2011 WAGE AND HOUR OVERVIEW

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Despite the fact we have been living with the federal Wage & Hour Act (the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201 et. seq.) for more than seventy years, a number of issues continue to cause problems. This paper will discuss, in the context of different fact situations, a number of these problems. However, before beginning this discussion, the following is a brief overview of the applicable laws and terminology.

I. OVERVIEW OF APPLICABLE LAWS

A. Fair Labor Standards Act

The Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201 et. seq. ("FLSA") requires that employers covered by the FLSA pay to their employees at least the minimum hourly wage prescribed by the FLSA ($7.25 per hour since July 24, 2009) for each hour worked and that such employers pay eligible employees at least one and one half times the employee's regular rate for all hours worked by the employee in excess of 40 hours in a given work week. FLSA §§ 6, 7. The FLSA applies to employers with employees engaged in commerce, and the production of goods for commerce, or in the handling, selling or otherwise working on goods that have been moved in or produced for commerce, with annual gross volume of sales made or business done of $500,000.00 or more (exclusive of excise taxes at the retail level that are separately stated).

Even if the employer does not meet the $500,000.00 test, the FLSA still applies to individual employees who are engaged in interstate or foreign commerce or producing goods for transportation in interstate or foreign commerce. The FLSA does not apply to independent contractors.

The FLSA is enforced by the United States Department of Labor, Wage and Hour Division. Additionally, individual employees are entitled to bring actions to enforce the FLSA in either federal or state court. Remedies available to individual employees include unpaid minimum wages, unpaid overtime, an additional amount up to the amount owed as liquidated damages, and attorney's fees. The FLSA provides for the potential of a $10,000.00 fine for willful violations and imprisonment for 6 months for a repeat conviction. The FLSA also provides for a civil penalty not to exceed $10,000.00 for a child labor violation and a civil penalty not to exceed $1,000.00 for each violation of the Section 6 (minimum wage) and Section 7 (overtime) provisions of the Act.

Most FLSA audits result from individual employee complaints. In the audit process, the United States Department of Labor generally both 1) requires employers to correct non-complying policies and 2) also collects unpaid back wages and overtime on behalf of all affected employees for the period of two years preceding the audit. This two year period reflects the statute of limitations for non-willful violations. However, in the case of willful violations, the statute of limitations is three years and the Wage and Hour Division can assess back wage liabilities for this three year period.

B. North Carolina Wage and Hour Act

The North Carolina Wage and Hour Act ("NC Act"), §§95-25.2 et. seq. of the North Carolina General Statutes, also requires that employers pay the minimum wage specified by the FLSA (with a provision for 90% of the minimum wage for students and apprentices), requires overtime at a rate of not less than 1½ of the employee's regular rate of pay for hours worked in excess of 40 per week, has provisions relating to youth employment, and contains a number of specific requirements relative to the timing, conditions and methods of payment to employees. The minimum wage and overtime requirements of the NC Act generally apply to businesses not covered by the FLSA, such as business enterprises grossing less than $500,000.00 per year or businesses not engaged in interstate commerce. However, the wage *payment* requirements of the NC Act apply to all employers in North Carolina.

The provisions of the NC Act are enforced by the North Carolina Department of Labor, Wage and Hour Division. The NC Act also allows employees to retain their own attorneys and bring suit in North Carolina state court. In addition to unpaid amounts due, the NC Act gives the court discretion to award liquidated damages in an amount equal to the amount found to be due, plus interest from date payment should have been made, plus costs and attorney's fees. In determining whether or not to award liquidated damages, the court can consider whether the employer had reasonable grounds for believing that the employer's act or omission was not in violation of the NC Act. §95-25.21(a)(1). Claims under the NC Act are subject to a two year statute of limitations.

II. "TERMS OF ART"

In discussing both the FLSA and the NC Act, it is helpful to understand certain "terms of art" which have very specific meanings for purposes of application of these laws. For example, both the FLSA and the NC Act require employers to pay overtime at 1½ times an employee's "regular rate" for all "hours worked" by the employee during a given "week".

A. "Work week"

All wage and hour overtime computations are performed on the basis of a single work week. A "work week" is a fixed and regularly reoccurring period of seven consecutive days. The work week can start on any particular day of the week, but once established, this day must remain fixed as the starting day for the work week. 29 CFR §778.105.

The FLSA does not allow averaging of hours over two or more work weeks (29 CFR §778.104). Except with respect to employees of a public agency which is a state, a political subdivision of a state, or an interstate governmental agency, employers may not substitute "comp" time (compensatory time off) for overtime payments. FLSA §§7(a)(1) and (o).

B. "Regular rate"

As noted above, for overtime purposes, employees must be paid 1½ times their "regular rate" for all hours worked in excess of 40 in any week. The "regular rate" is the hourly rate actually paid the employee for the normal, non-overtime work week for which he or she is employed. FLSA §7(e) requires inclusion in the "regular rate" of all remuneration for employment paid to, on behalf of, the employee except:

(1) sums paid as gifts (amounts of which are not measured by or dependant upon hours worked, production or efficiency);

(2) payments for occasional periods in which no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause, and reimbursable expenses;

(3) sums paid in recognition of services if either

(a) both the fact that the payment is to be made and the amount of the payment are determined at the sole discretion of the employer and not pursuant to any arrangement causing an expectation in the employee of such payments; or

(b) the payments are made pursuant to a bona fide profit-sharing plan or trust; or

(c) the payments are talent fees paid to performers.

(4) Irrevocable contributions by an employer to a bona fide plan providing for old-age, retirement, life, accident or health insurance or similar benefits;

(5) extra compensation provided by a premium rate paid for certain hours worked in any day or work week because such hours are hours worked in excess of 8 in a day or in excess of the maximum work week applicable to such employee;

(6) extra compensation provided by a premium rate paid for work by the employee Saturdays, Sundays, holidays, etc. where such a premium rate is not less than 1½ times the rate established in good faith for like work performed in non-overtime hours on other days; or

(7) extra compensation provided by a premium rate paid to the employee pursuant to contract for work outside of hours established in good faith by the contract or agreement as the basic, normal or regular work day where such premium rate is not less than 1½ times the rate established in good faith by the contract or agreement for like work performed during such work day or work week.

Extra compensation paid as described in paragraphs (5), (6) and (7) above is creditable towards overtime compensation.

Only the above listed payments can be excluded from the regular rate. For example, if an employee receives non-cash wages such as room and board, the reasonable cost or fair value of

these non-cash wages must be included in computing overtime for any week in which the non-exempt employee works more than 40 hours.

