Resolution 558, One Hundredth Congress, agreed to October 4, 1988, as continued in effect by House Resolution 15, One Hundred First Congress, agreed to January 3, 1989.

(b) **ARCHITECT OF THE CAPITOL EMPLOYEES.** — Not later than 180 days after the date the minimum wage rate prescribed by section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)) is increased pursuant to the amendment made by section 2, the rights and protections under the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) shall apply with respect to individuals employed under the Office of the Architect of the Capitol.

Approved November 17, 1989.

**ADDITIONAL PROVISIONS OF FAIR LABOR STANDARDS AMENDMENTS OF 1985**  
(99 Stat. 787)

[PUBLIC LAW 99-150]

[99TH CONGRESS] [FIRST SESSION]

AN ACT

To amend the Fair Labor Standards Act of 1938 to provide rules for overtime compensatory time off for certain public agency employees, to clarify the application of that Act to volunteers, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That this Act may be cited as the "Fair Labor Standards Amendments of 1985."*

[Sections 2(a), 3, 4(a) and 5 of the Fair Labor Standards Amendments of 1985 amend the Fair Labor Standards Act of 1938, and are incorporated in their proper place in the Act.]

### COMPENSATORY TIME

SEC. 2. \* \* \*

(b) **EXISTING COLLECTIVE BARGAINING AGREEMENTS** — A collective bargaining agreement which is in effect on April 15, 1986, and which permits compensatory time off in lieu of overtime compensation shall remain in effect until its expiration date unless otherwise modified, except that compensatory time shall be provided after April 14, 1986, in accordance with section 7(o) of the Fair Labor Standards Act of 1938 (as added by subsection (a)).

(c) **LIABILITY AND DEFERRED PAYMENT** — (1) No State, political subdivision of a State, or interstate governmental agency shall be liable under section 16 of the Fair Labor Standards Act of 1938 for a violation of section 6 (in the case of a territory or possession of the United States), 7, or 11(c) (as it relates to section 7) of such Act occurring before April 15, 1986, with respect to any employee of the State, political subdivision, or agency who would not have been covered by such Act under the Secretary of Labor's special enforcement policy on January 1, 1985, and published in sections 775.2 and 775.4 of title 29 of the Code of Federal Regulations.

(2) A State, political subdivision of a State, or interstate governmental agency may defer until August 1, 1986, the payment of monetary overtime compensation under section 7 of the Fair Labor Standards Act of 1938 for hours worked after April 14, 1986.

### VOLUNTEERS

(b) **REGULATIONS**. — Not later than March 15, 1986, the Secretary of Labor shall issue regulations to carry out paragraph (4) of section 3(e) (as amended by subsection (a) of this section).

(c) **CURRENT PRACTICE**. — If, before April 15, 1986, the practice of a public agency was to treat certain individuals as volunteers, such individuals shall until April 15, 1986, be considered, for purposes of the Fair Labor Standards Act of 1938, as volunteers and not as employees. No public agency which is a State, a political subdivision of a State, or an interstate governmental agency shall be liable for a violation of section 6 occurring before April 15, 1986, with respect to services deemed by that agency to have been performed for it by an individual on a voluntary basis.

### EFFECTIVE DATE

SEC. 6. The amendments made by this Act shall take effect April 15, 1986. The Secretary of Labor shall before such date promulgate such regulations as may be required to implement such amendments.

### EFFECT OF AMENDMENTS

SEC. 7. The amendments made by this Act shall not affect whether a public agency which is a State, political subdivision of a State, or an interstate governmental agency is liable under section 16 of the Fair Labor Standards Act of 1938 for a violation of section 5, 7, or 11 of such Act occurring before April 15, 1986, with respect to any employee of such public agency who would have been covered by such Act under the Secretary of Labor's special enforcement policy on January 1, 1985, and published in section 775.3 of title 29 of the Code of Federal Regulations.

## DISCRIMINATION

**SEC. 8.** A public agency which is a State, political subdivision of a State, or an interstate governmental agency and which discriminates or has discriminated against an employee with respect to the employee's wages or other terms or conditions of employment because on or after February 19, 1985, the employee asserted coverage under section 7 of the Fair Labor Standards Act of 1938 shall be held to have violated section 15(a)(3) of such Act. The protection against discrimination afforded by the preceding sentence shall be available after August 1, 1986, only for an employee who takes an action described in section 15(a)(3) of such Act.

Approved November 13, 1985.

**ADDITIONAL PROVISIONS OF FAIR LABOR STANDARDS AMENDMENTS OF 1977**  
(91 Stat. 1245)

[PUBLIC LAW 95-151]

[95TH CONGRESS] [FIRST SESSION]

AN ACT

To amend the Fair Labor Standards Act of 1938 to increase the minimum wage rate under that Act, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*  
That this Act may be cited as the "Fair Labor Standards Amendments of 1977."

[Sections 2(a) through 2(d) and sections 3 through 14, inclusive, of the Fair Labor Standards Amendments of 1977 amend the Fair Labor Standards Act of 1938, and are incorporated in their proper place in the Act.]

**Increase in Minimum Wage**

SEC. 2. \* \* \*

(e) (1) There is established the Minimum Wage Study Commission (hereinafter in this subsection referred to as the "Commission") which shall conduct a study of the Fair Labor Standards Act of 1938 and the social, political, and economic ramifications of the minimum wage, overtime, and other requirements of that Act. Such study shall include but not be limited to —

(A) the beneficial effects of the minimum wage, including its effect in ameliorating poverty among working citizens;

(B) the inflationary impact (if any) of increases in the minimum wage prescribed by that Act;

(C) the effect (if any) such increases have on wages paid employees at a rate in excess of the rate prescribed by that Act;

(D) the economic consequence (if any) of authorizing an automatic increase in the rate prescribed in that Act on the basis of an increase in a wage, price, or other index;

(E) the employment and unemployment effects (if any) of providing a different minimum wage for youth, and the employment and unemployment effects (if any) on handicapped and aged individuals of an increase in such rate and of providing a different minimum wage rate for such individuals;

(F) the effect (if any) of the full-time student certification program on employment and unemployment;

(G) the employment and unemployment effects (if any) of the minimum wage;

(H) the exemptions from the minimum wage and overtime requirements of that Act;

(I) the relationship (if any) between the Federal minimum wage rates and public assistance programs, including the extent to which employees at such rates are also eligible to receive food stamps and other public assistance;

(J) the overall level of noncompliance with that Act; and

(K) the demographic profile of minimum wage workers.

(2) The Commission shall conduct a study concerning the extent to which the exemptions from the minimum wage and overtime requirements of the Fair Labor Standards Act of 1938 may apply to employees of conglomerates, and shall make a report, within one year after the date of the appointment of the members of the Commission, of the results of such study. For the purposes of this paragraph a "conglomerate" means an establishment (A) which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to the activities of the establishment employing such employees and (B) whose annual gross volume of sales made or business done, when combined with the annual gross volume of sales made or business done by each establishment which controls, is controlled by, or is under common control with, the establishment employing such employee, exceeds \$100,000,000 (exclusive of excise taxes at the retail level which are separately stated). The report shall include an analysis of the effects of eliminating the exemptions from the minimum wage and overtime requirements of such Act that may currently apply to the employees of such conglomerates.

(3) The Commission shall make a report of the results of the study conducted pursuant to paragraph (1) thirty-six months after the date of the appointment of the members of the Commission. The report shall include such recommendations for legislation as the Commission determines are appropriate. The Commission may make interim or additional reports which it determines are appropriate. Each report shall be made to the President and to the Congress. The Commission shall cease to exist thirty days after the submission of the report required by this paragraph.

(4) (A) The Commission shall consist of eight members as follows:

- (i) Two members appointed by the Secretary of Labor.
- (ii) Two members appointed by the Secretary of Commerce.
- (iii) Two members appointed by the Secretary of Agriculture.
- (iv) Two members appointed by the Secretary of Health, Education, and Welfare.

The appointments authorized under this paragraph shall be made within 180 days after the date of enactment of this subsection.

(B) The Chairperson shall be selected by the members of the Commission. Any vacancy in the Commission shall not affect its powers and shall be filled in the same manner in which the original appointment was made.

(C) (i) Except as provided in clause (ii), members of the Commission who are officers or employees of the Federal Government shall serve without compensation. Other members, while engaged in the activities of the Commission, shall be paid at a rate equal to the per diem equivalent of the annual rate payable for grade GS-18 of the General Schedule under section 5332 of title 5, United States Code.

(ii) While away from their homes or regular places of business in the performance of services for the Commission, members of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of title 5 of the United States Code.

(5) (A) The Commission may prescribe such rules as may be necessary to carry out its duties under this subsection.

(B) The Commission may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as it deems advisable.

(C) Upon request of the Commission, the head of any Federal department or agency is authorized to detail, on a reimbursable basis, any of the personnel of such department or agency to the Commission to assist it in carrying out its duties under this subsection.

(D) The Department of Labor shall furnish such professional, technical, and research assistance as required by the Commission.

(E) The Administrator of General Services shall provide to the Commission on a reimbursable basis such administrative support services as the Commission may request to carry out its duties under this subsection.

(F) The Commission may secure directly from any department or agency of the United States such information as the Commission may require to carry out its duties under this subsection. Upon request of the Commission, the head of any such department or agency shall furnish such information to the Commission.

(G) The Commission may use the United States mails in the same manner and upon the same conditions as other departments and agencies of the United States.

(6) (A) The Chairperson may appoint an executive director of the Commission who shall perform such duties as the Chairperson may prescribe.

(B) With approval of the Chairperson, the executive director may appoint and fix the pay of such clerical personnel as are necessary for the Commission to carry out its duties.

(C) The executive director and staff shall be appointed without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and shall be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates but at rates not in excess of the annual rate payable for grade GS-18 of the General Schedule under section 5332 of such title.

(D) The executive director, with the concurrence of the Chairperson, may obtain temporary and intermittent services of experts and consultants in accordance with the provisions of section 3109 of title 5, United States Code.

## Effective Date

SEC. 15. (a) Except as provided in sections 3, 14, and subsection (b) of this section, the amendments made by this Act shall take effect January 1, 1978.

(b) The amendments made by sections 8, 9, 11, 12, and 13 shall take effect on the date of the enactment of this Act.

(c) On and after the date of the enactment of this Act, the Secretary of Labor shall take such administrative action as may be necessary for the implementation of the amendments made by this Act.

Approved November 1, 1977.

**ADDITIONAL PROVISIONS OF FAIR LABOR STANDARDS AMENDMENTS OF 1974**  
(88 Stat. 55)

[PUBLIC LAW 93-259]

[93RD CONGRESS] [SECOND SESSION]

AN ACT

To amend the Fair Labor Standards Act of 1938 to increase the minimum wage rate under that Act, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Amendments of 1974."*

*[Sections 2 through 6(d)(1) and sections 7 through 27, inclusive, of the Fair Labor Standards Amendments of 1974 amend the Fair Labor Standards Act of 1938, and are incorporated in their proper place in the Act. Section 6(d)(2)(A) and (B) amends the Portal-to-Portal Act of 1947 and is set forth below.]*

**Federal and State Employees**

**SEC. 6. \* \* \***

*(2) (A) Section 6 of the Portal-to-Portal Pay Act of 1947 is amended by striking out the period at the end of paragraph (c) and by inserting in lieu thereof a semicolon and by adding after such paragraph the following:*

*"(d) with respect to any cause of action brought under section 16(b) of the Fair Labor Standards Act of 1938 against a State or a political subdivision of a State in a district court of the United States on or before April 18, 1973, the running of the statutory periods of limitation shall be deemed suspended during the period beginning with the commencement of any such action and ending one hundred and eighty days after the effective date of the Fair Labor Standards Amendments of 1974, except that such suspensions shall not be applicable if in such action judgement has been entered for the defendant on the grounds other than State immunity from Federal jurisdiction."*

*(B) Section 11 of such Act is amended by striking out "(b)" after "section 16."*

**Effective Date**

*SEC. 29. (a) Except as otherwise specifically provided, the amendments made by this Act shall take effect on May 1, 1974.*

*(b) Notwithstanding subsection (a), on and after the date of the enactment of this Act the Secretary of Labor is authorized to prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act.*

*Approved April 8, 1974.*

**ADDITIONAL PROVISIONS OF FAIR LABOR STANDARDS AMENDMENTS OF 1966**  
(80 Stat. 830)

[PUBLIC LAW 89-601]

[89TH CONGRESS] [SECOND SESSION]

AN ACT

To amend the Fair Labor Standards Act of 1938 to extend its protection to additional employees, to raise the minimum wage, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Amendments of 1966."*

[Sections 101 to 501, inclusive, and section 601 (a) of the Fair Labor Standards Amendments of 1966 amend the Fair Labor Standards Act of 1938, and are incorporated in their proper place in the Act.]

*STATUTE OF LIMITATIONS*

*SEC. 601. \* \* \**

*(b) Section 6(a) of the Portal-to-Portal Act of 1947 (Public Law 49, Eightieth Congress) is amended by inserting before the semicolon at the end thereof the following: " , except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued."*

*EFFECTIVE DATE*

*SEC. 602. Except as otherwise provided in this Act, the amendments made by this Act shall take effect on February 1, 1967. On and after the date of the enactment of this Act the Secretary is authorized to promulgate necessary rules, regulations, or orders with regard to the amendments made by this Act.*

*STUDY OF EXCESSIVE OVERTIME*

*SEC. 603. The Secretary of Labor is hereby instructed to commence immediately a complete study of present practices dealing with overtime payments for work in excess of forty hours per week and the extent to which such overtime work impedes the creation of new job opportunities in American industry. The Secretary is*

*further instructed to report to the Congress by July 1, 1967, the findings of such survey with appropriate recommendations.*

*CANAL ZONE EMPLOYEES AND  
PANAMA CANAL STUDY*

*SEC. 604. The Secretary of Labor, in cooperation with the Secretary of Defense and the Secretary of State, shall (1) undertake a study with respect to (A) wage rates payable to Federal employees in the Canal Zone engaged in employment of the kind described in paragraph (7) of section 202 of the Classification Act of 1949 (5 U.S.C. 1082(7)) and (B) the requirements of an effective and economical operation of the Panama Canal, and (2) report to the Congress not later than July 1, 1968, the results of his study together with such recommendations as he may deem appropriate.*

*STUDY OF WAGES PAID HANDICAPPED  
CLIENTS IN SHELTERED WORKSHOPS*

*SEC. 605. The Secretary of Labor is hereby instructed to commence immediately a complete study of wage payments to handicapped clients of sheltered workshops and of the feasibility of raising existing wage standards in such workshops. The Secretary is further instructed to report to the Congress by July 1, 1967, the findings of such study with appropriate recommendations.*

*PREVENTION OF DISCRIMINATION  
BECAUSE OF AGE*

*SEC. 606. The Secretary of Labor is hereby directed to submit to the Congress not later than January 1, 1967, his specific legislative recommendations for implementing the conclusions and recommendations contained in his report on age discrimination in employment made pursuant to section 715 of Public Law 88-352. Such legislative recommendations shall include, without limitation, provisions specifying appropriate enforcement procedures, a particular administering agency, and the standards, coverage, and exemptions, if any, to be included in the proposed enactment.*

*Approved September 23, 1966.*

**ADDITIONAL PROVISIONS OF FAIR LABOR STANDARDS AMENDMENTS OF 1961**  
(75 Stat. 65)

[PUBLIC LAW 87-30]

[87TH CONGRESS] [FIRST SESSION]

AN ACT

To amend the Fair Labor Standards Act of 1938, as amended, to provide coverage for employees of large enterprises engaged in retail trade or service and of other employers engaged in commerce or in the production of goods for commerce, to increase the minimum wage under the Act of \$1.25 an hour, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Fair Labor Standards Amendments of 1961."

[Sections 2 to 12, inclusive, of the Fair Labor Standards Amendments of 1961 amend the Fair Labor

Standards Act of 1938, and are incorporated in their proper place in the Act.]

**EFFECTIVE DATE**

**SEC. 14.** The amendments made by this Act shall take effect upon the expiration of one hundred and twenty days after the date of its enactment, except as otherwise provided in such amendments and except that the authority to promulgate necessary rules, regulations, or orders with regard to amendments made by this Act, under the Fair Labor Standards Act of 1938 and amendments thereto, including amendments made by this Act, may be exercised by the Secretary on and after the date of enactment of this Act.

Approved May 5, 1961.

**ADDITIONAL PROVISIONS OF FAIR LABOR STANDARDS AMENDMENTS OF 1949**  
(63 Stat. 917)

[PUBLIC LAW 398 — 81ST CONGRESS]

[CHAPTER 736 — FIRST SESSION]

AN ACT

To provide for the amendment of the Fair Labor Standards Act of 1938, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*  
That this Act may be cited as the “Fair Labor Standards Amendments of 1949.”

[Sections 2 to 15, inclusive, of the Fair Labor Standards Amendments of 1949 amend the Fair Labor Standards Act of 1938, and are incorporated in their proper place in the Act.]

**MISCELLANEOUS AND EFFECTIVE DATE**

SEC. 16. (a) The amendments made by this Act shall take effect upon the expiration of ninety days from the date of its enactment; except that the amendment made by section 4 shall take effect on the date of its enactment.

(b) Except as provided in section 3(o) and in the last sentence of section 16(c) of the Fair Labor Standards Act of 1938, as amended, no amendment made by this Act shall be construed as amending, modifying, or repealing any provision of the Portal-to-Portal Act of 1947.

(c) Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in

effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act.<sup>1</sup>

(d) No amendment made by this Act shall affect any penalty or liability with respect to any act or omission occurring prior to the effective date of this Act; but, after the expiration of two years from such effective date, no action shall be instituted under section 16(b) of the Fair Labor Standards Act of 1938, as amended, with respect to any liability accruing thereunder for any act or omission occurring prior to the effective date of this Act.

(e) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended (in any action or proceeding commenced prior to or on or after the effective date of this Act), on account of the failure of said employer to pay an employee compensation for any period of overtime work performed prior to July 20, 1949, if the compensation paid prior to July 20, 1949 for such work was at least equal to the compensation which would have been payable for such work had section 7(d) (6) and (7) and section 7(g) of the Fair Labor Standards Act of 1938, as amended, been in effect at the time of such payment.

(f) Public Law 177, Eighty-first Congress, approved July 20, 1949, is hereby repealed as of the effective date of this Act.<sup>2</sup>

Approved, October 26, 1949.

<sup>1</sup> Effective May 24, 1950, all functions of Administrator were transferred to the Secretary of Labor by Reorganization Plan No. 6 of 1950, 64 Stat. 1263. See text set out under section 4(a) of the Fair Labor Standards Act.

<sup>2</sup> The provisions of the repealed statute are now contained in substance in sections 7(e)(5), (6), (7), and (h) of the Fair Labor Standards Act, as amended.

**PERTINENT PROVISIONS AFFECTING THE FAIR LABOR STANDARDS ACT  
FROM THE PORTAL-TO-PORTAL ACT OF 1947  
(61 Stat. 84)**

[PUBLIC LAW 49 — 80TH CONGRESS]

[CHAPTER 52 — FIRST SESSION]

[H.R. 2157]

AN ACT

To relieve employers from certain liabilities and punishments under the Fair Labor Standards Act of 1938, as amended, the Walsh–Healey Act, and the Bacon–Davis Act, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

PART I

FINDINGS AND POLICY

SECTION 1. (a) The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or

employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh–Healey and Bacon–Davis Acts and that it is therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act shall apply to the Walsh–Healey Act and the Bacon–Davis Act.

(b) It is hereby declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts.

\* \* \* \* \*

## PART III

## FUTURE CLAIMS

SEC. 4. RELIEF FROM CERTAIN FUTURE CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT, AND THE BACON-DAVIS ACT. —

(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act —

- (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
- (2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

*For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.<sup>1</sup>*

(b) Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either —

- (1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or
- (2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) For the purposes of subsection (b), an activity shall be considered as compensable under such contract provision

or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employs an employee with respect to walking, riding, traveling or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

## PART IV

## MISCELLANEOUS

\* \* \* \* \*

SEC. 6. STATUTE OF LIMITATIONS. — Any action commenced on or after the date of the enactment of this Act to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act —

(a) if the cause of action accrues on or after the date of the enactment of this Act — may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, *except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;*<sup>2</sup>

\* \* \* \* \*

*(d) with respect to any cause of action brought under section 16(b) of the Fair Labor Standards Act of 1938 against a State or a political subdivision of a State in a district court of the United States on or before April 18, 1973, the running of the statutory periods of limitation shall be deemed suspended during the period beginning with the commencement of any such action and ending one hundred and eighty days after the effective date of the Fair Labor Standards Amendments of 1974, except that such suspension shall not be applicable if in such action judgment has been entered for the defendant on the grounds other than State immunity from Federal jurisdiction.<sup>3</sup>*

<sup>1</sup> The final paragraph of section 4(a) was added by section 2102 of the Small Business Job Protection Act of 1996, effective August 20, 1996. Sections 2101, 2102, and 2103 of that Act may be cited as the Employee Commuting Flexibility Act of 1996.

<sup>2</sup> As amended by section 601 of the Fair Labor Standards Amendments of 1966, 80 Stat. 830.

<sup>3</sup> Added by the Fair Labor Standards Amendments of 1974, 88 Stat. 55.

SEC. 7. DETERMINATION OF COMMENCEMENT OF FUTURE ACTIONS. — In determining when an action is commenced for the purposes of section 6, an action commenced on or after the date of the enactment of this Act under the Fair Labor Standards Act of 1938, as amended, the Walsh–Healey Act, or the Bacon–Davis Act, shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended, or the Bacon–Davis Act, it shall be considered to be commenced in the case of any individual claimant —

(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or

(b) if such written consent was not so filed or if his name did not so appear — on the subsequent date on which such written consent is filed in the court in which the action was commenced.

\* \* \* \* \*

SEC. 10. RELIANCE IN FUTURE ON ADMINISTRATIVE RULINGS, ETC. —

(a) In any action or proceeding based on any act or omission on or after the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh–Healey Act, or the Bacon–Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) The agency referred to in subsection (a) shall be —

(1) in the case of the Fair Labor Standards Act of 1938, as amended — the Administrator of the Wage and Hour Division of the Department of Labor;

\* \* \* \* \*

SEC. 11. LIQUIDATED DAMAGES. — In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16<sup>4</sup> of such Act.

\* \* \* \* \*

SEC. 13. DEFINITIONS. —

(a) When the terms “employer,” “employee,” and “wage” are used in this Act in relation to the Fair Labor Standards Act of 1938, as amended, they shall have the same meaning as when used in such Act of 1938.

\* \* \* \* \*

(e) As used in section 6 of the term “State” means any State of the United States or the District of Columbia or any Territory or possession of the United States.

SEC. 14. SEPARABILITY. — If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall not be affected thereby.

SEC. 15. SHORT TITLE. — This Act may be cited as the “Portal-to-Portal Act of 1947.”

Approved May 14, 1947.

<sup>4</sup> The Fair Labor Standards Amendments of 1974 struck “(b)” after “section 16.”

**ADDITIONAL PROVISIONS OF EQUAL PAY ACT OF 1963**  
(77 Stat. 56)

[PUBLIC LAW 88-38]  
[88TH CONGRESS, S. 1409]  
[JUNE 10, 1963]

AN ACT

To prohibit discrimination on account of sex in the payment of wages by employers engaged in commerce or in the production of goods for commerce.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*  
That this Act may be cited as the "Equal Pay Act of 1963."

DECLARATION OF PURPOSE

SEC. 2. (a) The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex —

- (1) depresses wages and living standards for employees necessary for their health and efficiency;
- (2) prevents the maximum utilization of the available labor resources;
- (3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce;
- (4) burdens commerce and the free flow of goods in commerce; and

(5) constitutes an unfair method of competition.

(b) It is hereby declared to be the policy of this Act, through exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct the conditions above referred to in such industries.

[Section 3 of the Equal Pay Act of 1963 amends section 6 of the Fair Labor Standards Act by adding a new subsection (d). The amendment is incorporated in the revised text of the Act.]

EFFECTIVE DATE

SEC. 4. The amendments made by this Act shall take effect upon the expiration of one year from the date of its enactment: *Provided*, That in the case of employees covered by a bona fide collective bargaining agreement in effect at least thirty days prior to the date of enactment of this Act, entered into by a labor organization (as defined in section 6(d)(4) of the Fair Labor Standards Act of 1938, as amended), the amendments made by this Act shall take effect upon the termination of such collective bargaining agreement or upon the expiration of two years from the date of enactment of this Act, whichever shall first occur.

Approved June 10, 1963, 12 m.

# **STANDARDIZATION OF STATE ISSUES TRAINING**

## **INDEPENDENT CONTRACTORS**

## **ARE THEY CONTRACTORS OR EMPLOYEES?**

### ***Why should you care?***

**Gregory Trout, Chief Counsel  
Tina Krueger, Legal Counsel  
Ohio Department of Rehabilitation & Correction**

From assistance to injured employees to housing for the mentally ill to fire code inspections, state government agencies are responsible for a diverse range of services. Every agency has its mission and a set of specialized skills at which they excel and yet every agency needs assistance from time to time with areas outside its expertise. Sometimes the agency needs a person with a highly specialized, professional skill; sometimes the agency wishes to export the responsibility for a specific project to a person or firm outside the agency.

When a contract creates a service provider's duties and functions, the provider is an "independent contractor" and there are certain advantages for the agencies in using contractors. Contracting for service gives an agency greater flexibility in shaping the required functions and responsibilities. Additionally, contracting is an expedient alternative to hiring permanent employees. The results-oriented manager with a special project will see the independent contractor as an efficient tool.

Agencies have historically hired civil service employees to provide service for the state, and statutes, rules, bargaining agreements – even agency traditions, govern the employment duties. State agencies' job duties are not easily changed and the process of hiring a permanent employee is time and resource consuming. However, the administration is able to integrate the work of employees into the agency's operation, rely on them to make policy decisions for the agency and execute the administration's mission.

It is important for the human resources staff to understand the differences between independent contractors and employees. Both offer different functional advantages and disadvantages for the administrator. Administrators may be tempted to treat one group like the other in attempt to have the best of both worlds. Blending the two functions creates a risk for the administrator and the agency, and that risk must be clearly understood.

### **Evolutionary and Static Forces in the Workplace**

Change is a constant force within the agencies. Each agency faces its own pressures to adjust their services to meet changing expectations. The impetus for change may come from a bottom-up quality process team, from an agency director, from a new federal law or from an evolution in professional standards. Whatever the source, the demand for new or a better service motivates the agency's administration to seek change. Occasionally, an agency will seek advice or consultation from an outside entity for a new project and a contract will likely define the resulting relationship.

Agencies may seek expertise in a specialized area, such as the data management field. The agency may seek outside consultants who bring experience that is unavailable within the agency. In some cases, an agency may contract to pay market place compensation rates that are higher than state pay grades for such work. Alternatively, the agency may have traditionally contracted service providers to perform certain functions, and “that’s the way we’ve always done it.”

