

# **PROBLEMS, PITFALLS AND PERILS: WHAT EMPLOYERS NEED TO KNOW ABOUT WAGE AND HOUR LAWS**

**August 1, 2007**

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# Pop Quiz

## True or False

- ✗ 16 year old employees can operate a motor vehicle on-the-job if they have a valid drivers license.
- ✗ Bookkeepers and other office staff are exempt from overtime.
- ✗ Employers may deduct cash register shortages from the responsible employee's paycheck.
- ✗ Salaried employees are not eligible for overtime pay.
- ✗ Bonuses must be included in an employee's wage when calculating overtime pay owed to the employee.

- ✘ Federal law requires a 15-minute break for every 4 hours worked, but employers are not required to pay employees for it.
- ✘ Nebraska law requires an employer to pay a terminated employee all wages owed within 7 days of the date of termination.
- ✘ When an employee is terminated, employers may deduct the value of Company tools the employee failed to return from the employee's final paycheck.

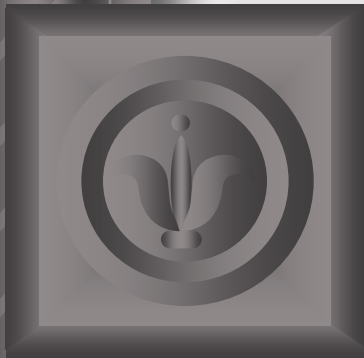
# Wage & Hour

## Fair Labor Standards Act of 1938

- ✗ Adopted in 1938
- ✗ Addresses:
  - ✗ Minimum Wage
  - ✗ Overtime Pay
  - ✗ Child Labor
  - ✗ Recordkeeping
- ✗ Does NOT require:
  - ✗ Vacation and Holiday Pay
  - ✗ Severance Pay
  - ✗ Premium Pay for Weekends & Holidays
  - ✗ Meal or Rest Periods

# Matter of Agreement Between Employer and Employee

- ✗ Pay raises above the minimum wage
- ✗ Vacation Pay, Sick Pay, Holiday pay
- ✗ Severance pay
- ✗ Double-time pay



# Overtime Requirements and Exemptions in Nebraska

# Wage & Hour Overtime

- ✗ Requires nonexempt employees to be paid:
  - ✗ 1 ½ times
  - ✗ their “regular rate of pay”
  - ✗ for all hours worked over 40 hours
  - ✗ in a “workweek”

# Wage & Hour

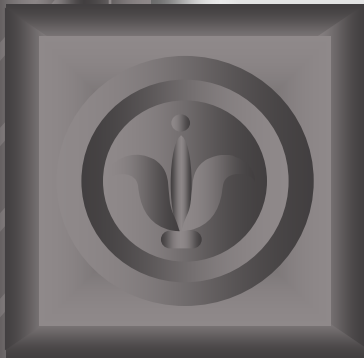
## Overtime

- ✗ FLSA does not limit the number of hours per day or per week that employees over the age of 16 can be required to work.
- ✗ FLSA has no provisions regarding scheduling, with the exception of child labor provisions. Employers may change work schedule without giving prior notice or obtaining employee consent.
- ✗ FLSA does not require overtime pay for work on Saturdays, Sundays, holidays, or regular days of rest.



# Wage & Hour Overtime

- ✗ Over the 60 years of the FLSA, Congress has created and repealed numerous overtime exemptions.
- ✗ Most common exemptions are the “white collar” exemptions:
  - ✗ Executive
  - ✗ Administrative
  - ✗ Professional
  - ✗ Outside Sales



# The “White Collar” Overtime Exemptions

# Overtime Exemptions

- ✗ The White Collar Exemptions have 3 basic requirements in common:
  - ✗ Employee must perform work of an exempt nature;
  - ✗ Employee must spend sufficient time performing exempt work or it must constitute the employee's primary duty; and
  - ✗ Employee must be paid on a salary basis of at least a specified amount.

