

**RECENT CHANGES
TO THE FAIR LABOR
STANDARDS ACT**

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Human Resources Division**

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**WELCOME AND
OPENING REMARKS**

**Clare Long, Deputy Director
Ohio Department of Administrative Services
Human Resources Division**

RECENT CHANGES TO THE FAIR LABOR STANDARDS ACT

SLOAN T. SPALDING
ASSISTANT ATTORNEY GENERAL
OHIO ATTORNEY GENERAL'S
OFFICE

Historical Background of the Act

In enacting the Fair Labor Standards Act of 1938, Congress declared it to be our national policy to eliminate labor conditions “detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.” In short, Congress and President Roosevelt explicitly wanted to place restrictions on unfair labor practices by creating a financial burden on employers through higher labor costs.

It is important to remember that the initial goal of the FLSA was not to “balance” the interest of employers and employees, rather the obligations and burdens imposed by the ACT are completely one-sided. **The Act by design is tilted in favor of employees.**

Portal-to-Portal Act of 1947

The first major revision to the FLSA came in 1947 following several large judgments against employers for violations of the Act. On May 14, 1947, President Harry S. Truman signed into law an amendment to the FLSA, commonly referred to as the Portal-to-Portal Act.

The purpose to the Portal-to-Portal Act was to stem the tide of claims for unpaid wages for activities that had traditionally been treated by employers as being uncompensated.

Other Notable Updates to the Act

In 1949, the minimum wage was raised for the first time since the passage of the Act in 1938, from 40 cents an hour to 75 cents an hour for all workers. Over the years, the Act was expanded to provide overtime wages and increased minimum wages to an increasing number of employees.

Initially, it appeared as if States and local governments would avoid the requirements of the FLSA, but after several changes by Congress and trips before the US Supreme Court, it is now clear that State employers must follow the FLSA regulations.

Why the *Fairpay* Regulations are so Controversial



Historically, any Congressional or federal court tinkering with the FLSA has typically followed the original purpose of the Act, that being the protection of workers through higher minimum wages, expanding overtime eligibility, and increased governmental regulation.

That is one of the reasons why the DOL's new "*Fairpay*" regulations are garnering so much attention. For the first time, employers can at least claim that the regulations are being scaled back to permit greater compensation flexibility.

General Introduction to the Act

The Fair Labor Standards Act establishes a minimum wage, overtime pay allowances, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in Federal, State, and local governments. The U.S. Department of Labor, Wage and Hour Division has responsibility for administering and enforcing the FLSA.

The FLSA is truly a broad collection of Acts and Statutes that impact differently upon certain business entities, employment relationships, and employee positions. The FLSA is extremely technical, carries strong penalties for violations, and in some cases allows for private legal actions by employees who have not been compensated in compliance with the law. Thus, employers are strongly encouraged to familiarize themselves with the requirements of the FLSA.

What is not Covered by the FLSA?

While the FLSA does set basic minimum wage, overtime pay standards and regulates the employment of minors; there are a number of employment practices that the FLSA does not regulate.

What is not covered by the FLSA?

- ✦ For example, the FLSA does not require:
 - ✦ Vacation, holiday, severance, or sick pay;
 - ✦ Meal or rest periods, holidays off, or vacations
 - ✦ Premium pay for weekend or holiday work;
 - ✦ Pay raises or fringe benefits; or
 - ✦ A discharge notice, reason for discharge, or immediate payment of final wages to terminated employees.

The FLSA leaves many of the above matters to be worked out by agreement between the employer and the employees or their authorized representatives (i.e., Collective Bargaining Agreements, Employee Handbooks, Personnel Policies, etc.). Additionally, Ohio's own laws and regulations address many of these issues as they relate to State employment.