Agency administrators are more likely to be concerned about getting the job done than studying the relationship with service providers. The agency human resources staff must often point out the risks of ill-defined relationships and can work with the administration to troubleshoot issues. Agency counsel and human resources staff must know how to identify employees and independent contractors and advise the administrators of potential liability.

### **The Consequences of Confusion**

Regardless of the existence of a written contract, an employee will be identified by the nature of the relationship with the agency. The agency that routinely treats its contractors as employees runs several risks. These risks include:

- Federal and state tax penalties<sup>1</sup>
- Payment of Ohio PERS or Social Security contributions
- Payment of Workers’ Compensation and Unemployment Compensation contributions
- Payment of Health Care benefits
- Unions may file Unfair Labor Practice complaints and attempt to include the positions into the Bargaining Units
- Actions for wrongful termination or uncompensated equivalent wages.

The agency must conduct its relationship with its contractors in such a manner that employment is not at issue, or consider converting the contract functions to civil service positions.

### **Defining the relationship**

The relationship between the agency and its contractor is defined by the contract, but only until someone with proper standing questions the relationship. A disgruntled contractor

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<sup>1</sup> If the IRS reclassifies independent contractors as employees, the employer is liable for all unpaid income, FICA and FUTA taxes. I.R.C. §§ 3402, 3102, 3301. In such reclassification cases, however, the employer’s federal tax liability for failure to withhold income taxes is only 1.5 percent of the wages subject to income tax withholding. Employee social security tax is 20 percent of the social security tax withholding. I.R.C. § 3509. The employer remains fully liable for the employer’s portion of the FICA tax and the FUTA tax at the regular rates. For State of Ohio employees, the Department would be obligated to PERS instead of FICA, but percentages are equivalent. Interest is also payable by the employer on unpaid taxes at the statutory rate. I.R.C. § 6601.

Additionally, any responsible person (including corporate officers and employees or members or employees of a partnership) with authority over the financial affairs of the business who *willfully* fails to collect and pay over taxes may be held personally liable for the total amount of the uncollected tax under the “100 percent penalty” provisions of the Internal Revenue Code. I.R.C. § 6672.

with a long history of service may bring a lawsuit to seek retirement benefits as an employee. A union may file an unfair labor practice complaint alleging that the agency is eroding the bargaining unit by contracting away the work of the agency. Alternatively, a tax agency may initiate an audit of the agency to determine whether contractors are actually employees, for whom the agency should deduct tax payments. Once the matter is set before a court or administrative hearing, the judge will evaluate and define the relationship according to the interaction of the parties. The written contract may very well be relevant, but it is not defining.<sup>2</sup> A mutual desire to avoid employment taxes and withholding will not support a label of independent contractor.

The various judicial forums use a variety of tests to identify employment. The common denominator is the degree of control exercised by the employer and the degree of independence exercised by the contractor. An important element often present in case law where courts have found "control" is the ability of the employer to dictate not only the result, but also the process or methods the contractor uses to produce his or her result. The courts examine how, when and where the contractor performs the work. The employer need not actually exercise control. It is sufficient that he has the right to do so.<sup>3</sup> The greater the Employer's control, or right to control, the terms and conditions of the work, the greater the chance that a court will find an employee- employer relationship.

The Ohio Revised Code sets out twenty factors for the Bureau of Workers' Compensation to use when deciding whether a claimant is an independent contractor.<sup>4</sup> The Internal Revenue Service utilizes a similar twenty-point test.<sup>5</sup> The Ohio Supreme Court has stated that when the employer reserves the right to control the manner or means of doing the work employment is found; if the manner or means of doing the work or job is left to one who is responsible for the final result, independence is found.<sup>6</sup> In *Bostic v. Connor* (1988), 37 Ohio St. 3d 144,146, the Ohio Supreme Court held that:

The determination of who has the right to control must be made by examining the individual facts of each case. The factors to be considered include, but are certainly not limited to, such indicia as who controls the details and quality of the work; who controls the hours worked; who selects the materials, tools and personnel used; who selects the routes traveled; the length of employment; the type of business; the method of payment; and any pertinent agreements or contracts.

If an agency administrator begins to dictate the manner and means of contractual performance, the administrator runs the risk of creating an employment relationship. Other employees may pressure administrators to treat contractors similarly to employees. Administrators may introduce controls to assist in documenting the work performance.

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<sup>2</sup> *Gillium v. Industrial Commission* (1943), 141 Ohio St. 373.

<sup>3</sup> IRS Man. 5(10)43.

<sup>4</sup> O.R.C. §4123.01(A)

<sup>5</sup> *American Consulting Corp. v United States*, 454 F.2d 473 (3d Cir. 1971); Rev. Rul.87-41, 1987-1 C.B. 296.

<sup>6</sup> See *Gillium*, supra.

Administrators may also impose controls to provide security at the workplace. For the convenience of the agency, administrators may ask or even require the contractor to perform the work at the agency location. No single factor will decide the analysis; a predominance of control or independence will.

## The IRS Test

The Internal Revenue Service is concerned with determining whether a worker is an independent contractor because employers are required to pay three types of employee taxes. These taxes are required under the Federal Insurance Contributions Act<sup>7</sup> ("FICA"), which governs employer and employee contributions to the Social Security system; the Federal Unemployment Tax Act<sup>8</sup> ("FUTA"), which governs employer contributions to the unemployment fund; and the IRS rules governing employee personal income tax withholding.<sup>9</sup> If the employer categorizes independent contractors incorrectly, and the IRS determines that a worker is actually an employee, the employer may be liable for penalties as well as any unpaid taxes.<sup>10</sup>

In determining whether a worker is an employee or an independent contractor under the common law rules, the IRS has developed a list of twenty factors. The IRS training manual states that the factors are not an objective scoring device, but rather are an analytical aid in determining whether the engaging entity retains the requisite right to control the worker with respect to the means and methods of performance.<sup>11</sup> If an employer-employee relationship exists, the designation or description of the relationship by the parties as anything other than that of an employer and employee is immaterial.<sup>12</sup>

The IRS test consists of the following twenty factors:

1. Whether the individual is required to follow instructions. An independent contractor does not receive instructions from the employer regarding how to accomplish a job.
2. The amount of training required for the individual related to that particular job. An independent contractor does not receive training from the employer.
3. The amount of integration of the individual into the employer's business. The employer's operational ability to be successful should not depend on the service of independent contractors.
4. Whether the individual renders services personally. Because independent contractors are in business for themselves, they have the right to hire others to assist them.
5. Whether the employer hires, fires and pays assistants. Independent contractors retain the right to control the work activities of their assistants.

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<sup>7</sup> 29 U.S.C. § 3121(d)(2)

<sup>8</sup> 26 U.S.C. § 3306(i)

<sup>9</sup> 26 U.S.C. § 3401(c)

<sup>10</sup> *Vizcaino v. Microsoft*, 97 F.3d 1187, 1190-91 (9th Cir. 1996). The I.R.S. investigation resulted in reclassification of Microsoft's free-lance employees as common law employees subject to withholding taxes, FICA tax and overtime pay.

<sup>11</sup> Rev. Rul. 87-41, 1987-1 C.B. 296.

<sup>12</sup> *Id.*

6. The existence of a continuing relationship. Unlike employees, independent contractors generally do not have a continuing working relationship with the employer, although the relationship may be frequent with multiple contracts.
7. The establishment of a set amount of work hours. An independent contractor sets his own work schedule.
8. Whether the individual must devote substantially full time to the job. An independent contractor is free to work when and for whom the individual chooses.
9. Whether the individual works on the employer's premises. Unless physical restrictions dictate that the work cannot be performed off-site, the independent contractor decides where the work is performed.
10. Whether the individual works according to a sequence set by the employer. Independent contractors have control over how to accomplish a result.
11. Whether the individual must submit regular or written reports to the employer. Independent contractors are accountable for accomplishing the objective only; interim and progress reports are not required.
12. How the individual is paid. Employers should compensate independent contractors by the job and not by time increments.
13. Whether the Employer reimburses the individual for expenses. Independent contractors are responsible for their incidental expenses.
14. Whether the individual furnishes the necessary tools and materials. Independent contractors provide their own equipment and tools.
15. Whether the individual has invested in the facilities for performing the services. An independent contractor invests in his own trade and assets.
16. Whether the individual can realize a profit or a loss.
17. Whether the individual works for more than one firm at a time. Independent contractors are free to work for more than one firm at a time.
18. Whether the individual makes his/her services available to the general public. Independent contractors make their services available to the general public.
19. Whether the employer has the right to discharge the individual. An employer cannot terminate an independent contractor at will, but may terminate the relationship for failure to comply with the terms of the contract.
20. Whether the individual has the right to terminate the relationship. Independent contractors are responsible for the completion of a job and are liable for failure to complete the job under the contract.

To determine whether a worker qualifies as an independent contractor, the relationship between the worker and a business is analyzed with the aid of the twenty common law factors to determine whether the requisite control exists. No one factor is decisive. The degree of importance of each factor varies depending on the occupation and factual context of the relationship.<sup>13</sup>

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<sup>13</sup> *American Consulting Corp. v. United States*, 454 F.2d 473, 477 (3d Cir. 1971); Rev. Rul. 87-41, 1987-1 C.B. 296.

### **C. The Fair Labor Standards Act (FLSA) Test**

The FLSA governs the federal minimum wage and overtime pay obligations.<sup>14</sup> Employers cannot reduce these obligations by classifying workers as independent contractors. If the U.S. Department of Labor determines that the workers are employees, the employer may be subject to substantial penalties, from the payment of unpaid overtime premiums to liquidated damages.

The FLSA "economic realities" test focuses on whether an individual is economically dependent on the business with which they contract; or whether the contractor effectively is in business for himself or herself. Unlike the IRS test, the "right of control" under the FLSA is determined by reference to one of six equal factors:

1. The extent to which the services in question are part of the company's business;
2. The amount of the individual's investment in the company's facilities and equipment;
3. The nature and degree of control retained by management;
4. Individual opportunity for profit or loss;
5. The amount of initiative, skill or judgment required;
6. The permanency and duration of the relationship.

### **D. The National Labor Relations Act (NLRA) Test**

The National Labor Relations Act excludes coverage for independent contractors.<sup>15</sup> The National Labor Relations Board ("NLRB") generally applies the "right of control" test to determine whether a worker is an employee entitled to protection under the Act.<sup>16</sup> If the employer retains the right to control how the contractor performs the job, the Board is likely to find an employment relationship. If the employer only controls the result, a finding of independent status is likely. This standard applies in all NLRA contexts, such as protection of concerted activity and the right to vote in representation elections.

### **The Ohio Bureau of Workers Compensation Test**

The Ohio Revised Code sets out twenty factors for identifying "employment." Although the statute references a construction contract, the tests and the underlying concerns are generic. The definition of "employee" in O.R.C. §4123.01 (A)(1) includes:

- (c) Every person who performs labor or provides services pursuant to a construction contract, as defined in section [4123.79](#) of the Revised Code, if at least ten of the following criteria apply:
- (i) The person is required to comply with instructions from the other contracting party regarding the manner or method of performing services;
  - (ii) The person is required by the other contracting party to have particular training;

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<sup>14</sup> 29 U.S.C. § 201.

<sup>15</sup> 29 U.S.C. § 152(3).

<sup>16</sup> See NLRB v. United Insurance Co., 390 U.S. 254, 256 (1968).

- (iii) The person's services are integrated into the regular functioning of the other contracting party;
- (iv) The person is required to perform the work personally;
- (v) The person is hired, supervised, or paid by the other contracting party;
- (vi) A continuing relationship exists between the person and the other contracting party that contemplates continuing or recurring work even if the work is not full time;
- (vii) The person's hours of work are established by the other contracting party;
- (viii) The person is required to devote full time to the business of the other contracting party;
- (ix) The person is required to perform the work on the premises of the other contracting party;
- (x) The person is required to follow the order of work set by the other contracting party;
- (xi) The person is required to make oral or written reports of progress to the other contracting party;
- (xii) The person is paid for services on a regular basis such as hourly, weekly, or monthly;
- (xiii) The person's expenses are paid for by the other contracting party;
- (xiv) The person's tools and materials are furnished by the other contracting party;
- (xv) The person is provided with the facilities used to perform services;
- (xvi) The person does not realize a profit or suffer a loss as a result of the services provided;
- (xvii) The person is not performing services for a number of employers at the same time;
- (xviii) The person does not make the same services available to the general public;
- (xix) The other contracting party has a right to discharge the person;
- (xx) The person has the right to end the relationship with the other contracting party without incurring liability pursuant to an employment contract or agreement.

### **If an Independent Contractor is found to be an Employee**

If the relationship is brought into a formal dispute and a judge or hearing officer decides that the contractor is an employee, a number of unpleasant consequences will occur. The IRS can seek back taxes from the employer, and may seek penalties of up to 35%. State tax penalties may apply.

The "contract" employee may seek benefits consistent with employment status. This would likely involve litigation. The employer may be liable for employment benefits retroactive to the creation of the relationship. The benefits could include employer contributions to the workers' compensation fund, unemployment compensation fund, health insurance benefits and retirement contributions. The employer may have to convert the "adjudicated employees" to civil service employee status. The contractor may have standing to claim unpaid disability or workers compensation, unemployment compensation, and wrongful termination. All of these consequences are likely to be expensive and disruptive.

## What should I do?

You should meet with your agency administrators to identify those service providers working pursuant to contract. Review your contracts and the agency relationships with the providers for indicia of independence and elements of control. Often, it may not be clear whether the worker is a bona fide independent contractor or evolved into employee status.

In cases where control factors exist, meet with the administrators responsible for the contracts to evaluate the extent of any problem. Ensure that the Administrators understand the issues of independence, control and the potential consequences. If administrators are treating contractors as employees, it will be necessary to examine the agency's interests. Should management introduce additional independence into the relationship? Or should the function be converted to employment?

Employment provides more control over the conditions of the worksite, the location and manner of the work performed, and the ability to integrate the service provider in to the organization's management structure. Contracting provides more flexibility in establishing the rate of pay, the scope of work, the length of the relationship, and defines parameters for terminating the relationship. What factors are most important to the agency, and what factors can be "negotiated" with the administration?

If a contractor is preferred, determine which aspects of work performance you can change to enhance independence. One component of strong contract management is to incorporate the IRS factors into written guidelines regarding independent contractors. Constructing practical guidelines is especially difficult for institutional agencies with unique security requirements, but nonetheless, it will place the employer in a more advantageous position for future scrutiny.

Service contracts should include the following:

1. A statement that the contractor is an independent contractor and not an employee, and that the parties understand and intend such a relationship.
2. A statement that the contractor, not the employer, controls how to accomplish the project.
3. A provision for payment by the project, where feasible, and not by increment of hour, day or week.
4. A provision that the contractor supplies all tools and equipment, if possible.
5. A provision specifying termination by either party for breach of contract.
6. A statement that the contractor shall pay all out-of-pocket expenses for the project, such as telephone calls, copying costs and travel.
7. A statement that the contractor shall be responsible to account for all taxes for contractor and contractor's employees.
8. A provision requiring the contractor to provide workers compensation coverage and any other legally required benefits for its employees.
9. A provision expressly exempting the contractor from all employee benefits.
10. An end date for the agreement.

The agency may also explore creative options beyond a full-time permanent employee or a personal service contract. The Ohio Civil Service Code allows for temporary, interim, limited term, part-time or intermittent employees. The agency can create or modify a current employee classification to serve specific agency needs.

The agency may also contract with an employee leasing company. The leasing company is responsible for the workers' payroll and assumes the risk of all employment related liability. The workers are employees of the leasing company. Most leasing firms offer employees a range of benefits that may add to the leasing costs.

Third-party contract and recruiting firms employ workers and assume the liability of the employer. This alternative is most cost efficient when the agency has identified a prospective contractor and recruitment is unnecessary. Contract recruiting firms can also locate, hire and payroll professional workers on a project basis, either temporary or long-term.

Regardless of the alternative pursued, the human resources staff and management must understand the differences between independent contractors and employees. Both offer distinct advantages and disadvantages, which you must balance with agency priorities. Contract language should address all service expectations and articulate a clear understanding between parties. Administrators can only expect from the contractor that which they clearly express within the contract. With an effectively crafted contract, administrators should not need to manage the contractor as they would an employee, thus avoiding the liability of treating a contractor as an employee.

## WORKPLACE SURVEY – A Contract Evaluation Tool

1. Obtain a complete listing of contractors for the agency.
2. Arrange for the contract administrators/supervisors to review the contract relationships broadly for complete independence or some element of control.
3. In cases where there are controls for the administrator, arrange for a review of the twenty factors for each contractor.
4. Ensure that the contract administrator/supervisor understands the issues of independence, control and the potential consequences.
5. Employment provides more control over: the conditions of worksite; the location and manner of work performance; the ability to integrate the service provider into the organization's management structure.
6. Contracting provides more flexibility in: establishing rate of pay; scope of work; hiring for specific expertise; terminating the relationship for unsatisfactory performance.
7. Refer to the twenty-point test below for the complete analysis.
8. For your reference, an IRS survey form is attached to written materials. The agency should use it as a guide to collecting information. Think about what you want and do not want to document.
9. Understand the employer's priorities. In an imperfect world, what is the most important thing? Control? Or an independently produced professional work product?
10. Use the survey results as a discussion tool to assist the executive staff. Consider what the agency priorities are, and which aspects of performance could change to enhance independence if a contract is desirable.

**In conducting your survey, consider this:** Your agency's control of a contractor should be limited to the end product as much as possible, and not how the contractor provides the product. If you have identified contractors who are less than fully independent and are subject to control by the administrator, consider adjusting the contract.

Can you adjust the relationship with the contractor regarding:

- where the work occurs,
- the hours in which the service can occur,
- how the work should be performed,
- whether the contractor supervises or is supervised by civil service employees,
- whether the contractor can provide his or her own assistants,
- whether the contractor can provide his or her own equipment,
- the unit of payment (for service rendered, rather than per hour),
- procedures to be utilized,
- training provided by the state,
- meetings that must be attended,
- the opportunity to subcontract, or
- the nature of services provided, possible to change so that contractors do not perform the same work as civil servants working in the same service area.

Using these factors and the attached test, review your contracts and determine what factors can be modified to justify treatment as a contractor.

If conflicts exist as a result of mixing independence and control factor, then you should consider other options. If the accountability factor is important, you may wish to convert the functions to civil service positions. Another alternative is to totally privatize the entire service area. Perhaps other creative alternatives are available according to the nature of the service.

### **Twenty – Point Test of Employment**

1. Whether the individual is required to **follow instructions**. An independent contractor does not receive instructions from the employer as to how to accomplish a job.
2. The amount of **training** required for the individual related to that particular job. An independent contractor does not receive training from the employer.
3. The amount of **integration** of the individual into the employer's business. The employer's operational ability to be successful does not depend on the service of independent contractors.
4. Whether the individual **renders services personally**. Because independent contractors are in business for themselves, they have the right to hire others to assist them.
5. Whether the employer hires, fires and pays **assistants**. Independent contractors retain the right to control the work activities of their assistants.
6. The existence of a **continuing relationship**. Unlike employees, independent contractors generally do not have a continuing working relationship with the employer, although the relationship may be frequent with multiple contracts.
7. The establishment of a set amount of **work hours**. An independent contractor sets his own work schedule.
8. Whether the individual must devote substantially **full time** to the job. An independent contractor is free to work when and for whom the individual chooses.
9. Whether the individual works on the employer's **premises**. Unless physical restrictions dictate that the work cannot be performed off-site, the independent contractor decides where the work is performed.
10. Whether the individual **works according to a sequence set by the employer**. Independent contractors have control over how to accomplish a result.
11. Whether the individual must submit **regular or written reports** to the employer. Independent contractors are accountable for accomplishing the objective only; interim and progress reports are not required.
12. **How the individual is paid**. Employers should compensate Independent contractors by the job and not by time increments.
13. Whether the Employer reimburses the individual for **expenses**. Independent contractors are responsible for their incidental expenses.
14. Whether the individual furnishes the necessary **tools and materials**. Independent contractors provide their own equipment and tools.
15. Whether the individual has invested in the **facilities** for performing the services. An independent contractor invests in his own trade and assets.

16. Whether the individual can realize a **profit or a loss**.
17. Whether the individual **works for more than one** firm at a time. Independent contractors are free to work for more than one firm at a time.
18. Whether the individual makes his/her services **available to the general public**.  
Independent contractors make their services available to the general public.
19. Whether the employer has the **right to discharge** the individual. An employer cannot terminate an independent contractor at will, but may terminate the relationship for failure to comply with the terms of the contract.
20. Whether the individual has the **right to terminate the relationship**. Independent contractors are responsible for the completion of a job and are liable for failure to complete the job under the contract.

Agency Name:

Agency address:

Employer Identification Number:

Name & Title of person completing questionnaire:

Name(s) of Independent Contractor(s) (**ICs**):

Occupation of Independent Contractor(s) (**ICs**):

Description of Independent Contractor's

(**IC's**) services:

{Please answer all questions. If a question is not applicable, mark it "N.A." If you need more space, use the reverse or attach another sheet.}

**1. INSTRUCTIONS:**

a. What instructions does the Agency give to the ICs concerning the work to be done?

b. Who determines **when** the work is to be done?

c. Who determines **where** the work is to be done?

d. Does the Agency require the ICs to wear or display Agency identification (i.e., uniforms, ID tags, etc.)?

e. Who determines the **order of work** (i.e., the routine, pattern or sequence of work)?

f. Does the Agency have a supervisor at the place of work?

g. Does the Agency ever supervise or monitor the ICs?

h. Does the Agency ever move ICs from one job to another?

i. Does the Agency require the ICs to make periodic oral or written **reports**, updates or call-ins?

j. Does the Agency ever perform IC evaluations or performance **reviews**?

k. Does the Agency require that the ICs obtain Agency **approval** before taking certain actions?

l. Who determines what **tools, equipment & supplies** to use?

m. Who determines where to **purchase** supplies or equipment?

n. Who determines which **workers** to hire to **assist** the ICs with the work?

o. If the ICs hire **assistants**, does the Agency have to approve the assistants before they are hired?

p. Does the Agency ever supervise or give instructions to **assistants** directly?

## 2. TRAINING:

a. Does the Agency provide on-the-job training?

b. Does the Agency provide an orientation about Agency **policies** or **procedures**?

c. Does the Agency offer any continuing education programs?

If yes, who pays the tuition / course fees?

If applicable, who pays for meals / travel/ lodging?

## 3. INVESTMENT:

a. Do the ICs have a **significant investment** in **equipment** (other than hand tools or an automobile), **supplies**, **inventory** or **facilities**? (If yes, please explain)

## 4. BUSINESS EXPENSES:

a. What **equipment, tools & supplies** does the Agency provide?

b. What **equipment, tools & supplies** do the **ICs** provide?

c. Who pays for **repair & maintenance** of equipment?

d. Who pays for **rent & utilities** at the place of work?

e. If **uniforms** are required, who pays for them?

f. If **travel** (other than commuting) is required, who pays for fuel, airfare, meal allowances, lodging, etc.?

g. If **assistants** are needed, who pays their wages?

h. If **licenses** or **permits** are required, who pays the fees and what is the cost?

i. If the ICs are required to have **liability insurance**, who obtains the policies, who pays the premiums and what is the cost?

j. Does the Agency cover the ICs for unemployment for **workers' compensation** purposes?

k. What other expenses does the Agency pay for?

l. What other expenses do the **ICs** pay for?

**5. SERVICES AVAILABLE TO THE RELEVANT MARKET:**

a. While performing services for the Agency, do the ICs represent themselves as though they are with the Agency?

b. Or, while performing services for the Agency, do the ICs hold themselves out to the Agency's inmates & to the Agency's employees as if they are operating their **own trades** or **businesses**?

If yes, please explain how this is demonstrated:

**6. METHOD OF PAYMENT:**

a. How does the Agency pay the ICs (i.e., an **hourly** rate, by the **week**, by the **month**, a **fee** for each job, etc.)?

b. What is the **rate** (i.e., \$10 / hour, \$100 / week, piece-rate, etc.)?

c. Is there more than one method of payment (i.e., an hourly rate for some work & fixed fees for other work)?

**7. PROFIT OR LOSS:**

a. In their work for the Agency, can the ICs experience a **profit** or suffer a **loss** as if they were operating their **own businesses**?

- If yes, how?
- {Financial risk due to significant **investments** & business **expenses** must be present for **profit** or **loss**}

**8. INTENT OF THE PARTIES (WRITTEN CONTRACTS):**

a. Do all of the ICs sign contracts?  
(Three sample contracts have been provided)

b. Must the ICs perform the services **personally**?

c. Or, can the ICs delegate the work to their **assistants** or **subcontract** the work to third parties?

If yes, **when** & to **whom** was work delegated or subcontracted?

If yes, must the Agency approve of assistants or subcontractors?

d. If an IC were to refuse to accept a job, shift or project from the Agency, would this jeopardize assignment of future work?

e. Does the Agency permit the ICs to perform the same services **concurrently** for other agencies / organizations / companies?

If yes, are the ICs treated as **employees** or as **independent contractors** by the other agencies / organizations / companies?

f. Are there any relevant conditions not stated in the contract?

If yes, what are they?

**9. EMPLOYEE BENEFITS:**

a. Do any of the ICs participate in any Agency health insurance, life insurance, deferred compensation or retirement plans?

b. Does the Agency provide paid vacation or sick time?

<p><b>10. DISCHARGE / TERMINATION:</b></p> <p>a. Can the Agency discharge an IC (i.e., can the Agency fire an IC at any time without liability to the IC) ?</p>
<p>b. Or, can an IC <b>not</b> be <b>discharged</b> (i.e., are there <b>breach of contract</b> provisions which prevent early termination)?</p>
<p>c. Does an IC have the right to <b>quit</b> (i.e., can the IC terminate at any time without liability to the Agency)?</p>
<p>d. Or, does an IC <b>not</b> have the right to quit (i.e., does the IC have a contractual obligation to continue providing services)?</p>
<p><b>11. PERMANENCY:</b></p> <p>a. Are the ICs' working relationships with the Agency <b>indefinite/permanent</b> or <b>temporary / short-term</b>?</p>
<p>b. On average, how long have the ICs worked for the Agency (i.e., one <b>week</b>, several <b>months</b>, several <b>years</b>, etc.) ?</p>
<p>c. On average, how much do the ICs work for the Agency (i.e., _____ <b>hours per day</b>, _____ <b>days per week</b>, _____ <b>weeks per year</b>)?</p>
<p><b>12. REGULAR BUSINESS ACTIVITY:</b></p> <p>a. Does the Agency treat any <b>ICs</b> as <b>employees</b>?</p>
<p>b. How many <b>IC's</b> are treated as <b>employees</b> (in 1999 or 2000)?</p>
<p>c. What is the salary or hourly pay rate for <b>employee / IC's</b>?</p>
<p>d. Do <b>employee / ICs</b> sign contracts or are they covered under collective bargaining agreements?</p> <p><b>If yes, please provide a sample contract or agreement.</b></p>
<p>e. What are the differences in working conditions between <b>employee / classification</b> and the <b>IC / classification</b>?</p>
<p>f. Has any <b>IC / worker</b> ever been placed on the Agency's payroll as an <b>employee</b>?</p> <p>If yes, what accounted for the change in status from <b>IC</b> to <b>employee</b>?</p>

g. Has any **employee** ever changed status to an **IC**?

