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## Wage and Benefits Overview

- Both federal and state laws have minimum wage and overtime pay requirements.
- In most cases, federal law will apply to overtime requirements. 29 U.S.C. § 201, *et seq.*

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## Fair Labor Standards Act

- Except as otherwise provided, covered employers shall not employ any employee “for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.” 29 U.S.C. § 207(a)(1).

*Continued*

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## Fair Labor Standards Act

- The overtime pay requirements shall not apply to certain employees. 29 U.S.C. § 213. These employees are known as “exempt.”
- All others (who are entitled to overtime pay) are referred to as “non-exempt.”

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## Fair Labor Standards Act

- With few exceptions, all non-exempt employees are required to be paid at one and a half times their regular rate for all hours in excess of 40 hours *actually* worked in a work week.
- To be exempt, employees must have the right kind of duties and generally be paid on a “salary” basis, which means they receive the same pay each week regardless of the number of hours worked, with some exceptions.

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## Pay For Time Not Worked: Vacation Rules

- The federal wage law does not regulate vacation, nor does the state minimum wage law.
- Vacation is governed by the Michigan Wage and Fringe Benefits Act.
  - That law considers vacation time as a fringe benefit and not wages.
  - It becomes a matter of contract between the parties.

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## Vacation Rules

- Employers should be cautious about using such words as vest, accrue, entitled, earn, etc. when describing vacation time in their employee handbooks and job offer letters.
- Describe vacation by terms like allotted, permitted, eligible for “X” hours per year to ensure no property rights are created.
- Employers are only required to pay out unused vacation time at termination *if* they have promised to do so in writing.

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## Vacation Rules

- Employers should address the issue in the employee handbook as follows:

“The employee may receive payment for unused vacation at time of termination at the sole discretion of the employer. Employees will only be eligible for consideration if he/she provides two weeks’ notice (and works during the notice period), leaves on good terms and assists in a smooth transition of duties. A full release may also be required.”

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## Travel Time and the Portal to Portal Act

- Excludes from the definition of hours worked the time spent traveling to and from the work site at the start and end of the work day and “activities which are preliminary or postliminary” to the employee’s principal work activities.
- It is because of the PTPA that employees are not paid for their commute to and from work.

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## Start and End of Shift – Changing Clothes

- In 1955, the Supreme Court held that time spent donning and doffing specialized protective gear just before and after regular work and time spent showering to remove toxic materials were integral and indispensable parts of the principal activities and, therefore, compensable under the Fair Labor Standards Act.

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## Start and End of Shift – Changing Clothes

- The court distinguished such activities from changing clothes and cleaning up under normal circumstances.
- Therefore, under the PTPA, employers do not need to pay employees for time spent changing clothes and cleaning up under normal circumstances.

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## *IBP, Inc v Alvarez*

- The more recent issue was whether walking time to and from the work site just *after* donning and just *before* doffing the protective gear is compensable.
- The court held that the locker room where the employee changes into special protective gear is the place where the principal work activity and work day begins and ends.

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## IBP, Inc v Alvarez

- Therefore, the employer must pay wages for all time spent putting on the protective gear and traveling from the locker room to the place where the actual work is performed, and traveling back to the locker room, showering and/or removing the protective equipment at the end of the day.

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## IBP, Inc v Alvarez

- The locker room where special protective gear is put on and taken off is part of the principal work site where the work day begins and ends.



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## Day or Over Night Travel

- Time spent traveling to and from work is not compensable time.
- Time spent traveling *during* the work day is.



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## Day or Over Night Travel

- When an employee is assigned to travel to another *more distant location* at the start or finish of his/her work day, the commute must be paid, although the usual commute time to and from work may be deducted from the longer commute time.



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## Overnight Travel

- Determined by complicated rules which consider such things as the mode of transportation, the employee's normal work hours, etc.
- Employers should seek advice from a competent employment attorney when such issues arise.

