

The Labor, Employment & Immigration  
Group of Ballard Spahr Presents:

## Watch Your Step: Auditing Your Way Through the Wage and Hour Minefield

October 10, 2008

Voorhees, NJ

Speakers:

Patricia A. Smith

Edward T. Groh

BallardBriefing  
2008

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# BallardBriefing

## **Watch Your Step: Auditing Your Way Through the Wage and Hour Minefield**

**October 10, 2008**

Registration and Breakfast: 8:00 a.m. to 9:00 a.m.

Seminar Presentation: 9:00 a.m. to 10:30 a.m.

Presenters:

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# Watch Your Step: Auditing Your Way Through the Wage and Hour Minefield

## **I. BASIC PRINCIPLES**

### **A. The Fair Labor Standards Act of 1938**

1. The FLSA, 29 U.S.C. §§ 201-219, is a federal law that sets the minimum wage and governs overtime payments for workers throughout the country.
2. It is enforced by the U.S. Department of Labor or through private lawsuits.
3. The FLSA requires employers to:
  - a. Pay at least the federal minimum wage to all covered non-exempt employees for all hours suffered or permitted to work (currently \$6.55/hr as of July 24, 2008 and increasing to \$7.25/hr on July 24, 2009).
  - b. Pay at least 1.5 times the employee's "regular rate" for all time worked over 40 hours in a week.
  - c. Comply with child labor laws.
  - d. Comply with recordkeeping requirements.
4. Provides for two years of back pay (three in the case of willful violations) plus fines and penalties for violations.
5. The FLSA sets the floor on employees' rights and employers' obligations. State law, contracts and collective bargaining agreements may impose stricter requirements.
6. The FLSA is the principle source of wage and hour obligations applicable to all Pennsylvania employers.

### **B. Pennsylvania wage and hour laws – Pennsylvania Minimum Wage Act (PMWA) and Wage Payment and Collection Law (WPCL)**

1. The PMWA is generally modeled after and consistent with the FLSA, but has some significant differences.
2. The PMWA and WPCL are enforced by the Pennsylvania Department of Labor and Industry or through private lawsuits.
3. The PMWA is not nearly as litigated as FLSA violations.

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4. Pennsylvania law imposes a higher minimum wage than the FLSA:
  - a. Current Pennsylvania minimum wage: \$7.15/hr (since January 1, 2007).
  - b. As of July 1, 2009, Pennsylvania minimum wage will be \$7.25/hr.
5. Pennsylvania does not follow the 2004 changes to FLSA exemption rules:
  - a. Pennsylvania has no special exemption for highly compensated employees;
  - b. Pennsylvania's "learned professional" exemption still requires a prolonged course of specialized intellectual instruction (under FLSA rules, work experience may substitute for formal instruction);
  - c. Pennsylvania has no specific exemption for computer professionals; and
  - d. Pennsylvania still requires all exempt employees be paid on a "salary basis," without exception, but does not define "salary basis."
6. The PMWA and WPCL provide for three years of back pay plus liquidated damages.

## **C. New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a et seq.**

1. The Wage and Hour Law is enforced by the Wage and Hour Division of the New Jersey Department of Labor.
2. The Commission and his authorized representatives have the power to:
  - a. Investigate and ascertain the wages of any employee;
  - b. Enter and inspect places of business or employment for the purpose of:
    - (1) Examining any records relevant to wages;
    - (2) Copying any records relevant to wages;

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- (3) Obtaining written statements, including sworn statements, relating to wages from employees; and
- (4) Investigate whether any occupation where the Commission believes, or fifty or more residents of New Jersey sign a petition alleging, that a substantial number of employees are receiving less than a “fair wage.” N.J.S.A. 34:11-56.a6-7.

## **D. Collective bargaining agreements (CBAs)**

1. CBAs frequently contain obligations that go beyond the requirements of the law.
2. Violations are enforced through the grievance/arbitration procedure set forth in the CBA.
3. Obligations may be modified or eliminated through subsequent bargaining or interest arbitration.
4. Although some CBA provisions can affect overtime obligations under the FLSA (e.g., clock-time premiums), they cannot abridge employee’s rights under the FLSA.