Overview of Changes

Deborah Archie
Chief Legal Counsel
Ohio Department of Administrative Services

Overview of Changes

- ✦ Raises the minimum salary level test from \$155 per week to \$455 per week (\$23,660 annually);
- ✦ Creates a new exemption for highly compensated employees who earn at least \$100,000 annually and who regularly perform one or more of the exempt duties;

Overview of Changes

- ✦ Clarifies that the exemptions do not apply to “blue collar” employees, such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers, so long as they are not in management positions;

Overview of Changes

- ✦ Requires that executive employees have effective authority to hire, fire, promote, or change employee status;
- ✦ Alters the “primary duty” requirement for exempt status to make clear that the emphasis is placed on the principal character of the employee’s job and not on the percentage of time spent performing the primary duty;

Overview of Changes

- ✦ Recognizes that computer network, Internet, and database engineers and administrators, insurance claims adjusters, and numerous workers in the financial services industry occupy positions directly related to management or general business operations of the employer, thereby making it likely that many such employees are administratively exempt, *provided* they exercise discretion and independent judgment;

Overview of Changes

- ✦ Expands the professional exemption to cover “learned” professionals, such as chefs and athletic trainers, among others, and broadening the “artistic” exemption to include “creative” professionals, such as actors and certain types of journalists; and

Overview of Changes

- ✦ Creates a new exception to the salary basis test for infractions of workplace conduct rules, as well as a new “safe harbor” rule to mitigate improper deductions from pay.

DEFINITIONS AND EXEMPTIONS

Christine Emch Thompson
Policy Development Administrator
Ohio Department of Administrative Services
Human Resources Division
Policy Development Section

Definitions and Exemptions

- ♦ **New Regulations**
 - ♦ Two new tests
 - Standard Duties Test
 - Highly Compensated Employee Test
- ♦ **Replace old tests**
 - ♦ Long test
 - ♦ Short test

Definitions and Exemptions

- ♦ **Standard Duties Test**
 - ♦ Applies to all employees who earn between \$455 per week (\$23,660 annually) and \$100,000 per year.
- ♦ **Highly Compensated Employee Test**
 - ♦ Total compensation of at least \$100,000

Key Terms in the Final Rules

✦ Primary Duty

- ✦ Must be based on all the facts of the particular case.
- ✦ Major emphasis on the character of the employee's job as a whole.
- ✦ Majority of time spent performing exempt work.
- ✦ Moves away from 50% measurement.
- ✦ Factors to consider.

Primary Duty

✦ Factors include, but are not limited to:

- ✦ Relative importance of the exempt duties as compared with other types of duties;
- ✦ The amount of time spent performing the exempt work (useful, but not the sole test);
- ✦ The employee's relative freedom from direct supervision; and
- ✦ The relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

Customarily and Regularly

- ✦ Greater than occasional frequency.
- ✦ Includes work normally and recurrently performed every week.
- ✦ Not isolated or one-time tasks.

Directly and Closely Related

If work contributes to or facilitates exempt work.

Menial or manual tasks still considered exempt work if an employee's exempt work could not be properly performed without these tasks.

Discretion and Independent Judgment

- ✦ Clarifies existing standard to reflect case law.
- ✦ Implies employee has authority to make an independent choice without immediate direction or supervision.
- ✦ Employee's decisions may still be reviewed or occasionally reversed.
- ✦ Must exercise discretion and independent judgment with respect to "**matters of significance.**"

Executive Exemption

- ✦ Paid Salary or Fee of at least \$455/week (\$23,660/year)
 - ✦ Must do all of the following:
 - ✦ Primary duty is **management** of the enterprise or a **customarily recognized department or subdivision** of the enterprise;

✦ Customarily & regularly directs the work of two (2) or more other full-time employees or equivalent; *AND*

✦ Authority to hire & fire, or employee's suggestions on hire, fire, advancement, promotion, or other changes must be given particular weight.

Executive Exemption Definitions

✦ “Management” – Includes but is not limited to activities such as:

- ✦ Interviewing, selecting, and training of employees;
- ✦ Setting and adjusting their rates of pay and hours of work;
- ✦ Directing the work of employees;
- ✦ Determining the techniques to be used;
- ✦ Apportioning the work among employees;

Executive Exemption Definitions

✦ “A customarily recognized department or subdivision”

- ✦ Intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with a permanent status and function.
- ✦ Permanent status and continuing function

Executive Exemption Definitions

➤ “Two or more other employees”

- Two full-time employees or their equivalent;
- One full-time and two half-time employees are equivalent to two full-time employees.

Executive Exemption Definitions

➤ “Particular weight”

- Factors to be considered include, but are not limited to:
 - Whether it is part of the employee’s job duties to make such suggestions and recommendations;
 - The frequency with which such suggestions and recommendations are made or requested;
 - And the frequency with which the employee’s suggestions and recommendations are relied upon.