Does not apply to Outside Sales Exemption

# Executive Exemption

- × Salary test:

- × Must be paid on a “salaried” basis.
- × Minimum salary \$455/week
  - × \$23,660/year

- × Duties test:

- × Primary duty consists of managing the enterprise in which they are employed or a customarily recognized department or subdivision; and
- × Customarily and regularly direct the work of 2 or more employees; and
- × Has the authority to hire or fire or whose suggestions and recommendations regarding such be given particular weight.

# Executive Exemption

- ✘ “Primary Duty”
  - ✘ Generally an employee who spends more than 50% of time in management work.
  - ✘ Is management the employee’s most important duty?
- ✘ “Management”
  - ✘ Responsibility for such things as:
    - ✘ Interviewing
    - ✘ Hiring
    - ✘ Training
    - ✘ Setting wage rates & hours of work
    - ✘ Directing work
    - ✘ Appraising performance
    - ✘ Discipline & discharge
    - ✘ Determining products/services to be bought & sold
    - ✘ Controlling flow & distribution of products/services

# Executive Exemption

- ✗ Authority to Hire or Fire; or
- ✗ Suggestions and Recommendations given “particular weight”
  - ✗ Section 541.105
    - ✗ Is it part of employee’s duties to make such suggestions?
    - ✗ Frequent suggestions are made and relied upon
    - ✗ Can have “particular weight” even if employee lacks ultimate authority to decide change in status.

# Executive Exemption

- × Examples:

- × Exempt:

- × Golf course manager who spent 50%+ of time on nonmanual management, including hiring, firing, keeping financial records, overseeing operations & supervising more than 2 FT employees.

- × Nonexempt:

- × Working foreman who devoted virtually all working time repairing vehicles, waiting on customers and cleaning service area.
    - × Crew supervisor who worked right along with the crew and did common labor.

# Professional Exemption

- ✗ Must have primary duty performing:
  - ✗ Work requiring knowledge of an advanced type in a field of science or learning customarily acquired by prolonged course of study (“learned profession”)
  - ✗ Teaching, tutoring, instruction or lecturing (“teachers”)
  - ✗ Work that requires theoretical & practical application of highly specialized knowledge in computers (“certain computer professionals”)



# Professional Exemption

- ✖ Salary test
  - ✖ Exemption: Computer professionals
    - ✖ Must be paid more than \$27.63/hour
  - ✖ \$455/week
    - ✖ \$23,660/year
- ✖ Duties test
  - ✖ Primary duty is:
    - ✖ Learned professional
    - ✖ Artistic professional
    - ✖ Teacher
    - ✖ Qualified computer professional

# Professional Exemption

- × Examples:

- × Learned Professional:

- × Medicine

- × Law

- × But not paralegals

- × Artistic Professional

- × Musicians

- × Actors/Actresses

- × Authors

- × Graphic Artists

- × Journalists

- × Teacher

- × Pre-school teacher

- × College instructor

- × Music teacher

- × But not dormitory parents

# Professional Exemption

- ✖ Computer Professionals
  - ✖ Added to professional exemption by Congress in 1990.
  - ✖ Applies to employees who are highly skilled in:
    - ✖ Computer systems analysis
    - ✖ Programming
    - ✖ Software functions
  - ✖ Includes:
    - ✖ Computer programmer
    - ✖ Systems analyst
    - ✖ Systems engineer
  - ✖ Excludes:
    - ✖ Computer repair personnel;
    - ✖ Employees who maintain computer hardware.
  - ✖ Salary basis not required if hourly rate exceeds \$27.63/hour

# Administrative Exemption

- ✖ Salary Requirement

  - ✖ \$455/week

  - ✖ \$23,660/year

- ✖ Duties Requirement

  - ✖ Primary Duty

    - ✖ Is office or nonmanual work that is directly related to the management policies or general business operations of the company or its customers; and

    - ✖ Includes the exercise of discretion and independent judgment with respect to matters of significance.