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## On Call Time

- Whether an employee is entitled to compensation for on-call time generally depends on how restrictive the employer's on call rules are.
- Recently, the federal appellate court held that police officers were not entitled to overtime pay for "off duty" hours although they were required to carry pagers and remain within a specific geographic area.

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## On Call Time

- The court found that officers could engage in regular personal activities, pages were rare, and officers were not subject to discipline for failing to answer a page.

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## On Call Time

- Courts will consider whether there are restrictions concerning how far from work an employee can stray, how often free time is disrupted and the duration of the disruption, etc.
- The more freedom an employee has for personal pursuits, the less likely the time needs to be compensated. This is a fact specific inquiry.

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## Payroll Issues: Overtime

- Based on the number of *actual* hours worked.
- An employee who began his work week with an eight hour vacation day and thereafter works 40 hours that week is not entitled to overtime because the eight hour vacation day is not counted as actual time worked.

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## Payroll Issues: Overtime

- Employers may not change the “work week” to avoid overtime obligations, but it may be changed for business purposes, provided the change is intended to be permanent.
- Employers may not “average” an employee’s hours between two weeks to avoid overtime pay.

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## Payroll Issues: Overtime

- Example: An employee who actually works 36 hours the first week and 44 hours the next week is still entitled to overtime pay for the four hours worked during the second week.

	Total Earnings	Over Time/Shortcuts	Total Taxes	Total Deductions	Net Pay
Normal	2,742.00	2,838.00	973.04	138.43	2,808.53
OTW	843.00 (3)	412.00 (2)	31,237.58	1,858.45	39,285.64

  

	Amount	YTD Amount	Rate	Amount	YTD Amount
Regular	2,742.00	27,421.16	Payroll Deductions	382.33	6,327.81
Overtime	843.00	8,430.00	Payroll Deductions	38.76	418.86
			Payroll Deductions	170.00	2,738.78
			Payroll Deductions	48.65	1,214.21
<b>Total</b>	<b>3,585.00</b>	<b>35,851.16</b>	<b>Total</b>	<b>679.74</b>	<b>10,709.66</b>

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## Payroll Issues: Compensatory Time-Off

- May not be substituted for overtime pay unless the employee works for a “public” employer (or, under the rare circumstance where the employer is covered solely under state wage laws).

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## Payroll Issues: Wage Offsets/Deductions

- Employers are required by law to make certain deductions from wages, often referred to as payroll taxes (FICA, income taxes, etc.).
- Collective bargaining agreements may require a specific deduction for union dues and employees may enroll in benefit plans which will require deductions for premiums.

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## Payroll Issues: Wage Offsets/Deductions

- When an employer is making a deduction that is intended to benefit it, the employee must give a *voluntary* consent in writing.
- To be valid under Michigan law, the consent must not be obtained under duress, and it must identify the amount to be deducted and the pay period that the deduction may be made.

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## Payroll Issues: Wage Offsets/Deductions

- State law requires a separate written consent to be given for each pay period the deduction is made.
- It is invalid to have a consent form, which is signed by the employee, that, for example, simply authorizes the employer to deduct the value of a laptop from the employee's paycheck should they damage it.

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## Payroll Issues: Wage Offsets/Deductions

- While an employer may not utilize an invalid authorization to make such a deduction, it can pursue a civil claim for the value of the damaged property.



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## Payroll Issues: Wage Offsets

- Michigan law permits the employer to recoup the overpayment of wages within six months of the error.



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## Payroll Issues: Wage Offsets

- The deduction must be made after all other deductions are made which are expressly permitted or required by law, and the deduction cannot exceed 15 percent of the employee's gross wages during the pay period when the deduction is made or reduce the employee's gross wages less than minimum wage.

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## Payroll Issues: Wage Offsets

- The employer is also required to provide the employee with a written explanation of the deduction at least one pay period in advance.

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## Payroll Issues: Retroactive Raises/Bonus Rules

- The regular rate of pay is straight forward in most circumstances.
- Bonuses, commissions, prizes and awards, when paid as additional remuneration for employment, will affect the employee's regular wage rate.

