OVERVIEW OF FEDERAL WAGE-HOUR LAW

The Fair Labor Standards Act (FLSA) is the federal wage-hour law. Its best-known requirements are to (1) pay non-exempt employees not less than a specified minimum hourly wage; (2) pay non-exempt employees an overtime premium based upon their regular hourly rates of pay if they have worked more than 40 hours in a workweek; (3) observe certain limitations and prohibitions relating to work by minors under 18 years old; (4) make and retain certain records, including accurate records of a non-exempt employee's hours worked; and (5) post a physical notice of the FLSA requirements in a conspicuous place. The following discussion pertains to FLSA matters most-often relevant to NACS members. Many state and local governments have their own wage-hour requirements with which members must also comply in those jurisdictions, but they are too numerous and frequently changing to cover here.

Who Is Covered By The FLSA?

- The FLSA's "coverage" is broad, meaning its requirements apply to most employees, though some might be exempt from one or more of the FLSA's requirements.
- *"Enterprise" Coverage*: The FLSA covers employees of an employer that is an "enterprise engaged in commerce or in the production of goods for commerce." An "enterprise" is made up of all the related activities performed by one or more individuals or entities through unified operation or common control for a common business purpose. A covered enterprise has (i) employees engaged in commerce or in the production of goods for commerce or has employees handling, selling, or otherwise working on goods or materials moved in or produced for interstate commerce, and (ii) an annual gross dollar volume of sales made or business done of at least $500,000 (excluding certain excise taxes at the retail level).
- *"Individual" Coverage*: Still other employers might have individual employees covered if doing work that regularly involves them in interstate commerce or in the production of goods for interstate commerce.
- *Specialized Coverage*: The FLSA's coverage typically extends to hospitals, residential-care institutions, schools, governments and government agencies, and domestic-service workers where "enterprise" or "individual" coverage does not exist.
- *"Employee"*: The FLSA applies only to employees and employment relationships. However, the meaning of employment is very broad under the FLSA. Taking a fast-and-loose approach to who is and is not an independent contractor, a volunteer, an intern, etc. risks substantial liability.

What Are The FLSA's General Minimum-Wage Requirements?

- Non-exempt employees must be paid not less than the current FLSA minimum wage of $7.25 per hour.
- In some circumstances, employers may take a "credit" towards the minimum wage for meals, lodging, or "other facilities", but in most circumstances careful accounting is required to ensure that the employer does not benefit from the credit.
- Employers also may take a "tip credit" towards the minimum wage for tipped work done by employees working in occupations in which they customarily and regularly receive more than $30 a month in true "tips". Such employees must be paid at least $2.13 per hour without reliance on the tip credit. The employer must strictly observe various tip-credit requirements and be able to prove that an employee received enough tips to cover the credit taken (or supplement the tips).
- Under the FLSA's "Opportunity Wage", an employer may pay a rate of at least $4.25 per hour for the first 90 consecutive calendar days after an employee's initial employment by that employer. However, each such employee must be under 20 years old, and an employer may not displace other workers or reduce their hours, wages, or benefits in order to hire employees at the Opportunity Wage.
- The U.S. Secretary of Labor may issue certificates allowing Full-Time Students, Learners, and Disabled Workers to be employed at less than the FLSA minimum wage. These certificates are subject to extensive, detailed, and strictly-applied requirements and conditions.

What Are The FLSA's General Overtime Requirements?

- Non-exempt employees must be paid overtime premium at a rate of not less than 1.5 times their "regular rates" of pay for all hours worked over 40 in a workweek. Employers must select and document a "workweek," which is a fixed, regularly-recurring period of seven, consecutive, 24-hour periods. It can be set to begin on any day of the week and at any time of day so long as it is consistently applied to the particular employee. An employer can establish different workweeks for different employees (different shifts, different jobs, etc.).
- The regular rate must include "all remuneration for employment," with only limited exceptions. Payments for a non-exempt employee's work (fairly broad) either must be included in computing overtime or must be lawfully excludable from that calculation. For instance, overtime must be figured on most bonuses (including most that many employers think are "discretionary") and on commissions, shift differentials, and incentive payments or awards of various kinds. As a result, even an hourly employee can have a different "regular rate" every workweek.