If yes, what accounted for the change in status from **employee** to **IC**?

**13. PART-TIME / FULL-TIME WORK:**

a. Do the ICs work for the Agency **full-time** or **part-time**?

b. Are any of the ICs treated as **employees** for similar **full-time** or **part-time** services for other agencies / organizations / companies?

**14. PLACE OF WORK:**

a. Are the ICs' services performed on Agency premises?

b. Are the ICs' services performed in the **ICs' homes, offices, or shops**?

**15. HOURS OF WORK:**

a. Who sets the hours of work, the Agency or the ICs?

b. If the **ICs** set the hours, must the hours be worked within a period that certain Agency facilities are open?

c. Do the **ICs** agree to work certain **scheduled** hours?

d. Does the Agency keep track of the number of hours worked?

**If yes, please provide a sample document used for this (i.e., a timesheet).**

**SIGNATURE:**

For the Agency

Title

Date

# SERVICE CONTRACT

CONTRACT NO: \_\_\_\_\_ FUND: \_\_\_\_\_ SAC: \_\_\_\_\_

## SECTION A: CONTRACT PARTIES

This Contract is entered into on behalf of the Ohio Department of Rehabilitation and Correction (ODRC) and between the following parties:

Name of Institution, Institutional Grouping, Division, Office, etc.		Address (street, city, state, zip code)	
Name of Independent Contractor	Address (street, city, state, zip code)		Tax I.D. or Soc. Sec. #

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## SECTION B: TYPE OF SERVICE AND EFFECTIVE DATES

The Independent Contractor shall provide \_\_\_\_\_ services as detailed in Section D of this Contract. The term of this Agreement shall commence on \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, as agreed by the parties; or upon the date of approval of the Controlling Board if Controlling Board approval is required. This Agreement shall continue in full force and effect through the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_. Independent Contractor agrees to perform the service as specified in Section D of this Contract. Subject to mutual agreement, this Contract may be extended for a period not to exceed one year. The negotiated agreement must comply with all Ohio Office of Budget and Management requirements.

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## SECTION C: METHOD OF PAYMENT

1. The Independent Contractor agrees to provide all services listed in Section D. Failure to provide listed services is a breach of contract, as defined under section F: Termination.
2. The Independent Contractor agrees that invoicing for the services specified under this Agreement shall not exceed \$ \_\_\_\_\_ for FY \_\_\_\_\_ and \$ \_\_\_\_\_ for FY \_\_\_\_\_.
3. Due to institutional security requirements, available hours to perform services may be limited by inmate availability. The Independent Contractor and ODRC staff will negotiate a mutually agreeable schedule to provide services.
4. The Independent Contractor and ODRC agree that the Independent Contractor shall invoice as services are provided and on a mutually agreed upon schedule. This schedule is for the convenience of the Independent Contractor and represents lump sum payments from their fee for services provided.

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## SECTION D: SERVICES

1. The Independent Contractor agrees to provide the following services: (List all services to be rendered and describe).

2. A. License number \_\_\_\_\_ (for licensed professionals only - put N/A if not applicable):  
B. For Physicians only: Is doctor certified in a specialty or sub-specialty? YES  NO   
If so, indicate area of specialization: \_\_\_\_\_

An Independent Contractor's failure to maintain required licensure is a breach of contract as defined in Section F: Termination.

3. The Independent Contractor recognizes the security requirements for entering a correctional institution and acknowledges receipt of the "Standards of Conduct for Contractors." The Independent Contractor agrees to comply with these standards and with safety rules and procedures. YES  NO
4. The Independent Contractor's ODRC contact person for this Contract is \_\_\_\_\_.  
The contact person is responsible for overseeing compliance and must verify and account for all expenditures of State funds.
5. Due to institutional security requirements, the institutional staff may require the Independent Contractor to utilize a system to document when the Independent Contractor or any of the Independent Contractor's staff are on State property.

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## SECTION E: TERMS AND CONDITIONS

1. The Independent Contractor declares that it is engaged as an independent business and has complied with all federal, state and local laws regarding business permits and licenses of any kind necessary to its business. The Independent Contractor also acknowledges that it is responsible for maintaining any and all professional licensing required to fulfill the Contract. The Independent Contractor shall further provide professional services performed in accordance with community and relevant professional standards. The Independent Contractor acknowledges that it does not have any authority to sign contracts, notes and/or obligations or to make purchases and/or dispose of property for or on behalf of the State.
2. The Independent Contractor understands that he/she/it is exempted from all ODRC employee benefits, including but not limited to: paid holiday, sick, vacation, or personal leave, and health and life insurance. The Independent Contractor may provide assistants, employees, subcontractors and persons required to perform the work who are employees of the Independent Contractor. The Independent Contractor understands and agrees that the Independent Contractor is responsible for providing any required benefits and withholding for the Independent Contractor and the Independent Contractor's employees, including all taxes, workers' compensation, disability, unemployment compensation, any specialized insurance, and any other coverage for liability arising from or occurring during the performance of this Contract. The State shall not be liable for any tax liabilities incurred by the Independent Contractor under this Contract. The Independent Contractor assumes full responsibility for any and all applicable city, state, and/or federal taxes as a result of work and/or payments made under this Contract.
3. If the amount(s) contracted within the ODRC for any Independent Contractor amounts to \$ 75,000 or more within the fiscal year, Controlling Board approval must be obtained before services are rendered pursuant to ORC 127.16.
4. Independent Contractor agrees to complete all documentation requested by the ODRC.
5. The ODRC shall have and will reserve the right to retain ownership of all patents, trademarks, and copyrights to work performed under this Contract by the Independent Contractor unless specifically agreed otherwise.
6. The Independent Contractor will invoice for the services provided as agreed upon in Section D. for the compensable units of service and at the time intervals as described in this agreement. The Independent Contractor is responsible for completing and submitting a contract payment form or invoice as appropriate. The Independent Contractor is responsible for all expenses incurred while performing the Contract.
7. This Contract is not valid unless and until the Director of the Ohio Office of Budget and Management certifies that there are adequate funds available to pay this obligation, as indicated in ORC Section 126.07.
8. If this Contract exceeds \$10,000 or the Independent Contractor holds contracts that total in excess of \$10,000 over a 12-month period, the Independent Contractor agrees to allow the federal government access to the contracts and the books, documents, and records needed to verify the Independent Contractor's and/or Subcontractor's costs.
9. The services to be performed under this Contract shall comply with the requirements set forth under Title VI of the Civil Rights Act of 1964, amended 1972 and Section 504 of the Rehabilitation Act of 1973 which states "...no person shall on the grounds of race, color, national origin, and handicap be excluded from participation in or denied the benefits of, or be otherwise subjected to discrimination under any program or activity."
10. **CERTIFICATION OF DRUG FREE WORKPLACE COMPLIANCE:** The undersigned certifies that, while on State property, he/she and/or all employees will not purchase, transfer onto State property, use or possess illegal drugs or alcohol or abuse prescription drugs in any way. The Independent Contractor agrees that this is a condition of the Contract and that violation constitutes a breach of the Contract.
11. The parties understand and acknowledge that Independent Contractor is entering into a service contract, and is not a Civil Service employee by entering into this Contract. Independent Contractor is not entitled to benefits provided to Civil Service employees.
12. **OHIO ELECTIONS LAW:**  
By signing this Service Contract, the vendor affirms that no party listed in Division (I) or (J) of section 3517.13 of the Ohio Revised Code, or spouse of such party, has made, as an individual, within the past two previous calendar years, one or more contributions totaling in excess of \$1,000.00 to the Governor or to his committees.

## SECTION F: TERMINATION

This Contract may be terminated before its expiration date in any of the following manners:

1. By the parties upon mutual written agreement, within a mutually agreeable time period.
2. ODRC may terminate the Contract with written 60-day advance notice without cause.
3. By either party, if either party fails to perform its required services or other obligations arising under the Contract consistent with the terms herein. Prior to termination under this clause the aggrieved party shall give the other party written notice of its intent to terminate. Any Independent Contractor that fails to perform on a contract may be held liable for damages incurred by ODRC. In addition, an Independent Contractor who breaches a contract or fails to perform on a contract may be precluded from being awarded any subsequent contract for the same or similar service during the biennium covered by this Contract.
4. ODRC may immediately terminate the Contract if the Independent Contractor, subcontractor and/or any individuals employed by the Independent Contractor violates the law or otherwise compromises the security and safety of the work site. The Independent Contractor may be held liable for damages incurred by ODRC.
5. The Independent Contractor understands and agrees that ODRC expressly reserves the right to conduct a background investigation on the Independent Contractor, subcontractor, assistants and any employee required to perform service. An unacceptable background history may, at ODRC's discretion, be grounds to terminate the Contract or reject any unacceptable subcontractors or other individuals performing services under the Contract.

### APPROVAL – INDEPENDENT CONTRACTOR

Signature of Independent Contractor:	Date:	Print Name:
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### APPROVALS – OHIO DEPARTMENT OF REHABILITATION AND CORRECTION

Authorizing Signatures:

ATTESTATION: I hereby attest that there are sufficient funds to cover the cost of this Contract.	
Program Administrator Approval:	Date:

Warden/Department Head:	Date:
Legal Services:	Date:
Deputy Director, Administration:	Date:
Director, Ohio Department of Rehabilitation and Correction:	Date:

## ARE THEY CONTRACTORS OR EMPLOYEES?

Why Should You Care?



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## WHEN DUTIES AND FUNCTIONS ARE CREATED BY A CONTRACT

- Provider is considered an “independent contractor”

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## ADVANTAGES OF USING A CONTRACTOR

- Flexibility
  - Shaping the functions and responsibilities
- Quicker
  - Retain contractor than to hire an employee

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## CIVIL SERVICE EMPLOYEES

- Employment job duties are governed by:
  - Statutes
  - Rules
  - Bargaining agreements
  - Agency's traditions

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## JOB DUTIES ARE NOT QUICKLY NOR EASILY CHANGED

- HIRING
  - Hiring of permanent employee is very time consuming



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## EMPLOYEES ARE INTREGATED INTO THE AGENCY'S OPERATION

- Administration relies upon the employees to make:
  - Policy decisions for the agency
  - Execute the administration's mission

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## DIFFERENCES BETWEEN INDEPENDENT CONTRACTORS AND EMPLOYEES

- ✓ Both offer advantages and disadvantages in terms of their proper function

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## BLENDING THE TWO FUNCTIONS CREATES A RISK



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## CHANGE

- Impetus for change may come from:
  - Quality Process Team
  - Agency Director
  - Law
  - Professional Evolution

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## OUTSIDE ENTITY

Advice or Consultation  Contract



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## SPECIALIZED AREA OF EXPERTISE

- Experience
  - ✓ Unavailable within the agency
- Market place rates of compensation
  - ✓ Higher than state pay grades for such work
- Traditional Functions
  - ✓ Utilized to perform certain functions

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## AGENCY COUNSEL AND HUMAN RESOURCES

- Staff must point out the risks of ill - defined relationships



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## COUNSEL AND HUMAN RESOURCE STAFF MUST IDENTIFY

- Employees and **Independent Contractors**



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## COUNSEL AND HUMAN RESOURCE STAFF MUST ADVISE ADMINISTRATORS OF POTENTIAL PROBLEMS



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## THE CONSEQUENCES OF CONFUSION

- Regardless of a written contract, an employee can be identified by the nature of the relationship with the agency



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## CONTRACTORS AS EMPLOYEES

✓ Risks:

- Federal and State tax penalties
- Payment of PERS contributions
- Payment of Worker's Compensation contributions
- Payment of Health Care benefits
- Unfair Labor Practice complaints

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## DEFINING THE RELATIONSHIP

- Relationship defined by the contract, only until challenged



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## MAY BE RELEVANT, BUT NOT DEFINING



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## VARIATION OF TEST TO IDENTIFY EMPLOYMENT

- The degree of control exercised by the employer
- Degree of independence exercised by the one performing the work

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- OHIO REVISED CODE
  - Twenty factors prescribed for the Bureau of Worker's Compensation.  
(4123.01) of the Ohio Revised Code
- OHIO SUPREME COURT
  - Control of the manner or means

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## DETERMINATION

- By the individual facts of each case
  - The manner and means of contract duties
  - Risk of creating an employment relationship

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## IF AN INDEPENDENT CONTRACTOR IS FOUND TO BE AN EMPLOYEE

- The IRS can seek back taxes and penalties
- State tax penalties
- Employee may seek employment benefits
- Litigation
- Benefits may be retroactive to the creation of the relationship

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Contributions to the worker's compensation fund

Health insurance benefits

Retirement contributions

Converted to civil service employee status

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## WHAT SHOULD I DO?

- Identify service providers working pursuant to contract
- Review contracts and the agency relationships

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## Problems?

- Contact responsible supervisor to determine if problems exist

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## IF CONTRACTORS ARE BEING TREATED LIKE EMPLOYEES

- Examine the agency's interest
- Additional independence converted to employment
- What factors can be "negotiated" with the administration?

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## Independent Contractor V. Employee

- Greg Trout, Chief Legal Counsel  
Ohio Department of Rehabilitation and  
Correction
- Tina Krueger, Legal Counsel  
Ohio Department of Rehabilitation and  
Correction

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### The IRS Test

- Courts generally will find an employment relationship exists if the employer "controls" the "process of work."
- Conversely, the courts will generally find an independent contractor relationship if the employer dictates only "the end result" of the work.

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- The courts examine how, when and where the work is performed.
- The employer need not actually exercise control. It is sufficient that he has the right to do so. IRS man. 5(10)43.

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- The IRS test consists of twenty factors.  
Rev. Rul. 87-41, 1987-1 C.B. 296.
- No one factor is decisive.
- The degree of importance of each factor varies depending on the occupation and factual context of the relationship.  
*American consulting corp. V. United states*, 454 F.2d 473, 477 (3d cir. 1971); rev. Rul. 87-41, 1987-1 C.B. 296.

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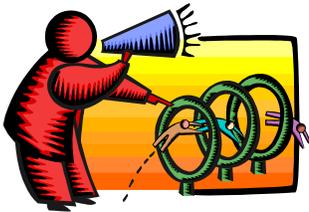
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Whether the individual is required to follow instructions.



- An independent contractor does not receive instructions from the employer as to how to accomplish a job.

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- The amount of training required for the particular job.
- An independent contractor does not receive training from the employer.

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- The amount of integration of the individual into the employer's business.



- The employer's operational ability to be successful does not depend on the service of independent contractors

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- Whether the individual renders services personally.
- Because independent contractors are in business for themselves, they have the right to hire assistants.

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- Whether the employer hires, fires and pays assistants.
- Independent contractors retain the right to control the work activities of their assistants.



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- The existence of a continuing relationship.
- Unlike employees, independent contractors generally do not have a continuing working relationship with the employer, although the relationship may be frequent with multiple contracts.

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- The establishment of a set amount of work hours. An independent contractor sets his own work schedule.

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- Whether the individual must devote substantially full time to the job.
- An independent contractor is free to work when and for whom the individual chooses.



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- Whether the individual works on the employer's premises.
- Unless physical restrictions dictate that the work cannot be performed off-site, the independent contractor decides where the work is performed.

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- Whether the individual works according to a sequence or method set by the employer.
- Independent contractors have control over how a result is accomplished.

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Whether the individual must submit regular or written reports to the employer.



- Independent contractors are accountable for accomplishing the objective only; interim and progress reports are not required.

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- How the individual is paid. Independent contractors are paid by the job and are not compensated by time increments.

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Whether the individual is reimbursed for expenses.



- Independent contractors are responsible for their incidental expenses.

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- Whether the individual furnishes the necessary tools and materials.
- Independent contractors provide their own equipment and tools.

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- Whether the individual has invested in the facilities for performing the services.
- An independent contractor's investments in his own trade is essential and adequate.

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- Whether the individual can realize a profit or a loss.



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- Whether the individual works for more than one firm at a time.
- Independent contractors are free to work for more than one firm at a time.

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Whether the individual makes his/her services available to the general public.



- Independent contractors make their services available to the general public.

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- Whether the employer has the right to discharge the individual.
- An independent contractor is not terminable at will, but may be terminated only for failure to comply with the terms of the contract.

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- Whether the individual has the right to terminate the relationship.
- Independent contractors are responsible for the completion of a job and are liable for failure to complete the job under the contract.

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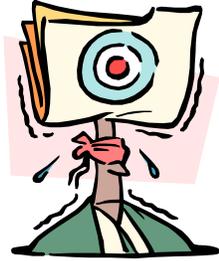
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**The End**

*Thank you!*



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## **IRS CODE**

### **TITLE 26, Subtitle C, CHAPTER 21, Subchapter C,**

#### **Sec. 3121(d) Employee:**

For purposes of this chapter, the term "employee" means -

- (1)** any officer of a corporation; or
- (2)** any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or
- (3)** any individual (other than an individual who is an employee under paragraph (1) or (2)) who performs services for remuneration for any person -
  - (A)** as an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or dry-cleaning services, for his principal;
  - (B)** as a full-time life insurance salesman;
  - (C)** as a home worker performing work, according to specifications furnished by the person for whom the services are performed, on materials or goods furnished by such person which are required to be returned to such person or a person designated by him; or
  - (D)** as a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for side-line sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations; if the contract of service contemplates that substantially all of such services are to be performed personally by such individual; except that an individual shall not be included in the term "employee" under the provisions of this paragraph if such individual has a substantial investment in facilities used in connection with the performance of such services (other than in facilities for transportation), or if the services are in the nature of a single transaction not part of a continuing relationship with the person for whom the services are performed; or
- (4)** any individual who performs services that are included under an agreement entered into pursuant to section 218 of the Social Security Act.

# **The IRS “Twenty Factor” Ruling on Contractors vs. Employee**

**Rev. Rul. 87-41  
1987-1 C.B. 296.  
Internal Revenue Service  
Revenue Ruling**

## **EMPLOYMENT STATUS UNDER SECTION 530(D) OF THE REVENUE ACT OF 1978**

**Published: 1987**

**Section 3121.-Definitions, 26 CFR 31.3121(d)-1: Who are employees.**

(Also Sections 3306, 3401; 31.3306(i)-1, 31.3401(c)-1.)

Employment status under section 530(d) of the Revenue Act of 1978. Guidelines are set forth for determining the employment status of a taxpayer (technical service specialist) affected by section 530(d) of the Revenue Act of 1978, as added by section 1706 of the Tax Reform Act of 1986. The specialists are to be classified as employees under generally applicable common law standards.

### **ISSUE**

In the situations described below, are the individuals employees under the common law rules for purposes of the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), and the Collection of Income Tax at Source on Wages (chapters 21, 23, and 24 respectively, subtitle C, Internal Revenue Code)? These situations illustrate the application of section 530(d) of the Revenue Act of 1978, 1978-3 (Vol. 1) C.B. xi, 119 (the 1978 Act), which was added by section 1706(a) of the Tax Reform Act of 1986, 1986-3 (Vol. 1) C.B. \_\_\_\_ (the 1986 Act) (generally effective for services performed and remuneration paid after December 31, 1986).

### **FACTS**

In each factual situation, an individual worker (Individual), pursuant to an arrangement between one person (Firm) and another person (Client), provides services for the Client as an engineer, designer, drafter, computer programmer, systems analyst, or other similarly skilled worker engaged in a similar line of work.

### **SITUATION 1**

The Firm is engaged in the business of providing temporary technical services to its clients. The Firm maintains a roster of workers who are available to provide technical services to prospective clients. The Firm does not train the workers but determines the services that the workers are qualified to perform based on information submitted by the workers.

The Firm has entered into a contract with the Client. The contract states that the Firm is to provide the Client with workers to perform computer programming

services meeting specified qualifications for a particular project. The Individual, a computer programmer, enters into a contract with the Firm to perform services as a computer programmer for the Client's project, which is expected to last less than one year. The Individual is one of several programmers provided by the Firm to the Client. The Individual has not been an employee of or performed services for the Client (or any predecessor or affiliated corporation of the Client) at any time preceding the time at which the Individual begins performing services for the Client. Also, the Individual has not been an employee of or performed services for or on behalf of the Firm at any time preceding the time at which the Individual begins performing services for the Client. The Individual's contract with the Firm states that the Individual is an independent contractor with respect to services performed on behalf of the Firm for the Client.

The Individual and the other programmers perform the services under the Firm's contract with the Client. During the time the Individual is performing services for the Client, even though the Individual retains the right to perform services for other persons, substantially all of the Individual's working time is devoted to performing services for the Client. A significant portion of the services are performed on the Client's premises. The Individual reports to the Firm by accounting for time worked and describing the progress of the work. The Firm pays the Individual and regularly charges the Client for the services performed by the Individual. The Firm generally does not pay individuals who perform services for the Client unless the Firm provided such individuals to the Client.

The work of the Individual and other programmers is regularly reviewed by the Firm. The review is based primarily on reports by the Client about the performance of these workers. Under the contract between the Individual and the Firm, the Firm may terminate its relationship with the Individual if the review shows that he or she is failing to perform the services contracted for by the Client. Also, the Firm will replace the Individual with another worker if the Individual's services are unacceptable to the Client. In such a case, however, the Individual will nevertheless receive his or her hourly pay for the work completed.

Finally, under the contract between the Individual and the Firm, the Individual is prohibited from performing services directly for the Client and, under the contract between the Firm and the Client, the Client is prohibited from receiving services from the Individual for a period of three months following the termination or services by the Individual for the Client on behalf of the Firm.

## **SITUATION 2**

The Firm is a technical services firm that supplies clients with technical personnel. The Client requires the services of a systems analyst to complete a project and contacts the Firm to obtain such an analyst. The Firm maintains a roster of analysts and refers such an analyst, the Individual, to the Client. The Individual is not restricted by the Client or the Firm from providing services to the general public while performing services for the Client and in fact does perform

substantial services for other persons during the period the Individual is working for the Client. Neither the Firm nor the Client has priority on the services of the Individual. The Individual does not report, directly or indirectly, to the Firm after the beginning of the assignment to the Client concerning (1) hours worked by the Individual, (2) progress on the job, or (3) expenses incurred by the Individual in performing services for the Client. No reports (including reports of time worked or progress on the job) made by the Individual to the Client are provided by the Client to the Firm.

If the Individual ceases providing services for the Client prior to completion of the project or if the Individual's work product is otherwise unsatisfactory, the Client may seek damages from the Individual. However, in such circumstances, the Client may not seek damages from the Firm, and the Firm is not required to replace the Individual. The Firm may not terminate the services of the Individual while he or she is performing services for the Client and may not otherwise affect the relationship between the Client and the Individual. Neither the Individual nor the Client is prohibited for any period after termination of the Individual's services on this job from contracting directly with the other.

For referring the Individual to the Client, the Firm receives a flat fee that is fixed prior to the Individual's commencement of services for the Client and is unrelated to the number of hours and quality of work performed by the Individual. The Individual is not paid by the Firm either directly or indirectly. No payment made by the Client to the Individual reduces the amount of the fee that the Client is otherwise required to pay the Firm. The Individual is performing services that can be accomplished without the Individual's receiving direction or control as to hours, place of work, sequence, or details of work.

### **SITUATION 3**

The Firm, a company engaged in furnishing client firms with technical personnel, is contacted by the Client, who is in need of the services of a drafter for a particular project, which is expected to last less than one year. The Firm recruits the Individual to perform the drafting services for the Client. The Individual performs substantially all of the services for the Client at the office of the Client, using materials and equipment of the Client. The services are performed under the supervision of employees of the Client. The Individual reports to the Client on a regular basis. The Individual is paid by the Firm based on the number of hours the Individual has worked for the Client, as reported to the Firm by the Client or as reported by the Individual and confirmed by the Client.

The Firm has no obligation to pay the Individual if the Firm does not receive payment for the Individual's services from the Client. For recruiting the Individual for the Client, the Firm receives a flat fee that is fixed prior to the Individual's commencement of services for the Client and is unrelated to the number of hours and quality of work performed by the Individual. However, the Firm does receive a reasonable fee for performing the payroll function. The Firm may not direct the

work of the Individual and has no responsibility for the work performed by the Individual. The Firm may not terminate the services of the Individual. The Client may terminate the services of the Individual without liability to either the Individual or the Firm. The Individual is permitted to work for another firm while performing services for the Client, but does in fact work for the Client on a substantially full-time basis.

## **LAW AND ANALYSIS**

This ruling provides guidance concerning the factors that are used to determine whether an employment relationship exists between the Individual and the Firm for federal employment tax purposes and applies those factors to the given factual situations to determine whether the Individual is an employee of the Firm for such purposes. The ruling does not reach any conclusions concerning whether an employment relationship for federal employment tax purposes exists between the Individual and the Client in any of the factual situations.

Analysis of the preceding three fact situations requires an examination of the common law rules for determining whether the Individual is an employee with respect to either the Firm or the Client, a determination of whether the Firm or the Client qualifies for employment tax relief under section 530(a) of the 1978 Act, and a determination of whether any such relief is denied the Firm under section 530(d) of the 1978 Act (added by Section 1706 of the 1986 Act).

An individual is an employee for federal employment tax purposes if the individual has the status of an employee under the usual common law rules applicable in determining the employer-employee relationship. Guides for determining that status are found in the following three substantially similar sections of the Employment Tax Regulations: sections 31.3121(d)-1(c); 31.3306(i)-1; and 31.3401(c)-1.

These sections provide that generally the relationship of employer and employee exists when the person or persons for whom the services are performed have the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but as to how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so.

Conversely, these sections provide, in part, that individuals (such as physicians, lawyers, dentists, contractors, and subcontractors) who follow an independent trade, business, or profession, in which they offer their services to the public, generally are not employees.

Finally, if the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such a relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

As an aid to determining whether an individual is an employee under the common law rules, twenty factors or elements have been identified as indicating whether sufficient control is present to establish an employer-employee relationship. The twenty factors have been developed based on an examination of cases and rulings considering whether an individual is an employee. The degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed. The twenty factors are designed only as guides for determining whether an individual is an employee; special scrutiny is required in applying the twenty factors to assure that formalistic aspects of an arrangement designed to achieve a particular status do not obscure the substance of the arrangement (that is, whether the person or persons for whom the services are performed exercise sufficient control over the individual for the individual to be classified as an employee). The twenty factors are described below:

1. INSTRUCTIONS. A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the RIGHT to require compliance with instructions. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

2. TRAINING. Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. See Rev. Rul. 70-630, 1970-2 C.B. 229.

3. INTEGRATION. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. See *United States v. Silk*, 331 U.S. 704 (1947), 1947-2 C.B. 167.

4. SERVICES RENDERED PERSONALLY. If the Services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. See Rev. Rul. 55-695, 1955-2 C.B. 410.

5. **HIRING, SUPERVISING, AND PAYING ASSISTANTS.** If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status. Compare Rev. Rul. 63-115, 1963-1 C.B. 178, with Rev. Rul. 55-593 1955-2 C.B. 610.