## **E. Individual employment agreements**

1. Employers may enter into agreements with individual employees (who are not represented by a union) that create additional obligations.
2. Written agreement is not necessarily required; the agreement can be oral.
3. Generally enforceable only through private litigation (for breach of contract).
4. Agreements cannot waive an employee’s statutory rights.

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## **II. CONDUCTING AN AUDIT GENERALLY**

A comprehensive audit has two parts: (1) ensuring that employees are correctly classified as exempt and non-exempt and (2) ensuring that non-exempt employees are being paid correctly. The first part of the audit – the classifications – requires an analysis of employees’ job duties, as well as a review to ensure that employees you classify as exempt are, in fact, being paid in a way that meets all the requirements of the “salary basis” tests. The second part of the audit – the payroll practices – requires an analysis of whether employees are being paid for all their “working time,” as well as a review to ensure that the actual pay employees receive has been correctly computed. Both parts of the audit raise their own traps for the unwary.

## **III. HANDLING EXEMPTION ISSUES**

### **A. 2004 Changes to Department of Labor’s FLSA Regulations**

1. On August 23, 2004, major changes to the U.S. Department of Labor’s long-standing FLSA regulations governing overtime exemptions went into effect. These exemption regulations are found in the Federal Code of Regulations, Title 29, Part 541.
2. Among the most significant changes, the revised regulations:
  - a. Raised minimum salary levels for exempt employees to \$455 per week;
  - b. Eliminated “long tests” and “short tests” and replaced them with new and reorganized “duties tests;”
  - c. Made significant changes to the “salary basis” test;
  - d. Established an entirely new exemption for highly compensated employees.

### **B. The Major Exemption Categories**

1. Executive
2. Administrative
3. Learned Professional
4. Creative Professional
5. Computer Professional

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6. Outside Sales
7. Highly Compensated Employees

## **C. The Executive Exemption**

1. To qualify for the executive exemption, employees must:
  - a. Be paid on a salary basis at least \$455 per week;
  - b. Have as their primary duty management of the enterprise or a recognized department or subdivision;
  - c. Customarily and regularly direct the work of two or more other employees; and
  - d. Have authority to hire or fire or have their recommendations as to hiring, firing, promotions or other changes of status be given particular weight.

29 C.F.R. § 541.100.
2. The regulations made two changes to the old “short test”:
  - a. Raised the minimum salary level to \$455 per week;
  - b. Added a requirement (taken from the old “long test”) that exempt executive employees must have the authority to hire or fire, or that their recommendations as to hiring and firing must be given particular weight.
3. The “sole charge” exemption has been eliminated.
4. Exemption added for business owners with at least a 20% equity interest, who are engaged in management of the business, but who need not be paid on a salary basis. See 29 C.F.R. § 541.101.

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## **D. The Administrative Exemption**

1. To qualify for the administrative exemption, employees must:
  - a. Be paid on a salary basis at least \$455 per week;
  - b. Have as their primary duty 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
  - c. Exercise discretion and independent judgment with respect to matters of significance.

29 C.F.R. § 541.200.
2. The test closely tracks the old "short test" but raises the minimum salary level to \$455 per week.
3. Factors that reflect an employee's exercise of discretion and independent judgment:
  - a. Authority to formulate management policies or operating practices;
  - b. Authority to perform work that substantially affects business operations;
  - c. Authority to commit the employer in matters with significant financial impact;
  - d. Involvement in planning business objectives;
  - e. Representing the employer in handling investigations, handling complaints, arbitrating disputes, or resolving grievances.

29 C.F.R. § 541.202.
4. The regulations also provide examples of positions that generally meet the administrative duties test:
  - a. Insurance claims adjusters
  - b. Analysts in the financial services industry

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- c. Human resource managers
- d. Labor relations managers
- e. Credit managers
- f. Traffic managers
- g. Management consultants
- h. Purchasing agents
- i. Administrative assistants to business owners or senior executives who have been delegated authority regarding matters of significance.

