







## WHAT EMPLOYERS ARE COVERED BY THE FLSA?

- Broad Coverage
  - > No threshold number of employees required.
  - > FLSA applies to any organization if it is:
    - Engaged in interstate commerce with gross income of at least \$500,000; or
    - Public agency, operates a hospital, healthcare facility, or school.

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## WHAT INDIVIDUALS ARE COVERED BY THE FLSA?

Notably, only a company's employees, and not independent contractors, are covered by the FLSA.

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## EMPLOYEE V. INDEPENDENT CONTRACTOR

- On April 29, 2019, the U.S. Department of Labor issued an opinion letter addressing the relevant standard for determining whether an individual is an employee or independent contractor under the FLSA.
- The DOL stated that whether or not an individual is an employee or an independent contractor depends on whether the worker is "economically dependent" on the employer. This is a fact-specific inquiry.





potential employer's business.

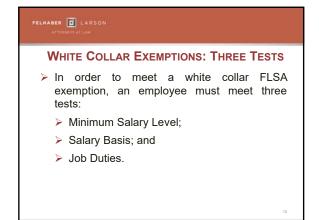
# THE FLSA? > Certain Employees are "exempt" from

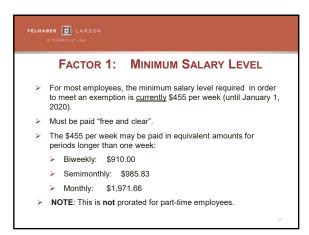
- the FLSA's coverage. For these employees:
  - No time records need to be kept;
  - Overtime does not need to be paid; and
  - No need to worry about what work is or is not covered.

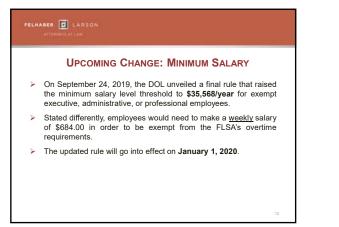
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Other white collar exemptions exist, for example, employees engaged in









## **UPCOMING CHANGE: MINIMUM SALARY (CONT.)**

- Additionally, under the updated rule employers are able to use non-discretionary bonuses and incentive payments (including commissions) that are paid at least annually to satisfy up to 10 percent of the calculation of an employee's standard salary level for minimum salary computation level purposes.
- Employers are also able to make a final "catch-up" payment within one pay period after the end of the relevant 52-week period to bring an employee's total compensation up to the required threshold level.

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## FACTOR 2: SALARY BASIS TEST

- The employee must additionally be paid on a salary basis.
  - Regularly receives a predetermined amount of compensation each pay period (on a weekly or less frequent basis);
  - The compensation cannot be reduced because of variations in the quality or quantity of the work performed;
  - Must be paid the full salary for any week in which the employee performs any work; and
  - Need not be paid for any workweek when no work is performed.

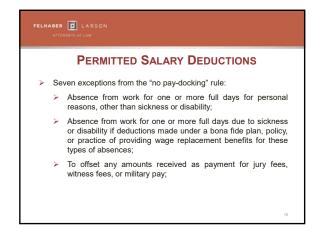
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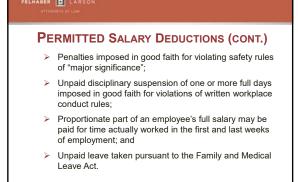
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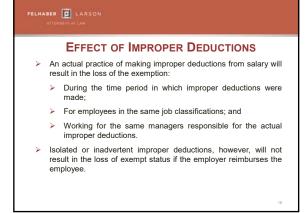


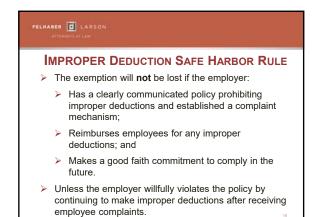
## **DEDUCTIONS FROM SALARY**

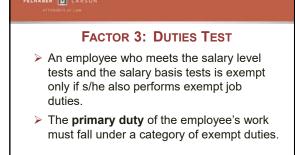
- An employee is not paid on a salary basis if deductions from the predetermined salary are made for absences occasioned by the employer or by the operating requirements of the businesses.
- If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

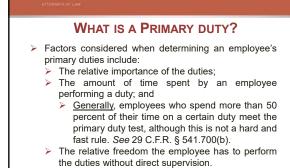














## **ADMINISTRATIVE EXEMPTION**

- The employee must support management or the general business operations of the employer.
  - >What is the nature of the business?
  - ➤ How does the employee directly support the business operations of the employer or the employer's customers?