Similarly, incentive pay or production bonuses must be included for purposes of computing overtime. The Department of Labor takes the position that bonuses which are designed to encourage increased efforts on the part of employees constitute earnings. These earnings must be included in determining the employee's regular rate and therefore also in making overtime computations. The only bonuses which are excludable from overtime computations are discretionary bonuses, not expected or anticipated from the employee's standpoint, which constitute a gift from the employer. Examples of bonuses which the Department of Labor contends are includable in overtime pay calculations include attendance bonuses, production bonuses, bonuses for quality and accuracy of work, efficiency bonuses, length-of-service bonuses, bonuses promised to employees at the time of hiring, and bonuses provided in contracts. Bonuses which do not have to be included for purposes of computing overtime include Christmas bonuses, gift bonuses, bonuses wholly within the employer's discretion, profit sharing bonuses paid pursuant to profit sharing plans and trusts, and bonuses based on a percentage of an employee's total wages. With respect to the Christmas bonuses, the bonus may be paid with such regularity that the employees are lead to expect it and the bonus may vary for different employees on the basis of salary, hourly rate, or length of service. However, the bonus must not be measured by hours worked, production or efficiency; the bonus must not be so substantial that the employees consider it a part of their wages; and the bonus must not be paid pursuant to a contract.

Where a bonus includable in the regular rate is earned for a specific weekly pay period in which the employee worked overtime, compensation for that week is computed by multiplying the employee's regular hourly rate by the total number of hours worked to obtain his straight time earnings. The bonus is then added to these straight time earnings and that figure is divided by the total number of hours worked to obtain the regular hourly rate for overtime purposes. One half of this figure is then multiplied by the number of overtime hours. The sum of the straight time hours, plus the bonus, plus the overtime, equal the total compensation owed to the employee for the week in question.

Where a bonus includable in the regular rate cannot be computed for a given work week, the employer may temporarily disregard the bonus in computation of the regular rate and apportion the bonus back over the work week in which it was earned at such time as the bonus can be calculated. The employee must then be paid an additional amount equal to one-half the hourly rate of pay allocable to the bonus for the weeks in question.

C. "Hours worked"

"Hours worked" includes not only time spent by employees actually performing work, but also, depending upon the circumstances, travel time, (29 CFR §785.33), waiting time (29 CFR §785.14), on-call time (§785.17), and training time (§ 785.27).

(1) Travel time

Under the Portal-to-Portal Act, travel by an employee from the employee's home to the worksite and travel from the worksite to the employee's home after work does not constitute "hours worked" and is therefore not compensable where overnight travel away from the

employee's home community is not involved. 29 C.F.R. §785.35. However, travel during the course of a day's work as part of the employee's principal activity, such as travel from jobsite to jobsite, must be counted as hours worked. 29 C.F.R. §785.38. If, after returning home, after completing his day's work, an employee is subsequently required to go to a customer's place of business to perform work, all travel between the employee's home and the customer's place of business is working time and must be compensated. As an enforcement policy, where, after an employee's normal business day, the employee is required to return to the employer's place of business (rather than a customer's place of business), the Department of Labor does not require the travel time to be considered as hours worked. 29 C.F.R. §785.36.

However, the Portal-to-Portal rules concerning non-compensability of travel time between home and work change where an employee is either away from home on work on a special one day assignment to another city or the employee is required to travel away from the employee's home community overnight. Where an employee who regularly works at a fixed location in one city is given a special one day work assignment in another city, time spent by the employee traveling to and from the special assignment will be counted as hours worked and must be compensated. The Wage and Hour Division considers operation of an automobile to be "work" and, therefore, hours spent in operating an automobile to and from a special assignment as compensable. However, if the employer offers public transportation (air, rail, bus, etc.) to the employee but the employee nevertheless wishes to operate his or her automobile instead, the employer may count as hours worked either the time spent driving the car or the time the

employer would have had to count as hours worked during working hours if the employee had used the public conveyance. 29 C.F.R. §785.40.

In the case of a special one-day assignment, where an employer offers to provide public transportation, the employer would not be required to count as hours worked either the travel between the employee's home and the public transportation or the employee's usual meal time. However, hours actually spent traveling on the public transportation, both before, during and after regular working hours, would have to be treated as hours worked. 29 C.F.R. §785.37.

Where travel takes an employee away from home overnight, such travel is considered to be hours worked when it occurs during regular working hours, regardless of whether the travel occurs during the week day or during corresponding hours on non-working days. Regular meal period time can be deducted. As an enforcement policy, the Division will not consider as work time any time spent in travel away from home outside of regular working hours when the employee is a passenger. However, absent offer of public transportation by the employer, even time spent outside of normal working hours would be counted as hours worked, and therefore would be compensable, where an employee drives an automobile. 29 C.F.R. §785.39.

(2) "On call" and "waiting" time

Under the regulations, the issue of whether time spent while waiting or while on call must be counted as hours worked turns on whether the employee is able to use the time in question effectively for his or her own purposes. 29 CFR §785.15.

(3) Lectures, Meetings, and Training Programs

In 29 CFR §§785.27 through .31, the Department of Labor has set up four tests which an employer must meet in order to justify not compensating employees for time spent in lectures, meetings, and training programs. Additionally, as discussed below, the Department of Labor has established an exception to the third test.

The four tests which must be met if time spent by an employee in training is not to be counted as hours worked are as follows:

1. Time spent in the meetings or training must be outside of the employee's regular working hours;

2. Time spent by the employee in training must be in fact voluntary (such time would not be voluntary if it is required by the employer; such time is also not voluntary if in fact the employee is given to understand or led to believe that the employee's present working conditions or the continuance of employment would be adversely affected by non-attendance);

3. The training is not directly related to the employee's job (the training is directly related to the employee's job if it is designed to make the employee handle his or her job more effectively as distinguished from training the employee for another job or a promotion - the Wage and Hour Division gives by way of example of training directly related to an employee's job a stenographer who is given a course in stenography in order to make her a better stenographer. Such time would be considered hours worked (and therefore compensable). However, if the stenographer was taking a course in bookkeeping for the purpose of preparing for advancement through upgrading to a higher skill, such training would not be considered hours worked); and

4. The employee does not perform any productive work for the employer during such attendance.

The exception to the third test is that, as set forth in §785.31, an employer can offer lectures, training sessions and courses of instruction for the benefit of his employees and not count time spent by employees in these sessions as hours worked if the training provided by the

employer is also available to the employee through "independent bona fide institutions of learning" such as trade schools, community colleges, universities, etc. Voluntary attendance by an employee at such courses outside of working hours would not be hours worked even if the instruction is directly related to the employee's job. That is, an employer can make available (but not require attendance at) an after-hours seminar designed to improve the skills of the employees without incurring liability for hours worked if the seminar covers material otherwise available to the employee through other recognized sources of instruction.