ADMINISTRATIVE EXEMPTION

- Paid Salary or Fee of at least \$455/week (\$23,660/year)

- Must do the following:

- Primary duty must be the performance of office or non-manual work **directly related to management or general business operations** of the employer or the employer’s clients; *AND*
- Primary duty includes the exercise of **discretion & independent judgment** with respect to **matters of significance**.

**ADMINISTRATIVE EXEMPTION
DEFINITIONS**

- **“Directly related to management or general business operations”**
 - Refers to the type of work performed by the employee.
 - An employee must perform work directly related to assisting with the running or servicing of the business.

**ADMINISTRATIVE EXEMPTION
DEFINITIONS**

Includes, but is not limited to, work in the functional areas such as: tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; **personnel management; human resources; employee benefits; labor relations;** public relations; government relations; computer network, internet and database administration; **legal and regulatory compliance; and similar activities.**

**ADMINISTRATIVE EXEMPTION
DEFINITIONS**

- **“Exercise of discretion and independent judgment”**
 - Involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after various possibilities have been considered.

ADMINISTRATIVE EXEMPTION DEFINITIONS

✦ “Matters of significance”

- ✦ Refers to the level of importance or consequence of the work performed.

EDUCATIONAL ESTABLISHMENTS ADMINISTRATOR

✦ “Performing administrative functions directly related to academic instruction or training”

- ✦ Work related to the academic operation and functions in a school rather than the administration along the lines of general business operations.
- ✦ Includes operations directly in the field of education.
- ✦ Jobs related to areas outside the educational field are not within the definition of academic administration.

EDUCATIONAL ESTABLISHMENTS ADMINISTRATOR DEFINITIONS

✦ “Educational establishment”

- ✦ An elementary or secondary school system, an institution of higher education or other educational institution.

✦ “Other educational establishment”

- ✦ Includes special schools for mentally or physically disabled or gifted children, regardless of any classification of such school as elementary, secondary, or higher.

DEFINITIONS AND EXEMPTIONS

Robert Patchen
Policy Analyst
Ohio Department of Administrative Services
Human Resources Division
Policy Development Section

PROFESSIONAL EXEMPTION
Learned Professional

- Paid salary or fee \geq \$455/week (23,660/year)
- Work requires knowledge of advanced type;*
- Field of science or learning;* and
- Customarily required by prolonged course of specialized intellectual instruction.*

*Measured by unique three (3) prong test.

LEARNED PROFESSIONAL
Three Prong Test

- Work requiring advanced knowledge;
- Field of science or learning; and
- Customarily acquired by a prolonged course of specialized intellectual instruction.

“Work requiring advanced knowledge”

- ✦ Work which is predominantly intellectual in character.
- ✦ Includes work requiring the consistent exercise of discretion and judgment.
- ✦ Advanced knowledge cannot be attained at the high school level.

“Field of science or learning”

- ✦ Includes the traditional professionals of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy, and other similar occupations that have a recognized professional status.

“Customarily acquired by a prolonged course of specialized intellectual instruction”

- ✦ Restricted to professions where specialized academic training is a prerequisite for entry.
- ✦ Best **prima facie evidence** for this requirement is possession of the appropriate academic degree.

CREATIVE PROFESSIONAL

- Paid salary or fee \geq \$455/week (23,660/year)
- Primary duty is work which requires invention, imagination, originality or talent in a field of artistic or creative endeavor.
 - Examples of “field of artistic or creative endeavor”:
 - Music
 - Writing
 - Acting
 - Graphic Arts

“Invention, imagination, originality or talent” are distinguished from work that primarily depends on intelligence, diligence and accuracy.

COMPUTER EMPLOYEE EXEMPTION

- Two potential exemptions for this kind of employee:
 - Learned Professional Exemption
 - OR
 - Unique Computer Employee Exemption

**UNIQUE COMPUTER EMPLOYEE
EXEMPTION**

- ✦ Paid salary or fee \geq \$455/week (\$23,660/year) or, if compensated by the hour, rate \geq \$27.63/hour.
- ✦ Application of systems analysis techniques to determine hardware, software, or system functional specifications;
- ✦ Design, develop, document, analysis, creation, testing, or modification of computer system or programs based on user or design specifications

**UNIQUE COMPUTER EMPLOYEE
EXEMPTION**

- ✦ Design, documentation, testing, creation, or modification of computer programs related to machine operating systems;
- OR
- ✦ Combination of tasks above, performance of which requires the same level of skills.