29 C.F.R. § 541.203.

- 5. *Burns v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, (N.D. Cal. 2006).
  - a. Merrill Lynch reached a \$37 million settlement with its securities brokers, who claimed, among other things, that it failed to properly pay them overtime, and sued for unpaid overtime wages.
  - b. Merrill Lynch argued that the brokers were exempt administrative employees.
  - c. The brokers argued that none of their duties constituted “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.”
- 6. Other professions that are a frequent source of misclassification claims:
  - a. Executive assistants
  - b. Insurance adjusters
  - c. Mortgage loan officers
  - d. Copy editors
  - e. Loss prevention managers and employees

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## **E. The Learned Professional Exemption**

1. To qualify for the learned professional exemption, employees must:
  - a. Be paid on a salary basis at least \$455 per week; and
  - b. Have as their primary duty the performance of office or non-manual work:
    - (1) That requires knowledge of an advanced type,
    - (2) In a field of science or learning,
    - (3) That is customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience.

29 C.F.R. § 541.301.
2. The regulations make three changes to the old “short test”:
  - a. Raised the minimum salary level to \$455 per week;
  - b. Eliminated the “discretion and independent judgment” criteria; and
  - c. Now permit an individual who has acquired the requisite advanced knowledge through a combination of experience and education to qualify for the exemption, so long as the required knowledge usually is acquired through education, rather than experience.
3. Examples of professions that generally will qualify:
  - a. Registered nurses, certified medical technologists, dental hygienists and physician assistants
  - b. Accountants
  - c. Chefs who have attained specialized academic degrees in a culinary arts program
  - d. Athletic trainers

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- e. Funeral directors
  - 4. Professions that generally will not qualify:
    - a. Licensed practical nurses
    - b. Bookkeepers
    - c. Paralegals and legal assistants
- 29 C.F.R. § 541.301(e).
- 5. The regulations continue the special professional exemptions for teachers, doctors and lawyers, who are considered exempt employees even if not paid on a salary basis. See 29 C.F.R. §§ 541.303, 541.304.

## **F. The Creative Professional Exemption**

- 1. To qualify for the creative professional exemption:
    - a. Employees must be paid on a salary basis at least \$455 per week; and
    - b. Have as their primary duty the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.
- 29 C.F.R. § 541.302.
- 2. The only difference in the regulations compared with the old “short test” is the increased salary level.

## **G. The Computer Professional Exemption**

- 1. To qualify for the exemption, computer professionals now must:
  - a. Be paid on a salary basis at least \$455 per week or on an hourly basis at least \$27.63 per hour; and
  - b. Have as their primary duty either (a) application of systems analysis techniques and procedures; or (b) design, development, documentation, analysis, creation, testing or modification of computer systems or programs; or (c) design, documentation, testing, creation or modification of computer programs related to

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machine operating systems; or (d) a combination of duties described in (a), (b) and (c); and

- c. Be employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.

29 C.F.R. § 541.400.

- 2. The regulations adopt the Section 13(a)(17) duties test and retain the \$27.63 hourly minimum for computer employees paid on an hourly basis.

- 3. The regulations also raise the minimum salary to \$455 per week for computer professionals paid on a salary basis.

- 4. *Martin v. Ind. Mich. Power Co.*, 381 F.3d 574 (6th Cir. 2004).

- a. The employer classified its IT Support Specialists as exempt computer employees.

- (1) An employee sued the employer to recover unpaid overtime wages, arguing that the position was non-exempt.

- (2) The Sixth Circuit found that the employee was non-exempt, and ordered summary judgment in his favor.

- (3) To determine whether the employee was an exempt computer employee, the court looked at the actual duties that he performed.