D. "Exempt/non-exempt"

Neither the FLSA nor the NC Act recognize a distinction, for overtime purposes, based on whether the employees are "hourly" personnel or "salaried" personnel. Rather, whether an employee must be paid overtime depends upon whether the employee is "exempt" or "non-exempt" from the requirements of the Act. As will be discussed in detail below, compensation of an employee on a "salary" basis is merely an element in certain of the exemptions.

III. EXEMPTIONS FROM MINIMUM WAGE AND OVERTIME REQUIREMENTS OF THE FLSA

Exemptions from overtime requirements of the FLSA are permitted only in connection with certain narrowly defined exceptions to the FLSA. Courts considering claims under the FLSA begin by construing the coverage provisions of the Act liberally, in favor of coverage for employees. Employers bear the burden of proving the applicability of any claimed exemption from the requirements of the Act. As a general rule, the FLSA mandates employers to track the hours worked by employees, pay at least the prescribed minimum wage for each hour worked,

and pay overtime at 1½ times the employee's regular rate for all hours worked in excess of 40 in a given week.

As noted, the FLSA does contain specific exemptions from the minimum wage and overtime requirements of the Act, pursuant to which employers can compensate employees on a salary basis without payment of overtime for hours in excess of 40 in a given week. The most common exemptions are the "white collar" exemptions for executive, administrative, and professional employees and outside salesmen contained in §13(a)(1) of the FLSA. 29 U.S.C. §213(a)(1).

Effective August 22, 2004, the United States Department of Labor issued revised regulations setting forth "FairPay Rules," governing the Fair Labor Standards Act ("FLSA") "white collar" exemption from the FLSA's minimum wage and overtime requirements as set forth in FLSA § 13(a)1,[1] and FLSA § 13(a)17.[2] The regulations (29 CFR § 541.00 to 541.710) specify the extent to

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[1] *29 U.S.C. § 213(a)(1). The provisions of sections 6 [Minimum Wage] (except § 6(d) [Equal Pay for Equal Work] in the case of paragraph (1) of this subsection) and 7 [Overtime] shall not apply with respect to -*

> *(1) any employee employed in a bonafide 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 [of the United States Department of Labor], 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 bonafide executive or administrative capacity because of the number of hours in his work week which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 percentum of his hours worked in the work week are devoted to such activities).*

[2] *29 U.S.C.§ 213(a)(17) 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;*

which the exemptions apply to Executive Employees (29 CFR 541.100 - .106), Administrative Employees (29 CFR 541.200 - .204), Professional Employees (29 CFR 541.300 - .304), Computer Employees (29 CFR 541.400 - .402), and Outside Sales Employees (29 CFR 541.500 - .504). To qualify for the executive exemption, employees must meet both a salary and a duties test (29 CFR § 541.100(a)(1). To qualify for the administrative and professional exemptions, employees (including computer employees) must meet either a salary or fee basis test, as well as a duties test (29 CFR § 541.200; 29 CFR § 541.300). Outside sales employees must meet only a duties test (29 CFR § 541.500).

A. COMPENSATION.

(1) SALARY BASIS.

(a) General Rule.

The salary test, as applied to executive, administrative or professional employees, requires that these employees must be compensated on a salary basis at a rate of not less than $455 per week [$23,660 per year annualized], not including board, lodging or other facilities (29 CFR § 541.600(a)). For administrative and professional employees, the $455 per week requirement may also be satisfied by payment on a fee basis. The requirement to pay $455 per week may be met by

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(B) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on or 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 [$57,470.40 annualized on a 40-hour work week].

payment of $910 biweekly, $985.83 semi-monthly, or monthly payments of $1,971.66 (29 CFR § 541.600(b)).

An employee will be considered to be paid on a "salary basis" if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation. Subject to specified exceptions, discussed below, this predetermined amount must not be subject to reduction because of variations in the quality or quantity of the work performed. An exempt employee must receive his or her full salary for any week in which the employee performs any work, regardless of the number of days or hours worked in the week. Exempt employees need not be paid for any work week in which they perform no work. An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences caused by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available (29 CRF § 541.602(a)).

(b) Exceptions.

The prohibition against deductions from pay are subject to the following exceptions[3]:

(1) Full Days.

Deductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability. Thus, if an employee is absent for two full days to handle personal affairs, the employee's salaried status will not be affected if

[3]*When calculating the amount of a deduction from pay allowed by these exceptions, the employer may use the hourly or daily equivalent of the employee's full weekly salary or any other amount proportional to the time actually missed by the employee. A deduction from pay as a penalty for violations of major safety rules under § d below may be made in any amount (29 CFR § 541.602(c)).*

deductions are made from the salary for two full-day absences. However, if an exempt employee is absent for one and a half days for personal reasons, the employer can only deduct for the one full day absence (29 CFR § 541.602).

(2) Sickness/Disability Plan.

Deductions from pay may be made for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bonafide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability. The employer is not required to pay any portion of the employee's salary for full-day absences for which the employee receives compensation under the plan, policy or practice. Deductions for such full-day absences may also be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted the leave allowance thereunder. For example, if an employer maintains a short-term disability insurance plan providing salary replacement for 12 weeks starting on the fourth day of absence, the employer may make deductions from pay for the three days of absence before the employee qualifies for benefits under the plan; for the 12 weeks in which the employee receives salary replacement benefits under the plan; and for absences after the employee has exhausted the 12 weeks of salary replacement benefits. Similarly, an employer may make deductions from pay for absences of one or more full days if salary replacement benefits are provided by workers' compensation (29 CFR § 541.602(b)(2)).

(3) Offset for Jury/Military Duty.

Although an employer cannot make deductions from pay for absences of an exempt employee occasioned by jury duty, attendance as a witness or temporary military leave, the employer can

offset any amounts received by an employee as jury fees, witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption (29 CFR § 541.602(b)(3)).

(4) Penalties for Violation of Safety Rules.

Deductions from pay of exempt employees may be made for penalties imposed in good faith for infractions of safety rules of major significance. Safety rules of major significance include those relating to the prevention of serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries and coal mines (29 CFR § 541.602(b)(4)).

(5) Full Day Disciplinary Suspensions.

Deductions of pay from exempt employees may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a written policy applicable to all employees. For example, an employer may suspend an exempt employee without pay for three days for violating a generally applicable written policy prohibiting sexual harassment. Similarly, an employer may suspend an exempt employee without pay for 12 days for violating a generally applicable written policy prohibiting workplace violence. (29 CFR § 541.602(b)(5)).