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## **ADMINISTRATIVE EXEMPTION**

- The employee "must perform work directly related to assisting with the running or servicing of the business."
  - ➤Instead of working in production or selling the product of the business.

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## INDEPENDENT JUDGMENT AND DISCRETION

- ➤ To be exempt administratively, the employee must exercise discretion and independent judgment with respect to matters of significance.
  - "Matters of significance" refers to the level of importance or consequence of the work performed.



# WHEN DOES AN EMPLOYEE USE INDEPENDENT JUDGMENT?

- > This means to compare and evaluate different courses of action.
- ➤ To formulate, affect, interpret, or implement management policies or practices.
  - ➤ It is more than the use of "skill" in applying well established rules.

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## EXAMPLES OF WORK IN SUPPORT MANAGEMENT

- ➤ Tax
- > Finance
- Accounting
- Marketing
- > HR
- > Government relations

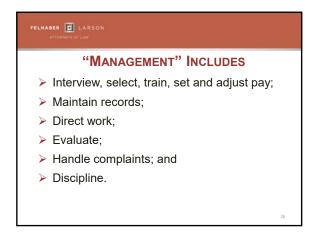
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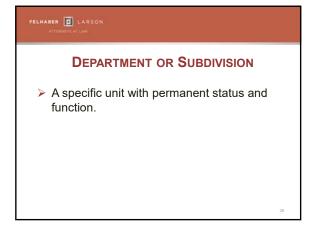
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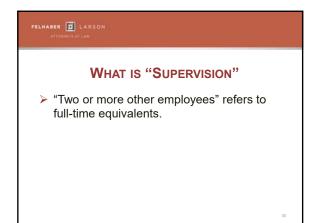


## THE **EXECUTIVE EXEMPTION**

- Primary duty of the management of the enterprise or of a recognized department or subdivision.
- Customarily and regularly directs the work of two or more other employees.
- Has authority to hire or fire other employees (or recommendations as to hiring, firing, promotion or other change of status of other employees are given particular weight).

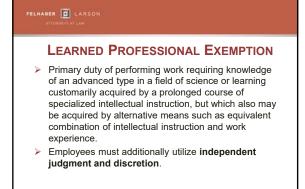








- Employers should consider the following in determining whether recommendations are given "particular weight":
  - Whether it is part of the employee's job duties to make recommendations;
  - How often recommendations are made or requested; and
  - How often recommendations are relied upon.



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- > Discretion and Independent Judgment.
  - Beyond skill in applying techniques, procedures or application of specific standards.
- > In a field of science and learning.



## **ADVANCED DEGREE?**

#### > Not technically required

Educational requirements can be met, in part, through a combination of work experience and intellectual instruction, but the occupation must generally require advanced knowledge and not comprise a majority of employees that have acquired their skill through experience rather than specialized intellectual instruction.

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#### PROFESSIONAL EXEMPTION EXAMPLES

- > Registered or certified medical technologists
- Registered nurses (but <u>not</u> licensed practical nurses)
- Dental hygienists
- Certified physician assistants
- Accountants (but <u>not</u> bookkeepers or accounting clerks)
- Chefs, such as executive chefs and sous chefs with four-year degrees
- Certified athletic trainers
- > Licensed funeral directors and embalmers

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## ADDITIONAL EXEMPTIONS: COMPUTER EXEMPTION

- > Applies to employees with primary duty of:
  - Application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional applications; or
  - Design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design
  - Design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
  - A combination of duties described in (A), (B) and (C), the performance of which requires the same level of skill.
- Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.



#### **COMPUTER EXEMPTION PAY REQUIREMENTS**

- <u>Currently</u>, in order to qualify for the Computer Employee Exemption, the employee must be compensated not less than \$455 per week, or, if compensated on an hourly basis, at a rate not less than \$27.63/hour.
- ➤ This threshold will also increase to \$684 per week on January 1, 2020.