- b. The employee performed such functions as:

- (1) maintaining computer workstation software,

- (2) troubleshooting and repairing,

- (3) network documentation, and

- (4) responding to calls from other employees who were having trouble with their computers.

- c. There was no evidence that he recommended the purchase of any equipment, hardware or software. Additionally, the employee

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would assist in installing a network system, but he was not responsible for designing or developing the network.

- d. Because he did not perform the type of work required by the primary duties test, the employee was not an exempt computer employee.
- e. The court also awarded liquidated damages because there was no evidence that the employer had made the classification in good faith.
- f. Liquidated damages are available in an amount equal to the amount of unpaid overtime wages. An employer may avoid liquidated damages by showing that it made the classification in good faith with reasonable grounds for its belief.

## **H. The Outside Sales Exemption**

1. To qualify for the outside sales exemption, employees must:
  - a. Have as their primary duty the making of sales or obtaining of orders or contracts for services or for the use of facilities for which consideration will be paid by the client or customer; and
  - b. Be customarily and regularly engaged away from the employer's place or places of business (a sales employee working out of his or her home does not, in itself, qualify).

29 C.F.R. § 541.500.
2. As under the old regulations, telephone and Internet sales are not considered time spent away from the employer's place of business. See 29 C.F.R. § 541.502.
3. The old "long test" for outside sales employees (there was no separate "short test") has now been replaced with a more streamlined test.
4. There continues to be no minimum salary requirement.
5. The regulations maintain the requirement that outside sales employees must be regularly employed away from the employer's place of business, but have eliminated the percentage-of-time-spent-on-sales requirement.

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## **I. Highly Compensated Employees Exemption**

1. To qualify, employees must:
  - a. Be paid at least \$455 per week on a salary basis and receive total annual compensation of \$100,000 or more (including non-discretionary bonuses and commissions);
  - b. Perform office or non-manual work; and
  - c. Customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee.

29 C.F.R. § 541.601.
2. Employers may designate the annual period for determining the employee's annual salary (otherwise, a calendar year test will apply). 29 C.F.R. § 541.601(b)(4).
3. Employers have a one month window for correction at the end of the employee's salary year (helpful when employee's salary is part bonus or commission, which may not be finally determined until the end of the year). 29 C.F.R. § 541.601(b)(2).
4. For employees who work only part of the year, the required minimum salary level is prorated based on the number of weeks worked. See 29 C.F.R. § 541.601(b)(3).
5. Pennsylvania has not adopted this FLSA exemption. See 34 Pa. Code §§ 231.81-.85.

## **J. Important changes to the salary basis test**

1. The DOL made three significant changes to the salary basis test in the 2004 amendments:
  - a. Raised minimum salary levels to \$455 per week;
  - b. Permitted pay docking for certain serious disciplinary offenses; and
  - c. Added a new "safe harbor" provision for improper deductions.
2. Permissible pay docking

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- a. Pay may be docked (without jeopardizing exempt status) only:
  - (1) When an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability;
  - (2) When an exempt employee is absent for one or more full days for sickness or disability, if deduction is made in accordance with bona fide plan of providing compensation for loss of salary occasioned by such sickness or disability;
  - (3) When an exempt employee violates important safety rules;
  - (4) When, in good faith, an exempt employee is suspended for one or more full days for infractions of workplace conduct rules (must meet criteria listed below):
    - (a) Salary must be docked in full day increments
    - (b) Applies only to serious, written workplace conduct rules applicable to all employees (e.g., sexual harassment, workplace violence, drug and alcohol policies), not for issues like attendance
    - (c) Employees must receive prior notice that they can be suspended for violation of such rules
  - (5) For initial and terminal weeks of employment; or
  - (6) When an exempt employee takes unpaid leave under the FMLA.

29 C.F.R. § 541.602(b)

3. Effect of improper deductions
  - a. An employer who has a practice of making improper deductions will lose the exemption for all employees who are in the same job classification working for the same managers responsible for the improper deductions during the entire time period when improper deductions were made.