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## Payroll Issues: Retroactive Raises/Bonus Rules

- A fluctuating weekly performance bonus will require recalculating the regular wage rate each week.
- If the payment is attributed to performance over an entire quarter, the bonus would need to be allocated for each week during that period.

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## Payroll Issues: Retroactive Raises/Bonus Rules

- This would affect the regular rate for each week during that entire period and require recalculating all overtime earned during that quarter.
- Retroactive raises have the same impact.
- Determining whether an award or bonus would have this affect is fact specific and can be complicated.

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## Other Issues: Exempt Status

- The duties performed and form of compensation are the key to determining whether an employee is exempt. These are called the duties and salary tests. We will review each.
- The specific test for each exemption was included in a PDF attached to the confirmation e-mail.

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## Other Issues: The Duties Test

- Example: Classifying an employee as “management” within the employer’s organization does not necessarily mean that the employee qualifies for the executive exemption. Nor would any of the exemptions apply to an employee who is still in training and not yet performing the requisite duties of the exemption. 29 C.F.R. § 541.705.

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## The Duties Test

- The duties test focuses on the primary duty. This means the principal, main, major or most important duty that the employee performs.
- Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

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## Duties Test: Other Factors to Consider

- "The relative importance of the exempt duties as compared with other types of duties;
- The amount of time spent performing exempt work compared to non-exempt work;

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## Duties Test: Other Factors to Consider

- The employee's relative freedom from direct supervision; and
- The relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee." 29 C.F.R. § 541.700(a).

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## Example

- Assistant retail managers perform “exempt executive work such as supervising and directing the work of other employees, ordering merchandise, managing the budget and authorizing the payment of bills...”
- However, the assistant manager spends more than 50 percent of their time performing nonexempt work (i.e., running the cash register).

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## Example

- If the assistant manager is closely supervised and does not earn much more than the nonexempt employees, the primary duty requirement will not be satisfied. 29 C.F.R. § 541.700(c).

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## Duties Test

- To “customarily and regularly” perform the duties at issue, the exempt work must be performed within a frequency that is greater than occasional but which may be less than constant. 29 C.F.R. § 541.701.

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## Tip

- Tasks or work performed “customarily and regularly” include work normally and recurrently performed *every workweek*; it does not include isolated or one-time tasks.  
29 C.F.R. § 541.701.

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## Duties Test

- However, “[a]n exempt employee will not lose the exemption by performing work of a normally non-exempt nature because of the existence of an emergency.

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## Duties Test

- When emergencies arise that threaten the safety of employees, a cessation of operations, or serious damage to the employer’s property, any work performed in an effort to prevent such results is considered exempt work.” 29 C.F.R. § 541.706(a).
- However, if the exempt employee routinely performs nonexempt work, the exempt status will be jeopardized.

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## Tip

- Emergencies occur *rarely*, and are events that the employer cannot reasonably anticipate, or provide for in the normal course of business. 29 C.F.R. § 541.706(b).

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## Example

- “A mine superintendent, who pitches in after an explosion and digs out workers who are trapped in the mine, is still a bona fide executive.” 29 U.S.C. § 541.706(c).

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## Example

- “Assisting nonexempt employees with their work during periods of heavy workload or to handle rush orders is **not** exempt work” and could result in loss of exempt status. 29 U.S.C. § 541.706(c).

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## Compensation (Salary) Test

- In order to be paid on a salary basis, the employee must regularly receive each pay period (on a weekly or less frequent basis) a predetermined amount constituting all or part of the compensation, which cannot be subject to reduction because of variations in the quality or quantity of work.

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## Compensation (Salary) Test

- With few exceptions, the employee must receive the full salary amount for any week in which the employee performs any work without regard to the number of days or hours worked.

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## Compensation (Salary) Test

- If the exempt employee does not work at all during the workweek, he or she does not have to be paid for that week.
- An employee is not paid on a salary basis where deductions are made for absences caused by the employer or the operating requirements of the business and the employee is ready, willing and able to work while such work is not available. 29 C.F.R. § 541.602(a).