**UNIQUE COMPUTER EMPLOYEE
EXEMPTION**

- ✦ The unique Computer Employee Exemption does NOT apply to employees engaged in the manufacture or repair of computer hardware and related equipment.

OUTSIDE SALES EXEMPTION

- ✦ No monetary component to the test.
 - ✦ Primary duty to make sales within the meaning of the Act OR obtaining orders or contracts for services or for use of facilities for which client or customer pays; AND
 - ✦ Customarily and regularly engaged away from employer's place(s) of business.

OUTSIDE SALES EXEMPTION

- ✦ **“Sales within the meaning of section 3(k) of the Act”**
 - ✦ Include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property.

OUTSIDE SALES EXEMPTION

- ✦ **“Sale” or “Sell”**
 - ✦ Includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.
- ✦ **“Services”**
 - ✦ Extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order.

OUTSIDE SALES EXEMPTION

✦ **“Away from the employer’s place or places of business”**

- ✦ The employee makes the sale at the customer’s place of business or, if selling door-to-door, at the customer’s home.
- ✦ Does NOT include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls.

OUTSIDE SALES EXEMPTION

- ✦ Any fixed site, home or office, used by a salesperson as a headquarters for telephonic solicitations is considered the employer’s place of business, regardless of the employer’s ownership or tenant status of the property.
- ✦ There are exceptions to this designation of an employer’s place of business for hotel rooms on road trips and sales at tradeshow of short (i.e., one or two weeks) duration.

OUTSIDE SALES EXEMPTION

- ✦ Drivers who sell may qualify under the outside sales exemption. Detailed guidance on drivers who sell is located at 29 C.F.R. 541.504

**DEFINITIONS AND
EXEMPTIONS**

Janine Salloum Ashanin
Policy Analyst
Ohio Department of Administrative Services
Human Resources Division
Policy Development Section

**Highly Compensated Employee
Exemption**

- Employee must earn an annual compensation of \$100,000 or more, which includes at least \$455/week paid on a salary basis;
- Primary duty is the performance of office or non-manual work; AND
- Customarily & regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative, or professional employee.

Primary Duty

- The principal, main, major or most important duty that the employee performs.
 - Must be based on all the facts of the particular case.
 - Major emphasis on the character of the employee's job as a whole.
 - Majority of time spent performing exempt work.

Customarily and Regularly

- ✦ A frequency that must be greater than occasional but which, of course, may be less than constant.
 - ✦ Tasks or work that are normally and recurrently performed every workweek.
 - ✦ Does not include isolated or one time tasks.

Highly Compensated Exemption

- ✦ Total amount compensation of \$100,000 or more may include: commissions, nondiscretionary bonuses, and other nondiscretionary compensation earned during a 52-week period.
- ✦ Does not include: credit for board and lodging, payments for medical or life insurance, or contributions to retirement plans or other fringe benefits.

Highly Compensated Exemption

- ✦ Employers are permitted to “make-up” the annual compensation
 - ✦ if employee works only part of the year
 - ✦ in order to satisfy annual amount at the end of the year

Highly Compensated Exemption

- ✦ Highly compensated test does not apply to computer professionals.

Blue Collar Workers

- ✦ Regulations specify that none of the exemptions encompass blue collar workers.
- ✦ This new regulation came about as the result of comments submitted since the March 2003 notice.
- ✦ DOL called the comments a “fundamental misunderstanding of the scope and application of the Part 541 regulations.”

Blue Collar Workers

- ✦ Exemptions do not apply to manual laborers or other blue color workers who perform work involving repetitive operations with their hands, physical skill and energy.
- ✦ Examples: (non-management) carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers.
- ✦ Not exempt no matter how highly paid.

First Responders

- ✦ Regulations specify that the majority of public safety employees cannot be exempted.
- ✦ Specifically lists 16 different types including: police officers, state troopers, highway patrol officers, correctional officers, park rangers, and fire fighters.
- ✦ Regardless of rank or pay level.
- ✦ Who perform duties such as: See 29 CFR 541.3(b)(1) provided in handouts.

First Responders

- ✦ Do not qualify for executive exemption because primary duty is not management of the enterprise.
- ✦ If primary duty is to investigate crimes or fight fires, employee not exempt if also directs work of others in the conduct of an investigation or fighting a fire.

