WAGE AND HOUR COMPLIANCE

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More than 130 million American workers are protected (or "covered") by the Fair Labor Standards Act ("FLSA"), which is enforced by the Wage and Hour Division ("WHD") of the U.S. Department of Labor ("USDOL"). FLSA is the federal law which sets minimum wage, overtime, recordkeeping, and youth employment standards. FLSA covers both enterprises and individual workers who are "engaged in commerce or in the production of goods for commerce."

Employees covered by the FLSA and who work in New York also have the full protection of the New York State Minimum Wage Law, including its supplemental industry wage orders. The requirements of the N.Y.S. law do not affect an employer's obligation to comply with federal law, which may result in a higher minimum wage. The higher wages apply, whether they be mandated by federal or State law.

Recently, President Obama requested Congress to raise the federal minimum hourly wage to $9.00 from the current $7.25 rate and to automatically adjust it with inflation. The proposal would see the federal floor on hourly wages reach $9.00 in stages by the end of 2015. If enacted, the $9.00 minimum hourly wage rate would be the highest in more than three decades, accounting for inflation, but still lower than the peaks reached in the 1960s and 1970s.

This presentation addresses the following wage compliance issues confronting employers who are subject to the provisions of FLSA and/or New York State wage and hour laws: Exempt and Nonexempt Classifications; Working Hours/Working Time; Overtime Pay; Flex Time/Comp Time; and Prevailing Wages.

I. FLSA AND NYS OVERVIEW

A. Fair Labor Standards Act

There are two ways in which an employee can be covered by the law: "enterprise coverage" and "individual coverage."

1. Enterprise Coverage

Employees who work for certain businesses or organizations (or "enterprises") are covered by the FLSA. These enterprises, which must have at least two employees, are:

(1) those that have an annual dollar volume of sales or business done of at least $500,000;

(2) hospitals, businesses providing medical or nursing care for residents, schools and preschools, and government agencies.

2. Individual Coverage

Even when there is no enterprise coverage, employees are protected by the FLSA if their work regularly involves them in commerce between States ("interstate commerce"). The FLSA covers individual workers who are "engaged in commerce or in the production of goods for commerce."

Domestic service workers (such as housekeepers, full-time babysitters, and cooks) are normally covered by the law.

B. New York State Law

1. Minimum Wage Orders:

The New York State Minimum Wage Law, N.Y. Lab. Law §§ 650-665, includes five minimum wage orders. These laws, with specified exceptions, apply to all workers in the State including those subject to the FLSA. The State minimum wage is also currently $7.25 per hour and is linked to the federal minimum wage. Any increase in the federal wage will automatically result in an increase in New York's minimum wage.

The basic minimum and overtime wage rates in New York may be modified by certain requirements set under regulations known as "wage orders." The Minimum Wage Orders issued by the N.Y.S. DOL include the following industries and occupations:

- Hospitality (covers restaurant and hotel workers, among others);
- Building Service;
- Miscellaneous Industries and Occupations;
- Farm Workers; and
- Non-Profitmaking Institutions

On March 29, 2013, Governor Andrew Cuomo signed legislation that increases the New York State minimum hourly wage rate starting December 31, 2013 to $8.00. This is New York's first minimum wage increase since July 24, 2009, when it was increased to match to federal minimum wage of $7.25 an hour. The new legislation further provides that the New York minimum wage will increase to:

- $8.75 on and after December 31, 2014; and
- $9.00 on and after December 31, 2015.

The new legislation does not provide for an increase in the minimum hourly wage rate applicable to food service and/or other tipped employees. Food service workers currently must be paid a minimum wage of $5.00 per hour and credit for tips must not exceed $2.25 per hour, provided that the total of tips received plus the wages equals or exceeds $7.25. The legislation, however, authorizes the commencement of Wage Board discussions on increases for tipped employees.

2. WTPA Payroll Record Retention Requirements

The New York Wage Theft Prevention Act ("WTPA") requires that employers provide employees hired on or after April 9, 2011 with a written acknowledgment concerning their rates of pay, wage allowances, pay dates, and related matters. Employers need to ensure that they are in full compliance with the new wage and hour notice requirements of Section 195(1) of the New York Labor Law in order to avoid the imposition of the expanded civil and/or criminal penalties set forth in Sections 197 and 198, also effective on April 9, 2011.