(6) First & Last Week of Employment.

An employer is not required to pay the full salary in the initial or terminal week of employment. Rather, an employer may pay a proportionate part of an employee's full salary for the time actually worked in the first and last week of employment. In such weeks, the payment of an hourly or daily equivalent of the employee's full salary for the time actually worked will meet the requirement.

However, employees are not paid on a salary basis within the meaning of the regulations if they are employed occasionally for a few days, and the employer pays them a proportionate part of the weekly salary when so employed (29 CFR § 541.602(b)(6)).

(7) Unpaid FMLA Leave.

An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act ("FMLA"). Rather, when an exempt employee takes unpaid leave under the FMLA, an employer may pay a proportionate part of the full salary for the time actually worked. For example, if an employee who normally works 40 hours per week uses four hours of unpaid leave under the FMLA, the employer could deduct 10% of the employee's normal salary that week (29 CFR § 541.602(b)(7)).

(c) Effect of Improper Deductions.

The regulations provide that an employer's practice of making improper deductions from salary can cause a loss of the exemption during the time period in which the improper deductions were made for all employees working in the same job classification for the same managers responsible for the deductions (29 CFR § 541.603(a) and (b)).

However, the regulations provide a type of "safe harbor" to avoid the punitive results which previously obtained under the prior regulations. Improper deductions that are either isolated or inadvertent will not result in loss of the exemption for any employee subject to such improper deductions if the employer reimburses the employees for such improper deductions (29 CFR § 541.603(c)). Additionally, if an employer has a clearly communicated policy that prohibits the improper pay deductions and includes a complaint mechanism, reimburses employees for any

improper deductions and 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 to make improper deductions after receiving employee complaints (29 CFR § 541.603(d)). The regulations provide that the best evidence of a clearly communicated policy is a written policy distributed to the employees prior to the improper pay deductions.

(d) Effect of Additional Payments.

The regulations also address a problem which had given rise to substantial litigation on the issue of whether additional payments could be construed to convert "salary" compensation to "hourly." The new regulations provide that an employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount on a salary basis (29 CFR 541.604(a)). Specifically, an exempt employee guaranteed at least $455 each week on a salary basis can also receive additional compensation based on commissions, a percentage of sales, a percentage of profits, additional payments for hours worked beyond the normal workweek regardless of basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one half or any other basis) and may include paid time off (29 CFR § 541.604(a)).

(2) FEE BASIS.

Unlike executive employees, administrative and professional employees may also be paid on a fee basis, rather than a salary basis. An employee will be considered to be paid on a "fee basis" within the meaning of the regulations if the employee is paid an agreed sum for a single job regardless of the time required for its completion. These payments resemble piecework payments

with the important distinction that generally a "fee" is paid for the kind of job that is unique rather than for a series of jobs repeated an indefinite number of times and for which payment on an identical basis is made over and over again. Payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis (29 CFR § 541.605(a)).

To determine whether the fee payments meet the minimum amount of salary required for exemption, the amount paid to the employee will be tested by determining a time worked on the job and whether the fee payment is at a rate that would amount to at least $455 per week if the employee worked 40 hours. For example, an artist paid $250 for a picture that took 20 hours to complete meets the minimum salary requirements for exemptions since earnings at this rate would yield the artist $500 if 40 hours were worked (29 CFR § 541.605(b)).

(3) HIGHLY COMPENSATED EMPLOYEES.

The regulations create an exception to the duties tests for executive, administrative or professional employees who are "highly compensated." Section 541.601 of 29 CFR provides that an employee with total annual compensation of at least $100,000 is deemed exempt under FLSA § 13(a)(1) if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee. "Total annual compensation" must include at least $455 per week paid on a salary or fee basis. Total annual compensation may also include commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period. Total annual compensation does not include board, lodging or other facilities and does not include payments for medical insurance, payments for life insurance, contributions to retirement plans or the costs of other fringe benefits (29 CFR § 541.601).

If an employee's total annual compensation does not total at least $100,000 by the last pay period of the 52-week period, the employee may, during the last pay period or within one month after the end of the 52-week period, make one final payment sufficient to achieve the required level (29 CFR § 541.601(c)). An employee who does not work a full year for the employer, either because the employee is newly hired or ends employment prior to the end of the year, may qualify for exemption if the employee receives a pro rata portion of the $100,000 compensation based on the number of weeks that the employee has been employed. This section applies only to employees whose primary duty includes performing office or non-manual work. Non-management production line workers and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, ironworkers, craftsmen, operating engineers, longshoremen, construction workers, laborers and other employees who perform work involving repetitive operations with their hands, physical skill and energy are not exempt under this section no matter how high their compensation (29 CFR § 541.601).

B. DUTIES.

(1) Combination Exemptions.

Employees who perform a combination of exempt duties may qualify for exemption. For example, an employee whose primary duties involves a combination of exempt administrative and exempt executive work may qualify for the exemption (29 CFR § 541.708).

(2) EXECUTIVE EMPLOYEES.

In order to qualify for the exemption as an employee employed in a bonafide executive capacity, the employee must be compensated on a salary basis at a rate of not less that $455 per week; the employee's "primary duty" must be management of the enterprise in which the employee

is employed, or of a customarily recognized department or subdivision thereof; the employee must customarily and regularly direct the work of two or more other employees; and the employee must have the authority to hire or fire other employees or this employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight (29 CFR § 541.100).

(a) Primary Duty.

"Primary duty" is defined by the regulations to mean the principal, main, major or most important duty that the employee performs, with the major emphasis on the character of the employee's job as a whole. Factors to consider include the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees of the kind of non-exempt work performed by the employee (29 CFR § 541.700(a)). The regulations make it clear that the amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty, i.e., employees who spend more than 50% of their time performing exempt work will generally satisfy the primary duty requirement. However, the regulations also make it clear that time alone is not the sole test and the regulations do not require that exempt employees spend more than 50% of their time performing exempt work (29 CFR § 541.700(b)). The regulations specifically address an issue previously the subject of extensive litigation by noting that assistant managers in retail establishments who perform exempt work such as supervising and directing the work of other employees, ordering merchandise, managing the budget and authorizing payment of bills may have management as their primary duty even if the assistant managers spend more than

50% of the time performing non-exempt work such as running the cash register. However, the regulations caution that if such assistant managers are closely supervised and earn little more than the non-exempt employees, the assistant managers generally would not satisfy the primary duty requirement (29 CFR § 541.700(c)).