First Responders

- ✦ Do not qualify for administrative exemption because primary duty is not the performance of work directly related to the management or general business operations.

First Responders

- ✦ Do not qualify for professional exemption because the primary duty is not work requiring knowledge of an advanced type, acquired by a prolonged course of specialized instruction, or requiring invention, imagination in a field of artistic or creative endeavor.
- ✦ The fact that the employee possesses an advanced degree is irrelevant.

First Responders

- ✦ Do not qualify for highly compensated exemption because the primary duty is not executive, administrative, or professional.

Important Note

- ✦ Preamble indicates that the ban on exemptions does apply to every employee who works in the safety forces arena.
- ✦ Primary duties will still be the most important factor.

Preamble Language

- ✦ Highlights one case in which the court determined that police and fire executives' discretion to respond to a call was an important fact.
- ✦ Footnote indicates that many first responder personnel currently treated as exempt executives may be eligible for overtime because of the additional requirement in the standard duties test relating to authority to hire or fire.

THE SALARY BASIS TEST

Sloan T. Spalding
Assistant Attorney General
Ohio Attorney General's Office
Employment Law Section

Step One in an FLSA Exemption Determination: The Salary Basis Test

As we all know, certain employees are “exempt” from the overtime requirements of the FLSA based in part upon their actual duties performed – the duties test. However, often overlooked is that the fact that an exemption determination is a two-step process. The first question to be answered should be – is the employee paid on a salary basis?

Salary Basis Defined

Salary basis is when an employee regularly receives a predetermined amount constituting all or part of his compensation, which meets the statutorily determined “salary level,” which cannot be subject to reduction because of variations in the quality or quantity of work performed. Thus, the exempt employee must receive a full week’s salary for any week in which he performs work regardless of variations in the quality or quantity of work performed – subject to a few permissible deductions.

**Highlight of Updates to the
Salary Basis Test – 29 CFR 541.602**

The new Fair Pay regulations preserve the “salary basis test” used to determine exemptions under the FLSA, along with the permissible deductions. An important change under the new regulations concerns deductions for infractions of workplace rules or improper conduct (as discussed in more detail later in this Seminar).

**Deductions From an Exempt
Employee’s Salary
– 29 CFR 541.603**

According to the DOL, there are several circumstances in which the employer may make deductions from an exempt employee’s salary without destroying the exemption.

Here are a few of the more notable deductions that are permitted.

The employee is absent the entire workweek or performs no work during that workweek. 29 CFR 541.118(a);

The employee is absent from work for a day or more due to personal reasons other than sickness or accident. 29 CFR 541.118(a)(2);

**Deductions From an Exempt
Employee's Salary**
– 29 CFR 541.603

The employee is absent for a day or more caused by sickness or disability and a deduction is made in accordance with a bona fide plan, policy, or practice providing for loss of salary occasioned by sickness and disability. 29 CFR 541.118(a)(3);

The employer imposes a good faith penalty for a major safety violation. 29 CFR 541.118(a)(5);

The employer issues a disciplinary suspension for a full day or more for the employee's violation of a serious workplace misconduct policy. 29 CFR 541.602(a); or

Under the public accountability rule, public employers can deduct for an absence where the employee has no leave to cover the time off, took time off without permission, or agreed to take leave without pay.
29 CFR 541.710

**Impermissible Salary
Deductions**

An employer can lose the exemption if it has an "actual practice" of making improper deductions from salary. Factors the DOL will consider when determining whether an employer has an actual practice of making improper deductions include, but are not limited to:

the number of improper deductions, particularly as compared to the number of employee infractions warranting deductions; the time period during which the employer made improper deductions; the number and geographic location of both the employees whose salary was improperly reduced and the managers responsible; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.

If an “actual practice” is found, the exemption is lost during the time period of the deductions for employees in the same job classification working for the same managers responsible for the improper deductions (i.e. the employer makes a mistake with one employee, and the exemption is lost for the entire job classification – so be careful).

Isolated or inadvertent improper deductions will not result in loss of the exemption if the employer reimburses the employee for the improper deductions under the safe harbor provisions of the Act. In other words, if an employer learns of an impermissible deduction, reimburse the employee right away.

Highlight of Updates to the Salary Test – 29 CFR 541.600

According to the DOL, raising the salary level test to \$455 will strengthen overtime protection for more that 6.7 million salaried workers who were exempt previously because they received a salary of \$155 or more (but less than \$455 per week).