The WTPA requires that employers provide employees hired on or after April 9, 2011 with a written acknowledgment containing the following information:

(1) the employee's rate or rates of pay (including the overtime rate of pay for non-exempt employees), and the basis thereof;

(2) whether the employee will be paid by the hour, shift, day, week, salary, piece, commission or otherwise;

(3) whether the employer will claim any allowances as part of the minimum wage (*e.g.*, tip, meal or lodging allowances);

(4) the employer's regular pay day;

(5) the physical address of the employer's main office or principal place of business, and a mailing address if different;

(6) the telephone number of the employer; and

(7) such other information as the commissioner deems material and necessary (the "Pay Notice").

The Pay Notice must be provided to employees either in English and in the language identified by each employee as his/her primary language at the time of their hiring. Each time the employer provides a Pay Notice to an employee, the employer shall obtain from the employee a signed and dated written acknowledgement, in English and in the primary language of the employee, of his/her receipt of the Pay Notice.

The Commissioner of Labor has issued Pay Notice templates in various languages, including English and Spanish that comply with the WTPA's new reporting requirements. These templates are available at the following web address: http://www.labor.ny.gov/formsdocs/wp/ellsformsandpublications.shtm.

3. Allowances:

Under N.Y.S. law, the minimum wage rate may be offset by certain allowances, including tips, meals, lodging and in some cases uniform allowances, as set forth in the applicable industry wage order. The Miscellaneous Industry Wage Order, for example, provides for employers to take the following wage allowances against the $7.25 per hour minimum wage rate, subject to the conditions set forth below:

- **Tip Allowances**: Tips, or gratuities, may be considered a part of the $7.25 minimum wage rate, subject to the following conditions: (i) the particular occupation in which the employee is engaged is one in which tips have customarily and usually constituted a part of the employee's remuneration; (ii) substantial evidence is provided that the employee received in tips at least the amount of the allowance claimed.
- **Meals**: $2.50 per meal
- **Lodging**: $3.10 per day (profit); $5.80 per day (profit/residence with utilities); $4.30 per day (non-profit); $9.00 per day (non-profit/residence with utilities)
- **Uniform Allowances:** No allowance for the supply, maintenance or laundering of required uniforms is permitted as part of the minimum wage rate. Where an employee purchases a required uniform, he/she must be reimbursed by the employer for the cost thereof not later than the time of the next payment of wages. Where an employer fails to launder or maintain required uniforms for any employee, it must pay such employee the following

compensation, in addition to the minimum wage rate: $9.00 per week (over 30 hours); $7.10 per week (20 to 30 hours); $4.30 per week (less than 20 hours).

4. <u>Wage Deductions</u>

An employer may not deduct any money from an employee's paycheck unless the employee has voluntarily authorized the deduction in writing and the deduction is for the employee's own benefit.

N.Y.S. law prohibits deductions from an employee's paycheck unless such deductions are (1) made pursuant to law, (2) are expressly authorized in writing by the employee, (3) are for the benefit of the employee, and (4) do not exceed 10 percent of the employee's gross wages (minus required deductions) for the pay period. An employer must keep such authorization on file on its premises. The five (5) permitted wage deductions categories are:

- Payments for insurance premiums (including health, medical and dental insurance for the employee and/or the employee's family)
- Payments for pension or health and welfare benefits (including 401K contributions, and retirement account contributions)
- Contributions to charitable organizations
- Payments for United States bonds
- Payments for dues or assessments to a labor organization

Employers may not deduct from an employee's wages in order to recover any damages allegedly caused by an employee; nor may employers make wage deductions in any indirect manner, such as requiring an employee to pay for shortages by means of a separate transaction. Prohibited wage deductions include, but are not limited to:

- Repayment of loans, advances or debts
- Recovery of employment-related expenses
- Recovery for spoilage or breakage
- Purchases made from employers or employer-sponsored stores, cafeterias, and like establishments
- Cash register shortages