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## HIGHLY COMPENSATED EMPLOYEE EXEMPTION

- An exemption that <u>currently</u> applies to employees over \$100,000 per year.
- > Performs office/non-manual work.
- > Primary duty must include "identifiable" functions of executive, administrative, or professional exemptions.
- ➤ Minimum weekly of \$455.00.
- NOTE: Under the DOL's September 24, 2019 updated rule altering the salary basis threshold, the total annual compensation required for the highly compensated employee exemption will increase to \$107,432 per year on January 1, 2020 (\$684 per/week).

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## HIGHLY COMPENSATED EMPLOYEES (CONT.)

- In assessing total annual compensation for highly paid exemption:
  - Include:
    - Commissions;
    - > Non-discretionary bonuses; and
    - Other non-discretionary compensation paid during 52-week period.
  - Exclude
    - > Benefits costs/payments; and
    - Retirement contributions.



## HIGHLY COMPENSATED EMPLOYEES (CONT.)

- Make-up payment and prorating:
  - ➤ One-month grace period to make additional payment (one) after the end of the year to reach \$100,000.
  - > Standard duties tests to be applied.
  - Employer may prorate for employees working less than full year.

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## WHAT ABOUT A COMBINATION OF EXEMPTIONS?

- If an employee performs a combination of exempt duties, they will still qualify as exempt from the FLSA regulations.
- For example, an school principal's primary job duties may be a combination of duties respectively classified as executive and administrative.

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## **TRAINEES AND INTERNSHIPS**

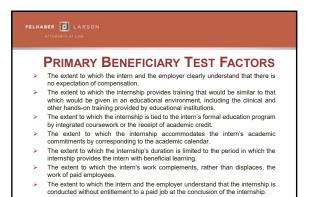
- Trainees or interns obtaining work-study generally fall outside of the FLSA's definition of an employee.
- According to DOL guidance issued on January 5, 2018, "unpaid internships for public sector and nonprofit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible."
- However, a different and more demanding standard applies when determining whether a trainee or intern at a private employer is an employee and therefore covered by the FLSA.



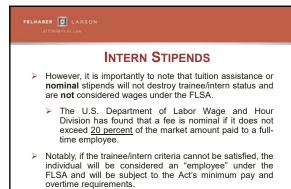
- For private sector employers, a seven-factor test is used to determine whether an individual is an intern or an employee.
- This test is known as the primary beneficiary test, because it bases the determination on whether the intern or the employer is the primary beneficiary of the parties' relationship.
- > This test was initially created by courts, but was adopted by the DOL in 2018.

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#### WHAT ABOUT VOLUNTEERS?

The FLSA only applies to **employees**, and not to **volunteers**.

An employee may participate in volunteer activities run by their employer. In these circumstances, the individual is considered a volunteer, and not an employee if:

- 1. The volunteering is optional;
- Choosing not to volunteer will have no adverse effect on the employee's working conditions or employment prospects; and
- 3. The employee is not guaranteed a bonus for volunteering.

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### RECENT UPDATE: "DIRECTING" VOLUNTEERS

In a March 14, 2019 Opinion Letter, the DOL reiterated that when an employee volunteers in an optional charitable program run by their employer, the employer cannot control or direct the volunteer's work.

Specifically, the DOL stated that if the employer attempts to "direct or control the employee's activities by, for example, giving specific instructions about what volunteer work he or she should do, or how he or she should do it, the time the employee spends following these instructions is hours worked under the FLSA."

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#### INTERESTING CASE - THE LONG-TERM INTERN

- ➤ In the case of *Brown v. New York City Dep't of Educ.*, 2012 U.S. Dist. LEXIS 176212 (S.D.N.Y. 2012), an employee was found to be a volunteer/intern, and not an employee, despite the fact that reported, and assisted, at a school for five days a week for a period of <u>over three years</u>.
- The individual sought help at the school in order to "mentor students" and give back to the community, although he hoped that his role would lead to a paying position, something that never happened.



## INTERESTING CASE - THE LONG-TERM INTERN

- The court found that there was ample evidence that the individual knew and understood, despite his hopes to the contrary, that he would not be compensated, and that part of his motivation was to assist with the students.
- Accordingly the Court found that he was motivated, at least in part, by "civic, charitable, or humanitarian reasons" and that he was therefore not an employee under the FLSA, or entitled to the Act's protections.