# Administrative Exemption

- ✗ Office or Nonmanual work
  - ✗ Employee who spends majority of time in manual labor is not exempt
  - ✗ Performance of some manual work will not destroy exemption
- ✗ Directly related to Management or Operations
  - ✗ Meant to distinguish
    - ✗ Administrative operations (exempt)
    - ✗ Production operations or sales (non exempt)
- ✗ Example:
  - ✗ HR clerk (non exempt)
  - ✗ HR Director (exempt)

# Administrative Exemption

- ✘ Exercises discretion and independent judgment with respect to matters of significance
  - ✘ Involves comparing and evaluating possible courses of conduct and making a decision after the possibilities have been considered.
  - ✘ “Discretion” and “Independent” imply
    - ✘ Freedom from immediate supervision/direction
    - ✘ Regarding matters of significance
  - ✘ Entails making or recommending decisions
    - ✘ In a manner that is distinguished from the use of skill or merely following procedures; and
    - ✘ Involving matters of significance

# Administrative Exemption

## ✕ Examples:

### ✕ Exempt

- ✕ Certified Public Accountant
- ✕ Bank credit manager
- ✕ Building inspectors who make recommendations

### ✕ Non Exempt

- ✕ Bookkeeper
- ✕ Personal banker
- ✕ Building inspectors who merely look for compliance
- ✕ Receptionist

# Outside Sales Exemptions

- ✘ Duties Test:

- ✘ Primary duty is:

- ✘ Making sales; or

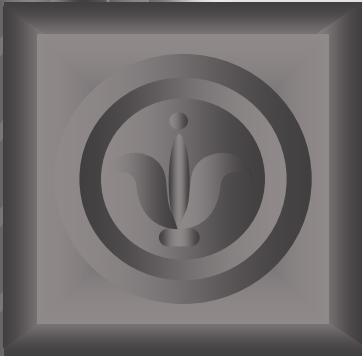
- ✘ Obtaining orders or contracts for services or for the use of facilities for which money will be paid.

- ✘ Who is customarily and regularly engaged away from the employer's place of business in performing such primary duty.



# Outside Sales Exemption

- ✘ Making sales or Obtaining Orders
  - ✘ Employees who both sell and provide the service are not covered
- ✘ Away from Employer's Place of Business
  - ✘ Working "outside" is not enough
  - ✘ Inside sales (e.g., phone, fax, mail) are not covered
  - ✘ Any fixed site (home or office) used by salesperson is considered the employer's place of business
- ✘ Incidental to and in Conjunction with Sales Work
  - ✘ Still is exempt work
  - ✘ Includes:
    - ✘ Incidental deliveries and collections
    - ✘ Writing sales reports
    - ✘ Attendance at sales conferences
    - ✘ Planning employee's own itinerary
    - ✘ Revising product catalog



# Overtime and Hours Worked

# Hours Worked

- ✘ FLSA overtime requirements mandate payment of 1 ½ times employees regular rate of pay for all “hours worked” by a nonexempt employee over 40 hours in a workweek
- ✘ “Hours worked”
  - ✘ FLSA defines “employ” as “to suffer or permit to work”
  - ✘ Has been defines by courts to mean:
    - ✘ Physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer

# Hours Worked: Special Issues

- × Waiting Time

- × Compensable

- × Idle time while waiting for machinery to be repaired
    - × Employees required to report to work but not punch in until customers arrive
    - × On-call time where employee is “engaged to wait”

- × Rest and Meal Periods

- × Rest periods of 20 minutes or less are compensable
  - × In order to be noncompensable, employee must be completely relieved of work
  - × Meal breaks are noncompensable if:
    - × 30 minutes or more in duration
    - × Employee is completely relieved of work

# Hours Worked: Special Issues

## × Sleeping Time

- × If on duty for less than 24 hours, sleep time is compensable
- × If more than 24 hours, employer and employee may by agreement exclude sleep time if sleeping facilities are provided by employer