6. **CONTINUING RELATIONSHIP.** A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals. See *United States v. Silk*.

7. **SET HOURS OF WORK.** The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. See Rev. Rul. 73-591, 1973-2 C.B. 337.

8. **FULL TIME REQUIRED.** If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work. An independent contractor on the other hand, is free to work when and for whom he or she chooses. See Rev. Rul. 56-694, 1956-2 C.B. 694.

9. **DOING WORK ON EMPLOYER'S PREMISES.** If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Rev. Rul. 56-660, 1956-2 C.B. 693. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. See Rev. Rul. 56-694.

10. **ORDER OR SEQUENCE SET.** If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show

control, however, if such person or persons retain the right to do so. See Rev. Rul. 56-694.

11. ORAL OR WRITTEN REPORTS. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. See Rev. Rul. 70-309, 1970-1 C.B. 199, and Rev. Rul. 68-248, 1968-1 C.B. 431.

12. PAYMENT BY HOUR, WEEK, MONTH. Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on § straight commission generally indicates that the worker is an independent contractor. See Rev. Rul. 74-389, 1974-2 C.B. 330.

13. PAYMENT OF BUSINESS AND/OR TRAVELING EXPENSES. If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities. See Rev. Rul. 55-144, 1955-1 C.B. 483.

14. FURNISHING OF TOOLS AND MATERIALS. The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. See Rev. Rul. 71-524, 1971-2 C.B. 346.

15. SIGNIFICANT INVESTMENT. If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship. See Rev. Rul. 71-524. Special scrutiny is required with respect to certain types of facilities, such as home offices.

16. REALIZATION OF PROFIT OR LOSS. A worker who can realize a profit or suffer a loss as a result of the worker's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee. See Rev. Rul. 70-309. For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and thus does not

constitute a sufficient economic risk to support treatment as an independent contractor.

17. **WORKING FOR MORE THAN ONE FIRM AT A TIME.** If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. See Rev. Rul. 70-572, 1970-2 C.B. 221. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.

18. **MAKING SERVICE AVAILABLE TO GENERAL PUBLIC.** The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship. See Rev. Rul. 56-660.

19. **RIGHT TO DISCHARGE.** The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications. Rev. Rul. 75-41, 1975-1 C.B. 323.

20. **RIGHT TO TERMINATE.** If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship. See Rev. Rul. 70-309.

Rev. Rul. 75-41 considers the employment tax status of individuals performing services for a physician's professional service corporation. The corporation is in the business of providing a variety of services to professional people and firms (subscribers), including the services of secretaries, nurses, dental hygienists, and other similarly trained personnel. The individuals who are to perform the services are recruited by the corporation, paid by the corporation, assigned to jobs, and provided with employee benefits by the corporation. Individuals who enter into contracts with the corporation agree they will not contract directly with any subscriber to which they are assigned for at least three months after cessation of their contracts with the corporation. The corporation assigns the individual to the subscriber to work on the subscriber's premises with the subscriber's equipment. Subscribers have the right to require that an individual furnished by the corporation cease providing services to them, and they have the further right to have such individual replaced by the corporation within a reasonable period of time, but the subscribers have no right to affect the contract between the individual and the corporation. The corporation retains the right to discharge the

individuals at any time. Rev. Rul. 75-41 concludes that the individuals are employees of the corporation for federal employment tax purposes.

Rev. Rul. 70-309 considers the employment tax status of certain individuals who perform services as oil well pumpers for a corporation under contracts that characterize such individuals as independent contractors. Even though the pumpers perform their services away from the headquarters of the corporation and are not given day-to-day directions and instructions, the ruling concludes that the pumpers are employees of the corporation because the pumpers perform their services pursuant to an arrangement that gives the corporation the right to exercise whatever control is necessary to assure proper performance of the services; the pumpers' services are both necessary and incident to the business conducted by the corporation; and the pumpers are not engaged in an independent enterprise in which they assume the usual business risks, but rather work in the course of the corporation's trade or business. See also Rev. Rul. 70-630, 1970-2 C.B. 229, which considers the employment tax status of sales clerks furnished by an employee service company to a retail store to perform temporary services for the store.

Section 530(a) of the 1978 Act, as amended by section 269(c) of the Tax Equity and Fiscal Responsibility Act of 1982, 1982-2 C.B. 462, 536, provides, for purposes of the employment taxes under subtitle C of the Code, that if a taxpayer did not treat an individual as an employee for any period, then the individual shall be deemed not to be an employee, unless the taxpayer had no reasonable basis for not treating the individual as an employee. For any period after December 31, 1978, this relief applies only if both of the following consistency rules are satisfied: (1) all federal tax returns (including information returns) required to be filed by the taxpayer with respect to the individual for the period are filed on a basis consistent with the taxpayer's treatment of the individual as not being an employee ('reporting consistency rule'), and (2) the taxpayer (and any predecessor) has not treated any individual holding a substantially similar position as an employee for purposes of the employment taxes for periods beginning after December 31, 1977 ('substantive consistency rule').

The determination of whether any individual who is treated as an employee holds a position substantially similar to the position held by an individual whom the taxpayer would otherwise be permitted to treat as other than an employee for employment tax purposes under section 530(a) of the 1978 Act requires an examination of all the facts and circumstances, including particularly the activities and functions performed by the individuals. Differences in the positions held by the respective individuals that result from the taxpayer's treatment of one individual as an employee and the other individual as other than an employee (for example, that the former individual is a participant in the taxpayer's qualified pension plan or health plan and the latter individual is not a participant in either) are to be disregarded in determining whether the individuals hold substantially similar positions.

Section 1706(a) of the 1986 Act added to section 530 of the 1978 Act a new subsection (d), which provides an exception with respect to the treatment of certain workers. Section 530(d) provides that section 530 shall not apply in the case of an individual who, pursuant to an arrangement between the taxpayer and another person, provides services for such other person as an engineer, designer, drafter, computer programmer, systems analyst, or other similarly skilled worker engaged in a similar line of work. Section 530(d) of the 1978 Act does not affect the determination of whether such workers are employees under the common law rules. Rather, it merely eliminates the employment tax relief under section 530(a) of the 1978 Act that would otherwise be available to a taxpayer with respect to those workers who are determined to be employees of the taxpayer under the usual common law rules. Section 530(d) applies to remuneration paid and services rendered after December 31, 1986.

The Conference Report on the 1986 Act discusses the effect of section 530(d) as follows:

The Senate amendment applies whether the services of [technical service workers] are provided by the firm to only one client during the year or to more than one client, and whether or not such individuals have been designated or treated by the technical services firm as independent contractors, sole proprietors, partners, or employees of a personal service corporation controlled by such individual. The effect of the provision cannot be avoided by claims that such technical service personnel are employees of personal service corporations controlled by such personnel. For example, an engineer retained by a technical services firm to provide services to a manufacturer cannot avoid the effect of this provision by organizing a corporation that he or she controls and then claiming to provide services as an employee of that corporation.

\* \* \* [T]he provision does not apply with respect to individuals who are classified, under the generally applicable common law standards, as employees of a business that is a client of the technical services firm.

2 H. R. Rep. No. 99-841 (Conf. Rep.), 99th Cong., 2d Sess. II-834 to 835 (1986). Under the facts of Situation 1 the legal relationship is between the Firm and the Individual, and the Firm retains the right of control to insure that the services are performed in a satisfactory fashion. The fact that the Client may also exercise some degree of control over the Individual does not indicate that the Individual is not an employee.

Therefore, in Situation 1, the Individual is an employee of the Firm under the common law rules. The facts in Situation 1 involve an arrangement among the Individual, Firm, and Client, and the services provided by the Individual are technical services. Accordingly, the Firm is denied section 530 relief under section 530(d) of the 1978 Act (as added by section 1706 of the 1986 Act), and no relief is available with respect to any employment tax liability incurred in Situation 1. The analysis would not differ if the acts of Situation 1 were changed

to state that the Individual provided the technical services through a personal service corporation owned by the Individual.

In Situation 2, the Firm does not retain any right to control the performance of the services by the Individual and, thus, no employment relationship exists between the Individual and the Firm.

In Situation 3, the Firm does not control the performance of the services of the Individual, and the Firm has no right to affect the relationship between the Client and the Individual. Consequently, no employment relationship exists between the Firm and the Individual.

## **HOLDINGS**

**SITUATION 1.** The Individual is an employee of the Firm under the common law rules. Relief under section 530 of the 1978 Act is not available to the Firm because of the provisions of section 530(d).

**SITUATION 2.** The Individual is not an employee of the Firm under the common law rules.

**SITUATION 3.** The Individual is not an employee of the Firm under the common law rules.

Because of the application of section 530(b) of the 1978 Act, no inference should be drawn with respect to whether the Individual in Situations 2 and 3 is an employee of the Client for federal employment tax purposes.

Rev. Rul. 87-41, 1987-1 C.B. 296

ORC 4123.01(A)

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TITLE XLI [41] LABOR AND INDUSTRY

CHAPTER 4123: WORKERS' COMPENSATION

**GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

ORC Ann. 4123.01 (Anderson 2001)

§ 4123.01 Definitions.

As used in this chapter:

(A)(1) "Employee" means:

(a) Every person in the service of the state, or of any county, municipal corporation, township, or school district therein, including regular members of lawfully constituted police and fire departments of municipal corporations and townships, whether paid or volunteer, and wherever serving within the state or on temporary assignment outside thereof, and executive officers of boards of education, under any appointment or contract of hire, express or implied, oral or written, including any elected official of the state, or of any county, municipal corporation, or township, or members of boards of education.

As used in division (A)(1)(a) of this section, the term "regular members of lawfully constituted police and fire departments" includes the following persons when the person responds to an inherently dangerous situation that calls for an immediate response on the part of the person, regardless of whether the person is within the limits of the jurisdiction of the person's regular employment or voluntary service when responding, on the condition that the person responds to the situation as the person otherwise would if the person were on duty in the person's jurisdiction.

(i) Off-duty peace officers. As used in division (A)(1)(a)(i) of this section, "peace officer" means a member of the organized police department of any municipal corporation, including a member of the organized police department of a municipal corporation in an adjoining state serving in Ohio under a contract pursuant to section 737.04 of the Revised Code, member of a police force employed by a metropolitan housing authority under division (D) of section 3735.31 of the Revised Code, member of a police force employed by a regional transit authority under division (Y) of section 306.05 of the Revised Code, state university law enforcement officer appointed under section 3345.04 of the Revised Code, Ohio veterans' home police officer appointed under section 5907.02 of the Revised Code, police constable of any township, police officer of a township or joint township police

district, state highway patrol trooper, and member of a qualified nonprofit corporation police department established pursuant to section 1702.80 of the Revised Code.

As used in division (A)(1)(a) of this section with respect to off-duty peace officers, "jurisdiction" means the limits of the municipal corporation, township, metropolitan housing authority housing project, regional transit authority facilities or areas of a municipal corporation that have been agreed to by a regional transit authority and a municipal corporation located within its territorial jurisdiction, college, university, or Ohio veterans' home in which the peace officer is appointed, employed, or elected.

(ii) Off-duty firefighters, whether paid or volunteer, of a lawfully constituted fire department. As used in division (A)(1)(a) of this section with respect to off-duty firefighters, "jurisdiction" means the limits of the political subdivision, joint ambulance district, fire district, or joint fire district in which the firefighter is appointed or employed.

(iii) Off-duty first responders, emergency medical technicians-basic, emergency medical technicians-intermediate, or emergency medical technicians-paramedic, whether paid or volunteer, of an ambulance service organization or emergency medical service organization pursuant to Chapter 4765. of the Revised Code. As used in division (A)(1)(a) of this section with respect to off-duty first responders and emergency medical technicians, "jurisdiction" means the limits of the political subdivision or joint ambulance district in which the first responder or emergency medical technician is employed or volunteers as a first responder or emergency medical technician.

(b) Every person in the service of any person, firm, or private corporation, including any public service corporation, that (i) employs one or more persons regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens and minors, household workers who earn one hundred sixty dollars or more in cash in any calendar quarter from a single household and casual workers who earn one hundred sixty dollars or more in cash in any calendar quarter from a single employer, or (ii) is bound by any such contract of hire or by any other written contract, to pay into the state insurance fund the premiums provided by this chapter.

(c) Every person who performs labor or provides services pursuant to a construction contract, as defined in section 4123.79 of the Revised Code, if at least ten of the following criteria apply:

(i) The person is required to comply with instructions from the other contracting party regarding the manner or method of performing services;

(ii) The person is required by the other contracting party to have particular training;

(iii) The person's services are integrated into the regular functioning of the other contracting party;

(iv) The person is required to perform the work personally;

(v) The person is hired, supervised, or paid by the other contracting party;

(vi) A continuing relationship exists between the person and the other contracting party that contemplates continuing or recurring work even if the work is not full time;

(vii) The person's hours of work are established by the other contracting party;

- (viii) The person is required to devote full time to the business of the other contracting party;
- (ix) The person is required to perform the work on the premises of the other contracting party;
- (x) The person is required to follow the order of work set by the other contracting party;
- (xi) The person is required to make oral or written reports of progress to the other contracting party;
- (xii) The person is paid for services on a regular basis such as hourly, weekly, or monthly;
- (xiii) The person's expenses are paid for by the other contracting party;
- (xiv) The person's tools and materials are furnished by the other contracting party;
- (xv) The person is provided with the facilities used to perform services;
- (xvi) The person does not realize a profit or suffer a loss as a result of the services provided;
- (xvii) The person is not performing services for a number of employers at the same time;
- (xviii) The person does not make the same services available to the general public;
- (xix) The other contracting party has a right to discharge the person;
- (xx) The person has the right to end the relationship with the other contracting party without incurring liability pursuant to an employment contract or agreement.

Every person in the service of any independent contractor or subcontractor who has failed to pay into the state insurance fund the amount of premium determined and fixed by the administrator of workers' compensation for the person's employment or occupation or if a self-insuring employer has failed to pay compensation and benefits directly to the employer's injured and to the dependents of the employer's killed employees as required by section 4123.35 of the Revised Code, shall be considered as the employee of the person who has entered into a contract, whether written or verbal, with such independent contractor unless such employees or their legal representatives or beneficiaries elect, after injury or death, to regard such independent contractor as the employer.

(2) "Employee" does not mean:

- (a) A duly ordained, commissioned, or licensed minister or assistant or associate minister of a church in the exercise of ministry; or
- (b) Any officer of a family farm corporation.

Any employer may elect to include as an "employee" within this chapter, any person excluded from the definition of "employee" pursuant to division (A)(2) of this section. If an employer is a partnership, sole proprietorship, or family farm corporation, such employer may elect to include as an "employee" within this chapter, any member of such partnership, the owner of the sole proprietorship, or the officers of the family farm corporation. In the event of an election, the employer shall serve upon the bureau of

workers' compensation written notice naming the persons to be covered, include such employee's remuneration for premium purposes in all future payroll reports, and no person excluded from the definition of "employee" pursuant to division (A)(2) of this section, proprietor, or partner shall be deemed an employee within this division until the employer has served such notice.

For informational purposes only, the bureau shall prescribe such language as it considers appropriate, on such of its forms as it considers appropriate, to advise employers of their right to elect to include as an "employee" within this chapter a sole proprietor, any member of a partnership, the officers of a family farm corporation, or a person excluded from the definition of "employee" under division (A)(2)(a) of this section, that they should check any health and disability insurance policy, or other form of health and disability plan or contract, presently covering them, or the purchase of which they may be considering, to determine whether such policy, plan, or contract excludes benefits for illness or injury that they might have elected to have covered by workers' compensation.

(B) "Employer" means:

(1) The state, including state hospitals, each county, municipal corporation, township, school district, and hospital owned by a political subdivision or subdivisions other than the state;

(2) Every person, firm, and private corporation, including any public service corporation, that (a) has in service one or more employees regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written, or (b) is bound by any such contract of hire or by any other written contract, to pay into the insurance fund the premiums provided by this chapter.

All such employers are subject to this chapter. Any member of a firm or association, who regularly performs manual labor in or about a mine, factory, or other establishment, including a household establishment, shall be considered an employee in determining whether such person, firm, or private corporation, or public service corporation, has in its service, one or more employees and the employer shall report the income derived from such labor to the bureau as part of the payroll of such employer, and such member shall thereupon be entitled to all the benefits of an employee.

(C) "Injury" includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment. "Injury" does not include:

(1) Psychiatric conditions except where the conditions have arisen from an injury or occupational disease;

(2) Injury or disability caused primarily by the natural deterioration of tissue, an organ, or part of the body;

(3) Injury or disability incurred in voluntary participation in an employer-sponsored recreation or fitness activity if the employee signs a waiver of the employee's right to compensation or benefits under this chapter prior to engaging in the recreation or fitness activity.

(D) "Child" includes a posthumous child and a child legally adopted prior to the injury.

(E) "Family farm corporation" means a corporation founded for the purpose of farming agricultural land in which the majority of the voting stock is held by and the majority of the stockholders are persons or the spouse of persons related to each other within the fourth degree of kinship, according to the rules of the civil law, and at least one of the related persons is residing on or actively operating the farm, and none of whose stockholders are a corporation. A family farm corporation does not cease to qualify under this division where, by reason of any devise, bequest, or the operation of the laws of descent or distribution, the ownership of shares of voting stock is transferred to another person, as long as that person is within the degree of kinship stipulated in this division.

(F) "Occupational disease" means a disease contracted in the course of employment, which by its causes and the characteristics of its manifestation or the condition of the employment results in a hazard which distinguishes the employment in character from employment generally, and the employment creates a risk of contracting the disease in greater degree and in a different manner from the public in general.

(G) "Self-insuring employer" means an employer who is granted the privilege of paying compensation and benefits directly under section 4123.35 of the Revised Code, including a board of county commissioners for the sole purpose of constructing a sports facility as defined in section 307.696 [307.69.6] of the Revised Code, provided that the electors of the county in which the sports facility is to be built have approved construction of a sports facility by ballot election no later than November 6, 1997.

(H) "Public employer" means an employer as defined in division (B)(1) of this section.

#### HISTORY:

: GC § § 1465-61, 1465-60; 103 v 72, § § 13, 14; 107 v 159; 108 v Ptl, 313; 110 v 224; 114 v 26; 116 v 56; 120 v 449; Bureau of Code Revision, 10-1-53; 128 v 743 (Eff 11-2-59); 129 v 1020 (Eff 10-2-61); 129 v 1801 (Eff 10-23-61); 130 v 917 (Eff 10-1-63); 135 v H 417 (Eff 7-1-74); 136 v H 714 (Eff 12-2-75); 137 v H 1282 (Eff 1-1-79); 140 v H 340 (Eff 10-13-83); 141 v S 307 (Eff 8-22-86); 141 v S 411 (Eff 8-22-86); 145 v H 107 (Eff 10-20-93); 146 v H 245 (Eff 9-17-96); 147 v S 45\*; 147 v H 361 (Eff 12-16-97); 147 v H 558 (Eff 9-30-98); 148 v S 266. Eff 3-12-2001.

#### Employee

81. (1985) The position of the Ohio Bureau of Workers' Compensation and the Ohio Industrial Commission that Foster Grandparent Volunteers are employees and therefore eligible for Ohio workers' compensation benefits is in conflict with and has been preempted by the Domestic Volunteer Services Act: *United States v. Connors*, 634 FSupp 484 (S.D.).

81.1 (1998) In determining whether an employee is a fixed-situs employee and therefore within the coming-and-going rule, the focus is on whether the employee commences his or her substantial employment duties only after arriving at a specific and identifiable work place designated by his employer. That focus remains the same even though the

employee may be reassigned to a different work place monthly, weekly, or even daily. Despite periodic relocation of job sites, each particular job site may constitute a fixed place of employment. A fixed-situs employee is entitled to workers' compensation benefits for injuries occurring while coming and going from or to his place of employment where the travel serves a function of the employer's business and creates a risk that is distinctive in nature from or quantitatively greater than risks common to the public: *Ruckman v. Cubby Drilling, Inc.*, 81 OS3d 117, 689 NE2d 917.

82. (1990) A person who consents to perform community service in lieu of sentence enters into an agreement with the court, not the agency where the work is performed. There is no express or implied contract of hire between the community service worker and the agency using his services. The community service worker, therefore, cannot be considered an employee of the agency where the work is performed: *Republic-Franklin Ins. Co. v. Amherst*, 50 OS3d 212, 553 NE2d 614.

83. (1989) Revised Code § 4123.01(A)(1)(b) does not require that an employee be non-supervisory, but requires only that he be in the service of any person, firm or private corporation: *State ex rel. Cotterman v. Foundry*, 46 OS3d 42, 544 NE2d 887.

84. (1988) Whether someone is an employee or an independent contractor is ordinarily an issue to be decided by the trier of fact. The key factual determination is who had the right to control the manner or means of doing the work: *Bostic v. Connor*, 37 OS3d 144, 524 NE2d 881.

85. (1984) In order for a national guardsman to be eligible for workers' compensation benefits, he must be ordered to state active duty by competent state authority and federal benefits must not be otherwise provided: *Farrier v. Connor*, 12 OS3d 219, 12 OBR 303, 466 NE2d 557.

86. (1980) "Operator" of a machine does not include a worker who only places items on a conveyor belt leading to the machine: *State ex rel. Owens-Corning Fiberglas v. Indus. Comm.*, 62 OS2d 143, 16 OO3d 165, 404 NE2d 140.

87. (1973) Full-time salaried physicians, hired to staff a plant medical facility furnished by their employer for employees' use, are "employees" as defined in RC § 4123.01(A)(2): *Proctor v. Ford Motor Co.*, 36 OS2d 3, 65 OO2d 32, 302 NE2d 580.

88. (1969) Household servants, employed solely to render services in connection with the functioning, operation and maintenance of a private dwelling, are not "employees" within the meaning of the workmen's compensation law of this state: *Litmon v. Administrator, Bureau of Workmen's Compensation*, 20 OS2d 131, 49 OO2d 467, 254 NE2d 352.

89. (1951) A trucker who, as an "independent contractor," is injured while transporting goods for an Ohio corporation engaged in the business of interstate commerce is not an "employee" of such corporation within the coverage of GC § 1465-61 (RC § § 4123.01,

4123.02), a part of the Ohio Workmen's Compensation Act: *Behner v. Industrial Comm.*, 154 OS 433, 43 OO 360, 96 NE2d 403.

90. (1943) An independent contractor is not an "employee," "workman" or "operative" within the meaning of the Workmen's Compensation Act (GC § § 1465-60 and 1465-61 [RC § § 4123.01, 4123.02]): *Gillum v. Industrial Comm.*, 141 OS 373, 25 OO 531, 48 NE2d 234.

91. (1935) Where a traffic patrolman, at four o'clock in the afternoon, requested plaintiff to accompany patrolman that night in performance of his official duties, and plaintiff was injured while he and patrolman were investigating sound thought to be made by chicken thieves, plaintiff could not recover workmen's compensation on theory that patrolman was authorized to engage plaintiff under statute permitting officer to call on another for assistance when suddenly confronted with dangerous emergency in apprehending, securing or conveying person charged with, or convicted of, a crime: *Industrial Comm. v. Turek*, 129 OS 545, 2 OO 550, 196 NE 382.

92. (1935) When a regular member of a lawfully constituted fire department, under contract of hire, in a city which has established and maintains a firemen's pension fund under existing laws, is so seriously injured in the regular course of his employment that his death ensues almost instantly, his status as an employee at the time of his decease, under GC § 1465-61 (RC § § 4123.01, 4123.02), is to be determined on the basis of the rights of injured firemen as a class in such city to participate in its firemen's pension fund; such fireman is an employee within the provisions of GC § 1465-61 (RC § § 4123.01, 4123.02): *Industrial Comm. v. Flynn*, 129 OS 220, 2 OO 10, 194 NE 420.

93. (1934) One who applies to a municipality for relief and is given the opportunity, and required to work for the support which he is to receive, and who, in response to such opportunity and requirement, works in one of the municipal departments which employs labor, under the direction of a municipal foreman, at a regular daily wage, payable alternately in groceries and in cash, is in the service and is an employee of the municipality within the meaning of GC § 1465-61 (RC § § 4123.01, 4123.02): *Industrial Comm. v. McWhorter*, 129 OS 40, 1 OO 353, 193 NE 620.

94. (1933) "Employees" of state or subdivisions thereof within compensation act are generally of class which derives compensation directly from public funds: *Industrial Comm. v. Shaner*, 127 OS 366, 188 NE 559.

95. (1933) Where a board of county commissioners employed a person to decorate a room in the courthouse, such person to furnish labor and materials, the board reserving no right to control over manner of executing job, such person is an independent contractor and not an employee: *Industrial Comm v. McAdow*, 126 OS 198, 184 NE 759.

96. (1930) A juror is not an officer within the purview of GC § 1465-61 (RC § § 4123.01, 4123.02): *Industrial Comm. v. Rogers*, 122 OS 134, 171 NE 35.

97. (1925) Where parties engaged in building docks, jetties, etc., have contracted with reference to the compensation act, and its application will not work prejudice to the general maritime law, such application will not be denied even though the service of the employees is rendered on "floating vessels in navigable waters": *State ex rel. Cleveland Eng. Constr. Co. v. Industrial Comm.*, 113 OS 96, 148 NE 572.

97.1 (1923) General Code § 1465-61, par. 3 (RC § 4123.01, fifth par.), which classifies employees of an independent contractor as employees of the principal contractor, is constitutional: *DeWitt v. State ex rel. Price*, 108 OS 513, 141 NE 551.

98. (1999) An off-duty police officer who was injured while trying to prevent a bank robbery was entitled to workers' compensation: *Luketic v. Univ. Circle, Inc.*, 134 OApp3d 217, 730 NE2d 1006.

98.1 (1998) A professional football player injured during an off-season conditioning session was an "employee" even though he was not formally under contract: *Farren v. Baltimore Ravens, Inc.*, 130 OApp3d 533, 720 NE2d 590.

98.2 (1998) The injury was within the course and scope of employment where the employee was assigned to installation sites for extended periods and was consequently exposed to the risks of travel, including traveling between his hotel and restaurants: *Duncan v. Ohio Blow Pipe Co.*, 130 OApp3d 228, 719 NE2d 1029.

98.3 (1998) An employee was within the zone of employment where she fell in parking facilities provided by the employer's organization: *Fogaras v. Univ. Hospitals of Cleveland*, 129 OApp3d 653, 718 NE2d 974.

98.4 (1997) A determination that an injured worker was an independent contractor in a prior tort action was the same issue as whether the injured worker was an independent contractor for the purposes of workers' compensation; claim for workers' compensation was barred by the doctrine of collateral estoppel: *Koch v. Conrad*, No. 97APE05-663 (10th Dist.), 1997 Ohio App. LEXIS 5607.

98.5 (1997) A person's use of a false name for employment purposes does not, absent proof of fraud, preclude receiving workers' compensation: *Dennis v. Ford Motor Co.*, 121 OApp3d 318, 699 NE2d 993.

