

FELHABER  **LARSON**
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**WAGE AND HOUR CONSIDERATIONS &
 FLSA UPDATE**
 NORTHSTAR FALL CONFERENCE
 OCTOBER 24, 2019

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FLSA GENERALLY

- Topics Covered by the FLSA:
 - Minimum Wage;
 - Overtime;
 - Recordkeeping;
 - Equal Pay; and
 - Timely payment of wages and overtime.

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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 STATUS

- 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.

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ECONOMIC DEPENDENCE FACTORS

1. The nature and degree of the potential employer's **control**;
2. The **permanency** of the worker's relationship with the potential employer;
3. The amount of the worker's **investment** in facilities, equipment, or helpers;
4. The amount of **skill, initiative, judgment, or foresight required** for the worker's services;
5. The worker's opportunities for **profit or loss**; and
6. The extent of **integration** of the worker's services into the potential employer's business.

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WHAT EMPLOYEES ARE COVERED BY 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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WHITE COLLAR EXEMPTIONS

The most common FLSA minimum wage and overtime exemption, often referred to as the “white collar” or “541” exemptions, applies to certain classes of employees, specifically:

- Executive Employees;
- Administrative Employees;
- Professional Employees;
- Computer Employees; and
- Highly Compensated Employees.

Other white collar exemptions exist, for example, employees engaged in “outside sales.”

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WHITE COLLAR EXEMPTIONS: THREE TESTS

- In order to meet a white collar FLSA exemption, an employee must meet three tests:
 - Minimum Salary Level;
 - Salary Basis; and
 - Job Duties.

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FACTOR 1: MINIMUM SALARY LEVEL

- For most employees, the minimum salary level required in order to meet an exemption is currently \$455 per week (until January 1, 2020).
- Must be paid "free and clear".
- The \$455 per week may be paid in equivalent amounts for periods longer than one week:
 - Biweekly: \$910.00
 - Semimonthly: \$985.83
 - Monthly: \$1,971.66
- **NOTE:** This is **not** prorated for part-time employees.

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UPCOMING CHANGE: MINIMUM SALARY

- On September 24, 2019, the DOL unveiled a final rule that raised the minimum salary level threshold to **\$35,568/year** for exempt executive, administrative, or professional employees.
- Stated differently, employees would need to make a weekly salary of \$684.00 in order to be exempt from the FLSA's overtime requirements.
- The updated rule will go into effect on **January 1, 2020**.

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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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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.

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PERMITTED SALARY DEDUCTIONS

- Seven exceptions from the "no pay-docking" rule:
 - Absence from work for one or more full days for personal reasons, other than sickness or disability;
 - Absence from work for one or more full days due to sickness or disability if deductions made under a bona fide plan, policy, or practice of providing wage replacement benefits for these types of absences;
 - To offset any amounts received as payment for jury fees, witness fees, or military pay;

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PERMITTED SALARY DEDUCTIONS (CONT.)

- Penalties imposed in good faith for violating safety rules of "major significance";
- Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of written workplace conduct rules;
- Proportionate part of an employee's full salary may be paid for time actually worked in the first and last weeks of employment; and
- Unpaid leave taken pursuant to the Family and Medical Leave Act.

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EFFECT OF IMPROPER DEDUCTIONS

- An actual practice of making improper deductions from salary will result in the loss of the exemption:
 - During the time period in which improper deductions were made;
 - For employees in the same job classifications; and
 - Working for the same managers responsible for the actual improper deductions.
- Isolated or inadvertent improper deductions, however, will not result in the loss of exempt status if the employer reimburses the employee.

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IMPROPER DEDUCTION SAFE HARBOR RULE

- The exemption will **not** be lost if the employer:
 - Has a clearly communicated policy prohibiting improper deductions and established a complaint mechanism;
 - Reimburses employees for any improper deductions; and
 - Makes a good faith commitment to comply in the future.
- Unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints.