The fact that an employee is performing both exempt and nonexempt work on a concurrent basis will not disqualify the employee from the executive exemption if the requirements for the executive exemption are otherwise met. Such determination must be made on a case-by-case basis utilizing the analysis set forth for determination of "primary duty" as discussed above (29 CFR § 541.106).

(b) Management.

The regulations define management to include activities such as interviewing, selecting and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees of the property; planning and controlling the budget; and monitoring or implementing legal compliance measures (29 CFR § 541.102).

(c) Customarily Recognized Department or Subdivision.

The phrase "a customarily recognized department or subdivision" distinguishes a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and a continuing function. When an enterprise has more than one establishment, the employee in charge of each establishment may be considered in charge of a recognized subdivision of the enterprise. A recognized department or subdivision does not have to be physically within the employer's establishment and may move from place to place. The fact that an employee works in more than one location will not invalidate the exemption if other factors show that the employee is actually in charge of a recognized unit with a continuing function in the organization. An otherwise exempt employee will not lose exemption merely because the employee draws and supervises workers from a pool or supervises a team of workers drawn from other recognized units, if other factors are present that indicate that the employee is in charge of a recognized unit with a continuing function (29 CFR § 541.103).

(d) Two or More Other Employees.

The phrase "two or more other employees" means two full-time employees or their equivalent. One full-time and two half-time employees, for example, are equivalent to two full-time employees. Four half-time employees are also equivalent (29 CFR § 541.104(a)).

Supervision can be distributed among two or more employees, but each such employee must customarily and regularly direct the work of two or more other full-time employees or the equivalent. For example, a department with five full-time nonexempt workers may have up to two exempt supervisors if each such supervisor customarily and regularly directs the work of two of those workers (29 CFR § 541.104(b)). An employee who merely assists the manager of a particular department and supervises two or more employees only in the actual manager's absence does not

meet the requirement (29 CFR § 541.104(c)). Hours worked by an employee cannot be credited more than once for different executives. A shared responsibility for the supervision of the same two employees in the same department does not satisfy the requirement. However, a full-time employee who works four hours for one supervisor and four hours for a different supervisor can be credited as a half-time employee for those supervisors (29 CFR § 541.104(d)).

(e) Authority or Hire/Fire - Suggestions Given Particular Weight.

With respect to whether an employee's suggestions and recommendations are given "particular weight," factors include but are not limited to whether it is part of the employee's job duties to make such suggestions or 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. Generally, an executive's suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include an occasional suggestion with regard to the change in status of a co-worker. An employee's suggestions and recommendations may still be deemed to have "particular weight" even if a higher level manager's recommendation has more importance and even if the employee does not have the authority to make the ultimate decision as to the employee's change in status (29 CFR § 541.105).

(3) ADMINISTRATIVE EMPLOYEES.

In order to qualify for the exemption as an administrative employee, an employee must be compensated on a salary or fee basis at a rate of not less than $455 per week; the primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customer; and the primary duty must include

the exercise of discretion and independent judgment with respect to matters of significance (29 CFR § 541.200(a)).

(a) Primary Duty.

To qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and evaluation of various courses of conduct, and acting or making a decision after the various possibilities have been considered. The term "matters of significance" refers to the level of importance or consequence of the work performed (29 CFR § 541.202(a)).

The phrase "discretion and independent judgment" must be applied in light of all of the facts involved in a particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has the authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to the operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long or short-term business objectives;

whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances (29 CFR § 541.202(b)).

Although the exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level (29 CFR § 541.202(c)). The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and subject to revision or reversal after review does not mean that the employee is not exercising discretion and independent judgment (29 CFR § 541.202(c)).

The volume of work may make it necessary for a given employer to employ a number of employees to perform the same or similar work. The fact that a number of employees perform identical work or work of the same relative importance does not mean that the work of each employee does not involve the exercise of discretion and independent judgment with respect to matters of significance (29 CFR § 541.202(d)). The exercise of discretion and independent judgment must be more than use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources (29 CFR § 541.202(e)).[4] This section

[4]*Use of manuals, guidelines or other established procedures containing or relating to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge does not preclude an exemption (29 CFR § 541.704). However, this section provides that an exemption would not be available for employees who simply apply well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances.*

makes it clear that the exercise of discretion and independent judgment does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work. An employee who simply tabulates data is not exempt, even if labeled as a "statistician."

An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly (29 CFR § 541.202(f)).

(b) Work Directly Related to Management or General Business.

"Directly related to management or general business operations" is defined in the regulations as work directly related to or assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment (29 CFR § 541.201(a)). Work directly related to management or general business operations includes, but is not limited to, work in functioning areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertisement; 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 (29 CFR § 541.201(b)). An employee acting as advisor or consultant to their employer's clients or customers (such as tax experts or financial consultants) may be exempt (29 CFR § 541.201(c)).

(c) Educational Establishments.

The administrative exemption is also available to persons performing administrative functions in educational establishments, provided that the employee receives at least $455 per week

on a salary or fee basis or ***a salary which is at least equivalent to the entry salary for teachers in the educational establishment in question, if the person's primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision*** (29 CFR § 541.204(a)(1)). "Educational establishment" include elementary or secondary school, institution of higher education, or other educational institution. "Performing administrative functions directly related to academic instruction or training" means work related to the academic operations and functions in a school rather than to administration along the lines of general business operations. Such academic administrative functions include operations directly in the field of education (29 CFR § 541.204(c)). Examples of exempt positions include superintendents, heads of elementary or secondary schools, assistants responsible for administration of matters such as curriculum, quality and methods of instruction, principals, vice principals, department heads. Jobs relating to building maintenance, health of students, such as social workers, psychologists, lunchroom managers or dieticians will not be considered to be performing academic administrative functions.

(d) Examples of Administrative Exemptions.

Section 541.203 of the regulations set forth numerous examples for the administrative exemption:

> *(a) Insurance claims adjusters generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.*
>
> *(b) Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as*

collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

(c) An employee who leads a team of other employees assigned to complete major projects for the employer (such as purchasing, selling or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements) generally meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team.

(d) An executive assistant or administrative assistant to a business owner or senior executive of a large business generally meets the duties requirements for the administrative exemption if such employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance.

(e) Human resources managers who formulate, interpret or implement employment policies and management consultants who study the operations of a business and propose changes in organization generally meet the duties requirements for the administrative exemption. However, personnel clerks who "screen" applicants to obtain data regarding their minimum qualifications and fitness for employment generally do not meet the duties requirements for the administrative exemption. Such personnel clerks typically will reject all applicants who do not meet minimum standards for the particular job or for employment by the company. The minimum standards are usually set by the exempt human resources manager or other company officials, and the decision to hire from the group of qualified applicants who do not meet the minimum standards is similarly made by the exempt human resources manager or personnel manager who makes the hiring decision or makes recommendations for hiring from the pool of qualified applicants, such duties constitute exempt work, even though routine, because this work is directly and closely related to the employee's exempt functions.