98.6 (1997) A cab driver who had total control of the days and hours worked and kept all earnings was an independent contractor: *Walters v. Americab, Inc.*, 118 OApp3d 180, 692 NE2d 234.

98.7 (1996) Where plaintiff's job offer was contingent on passing a physical and she was injured during the physical, she was not yet an "employee": *Young v. Toledo Hosp.*, 116 OApp3d 675, 688 NE2d 1128.

99. (1996) Volunteers who assisted park rangers, but who had no law enforcement authority, were not "employees": *Conover v. Lake Cty. Metro Parks Sys.*, 114 OApp3d 570, 683 NE2d 808.

100. (1996) Where a truck driver was treated as an independent contractor for income tax purposes and was required only to attend monthly meetings and call in for assignments, but performed them at his own discretion, he was clearly not an employee: *Testement v. Natl. Hwy. Express*, 114 OApp3d 529, 683 NE2d 439.

101. (1994) Summary judgment for a defendant, on the basis of plaintiff's affidavit stating he was an employee of the defendant, with therefore a sole remedy by way of workers' compensation, is error where an affidavit submitted by defendant denies that plaintiff was an employee: *Teed v. Twinsburg Auto & Truck*, 94 OApp3d 557, 641 NE2d 252.

102. (1994) Where there is conflicting evidence as to whether the plaintiff was an employee or an independent contractor, the court may not grant summary judgment for the alleged employer, finding that plaintiff was not an employee: *Peterson v. Red Riding Hood Registry, Inc.*, No. 15964 (9th Dist.), 1994 Ohio App. LEXIS 406.

103. (1993) Section 1057.12, Title 49, C.F.R., creates an irrebutable presumption of an employment relationship between the carrier lessee and the driver of a vehicle transporting freight using the carrier's ICC authorization. The section does not establish an employment relationship for purposes of workers' compensation laws: *Lakes v. Minor*, 86 OApp3d 386, 620 NE2d 1015.

104. (1992) Summary judgment for an alleged employer of a truck driver is proper where the equipment lease agreement clearly provided that the driver was an independent contractor: *Haring v. Triangle Equip. Corp.*, 91 OApp3d 432, 632 NE2d 973.

105. (1992) The court properly ruled that a nurse's aide who provided nursing services for an elderly person in return for payment by a relative was an "employee" of the relative: *Harmon v. Schnurmacher*, 84 OApp3d 207, 616 NE2d 591.

106. (1992) Once the claim was properly submitted, neither the employer nor the employer's attorney had any further duty to help the employee pursue the claim: *Taylor v. Microdot, Inc.*, 79 OApp3d 485, 607 NE2d 855.

107. (1991) Even though the employer was only a contractor at the site, the fenced property including the plant, parking lots and access road comprised the employment premises of the decedent: *Faber v. R.J. Frazier Co.*, 72 OApp3d 9, 593 NE2d 410.

108. (1991) Volunteers, other than regular members of lawfully constituted police and fire departments, are not employees as defined in RC § 4123.01(A)(1)(6): *Cogar v. Shupe Middle School*, No. 90CA004910 (9th Dist.), 1991 Ohio App. LEXIS 2978.

109. (1988) A striking worker who is a union steward, who participates in picketing organized by his union and receives strike benefits from the union, is not an "employee" of the union for purposes of workers' compensation benefits, if the strike benefits have no relationship to his hours of picketing and the union's control over picketing is only to ensure compliance with state and federal law: *Fox v. Mayfield*, 43 OApp3d 12, 538 NE2d 1077.

110. (1988) Ohio workers' compensation laws provide no specific statutory exclusions from participation in the Workers' Compensation Fund for persons who are injured while working off a fine for a misdemeanor offense: *Faulkner v. Mayfield*, 39 OApp3d 136, 529 NE2d 1294.

111. (1986) A newspaper carrier is an independent contractor and not an employee of the newspaper, and thus is not entitled to workers' compensation benefits, when the newspaper's control over the carrier is limited to requiring prompt and careful delivery, and control of the actual means of delivery is left to the carrier: *Fankhauser v. Knight-Ridder Newspaper*, 27 OApp3d 236, 27 OBR 277, 500 NE2d 407.

112. (1964) A person who is "laid off" by his employer-company because of lack of work and during such layoff performs no services for and receives no compensation from such company, but who continues to bowl in such company's bowling league pursuant to the rules of such league which permit "any employee that was laid off or retired" to bowl therein, is not an employee within the purview of RC § 4123.01, a part of the Workmen's Compensation Act; and an injury received by such person while so bowling is not an injury received in the course of and arising out of employment within the comprehension of such act: *Butler v. Bureau of Workmen's Compensation*, 120 OApp 20, 28 OO2d 176, 200 NE2d 811.

113. (1955) Claimant is not entitled to an award under the Ohio Workmen's Compensation Act where he introduces no proof from which it may be inferred that the work which claimant testifies he was doing when he was injured was in the usual course of the occupation of his employer: *Lanum v. Beatty*, 74 OLA 552, 141 NE2d 690 (App).

114. (1954) A salaried employee of a business firm which employee hires more than three workmen to construct a house to be used as his own home, such house not being in any way connected with his salaried position, is not employing such workmen regularly in the usual course of his business and is not amenable to the provisions of the Workmen's Compensation Act [RC § 4123.01 et seq]: *Phipps v. Redick*, 98 OApp 442, 57 OO 479, 129 NE2d 856.

115. (1952) An employee is not entitled to an award of state workmen's compensation, based on a claim of employment in a specific business at a specific establishment, where there is evidence that the employer operated other businesses at other places; that the employee was not, at the time of his injury, an employee in the specific business claimed but was an employee in another place and business of the employer and also in a

personal capacity; and that the injury occurred during the performance of duties in the latter capacity: *State v. Beatty*, 94 OApp 457, 52 OO 158, 116 NE2d 17.

116. (1947) Where it appears from the evidence that the claimant was employed by the defendant, a proprietor of a "tavern and cafe," as a carpenter to assist in the erection of an addition to the main building used for such purpose; that the materials used in erecting the addition were furnished by the proprietor; that the claimant was paid by the proprietor; and that, although the building was owned by the mother of the proprietor, there was sufficient evidence that such undertaking was directly concerned with the furtherance of the business of such proprietor, the claimant not being a person whose employment is but casual, but being employed in the usual course of the business or occupation of the proprietor: *Smith v. Brockamp*, 81 OApp 381, 37 OO 218, 77 NE2d 727.

117. (1945) A citizen injured while attempting to apprehend a fugitive in response to the call of a police officer of a municipality to "stop that man," does not thereby become an employee of the city within the meaning of GC § 1465-61 (RC §§ 4123.01, 4123.02), so as to be entitled to participate in the workmen's compensation fund: *Stoeckel v. Industrial Comm.*, 77 OApp 159, 32 OO 465, 66 NE2d 776 [affirming 31 OO 331 (CP)].

118. (1943) A superintendent of schools of a county school district is not a public officer but an "employee" of the board of education within the meaning of GC § 1465-61 (114 v 28) (RC §§ 4123.01, 4123.02), defining that term as used in the Workmen's Compensation Act: *Anderson v. Industrial Comm.*, 74 OApp 77, 29 OO 265, 57 NE2d 620.

119. (1943) A person employed by a corporation as its superintendent of construction, who at times performs manual labor in such capacity, is an employee within the meaning of the Workmen's Compensation Act, although such person is also president of the corporation: *Hillenbrand v. Industrial Comm.*, 72 OApp 427, 27 OO 341, 52 NE2d 547.

120. (1941) An injured policeman who has served for a period of twenty-five years and upon resignation is awarded one hundred dollars per month from the police relief fund may not be classified as an employee under the Workmen's Compensation Act and by reason of the provisions of GC § 1465-61 (RC §§ 4123.01, 4123.02) may not share in the compensation fund: *Brown v. Industrial Comm.*, 34 OLA 557, 38 NE2d 172 (App).

121. (1940) A minor, employed to wash motor trucks used in his employer's business, to clean windows at his employer's establishment, and to unpack, and, in some instances, weigh merchandise, is an "employee" as defined in GC § 1465-61 (RC §§ 4123.01, 4123.02). The test as to what constitutes casual employment is not dependent on the length of the employment alone but also the nature of the employment must be considered: *Schneeberg v. Industrial Comm.*, 67 OApp 499, 21 OO 455, 37 NE2d 427.

122. (1938) A painter who contracts with a retail coal dealer to paint the buildings leased and occupied by the latter in its business, the painter agreeing to furnish all equipment and to do the specific job of painting, the coal company neither reserving nor exercising any specific control over the work, the manner of doing it, the hours per day to be employed, or

the handling of the equipment, and when completed the employment is to end, is an independent contractor in the "casual" employment of the coal company within the terms of GC § 1465-61 (RC §§ 4123.01, 4123.02), and is not to be classed as an employee: *Holden v. Beebe Fuel Co.*, 60 OApp 430, 14 OO 477, 21 NE2d 874.

123. (1937) One who is in the employ of a master by sufferance only is not in the employ of the master under a contract of hire, either express or implied, and is, therefore, not an "employee" within the meaning of the Workmen's Compensation Act. Knowledge on the part of the company that such person was assisting the driver of its truck does not make the person an employee of the company: *Krull v. Triangle Dairy, Inc.*, 59 OApp 107, 12 OO 405, 17 NE2d 291.

124. (1937) The fact that a minor is employed to work longer hours per day or more days per week than the statutes permit, does not, of itself exclude him from the definition of "employee" in the Workmen's Compensation Act: *Krull v. Triangle Dairy, Inc.*, 59 OApp 107, 12 OO 405, 17 NE2d 291.

125. (1937) An employee of a board of education, on a monthly salary basis, whose duties are to supervise the operation of school buses, and having authority to employ and discharge drivers, and was paid a sum to be expended for repair of motor equipment, is entitled to workmen's compensation for an injury suffered while assisting in changing a tire on one of the buses; he was not acting as an independent contractor although he owned all of the buses: *George v. Industrial Comm.*, 26 OLA 10 (App).

126. (1936) A person called upon verbally by a deputy sheriff to assist in making an arrest, by the words "in the name of the law, you are a deputy sheriff," the person to be arrested being known to the deputy as a dangerous character and the sheriff and other deputies not being at hand, is an "employee" of the county within the meaning of the Workmen's Compensation Act: *Mitchell v. Industrial Comm.*, 57 OApp 319, 10 OO 503, 13 NE2d 736.

127. (1936) One employed to clean walls in the household of an employer subscribing to the state insurance fund for protection of domestic help, is hired to do work in usual course of the trade, business, profession or occupation of the employer and is a regular employee within the purview of the compensation law: *Reese v. Industrial Comm.*, 55 OApp 76, 7 OO 341, 8 NE2d 567.

128. (1933) Evidence showed that truck owner engaged by contractor to haul loads when business required extra truck and killed when truck overturned was "independent contractor," and not "employee," hence truck owner's widow had no claim for compensation for death against company employing contractor who paid nothing into state insurance fund: *Fisher Body Co. v. Wade*, 45 OApp 263, 187 NE 78.

129. (1933) One who furnishes teams and drivers to a principal contractor, under an hourly contract, terminable at any time at the will of either party, and who has no supervision over the work, other than the care of teams, is not an independent contractor within the meaning of GC § 1465-61 (RC §§ 4123.01, 4123.02), and a driver of such team, struck

by an automobile while driving the team to the place of employment and about one-half mile therefrom, is not injured in the course of employment: *McNamer v. Industrial Comm.*, 15 OLA 473 (App).

130. (1933) An employee of a grocer, whose work consisted in the main of handling Christmas trees, mounting them on bases, selling them and securing scrap lumber to use for mounting, is not one whose employment is "casual and not in the usual course of trade," within meaning of GC § 1465-61 (RC §§ 4123.01, 4123.02), and is not an independent contractor in absence of evidence that grocer did not have complete control over manner of doing work: *Industrial Comm. v. Doty*, 15 OLA 230 (App).

131. (1932) Contract between claimant and county to rebuild bridge upon highway held contract for job of work and not contract of hire; hence leg fracture sustained by claimant while executing contract was not compensable, since claimant was contractor and not county "employee": *Industrial Comm v. Henderson*, 43 OApp 20, 182 NE 603, 36 OLR 515.

132. (1932) An ordinary public works contract, such as for resurfacing of a county bridge, is not a contract for hire within meaning of workmen's compensation law, and contractor is not an employee of county: *Industrial Comm. v. Henderson*, 43 OApp 20, 182 NE 603, 36 OLR 515.

133. (1932) That claimant recover under compensation law, for leg fracture incurred while executing contract to rebuild bridge upon county highway, he must prove that he was at time of injury under contract of hire: *Industrial Comm. v. Henderson*, 43 OApp 20, 182 NE 603, 36 OLR 515.

134. (1932) Person employed by driver working on tonnage basis to help with load held not "employee" of driver's employer, but "casual helper," not entitled to compensation: *Colbert v. Industrial Comm.*, 42 OApp 544, 182 NE 330, 36 OLR 450.

135. (1932) Where a truck driver employed extra help to assist him unload truck, and extra workman was fatally injured when truck overturned, such death is not compensable, there being no evidence that employer had any knowledge of hiring: *Colbert v. Industrial Comm.*, 42 OApp 544, 182 NE 330, 36 OLR 450.

136. (1930) A son of employer, who had no interest in the business may be counted as a workmen: *Schaefer v. Consolidated Iron-Steel Mfg. Co.*, 32 OLR 66, 8 OLA 214 (App).

137. (1929) Deputy county officers are not "officials" within GC § 1465-61, par. 1 (RC § § 4123.01, par. (A)(1), 4123.02), defining "employee" as not including any official: *State ex rel. Alcorn v. Beaman*, 34 OApp 382, 170 NE 877.

138. (1929) Injuries to claimant, sustained at courthouse while engaged in jury service, held compensable; juror not being an "official" within statutory exception denying compensation: *Industrial Comm. v. Rogers*, 34 OApp 196, 170 NE 600.

139. (1929) The compensation law and the provision defining "employee" (GC § 1465-61 [RC § § 4123.01, 4123.02]) should be liberally construed in favor of claimant: *Industrial Comm. v. Rogers*, 34 OApp 196, 170 NE 600.

140. (1927) Death of fisherman on waters of Lake Erie resulted from employment purely maritime and is not compensable, though he was required to work on shore in the fishing industry: *Tyler v. Industrial Comm.*, 25 OApp 444, 158 NE 586.

141. (1923) Under GC § 1465-61 (par. 3 [RC § 4123.01(A)(2)]), it is only when subcontractor has not complied with the law that injured employee of subcontractor is deemed to be the employee of the general contractor; and hence, where subcontractor has complied with the act, the principal contractor is not the employer of the subcontractor's employees: *Trumbull Cliffs Furnace Co. v. Shackovsky*, 27 OApp 522, 161 NE 238.

142. (1920) The term "employee," as used in GC § 1465-61 (RC § § 4123.01, 4123.02), does not include a member of an employing firm, who is doing the work of the firm, although he received wages for such work: *McMillen v. Industrial Comm.*, 13 OApp 310, 32 OCA 285.

143. (1914) One who has accepted an offer of employment by reporting for work is an employee, although actual work has not begun: *McDowell v. Larson*, 3 OApp 150, 30 CC(NS) 314.

144. (1964) The status of an employee of Manpower who had been at work on the premises of Manpower's customer for four days before the day he was injured but during that period he was engaged in the same kind of work which was being performed by the customer's maintenance employee in furtherance of the customer's business, was that of a regular employee of the customer, although he remained the general employee of Manpower: *Daniels v. MacGregor*, 94 OLA 306, 26 OO2d 196, 197 NE2d 427 (CP).

145. (1963) A taxicab driver who is master of his own time and efforts is not an employee, but an independent contractor; the taxicab company, which rents out its vehicles to such drivers is not an employer of the drivers and is not obliged to pay workmen's compensation premiums as an employer: *Industrial Comm v. Warren Zone Cab Co., Inc.*, 91 OLA 215, 191 NE2d 852 (CP).

146. (1947) Where a boiler repairman had not been discharged nor retired by his employer, but was subject to call for repair work, and on several occasions he was called directly by one of his employer's customers and paid for his work, he became an employee of the customer within the provisions of GC § 1465-61 (RC § § 4123.01, 4123.02): *Marrie v. Industrial Comm.*, 37 OO 384, 81 NE2d 300 (CP).

147. (1933) An independent contractor is not an employee within the meaning of that term as set forth in Workmen's Compensation Act: *Furlong v. First Presbyterian Church*, 30 NP(NS) 561.

148. (1921) Under GC § 1465-61 (RC § § 4123.01, 4123.02), an "employee" now includes a minor, although such minor would not be eligible for such employment under GC § § 12993 and 12996 (RC § § 4109.10 and 4109.22): *Hartley v. Victor Rubber Co.*, 23 NP(NS) 593.

149. (1987) Certified type B family day-care home providers and in-home aides with whom a county department of human services contracts for child day-care services are not "employees," as defined in RC § 4123.01(A)(1), for purposes of RC Chapter 4123.: OAG No. 87-013.

150. (1982) An unpaid volunteer who renders service on behalf of a private organization does not fall within the definition of "employee" as the term is used in RC § 4123.01(A): OAG No. 82-040.

151. (1982) A prisoner engaged in a work release program whereby the prisoner is allowed to leave the jail in order to continue employment held prior to sentencing is not an employee of the county for the purpose of the Ohio Workers' Compensation Act: OAG No. 82-007.

152. (1982) A prisoner engaged in a trustee program whereby the prisoner works in or about the county jail under the direct supervision of the sheriff and deputy sheriffs is not an employee of the county for the purpose of the Ohio Workers' Compensation Act: OAG No. 82-007.

153. (1978) A township police trainee who receives no compensation for his services, who has no regular duty schedule, and who is not a "regular member of a lawfully constituted police force," is not an "employee" for purposes of Workers' Compensation under RC § 4123.01(A)(1). A township police trainee who does not qualify as an "employee" under RC § 4123.01(A)(1) may nonetheless be covered by the Workers' Compensation system if the township enters into a special contract for such coverage under RC § 4123.03. Members of a township zoning commission appointed by a board of township trustees under RC § 519.04, who receive compensation from the township for services actually performed, are "employees" for purposes of the Workers' Compensation system under RC § 4123.01(A)(1). Members of a township board of zoning appeals, appointed by the board of township trustees pursuant to RC § 519.13, who receive compensation from the township for services actually performed, are "employees" for purposes of the Workers' Compensation system under RC § 4123.01(A)(1). Where a board of township trustees creates an advisory panel known as a township planning commission, and the formation of such a commission is not authorized by statute, and the members of that commission receive no compensation, then the members are not "employees" for purposes of the Workers' Compensation system under RC § 4123.01(A)(1). Coverage for such members

may not be obtained by contract under RC § 5123.03 since the township would not be authorized to expend funds for such a purpose: OAG No. 78-031.

154. (1976) There are no constitutional limitations on RC § 4123.01(A)(3) and a partner or sole proprietor, who has otherwise qualified, may be included as an "employee" under the provisions of the Workmen's Compensation Act: OAG No. 76-077.

155. (1976) Emergency board approval of a state employee's out of state travel is not necessary to entitle an employee to receive workmen's compensation benefits if the employee otherwise qualifies: OAG No. 76-035.

156. (1974) Members of a municipal police department who assist a county sheriff outside the corporate limits at the direction of their superiors are eligible for workmen's compensation benefits pursuant to RC §§ 4123.02.5 and 4123.54: OAG No. 74-105.

157. (1971) Members of a township fire department are covered by the Ohio workmen's compensation act during a trip outside the state of Ohio to attend a training meeting as directed by an authorized official: OAG No. 71-073.

158. (1967) An official of a limited partnership association may be covered by the Ohio Workmen's Compensation Act, depending upon the factual context in which the injury is sustained: OAG No. 67-022.

159. (1967) A member of a limited partnership association who does in fact perform services under a contract of hire, and, therefore, would qualify as an employee were he not a member of the association, is an employee for the purpose of the Ohio Workmen's Compensation Insurance Act: OAG No. 67-022.

160. (1960) Members of the public employees retirement board, while acting as such, are "employees" within the meaning of RC § 4123.01 and are covered by the workmen's compensation law: *1960 OAG No. 1253.*

161. (1959) A volunteer civil defense worker who is performing a civil defense duty under order of a duly appointed director or authorized staff member of a civil defense organization is governed by the workmen's compensation law, RC § 4123.01 et seq: *1959 OAG No. 780.*

162. (1959) A member of the Ohio wildlife council, who is a passenger in a state-owned aircraft, in the course of discharging his official duties, is an "appointed official" of the state within the meaning of this section and is within the coverage and "protection" of the Workmen's Compensation Act. There is no responsibility on the part of the State of Ohio or of the division of wildlife to a member of the wildlife council, or to his family, in the event of injury or death of such member: *1959 OAG No. 295.*

163. (1953) Fireman of a township fire department, whether regularly employed, or volunteers, while engaged in providing fire service within the area of the Delaware

Reservoir located in the township by which they are employed are, by virtue of RC § 505.41, included within RC § 4123.01 et seq, and thus are employees of the township within the scope of the Workmen's Compensation Act: 1953 OAG No. 3374.

164. (1947) A disabled veteran engaged in "on-the-job" training under the provisions of Public Law 16 of the 78th Congress who received compensation for services rendered to an employer amenable to the Ohio workmen's compensation law, and who is injured in the course of and arising out of his employment, is entitled to the benefits of the workmen's compensation law to the extent appropriate in view of his average weekly wage paid to him by said employer irrespective of any disability awards or benefits received by him from the federal government: 1947 OAG No. 2537.

165. (1939) The question as to whether or not certain cemetery employees are eligible for membership in the public employees' retirement system in no wise affects the obligation of a municipality to contribute to the public insurance fund under the workmen's compensation law: 1939 OAG No. 848.

166. (1934) A professor in the employ of Ohio State University who during his vacation period attends meetings not required or contemplated by his contract of employment, is not performing services for such university and is not an employee within the meaning of the workmen's compensation law even though he is attending such meetings as a representative of the university: 1934 OAG No. 2988.

#### Employer

167. (1990) The Ohio workers' compensation law, RC § 4123.01 et seq., applies to churches and requires that they make payments into the state workers' compensation fund for all employees other than ministers. The statute does not violate the free exercise or establishment clauses of USConst amend I: *South Ridge Baptist Church v. Industrial Comm'n of Ohio*, 911 F2d 1203 (6th Cir.).

168. (1951) An employee cannot recover either under the federal employers' liability act where the defendant corporation is not a common carrier by railroad, or at common law where defendant is subject to and has complied with the Ohio workmen's compensation law: *Latsko v. National Carloading Corp.*, 192 F2d 905, 46 OO 452 (6th Cir.).

169. (1987) Churches are employers subject to the provisions of Chapter 4123., under which participation is discretionary in regard to ministers or assistant ministers in the exercise of their ministries, but mandatory in regard to other employees: *South Ridge Baptist Church v. Industrial Commission of Ohio*, 676 FSupp 799 (S.D.).

170. (1987) The legislative intent to include churches within the definition of "employer" has been further clarified because recently the legislature amended the definition of "employee" to exclude ministers, but it did not amend the definition of "employer" to exclude churches: *South Ridge Baptist Church v. Industrial Commission of Ohio*, 676 FSupp 799 (S.D.).

171. (1990) There is no statutory language which limits the definition of an "employer" to one who has employees "under any contract of hire" for work to be performed only within Ohio. Thus, where an Ohio employer hired employees to perform at least some of their work in Ohio, and the employees suffered injury within Ohio, the Ohio employer is clearly an "employer" within the meaning of RC § 4123.01(B)(2)(a): *Bridges v. Natl. Engineering & Construction*, 49 OS3d 108, 551 NE2d 163.

172. (1987) A surety for an insolvent self-insured employer, who bears the financial responsibility for benefit payments from the statutory surplus fund, is included within the definition of "employer" in RC § 4123.01(B) for the limited purpose of participating in the workers' compensation benefit determination proceedings, and therefore may appeal a decision of the Industrial Commission or a regional board of review to the court of common pleas, pursuant to RC § 4123.51.9: *Holben v. Interstate Motor Freight System*, 31 OS3d 152, 31 OBR 318, 509 NE2d 938. (See also companion cases beginning at 31 OS3d 159).

173. (1985) One who exercises day-to-day control over a worker and indirectly pays the compensation premiums may be considered to be the employer for purposes of immunity from suit: *Foran v. Fisher Foods, Inc.*, 17 OS3d 193, 17 OBR 430, 478 NE2d 998.

174. (1978) Although a temporary laborer is on assignment from, and paid by, a temporary help agency, he is under the direction and control of the person to whom he is assigned. Thus that person is the "employer" for purposes of the immunity granted under the workers' compensation act: *Campbell v. Central Terminal Warehouse*, 56 OS2d 173, 10 OO3d 342, 383 NE2d 135.

175. (1978) A self-insurer under the workers' compensation law who continues to make compensation and medical payments while contesting the origin of a claim must be reimbursed by the state for such payments where the injury is determined to be covered by the state fund. The proper remedy to compel such reimbursement is by way of mandamus: *State ex. rel. Louisiana-Pacific Corp. v. Industrial Comm.*, 54 OS2d 39, 8 OO3d 35, 374 NE2d 422.

176. (1943) The dependents of an employee, a resident of Pennsylvania, fatally injured in Ohio in the course of his employment under a contract entered into in Pennsylvania with Pennsylvania corporation which has complied with the Ohio Workmen's Compensation Act, for services to be performed indiscriminately in interstate and intrastate commerce, are entitled to participate in the Ohio state insurance fund (workmen's compensation fund), although the injury was sustained while the employee was performing service exclusively interstate in character: *Holly v. Industrial Comm.*, 142 OS 79, 26 OO 261, 50 NE2d 152.

177. (1936) Article II, § 35 of the state constitution, authorizes the imposition of an additional award only upon an employer who has failed to comply with a specific requirement. The language and spirit of the constitutional provision, properly construed, authorize such imposition only upon that employer whose failure to comply caused death or injury to his employee. A contractor is not liable to pay additional compensation to the

employee of a subcontractor injured because of the subcontractor's failure to construct scaffold in accordance with specific requirement adopted by the industrial commission (GC § 1465-61 [RC § 4123.01]): *State ex rel. Whitman v. Industrial Comm.*, 131 OS 375, 6 OO 88, 3 NE2d 873.

178. (1923) An employee of an independent contractor who has accepted compensation, can thereafter sue the owner of the premises for negligence, even when the owner has complied with the act. Such an owner is not the employer, when such contractor has complied with the act: *Trumbull Cliffs Furnace Co. v. Shachovsky*, 111 OS 791, 146 NE 306.

179. (1923) One who employs five [now one] or more workmen regularly is considered as the employer of the employee of an independent contractor if the latter also employs five [now one] or more workmen regularly and has failed to pay into the fund, or to pay compensation direct, unless such employee or his legal representative or beneficiary has elected, after injury or death, to regard the independent contractor as the employer: *DeWitt v. State ex rel. Crabbe*, 108 OS 513, 141 NE 551.