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#### **OVERTIME**

- The FLSA generally provides that 40 hours per workweek is the maximum number that a non-exempt employee may work without receiving additional compensation at not less than one and one-half times their "regular rate" of pay.
- The law defines the "regular rate" of pay as "all remuneration for employment paid to, or on behalf of, the employee" except for specifically excluded payments.
- Note: Under the Minnesota Fair Labor Standards Act, the overtime requirement applies to hours worked in excess of 48 hours in a given workweek for non-exempt employees.

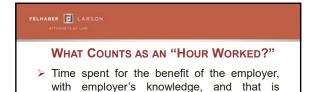
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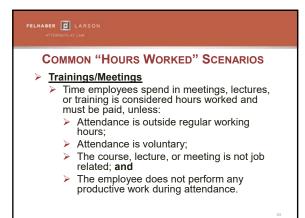
## COMMON PITFALL: "BUT THEY ARE SALARIED!"

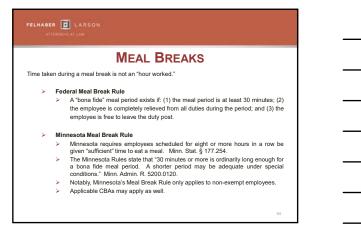
- One common pitfall is to designate an employee as "salaried" and then stop paying the employee overtime for hours worked in excess of 40 hours in a given workweek.
- Unless an employee meets one of the previously discussed exemptions, they must still be paid overtime and receive the minimum wage, even if they are paid on a "salaried" basis.

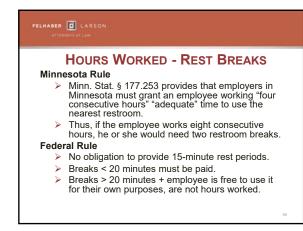


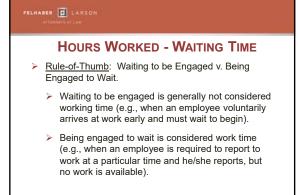
integral to the employee's principal activity, is considered work.In addition to set work schedules, anytime this

work is not requested but is "suffered or permitted," is work time that must be paid.

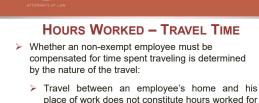




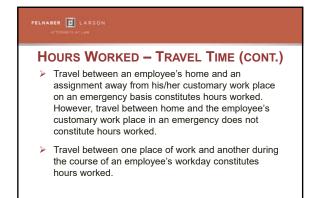




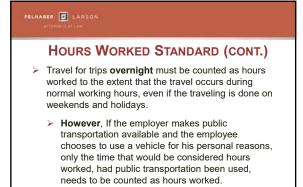
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Travel between an employee's home and his place of work does not constitute hours worked for an employee who travels from his/her home before his regular work time and returns home that night, regardless of whether the employee has a fixed work place or works at different locations.









## HOURS WORKED STANDARD (CONT.)

- If an employee reports to the employer's premises to pick up supplies, receive instructions, etc., his/her compensable time starts when he arrives at that location to engage in these duties.
- If the employee carries burdensome, heavy, or inconvenient equipment or supplies in his personal or company vehicle, then all travel time constitutes hours worked.

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## HOURS WORKED - "DONNING AND DOFFING"

- If changing or putting on a uniform or equipment/gear prior to or after work is "an integral and indispensable" part of an employee's job then time donning and doffing the gear is compensable.
  - Despite this, if the time spent donning and doffing gear only takes a de minimis amount of time, it is not compensable.
- Courts have held that if an employee is not required to don or doff their gear at the worksite (i.e. if they can change into their gear at home) then the donning and doffing activities need not be compensated. <u>Adams v. Alcoa. Inc.</u> 822 F.Supp.2d 156 (N.D. N.Y. 2011).
- Additionally, Section 3(o) of the FLSA allows of the exclusion of time spent by an employee changing clothes or washing at the beginning or end of each work day if such exclusion is pursuant to a collective bargaining agreement.