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FACTOR 3: DUTIES TEST

- An employee who meets the salary level tests and the salary basis tests is exempt only if s/he also performs exempt job duties.
- The **primary duty** of the employee's work must fall under a category of exempt duties.

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WHAT IS A PRIMARY DUTY?

- Factors considered when determining an employee's primary duties include:
 - The relative importance of the duties;
 - The amount of time spent by an employee performing a duty; and
 - Generally, employees who spend more than 50 percent of their time on a certain duty meet the primary duty test, although this is not a hard and fast rule. See 29 C.F.R. § 541.700(b).
 - The relative freedom the employee has to perform the duties without direct supervision.

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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.

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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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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).

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“MANAGEMENT” INCLUDES

- Interview, select, train, set and adjust pay;
- Maintain records;
- Direct work;
- Evaluate;
- Handle complaints; and
- Discipline.

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DEPARTMENT OR SUBDIVISION

- A specific unit with permanent status and function.

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WHAT IS “SUPERVISION”

- “Two or more other employees” refers to full-time equivalents.

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AUTHORITY TO HIRE OR FIRE OR WHOSE SUGGESTIONS AND RECOMMENDATIONS 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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LEARNED PROFESSIONAL EXEMPTION

- Primary duty of performing work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as equivalent combination of intellectual instruction and work experience.
- Employees must additionally utilize **independent judgment and discretion**.

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ADDITIONAL REQUIREMENTS

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

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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 **not** licensed practical nurses)
- Dental hygienists
- Certified physician assistants
- Accountants (but **not** 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 specifications; *or*
 - 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.

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COMPUTER EXEMPTION PAY REQUIREMENTS

- Currently, 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 currently 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.

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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 non-profit 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.

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PRIVATE SECTOR INTERNSHIP TEST

- 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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PRIMARY BENEFICIARY TEST FACTORS

- The extent to which the intern and the employer clearly understand that there is no expectation of compensation.
- The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
- The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
- The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
- The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
- The extent to which the intern's work complements, rather than displaces, the work of paid employees.
- The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

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INTERN STIPENDS

- However, it is importantly to note that tuition assistance or **nominal** stipends will not destroy trainee/intern status and are **not** considered wages under the FLSA.
 - The U.S. Department of Labor Wage and Hour Division has found that a fee is nominal if it does not exceed 20 percent of the market amount paid to a full-time employee.
- Notably, if the trainee/intern criteria cannot be satisfied, the individual will be considered an "employee" under the FLSA and will be subject to the Act's minimum pay and overtime requirements.

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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;
2. 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 over three years.
- 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.

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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.

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WHAT COUNTS AS AN "HOUR WORKED?"

- Time spent for the benefit of the employer, with employer's knowledge, and that is 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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COMMON "HOURS WORKED" SCENARIOS

- **Trainings/Meetings**
 - Time employees spend in meetings, lectures, or training is considered hours worked and must be paid, unless:
 - Attendance is outside regular working hours;
 - Attendance is voluntary;
 - The course, lecture, or meeting is not job related; **and**
 - The employee does not perform any productive work during attendance.

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MEAL BREAKS

Time taken during a meal break is not an "hour worked."

- **Federal Meal Break Rule**
 - A "bona fide" meal period exists if: (1) the meal period is at least 30 minutes; (2) the employee is completely relieved from all duties during the period; and (3) the employee is free to leave the duty post.
- **Minnesota Meal Break Rule**
 - Minnesota requires employees scheduled for eight or more hours in a row be given "sufficient" time to eat a meal. Minn. Stat. § 177.254.
 - The Minnesota Rules state that "30 minutes or more is ordinarily long enough for a bona fide meal period. A shorter period may be adequate under special conditions." Minn. Admin. R. 5200.0120.
 - Notably, Minnesota's Meal Break Rule only applies to non-exempt employees.
 - Applicable CBAs may apply as well.

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HOURS WORKED - REST BREAKS

Minnesota Rule


- Minn. Stat. § 177.253 provides that employers in Minnesota must grant an employee working "four consecutive hours" "adequate" time to use the nearest restroom.
- Thus, if the employee works eight consecutive hours, he or she would need two restroom breaks.