Regardless of their duties, any employee paid less than \$455 per week is eligible for overtime. The DOL hopes that increasing the salary level will make it easier for employers to determine exemptions under the Act.

Highly Compensated Employees – 29 CFR 541.601

A new wrinkle under the Fair Pay regulations is the creation of an exemption for so-called “*highly compensated employees*.” Employees must have total compensation of at least \$100,000 per year.

To be a highly compensated employee, they must:

- ✦ make at least \$455 per week (remember that each work week stands alone), which equates to \$23,660 per year (52 weeks);
- ✦ perform office or non-manual labor; and
- ✦ customarily and regularly perform any one or more of the exempt duties of an executive, administrative, or professional employee.

The duties portions of this exemption are clear: the employee must not be a non-management production worker (i.e. highly compensated blue collar workers are still entitled to overtime).

According to a fair reading of the new regulations, an employer may be able to make-up the salary of an employee who might meet this exemption, but who is just a few dollars short of \$100k, by paying the employee the extra money needed to hit the threshold during the last month of the fiscal year.

**Public Accountability Rule and
the Salary Basis Test**

– 29 CFR 541.601

During a growing wave of costly private lawsuits filed by public employees against their employers challenging their exempt status, a series of court decisions were issued that sharply limited public employers' ability to successfully claim exemption under the "salary basis" rule.

So, are you paid on a salary basis?

**Special Salary Test Rule for
Public Employer**

Realizing the potentially disastrous consequences of finding almost every public employee to be paid on an hourly basis under the Act, the DOL modified the "salary basis" rule to provide specific relief to public employers based on principles of public accountability. The language in new section 541.710 is from the current section 541.5(d) – meaning Fairpay recognizes the public accountability rule.

**CHANGES TO THE
DISCIPLINARY PROCESS FOR
NONEXEMPT EMPLOYEES**

Anne E. Thomson
Deputy Attorney General
Office of the Ohio Attorney
General Employment Law Section

**Disciplinary Suspensions
Under the Current FLSA Rules**

Under the current rules, the situations in which an employer can suspend an exempt employee in less than one-week increments are severely limited. The regulations only allow suspensions for less than one full week for “infractions of safety rules of major significance.” 29 C.F.R. § 541.118(a)(5).

By way of example, the DOL issued an opinion letter on this issue noting that:

Safety rules of major significance embrace those intended to prevent serious danger to the workplace or to other employees, including smoking in explosives plants, oil refineries, and coal mines. This has also been construed to cover industrial security regulations promulgated by a government agency.

DOL Wage and Hour Opinion Letter, March 29, 1991.

Under the current FLSA rules, by issuing a disciplinary suspension that is less than a full week the employer runs the risk of destroying the employee's exemption under the Act. By doing so, the employee could then be potentially eligible to collect overtime wages for those workweeks in which that exemption was destroyed and possibly more. Obviously, this is not a risk that most employers are willing to take. .

Consistent Progressive Discipline Under the New *Fairpay* Regulations

The DOL's updated "*Fairpay*" Regulations add a new and significant exception that permits "unpaid disciplinary suspensions of one or more full days to be imposed in good faith for infractions of workplace conduct rules. 29 CFR 541.602(a); see also 29 CFR 541.710 for public sector employees.

The DOL claims that the goal of this change in the FLSA is to allow employers to apply the same progressive disciplinary rules to both exempt and nonexempt employees and to assist employers in taking prompt remedial action to address certain employee misconduct.

Serious Misconduct ?

The DOL's comments on the changed regulations make it clear that "workplace conduct" leading to suspensions should be narrowly construed to mean serious misconduct like sexual harassment, workplace violence, drug or alcohol infractions, or violations of state or federal laws. The regulations do not make mention of general performance or attendance issues as meeting this new standard.

Written Policy

Importantly, this new disciplinary exception *only* applies if the suspension is pursuant to a written policy that is generally applicable to all employees and which places employees on notice that certain acts of misconduct could result in an unpaid disciplinary suspension.

While the employer's policy does not need to have an exhaustive list of possible infractions that could lead to a disciplinary suspension, the policy should be sufficient enough to put the employees on notice as to the types of conduct that could lead to discipline.