- It is possible to pay a non-exempt employee at more than one hourly rate or another form of non-hourly pay (including a salary), but care must be taken in both structuring the pay and then determining the regular rate for *each* workweek.
- It is important to ensure that all overtime hours are identified as such, including, for instance, pulling together all work an employee performs in different stores, locations, departments, or jobs or on different shifts.
- Each workweek stands alone, and overtime is due for work over 40 hours in a single workweek. A non-exempt employee's worktime cannot be averaged across workweeks. Typical "comp time" systems are impermissible for non-exempt, private-sector employees. An employer may control an employee's worktime *within* a workweek to *prevent* the person from exceeding 40 hours in that workweek.

What Are The FLSA's General Timekeeping Requirements?

- Employers must maintain accurate records of all time a non-exempt employee works each workday and each workweek. The USDOL and many courts have said that an employer must accurately record and properly pay for all time the employer knows *or has reason to know* an employee is working. There are too many timekeeping scenarios to address them all here, but typical problem areas include pre- and post-shift work; shift-change overlap; opening or closing activities at restricted-hours stores; banking or post-office time; compensable training time or meeting time; compensable travel time; compensable "on-call" work; meal periods and breaks; and work done at home.
- Employers must have a system for capturing and documenting all worktime and should have clear policies supporting that system. Employers should be sure that non-exempt employees and their supervisors know how the system works and what the timekeeping policies are.
- FLSA recordkeeping regulations do not require that timeclocks be used, nor do they prescribe any other particular way in which time must be recorded.
- Employers should regularly evaluate whether time records appear to be accurate. For example, does it look like the employee is recording the exact times at which he or she starts and stops work, or instead only uniform, repetitive, or "expected" starting or stopping times or daily or weekly hours? Are the times and totals *reasonable* in view of the employee's schedule or workload, unusual or "emergency" assignments, etc.? Employers should further investigate any questions raised by such a review to ensure that timekeeping is accurate. If additional time was unauthorized, the employer should include it as hours worked but still may discipline the employee for not following a company rule.
- Employers should carefully evaluate any "rounding" of starting or stopping times. As an enforcement policy, the USDOL will not challenge a practice of "rounding" those times to the nearest five minutes or to the nearest tenth or quarter of an hour when the employer is moving from the timekeeping phase to calculating pay. However, this is true only if, over time, the employer's practice does not cause employees to be paid for less than all their worktime. The policy does not authorize employers to treat up to 15 minutes of work as "free" or "unpaid". Even if rounding is appropriate under the circumstances, it should be limited to the clerical handling of *exact times already recorded*. USDOL's enforcement policy does not prevent current or former employees from suing over rounding practices, nor does it prevent another jurisdiction from prohibiting rounding entirely for purposes of another wage-hour law.

Who Is An "Exempt" Employee?

- An employee is not exempt from the FLSA's requirements simply because he or she is salaried or commissioned, or because higher management thinks of the person as a manager or as being important or even indispensable, or because the employee "wants to be" exempt. Instead, there are specific and often-detailed criteria limiting to whom FLSA exemptions can apply. If there is a challenge, it is the *employer's* legal burden to *prove* that *each* exemption requirement is met.
- Exemption rules apply on an employee-by-employee basis. It can be risky to evaluate exemptions based simply upon things like job descriptions (particularly out-of-date ones), generalizations about the work that groups of employees do, or conventional wisdom that "everybody" treats a position as being exempt.
- There are too many FLSA exemptions to cover them all here. Most-often considered are those for Executive, Administrative, Professional, Computer, and Outside-Sales employees, and certain "Highly Compensated" employees. These are exemptions from the FLSA's minimum-wage, overtime, and timekeeping requirements. The Executive and Administrative exemptions are typically of interest to NACS members.
- The FLSA's Executive exemption applies to an employee:
  - Whose primary duty is the management of the enterprise by which he or she is employed or of a customarily recognized department or subdivision of that enterprise, *and*

- Who customarily and regularly directs the work of two or more other full-time employees (or the equivalent), *and*
- Who has the authority to hire or fire other employees, or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or other significant change of employee status are given particular weight, *and*
- Who is paid at least $684 per week on a "salary basis".

Store Managers can sometimes qualify for this exemption, but one should not *assume* that they do. Employers should thoroughly review the exemption's requirements in light of a candid evaluation of a Store Manager's actual day-to-day duties and responsibilities.

It is conceivable that this exemption might apply to Assistant Managers and similar personnel, but this is a decision to be made with the utmost care and advance analysis. At least one USDOL opinion letter concluded that particular retail-store Assistant Managers did not qualify for this exemption.

- The FLSA's Administrative exemption applies to an employee:
  - Whose primary duty is office or non-manual work that is directly related to the management or general business operations of either the employer or the employer's customers, *and*
  - Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance, *and*
  - Who is paid at least $684 per week on a "salary basis" (or on the little-used "fee basis" method that would be extremely rare in the convenience-store industry).