(f) Purchasing agents with authority to bind the company on significant purchases generally meet the duties requirements for the administrative exemption even if they must consult with top management officials when making a purchase commitment for raw materials in excess of the contemplated plant needs.

(g) Ordinary inspection work generally does not meet the duties requirements for the administrative exemption. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may

have been catalogued and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They have some leeway in the performance of their work but only within closely prescribed limits.

(h) Employees usually called examiners or graders, such as employees that grade lumber, generally do not meet the duties requirements for the administrative exemption. Such employees usually perform work involving the comparison of products with established standards which are frequently catalogued. Often, after continued reference to the written standards, or through experience, the employee acquires sufficient knowledge so that reference to written standards is unnecessary. The substitution of the employee's memory for a manual of standards does not convert the character of the work performed to exempt work requiring the exercise of discretion and independent judgment.

(i) Comparison shopping performed by an employee of a retail store who merely reports to the buyer the prices at a competitor's store does not qualify for the administrative exemption. However, the buyer who evaluates such reports on competitor prices to set the employer's prices generally meets the duties requirements for the administrative exemption.

(j) Public sector inspectors or investigators of various types, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists and similar employees, generally do not meet the duties requirements for the administrative exemption because their work typically does not involve work directly related to the management or general business operations of the employer. Such employees also do not qualify for the administrative exemption because their work involves the use of skills and technical abilities in gathering factual information, applying known standards or prescribed procedures, determining which procedure to follow, or determining whether prescribed standards or criteria are met.

(4) <u>PROFESSIONAL EMPLOYEES</u>.

To qualify for exemption as a professional employee, the employee must be compensated on a salary or fee basis at a rate of not less than $455 per week, exclusive of board, lodging or other facilities and the employee's primary duty must be the performance of work which either (i) requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction (learned professional); or (ii) requiring

invention, imagination, originality or talent in a recognized field of artistic or creative endeavor (creative professional) (29 CFR § 541.300).

(a) Primary Duty - Learned Professional.

To qualify for the learned professional exemption, an employee's primary duty must be performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. This primary duty test includes three elements: (i) the employee must perform work requiring advanced knowledge; (ii) the advanced knowledge must be in a field of science or learning; and (iii) the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction (29 CFR § 541.301(a)). The phrase "work requiring advanced knowledge" means work which is predominantly intellectual in character and includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be obtained at the high school level (29 CFR § 541.301(b)).

The phrase "field of science or learning" includes the traditional professions 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 as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning (29 CFR § 541.301(c)).

The phrase "customarily acquired by a prolonged course of specialized intellectual instruction" restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree. However, the word "customarily" means that the exemption is also available to employees in such professions who have substantially the same knowledge level and performs substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. Although the learned professional exemption is available to the occasional lawyer who has not gone to law school or the occasional chemist who is not the possessor of a degree in chemistry, the learned professional exemption is not available for occupations that customarily may be performed with only a general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes. The learned professional exemption does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction (29 CFR § 541.301(d)).

(b) Examples of Learned Professional Exemptions.

Section 541.301(e) sets forth examples of occupations which qualify and do not qualify for the "learned professional" exemption:

> *(e) (1) Registered or certified medical technologists. Registered or certified medical technologists who have successfully completed three academic years of pre-professional study in an accredited college or university plus a fourth year of professional course work in a school of medical technology approved by the Council of Medical Education of the American Medical Association generally meet the duties requirement for the learned professional exemption.*

(2) Nurses. Registered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption. Licensed practical nurses and other similar health care employees, however, generally do not qualify as exempt learned professionals because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations.

(3) Dental hygienists. Dental hygienists who have successfully completed four academic years of pre-professional and professional study in an accredited college or university approved by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association generally meet the duties requirements for the learned professional exemption.

(4) Physician assistants. Physician assistants who have successfully completed four academic years of pre-professional and professional study, including graduation from a physician assistant program accredited by the Accreditation Review Commission on Education for the Physician Assistant, and who are certified by the National Commission on Certification of Physician Assistants generally meet the duties requirements for the learned professional exemption.

(5) Accountants. Certified public accountants generally meet the duties requirements for the learned professional exemption. In addition, many other accountants who are not certified public accountants but perform similar job duties may qualify as exempt learned professionals. However, accounting clerks, bookkeepers and other employees who normally perform a great deal of routine work generally will not qualify as exempt professionals.

(6) Chefs. Chefs, such as executive chefs and sous chefs, who have attained a four-year specialized academic degree in a culinary arts program, generally meet the duties requirements for the learned professional exemption. The learned professional exemption is not available to cooks who perform predominantly routine mental, manual, mechanical or physical work.

(7) Paralegals. Paralegals and legal assistants generally do not qualify as exempt learned professionals because an advanced specialized academic degree is not a standard prerequisite for entry into the field. Although many paralegals possess general four-year advanced degrees, most specialized paralegal programs are two-year associate degree programs from a community college or equivalent institution. However, the learned professional exemption is available for paralegals who possess advanced specialized degrees in other professional fields and apply advanced knowledge in that field in the performance of their duties. For example, if a law firm hires an engineer as a paralegal to provide expert advice on product liability cases or to assist on patent matters, that engineer would qualify for exemption.

(8) Athletic trainers. Athletic trainers who have successfully completed four academic years of pre-professional and professional study in a specialized curriculum accredited by the Commission on Accreditation of Allied Health Education Programs and who are certified by the Board of Certification of the National Athletic Trainers Association Board of Certification generally meet the duties requirements for the learned professional exemption.

(9) Funeral directors or embalmers. Licensed funeral directors and embalmers who are licensed by and working in a state that requires successful completion of four academic years of pre-professional and professional study, including graduation from a college of mortuary science accredited by the American Board of Funeral Service Education, generally meet the duties requirements for the learned professional exemption.

(c) Primary Duty - Creative Professional.

To qualify for the creative professional exemption, an employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work. The exemption does not apply to work which can be produced by a person with general, manual or intellectual ability and training (29 CFR § 541.302(a)). To qualify for exemption as a creative professional, the work performed must be "in a recognized field of artistic or creative endeavor." This includes such fields as music, writing, acting and the graphic arts (29 CFR § 541.302(b)).