Overview

<p>Current FLSA Regulations</p> <p>Unpaid disciplinary suspensions for violations other than “infractions of safety rules of major significance” are <u>only</u> permissible when the suspension is given in full workweek increments.</p>	<p>New Fairpay Regulations</p> <p>Unpaid disciplinary suspensions for violations other than “infractions of safety rules of major significance” <u>will be</u> permissible in one or more full day increments, are:</p> <ol style="list-style-type: none"> 1. Imposed in good faith, 2. The infraction is of a serious workplace conduct rule, 3. The work rule is applicable to all employees, and 4. The work rule is part of a published, disseminated, written policy.
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Impact on State of Ohio Employers

After August 23, 2004, employers will be allowed to issue full day disciplinary suspensions to salaried exempt employees without running afoul of the FLSA. However, the DOL will be closely monitoring employer’s use of these types of suspensions to assure that they conform to the intention of the regulations.

As with any new federal law, it will take years of administrative and court interpretations before we truly understand the parameters of the regulations – so proceed cautiously for now in deciding what constitutes a violation of a serious workplace conduct rule.

Collective Bargaining Issues

Jillian Froment
General Counsel
Ohio Department of Administrative Services
Office of Collective Bargaining

Collective Bargaining Issues

- **Applicable standards for BU employees**
- CBA does not relieve obligations of FLSA
- FLSA does not relieve obligation of CBA
- Application of CBA may invalidate an exemption by violating the salary test

Other Laws & CBAs

- FLSA minimum standards can be exceeded, but not waived or reduced.
- State or municipal laws, regulations, or ordinances may establish higher minimum wage or lower maximum workweek than established under FLSA
- CBA may provide a higher wage, shorter workweek, higher OT premium than FLSA

Other Laws & CBAs

- ✦ State laws or CBA provisions may not waive provisions of the FLSA.
- ✦ Neither FLSA nor Part 541 reg. relieves employers from contractual obligations of CBA.

Relation to Other Rules

- ✦ Rule of thumb: When the FLSA, state laws and collective bargaining agreements apply, the rule setting the most restrictive standard must be observed.

Standards Governing Overtime Eligibility

	Collective Bargaining Agreement	FLSA and Ohio Revised Code	Agency Policy and Procedure
Bargaining Unit Employees	✓	✓	✓
Non-Bargaining Unit, FLSA Eligible Employees		✓	✓
Non Bargaining Unit, FLSA Exempt Employees			✓

Ohio Revised and Administrative Code

- ✦ R.C. Chapter 4111 Minimum Fair Wage Standards
- ✦ R.C. Chapter 4117 Collective Bargaining
- ✦ Agency Enabling Statutes
- ✦ R.C. §124.18 Standard work week; compensatory time or overtime pay; holiday pay.
- ✦ A.C. §123:1-43-01 Overtime.
- ✦ A.C. §123:1-43-02 Compensatory time.

R.C. §4111.11:

Any standards in effect under any other Ohio law which are more favorable to employees than R.C. 4111 continue in full force and effect.

R.C. §4117.10;

A collective bargaining agreement governs the wages, hours, and terms and conditions of employment. Where the agreement is silent on an issue, civil service law governs.





OCSEA Collective Bargaining Agreement

- ✦ 13.01 – Standard Work Week
- ✦ 13.02 - Work Schedules
- ✦ 13.03 - Meal Periods
- ✦ 13.04 – Rest Periods
- ✦ 13.06 – Report in locations
- ✦ 13.10 – Payment for Overtime
- ✦ 13.12 – Stand-By Pay
- ✦ 13.13 – Flextime/Four Day Work Week
- ✦ 26.02 Work on Holidays
- ✦ 3 – Union Rights

Enabling Statute

“The director may adopt rules for the government of the department, the conduct of the employees, the performance of its business, and the custody, use, and preservation of the department’s records, papers, books, documents, and property.”

Collective Bargaining Issues

- Applicable standards for BU employees
- **CBA does not relieve obligations of FLSA**
- FLSA does not relieve obligation of CBA
- Application of CBA may invalidate an exemption by violating the salary test

➤ OCSEA - 13.07

➤ “...in the event the Employer has determined the need for overtime...”

➤ District 1199 - 24.03

➤ “...when the agency determines that overtime is necessary...”

➤ “...the agency reserves the right to schedule and approve overtime.”

✦ **OEA - 23.06**

- ✦ “...need for, scheduling, and requiring overtime are exclusively Employer rights.”
- ✦ “Employees shall be compensated for any authorized hours in active pay status...”