179.1 (1997) The city was claimant's "employer" where he was trying to arrest a shoplifter, even though he was off-duty and working in a private security capacity: *Cooper v. Dayton*, 120 OApp3d 34, 696 NE2d 640.

180. (1994) Although the county board of mental retardation was technically the employer for purposes of the notice of appeal under former RC § 4123.51.9, the notice was not defective in naming the county auditor instead where that official was designated as the employer in the proceeding below. Also, the auditor was an agent of the board for such purpose: *Istenes v. Lake Cty. Aud.*, 97 OApp3d 735, 647 NE2d 534.

181. (1992) A homeowner is not necessarily, as a matter of law, entitled to immunity as the "employer" of a maid who is dispatched by a cleaning service, even though the homeowner indirectly pays the service's compensation premiums: *Horn v. Cassan*, 78 OApp3d 353, 604 NE2d 816.

182. (1991) An employee's employment has sufficient contacts with Ohio where he pays Ohio taxes and a significant part of his work is performed in Ohio each day. A conflict of laws agreement must be filed with the bureau within ten days to be valid: *Dotson v. Com Trans, Inc.*, 76 OApp3d 98, 601 NE2d 126.

183. (1991) Successor liability does not arise when the transferor corporation is dissolved, but arises when the transferee corporation has so depleted the transferor's assets as to leave creditors' claims unsatisfied: *Ohio Bur. of Workers' Comp. v. Widenmeyer Elec. Co.*, 72 OApp3d 100, 593 NE2d 468.

184. (1991) A purchasing corporation may be liable as a successor employer on a compensation claim where it is merely a continuation of the selling corporation, despite a

general disclaimer as to the assumption of any liabilities: *Bagin v. IRC Fibers Co.*, 72 OApp3d 1, 593 NE2d 405.

185. (1989) When an employer negligently introduces carbon monoxide fumes into his gasoline service station/convenience store by failing, before leaving, to turn off the engine of his recreational vehicle which he was working on in a garage adjacent to the convenience store, thus causing injuries to his employee, the employer violates his obligation to provide a safe workplace for his employee and is liable for workers' compensation damages. The dual-capacity doctrine does not apply in such a situation: *Hillman v. McCaughtrey*, 56 OApp3d 100, 564 NE2d 1123.

186. (1988) Where there is competent, credible evidence that a member of a local union's workers' compensation committee is assigned to represent a co-worker at a workers' compensation hearing, that he is compensated by the union for his services, and that he has been trained at union-directed training sessions on how to represent claimants at hearings, a trial court's judgment that the union member is entitled to participate in the workers' compensation fund for injuries he received while en route to an office of the Bureau of Workers' Compensation and that the local union is his employer for purposes of the claim will not be reversed on appeal: *Doyle v. Mayfield*, 48 OApp3d 113, 548 NE2d 326.

187. (1982) The General Assembly intended to include religious institutions and their employees within the protection of the Workers' Compensation Act: *Victory Baptist Temple, Inc. v. Indus. Comm.*, 2 OApp3d 418, 2 OBR 510, 442 NE2d 819.

188. (1941) A self-insurer required by the industrial commission, under the provisions of GC § 1465-61 (RC § § 4123.01, 4123.02), to pay an award of compensation to an injured employee of an independent contractor, is not entitled to reimbursement from such independent contractor where the latter is not amenable to the Workmen's Compensation Act: *Cleveland, Columbus & Cinti. Highway, Inc. v. Bookmyer*, 67 OApp 476, 21 OO 434, 37 NE2d 393.

189. (1936) The meaning of the word "employer" found in the safety code, GC § 871-1 (RC § § 4101.01, 4121.01) et seq, is not identical with the meaning of the word as implied in par. 3 of GC § 1465-61 (fifth par. of RC § 4123.01): *State ex rel. Whitman v. Industrial Comm.*, 21 OLA 533 (App) [affirmed, 131 OS 375, 6 OO 88, 3 NE2d 52].

190. (1935) The owner of an orchard whose employees vary in number because of the seasonable character of the work of orcharding is, under GC § 1465-61(2) [RC § 4123.01(A)(2)], amenable to the workmen's compensation law. The length of time of employment of a claimant is not controlling: *Industrial Comm. v. Kukes*, 53 OApp 309, 7 OO 104, 4 NE2d 988.

191. (1935) A, a self-insurer, owing several gasoline stations, employed B and C to operate one of them, permitting them to maintain an independent tire and battery business on the premises. B and C hired W to assist in the battery and tire business and in servicing

cars at the gasoline station, allowance being made, by A, to B and C, for parts of W's wages. W, injured while at work, was held to be employed by B and C who were in turn employees of A. An independent contractual relationship intervened between A and W, constituting a bar to any relationship of employer and employee, and barring W from participation in the workmen's compensation fund under GC § 1465-61 (RC §§ 4123.01, 4123.02): *Industrial Comm. v. Watterson*, 52 OApp 7, 5 OO 310, 2 NE2d 511.

192. (1935) Where the defendants owned sixty pieces of rental property requiring constant attention in keeping them in repair, providing janitor and elevator service, securing tenants, paying taxes, collecting rents and engaging agents and employees to perform the same, all operated as a designated estate, said defendants are engaged in a business within the meaning of GC § 1465-60 (RC § 4123.01): *Wallingford v. Slattery*, 51 OApp 225, 3 OO 552, 200 NE 206.

193. (1925) Intention of legislature under GC §§ 1465-60 and 1465-61 (RC §§ 4123.01, 4123.02) was to make cities liable for personal injuries in case of failure to comply with a lawful requirement, whether injuries occurred in exercise of a governmental function or not: *Lovering v. Cleveland*, 3 OLA 607 (App).

194. (1950) Where the evidence shows that a manufacturer furnished the materials and instructed the workmen what to do and how to do it, a sufficient reservation of control is shown to create a master and servant relationship rather than that of an independent contractor and such workmen are employees even though, due to a destruction of the manufacturer's business building they are working in their own homes: *Look v. Hinkle*, 66 OLA 176, 113 NE2d 611 (CP).

195. (1942) Owner-operators of tractors and trucks who bear the entire cost of maintaining and operating their equipment, are paid on the basis of miles driven or weight of merchandise carried, and employ as many helpers or drivers as they deem necessary, making all terms of such employment, including compensation, directly with such drivers and helpers, upon being engaged to transport merchandise from one location to another through the medium of motor vehicles, are acting in the capacity of independent contractors while so engaged and not as employees under a contract of hire making them subject to premium liability under GC § 1465-61 (RC §§ 4123.01, 4123.02): *State ex rel. Herbert v. Commercial Motor Freight*, 37 OLA 475, 27 OO 98, 11 OSupp 31 (CP) [affirmed, 37 OLA 480, 48 NE2d 898 (App)].

196. (1916) The word "regularly" in the provision that an employer subject to the provisions of the workmen's compensation act, is one that has in service five [now one] or more workmen, regularly in the same business, does not mean "continuously" and the court cannot ignore the plain provisions of a statute in order to produce a result which the court thinks is more just than that for which the legislature has made provision: *State ex rel. Hogan v. Berl*, 19 NP(NS) 186.

197. (1973) A mentally retarded trainee of an adult training center who receives compensation for services rendered is entitled to the benefits and protection of the

workmen's compensation statutes. The nonprofit corporation, which is created to secure jobs for the mentally retarded trainees, is the employer of such trainees and is, therefore, required to provide the benefits of workmen's compensation to its employees: OAG No. 73-092.

198. (1966) The bureau of unemployment compensation is an employer within the meaning of that term as it is used in the workmen's compensation laws of Ohio and is subject to the provisions set forth in RC § § 4123.41.1 through 4123.41.8, inclusive, and the failure of the legislature to appropriate funds for the disabled workers relief fund does not interfere with the industrial commission's power to to assess directly the bureau of unemployment compensation, as provided by RC § 4123.01: OAG No. 66-156.

199. (1962) A federal credit union organized and operating under the authority of the federal credit union act, is a private corporation as such term is used in Chapter 4123., and is subject to the provisions of said chapter, commonly known as the workmen's compensation act: 1962 OAG No. 3419.

200. (1950) Metropolitan housing authorities are included in the term "any public service corporation" as used in GC § 1465-60(2) [RC § 4123.01(B)(2)], providing they have in their service three or more workmen or operatives regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written: 1950 OAG No. 1413.

201. (1950) Metropolitan housing authorities are not included in the term "the state and each county, city, township, incorporated village and school district therein" as used in GC § 1465-60(1) [RC § 4123.01(B)(1)], defining the class of employers who may contribute to the "public fund" of the workmen's compensation fund, and hence may not contribute to such fund: 1950 OAG No. 1413.

202. (1939) Under the provisions of GC § 1465-60 (RC § 4123.01) and related sections, it is the duty of the state bridge commission to contribute to the state insurance fund: 1939 OAG No. 849.

#### Employment relationship

203. (1935) The relation of employer and employee under the workmen's compensation act does not arise from a contract whereby a taxicab is leased by one to another at a stipulated, unconditional rental per day, no accounting for fares collected from its operation being required or made; such arrangement does not constitute a contract for hire: *Coviello v. Industrial Comm.*, 129 OS 589, 3 OO 9, 196 NE 661.

204. (1935) To constitute the relationship of employer and employee under the workmen's compensation law, there must be a contract of hire express or implied: *Coviello v. Industrial Comm.*, 129 OS 589, 3 OO 9, 196 NE 661.

205. (1933) An appraiser in a replevin suit pending in a court of common pleas, whose compensation is dependent upon the receipt of costs in the action, is not acting in the service of a county under any appointment or contract of hire, within the provisions of GC § 1465-61 (RC § 4123.01), and is therefore not entitled to compensation from the state insurance fund for injuries received in the performance of his duties as such appraiser: *Industrial Comm. v. Shaner*, 127 OS 366, 188 NE 559.

206. (1933) Workman is not entitled to compensation if at time of injury relation of employer and employee did not exist, or workman was not under appointment or contract of hire: *Industrial Comm. v. Bateman*, 126 OS 279, 185 NE 50.

207. (1917) If the relation of employer and employee does not exist the provisions of the act have no application: *Acklin Stamping Co. v. Kutz*, 98 OS 61, 120 NE 229, 14 ALR 812 [affirming *Kutz v. Acklin Stamping Co.*, 8 OApp 70, 27 OCA 273, 28 CD 273].

208. (1914) A young woman was sent for to take a place in a laundry and begin work at once. She put on her working clothes and accompanied the messenger back to the laundry. They entered the premises through the engine room, where the young woman stepped into a sunken barrel filled with boiling water, which was uncovered and the existence of which she had no knowledge. The proprietor of the laundry provided medical attendance for her and after her recovery took her back into his employ. It was held that the relation of master and servant existed and she was not a trespasser: *McDowell v. Larson*, 3 OApp 150, 20 CC(NS) 314.

209. (1976) The State's responsibility as an employer for purposes of workmen's compensation, unemployment compensation and the withholding of income taxes is based on the existence of an employer-employee relationship, which must be determined on a case to case basis using the common law direct control test: OAG No. 76-40.

210. (1933) When a person is called upon by the sheriff of a county to aid him in the execution of the criminal laws of the state, such a person, not being an appointee for hire, is not an employee of the county and therefore is not entitled to the benefits of the workmen's compensation law: 1933 OAG No. 85.

\*\*\* THIS DOCUMENT REFLECTS CHANGES RECEIVED THROUGH MARCH 31, 2001  
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TITLE XLI [41] LABOR AND INDUSTRY

CHAPTER 4141: UNEMPLOYMENT COMPENSATION

**GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

ORC Ann. 4141.01 (Anderson 2001)

STATUS: CONSULT SLIP LAWS CITED BELOW FOR RECENT CHANGES TO THIS DOCUMENT LEXSEE 2001 Ohio SB 99 -- See sections 1 and 2.

§ 4141.01 Definitions.

As used in this chapter, unless the context otherwise requires:

(A)(1) "Employer" means the state, its instrumentalities, its political subdivisions and their instrumentalities, and any individual or type of organization including any partnership, limited liability company, association, trust, estate, joint-stock company, insurance company, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee, or the successor thereof, or the legal representative of a deceased person who subsequent to December 31, 1971, or in the case of political subdivisions or their instrumentalities, subsequent to December 31, 1973:

(a) Had in employment at least one individual, or in the case of a nonprofit organization, subsequent to December 31, 1973, had not less than four individuals in employment for some portion of a day in each of twenty different calendar weeks, in either the current or the preceding calendar year whether or not the same individual was in employment in each such day; or

(b) Except for a nonprofit organization, had paid for service in employment wages of fifteen hundred dollars or more in any calendar quarter in either the current or preceding calendar year; or

(c) Had paid, subsequent to December 31, 1977, for employment in domestic service in a local college club, or local chapter of a college fraternity or sorority, cash remuneration of one thousand dollars or more in any calendar quarter in the current calendar year or the preceding calendar year, or had paid subsequent to December 31, 1977, for employment in domestic service in a private home cash remuneration of one thousand dollars in any calendar quarter in the current calendar year or the preceding calendar year:

(i) For the purposes of divisions (A)(1)(a) and (b) of this section, there shall not be taken into account any wages paid to, or employment of, an individual performing domestic service as described in this division.

(ii) An employer under this division shall not be an employer with respect to wages paid for any services other than domestic service unless the employer is also found to be an employer under division (A)(1)(a), (b), or (d) of this section.

(d) As a farm operator or a crew leader subsequent to December 31, 1977, had in employment individuals in agricultural labor; and

(i) During any calendar quarter in the current calendar year or the preceding calendar year, paid cash remuneration of twenty thousand dollars or more for the agricultural labor; or

(ii) Had at least ten individuals in employment in agricultural labor, not including agricultural workers who are aliens admitted to the United States to perform agricultural labor pursuant to sections 214(e) and 101(a)(15)(H) of the "Immigration and Nationality Act," 66 Stat. 163, 8 U.S.C.A. 1101(a)(15)(H)(ii)(a), for some portion of a day in each of the twenty different calendar weeks, in either the current or preceding calendar year whether or not the same individual was in employment in each day; or

(e) Is not otherwise an employer as defined under division (A)(1)(a) or (b) of this section; and

(i) For which, within either the current or preceding calendar year, service, except for domestic service in a private home not covered under division (A)(1)(c) of this section, is or was performed with respect to which such employer is liable for any federal tax against which credit may be taken for contributions required to be paid into a state unemployment fund;

(ii) Which, as a condition for approval of this chapter for full tax credit against the tax imposed by the "Federal Unemployment Tax Act," 84 Stat. 713, 26 U.S.C.A. 3301 to 3311, is required, pursuant to such act to be an employer under this chapter; or

(iii) Who became an employer by election under division (A)(4) or (5) of this section and for the duration of such election; or

(f) In the case of the state, its instrumentalities, its political subdivisions, and their instrumentalities, had in employment, as defined in division (B)(2)(a) of this section, at least one individual;

(g) For the purposes of division (A)(1)(a) of this section, if any week includes both the thirty-first day of December and the first day of January, the days of that week before the first day of January shall be considered one calendar week and the days beginning the first day of January another week.

(2) Each individual employed to perform or to assist in performing the work of any agent or employee of an employer is employed by such employer for all the purposes of this chapter, whether such individual was hired or paid directly by such employer or by such agent or employee, provided the employer had actual or constructive knowledge of the work. All individuals performing services for an employer of any person in this state

who maintains two or more establishments within this state are employed by a single employer for the purposes of this chapter.

(3) An employer subject to this chapter within any calendar year is subject to this chapter during the whole of such year and during the next succeeding calendar year.

(4) An employer not otherwise subject to this chapter who files with the director of job and family services a written election to become an employer subject to this chapter for not less than two calendar years shall, with the written approval of such election by the director, become an employer subject to this chapter to the same extent as all other employers as of the date stated in such approval, and shall cease to be subject to this chapter as of the first day of January of any calendar year subsequent to such two calendar years only if at least thirty days prior to such first day of January the employer has filed with the director a written notice to that effect.

(5) Any employer for whom services that do not constitute employment are performed may file with the director a written election that all such services performed by individuals in the employer's employ in one or more distinct establishments or places of business shall be deemed to constitute employment for all the purposes of this chapter, for not less than two calendar years. Upon written approval of the election by the director, such services shall be deemed to constitute employment subject to this chapter from and after the date stated in such approval. Such services shall cease to be employment subject to this chapter as of the first day of January of any calendar year subsequent to such two calendar years only if at least thirty days prior to such first day of January such employer has filed with the director a written notice to that effect.

(B)(1) "Employment" means service performed by an individual for remuneration under any contract of hire, written or oral, express or implied, including service performed in interstate commerce and service performed by an officer of a corporation, without regard to whether such service is executive, managerial, or manual in nature, and without regard to whether such officer is a stockholder or a member of the board of directors of the corporation, unless it is shown to the satisfaction of the director that such individual has been and will continue to be free from direction or control over the performance of such service, both under a contract of service and in fact. The director shall adopt rules to define "direction or control."

(2) "Employment" includes:

(a) Service performed after December 31, 1977, by an individual in the employ of the state or any of its instrumentalities, or any political subdivision thereof or any of its instrumentalities or any instrumentality of more than one of the foregoing or any instrumentality of any of the foregoing and one or more other states or political subdivisions and without regard to divisions (A)(1)(a) and (b) of this section, provided that such service is excluded from employment as defined in the "Federal Unemployment Tax Act," 53 Stat. 183, 26 U.S.C.A. 3301, 3306(c)(7) and is not excluded under division (B)(3) of this section; or the services of employees covered by voluntary election, as provided under divisions (A)(4) and (5) of this section;

(b) Service performed after December 31, 1971, by an individual in the employ of a religious, charitable, educational, or other organization which is excluded from the term

"employment" as defined in the "Federal Unemployment Tax Act," 84 Stat. 713, 26 U.S.C.A. 3301 to 3311, solely by reason of section 26 U.S.C.A. 3306(c)(8) of that act and is not excluded under division (B)(3) of this section;

(c) Domestic service performed after December 31, 1977, for an employer, as provided in division (A)(1)(c) of this section;

(d) Agricultural labor performed after December 31, 1977, for a farm operator or a crew leader, as provided in division (A)(1)(d) of this section;

(e) Service not covered under division (B)(1) of this section which is performed after December 31, 1971:

(i) As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages other than milk, laundry, or dry-cleaning services, for the individual's employer or principal;

(ii) As a traveling or city salesperson, other than as an agent-driver or commission-driver, engaged on a full-time basis in the solicitation on behalf of and in the transmission to the salesperson's employer or principal except for sideline sales activities on behalf of some other person of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale, or supplies for use in their business operations, provided that for the purposes of this division (B)(2)(e)(ii) [n1] of this section, the services shall be deemed employment if the contract of service contemplates that substantially all of the services are to be performed personally by the individual and that the individual does not have a substantial investment in facilities used in connection with the performance of the services other than in facilities for transportation, and the services are not in the nature of a single transaction that is not a part of a continuing relationship with the person for whom the services are performed.

(f) An individual's entire service performed within or both within and without the state if:

(i) The service is localized in this state.

(ii) The service is not localized in any state, but some of the service is performed in this state and either the base of operations, or if there is no base of operations then the place from which such service is directed or controlled, is in this state or the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed but the individual's residence is in this state.

(g) Service not covered under division (B)(2)(f)(ii) of this section and performed entirely without this state, with respect to no part of which contributions are required and paid under an unemployment compensation law of any other state, the Virgin Islands, Canada, or of the United States, if the individual performing such service is a resident of this state and the director approves the election of the employer for whom such services are performed; or, if the individual is not a resident of this state but the place from which the service is directed or controlled is in this state, the entire services of such individual shall be deemed to be employment subject to this chapter, provided service is deemed to be localized within this state if the service is performed entirely within this state or if the service is performed both within and without this state but the service performed without

this state is incidental to the individual's service within the state, for example, is temporary or transitory in nature or consists of isolated transactions;

(h) Service of an individual who is a citizen of the United States, performed outside the United States except in Canada after December 31, 1971, or the Virgin Islands, after December 31, 1971, and before the first day of January of the year following that in which the United States secretary of labor approves the Virgin Islands law for the first time, in the employ of an American employer, other than service which is "employment" under divisions (B)(2)(f) and (g) of this section or similar provisions of another state's law, if:

(i) The employer's principal place of business in the United States is located in this state;

(ii) The employer has no place of business in the United States, but the employer is an individual who is a resident of this state; or the employer is a corporation which is organized under the laws of this state, or the employer is a partnership or a trust and the number of partners or trustees who are residents of this state is greater than the number who are residents of any other state; or

(iii) None of the criteria of divisions (B)(2)(f)(i) and (ii) of this section is met but the employer has elected coverage in this state or the employer having failed to elect coverage in any state, the individual has filed a claim for benefits, based on such service, under this chapter.

(i) For the purposes of division (B)(2)(h) of this section, the term "American employer" means an employer who is an individual who is a resident of the United States; or a partnership, if two-thirds or more of the partners are residents of the United States; or a trust, if all of the trustees are residents of the United States; or a corporation organized under the laws of the United States or of any state, provided the term "United States" includes the states, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

(j) Notwithstanding any other provisions of divisions (B)(1) and (2) of this section, service, except for domestic service in a private home not covered under division (A)(1)(c) of this section, with respect to which a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund, or service, except for domestic service in a private home not covered under division (A)(1)(c) of this section, which, as a condition for full tax credit against the tax imposed by the "Federal Unemployment Tax Act," 84 Stat. 713, 26 *U.S.C.A. 3301 to 3311*, is required to be covered under this chapter.

(k) Construction services performed by any individual under a construction contract, as defined in section 4141.39 of the Revised Code, if the director determines that the employer for whom services are performed has the right to direct or control the performance of the services and that the individuals who perform the services receive remuneration for the services performed. The director shall presume that the employer for whom services are performed has the right to direct or control the performance of the services if ten or more of the following criteria apply:

- (i) The employer directs or controls the manner or method by which instructions are given to the individual performing services;
- (ii) The employer requires particular training for the individual performing services;
- (iii) Services performed by the individual are integrated into the regular functioning of the employer;
- (iv) The employer requires that services be provided by a particular individual;
- (v) The employer hires, supervises, or pays the wages of the individual performing services;
- (vi) A continuing relationship between the employer and the individual performing services exists which contemplates continuing or recurring work, even if not full-time work;
- (vii) The employer requires the individual to perform services during established hours;
- (viii) The employer requires that the individual performing services be devoted on a full-time basis to the business of the employer;
- (ix) The employer requires the individual to perform services on the employer's premises;
- (x) The employer requires the individual performing services to follow the order of work established by the employer;
- (xi) The employer requires the individual performing services to make oral or written reports of progress;
- (xii) The employer makes payment to the individual for services on a regular basis, such as hourly, weekly, or monthly;
- (xiii) The employer pays expenses for the individual performing services;
- (xiv) The employer furnishes the tools and materials for use by the individual to perform services;
- (xv) The individual performing services has not invested in the facilities used to perform services;
- (xvi) The individual performing services does not realize a profit or suffer a loss as a result of the performance of the services;
- (xvii) The individual performing services is not performing services for more than two employers simultaneously;
- (xviii) The individual performing services does not make the services available to the general public;
- (xix) The employer has a right to discharge the individual performing services;
- (xx) The individual performing services has the right to end the individual's relationship with the employer without incurring liability pursuant to an employment contract or agreement.

(3) "Employment" does not include the following services if they are found not subject to the "Federal Unemployment Tax Act," 84 Stat. 713 (1970), 26 U.S.C.A. 3301 to 3311, and if the services are not required to be included under division (B)(2)(j) of this section:

(a) Service performed after December 31, 1977, in agricultural labor, except as provided in division (A)(1)(d) of this section;

(b) Domestic service performed after December 31, 1977, in a private home, local college club, or local chapter of a college fraternity or sorority except as provided in division (A)(1)(c) of this section;

(c) Service performed after December 31, 1977, for this state or a political subdivision as described in division (B)(2)(a) of this section when performed:

(i) As a publicly elected official;

(ii) As a member of a legislative body, or a member of the judiciary;

(iii) As a military member of the Ohio national guard;

(iv) As an employee, not in the classified service as defined in section 124.11 of the Revised Code, serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency;

(v) In a position which, under or pursuant to law, is designated as a major nontenured policymaking or advisory position, not in the classified service of the state, or a policymaking or advisory position the performance of the duties of which ordinarily does not require more than eight hours per week.

(d) In the employ of any governmental unit or instrumentality of the United States;

(e) Service performed after December 31, 1971:

(i) Service in the employ of an educational institution or institution of higher education, including those operated by the state or a political subdivision, if such service is performed by a student who is enrolled and is regularly attending classes at the educational institution or institution of higher education; or

(ii) By an individual who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at the institution, which combines academic instruction with work experience, if the service is an integral part of the program, and the institution has so certified to the employer, provided that this subdivision shall not apply to service performed in a program established for or on behalf of an employer or group of employers;

(f) Service performed by an individual in the employ of the individual's son, daughter, or spouse and service performed by a child under the age of eighteen in the employ of the child's father or mother;

(g) Service performed for one or more principals by an individual who is compensated on a commission basis, who in the performance of the work is master of the individual's own time and efforts, and whose remuneration is wholly dependent on the amount of effort

the individual chooses to expend, and which service is not subject to the "Federal Unemployment Tax Act," 53 Stat. 183 (1939), 26 U.S.C.A. 3301 to 3311. Service performed after December 31, 1971:

(i) By an individual for an employer as an insurance agent or as an insurance solicitor, if all this service is performed for remuneration solely by way of commission;

(ii) As a home worker performing work, according to specifications furnished by the employer for whom the services are performed, on materials or goods furnished by such employer which are required to be returned to the employer or to a person designated for that purpose.