The requirement of "invention, imagination, originality or talent" distinguishes the creative professionals from work that primarily depends on intelligence, diligence and accuracy. The duties of employees vary widely, and exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee.

(d) Examples of Creative Professional Exemptions.

Section 541.302(c) and (e) of 29 CFR contain examples of creative professionals:

This requirement generally is met by actors, musicians, composers, conductors, and soloists; painters who at most are given the subject matter of their painting; cartoonists who are merely told the title or underlying concept of a cartoon and must rely on their own creative ability to express the concept; essayists, novelists, short-story writers and screen-play writers who choose their own subjects and hand in a finished piece of work to their employers (the majority of such persons are, of course, not employees but self-employed); and persons holding the more responsible writing positions in advertising agencies. This requirement generally is not met by a person who is employed as a copyist, as an "animator" of motion-picture cartoonists, or as a retoucher of photographs, since such work is not properly described as creative in character.

(d) Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent, as opposed to work which depends primarily on intelligence, diligence and accuracy. Employees of newspapers, magazines, television and other media are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. Thus, for example, newspaper reporters who merely rewrite press releases or who write standard recounts of public information by gathering facts on routine community events are not exempt creative professionals if their work product is subject to substantial control by the employer. However, journalists may qualify as exempt creative professionals if their primary duty is performing on the air in radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns or other commentary; or acting as a narrator or commentator.

(e) Teachers.

The term "employee employed in a bonafide professional capacity" also means any employee with the primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed (29 CFR § 541.303(a)). Exempt teachers include but are not limited to regular academic teachers; teachers of kindergarten or nursery school pupils; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal and instrumental music instructors. Faculty

members who are engaged as teachers but spend a considerable amount of their time in extracurricular activities such as coaching athletic teams or acting as moderators or advisors in areas such as drama, speech, debate or journalism are engaged in teaching (29 CFR § 541.303(b)). The exemption is available to teachers with certificates, and to teachers who are not certified, but who are employed with credentials sufficient for the employing school or school system (29 CFR § 541.303(c)). The Section 541.300 duties and salary tests do not apply to teaching professionals (29 CFR § 541.303(d)).

(f) Computer Employees.

Computer systems analysts, computer programmers, software engineers and other similarly skilled workers in the computer field are eligible for the exemption as professionals under FLSA § 13(a)(1) and 13(a)(17) (see footnotes 1 and 2 above) (29 CFR § 541.400(a)). The § 13(a)(1) exemption applies to computer employees compensated a salary or fee basis at a rate of not less than $455 per week. The § 13(a)(17) exemption applies to any computer employee compensated on an hourly basis at a rate of not less than $27.63 per hour (29 CFR § 541.400(b)). Under either § 13(a)(1) or 13(a)(17), the exemptions only apply to computer employees whose primary duty consists of: (i) the application of systems analysts techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; (ii) the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system specifications; (iii) the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or (iv) a combination of the above duties, the performance of which requires the same level of skills (29 CFR § 541.400(b)).

The computer exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment. The exemption also does not apply to employees based on their dependency upon or use of computers and computer software programs but who are not primarily engaged in analysis or programming (29 CFR § 541.401).

(5) OUTSIDE SALES EMPLOYEES.

(a) Primary Duty.

Outside sales employees are exempt if their primary duty is making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer and the employee is customarily and regularly engaged away from the employer's place or places of business in performing such primary duties (29 CFR § 541.500). In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee sales efforts shall also be regarded as exempt work including, for example, writing sales reports, updating or revising the employee sales or display catalog, planning itineraries and attending sales conferences (29 CFR § 541.500(b)). The salary requirements do not apply to the outside sales employees (29 CFR § 541.500(c)).

In order to qualify for the outside sales exemption, the employee must be engaged in making sales, including the transfer of title to tangible property, obtaining orders or contracts for services or for use of facilities for which a consideration will be paid by the client or customer, including selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies (29 CFR §

541.501(c)). "Services" extends the outside sales exemption to employee who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order (29 CFR § 541.501(d)).

(b) Away From the Employer's Place of Business.

The requirement that activity be "away from the employer's place or places of business" requires that the employee make sales at the customer's place of business or, if selling door-to-door, at the customer's home. Outside sales **does not** include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Thus, any fixed site, whether home or office, used by a sales person as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any form or sense the owner or tenant of the property. However, an outside sales employee does not lose the exemption by displaying samples in hotel sample rooms during trips from city to city. Similarly, an outside sales employee does not lose the exemption by displaying the employer's products at a trade show. If selling actually occurs during the trade shows, so long as the trade shows are of short duration (i.e., one or two weeks), such sales should not be considered as the employer's place of business (29 CFR § 541.502).

Promotional work that is actually performed incidental to or in conjunction with an employee's own outside sales or solicitations is exempt work. However, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work (29 CFR § 541.503(a)). A company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, sets up displays and consults

with the store manager when inventory runs low, but does not obtain a commitment for additional purchases, is not performing exempt work (29 CFR § 541.503(c)).

Drivers who deliver products and also sells such products may qualify as exempt outside sales employees only if the employee has a primary duty of making sales. In determining the primary duty of drivers who sell, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including loading, driving or delivering products, shall be regarded as exempt outside sales work (29 CFR § 541.504).

IV. WAGE PAYMENT

The North Carolina Wage and Hour Act, Article 2A, Sections 95-25.1 through .25 of the North Carolina General Statutes, contains specific provisions governing payment of wages to employees in North Carolina, including matters such as the timing of wage payment, payment of vacation pay, permissible forfeitures, and deductions.

A. Timing of Payment

With respect to current employees, the North Carolina Wage and Hour Act requires payment of all wages accruing to the employee on the employee's regular pay day. Pay periods may be daily, weekly, bi-weekly, semi-monthly or monthly. Wages based on bonuses, commissions or other forms of calculation may be paid as infrequently as annually if prescribed in advance. G.S. § 95-25.6.

With respect to terminated employees, G.S. § 95-25.7 requires that employers pay to employees whose employment is discontinued for any reason all wages due on or before the next regular pay day. Wages based on bonuses, commissions or other forms of calculation shall be

paid on the first regular pay day after the amount becomes calculable. Wages based on bonuses, commissions or other forms of calculation may not be forfeited unless the employee has previously been notified in writing of the employer's policy or practice which results in forfeiture.

If requested by the employee, an employer must mail the final paycheck to the employee at the employer's expense. Employers are prohibited from withholding the final paycheck because the employee refuses to come to the business office or place of employment to pick up the paycheck if the employee requests the employer to mail it to the employee. The employer may require the employee to provide a notarized or witnessed written request to avoid fraudulent requests. 13 NCAC 12.0308.