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## HOURS WORKED - "DONNING AND DOFFING"

- Typically, time spent "donning and doffing" equipment or clothing, for example, changing into a uniform at the outset or end of a shift, does not need to be included as compensable work time.
- However, there is an exception to this rule if changing or putting on the equipment/gear prior to work is "an integral and indispensable" part of the employees job then time donning and doffing the gear is compensable.
  - Despite this, if the time spent donning and doffing gear only takes a de minimis amount of time, it is not compensable.
- The DOL has taken the position that if an employee is not required to don or doff their gear at the worksite (i.e. if they can change into their gear at home) then the donning and doffing activities need not be compensated. Courts have echoed this position. See <u>Bamonte v. City of Mesa</u>, 598 F.3d 1217 (9th Cir. 2010).
- Section 3(o) of the FLSA allows of the exclusion of time spent by an employee changing clothes or washing at the beginning or end of each work day if such exclusion is pursuant to a collective bargaining agreement.



## HOURS WORKED - "DONNING AND DOFFING" (CONT.)

- For example, in <u>Steiner v. Mitchell</u>, 350 U.S. 247 (1956) the U.S. Supreme Court held that showering and changing clothes for employees who worked in an environment where they were exposed to toxic "chemicals" was compensable time due to the fact that changing and showering was necessary "to avoid the dangers of [employee] lead poisoning," making the activities "integral and indispensable" to the employees' jobs.
- To contrast, in <u>Adams v. Alcoa, Inc.</u>, 822 F.2d 156 (N.D. NY. 2011) the Court found that time showering was **not** compensable when the need to shower was necessitated by simple employee hygiene, and not health reasons.

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## COMMON "HOURS WORKED" FLSA VIOLATIONS TO AVOID

- "Start Early, Stay Late" Violations—Employees required to punch out at the end of their shift (or not allow them to punch in before their shift), but employer requires them to continue (or start) work.
- "Booting-Up and Shutting-Down" Violations— Employees are not compensated for time spent for the task of booting their computers at the start of each day and logging out at the end.
- "Acquiescent Work" Violations—Employees engage in unauthorized (but compensable) work, but an employer's policy does not pay the employee for unapproved hours worked (checking email, making work calls, etc.).

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## **CALCULATING OVERTIME**

- ➤ Overtime Rate = Regular Rate x 1.5
  - Regular Rate Total remuneration received during the workweek divided by the number of hours worked during the workweek.



## **CALCULATING OVERTIME**

- When an non-exempt employee works more than 40 hours in a week, overtime *must* be paid
  - Employees may not waive their right to overtime under the FLSA. Thus, requiring employees to sign a waiver of their right to overtime is ineffective.
  - Employees must be paid overtime even if they are not authorized to work overtime or are expressly prohibited from working overtime.

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#### CASE LAW UPDATE - BAYWOOD HOME CARE

- In a recent case, the Minnesota Supreme Court analyzed an employer's attempt to avoid a conclusion that the plain meaning of the MFLSA required all hours worked in excess of 48 hours in a given workweek must be compensated at the overtime rate.
- Specifically, in <u>Baywood Home Care</u>, 2019 WL 4456081(Minn. Sept. 18, 2019), an employer compensated its employees using a "split pay plan" where employees would work a 16-hour workday, receiving straight time rate of pay for the first 5.5 scheduled hours and time-and-one-half pay for the remaining 10.5 scheduled hours.
- The employer would use this pay scheme even after the employees worked past the 48 hour per week "overtime threshold" under Minnesota law.

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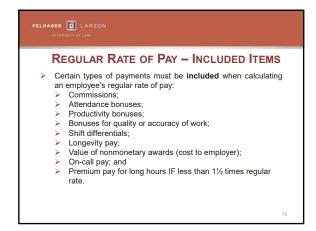
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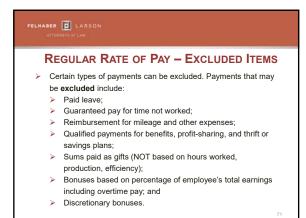