## × Preparatory and Concluding Activities

- × Is activity closely related to employee's principal activity and indispensable to its performance?
  - × Showering
  - × Changing into uniform
  - × Sharpening knives
  - × Cleaning machines
  - × Riding to work on Company-provided bus

# Hours Worked: Special Issues

- ✖ Lectures, Meetings and Training
  - ✖ Compensable, unless all 4 criteria met:
    - ✖ Attendance is outside employee's regular working hours
    - ✖ Attendance is truly voluntary
    - ✖ Course/lecture/meeting is not directly related to employee's job
    - ✖ Employee does not perform any productive work during such attendance
- ✖ Travel Time
  - ✖ Travel to and from work generally is not compensable
  - ✖ Travel job-site to job-site during the day is compensable
  - ✖ Travel in emergency or call-back situations may be compensable
  - ✖ Overnight travel: All time spent traveling during normal work hours is "hours worked"
    - ✖ Includes weekends and holidays when travel hours correspond to hours employee normally worked during the regular work week

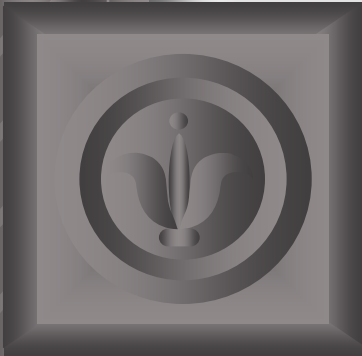
# Hours Worked: Special Issues

- ✗ Medical Attention

- ✗ If on employer's premises or at employer's direction during normal work hours, it is generally "hours worked"

- ✗ Charitable Work

- ✗ Is "hours worked" if
    - ✗ Done at employer's request; or
    - ✗ Done under employer's direction or control: or
    - ✗ Done while employee is required to remain on employer's premises.



# Overview of Minimum Wage Requirements



# Overview

- ✘ The FLSA established a minimum wage that must be paid to all covered, non-exempt employees.

# Overview

- ✗ Minimum wage applies to:
  - ✗ Employees of enterprises that do at least \$500,000 in business a year.
  - ✗ Employees of smaller enterprises if employees are engaged in interstate commerce or in the production of goods for commerce.
  - ✗ Examples:
    - ✗ Transportation, regular use of mail, telephone
    - ✗ Compute email to communicate with persons in another state, regularly cross state lines in course of employment
    - ✗ Electronic device which authorize a credit card purchase.

# Overview

- ✕ Minimum Wage Exemptions:
  - ✕ Executive, administrative, and professional employer;
  - ✕ Employees of certain seasonal amusement establishments
  - ✕ Employer in newspaper delivery
  - ✕ Farm workers employed on small farms (less than 500 “man day” of farm labor per year)

# Overview

- ✗ September 1, 1997, minimum wage under Federal law was set at \$5.15 per hour

# Overview

- ✘ Tipped employees are those who customarily receive more than \$30/month in tips
- ✘ Tipped employees must receive a cash wage of at least \$2.13/hour
- ✘ If an employee's tips combined with the employer's cash wage of at least \$2.13/hour do not equal the minimum hourly wage, the employer must make up the difference.

# Overview

- ✘ The Fair Minimum Wage Act of 2007 was enacted on May 25, 2007.
- ✘ This amended the FLSA to increase the federal minimum wage in three increments.
- ✘ The Act will raise the Federal minimum wage from \$5.15 per hour to \$7.25 per hour by July 24, 2009

# Overview

- ✕ The Act will raise minimum wage in these three increments:
  - ✕ \$5.85 per hour by July 24, 2007;
  - ✕ \$6.55 per hour by July 24, 2008; and
  - ✕ \$7.25 per hour by July 24, 2009

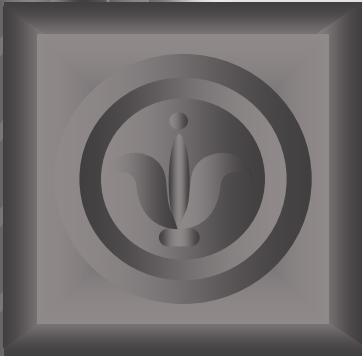
# Overview

- ✘ Nebraska Unicameral unanimously passed L.B. 265 in 2007
  - ✘ It mirrors the FLSA



# Overview

- ✘ Tipped employees minimum direct wage remains at \$2.13 per hour.