(h) Service performed after December 31, 1971:

(i) In the employ of a church or convention or association of churches, or in an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

(ii) By a duly ordained, commissioned, or licensed minister of a church in the exercise of the individual's ministry or by a member of a religious order in the exercise of duties required by such order; or

(iii) In a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, or providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market, by an individual receiving such rehabilitation or remunerative work;

(i) Service performed after June 30, 1939, with respect to which unemployment compensation is payable under the "Railroad Unemployment Insurance Act," 52 Stat. 1094 (1938), 45 U.S.C. 351;

(j) Service performed by an individual in the employ of any organization exempt from income tax under section 501 of the "Internal Revenue Code of 1954," if the remuneration for such service does not exceed fifty dollars in any calendar quarter, or if such service is in connection with the collection of dues or premiums for a fraternal beneficial society, order, or association and is performed away from the home office or is ritualistic service in connection with any such society, order, or association;

(k) Casual labor not in the course of an employer's trade or business; incidental service performed by an officer, appraiser, or member of a finance committee of a bank, building and loan association, savings and loan association, or savings association when the remuneration for such incidental service exclusive of the amount paid or allotted for directors' fees does not exceed sixty dollars per calendar quarter is casual labor;

(l) Service performed in the employ of a voluntary employees' beneficial association providing for the payment of life, sickness, accident, or other benefits to the members of such association or their dependents or their designated beneficiaries, if admission to a membership in such association is limited to individuals who are officers or employees of a municipal or public corporation, of a political subdivision of the state, or of the United

States and no part of the net earnings of such association inures, other than through such payments, to the benefit of any private shareholder or individual;

(m) Service performed by an individual in the employ of a foreign government, including service as a consular or other officer or employee or of a nondiplomatic representative;

(n) Service performed in the employ of an instrumentality wholly owned by a foreign government if the service is of a character similar to that performed in foreign countries by employees of the United States or of an instrumentality thereof and if the director finds that the secretary of state of the United States has certified to the secretary of the treasury of the United States that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States and of instrumentalities thereof;

(o) Service with respect to which unemployment compensation is payable under an unemployment compensation system established by an act of congress;

(p) Service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to state law, and service performed as an intern in the employ of a hospital by an individual who has completed a four years' course in a medical school chartered or approved pursuant to state law;

(q) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

(r) Service performed in the employ of the United States or an instrumentality of the United States immune under the constitution of the United States from the contributions imposed by this chapter, except that to the extent that congress permits states to require any instrumentalities of the United States to make payments into an unemployment fund under a state unemployment compensation act, this chapter shall be applicable to such instrumentalities and to services performed for such instrumentalities in the same manner, to the same extent, and on the same terms as to all other employers, individuals, and services, provided that if this state is not certified for any year by the proper agency of the United States under section 3304 of the "Internal Revenue Code of 1954," the payments required of such instrumentalities with respect to such year shall be refunded by the director from the fund in the same manner and within the same period as is provided in division (E) of section 4141.09 of the Revised Code with respect to contributions erroneously collected;

(s) Service performed by an individual as a member of a band or orchestra, provided such service does not represent the principal occupation of such individual, and which service is not subject to or required to be covered for full tax credit against the tax imposed by the "Federal Unemployment Tax Act," 53 Stat. 183 (1939), 26 U.S.C.A. 3301 to 3311. Service performed after December 31, 1971, for a nonprofit organization, this state or its instrumentalities, or a political subdivision or its instrumentalities, as part of an unemployment work-relief or work-training program assisted or financed in whole or in part

by any federal agency or an agency of a state or political subdivision thereof, by an individual receiving the work-relief or work-training.

(t) Service performed in the employ of a day camp whose camping season does not exceed twelve weeks in any calendar year, and which service is not subject to the "Federal Unemployment Tax Act," 53 Stat. 183 (1939), 26 U.S.C.A. 3301 to 3311. Service performed after December 31, 1971:

(i) In the employ of a hospital, if the service is performed by a patient of the hospital, as defined in division (W) of this section;

(ii) For a prison or other correctional institution by an inmate of the prison or correctional institution;

(iii) Service performed after December 31, 1977, by an inmate of a custodial institution operated by the state, a political subdivision, or a nonprofit organization.

(u) Service that is performed by a nonresident alien individual for the period the individual temporarily is present in the United States as a nonimmigrant under division (F), (J), (M), or (Q) of section 101(a)(15) of the "Immigration and Nationality Act," 66 Stat. 163, 8 U.S.C.A. 1101, as amended, that is excluded under section 3306(c)(19) of the "Federal Unemployment Tax Act," 53 Stat. 183 (1939), 26 U.S.C.A. 3301 to 3311.

(v) Notwithstanding any other provisions of division (B)(3) of this section, services that are excluded under divisions (B)(3)(g), (j), (k), and (l) of this section shall not be excluded from employment when performed for a nonprofit organization, as defined in division (X) of this section, or for this state or its instrumentalities, or for a political subdivision or its instrumentalities;

(w) Service that is performed by an individual working as an election official or election worker if the amount of remuneration received by the individual during the calendar year for services as an election official or election worker is less than one thousand dollars;

(x) Service performed for an elementary or secondary school that is operated primarily for religious purposes, that is described in subsection 501(c)(3) and exempt from federal income taxation under subsection 501(a) of the Internal Revenue Code, 26 U.S.C.A. 501;

(y) Service performed by a person committed to a penal institution.

(4) If the services performed during one half or more of any pay period by an employee for the person employing that employee constitute employment, all the services of such employee for such period shall be deemed to be employment; but if the services performed during more than one half of any such pay period by an employee for the person employing that employee do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment. As used in division (B)(4) of this section, "pay period" means a period, of not more than thirty-one consecutive days, for which payment of remuneration is ordinarily made to the employee by the person employing that employee. Division (B)(4) of this section does not apply to services performed in a pay period by an employee for the person employing that employee, if any of such service is excepted by division (B)(3)(o) of this section.

(C) "Benefits" means money payments payable to an individual who has established benefit rights, as provided in this chapter, for loss of remuneration due to the individual's unemployment.

(D) "Benefit rights" means the weekly benefit amount and the maximum benefit amount that may become payable to an individual within the individual's benefit year as determined by the director.

(E) "Claim for benefits" means a claim for waiting period or benefits for a designated week.

(F) "Additional claim" means the first claim for benefits filed following any separation from employment during a benefit year; "continued claim" means any claim other than the first claim for benefits and other than an additional claim.

(G)(1) "Wages" means remuneration paid to an employee by each of the employee's employers with respect to employment; except that wages shall not include that part of remuneration paid during any calendar year to an individual by an employer or such employer's predecessor in interest in the same business or enterprise, which in any calendar year is in excess of eight thousand two hundred fifty dollars on and after January 1, 1992; eight thousand five hundred dollars on and after January 1, 1993; eight thousand seven hundred fifty dollars on and after January 1, 1994; and nine thousand dollars on and after January 1, 1995. Remuneration in excess of such amounts shall be deemed wages subject to contribution to the same extent that such remuneration is defined as wages under the "Federal Unemployment Tax Act," 84 Stat. 714 (1970), 26 U.S.C.A. 3301 to 3311, as amended. The remuneration paid an employee by an employer with respect to employment in another state, upon which contributions were required and paid by such employer under the unemployment compensation act of such other state, shall be included as a part of remuneration in computing the amount specified in this division.

(2) Notwithstanding division (G)(1) of this section, if, as of the computation date for any calendar year, the director determines that the level of the unemployment compensation fund is sixty per cent or more below the minimum safe level as defined in section 4141.25 of the Revised Code, then, effective the first day of January of the following calendar year, wages subject to this chapter shall not include that part of remuneration paid during any calendar year to an individual by an employer or such employer's predecessor in interest in the same business or enterprise which is in excess of nine thousand dollars. The increase in the dollar amount of wages subject to this chapter under this division shall remain in effect from the date of the director's determination pursuant to division (G)(2) of this section and thereafter notwithstanding the fact that the level in the fund may subsequently become less than sixty per cent below the minimum safe level.

(H)(1) "Remuneration" means all compensation for personal services, including commissions and bonuses and the cash value of all compensation in any medium other than cash, except that in the case of agricultural or domestic service, "remuneration" includes only cash remuneration. Gratuities customarily received by an individual in the course of the individual's employment from persons other than the individual's employer and which are accounted for by such individual to the individual's employer are taxable wages.

The reasonable cash value of compensation paid in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the director, provided that "remuneration" does not include:

(a) Payments as provided in divisions (b)(2) to (b)(16) of section 3306 of the "Federal Unemployment Tax Act," 84 Stat. 713, 26 U.S.C.A. 3301 to 3311, as amended;

(b) The payment by an employer, without deduction from the remuneration of the individual in the employer's employ, of the tax imposed upon an individual in the employer's employ under section 3101 of the "Internal Revenue Code of 1954," with respect to services performed after October 1, 1941.

(2) "Cash remuneration" means all remuneration paid in cash, including commissions and bonuses, but not including the cash value of all compensation in any medium other than cash.

(I) "Interested party" means the director and any party to whom notice of a determination of an application for benefit rights or a claim for benefits is required to be given under section 4141.28 of the Revised Code.

(J) "Annual payroll" means the total amount of wages subject to contributions during a twelve-month period ending with the last day of the second calendar quarter of any calendar year.

(K) "Average annual payroll" means the average of the last three annual payrolls of an employer, provided that if, as of any computation date, the employer has had less than three annual payrolls in such three-year period, such average shall be based on the annual payrolls which the employer has had as of such date.

(L)(1) "Contributions" means the money payments to the state unemployment compensation fund required of employers by section 4141.25 of the Revised Code and of the state and any of its political subdivisions electing to pay contributions under section 4141.242 [4141.24.2] of the Revised Code. Employers paying contributions shall be described as "contributory employers."

(2) "Payments in lieu of contributions" means the money payments to the state unemployment compensation fund required of reimbursing employers under sections 4141.241 [4141.24.1] and 4141.242 [4141.24.2] of the Revised Code.

(M) An individual is "totally unemployed" in any week during which the individual performs no services and with respect to such week no remuneration is payable to the individual.

(N) An individual is "partially unemployed" in any week if, due to involuntary loss of work, the total remuneration payable to the individual for such week is less than the individual's weekly benefit amount.

(O) "Week" means the calendar week ending at midnight Saturday unless an equivalent week of seven consecutive calendar days is prescribed by the director.

(1) "Qualifying week" means any calendar week in an individual's base period with respect to which the individual earns or is paid remuneration in employment subject to this chapter. A calendar week with respect to which an individual earns remuneration but for

which payment was not made within the base period, when necessary to qualify for benefit rights, may be considered to be a qualifying week. The number of qualifying weeks which may be established in a calendar quarter shall not exceed the number of calendar weeks in the quarter.

(2) "Average weekly wage" means the amount obtained by dividing an individual's total remuneration for all qualifying weeks during the base period by the number of such qualifying weeks, provided that if the computation results in an amount that is not a multiple of one dollar, such amount shall be rounded to the next lower multiple of one dollar.

(P) "Weekly benefit amount" means the amount of benefits an individual would be entitled to receive for one week of total unemployment.

(Q)(1) "Base period" means the first four of the last five completed calendar quarters immediately preceding the first day of an individual's benefit year, except as provided in division (Q)(2) of this section.

(2) If an individual does not have sufficient qualifying weeks and wages in the base period to qualify for benefit rights, the individual's base period shall be the four most recently completed calendar quarters preceding the first day of the individual's benefit year. Such base period shall be known as the "alternate base period." If information as to weeks and wages for the most recent quarter of the alternate base period is not available to the director from the regular quarterly reports of wage information, which are systematically accessible, the director may, consistent with the provisions of section 4141.28 of the Revised Code, base the determination of eligibility for benefits on the affidavit of the claimant with respect to weeks and wages for that calendar quarter. The claimant shall furnish payroll documentation, where available, in support of the affidavit. The determination based upon the alternate base period as it relates to the claimant's benefit rights, shall be amended when the quarterly report of wage information from the employer is timely received and that information causes a change in the determination. As provided in division (B)(1)(b) of section 4141.28 of the Revised Code, any benefits paid and charged to an employer's account, based upon a claimant's affidavit, shall be adjusted effective as of the beginning of the claimant's benefit year. No calendar quarter in a base period or alternate base period shall be used to establish a subsequent benefit year.

(3) The "base period" of a combined wage claim, as described in division (H) of section 4141.43 of the Revised Code, shall be the base period prescribed by the law of the state in which the claim is allowed.

(4) For purposes of determining the weeks that comprise a completed calendar quarter under this division, only those weeks ending at midnight Saturday within the calendar quarter shall be utilized.

(R)(1) "Benefit year" with respect to an individual means the fifty-two week period beginning with the first day of that week with respect to which the individual first files a valid application for determination of benefit rights, and thereafter the fifty-two week period beginning with the first day of that week with respect to which the individual next files a valid application for determination of benefit rights after the termination of the individual's last preceding benefit year, except that the application shall not be considered valid unless

the individual has had employment in six weeks that is subject to this chapter or the unemployment compensation act of another state, or the United States, and has, since the beginning of the individual's previous benefit year, in the employment earned three times the average weekly wage determined for the previous benefit year. The "benefit year" of a combined wage claim, as described in division (H) of section 4141.43 of the Revised Code, shall be the benefit year prescribed by the law of the state in which the claim is allowed. Any application for determination of benefit rights made in accordance with section 4141.28 of the Revised Code is valid if the individual filing such application is unemployed, has been employed by an employer or employers subject to this chapter in at least twenty qualifying weeks within the individual's base period, and has earned or been paid remuneration at an average weekly wage of not less than twenty-seven and one-half per cent of the statewide average weekly wage for such weeks. For purposes of determining whether an individual has had sufficient employment since the beginning of the individual's previous benefit year to file a valid application, "employment" means the performance of services for which remuneration is payable.

(2) Effective for applications filed on and after March 3, 2002, any application for determination of benefit rights made in accordance with section 4141.28 of the Revised Code is valid if the individual satisfies the criteria described in division (R)(1) of this section, and if the reason for the individual's separation from employment is not disqualifying pursuant to division (D)(2) of section 4141.29 or section 4141.291 [4141.29.1] of the Revised Code. A disqualification imposed pursuant to division (D)(2) of section 4141.29 or section 4141.291 [4141.29.1] of the Revised Code must be removed as provided in those sections as a requirement of establishing a valid application for benefit rights filed on and after March 3, 2002.

(3) The statewide average weekly wage shall be calculated by the director once a year based on the twelve-month period ending the thirtieth day of June, as set forth in division (B)(3) of section 4141.30 of the Revised Code, rounded down to the nearest dollar. Increases or decreases in the amount of remuneration required to have been earned or paid in order for individuals to have filed valid applications shall become effective on Sunday of the calendar week in which the first day of January occurs that follows the twelve-month period ending the thirtieth day of June upon which the calculation of the statewide average weekly wage was based.

(4) As used in this division, an individual is "unemployed" if, with respect to the calendar week in which such application is filed, the individual is "partially unemployed" or "totally unemployed" as defined in this section or if, prior to filing the application, the individual was separated from the individual's most recent work for any reason which terminated the individual's employee-employer relationship, or was laid off indefinitely or for a definite period of seven or more days.

(S) "Calendar quarter" means the period of three consecutive calendar months ending on the thirty-first day of March, the thirtieth day of June, the thirtieth day of September, and the thirty-first day of December, or the equivalent thereof as the director prescribes by rule.

(T) "Computation date" means the first day of the third calendar quarter of any calendar year.

(U) "Contribution period" means the calendar year beginning on the first day of January of any year.

(V) "Agricultural labor," for the purpose of this division, means any service performed prior to January 1, 1972, which was agricultural labor as defined in this division prior to that date, and service performed after December 31, 1971:

(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;

(2) In the employ of the owner or tenant or other operator of a farm in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by hurricane, if the major part of such service is performed on a farm;

(3) In connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15(g) of the "Agricultural Marketing Act," 46 Stat. 1550 (1931), *12 U.S.C. 1141j*, as amended, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(4) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity, but only if the operator produced more than one half of the commodity with respect to which such service is performed;

(5) In the employ of a group of operators of farms, or a cooperative organization of which the operators are members, in the performance of service described in division (V)(4) of this section, but only if the operators produced more than one-half of the commodity with respect to which the service is performed;

(6) Divisions (V)(4) and (5) of this section shall not be deemed to be applicable with respect to service performed:

(a) In connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(b) On a farm operated for profit if the service is not in the course of the employer's trade or business.

As used in division (V) of this section, "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses, or other similar structures used primarily for the raising of agricultural or horticultural commodities and orchards.

(W) "Hospital" means an institution which has been registered or licensed by the Ohio department of health as a hospital.

(X) "Nonprofit organization" means an organization, or group of organizations, described in section 501(c)(3) of the "Internal Revenue Code of 1954," and exempt from income tax under section 501(a) of that code.

(Y) "Institution of higher education" means a public or nonprofit educational institution which:

(1) Admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent;

(2) Is legally authorized in this state to provide a program of education beyond high school; and

(3) Provides an educational program for which it awards a bachelor's or higher degree, or provides a program which is acceptable for full credit toward such a degree, a program of post-graduate or post-doctoral studies, or a program of training to prepare students for gainful employment in a recognized occupation.

For the purposes of this division, all colleges and universities in this state are institutions of higher education.

(Z) For the purposes of this chapter, "states" includes the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

(AA) "Alien" means, for the purposes of division (A)(1)(d) of this section, an individual who is an alien admitted to the United States to perform service in agricultural labor pursuant to sections 214(c) and 101(a)(15)(H) of the "Immigration and Nationality Act," 66 Stat. 163, 8 U.S.C.A. 1101.

(BB)(1) "Crew leader" means an individual who furnishes individuals to perform agricultural labor for any other employer or farm operator, and:

(a) Pays, either on the individual's own behalf or on behalf of the other employer or farm operator, the individuals so furnished by the individual for the service in agricultural labor performed by them;

(b) Has not entered into a written agreement with the other employer or farm operator under which the agricultural worker is designated as in the employ of the other employer or farm operator.

(2) For the purposes of this chapter, any individual who is a member of a crew furnished by a crew leader to perform service in agricultural labor for any other employer or farm operator shall be treated as an employee of the crew leader if:

(a) The crew leader holds a valid certificate of registration under the "Farm Labor Contractor Registration Act of 1963," 90 Stat. 2668, 7 U.S.C. 2041; or

(b) Substantially all the members of the crew operate or maintain tractors, mechanized harvesting or crop-dusting equipment, or any other mechanized equipment, which is provided by the crew leader; and

(c) If the individual is not in the employment of the other employer or farm operator within the meaning of division (B)(1) of this section.

(3) For the purposes of this division, any individual who is furnished by a crew leader to perform service in agricultural labor for any other employer or farm operator and who is not treated as in the employment of the crew leader under division (BB)(2) of this section shall be treated as the employee of the other employer or farm operator and not of the crew leader. The other employer or farm operator shall be treated as having paid cash remuneration to the individual in an amount equal to the amount of cash remuneration paid to the individual by the crew leader, either on the crew leader's own behalf or on behalf of the other employer or farm operator, for the service in agricultural labor performed for the other employer or farm operator.

(CC) "Educational institution" means an institution other than an institution of higher education as defined in division (Y) of this section which:

(1) Offers participants, trainees, or students an organized course of study or training designed to transfer to them knowledge, skills, information, doctrines, attitudes, or abilities from, by, or under the guidance of an instructor or teacher; and

(2) Is approved, chartered, or issued a permit to operate as a school by the state board of education or other government agency that is authorized within the state to approve, charter, or issue a permit for the operation of a school.

For the purposes of this division, the courses of study or training which the institution offers may be academic, technical, trade, or preparation for gainful employment in a recognized occupation.

#### HISTORY:

: GC § 1345-1; 116 v PtlI, 286; 117 v 289; 118 v 259; 118 v 721; 119 v 821; 120 v 666; 121 v 73; 121 v 635; 121 v 703; 122 v 695; 123 v 178; 123 v 559; 124 v 488; Bureau of Code Revision, 10-1-53; 125 v 689; 126 v 337 (Eff 10-10-55); 128 v 1308 (Eff 10-16-59); 130 v 941 (Eff 10-20-63); 132 v S 237 (Eff 12-31-67); 133 v H 1 (Eff 3-18-69); 134 v S 77 (Eff 10-29-71); 134 v H 495 (Eff 3-23-73); 135 v S 1 (Eff 1-1-74); 135 v S 52 (Eff 1-6-74); 136 v S 173 (Eff 12-2-75); 137 v H 762 (Eff 1-1-78); 138 v H 1021 (Eff 10-19-80); 139 v H 1055 (Eff 12-17-82); 140 v H 404 (Eff 7-10-83); 140 v S 141 (Eff 9-20-84); 141 v H 557 (Eff 8-1-85); 141 v H 766 (Eff 12-17-86); 142 v H 231 (Eff 1-1-88); 142 v H 231, § 10 (Eff 10-1-88); 142 v H 872 (Eff 10-15-88); 143 v H 431 (Eff 10-24-89); 143 v H 826 (Eff 6-26-90); 143 v H 446 (Eff 9-25-90); 146 v H 275 (Eff 11-24-95); 146 v H 245 (Eff 9-17-96); 147 v S 130 (Eff 9-18-97); 147 v H 478 (Eff 11-26-97); 148 v H 471 (Eff 7-1-2000); 148 v H 509. Eff 9-21-2000.

#### CASE NOTES AND OAG

1. (1936) The Alabama unemployment compensation act does not violate USConst amend XIV because it exempts from the tax thereby imposed on employers, those who employ agricultural laborers, domestic servants, seamen, insurance agents, or close relatives, or because exempting charitable institutions, interstate railways, the government of the United States, or of any state or political subdivision and those doing business for less

than twenty weeks in the year: *Carmichael v. Southern Coal & Coke Co.*, 301 US 495, 81 LEd 1245, 57 SCt 868.

2. (1936) The excise tax imposed on an employer with respect to having individuals in his employ equal to certain percentage of total wages was held not unconstitutional as arbitrary and discriminatory because of provisions exempting employers of less than eight individuals, agricultural laborers, and domestic servants, since the exemptions have support in considerations of policy and practical convenience and would be upheld under USConst amend XIV if adopted by a state and hence are valid in legislation by congress (Title IX, Social Security Act; U.S. Code, Title 42, § § 1101 to 1110): *Chas. C. Steward Mach. Co. v. Davis*, 301 US 548, 81 LEd 1279, 57 SCt 883.

3. (1986) A benefit year for unemployment benefits commences on the first day of that week in which an applicant first files a valid application for the determination of benefit rights: *Knight v. Ohio Bur. of Emp. Serv.*, 28 OS3d 8, 28 OBR 6, 501 NE2d 1198.

4. (1986) Acceptance of deferred remuneration does not preclude a claimant from being totally or partially unemployed as defined by RC § 4141.01(M) or (N): *Mt. Healthy Bd. of Edn. v. Cook*, 28 OS3d 1, 28 OBR 1, 501 NE2d 615.

5. (1983) Failure of an employer to file an election to have his parent-employee covered under the unemployment compensation laws does not necessarily preclude the employee from receiving benefits where contributions were paid during the course of the employment: *Dixon v. Dixon*, 4 OS3d 160, 4 OBR 402, 447 NE2d 756.

6. (1969) A corporation not for profit which operates a home caring for the aged and infirm is not an "employer," under RC § 4141.01(A), liable to contribute to the unemployment compensation fund: *Carmelite Sisters, St. Rita's Home v. Board of Review*, 18 OS2d 41, 47 OO2d 159, 247 NE2d 477.

7. (1969) The care of the aged and infirm by a home operated by a corporation not for profit constitutes ". . . activities . . . confined exclusively to the rendition of service . . . for its . . . charitable . . . purposes" under RC § 4141.01(B)(3)(h): *Carmelite Sisters, St. Rita's Home v. Board of Review*, 18 OS2d 41, 47 OO2d 159, 247 NE2d 477.

8. (1967) Where an employer, pursuant to a labor-management contract, allocates the vacations of his employees, a claimant who finds himself on an enforced vacation without pay is involuntarily and totally unemployed for the duration of such "vacation" and shall receive benefits provided in the unemployment compensation act, RC § § 4141.01 to 4141.46, inclusive: *Dudley v. Morris*, 10 OS2d 235, 39 OO2d 370, 227 NE2d 231.

9. (1965) Where the fee received by individual salesmen and sales managers is a commission within the meaning of paragraph (B)(2)(g) [now (B)(3)(g)] of RC § 4141.01 and such remuneration is "wholly dependent on the amount of effort" each chooses to expend, the employees are excepted from the requirement of the act: *Lomicka v. Leach*, 2 OS2d 248, 31 OO2d 506, 208 NE2d 527.

10. (1965) There can be no doubt that vacation pay is "remuneration," defined by RC § 4141.01(H) as including "all compensation for personal services": *Nunamaker v. U.S. Steel Corp.*, 2 OS2d 55, 31 OO2d 47, 206 NE2d 206.

11. (1965) An employee who voluntarily elected to receive and accepted vacation pay, received "remuneration," was not "totally unemployed," and, therefore, was ineligible for unemployment benefits pursuant to RC §§ 4141.01 to 4141.46, inclusive, in effect from October 16, 1959, to October 19, 1963: *Nunamaker v. United States Steel Corp.*, 2 OS2d 55, 31 OO2d 47, 206 NE2d 206.

12. (1954) The unemployment compensation board of review, under the unemployment compensation act, is not an interested party, as defined by RC § 4141.01(I), and does not have the right to appeal from a judgment of the court of common pleas allowing unemployment compensation to a claimant: *Miller v. Bureau of Unemployment Comp.*, 160 OS 561, 52 OO 451, 117 NE2d 427.

13. (1949) Where services are performed by an individual who is compensated solely on a commission basis and is the master of his own time and efforts and whose remuneration is wholly dependent on the amount of effort he chooses to expend, such individual is not in employment within the meaning of the unemployment compensation act of Ohio, whether he be considered an independent contractor or an employee excepted by RC § 4141.01: *American Life & Accident Ins. Co. v. Jones*, 152 OS 287, 40 OO 326, 89 NE2d 301.

14. (1944) The three tests provided by the Ohio unemployment compensation act, by which it may be determined that one employing another shall be exempt from the operation of the act, do not serve to widen the scope of the term "employment" as used in the statute so as to include persons not otherwise included, but to exclude from the definition of the term "employment" persons who perform incidental service and who, but for such limitations, might be classed as employees of the person for whom such incidental service is rendered: *Commercial Motor Freight, Inc. v. Ebright*, 143 OS 127, 28 OO 56, 54 NE2d 297.

15. (1944) The superintendent of building and loan associations of the state of Ohio, in his capacity as liquidator of a building and loan association, was an employer within the contemplation of the unemployment compensation act (GC § 1345-1 [RC § 4141.01] et seq) with respect to an employee who had worked for such association before it was taken over for liquidation, was retained in connection with the liquidating process, was compensated from the funds of the association, and was released solely for the reason that the liquidating operation had advanced so far that his services were no longer required: *State ex rel. Merion v. Board of Review*, 142 OS 628, 27 OO 539, 53 NE2d 818.

16. (1940) A privately organized and owned corporation for profit, existing under and by virtue of the statutory law of Ohio and conducting a general banking and trust business in this state, does not ipso facto become an instrumentality of the United States by reason of

incidental, voluntary membership in the federal reserve system: *Western Bank & Trust Co. v. Atkinson*, 137 OS 352, 19 OO 31, 30 NE2d 341.

17. (1940) A person who sells goods for another and who is compensated therefor by commissions calculated on the amount of goods sold, is not an employee within the meaning of the Ohio unemployment compensation act, where such person is subject to no direction or control from the person for whom he sells and is not obligated to devote any time to such selling operations unless he so chooses: *Bowman v. Atkinson*, 136 OS 495, 17 OO 95, 26 NE2d 798.

17.1 (1998) The exemption under RC § 4141.01 for religious organizations applied to a teacher at a school operated by a church: *Miller v. Sts. Peter & Paul School*, 126 OApp3d 762, 711 NE2d 311.

17.2 (1997) Public policy did not prevent the school board from refusing to rehire bus drivers who collected unemployment compensation during the intervening summer: *Valot v. Southeast Local School Dist. Bd. of Edn.*, 124 OApp3d 492, 706 NE2d 805.