  It is conceivable that this exemption might apply to Store Managers, Assistant Managers, and similar personnel, but this is a decision to be made with the utmost care and advance analysis. At least one USDOL opinion letter concluded that particular retail Store Managers did not qualify for this exemption.
- Payment on a "salary basis" generally means that an employee regularly receives each pay period a predetermined amount of compensation that is not subject to reduction because of variations in the quality or quantity of the employee's work. Subject to certain exceptions, the employee must receive the full salary for every workweek in which he or she performs any work, without regard to the number of days or hours worked. In most circumstances, salary deductions are not permitted for absences occasioned by the employer or the employer's operating requirements, or for reasons of performance or work quality (such as deducting cash shortages from the salary). It is important to proceed cautiously with respect to any alternative pay structure that is intended to meet this set guarantee requirement.
- The FLSA's Section 7(i) provides an overtime exemption for an employee paid under a bona-fide commission plan if these conditions are met:
  - The person is employed by a retail or service establishment, *and*
  - *More than* 50% of the employee's compensation in a "representative period" (of at least one month) represents commissions on goods or services, *and*
  - The employee's regular hourly rate is *more than* 1.5 times the FLSA minimum wage for a workweek in which he or she works over 40 hours.

  For these purposes, a "retail or service establishment" is one 75% of whose annual dollar volume of sales is not for resale *and* is recognized as retail sales in the particular industry.

  A variety of other considerations should be considered in deciding whether and how to design and implement a pay plan intended to qualify under Section 7(i).

What Does It Mean To Pay FLSA Wages "Free And Clear"?

- FLSA wages must generally be paid "free and clear" of deductions or offsets that directly or indirectly benefit the employer. Employers must distinguish between the kinds of deductions or offsets that are and are not permitted to reduce an employee's wages below the amounts legally required, which necessitates an analysis of the reason for the deduction or offset.
- The question is broader than just whether wages are reduced by a "deduction" in a dictionary-definition sense. The limit also applies to situations in which an employee "kicks back" part of his or her wages by giving the employer cash, writing a check, or bearing the cost through some other kind of payment, repayment, or work-related purchase (such as a required uniform). Employees cannot agree to arrangements that violate these principles.
- Examples of sums that cannot cut into FLSA wages are those relating to cash shortages, "shrink" or inventory shortages, dishonored checks, "walk-outs" or "drive-offs", and unreturned employer property.
- For an employee who is subject to the FLSA's minimum wage requirement, only the excess wages can be offset by these deductions. If the employee also is subject to the FLSA's overtime requirements, however, *no part* of the time-and-one-half wages paid for hours worked over 40 in a workweek may be offset by these deductions.

- Similar, and in some cases more stringent, restrictions apply to employees paid a salary or subject to Section 7(i)'s "more than 1.5 times the FLSA minimum wage" requirement.

Are There Other Noteworthy FLSA Provisions?