# Overview of Child Labor Restrictions

# Overview

- ✗ The child labor provisions of the FLSA establish minimum wage requirements for specific jobs.
  - ✗ 16 year old requirement:
    - ✗ To work in most non-farm jobs
  - ✗ 18 year old requirement
    - ✗ To work in non-farm jobs declared hazardous by the Secretary of Labor:
      - ✗ Ex: storing of explosives, powder-driven woodworking machines, roofing and excavation.

# Overview

- ✘ 14 and 15 year olds restriction:
  - ✘ May work outside school hours in non-manufacturing, non-mining, non-hazardous jobs under the following conditions:
    - ✘ No more than 3 hours on a school day (including Fridays) or 18 hours in a school week;
    - ✘ No more than 8 hours on a non-school day or 40 hours in a non-school week
    - ✘ 14 and 15 year olds may not begin work before 7:00 am or end after 7:00 pm except from June 1 through Labor Day; then it is extended to 9:00 pm.

# Overview

## ✕ Cooking Duties

- ✕ Ban all cooking by 14 and 15 year olds, except cooking that involves electric or gas grills and deep-fat fryers that are equipped with and use devices to automatically raise and lower the baskets into hot oil.
- ✕ 14 and 15 year olds may use dishwashers, toasters, popcorn poppers, coffee machines and grinders, devices used to maintain the temperature of prepared foods, and microwave ovens that are used only to warm prepared food and do not have a capacity to warm above 140 degrees Fahrenheit.
- ✕ 14 and 15 year olds may clean kitchen equipment, remove oil or grease filters, pour oil or grease through filters, and move receptacles containing grease or hot oil, but only when the equipment, surfaces, containers and liquids do not exceed a temperature of 100 degrees Fahrenheit.

# Overview

- ✖ Driving on public roads:
  - ✖ All on the job driving on public roads by 16 year olds is prohibited
  - ✖ Incidental and occasional driving by 17 year olds is allowed only if the following conditions are met:
    - ✖ The minor employee must not have a record of moving violations at the time of hire;
    - ✖ The minor has successfully completed a state approved driver's education course;
    - ✖ The vehicle is equipped with seat belts and the employer has instructed the minor that the seat belt must be used;

# Overview

## ✕ Cont'd..

- ✕ The driving to be performed by the minor cannot include route deliveries or route sales, the transportation for hire of property, goods or passengers, urgent time sensitive deliveries, or the transporting at any one time of more than 3 passengers.
- ✕ The driving cannot involve more than 2 trips away from the primary place of employment in any single day for the purpose of delivering goods of the minor's employer to a customer or transporting passengers.
- ✕ The driving must be truly occasional and incidental which is defined as no more than 1/3 of the employee's work time in any work day and no more than 20% of the employee's work time in any work week.

# Overview

## ✘ Roofing

- ✘ 16 and 17 year olds are prohibited from working on or about a roof, which includes all work performed upon or in close proximity to a roof.
  - ✘ Including carpentry and metal work, alterations, additions, maintenance and repair, the construction of the sheathing or base of roofs, roof trusses or joists, gutter and down spout work, the installation and servicing of television and communication equipment, and the installation and servicing of heating, ventilation and air conditioning equipment or similar appliances attached to roofs.
  - ✘ Exemptions exist for apprentices and student learners.

