



## 36TH ANNUAL SEMINAR

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Labor & Employment Relations Law

# **FLSA Compliance – The State of Federal Law & Avoiding FLSA Litigation**

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# Agenda

## 1. Current State of the FLSA

- Voluntary Compliance Program

## 2. FLSA Compliance – Tips & Best Practices

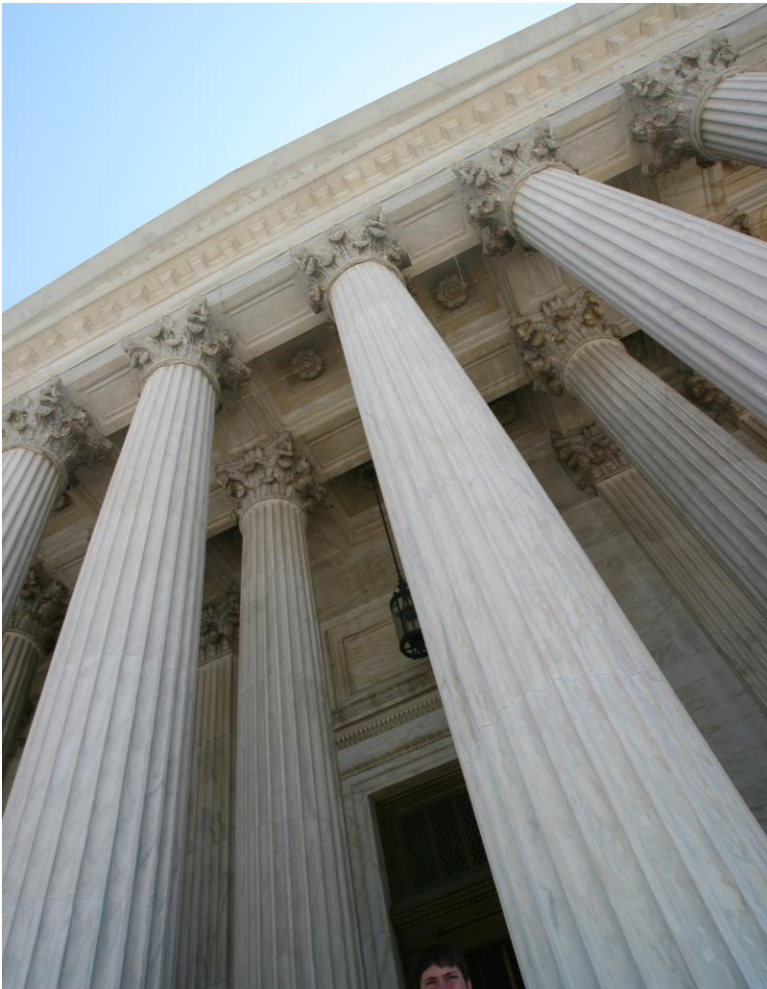
- FLSA Audits
- Regular Rate Calculations
- Pre- and Postliminary Activities
- Timeclock Rounding
- Classification of Employees (Exempt vs. Nonexempt)

## 3. Artificial Intelligence



# Current State of the FLSA

# Notable Recent Developments



- Overtime-Exemption Salary Threshold
- Independent Contractor Classification
- Joint Employer Rule
- Voluntary Compliance Program



# Overtime Salary Exemption Threshold

- 2024 Rule - Biden Administration
  - Salary threshold would have increased:
    - \$844/week (\$43,888/year) - Eff. July 1, 2024
    - \$1,128/week (\$58,656/year) - Eff. Jan. 1, 2025
- In November 2024, the Eastern District of Texas struck down the rule, holding the DOL exceeded its authority.
- Currently, the salary threshold remains at \$684/week (\$35,568/year).



# Independent Contractor Classification

- On May 1, 2025, the DOL's Wage and Hour Division ("WHD") announced it would no longer enforce the Biden-era classification test.
- The Biden-era test took effect March 2024 and employed a multifactor, "totality of the circumstances" analysis.
- The DOL stated it would now enforce the less restrictive test contained in the **2008 DOL Fact Sheet**.



# 2008 DOL Fact Sheet (Currently in Effect)

## Significant Factors Considered:

1. The extent to which the services rendered are an integral part of the principal's business.
2. The permanency of the relationship.
3. The amount of the alleged contractor's investment in facilities and equipment.
4. The nature and degree of control by the principal.
5. The alleged contractor's opportunities for profit and loss.
6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
7. The degree of independent business organization and operation.