- *Child Labor*: The minimum age for general non-agricultural occupations is 16 years old.
- The minimum age for certain non-agricultural occupations is generally 18 years old. Among these occupations that USDOL has declared "hazardous" are:
  - Driving on public roads (unless under prescribed conditions);
  - Operating or unloading paper balers or box compactors (exception for *loading* if a number of detailed conditions are met);
  - Operating or cleaning power-driven meat-processing machines.
- 14- and 15-year-olds may be employed only in limited occupations, subject to time restrictions.
- The exceptions are narrow and few. The only reliable protection if an employee was not, in fact, "old enough" is to have a valid, unexpired official age certificate establishing that the person is old enough to work in the particular occupation.
- The USDOL takes child-labor enforcement very seriously. It can assess civil penalties of up to $13,227 for each employee as to whom there is a violation.
- The civil penalty for a violation resulting in the death or serious injury of an employee under 18 years old can be up to $60,115 – or doubled if such a violation is found to have been "repeated" or "willful".
- *Lactation Breaks*: The FLSA now requires covered employers to grant breaktime to a worker for the purpose of expressing breastmilk for a nursing child. This obligation is contained in FLSA Section 7(r) as part of the Patient Protection and Affordable Care Act.
- An employer must provide:
  - A "reasonable" break time for an employee to express breast milk for her nursing child, each time the employee has need to do so, for one year after the child's birth,
  - A place to be used for this purpose, other than a bathroom, that is shielded from view and free from intrusion by coworkers and the public.
- The employer is not required to compensate an employee for her time spent in a "reasonable" break for this purpose, but the employer should consider the surrounding circumstances (for example, if the employee listens to a training video during the break).
- An employer of fewer than 50 employees is not subject to this break requirement *if* the requirement would impose "an undue hardship" by causing the employer significant difficulty or expense when considered in relation to the business's size, financial resources, nature, or structure.
- Many states already require these kinds of breaks. The FLSA's provision does not override any such laws extending greater employee rights than it does.
- *Retaliation*: The FLSA makes it illegal to discharge or otherwise discriminate against an employee (i) who has "filed any complaint" or "instituted or caused to be instituted any proceeding under or related to" the FLSA, or (ii) who "has testified or is about to testify in any such proceeding."
- Most courts have found a violation when an employer took action against an employee for making purely internal complaints to management about matters implicating the FLSA. For example, firing or demoting an employee who complains about being classified as exempt from overtime when they believe they are entitled to overtime.
- The FLSA permits a court to remedy employer retaliation by ordering reinstatement, back-pay, front-pay, injunctions, liquidated ("double") damages, attorney's fees, and costs. Compensatory and punitive damages are not authorized for most FLSA violations, but this is not necessarily so where retaliation is concerned. Some courts have even permitted punitive damages.
- Examples of conduct found to be unlawful include:
  - Taking adverse action against an employee for calling the USDOL to get information and then passing that information around to other employees;
  - Taking adverse action for disclosing to a U.S. Wage and Hour Division investigator that the employer did not pay the employee overtime;
  - Reporting a former employee to the U.S. Immigration and Naturalization Service;
  - Telling prospective employers that the employee had complained to the USDOL;
  - Bringing a state-court contract-breach lawsuit against an employee who filed an FLSA complaint in federal court.

How Are The FLSA's Requirements Enforced?

- The usual ways in which the FLSA is enforced include:
  - Administrative investigations by the USDOL's Wage and Hour Division;

- Lawsuits for back-pay and other monetary relief brought by one or more current or former employees (sometimes including so-called "collective actions", which are an unusual kind of class action);
- Lawsuits for back-pay and other monetary relief brought by the U.S. Secretary of Labor;
- Lawsuits by the U.S. Secretary of Labor for injunctions, such as court orders prohibiting an employer from withholding payment of the required wages, court mandates that an employer comply with the FLSA in the future, orders prohibiting the shipment of goods, or orders finding the employer in contempt of a prior court order;
- Proceedings by the U.S. Secretary of Labor to assess civil money penalties;
- Proceedings to enforce the FLSA's criminal penalties.

- Depending upon the circumstances, FLSA liability can include such things as:
  - Unpaid minimum wages and overtime due for a two-year period (three years for a "willful" violation);
  - An amount equal to the total wages due ("liquidated damages");
  - Reasonable attorney's fees and the costs of a lawsuit;
  - Civil money penalties of as much as $2,074 for each "willful" or "repeated" minimum-wage or overtime violation (this is normally a per-person assessment, and the total can be larger than the underlying wage liability);
  - The child-labor civil money penalties;
  - Remedies for retaliation described earlier;
  - Criminal penalties for willful violations, including a fine, up to six months' imprisonment, or both (there is no imprisonment for the first conviction).

What About Other Wage-Hour Laws?

- States and other jurisdictions are permitted to (and many do) have wage-hour provisions that are tougher on employers than the FLSA is. Usually, the employer must observe the most employee-favorable law applicable to the worker. Such laws might, for instance:
  - Set a minimum wage higher than the FLSA's;
  - Impose a daily-overtime requirement;
  - Require minimum pay for reporting to work;
  - Mandate extra pay for working split shifts;
  - Maintain tougher child-labor standards;
  - Strictly limit or prohibit most wage deductions;
  - Require that employees who resign or are fired must be paid within a short timeframe;
  - Limit whether or how bonuses, incentives, or commission payments can be lost or forfeited;
  - Require the payment of wages with a particular frequency.
- States and other jurisdictions might not recognize the same exemptions or exceptions under their own laws that exist under the FLSA, or they might recognize similar-sounding exemptions or exceptions only under different or more-limited conditions.
- Increasingly, local governments have been adopting so-called "living wage" ordinances requiring employers doing business with or receiving benefits from them to pay higher wage rates than the federal and/or state minimum wage. Some expand coverage to all of the employers in the locality.
- Special federal wage-hour laws might apply to a business that is a prime contractor, a subcontractor, or a "substitute manufacturer" on certain federal government contracts.