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## Proper Deductions

- Where the employee absents himself from work for a full day or longer for personal reasons (other than sickness or disability). 29 C.F.R. § 602(b)(1).
- **TIP:** "If the employee is absent for 1-1/2 days for personal business, the employer can only deduct for the full-day absence."

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## Proper Deductions

- Where the employee is absent for a full day or longer because of sickness or disability, including work related accidents, and the deduction (full days only) is made in accordance with a bona fide plan, policy or practice of providing compensation for time off due to sickness or disability.

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## Deductions

- Where the employee receives payment pursuant to such a plan, policy or practice, the employer is not required to pay any portion of the salary for such days. 29 C.F.R. § 602(b)(2).

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## Example

- “[I]f an employer maintains a short-term disability insurance plan providing 60 percent salary replacement for 12 weeks *starting on the fourth day of absence*, the employer may make deductions:
  - From pay for the three days of absence before the employee qualifies for benefits under the plan.

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## Example

- For the 12 weeks in which the employee receives 60 percent salary replacement benefits under the plan;
- For absences *after* the employee has exhausted the 12 weeks of salary replacement benefits.

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## Example

- Similarly, an employer may make deductions from pay for absences of one or more full days if salary replacement benefits are provided under a state disability insurance law or under a state worker’s compensation law. 29 U.S.C. § 541.602(b)(2).

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## Deductions as Penalty

- Major Safety Violations: Deductions may be made where an employer imposes penalties in good faith for violations of safety rules of major significance (i.e., those relating to the prevention of a serious danger in the workplace or to others such as rules prohibiting smoking in explosive plants, oil refineries and coal mines).  
29 C.F.R. § 541.602(b)(4).

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## Deductions As Penalty

- TIP:** Deductions from pay as a penalty for violations of major safety rules may be made in any amount. 29 C.F.R. § 541.602(c).
- Work Rule Violations: “Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of *one or more full days* imposed in good faith for infractions of workplace conduct rules.
- Such suspensions must be imposed pursuant to a written policy applicable to all employees.” 29 C.F.R. § 541.602(b)(5).

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## Deductions as Penalty

- Example: “An employer may suspend an exempt employee without pay for three days for violating a generally applicable written policy prohibiting sexual harassment.”  
29 C.F.R. § 541.602(b)(5).

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## Deductions – Other Absences

- Deductions may *not* be made for absences of an employee caused by jury duty, attendance as a witness or temporary military leave.
- The employer may offset amounts received by the employee against the salary due for that week. 29 C.F.R. § 541.602(b)(3).

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## Deductions – First & Last Weeks

- “An employer is not required to pay the full salary in the initial or terminal week of employment.
- An employer may pay a proportionate part of an employee’s full salary for the time actually worked in the first and last week of employment.

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## Deductions – First & Last Weeks

- The payment of an hourly or daily equivalent of the employee’s full salary for the time actually worked will meet the requirement.
- Employees are not paid on a salary basis if they are employed occasionally for a few days, and the employer pays them a proportionate part of the weekly salary when so employed.”  
29 C.F.R. § 541.602(b)(6).

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## Deductions From Salary

- Caution: Under the FLSA regulations an employer may not make a deduction from salary for absences of less than a full day. *Reich v. Pierce*, 1994 U.S. App. LEXIS 36194, \* 5-6 (6th Cir. 1994).

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## Deductions From Salary

- However, the Family and Medical Leave Act, 29 U.S.C. § 2601, *et seq.*, provides that unpaid leave, even for intermittent and reduced leave schedules, may be granted to exempt employees who are paid on a salary basis without affecting their exempt status. 29 U.S.C. § 2612(c).

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## Deductions From Salary – The Consequences

- “An employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer did not intend to pay employees on a salary basis. An actual practice of making improper deductions demonstrates that the employer did not intend to pay employees on a salary basis.”