5. "Spread of Hours" Pay

The New York State Minimum Wage Orders contains a "spread of hours" requirement which provides that "an employee shall receive one hour's pay at the basic minimum hourly wage rate, in addition to the minimum wage required . . . in any day in which: (a) the spread of hours exceeds 10 hours; or (b) there is a split shift; or (c) both situations occur." The term "spread of hours" is defined as the interval between the beginning and end of an employee's workday, and includes working time, plus time off for meals, plus intervals of off-duty time. If an employee is paid sufficiently above the required minimum wage of $7.25 per hour so that his/her earned wages cover this additional hour, an employer may not be required to pay the additional hour at the minimum wage.

I. EMPLOYEE CLASIFICATIONS

Section 13(a)(1) of the FLSA provides an exemption from both the minimum wage and overtime pay requirements for employees employed as *bona fide* executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis

at not less than $455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the USDOL's regulations.

A. Administrative Exemption

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

The administrative exemption is also available to employees compensated on a salary or fee basis at a rate not less than $455 a week, or on a salary basis which is at least equal to the entrance salary for teachers in the same educational establishment, and whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment. Academic administrative

functions include operations directly in the field of education, and do not include jobs relating to areas outside the educational field.

B. Executive Exemption

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Under a special rule for business owners, an employee who owns at least a bona fide 20-percent equity interest in the enterprise in which employed, regardless of the type

of business organization (e.g., corporation, partnership, or other), and who is actively engaged in its management, is considered a bona fide exempt executive.

C. Professional Exemption

1. Learned Professional Exemption

To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Fields of science or learning include law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other occupations that have a recognized

professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but is not in a field of science or learning.

2. Creative Professional Exemption

To qualify for the creative professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

This includes such fields as, for example, music, writing, acting and the graphic arts.

3. Teachers

Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. The salary and salary basis requirements do not apply to bona fide teachers. Having a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge includes, by its very nature, exercising discretion and judgment.

4. Practice of Law or Medicine

An employee holding a valid license or certificate permitting the practice of law or medicine is exempt if the employee is actually engaged in such a practice. An employee who holds the requisite academic degree for the general practice of medicine is also exempt if he or she is engaged in an internship or resident program for the profession. The salary and salary basis requirements do not apply to bona fide practitioners of law or medicine.

D. Outside Sales Exemption

To qualify for the outside sales employee exemption, all of the following tests must be met:

- The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- The employee must be customarily and regularly engaged away from the employer's place or places of business.

The salary requirements of the regulation do not apply to the outside sales exemption.

An outside sales employee makes sales at the customer's place of business, or, if selling door-to-door, at the customer's home. Any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is

considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property.

1. Promotion Work

Promotion work may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. However, promotion work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work.

2. Drivers Who Sell

Drivers who deliver products and also sell such products may qualify as exempt outside sales employees only if the employee has a primary duty of making sales. Several factors should be considered in determining whether a driver has a primary duty of making sales, including a comparison of the driver's duties with those of other employees engaged as drivers and as salespersons, the presence or absence of customary or contractual arrangements concerning amounts of products to be delivered, whether or not the driver has a selling or solicitor's license when required by law, the description of the employee's occupation in collective ……

E. Computer Employee Exemption

To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated either on a salary or fee basis at a rate not less than $455 per week or, if compensated on an hourly basis, at a rate not less than $27.63 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- The employee's primary duty must consist of:

    1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

    2. The 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;

    3. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

4. A combination of the aforementioned duties, the performance of which requires the same level of skills.

The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in the primary duties test described above, are also not exempt under the computer employee exemption.

F. Highly Compensated Employees

Highly compensated employees performing office or non-manual work and paid total annual compensation of $100,000 or more (which must include at least $455 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

II. WORKING HOURS/WORKING TIME

The workweek ordinarily includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place. "Workday," in general, means the period between the time on any particular day when such employee commences his/her "principal activity" and the time on that day at

which he/she ceases such principal activity or activities. The workday may therefore be longer than the employee's scheduled shift, hours, tour of duty, or production line time.