Federal Rule

- No obligation to provide 15-minute rest periods.
- Breaks < 20 minutes must be paid.
- Breaks > 20 minutes + employee is free to use it for their own purposes, are not hours worked.

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HOURS WORKED - WAITING TIME

- **Rule-of-Thumb:** Waiting to be Engaged v. Being Engaged to Wait.
- Waiting to be engaged is generally not considered working time (e.g., when an employee voluntarily arrives at work early and must wait to begin).
- Being engaged to wait is considered work time (e.g., when an employee is required to report to work at a particular time and he/she reports, but no work is available).

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
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HOURS WORKED – TRAVEL TIME

- Whether a non-exempt employee must be compensated for time spent traveling is determined by the nature of the travel:
- 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.

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HOURS WORKED – TRAVEL TIME (CONT.)

- Travel between an employee's home and an assignment away from his/her customary work place on an emergency basis constitutes hours worked. However, travel between home and the employee's customary work place in an emergency does not constitute hours worked.
- Travel between one place of work and another during the course of an employee's workday constitutes hours worked.

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
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HOURS WORKED – TRAVEL TIME (CONT.)

- Travel between an employee's home and an assignment involving a one-day, out-of-town trip by an employee who normally works at a fixed location constitutes hours worked. If an employee leaves from a fixed location rather than from home, the travel between home and the fixed location may not be counted as hours worked.
- If an employee is required to drive a vehicle, all travel is considered hours worked.

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HOURS WORKED STANDARD (CONT.)

- Travel for trips **overnight** must be counted as hours worked to the extent that the travel occurs during normal working hours, even if the traveling is done on weekends and holidays.
- **However,** If the employer makes public transportation available and the employee chooses to use a vehicle for his personal reasons, only the time that would be considered hours worked, had public transportation been used, needs to be counted as hours worked.

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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. Adams v. Alcoa, Inc., 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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
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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 Bamonte v. City of Mesa, 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.

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HOURS WORKED – “DONNING AND DOFFING” (CONT.)

- For example, in Steiner v. Mitchell, 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 Adams v. Alcoa, Inc., 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.

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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 Baywood Home Care, 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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BAYWOOD HOME CARE (CONT.)

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

1. 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
2. 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.

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REGULAR RATE OF PAY – INCLUDED ITEMS

- Certain types of payments must be **included** when calculating an employee's regular rate of pay:
 - Commissions;
 - Attendance bonuses;
 - Productivity bonuses;
 - Bonuses for quality or accuracy of work;
 - Shift differentials;
 - Longevity pay;
 - Value of nonmonetary awards (cost to employer);
 - On-call pay; and
 - Premium pay for long hours IF less than 1½ times regular rate.

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REGULAR RATE OF PAY – EXCLUDED ITEMS

- Certain types of payments can be excluded. Payments that may be **excluded** include:
 - Paid leave;
 - Guaranteed pay for time not worked;
 - Reimbursement for mileage and other expenses;
 - Qualified payments for benefits, profit-sharing, and thrift or savings plans;
 - Sums paid as gifts (NOT based on hours worked, production, efficiency);
 - Bonuses based on percentage of employee's total earnings including overtime pay; and
 - Discretionary bonuses.

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REGULAR RATE OF PAY – POTENTIAL CHANGE


In a March 2019 Notice of Proposed Rulemaking, the DOL proposed a rule that clarified that the following may be excluded from an employee's regular rate when calculating overtime:

- The cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services;
- Payments for unused paid leave, including paid sick leave;
- Reimbursed expenses, even if not incurred "solely" for the employer's benefit;
- Reimbursed travel expenses that do not exceed the maximum travel reimbursement permitted under the Federal Travel Regulation System regulations and that satisfy other regulatory requirements;
- Discretionary bonuses;
- Benefit plans, including accident, unemployment, and legal services; and
- Tuition programs, such as reimbursement programs or repayment of educational debt.