B. Vacation

Under the North Carolina Wage and Hour Act, employers are not required to provide vacation for employees. However, if an employer provides vacation for employees, the employer is required to give all vacation time off or payment in lieu of time off in accordance with the company policy or practice. Employees must be prior notified, in writing, of any policy or practice that results in loss or forfeiture of accrued vacation benefits. G.S. §95-25.12.

Employees shall be notified of the employer's policies and practices concerning vacation pay both at the time of initial employment, orally or in writing, and also thereafter by making a copy of the policies and practices available to the employees in writing (such as through an employee handbook) or through a posted notice maintained in a place accessible to the employees. G.S. §95-25.13.

Existing administrative code requires that all vacation policies and practices communicated to employees address how and when vacation is earned, so that the employees know the amount of vacation to which they are entitled, whether or not vacation time may be carried forward from one year to another, when vacation time must be taken, when and if vacation pay may be paid in lieu of time off, and under what conditions vacation pay will be forfeited upon termination. Accrual policies cannot be changed retroactively. 13 NCAC 12.0306.

The regulations contain similar provisions with respect to payment of commissions and bonuses. 13 NCAC 12.0307.

C. Forfeitures

Under certain circumstances, the North Carolina Wage and Hour Act allows for forfeiture by employees of wages or pay they would otherwise be entitled to receive. Section 95-25.7 of the North Carolina General Statutes addresses forfeiture of wages based on bonuses, commissions or other forms of calculation (i.e., some method other than salary or hourly payments). Section 95-25.12 of the North Carolina General Statutes provides that vacation time or pay may be forfeited. However, under both sections, such forfeitures can occur only if 1) the employer has established a policy or practice which results in such forfeiture and 2) employees are notified of such policy or practice in accordance with the requirements of G.S. §95-25.13.

Section 95-25.13 requires that employers:

(1) notify employees, orally or in writing at the time of hiring, of the promised wages and the day and place for payment;

(2) make available to employees, in writing or through a posted notice maintained in a place accessible to its employees, employment practices and policies with regard to promised wages;

(3) notify employees, in writing or through a posted notice maintained in a place accessible to employees, of any changes in promised wages prior to the time of such changes; and

(4) furnish each employee with an itemized statement of deductions from that employee's wages for each pay period such deductions are made.

North Carolina case law holds that policies resulting in forfeitures may only be applied prospectively and cannot result in forfeiture of benefits earned prior to adoption of (and proper notification to the employee of) the policy in question. Narron v. Hardee's Food Systems, Inc., 331 S.E.2d 205 (N.C. App. 1985) (Restaurant manager's vacation not subject to forfeiture if vacation was earned prior to company's adoption of a policy which resulted in forfeiture of unused vacation pay even though the policy resulting in forfeiture was adopted prior to termination); Hamilton v. Memorex Telex Corp., 454 S.E.2d 278, (N.C. App. 1995).

D. Deductions

In addition to withholding wages required by State or Federal law, employers, under certain circumstances, can withhold wages provided the employer has obtained proper documentation.

When the amount or rate of the proposed deduction is known and agreed upon in advance, the employer must have written authorization from the employee which (1) is signed on or before the payday for the pay period from which the deduction is to be made; (2) indicates the reason for the deduction; and (3) states the actual dollar amount or percentage of wages which shall be deducted from one or more paychecks. However, if the deduction is for the convenience of the employee, the employee shall be given a reasonable opportunity to withdraw the authorization.

G.S. § 95-25.8(a)(2). "For the convenience of the employee" includes savings plans, credit union installations, savings bonds, union or club dues, uniform rental or cleaning not required by the employer, parking, and charitable contributions. 13 NCAC 12.0305(b).

When the amount of the proposed deduction is not known and agreed upon in advance, the employer must have written authorization from the employee which (1) is signed on or before the pay day for the pay period from which the deduction is to be made; and (2) indicates the reason for the deduction. Prior to any deductions being made under this section, the employee must (1) receive advance written notice of the actual amount to be deducted; (2) receive written notice of their right to withdraw the authorization; and (3) be given a reasonable opportunity to withdraw the authorization in writing. G.S. §95-25.8(a)(3) a "reasonable opportunity to withdraw" shall be at least three calendar days from the date of the employer's notice of the actual amount to be deducted or the employee's written notice of withdrawal of the authorization. 13 NCAC 12.0305(c).

Employers are allowed to withhold or to avert a portion of an employee's wages for cash shortages, inventory shortages, or loss or damage to an employer's property after giving the employee written notice of the amount to be deducted seven days prior to the payday on which the deduction is to be made, except that when a separation occurs the seven day notice is not required G.S. §95-25.8(c). Additionally, an employer can withhold or divert a portion of the employee's wages without written authorization if criminal process has been issued against the employee, the employee has been indicted, or the employee has been arrested for a charge incident to a cash shortage, inventory shortage, or damage to the employer's property §98-25.8(e).

Loans from an employer to an employee that are considered to be an advance of wages may include credit advanced for purchasing from the employer items not primarily for the benefit of the employer and personal usage of the employer's property when designated for business use only. 13 NCAC 12.0305(e).

Authorizations for deductions that are not permitted by law are invalid. Such deductions include any agreement by an employee to pay any portion of a premium for workers compensation coverage or agreements by employees to pay for personal protective equipment that the employee does not wear off the jobsite for use off the job. 13 NCAC 12.0305(g).

Employers are also allowed to withhold or deduct overpayment or prepayment of wages (including the loans made by an employer to an employee) without written notice or authorization. However, deductions for interest or other charges do require written authorization.

V. SOURCES FOR ASSISTANCE

The U.S. Department of Labor's website is www.dol.gov. The portion of the site devoted to the FairPay Regs, including online training, and frequently asked questions is www.dol.gov/esa/regs/compliance/whd/fairpay/main.htm. The FairPay Regulations are located at www.dol.gov/esa/regs/compliance/whd/fairpay/regulations.htm. In Greensboro, the U.S. Wage and Hour Division can be contacted at (336) 547-4230. In Raleigh, the U.S. Wage and Hour Division can be contacted at (919) 790-2741.

Similarly, website for the North Carolina Department of Labor, Wage and Hour Division, is www.nclabor.com. The North Carolina Wage and Hour Act, including the statutory provisions and pertinent provisions from the North Carolina Administrative Code is

www.nclabor.com/wh/Wage_Act_Packet.pdf. The Wage and Hour Division can be contacted by telephone in Raleigh at (919) 733-2152 or 1 (800) LABOR NC.