A. Waiting Time

Whether waiting time is hours worked under the Act depends upon the particular circumstances. Generally, the facts may show that the employee was engaged to wait (which is work time) or the facts may show that the employee was waiting to be engaged (which is not work time). For example, a secretary who reads a book while waiting for dictation or a fireman who plays checkers while waiting for an alarm is working during such periods of inactivity. These employees have been "engaged to wait."

B. On-Call Time

An employee who is required to remain on call on the employer's premises is working while "on call." An employee who is required to remain on call at home, or who is allowed to leave a message where he/she can be reached, is not working (in most cases) while on call. Additional constraints on the employee's freedom could require this time to be compensated.

C. Rest and Meal Periods

Rest periods of short duration, usually 20 minutes or less, are common in industry (and promote the efficiency of the employee) must be counted as hours worked. Unauthorized extensions of authorized work breaks need not be counted as hours worked when the employer has expressly and unambiguously communicated to the employee that

the authorized break may only last for a specific length of time, that any extension of the break is contrary to the employer's rules, and any extension of the break will be punished.

Bona fide meal periods (typically 30 minutes or more) generally need not be compensated as work time. The employee must be completely relieved from duty for the purpose of eating regular meals. The employee is not relieved if he/she is required to perform any duties, whether active or inactive, while eating.

Problems arise when employers fail to recognize and count certain hours worked as compensable hours. For example, an employee who remains at his/her desk while eating lunch and regularly answers the telephone and refers callers is working. This time must be counted and paid as compensable hours worked because the employee has not been completely relieved from duty.

D. Sleeping Time and Certain Other Activities

An employee who is required to be on duty for less than 24 hours is working even though he/she is permitted to sleep or engage in other personal activities when not busy. An employee required to be on duty for 24 hours or more may agree with the employer to exclude from hours worked bona fide regularly scheduled sleeping periods of not more than eight hours, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. No reduction is permitted unless at least five hours of sleep is taken.

E. Lectures, Meetings and Training Programs

Attendance at lectures, meetings, training programs and similar activities need not be counted as working time only if four criteria are met, namely: it is outside normal hours, it is voluntary, not job related, and no other work is concurrently performed.

F. Travel Time

The principles which apply in determining whether time spent in travel is compensable time depends upon the kind of travel involved.

G. Home to Work Travel

An employee who travels from home before the regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel, which is not work time.

H. Home to Work on a Special One Day Assignment in Another City

An employee who regularly works at a fixed location in one city is given a special one day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that the employer may deduct/not count that time the employee would normally spend commuting to the regular work site.

I. Travel That is All in a Day's Work

Time spent by an employee in travel as part of their principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.

J. Travel Away from Home Community

Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly work time when it cuts across the employee's workday. The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days. As an enforcement policy the Division will not consider as work time that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

III. OVERTIME PAY

Unless specifically exempted, employees covered by FLSA must receive overtime pay for hours worked in excess of 40 in a workweek at a rate not less than time and one-half their regular rates of pay. There is no limit in FLSA on the number of hours employees aged 16 and older may work in any workweek. FLSA does not require overtime pay for work on Saturdays, Sundays, holidays, or regular days of rest, as such.

An employee's workweek need not coincide with the calendar week, but may begin on any day and at any hour of the day. Different workweeks may be established for different employees or groups of employees. Averaging of hours over two or more

weeks is normally not permitted. Normally, overtime pay earned in a particular workweek must be paid on the regular pay day for the pay period in which the wages were earned.

The regular rate of pay cannot be less than the minimum wage, and includes all remuneration for employment except certain payments excluded by FLSA itself. Payments which are not part of the regular rate include pay for expenses incurred on the employer's behalf, premium payments for overtime work or the true premiums paid for work on Saturdays, Sundays, and holidays, discretionary bonuses, gifts and payments in the nature of gifts on special occasions, and payments for occasional periods when no work is performed due to vacation, holidays, or illness.