## "Immaterial" factors:

1. Where the work is performed.
2. The existence of a formal employment agreement.
3. Whether an alleged independent contractor is licensed by the state or local government.
4. Time or mode of payment.



# Joint Employer Status



- On September 4, 2025, the DOL announced its regulatory agenda for 2025.
- Among the items referenced were that "[t]he department will look at the circumstances under which a business can be held liable as a joint employer."
- The Trump Administration's 2020 joint employer test (repealed in 2021): "Substantial direct and immediate control" over the "essential terms and conditions" of the workers' employment. "Essential terms and conditions" include wages, benefits, hours of work, hiring, discharge, discipline, supervision and direction.

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# Voluntary Compliance Program



# Voluntary Compliance Program - "PAID"

- In July 2025, the DOL's Wage and Hour Division ("WHD") relaunched the **Payroll Audit Independent Determination ("PAID")** program.
- The program allows employers to self-identify and resolve FLSA violations (e.g., wage and overtime violations).
- The Trump Administration initially kicked off this program in April 2018. This new iteration is more robust.



# PAID Requirements

- Must be covered by the FLSA
- The employees included in the PAID self-audit cannot be subject to prevailing wage requirements.
- Cannot have had a FLSA minimum wage or overtime violation over the past 3 years (as determined by WHD or a court).
- Cannot currently be a party to any litigation where it is asserted that the compensation practices at issue are a violation of the FLSA minimum wage/overtime requirements.
- Must make WHD aware of any complaints by employees (or their representatives) in which it is asserted that the compensation practices at issue are a violation of the FLSA minimum wage/overtime requirements.
- Cannot have participated in PAID within the last 3 years.
- Must acknowledge: (1) you have a continuing duty, during the audit process, to update WHD on any changes to the above information and/or representations; (2) participating in the PAID program does not cut off employee rights under other state or local laws.

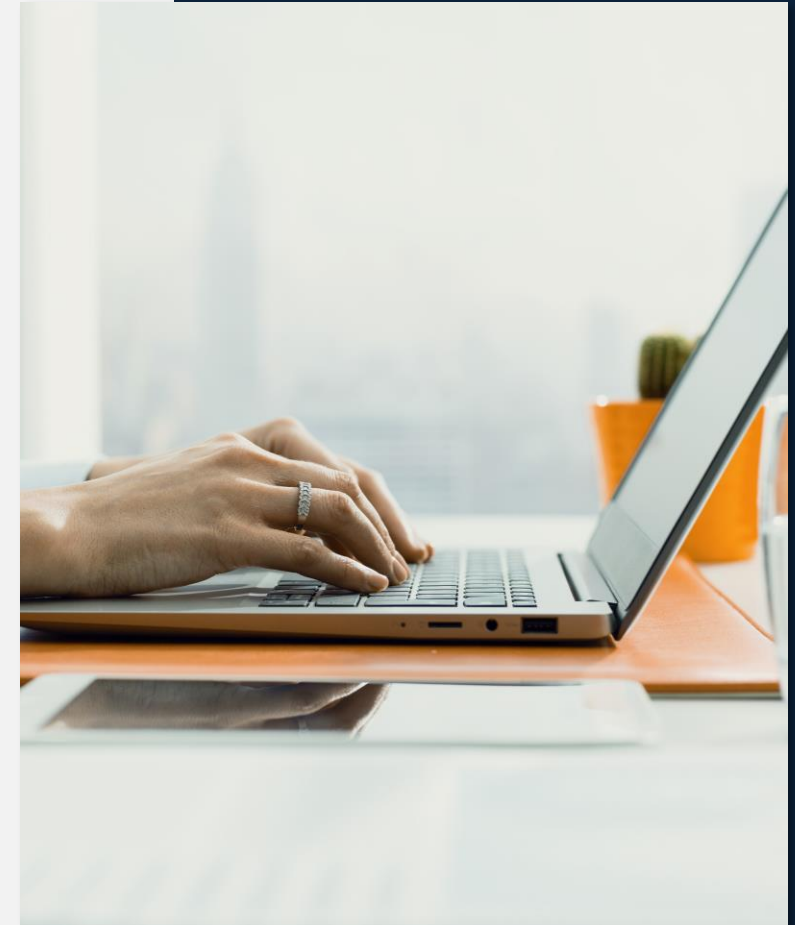
# Pros/Cons of Participation:

PROS	CONS
May help avoid costly litigation.	Requires employer self-identification (cannot participate anonymously).
May avoid certain penalties (e.g., payments made without liquidated damages or civil monetary penalties).	Resolution offered through PAID may not cover non-FLSA claims (e.g., state or local law violations).
Might allow for a faster resolution than a WHD investigation or private litigation.	Employees may still file claims under state or local law, or pursue private litigation separately.
Could signal good-faith efforts to comply, which could subject the employer to less WHD scrutiny in the future.	Disclosure of information could be harmful if employer is not accepted to PAID program and/or because such information could be subject to public information requests.



# Next Steps for Employers

- Monitor for DOL rulemaking or announcements, and federal court rulings on FLSA matters.
  - New joint employer test forthcoming?
- Audit existing practices:
  - Independent Contractors vs. Employees
  - Exempt Salary Threshold
  - If any concerns are found, discuss participation in PAID program with counsel





# FLSA Compliance Tips & Best Practices

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# FLSA Audits



# FLSA Audits

## Initiation:

- Employee complaint
- Industry sweep (e.g., food service, manufacturing, retail, etc.)
- Post-violation audit (random or planned follow-up)
- Self-report (e.g., through PAID program, discussed later)

## Preliminary Steps:

- Investigator will typically meet with employer and explain the purpose and scope of the audit
- Investigator will specify the records requested



# FLSA Audits (cont'd)

## Audit Process:

- Records review (payroll data, timekeeping records, etc.)
- Employee interviews
  - May ask about hours worked, off-the-clock work, job duties, etc.

## Final Steps:

- WHD will determine whether violation(s) have occurred
- If violations have occurred, the employer will be liable for back wages and possibly liquidated damages or other penalties
  - Damages and/or penalties may not apply with the PAID program



# Best Practices to Avoid a Bad Audit

1. **Review employee classification regularly** (exempt vs. nonexempt)
2. **Verify timekeeping accuracy** (hours worked, breaks, on-call time)
3. **Check wage calculations** (overtime, regular rate)
4. **Confirm record retention** (keep at least 3 years of pay stubs; certain states may require longer record retention).

**Self-audit on a regular basis (ideally at least annually).**



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# Regular Rate Calculations





# Regular Rate Calculations

$$\text{Regular Rate} = \text{Total Compensation} / \text{Total Hours}$$

## Total compensation includes:

- Nondiscretionary bonuses
- Commissions
- Most incentive payments

## Total compensation does not include:

- Gifts (and "payments in the nature of gifts")
- Vacation, holiday, and illness pay
- Reimbursement for business expenses
- Discretionary bonuses
- Employer contributions to benefit plans



# Regular Rate Calculation

## Common Mistakes:

- Failing to include nondiscretionary bonuses or shift differentials
- Miscalculating overtime rate (1.5x **regular rate**)
- Excluding retroactive pay adjustments that affect the relevant pay period

## Best Practices:

- Calculate the regular rate each workweek to account for any pay variability due to bonuses, commissions, or shift differentials
- Audit bonus or incentive programs (ideally annually) to determine whether they need to be included in the regular rate
- Use reliable timekeeping systems that are integrated with payroll, to avoid calculation and/or categorization errors



# Bonuses

## Discretionary Bonuses:

- Both of these factors are subject to the sole discretion of the employer at or near the end of the period:
  - *the fact that the bonus payment is to be made* and;
  - *amount* of the bonus payment.
- Bonus payment is *not made according to any prior contract, agreement, or promise* causing an employee to expect such payments regularly.

## Nondiscretionary Bonuses:

- Any bonus that is not a discretionary bonus.
- Examples include:
  - Bonuses based on a predetermined formula, such as individual or group production bonuses.
  - Bonuses for quality and accuracy of work.
  - Bonuses announced to employees to induce them to work more efficiently.
  - Attendance bonuses; and
  - Safety bonuses (i.e., number of days without safety incidents).



# Bonus Best Practices

- Clearly define the bonus type (discretionary or nondiscretionary) in any bonus or incentive compensation plan.
- Avoid using performance criteria, production goals, or any specific formula for determining discretionary bonuses.
- Avoid promising bonuses that are intended to be discretionary.