Notably, the proposed rule does not take effect until a final rule is implemented.

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WHAT IS A WORKWEEK?

- The FLSA requires employers to establish a "workweek" for the purposes of calculating when overtime compensation is due.
- FLSA workweek: fixed and regularly recurring 7-day period (168 hours)
 - Employers may choose when workweek begins and ends;
 - Does not have to be Sunday through Saturday; and
 - Different workweeks for different employees are allowed.
- Employees must be paid overtime for all hours over 40 worked within the workweek.

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CALCULATING OVERTIME

➤ **EXAMPLE**

- Employee is paid on an hourly basis at \$10 per hour. Employee works 50 hours in a single workweek. Gross pay is calculated as follows:
 - Regular Rate is \$10 per hour
 - Overtime Rate is \$15 per hour ($\10×1.5)
 - Employee is owed \$400 in regular pay ($40 \text{ hrs} \times \10)
 - Employee is owed \$150 in overtime pay ($10 \times \15)
 - Employee's gross pay is \$550 ($\$400 + \150)

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CALCULATING OVERTIME – MIXED RATE

- Calculating an employee's overtime rate becomes more complicated when an employee does not earn a single rate of pay, for example, when an employee works multiple jobs.
- Generally, an employer must calculate the mixed or blended rate of pay to determine the employee's "regular rate of pay" for overtime computation purposes.

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CALCULATING OVERTIME – MIXED RATE

- **Hypothetical:** A non-exempt employee works in as a janitor and a cook, each with different pay rates:
 - Janitor Rate \$8.50 – Weekly; Janitor Hours 21
 - Cook Rate \$9.00 – Weekly; Cook Hours 26
 - Regular Pay
 - 21 hours x \$8.50 = \$178.50
 - 26 hours x \$9.00 = \$234.00
 - Total = \$412.50
 - Overtime Pay
 - \$412.50 / 47 hours = \$8.78 (Regular Rate)
 - \$8.78 x 0.5 = \$4.39
 - \$4.39 x 7 hours = **\$30.73** (Overtime Due)

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CALCULATING OVERTIME – MULTIPLE RATES

- Specifically if an employee who performs two or more different kinds of work, for which straight hourly rates are established, the employee may agree with their employer **in advance of the performance of the work**, that he will be payed during overtime hours at a rate not less than one and one-half times the hourly non-overtime rate established for the type of work performed during such overtime hours.
29 C.F.R. § 778.419.
- An alternative calculation method additionally exists.

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CALCULATING OVERTIME – MIXED RATE HYPOTHETICAL

- Janitor Rate \$8.50, Janitor Hours 21
Cook Rate \$9.00, Cook Hours 26
- After hitting 40 hours, 3 of the "Janitor Hours" and 4 of the "Cook Hours" are worked.
 - Regular Pay
 - 18 hours x \$8.50 = \$153.00
 - 22 hours x \$9.00 = \$198.00
 - Total = \$351.00
 - Overtime Pay
 - 3 hours x \$8.50 x 1.5 = \$38.25
 - 4 hours x \$9.00 x 1.5 = \$54
 - Total = **\$92.25** Overtime Due

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CALCULATING OVERTIME

- **REGULAR RATE OF PAY: INCORPORATING BONUSES**
 - When an employee earns a non-discretionary bonus, the employer must include the bonus when calculating the regular rate of pay.
 - This is calculated by dividing the employee's total compensation for the week by the total 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 always favor the employer; or
- DOL has interpreted the Federal Regulations to require employers to both round up and round down.

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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.

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CALCULATING OVERTIME

- An employer may not average multiple workweeks within the same pay period when calculating overtime.
- Where an employee is paid every two weeks, it would violate the FLSA to average the hours worked during those weeks.
- **For example**, if an employee works 43 hours one week and 37 hours the next, the employer may not pay the employee for 40 hours each week. Rather, the employer must pay 3 hours of overtime to the employee for week one.