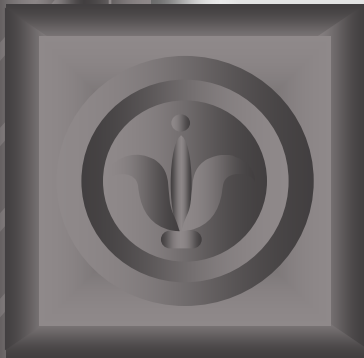


# Overview

- ✘ Paper Balers and Compactors:
  - ✘ 16 and 17 year olds may load but not operate or unload scrap paper balers and paper box compactors if certain conditions are met:
    - ✘ The machine must meet the applicable American National Standard Institute standards and must have an on/off switch incorporating a key-lock or other system.
    - ✘ On/off switch must be maintained in an off position when the machine is not in operation.

# Overview

- ✘ Employer Violations:
  - ✘ Monetary penalties
  - ✘ Public relation tragedies



# Common Pitfalls with the FLSA and Nebraska Wage Payment and Collection Act

# Common Pitfalls

- ✘ Allowing 16 and 17 year olds to operate motor vehicles
- ✘ 16 year olds can never operate motor vehicles on the job
- ✘ 17 year olds can, with restrictions

# Common Pitfalls

- ✗ Classifying Nonexempt Employees as Exempt
  - ✗ Must be able to point to applicable exemption
  - ✗ Titles don't matter
  - ✗ White collar exemptions have duties and salary test
    - ✗ Employee receives predetermined amount not subject to reduction because of variations in quality and quantity of work
  - ✗ Policies that tend to jeopardize salary-basis test:
    - ✗ Section 541.602

# Common Pitfalls

- ✗ Ignoring what is meant by “hours worked”
  - ✗ Eager beavers
  - ✗ Working off the clock
  - ✗ Preparatory activities

# Common Pitfalls

## ✘ Calculating “Regular Rate”

### ✘ Bonuses

- ✘ Must be included unless “discretionary”
  - ✘ Whether to be awarded
  - ✘ Amount

### ✘ Prizes and Awards

- ✘ Must be included if given as remuneration for employment
- ✘ To be excluded:
  - ✘ Not paid to employee for employment
  - ✘ Non-work activities
  - ✘ Amount of time spent competing for prize/award
  - ✘ Not a thing of value that is part of wages.

# Common Pitfalls

- ✘ Improper Treatment of Rest and Lunch Breaks
  - ✘ Rest breaks between 5 and 20 minutes are “hours worked”
  - ✘ Bona fide meal breaks of 30 or more minutes are not “hours worked”
    - ✘ Employee must be completely relieved of work
    - ✘ Employee need not be allowed to leave the premises



# Common Pitfalls

- ✗ Improper Treatment of On-Call and Travel Time
  - ✗ On-call time
  - ✗ Travel time

# Common Pitfalls

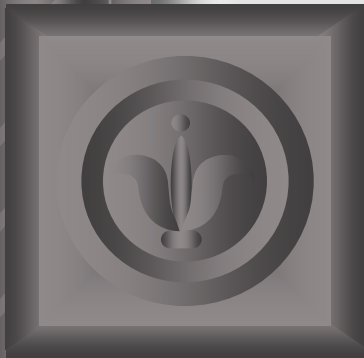
## ✗ Deductions from Pay

- ✗ Certain deductions may result in violation of minimum wage provisions
  - ✗ Cash register shortages
    - ✗ Exemption: Admission or conviction for embezzlement
  - ✗ Customers failing to pay/bad accounts
  - ✗ Employee accounts
  - ✗ Uniforms
- ✗ Certain deductions may jeopardize “white collar” exemptions
  - ✗ Absences occasioned by employer
  - ✗ Deductions for absences of less than 1 day
  - ✗ Disciplinary deductions for anything other than that allowed by Sec. 541.602(b)(5)
- ✗ Nebraska Wage Payment & Collection Act
  - ✗ No deductions unless:
    - ✗ Required by law
    - ✗ Required by Court order
    - ✗ Authorized in writing by employee

# Pop Quiz: True or False

- ✗ 16 year old employees can operate a motor vehicle on-the-job if they have a valid drivers license
- ✗ Bookkeepers and other office staff are exempt from overtime
- ✗ Employers may deduct cash register shortages from the responsible employee's paycheck
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