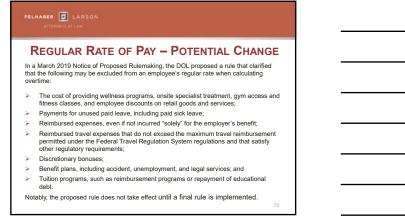
## **BAYWOOD HOME CARE (CONT.)**

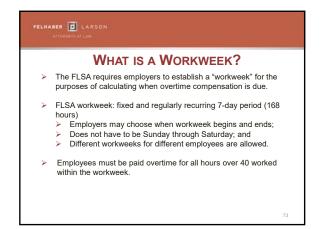
The Minnesota Supreme Court held that this practice violated the MFLSA, reasoning that:

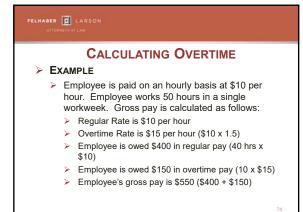
- The statute's plain language required all hours worked after the first 48 hours in a given workweek be compensated at time-and-a-half wages; and
- Employers are not able to use hours worked in the first 48 hours which were paid at time-and-a-half wages as a "credit" towards the required overtime payments.

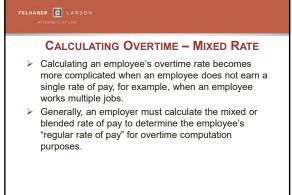


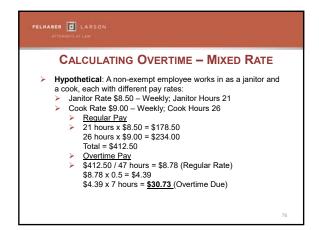


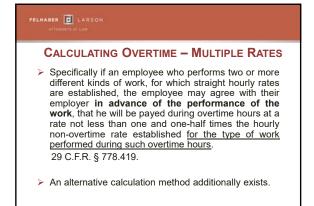


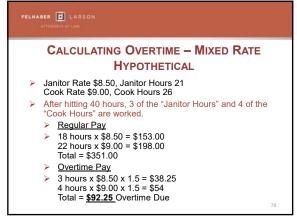


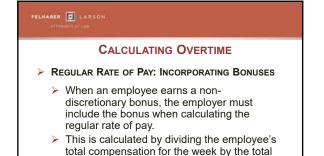












number of hours worked.

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## **CALCULATING OVERTIME - ROUNDING**

- The FLSA does allow employers to "round" work calculations, as long as the rounding practices average out.
  - In other words rounding cannot <u>always</u> favor the employer; or
  - DOL has interpreted the Federal Regulations to require employers to both round up and round down.

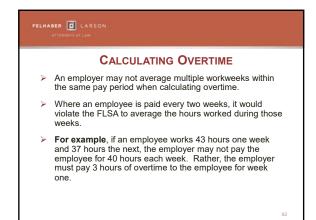
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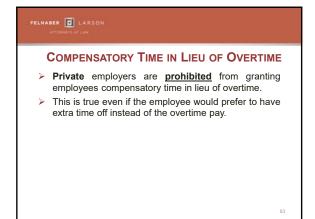
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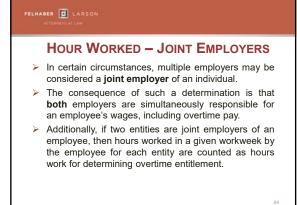


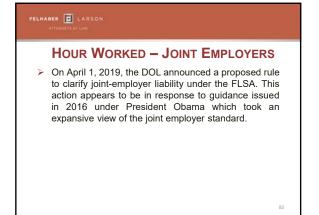
#### **CALCULATING OVERTIME - ROUNDING**

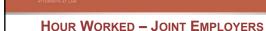
- EXAMPLES
  - An employee's schedule is 7 a.m. to 3:30 p.m. with a thirty minute unpaid lunch break. The employee receives overtime compensation after 40 hours in a workweek. The employee clocks in 10 minutes early every day and clocks out 7 minutes late each day. The employer rounds employee time to the nearest quarter hour, which is allowed under the FLSA.
  - In order to comply with the FLSA the employer must round back a quarter hour each morning to 6:45 a.m. and round back each evening to 3:30 p.m. By doing so, the employee will show a total of 41.25 hours worked during that workweek. The employee will be entitled to additional overtime compensation for the 1.25 hours over 40.