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COMPENSATORY TIME IN LIEU OF OVERTIME

- **Private** employers are **prohibited** from granting employees compensatory time in lieu of overtime.
- This is true even if the employee would prefer to have extra time off instead of the overtime pay.

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HOURLY WORKED – JOINT EMPLOYERS

- In certain circumstances, multiple employers may be considered a **joint employer** of an individual.
- The consequence of such a determination is that **both** employers are simultaneously responsible for an employee's wages, including overtime pay.
- Additionally, if two entities are joint employers of an employee, then hours worked in a given workweek by the employee for each entity are counted as hours work for determining overtime entitlement.

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HR WORKED – JOINT EMPLOYERS

- On April 1, 2019, the DOL announced a proposed rule to clarify joint-employer liability under the FLSA. This action appears to be in response to guidance issued in 2016 under President Obama which took an expansive view of the joint employer standard.

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HR WORKED – JOINT EMPLOYERS

The proposed rule establishes a four-factor test to consider 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;
3. Determine the employee's rate and method of payment; and
4. Maintain the employee's employment records.

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FEDERAL RECORD KEEPING REQUIREMENTS

- 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.

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RECORD KEEPING REQUIREMENTS (CONT.)

- Full name;
- Address, including zip code;
- Date of birth;
- Sex and occupation in which employed;
- Time and day of week when workweek begins;
- Hours worked each day;
- Total hours worked each week;
- Basis upon which wages are paid (such as hourly, weekly, piecework, etc.);
- Effective hourly pay rate for any week overtime is worked;

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RECORD KEEPING REQUIREMENTS (CONT.)

- Amount and nature of each payment excluded from the effective hourly pay rate;
- Total weekly straight-time earnings;
- Total overtime earnings for hours over 40 in any workweek;
- All additions to or deductions from wages for each pay period;
- Total wages paid each pay period; and
- Dates of payment and pay period covered by payment.

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**FEDERAL RECORD KEEPING REQUIREMENTS
EXEMPT EMPLOYEES**

- For **exempt employees**, the following records must be maintained:
 - Full name;
 - Address, including zip code;
 - Date of birth;
 - Sex and occupation in which employed;
 - Time and day of week when workweek begins; and
 - Information regarding total remuneration for each pay period, including fringe benefits and prerequisites.

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FEDERAL RECORD KEEPING REQUIREMENTS (CONT.)

- 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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MINNESOTA RECORD KEEPING REQUIREMENTS MINN. STAT. § 177.30

Under the Minnesota Fair Labor Standards Act, employers must maintain the following records for non-exempt employees for **three years**:

- The name, address, and occupation of each employee.
- The rate of pay, and the amount paid each pay period to each employee.
- The hours worked each day and each workweek by the employee.
- Hours worked each day and each workweek, including starting and ending hours each day, with both morning and afternoon designations.
- Any other information the Commissioner finds necessary and appropriate to enforce Minnesota's Fair Labor Standards Act.

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MINNESOTA RECORD KEEPING – NEW REQUIREMENTS

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.

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MINNESOTA REQUIRED STATEMENT OF EARNINGS

- Minnesota employers must also provide all employees with a written statement of earnings following each pay period, which must state:
 - The name of the employee;
 - The hourly rate of pay, if applicable;
 - The total hours worked;
 - The gross pay;
 - A list of all deductions (taxes, insurance, union dues, other);
 - The net pay;
 - The pay period ending date; and
 - The employer's legal name and d/b/a if different.

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MINNESOTA REQUIRED STATEMENT OF EARNINGS (CONT.)

- As of July 1, 2019, the required earnings statement must also include the following information:
 - The employee's rate or rates of pay and basis thereof, including whether the employee is paid by hour, shift, day, week, salary, piece, commission, or other method.
 - Allowances, if any, claimed pursuant to permitted meals and lodging.
 - The physical address of the employer's main office or principal place of business, and a mailing address, if different.
 - The telephone number of the employer.