17.3 (1997) Revised Code § 5104.11(A) supersedes RC § 4141.01 and, as a matter of law, type B day-care home providers are independent contractors for purposes of unemployment compensation: *Lucas Cty. Auditor v. Ohio Bur. of Emp. Serv.*, 122 OApp3d 237, 701 NE2d 703.

18. (1997) The three-pronged test for independent contractor status contained in RC § 4141.01(B)(1)(b) is merely a condensed statutory version of the analysis embodied in *Gillum v. Indus. Comm.* (1943), 141 OS 373 and *Bostic v. Conner* (1988), 37 OS3d 144; if an individual is determined to be an independent contractor under the statutory test there is no compelling reason to apply the additional factors mentioned in those cases: *Griffith v. Administrator*, No. 96-L-202 (11th Dist.), 1997 Ohio App. LEXIS 4030.

18.1 (1997) The trial court did not abuse its discretion in finding an independent contractor relationship where the clients, not the business, dictated the work to be performed and the workers accepted what jobs and hours they wished and had control over the means and manner of the work, as dictated by the clients: *Eisenhour v. Ohio Unemp. Comp. Bd. of Rev.*, No. 97APE03-349 (10th Dist.), 1997 Ohio App. LEXIS 3631.

19. (1997) Since a teacher's deferred remuneration was for services performed during the school-year, such remuneration was not for a week in which "no services" were performed, nor was such deferred remuneration for any week where an involuntary loss of work had occurred; pursuant to RC § 4141.01(M) and (N) she could not be considered either totally or partially unemployed: *Catholic Diocese of Youngstown v. Administrator*, No. 1997CA0023 (5th Dist.), 1997 Ohio App. LEXIS 3945.

20. (1997) Since it is well-settled that specific statutory provisions prevail over conflicting general statutes, RC § 5104.11(A) supersedes RC § 4141.01; type B day care home providers certified pursuant to RC § 5104.11 are independent contractors and not

employees for purposes of unemployment compensation: *Lucas County Auditor v. Administrator*, No. L-96-398 (6th Dist.), 1997 Ohio App. LEXIS 3360.

21. (1996) Claimant never became an "employee" where she was chosen for a training program, but did not pass all the tests required to be accepted as an employee: *Laukert v. Ohio Valley Hosp. Assn.*, 115 OApp3d 168, 684 NE2d 1281.

22. (1995) The trial court properly affirmed a decision awarding benefits to a musician who played the trombone for various orchestras, when: (1) Ohio law was properly applied with respect to the West Virginia employer; (2) the services provided in West Virginia qualified as "employment" in Ohio; (3) the finding about the number of qualifying weeks of employment was not against the manifest weight of the evidence; (4) the claimant was "unemployed" since he was paid only on a "per performance" basis; and (5) the occasions when he refused to work were for good cause: *West Virginia Symphony v. Administrator*, Nos. C-940983, C-940991 (1st Dist.), 1995 Ohio App. LEXIS 5194.

23. (1995) The employer's lump sum payment of all unused vacation pay in connection with a temporary plant closing did not affect the unemployment compensation eligibility of employees who had not scheduled vacation during the closing: *Akzo Salt, Inc. v. Ohio Bur. of Emp. Serv.*, 107 OApp3d 567, 669 NE2d 250.

24. (1994) Revised Code § 4141.01(G)(1) does not permit an employer to utilize the common paymaster arrangement: *Dayton Barsplice, Inc. v. Bur. of Emp. Serv.*, No. 93AP-670 (10th Dist.), 1994 Ohio App. LEXIS 631.

25. (1992) A college whose primary purpose is to train rabbis is within the church-related exemption under RC § 4141.01: *Bach v. Steinbacher*, 80 OApp3d 461, 609 NE2d 607.

26. (1991) Claimant's disability income payments constituted "remuneration" under RC § 4141.01. Thus she had the requisite number of "qualifying weeks": *Shepherd v. Wearever-Proctor Silex, Inc.*, 75 OApp3d 414, 599 NE2d 789.

27. (1991) The Ohio legislature did not intend to extend benefits to Ohio residents based on employment in other jurisdictions unless that employment could be used to qualify the applicant for benefits in the other jurisdiction. Thus army reserve service which would not qualify for federal benefits cannot be used in qualifying for Ohio benefits: *Howard v. Flag City Water, Inc.*, 74 OApp3d 446, 599 NE2d 330.

28. (1990) A claimant's attorney is not an "interested party" for purposes of RC § § 4141.01(I) and 4141.28(J): *Cortwright v. Unemp. Comp. Bd. of Review*, 64 OApp3d 696, 582 NE2d 1068.

29. (1988) An individual who is otherwise eligible for unemployment benefits does not become eligible by performing uncompensated work for a company he owns, since he remains "partially unemployed" within the definition of RC § 4141.01(N): *Rieth v. Ohio Bur. of Emp. Serv.*, 43 OApp3d 150, 539 NE2d 1146.

30. (1988) Under RC § 4141.01(N), an individual is "partially unemployed" if, by reason of involuntary loss of work, his total weekly remuneration is less than his weekly benefit amount: *Rieth v. Ohio Bur. of Emp. Serv.*, 43 OApp3d 150, 539 NE2d 1146.

31. (1987) A determination by the Unemployment Board of Review that a particular person is an employee, rather than an independent contractor, will not be disturbed upon appeal, unless the appellant can show an abuse of discretion: *Prime Kosher Foods, Inc. v. Bur. of Emp. Serv.*, 35 OApp3d 121, 519 NE2d 868.

32. (1986) In order to satisfy the statutory requirement under RC § 4141.01(R) of having "earned remuneration" in a certain amount for each of twenty weeks, a claimant for unemployment benefits must prove that he served an employer during that time under an agreement with the employer to provide services and to be compensated in at least the requisite amount over the full twenty-week period: *Bauer v. Bur. of Emp. Services*, 33 OApp3d 291, 515 NE2d 978.

33. (1986) A claimant otherwise eligible for unemployment compensation benefits does not become ineligible by performing uncompensated work for a company he partly owns, since he remains "partially unemployed," as defined in RC § 4141.01(N): *Adams v. Ohio Bur. of Emp. Serv.*, 31 OApp3d 8, 31 OBR 22, 507 NE2d 1144.

34. (1985) Limited partners who receive compensation in the form of a draw against future profits for their day-to-day activities, who have made a \$50,000 minimum investment in the partnership, and who do not receive as benefits medical hospitalization and dental benefits, paid vacation, accident and sick pay, eligibility for a loan program, participation in a profit-sharing plan, and access to a savings program, are employers, not employees, under RC § 4141.01(A)(1): *In re Appeal of Anderson*, 29 OApp3d 248, 29 OBR 310, 504 NE2d 1155.

35. (1985) A pervasively religious educational institution operated, conducted and financed exclusively by the Jewish community for the purpose of preserving its religious traditions and practices is an organization "operated primarily for religious purposes" within the meaning of RC § 4141.01(B)(3)(i) of the unemployment compensation laws: *Czigler v. Bur. of Emp. Serv.*, 27 OApp3d 272, 27 OBR 316, 501 NE2d 56.

36. (1983) A liquor permit holder is the "employer," for purposes of unemployment taxes (RC § 4141.25), of all persons who work under the liquor permit at the location named in the permit even though the permit holder is not the owner or operator of the business operated at said location: *Westwood Constr. Co. v. Bd. of Review*, 11 OApp3d 120, 11 OBR 175, 463 NE2d 426.

37. (1983) The fact that claimant performed uncompensated services as an officer of a company did not render him ineligible for partial unemployment benefits: *Rini v. Unemployment Comp. Bd. of Review*, 9 OApp3d 214, 9 OBR 364, 459 NE2d 602.

38. (1981) The services of airport limousine drivers are excluded from the definition of "employment" as the term relates to unemployment compensation when the following criteria are satisfied: (1) The individual is compensated on a commission basis; (2) In the performance of his work, the individual is master of his own time and efforts; (3) The individual's remuneration is wholly dependent upon the amount of effort he chooses to expend; and (4) The individual's services are not subject to the Federal Employment Tax Act. (RC § 4141.01[B][3] [g], applied.): *Mogg v. Ohio Bur. of Emp. Serv.*, 2 OApp3d 247, 2 OBR 269, 441 NE2d 625.

39. (1965) A company-union employment contract said: "Employees entitled to vacation who are laid off . . . before they have taken their vacations shall be entitled to vacation pay at the time of exit. Vacation pay received at time of layoff is in lieu of vacation time off . . . ." Thereafter, an employee entitled to a vacation was laid off prior to taking his vacation, but instead received his vacation pay. Held: The weeks for which such vacation pay was given the employee cannot now be considered in determining the twenty calendar weeks of employment within his base period for purposes of complying with RC § 4141.01(R): *Hines v. Dudley*, 1 OApp2d 579, 30 OO2d 600, 206 NE2d 50.

40. (1963) The provisions of the unemployment compensation act deal only with a person who is "unemployed" and do not apply to persons who are employed: *Leach v. Board of Review*, 3 OApp2d 314, 32 OO2d 425, 210 NE2d 395.

41. (1963) The proprietor of a barber shop, who exercises control over barbers working therein and receives a share of the income such barbers receive from customers, is, pursuant to RC § 4141.01, an employer of such barbers and subject to the unemployment compensation act: *Bailey v. Leach*, 118 OApp 10, 24 OO2d 351, 193 NE2d 165.

42. (1963) The proprietor of a barber shop, who exercises no control over barbers working therein and receives only a monthly rental from such barbers who receive their remuneration directly from customers and perform no services directly for such proprietor, is not, pursuant to RC § 4141.01, an employer of such barbers and is not subject to the unemployment compensation act: *Bailey v. Leach*, 118 OApp 7, 24 OO2d 350, 193 NE2d 166.

43. (1962) A taxicab driver who leases a taxicab and dispatch service from a taxicab company is an independent contractor and not an employee of such taxicab company, and is not subject to the unemployment compensation act where, pursuant to such lease, he pays the lessor-owner fifty percent "of the fares collected in excess of the cost of gasoline each day from the operation of said taxicab," and where the lessor-owner exercises no control over the operation of the taxicab and the lessee-driver has no designated working hours, is not required by the lessor-owner to accept dispatched calls or keep any records and receives no compensation from the lessor-owner: *Davis Cabs, Inc. v. Leach*, 115 OApp 165, 20 OO2d 265, 184 NE2d 444.

44. (1955) Where two separate and distinct partnerships with common members operate separate enterprises, they do not constitute a single employment unit under the Ohio

unemployment compensation act: *Church Budget Envelope Co. v. Cornell*, 75 OLA 504, 2 OO2d 158, 136 NE2d 101 (App).

45. (1955) Revised Code § 4141.01, which defines the term "employer," recognizes a partnership as a type of organization: *Church Budget Envelope Co. v. Cornell*, 72 OLA 504, 2 OO2d 158, 136 NE2d 101 (App).

46. (1953) A claimant who has received no compensation from an employer covered by the Ohio unemployment compensation act since his employment by a previous employer, is not entitled to an award: *Pilat v. Bureau of Unemployment Comp.*, 72 OLA 208, 56 OO 160, 128 NE2d 450 (App).

47. (1953) "Wages" within the meaning of the unemployment compensation act means compensation paid by a covered employer: *Pilat v. Bureau of Unemployment Comp.*, 72 OLA 208, 56 OO 160, 128 NE2d 450 (App); *In re Norris*, 31 OMisc 163, 60 OO2d 338, 287 NE2d 830 (CP) (1972).

48. (1952) The unemployment compensation act refers to all payments to be made to the fund as "contributions" and "contributions" are defined in GC § 1345-1 (RC § 4141.01) as the money payments to the state unemployment compensation fund required by this act: *State v. Feingold*, 64 OLA 509, 112 NE2d 830 (App).

49. (1951) The term "employment," as used in the unemployment compensation act of Ohio, does not encompass "service performed in the employ of a private or parochial school, college, or university as a teacher, in research or experimental work, as an administrative officer, or as a member of the faculty": *Technical Schools, Inc. v. Collopy*, 90 OApp 307, 47 OO 394, 106 NE2d 167.

50. (1950) Under par.(a) [now (H), RC § 4141.01], gratuities customarily received by an individual in the course of his employment from persons other than his employer, constitute remuneration within the purview of the act: *State v. Columbus Green Cabs, Inc.*, 91 OApp 164, 48 OO 284, 104 NE2d 709.

51. (1950) Under (f) [now (H)], GC § 1345-1 which requires gratuities customarily received by an individual from other than his employer to be treated as wages received from his employer, and the provision of Rule 2 of the bureau of unemployment compensation, which requires the employer to include as remuneration payable the amount of gratuities or tips actually received by each worker or a reasonable estimate thereof, the operator of a fleet of taxicabs is required to include as remuneration tips received by its drivers, or a reasonable estimate thereof: *State v. Columbus Green Cabs, Inc.*, 91 OApp 164, 48 OO 284, 104 NE2d 709.

52. (1948) By virtue of GC § 1345-1(c)(D)(7) (RC § 4141.01(B)(3)(g)), the term "employment" does not extend to an individual who as master of his own time and efforts is compensated on a commission basis, such remuneration being wholly dependent on the

amount of effort expended: *American Life & Accident Ins. Co. v. Jones*, 53 OLA 161, 83 NE2d 408 (App).

53. (1947) Where officers and directors of a building and loan company are paid a fixed salary, which in one calendar quarter exceeds the amount of sixty dollars, and the company does not separate the amounts paid into directors' fees and additional compensation, the company if otherwise liable under the law is required to pay contributions to the bureau of unemployment compensation, as required by the provisions of GC § 1345-1 (RC § 4141.01) (et seq: *Central Bldg. & Loan Co. v. Jenkins*, 82 OApp 252, 37 OO 562, 81 NE2d 125.)

54. (1947) The term "employment," as defined in GC § 1345-1(c)(D)(7) (RC § 4141.01(B)(3)(g)), does not include service of an employee if it is established, first, that the employee is compensated on a commission basis, second, that the employee is master of his own time and efforts, and third, that the remuneration is wholly dependent on the amount of effort which such employee chooses to expend: *State v. Earl G. Smith, Inc.*, 79 OApp 469, 35 OO 70, 72 NE2d 397.

55. (1944) A member of a partnership association organized under GC § § 8059 to 8078 (RC § 1783.01 et seq), who is also an employee thereof is an "employee" within the meaning of the unemployment compensation act and entitled to benefits thereunder: *R.F. Roof, Ltd. v. Sommers*, 75 OApp 511, 31 OO 298, 62 NE2d 647.

56. (1943) The superintendent of building and loan associations, although an instrumentality of the State of Ohio, in the performance of his duty in taking over and administering an insolvent association, is not exercising governmental functions, and therefore is not exempt from the provisions of the unemployment compensation law within the meaning of (E)(4) [now (F), RC § 4141.01]: *State ex rel. Merion v. Unemployment Comp. Board*, 45 OLA 614, 68 NE2d 411 (App).

57. (1942) The unemployment compensation act (GC § § 1345-1 to 1346-5 [RC § 4141.01 et seq]) is a valid and constitutional legislative measure enacted in the exercise of the state's taxing power, and its validity is determined by constitutional principles applicable to state taxation: *State v. Iden*, 71 OApp 65, 25 OO 404, 47 NE2d 907.

58. (1942) The legislature, by defining the term "employment" in GC § 1345-1 par.(B) [RC § 4141.01], did not enlarge upon the powers granted to it by OConst art II, § 34, authorizing legislation for the welfare of employees; the purpose of that section not being to define employees, but to clarify the right of the legislature to pass laws to promote the general welfare of employees by improving conditions of their employment: *State v. Iden*, 71 OApp 65, 25 OO 404, 47 NE2d 907.

59. (1983) An employee who was not entitled to time off with pay and is laid off for a two-week period suffers "involuntary unemployment" as defined in RC § 4141.01 et seq.: *Caudill v. Ashland Oil Co.*, 9 OMisc2d 16, 9 OBR 501, 459 NE2d 922 (CP).

60. (1972) Where claimants performed no services during the periods of time in question, and with respect to such periods of time no remuneration was payable to them by reason of the insolvency of the employer, the said claimants are "totally unemployed" as defined in RC § 4141.01(M): *In re Norris*, 31 OMisc 163, 60 OO2d 338, 287 NE2d 830 (CP).

61. (1972) Claimants are not precluded from receiving unemployment benefits by reason of their being officers of the employer corporation: *In re Norris*, 31 OMisc 163, 60 OO2d 338, 287 NE2d 830 (CP).

62. (1967) For the purposes of the unemployment compensation law, services may not be considered those of an independent contractor unless all three of the tests of paragraph (B)(1)(b) of RC § 4141.01, are met. These are freedom from control, that the service is outside the usual course of the business for which it is performed, and that the person by whom it is performed is customarily engaged in an independently established business: *Silverman v. Dudley*, 17 OMisc 113, 46 OO2d 140, 244 NE2d 531 (CP).

63. (1965) Where A company hires persons who are assigned to perform work for B company which occupies space in A company's facilities, and such persons are paid by A company which also pays all taxes, on such salaries (with, however, B company reimbursing A company for the gross salaries paid such persons) as well as certain benefits, and where only A company can terminate the employment contract of such persons, such persons are, within the purview of the Unemployment Compensation Act, "employees" of A company and not of B company: *Kant Slip Federal Credit Union, Inc. v. Dudley*, 9 OMisc 123, 38 OO2d 237, 223 NE2d 912, affirmed 9 OS2d 135.

64. (1964) Canvassers who procure raw data in the field to be correlated and made into reports to manufacturers by an analyst of product appeal, are not employees under RC § 4141.01: *In re Bower*, 2 OMisc 35, 31 OO2d 169, 206 NE2d 595 (CP).

65. (1964) Canvassers, all of whom have independent trades or occupations and who are qualified to do their job without instruction, are not employees under paragraph (B)(1)(c) of RC § 4141.01: *In re Bower*, 2 OMisc 35, 31 OO2d 169, 206 NE2d 595 (CP).

66. (1964) Canvassers who are granted complete freedom from control over the performance of services and are not supervised as to the details of doing the work, are not employees under RC § 4141.01: *In re Bower*, 2 OMisc 35, 31 OO2d 169, 206 NE2d 595 (CP).

67. (1961) Under RC § 4141.01(H), a Christmas bonus paid by an employer to an employee, is compensation for personal services rendered by such employee to the employer: *Albaugh v. AlSCO, Inc.*, 87 OLA 582, 18 OO2d 493, 179 NE2d 562 (CP).

68. (1961) The phrase "first claim for benefits" as used in RC § 4141.01(I), defining who is an interested party within the purview of the unemployment compensation act means the first claim actually allowed by final determination within the structure of the unemployment

compensation administration, including its board of review: *Warren Sanitary Milk Co. v. Board of Review*, 87 OLA 195, 179 NE2d 385 (CP).

69. (1960) The owner of taxicabs who pays for all oil and other supplies except gasoline, makes needed repairs, furnishes office facilities, telephone or radio service, garage space and cab stands, is not a person excluded from "employment," under the provisions of paragraph (B)(2)(g) [now (B)(3)(g)], of RC § 4141.01, where the drivers must carry out certain instructions, conform to the rules of the company, and operate their cabs during specified periods of time: *Pharr v. Tichenor*, 16 OO2d 370, 176 NE2d 923 (CP).

70. (1959) Since the unemployment compensation act defines employment to mean "service performed for wages under any contract of hire, written or oral, express or implied," unemployment would therefore mean one without service performed for wages under any contract for hire: *Parent v. Board of Review*, 81 OLA 97, 160 NE2d 560 (CP).

71. (1952) General Code § 1345-1 (RC § 4141.01), cannot be so construed as to grant authority to the administrator to appeal from a decision of the board of review wherein the board arrived at the same conclusion as the administrator: *Collopy v. Haloway*, 64 OLA 363, 49 OO 46, 108 NE2d 878 (CP).

72. (1939) The broad intent and purpose of the unemployment compensation act is to provide against the risks of unemployment by granting security and compensation to those who become separated from their employment through no condition of their own creation or by conditions beyond human control and who are capable of and available for work and unable to obtain work in their usual trade or occupation or other employment: *United States Coal Co. v. Unemployment Comp. Board*, 16 OO 323 (CP), affirmed, 66 OApp 329 (1940).

73. (1939) An order of the unemployment compensation commission requiring a corporate employer to pay compensation taxes on the gross amount of disbursements made to persons in its employ as independent contractors, including compensation not only for personal service rendered by the contractors and their employees but also for the use of trucks of the contractors, is illegal and void: *Commercial Motor Freight, Inc. v. Unemployment Comp. Comm.*, 28 OLA 433 (CP).

74. (1997) Pursuant to OAC 4123-17-14, RC § 4141.01(H)(1), and related provisions of federal law, when a township or other public employer "picks up" employees' contributions to the public employees retirement system as a: (1) "salary reduction" pick up, by reducing the salaries that the employees receive, the amounts picked up by the employer should be included as part of the employer's payroll for purposes of determining workers' compensation premium payments pursuant to RC § 4123.29; and (2) "fringe benefit" pick up or "pick up in lieu of salary increase," by assuming payment of contributions without reducing the employees' salaries, the amounts picked up by the employer should not be included as part of the employer's payroll for purposes of determining workers' compensation premium payments pursuant to RC § 4123.29: OAG No. 97-032.

75. (1987) Certified type B family day-care home providers and in-home aides with whom a county department of human services contracts for child day-care services are not in the "employment," as defined in RC § 4141.01(B)(1), of the county department of human services for purposes of RC Chapter 4141.: OAG No. 87-073.

76. (1982) Political subdivisions and agencies which accept the services of persons on probation to perform community services pursuant to RC § 2951.02(G), and which do not provide any compensation or remuneration to such individuals, are not required to make contributions to either the workers' compensation fund or the unemployment compensation fund on behalf of those individuals: OAG No. 82-041.

77. (1977) A teacher is not totally unemployed, pursuant to RC § 4141.01(M), in any week with respect to which remuneration has been or will be paid to him. If a teacher will be retroactively reimbursed for salary not paid during a period in which the schools are closed, such teacher is not entitled to unemployment compensation during this period. (OAG No. 74-096, clarified.) Whether a school board must pay a teacher for makeup days after the schools reopen is not a question of state law. Rather, it is a matter to be controlled by the local contract between the school board and its teachers. The determination of this matter has no bearing on a teacher's right to unemployment benefits during the time the schools are closed, provided that such compensation does not constitute retroactive payments for the period during which unemployment benefits are claimed: OAG No. 77-100.

78. (1976) The State's responsibility as an employer for purposes of workmen's compensation, unemployment compensation and the withholding of income taxes is based on the existence of an employer-employee relationship, which must be determined on a case to case basis using the common law direct control test: OAG No. 76-40.

79. (1970) The Cuyahoga County community mental health and retardation board does not have the authority under RC § 4141.01(A)(4), as amended, effective March 18, 1969, to voluntarily qualify its employees for the purposes of unemployment compensation: OAG No. 70-088.

80. (1959) Pursuant to 128 v 1308, § 3, relative to unemployment compensation, effective October 16, 1959, benefit rights with respect to weeks of unemployment beginning on and after October 16, 1959, are to be determined in accordance with the provisions of RC § 4141.01 et seq, as effective October 16, 1959: *1959 OAG No. 1047.*

81. (1948) An individual receiving unemployment compensation, who is re-employed before he has received the total amount of benefits payable to him in connection with eligibility which he acquired under his initial employment, and who subsequently becomes separated from re-employment before he has acquired eligibility to benefits in relation to such re-employment, is entitled to a continuance of benefits at the rate and in the amount of the balance of the total benefits payable as determined at the time of his initial eligibility for benefits: *1948 OAG No. 2110.*

82. (1940) Service performed for one or more principals by an individual who is required to secure from the state a license to perform such service and who in the performance of such service is master of his own time and efforts, for which service such individual is compensated by commissions dependent on the amount of effort he chooses to expend, is not "employment" within the meaning of the unemployment compensation act [RC § 4141.01(B)(3)(g)], unless the provisions of law regulating the business or occupation in which such service is rendered prohibit such service from being rendered in the manner and under the conditions above set forth: *1940 OAG No. 2414.*

83. (1940) Service performed on a commission basis is not employment within the meaning of the act, where the agent is not obligated to devote any more time or effort than he chooses in the rendition of such service: *1940 OAG No. 2255.*

84. (1939) Appraisers of a building and loan association are not "employees" of the association within the meaning of the unemployment compensation act where they are paid for the services directly by the prospective borrower: *1939 OAG No. 232.*

85. (1939) Officers and directors of a building and loan association are not, as such, "employees" within the meaning of the act, but they may perform additional duties under a contract of hire which might make them "employees" within the meaning of the act: *1939 OAG No. 232.*

86. (1938) The term "average weekly wages," as defined in (g) [now RC § 4141.01(O)(2)], refers to the amount of remuneration received by an individual in employment and not to a weekly unit of remuneration which is customarily received by workers in a classified occupation: *1938 OAG No. 2110.*

87. (1938) The question of whether an individual "is master of his own time and efforts" and whether his remuneration "is wholly dependent on the amount of effort he chooses to expend," within the meaning of subsection (c)(E)(7) [now (B)(3)(g)], is factual and depends upon the extent to which he is subject to the control and regulation of his superior: *1938 OAG No. 2057.*

88. (1938) Moneys drawn by partners in a limited partnership by way of a drawing account are not "wages," nor are partners, in the absence of an agreement, express or implied, to render services at a stipulated compensation, "employees" as those terms are used in the unemployment compensation act: *1938 OAG No. 2014.*

89. (1938) State banks which are members of the federal reserve system and state building and loan associations which are members of the federal home loan bank are not instrumentalities of the federal government exercising "purely governmental functions," and therefore, employment by such institutions is not exempt from the provisions of the unemployment compensation act by reason of the provisions of RC § 4141.01(c)(E)(4) [now (B)(2)(c)]: *1938 OAG No. 1769.*

90. (1938) Employment by private or parochial schools, colleges and universities in capacities other than as a "teacher" or "in research or experimental work" or "as administrative officer" or "as a member of the faculty" is not exempt from the provisions of the unemployment compensation act: *1938 OAG No. 1989.*

91. (1938) Service performed in the employ of national banks is not employment within the meaning of (c)(E)(4) [now (B)(2)(c), RC § 4141.01]: *1938 OAG No. 1769.*

92. (1937) Employment by municipal waterworks or municipal cemeteries does not come within the exemption provided in (c)(E)(4) [now (B)(2)(c), RC § 4141.01]: *1937 OAG No. 1341.*

93. (1937) The mere fact that institutions such as hospitals, Y.M.C.A., Y.W.C.A., Salvation Army, and others, render medical service, operate cafeterias, furnish lodging for pay, does not remove them from the exemption provided in RC § 4141.01 of the unemployment insurance act: *1937 OAG No. 1024.*

94. (1937) Employment by a county agricultural society, organized and existing under authority of GC § 9880 (RC § 1711.01) et seq, does not constitute employment within the meaning of the term as used in the Ohio unemployment insurance act, GC § 1345-1 (RC § 4141.01) et seq: *1937 OAG No. 522.*