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## Deductions From Salary – The Consequences

- Factors to consider include:
  - Number of improper deductions;
  - The time period during which the employer made improper deductions;
  - The number and geographic location of employees whose salaries were improperly reduced;

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## Deductions From Salary – The Consequences

- The number and geographic location of managers responsible for taking the improper deductions;
- Whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.”  
29 C.F.R. § 541.603(a).

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## Tip

- It is important that leave, overtime and discipline policies in employee handbooks have special rules applicable to exempt employees.



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## Safe Harbor Policy

- All employers should have a “safe harbor” policy in their handbooks to protect them against an inadvertent improper deduction.

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## Safe Harbor Policy

- Example:  
It is our policy to comply with the salary basis requirements of the FLSA. Therefore, we prohibit all improper deductions from the salaries of exempt employees. We want employees to be aware of this policy and that the company does not allow deductions that violate the FLSA.

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## Safe Harbor Policy

- If you believe that an improper deduction has been made to your salary, you should immediately report this information to your department manager or to the company manager. Reports of improper deductions will be promptly investigated. If it is determined that an improper deduction has occurred, you will be promptly reimbursed for any improper deduction made.

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## Additional Compensation Permitted

- An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis.

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## Example

- [A]n exempt employee, guaranteed at least \$455 each week paid on a salary basis, receives additional compensation based on hours worked for work beyond the normal workweek. Such additional compensation may be paid on any basis (i.e., flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off." 29 C.F.R. § 541.604(a).

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## Flexible Workweeks – The 8/80 Rule

- Generally, the Fair Labor Standards Act requires time and a half the regular rate of pay to be paid for all hours *actually worked* in excess of 40 hours in a workweek.
- However, there are special rules applicable only to certain nursing care and medical facilities which allow an employer to pay overtime under the 8/80 rule.

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## Flexible Workweeks – The 8/80 Rule

- This rule permits the employer and employee to enter an agreement providing for overtime to be paid whenever an employee works over eight hours in a day or 80 hours in a 14 day period.
- There are specific rules that apply to fluctuating work weeks and covering reductions in salaries and/or scheduled hours. 29 C.F.R. §§ 778.321 – 778.329. You should consult an employment attorney.

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## Sales Commissions

- The Sales Representative Commissions Act (SRCA), MCL 600.2961, was written with the intent of assessing stiff penalties against principals/employers, who fail to pay sales representatives in Michigan their full commissions due, especially when the relationship terminates.

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## Sales Commissions

- Recently, in *Warring v Total Manufacturing Systems, Inc*, the employer found out that a good faith belief (albeit erroneous) that all amounts due had been paid can be costly.

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## Sales Commissions

- It is essential that all commission contracts include terms governing the payment of post-termination commissions to avoid the procuring cause doctrine.

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## Sales Commissions

- In fact, employers should address these three separate issues in every contract:
  - What event triggers the salesperson's right to earn the payment
  - When the payment will be made to the salesperson
  - Whether payment will be made on sales pending at the time the salesperson leaves the company

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## Sales Commissions

- These issues are a matter of contract and, unless addressed, may result in the application of the procuring cause doctrine.
- Employers are encouraged to seek legal advice before entering any commissions contracts, which often also include non-compete terms.

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## Sales Commissions

- Better yet, employers may wish to consider eliminating the payment of “commissions” and, instead, compensate salespeople through a “bonus” program which is not governed under the SRCA.
- Commissions are defined by the SRCA as a payment owed to a salesperson that is expressed as a percentage of orders or profits.

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## Sales Commissions

- Bonuses, by comparison, are typically a flat amount paid on a per item amount or on a sliding scale such as two percent on all orders up to \$10,000, four percent on orders up to \$20,000 and six percent on orders above \$20,000.
- How the “bonus” program is written will be important to ensure it does not fall back within the SRCA.