✦ **FOP – 22.07**

- ✦ ...management reserves the right to assign employees to work overtime as needed.”

✦ An employee’s failure to meet a contractual provision or departmental policy:

- ✦ May be a defense to a grievance
- ✦ Does not eliminate the employer’s FLSA requirement to pay.
- ✦ Pay and discipline.

Collective Bargaining Issues

- ✦ Applicable standards for BU employees
- ✦ CBA does not relieve obligations of FLSA
- ✦ **FLSA does not relieve obligation of CBA**
- ✦ Application of CBA may invalidate an exemption by violating the salary test

✦ Many bargaining unit positions may have duties that qualify them as FLSA exempt:

- ✦ Learned Professionals
 - ✦ Doctors
 - ✦ RNs
 - ✦ Teachers
- ✦ Computer Professionals

✦ However, CBA will still require payment of overtime :

- ✦ OCSEA 13.10
 - ✦ "All employees...shall be compensated for overtime work..."
- ✦ CBA provisions and departmental policy must be met.

✦ Additionally, CBAs may provide for:

- ✦ Callback Pay
- ✦ Standby Pay

Collective Bargaining Issues

- Applicable standards for BU employees
- CBA does not relieve obligations of FLSA
- FLSA does not relieve obligation of CBA
- **Application of CBA may invalidate an exemption by violating the salary test**

➤ Salary Test can be violated by:

- Overtime Pay
- Callback Pay
- Standby Pay
- Discipline in less than week increments for:
 - Performance or attendance issues

SELF AUDITS

Sloan T. Spalding
Assistant Attorney General
Ohio Attorney General's Office
Employment Law Section

Undeniably, the single largest area of potential "employment" liability for State of Ohio employers comes from violations of the FLSA. Does your agency have a fire evacuation plan? How about a "fire drill" for responding to a wage and hour disaster?

Under the new *Fairpay* regulations, it is even more critical that employers be proactive in their approach to these issues. While it remains to be seen, many commentators have speculated that the enhanced "safe harbor" provisions of the new regulations will give diligent employers an opportunity to correct slight violations to the FLSA and avoid a mountain of exposed liability.

Safe Harbor

Under the *Fairpay's* safe harbor provision, if an employer (1) has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism, (2) reimburses employees for any improper deductions, and (3) makes a good faith commitment to comply in the future, the employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing the improper deductions after receiving employee complaints.

Self Audit Tips

Unfortunately, there is no magic formula for conducting a self-audit. Rather, each employer has a unique set of issues, employees, policies and obligations under the Act.

However, at a minimum an audit should attempt to address the following issues:

Make sure that upper management is fully aware how important it is that your organizations remain compliant with the FLSA.

Conduct manager level training on the new FLSA regulations so that everyone responsible for Applying and enforcing the regulations are aware of the new rules.

Review each employee's actual job duties and classification as exempt or non-exempt under the updated regulations to assure that they are properly classified. Be conservative with applying the exemptions and make adjustments as necessary.

Update job descriptions and positions postings regularly. For exempt positions, ensure that job descriptions include duties that actually meet the "duties" test of the applicable exemption.

Review FLSA's record-keeping requirements and maintain updated and accurate information as required by the Act.

Assure that your timekeeping system is accurately recording the "hours worked" for each employee and that they are then fully compensated for all hours worked in accordance with the Act.

Prominently display the DOL's required FLSA poster in the workplace. If you need copies of employment posters, check out the DAS website for contact information on how to obtain copies.

Review rules regarding what is considered "working time" under the FLSA and ensure that non-exempt employees accurately record hours worked. Pay particular attention to lunch breaks, which to be uncompensated must be for thirty uninterrupted minutes (i.e., not at the employees desk or work station).

Ensure correct calculation of overtime hours and compensation.

Be very careful when entering into agreements for independent contractors. Periodically review the status of independent contractors to ensure they are correctly paid as independent contractors rather than employees.

Ensure that employees who complain of FLSA violations are not subject to retaliation and that when a valid error has been discovered, the employee is properly compensated and the practice corrected to prevent future occurrences.

**PROCEDURES FOR
CHANGING EXEMPTION**

Policy Development Staff
Ohio Department of Administrative Services
Human Resources Division
Policy Development Section

**Recent Changes to the
Fair Labor Standards Act**

Questions and Answers