The proposed rule establishes a four-factor test to considers whether the potential joint employer **actually exercises** the power to:

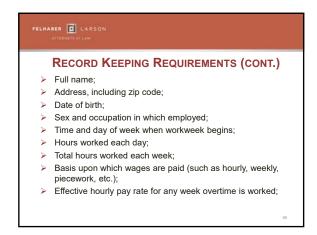
- 1. Hire or fire the employee;
- 2. Supervise and control the employee's work schedules or conditions of employment;
- Determine the employee's rate and method of payment; and
- 4. Maintain the employee's employment records.

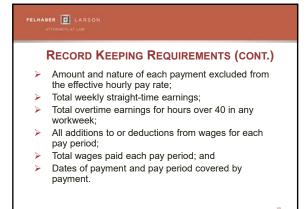
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- > The FLSA requires that for **non-exempt employees**, an employer must maintain certain records.
- The FLSA additionally requires employers to display a poster issued by the DOL.









- Employee records must be retained at least three (3) years.
- All records upon which wage and hour computations are based, for example, timesheets, must retained for at least two (2) years.

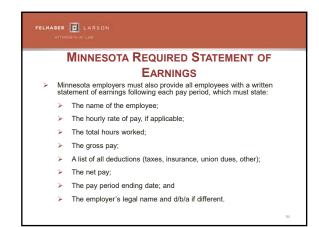


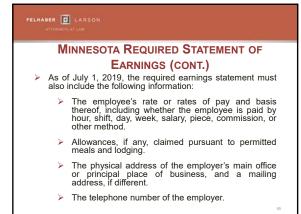
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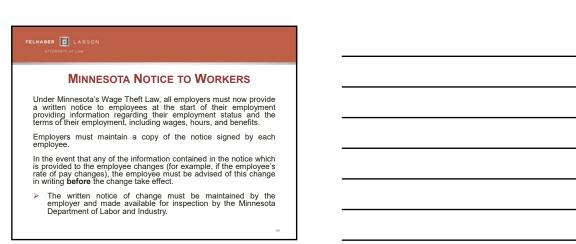


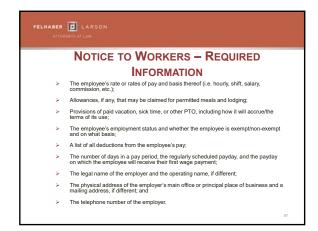
As of July 1, 2019, Minnesota employers must additionally maintain the following records:

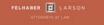
- A list of the hours worked for employees paid at piece rate, and the number of pieces completed at each piece rate.
- A list of the personnel policies provided to the employee, including the date the policies were given to the employee and a brief description of the policies.
- A written notice highlighting the terms of the employee's employment, signed by the employee.











#### PAYMENT OF WAGES - MINNESOTA

- Under Minnesota law, all employee "wages" must be paid at least once every 31 days.
- Effective July 1, 2019, Minnesota's wage payment statute was amended to clarify that the term "wages" includes "salary, earnings and gratuities."
- Additionally, the revised wage payment statute provides that all commissions earned must be paid at least once every three months on a regular payday.

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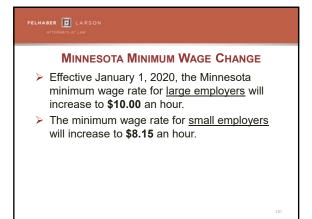


### FLSA - MINIMUM WAGE

- > The FLSA requires that covered nonexempt workers are entitled to receive a minimum wage.
- While this may seem straight-forward in practice, there are a number of pitfalls which could result in an employee's total compensation falling below the federal minimum wage rate.



- ➤ Large Employers (annual receipts of at least \$500,000) minimum wage is \$9.86.
- ➤ Small employers (annual receipts of less than \$500,000) minimum wage is \$8.04/hour.
- Because the Minnesota minimum wage is higher, it must be followed in the event that both the FLSA and MFLSA apply.



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- ➤ The cities of Minneapolis and St. Paul additionally have their own minimum wages ordinances which may require non-exempt employees be paid a higher wage.
- Current Minneapolis Minimum Wage: \$12.25 for employers with over 100 employees.
  - > \$11.00 for employers with 100 or fewer employees.
- St. Paul's Minimum Wage Ordinance goes into effect January 1, 2020.