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## Equal Pay Act

- Prohibits employers from discriminating on the basis of sex in the payment of wages.
- The EPA prohibits paying an employee less than someone of the opposite sex for “work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions....”

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## Equal Pay Act

- A comparison of wages between *different* job classifications can support a claim!
- The EPA only permits disparate wages based on seniority, merit, education, experience or another factor (other than sex), such as quality or quantity of production.

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## Equal Pay Act

- Employers should regularly compare the salaries of jobs of equal skill, effort and responsibility that are performed under similar working conditions.
- When hiring replacements, employers should consider the salaries that have been paid to *prior incumbents* of the position.
- Any distinction in wages should be based on a permissible factor, and not sex.

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## Parting Thought Under State Law

- It is unlawful, under state law, to discipline employees for discussing their wage rate with other employees.



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## Health Care Reform Act: FLSA Amendment

### Nursing Mothers

- Employers are now required to provide reasonable break periods for mothers who are breastfeeding a newborn baby (up to one year old).
- Employers must provide a break “each time” the employee has “need to express the milk.”

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## Health Care Reform Act: FLSA Amendment

- Employers must provide a location for the employee to express milk that is shielded from view and free from intrusion from coworkers and the public.
  - A bathroom does not satisfy this requirement.
- No specific requirement for the length of the break.

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## Health Care Reform Act: FLSA Amendment

- Employers are not required to compensate employees for such breaks (likely only non-exempt employees)
- Exception to providing the breaks: employers with fewer than 50 employees *if* the requirement causes “undue hardship”

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## Health Care Reform Act: FLSA Amendment

- For example, breaks are not required if they would impose “significant difficulty or expense” in relation to the size, financial resources, and nature or structure of the employer’s business.
- Department of Labor has yet to issue any guidelines regarding effective date or other specifics of implementation of the new requirements.

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## Recent Trends - FLSA

### Rise in FLSA litigation

- The number of FLSA lawsuits filed nationwide has more than doubled since 2004.
- Between 2008 and 2009 alone, the number jumped by nearly 1,000 lawsuits.

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## Recent Overtime Settlements / Judgments

- \$93,897 paid by two paper stores in New York to 28 employees for alleged paycheck shortfalls.

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## Recent Overtime Settlements / Judgments

- \$90,000 in overtime compensation and post-judgment interest paid by owners of five Famous Dave's restaurants in Nebraska for failure to combine the hours of employees who worked at more than one location for the purposes of calculating overtime. The owners also paid an additional \$90,000 in liquidated damages.

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## Recent Overtime Settlements / Judgments

- \$640 million paid by Wal-Mart to settle 63 wage and hour suits across the country resolving claims for off-the-clock work, failure to provide required meal and rest breaks, and failure to pay overtime

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## Loss of Exemption Case

***Baden-Winterwood v. Life Time Fitness, Inc.***, 566 F.3d 618 (6th Cir. 2009)

- This case demonstrates how the loss of exempt status for one employee can result in significant liability for unpaid overtime for all employees in the same classification.

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## Loss of Exemption Case

- Under the salary basis test, Life Time Fitness had taken improper deductions from employees pay when it made deductions under a performance policy.
- The policy provided that if certain performance indicators dropped below 80 percent and bonus payments had been made in previous months, it could reclaim the amount of previous payments by reducing future salary payments.

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## Loss of Exemption Case

- The court reasoned that Life Time Fitness had the right to recoup overpayments; however it could not do so by dipping into plaintiffs' *guaranteed salaries* and deductions could not be based on the quality and quantity of the employees' work without losing the exempt status.

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## Loss of Exemption Case

- Life Time Fitness was held liable for overtime pay to *all* of the "employees in the same job classification working for the same managers responsible for the actual improper deductions" for all pay periods where improper deductions were taken.

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## Executive Exemption

- Has been the subject of several high-profile overtime cases, typically involving employees who were managers in name only or who also performed the job duties of non-exempt employees in their charge.