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MINNESOTA NOTICE TO WORKERS

Under Minnesota's Wage Theft Law, all employers must now provide a written notice to employees at the start of their employment providing information regarding their employment status and the terms of their employment, including wages, hours, and benefits.


Employers must maintain a copy of the notice signed by each employee.

In the event that any of the information contained in the notice which is provided to the employee changes (for example, if the employee's rate of pay changes), the employee must be advised of this change in writing **before** the change take effect.

- The written notice of change must be maintained by the employer and made available for inspection by the Minnesota Department of Labor and Industry.

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NOTICE TO WORKERS – REQUIRED INFORMATION

- The employee's rate or rates of pay and basis thereof (i.e. hourly, shift, salary, commission, etc.);
- Allowances, if any, that may be claimed for permitted meals and lodging;
- Provisions of paid vacation, sick time, or other PTO, including how it will accrue/the terms of its use;
- The employee's employment status and whether the employee is exempt/non-exempt and on what basis;
- A list of all deductions from the employee's pay;
- The number of days in a pay period, the regularly scheduled payday, and the payday on which the employee will receive their first wage payment;
- The legal name of the employer and the operating name, if different;
- The physical address of the employer's main office or principal place of business and a mailing address, if different; and
- The telephone number of the employer.

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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.

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FEDERAL AND MINNESOTA MINIMUM WAGE

- Employers subject to the FLSA - minimum wage is \$7.25 per hour.
- Employers subject to the MFLSA
 - 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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MINNESOTA MINIMUM WAGE CHANGE

- Effective January 1, 2020, the Minnesota minimum wage rate for large employers will increase to **\$10.00** an hour.
- The minimum wage rate for small employers will increase to **\$8.15** an hour.

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CITY SPECIFIC MINIMUM WAGE

- 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.

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MINIMUM WAGE REQUIREMENTS

- In addition to hours worked being counted towards overtime, in certain situations issues may arise if certain events cause their wages to dip below the required minimum.
- For example, even if an employee is paid an hourly rate above the minimum wage, certain "deductions" may result in a violation.

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MINIMUM WAGE CONSIDERATIONS (CONT.)

- Is all waiting time, travel time, and training time being recorded and compensated?
- Do any employees work "off-the-clock" (such as starting work early, working after clocking out, performing work at home without reporting it?)
- Does the company automatically deduct for meal periods, regardless of their actual duration?
 - If so, during the meal periods are employees completely relieved from their duties?
- Are employees paid for "break" time?
- Are employees compensated for attending required training programs or meetings?
- Are employees permitted to "volunteer" any working time?
- Are the costs of uniforms deducted from an employee's paycheck?

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MINNESOTA LAW UPDATE – WAGE THEFT

- Effective August 1, 2019, the Minnesota Criminal Code was amended to add the crime of "wage theft." Minn. Stat. § 609.52.
- **Wage theft** occurs when an employer does any of the following, with the intent to defraud:
 - Fails to pay an employee all wages, salary, gratuities, earnings or commissions at the employee's rate or rates of pay or at the rate or rates required by law, whichever is greater.
 - Directly or indirectly causes any employee to give a receipt for wages for a greater amount than that actually paid to the employee for services rendered.
 - Directly or indirectly demands or receives from any employee any rebate or refund from the wages owed the employee under contract of employment with the employer.
 - Makes or attempts to make it appear in any manner that the wages paid to any employee were greater than the amount actually paid to the employee.

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WAGE THEFT (CONT.)

- Penalties for wage theft vary depending on the value of the wages "stolen," ranging from:
 - Imprisonment for not more than one year, payment of a fine of not more than \$3,000 or both if the value of the property or services stolen is more than \$500 but not more than \$1,000.
 - to
 - Imprisonment for not more than 20 years, payment of a fine of not more than \$100,000 or both if the value of the wages stolen is more than \$35,000.
- When calculating the value of the wages stolen, the relevant inquiry is to look at the amount of aggregated wages stolen within any six-month period.

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QUESTIONS?

Thank you.

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