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# Pre- and Postliminary Activities



# Pre- and Postliminary Activities



- Refers to activities an employee is expected to do before formally beginning work or after formally ending work.

**Examples:** Donning or doffing protective gear; logging into the company's computer network; undergoing security checks or other screenings.

- Whether preliminary/postliminary activity is excluded from *hours worked* is a mixed question of law and fact.



# Pre- and Postliminary Activities

U.S. Supreme Court in *Steiner*:

- Activities an employee performs before or after their regular hours of work are compensable ***if those activities are an "integral and indispensable" part of the employee's "principal" activity or activities.***
- "Integral" means "belonging to or making up an integral whole; constituent, component; specifically necessary to the completeness or integrity of the whole; forming an intrinsic portion or element, as distinguished from an adjunct or appendage."
- "Indispensable" is a duty "that cannot be dispensed with, remitted, set aside, disregarded, or neglected."

29 C.F.R. §§ 790.7 and 790.8(b), (c)

- "Principal" activities include all activities that are an "integral part" of those activities.
- The same activities may be non-compensable under certain conditions and compensable "principal" activities under other conditions.

# Pre- and Postliminary Activities

Compensability is highly dependent on circumstances, and similar activities can be compensable in one case and non-compensable in another.

Activities courts have found **compensable**:

- Booting up a computer/launching software;
- Returning keys and equipment; and
- Preparing, loading, and unloading equipment.

Activities courts have found **non-compensable**:

- Cleaning, fueling, and maintaining vehicles;
- Loading, unloading, and carrying work items;
- Receiving work assignments and mapping routes; and
- Logging on to a computer or similar device used only to receive daily assignments.



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# Timeclock Rounding



# Timeclock Rounding Practices

Timeclock rounding is the practice of rounding employee punch times up or down to a pre-determined interval. For example, if an employee clocks in at 7:58 a.m., their punch time may be rounded to 8:00 a.m.

Historically, rounding assisted employers with managing the administrative burden of calculating time entries by allowing employers to use “round” numbers, such as :00, :15, and :30.

Though permitted under the FLSA, the practice is facing increased scrutiny as modern time clocks eliminate the historic justification for rounding.



# Rounding Requirements

- For rounding to be permissible under the FLSA, it must be neutral in both policy and practice.
  - Rounding must occur in both directions and cannot only favor the employer.
  - Rounding must average out over time and cannot result in underpayment to employees.
- Employers utilizing rounding should also use smaller increments, such as five minutes, should ensure that attendance policies support neutral rounding, and should perform annual audits to ensure neutrality over time.



# Classification of Employees (Exempt vs. Nonexempt)





# Classification of Employees

- **General Rule:** Employees must be paid overtime unless **exempt** under the FLSA.
- **Relevant Tests to Determine "Exempt" Status**
  - **Salary Basis:** Employee must be paid a predetermined salary (i.e., cannot be paid on an hourly basis).
  - **Salary Threshold:** Employee must make at least \$684/week (\$35,568/year) (as of 2025).
  - **Duties Tests:** Employee's job duties must satisfy a duties test, such as the executive, administrative, or professional ("EAP") duties (there are others).

### **Executive Exemption**

#### **Primary Duties:**

- Managing the enterprise or a recognized department or subdivision of it.
- Regularly directing the work of at least 2 or more full-time employees.
- Has hiring/firing authority, or their recommendations for hiring/firing are given particular weight.

#### **Identifying Criteria:**

- Involvement in areas such as personnel decisions, budgeting, or operational oversight.

#### **Examples:**

- Company presidents, department heads, store managers.



## Administrative Exemption

### Primary Duties:

- Performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers.
- Exercising discretion and independent judgment with respect to matters of significance.

### Identifying Criteria:

- Employee directly supports the business (not producing the goods or services provided by the business).
- Work usually includes analysis, planning, or advising management.

### Examples:

- HR professionals, compliance officers, analysts, strategists (e.g., in areas like finance or marketing).