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## Executive Exemption Case

**Rodriguez v. Farm Stores Grocery, Inc.**, 518 F.3d 1259 (11th Cir. 2008)

- The Eleventh Circuit affirmed in part that an employer's designation of one of five employees who typically worked in its drive-thru grocery stores as "store manager" did not necessarily qualify that employee as an exempt employee under the executive exemption of FLSA.
- The court required proof that employee actually performed exempt work.

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## Executive Exemption Case

**Pendlebury v. Starbucks Coffee Co.**, 2008 WL 700174 (S.D. Fla. 2008) (unpublished)

- In a case involving Starbucks store managers, the court denied plaintiffs' motion for summary judgment finding an issue of fact existed concerning whether plaintiffs' managerial duties were less important than the non-managerial duties.

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## Tips and Meal / Lodging Credits

**Solis v. Min Fang Yang**, 2009 WL 2017906 (6th Cir. 2009)(unpublished)

- This case demonstrates the importance of an employer providing employees with notice that it intends to treat tips as satisfaction of part of the employer's minimum wage obligation.

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## Tips and Meal / Lodging Credits

- Defendant restaurants were not entitled to a retroactive tip credit, as they had failed to inform employees that their wages were being decreased under the FLSA's tip credit provision.

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## Tips and Meal / Lodging Credits

- Employer's notification to employees that pay would consist almost exclusively of tips was insufficient – it didn't discuss the minimum-wage obligation or explain how tip credit applied against that obligation.

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## Tips and Meal / Lodging Credits

- Additionally, the court held employers were not entitled to a credit for meals and lodging due to a failure to maintain and produce contemporaneously maintained records reflecting the number and actual costs of meals provided to employees and the value of housing that individual employees occupied.

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## Tips and Meal / Lodging Credits

- Finally, the court stated that liquidated damages under the FLSA are considered compensation, not penalty or punishment and they are “the norm” and referred to as “mandatory” by the Sixth Circuit.

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## Tips and Meal / Lodging Credits

- Employers’ claimed ignorance of the law, adherence to cultural practices, and language difficulties were insufficient to establish good faith as a defense to liquidated damages.

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## Cost of Improper Treatment of Tips

### *Agofonova v. Nobu Corp.,*

- U.S. District Court, Southern District of New York, judgment entered in February 2009: a class of waiters, bartenders and bus staff working for the NOBU restaurant group (co-owned by Robert DeNiro) settled their claims that the restaurants violated the FLSA by requiring them to share their tips with managers and sushi chefs for \$2.5 million.

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## Missed Meal Periods

**Wage and Hour Opinion Letter, FLSA 2008-7NA (May 15, 2008):**

- Time worked during missed meal period is considered “time worked” under FLSA.
- Employer must compensate an employee for all hours worked, including time worked during a missed meal period. This rule holds true even if employee violates employer’s pre-approval policy regarding working during breaks and meal periods.

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## Collective Actions and Spoliation of Records

***O'Brien v. Ed Donnelly Enterprises, Inc.,* 575 F.3d 567, 585 (6th Cir. 2009)**

- This case represents a significant relaxation of the standards previously used to evaluate whether employees’ FLSA claims will be certified for collective action, therefore making it easier for plaintiffs to bring a collective action (similar to class actions).

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## Record-Keeping Requirements

- The *O'Brien* decision also reaffirmed the employee-friendly burden of proof that, when an employer maintains inaccurate or inadequate records, the plaintiff does not need to prove every minute of uncompensated work, but rather is allowed to simply estimate his damages, shifting the burden to the employer.

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## Record-Keeping Requirements

- If the employer cannot negate the estimate, then the court may award damages to the employee, even though the result will be only approximate.

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## Spoilation of Records

***Brown v. Family Dollar Stores of Ind. LP***, 534 F.3d 593 (7th Cir. 2008)

- A former assistant manager was permitted to proceed with a claim under FLSA where she was not paid for all of the overtime hours she worked despite a lack of specific evidence, as plaintiff did present evidence that management altered her time records.

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## Thank You!



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