Earnings may be determined on a piece-rate, salary, commission, or some other basis, but in all such cases the overtime pay due must be computed on the basis of the average hourly rate derived from such earnings. This is calculated by dividing the total pay for employment (except for the statutory exclusions noted above) in any workweek by the total number of hours actually worked.

Where an employee in a single workweek works at two or more different types of work for which different straight-time rates have been established, the regular rate for that week is the weighted average of such rates, that is, the earnings from all such rates are added together and this total is then divided by the total number of hours worked at all jobs.

Where non-cash payments are made to employees in the form of goods or facilities, the reasonable cost to the employer or fair value of such goods or facilities must be included in the regular rate.

Overtime pay may not be waived by agreement between the employer and employees. An agreement that only eight hours a day or only forty hours a week will be counted as working time also fails the test of FLSA compliance. An announcement by the employer that no overtime work will be permitted, or that overtime work will not be paid for unless authorized in advance, also will not impair the employee's right to compensation for compensable overtime hours that are worked.

IV. FLEX TIME/COMP TIME

A flexible work schedule is an alternative to the traditional 9 to 5, 40-hour work week. It allows employees to vary their arrival and/or departure times. Under some policies, employees must work a prescribed number of hours a pay period and be present during a daily "core time." FLSA does not address flexible work schedules. Alternative work arrangements such as flexible work schedules are a matter of agreement between the employer and the employee (or the employee's bargaining representative).

FLSA non-exempt employees who work for private sector employers may not be ordered to take compensatory time-off in lieu of overtime pay. FLSA only permits compensatory time-off in lieu of overtime apply for public sector employers (*see* 29 U.S.C. § 207(o)), not private employers. A private sector employer can only provide compensatory time during the workweek by adjusting the hours worked so that they do not exceed 40 in the week.

V. PREVAILING WAGES

A. Federal Public Work and Services Laws

Certain federal prevailing wage laws are found in "The Davis-Bacon and Related Acts" (DBRA) which are administered by the Wage and Hour Division of the USDOL. These Acts apply to contractors and subcontractors performing on federally funded or assisted contracts in excess of $2,000 for the construction, alteration, or repair (including painting and decorating) of public buildings or public works.

The Davis-Bacon Act requires that all contractors and subcontractors performing on federal contracts (and contractors or subcontractors performing on federally assisted contracts under the related Acts) in excess of $2,000 pay their laborers and mechanics not less than the prevailing wage rates and fringe benefits listed in the contract's Davis-Bacon wage determination for corresponding classes of laborers and mechanics employed on similar projects in the area. Davis-Bacon labor standards clauses must be included in covered contracts.

Other federal prevailing wage laws for government contracts or services include the Walsh-Healey Public Contracts Act (which protects employees of government contractors whose contracts exceed $10,000), and the McNamara O'Hara Services Contract Act (which applies to general contractors and subcontractors performing services on U.S. government prime contracts in excess of $2,500).

B. U.S. Immigration Law

Employers who sponsor foreign workers for either a labor certification applications (LCA) or certain non-immigrant visas (H-1B, H-2B, E-3, etc.) must agree to

pay the worker the required prevailing wage as determined by the U.S. Department of Labor (DOL) (or other valid wage survey) upon the approval of an immigrant visa (i.e., "green card") based on the LCA or for the period of intended employment for the non-immigrant visa. The DOL maintains an online prevailing wages library by job classifications, positions and areas of intended employment (which are divided by state and county) at http://www.flcdatacenter.com.

The primary factors taken into consideration by the DOL when making the prevailing wage determination are: experience, education, and skills required by the employer. The experience is broken down into four levels with the prevailing increasing accordingly for each higher experience level (Level I -Entry; Level II - Qualified; Level III - Experienced; Level IV - Fully Competent). The employer may use the prevailing wage determination for more than one employee if the prevailing wage is for the same occupation and skill level; the same wage source is applicable; and the same area of intended employment is involved.

The DOL, under its new online iCert system, determines the validity period of the prevailing wage determination and whether the wage is appropriate in which event it will be certified. The validity period may range from no less than ninety days to no more than one year from the date the determination was made. The salary offered by the employer to a foreign worker must meet or exceed the certified prevailing wage determination.