## **Professional Exemption**

### **Primary Duties:**

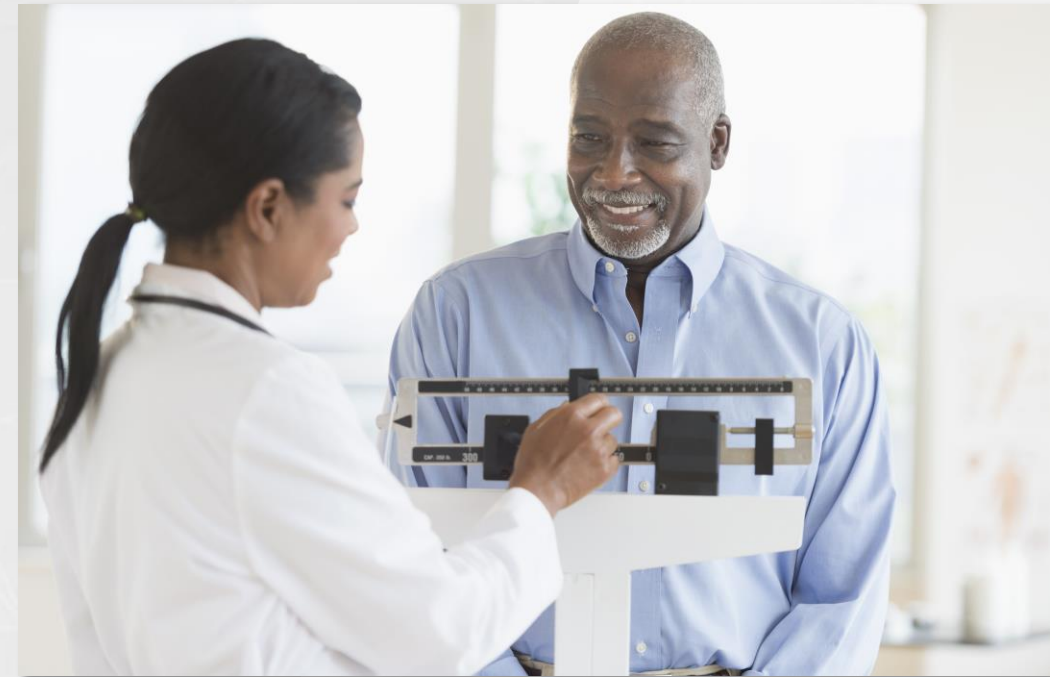
- Performing work that requires advanced knowledge and the consistent exercise of discretion and judgment.
- Advanced knowledge must be in a field of science or other learning.
- Acquisition of such knowledge must be acquired by a prolonged course of specialized study.

### **Identifying Criteria:**

- Work entails the application of specialized training to intellectual problems.

### **Examples:**

- Doctors, accountants, lawyers, engineers, teachers.



# Best Practices for Classification

## **Job title is NOT determinative.**

- Duties are the critical piece.
- Regularly audit job duties when employees' roles evolve (e.g., due to reorganizations, promotions, transfers etc.).
- Ensure managers/supervisors understand the distinction between exempt and nonexempt with respect to tracking hours, overtime, and duties.

## **Avoid improper deductions for exempt employees.**

- E.g., partial-day deductions from pay
- Such treatment could result in classification of these employees as nonexempt (with the attendant requirement of overtime pay).

## **Be mindful of states that have more protective requirements.**

- E.g., California or New York
- The more employee-friendly provision always applies.



# Takeaways for Employers

- Proactive self-audits (through PAID program or not) can potentially help mitigate risk.
- Ensure calculation of regular rate is accurate, and includes necessary forms of compensation.
- Use the latest DOL guidance to properly classify individuals.
  - Independent contractor vs. employee
  - Exempt vs. Nonexempt employee
- Thoroughly evaluate pre- and postliminary activities to determine whether they are compensable.
- Monitor for DOL developments (e.g., a possible new joint employer rule) to stay up to speed.



# Artificial Intelligence

# AI on the Horizon

## New AI Timekeeping Tools

- There are an increasing number of software providers offering employers AI-powered timekeeping tools, including tools that automatically track employee work time based on logins, computer activity, and physical movement.
- These systems can present risk, as they are still in their infancy and are imperfect. This has not gone unnoticed by the DOL and Plaintiffs' firms.
- In April 2024, the DOL issued a Field Assistance Bulletin outlining the wage and hour risks posed by using AI software for time tracking and payroll, including undercounting work time, improper break time tracking, and incorrect regular rate calculations.

Employers cannot offload wage and hour responsibilities onto software companies. Employers can and will face liability for the errors made by their time tracking software.

# Questions





# Thank you!