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- b. Factors used to determine if the employer has a practice of making improper deductions include:
    - (1) The number of improper deductions;
    - (2) The time period in which deductions were made;
    - (3) The number and geographic location of affected employees;
    - (4) The number and geographic location of managers responsible for the improper deductions; and
    - (5) Whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.
  - c. Isolated or inadvertent improper deductions will not result in loss of the exemption if the employees are reimbursed (*i.e.*, the “window of correction”). See 29 C.F.R. § 541.603.
4. Improper deductions – the safe harbor provisions
- a. Despite an impermissible deduction, an employee will not lose exempt status if the employer:
    - (1) Has a written policy prohibiting improper pay deductions including a complaint mechanism;
    - (2) Notifies employees of that policy;
    - (3) Reimburses employees for any improper deductions; and
    - (4) Does not repeatedly and willfully violate the policy or continue to make improper deductions after receiving employee complaints.

29 C.F.R. § 5 41.603.
5. Additional payments to exempt employees
- a. The regulations clarify the DOL’s position that exempt employees may receive certain payments in addition to their salary without losing their exempt status.

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- b. Permissible payments to exempt employees:
  - (1) Overtime (either straight time or time-and-a-half), even if paid on an hour for hour basis for additional time worked;
  - (2) Compensatory time off, even on an hour for hour basis for additional time worked;
  - (3) Bonus payments;
  - (4) Commissions.

29 C.F.R. § 541.604.

## 6. Minimum guarantee plus extras

- a. Exempt employees may have their earnings computed on an hourly, daily or shift basis if the following tests are met:
  - (1) The employee receives a guaranteed amount each week (which must be at least \$455 per week) regardless of the number of hours, days or shifts worked; and
  - (2) A reasonable relationship exists between the guaranteed amount and the amount actually earned (i.e., the weekly guarantee is roughly equivalent to the employee's usual weekly earnings).

29 C.F.R. § 541.604(b).

## **K. Exemption rules – application of state law**

### 1. Pennsylvania

- a. In Pennsylvania, employees are exempt only if they satisfy all the requirements of both the state and federal tests.
- b. The Pennsylvania overtime statute follows the old federal short and long tests.
- c. Generally, employees in Pennsylvania may be properly characterized as exempt under both state and federal law if:
  - (1) They were exempt under the old federal short or long test;

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- (2) They satisfy the FLSA test for an exempt executive, administrative, professional or outside sales employee; and
    - (3) They are paid on a salary basis, as that term is defined in the FLSA regulations.
  - d. Employees who were not exempt under the old federal short or long duties test cannot be exempt in Pennsylvania, even if they would be exempt under the federal rules.
  - e. As a result, Pennsylvania employers are not permitted to take advantage of the new federal highly compensated employee exemption.
  - f. Nor does Pennsylvania recognize an exemption for business owners.
  - g. Pennsylvania employers will be permitted to take advantage of the changes to the federal salary basis test, including the new safe harbor provisions, because Pennsylvania does not define what it means to be paid on a salary basis.
2. New Jersey
- a. Like Pennsylvania, employees are exempt in New Jersey only if they satisfy all the requirements of both the state and federal tests.
  - b. New Jersey has separate and distinct exemption rules from the FLSA.
    - (1) Executive exemption. N.J.A.C. 12:56-7.1 (All six factors must be met)
      - (a) Primary duty is the management of:
        - (i) The enterprise in which he is employed; or
        - (ii) A recognized department or subdivision thereof; and
        - (iii) Customarily and regularly directs the work of two or more other employees; and

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- (b) Has authority to hire or fire other employees or to make recommendations as to hiring, firing and the advancement, promotion, or change of status of employees; and
  - (c) Customarily and regularly exercises discretionary powers; and
  - (d) Receives payment on a salary basis at a rate of not less than \$400.00 per week; and
  - (e) Does not devote more than 20% of the hours worked in a workweek to activities which are not directly and closely related to the performance of exempt work, with exception of:
    - (i) Executive employees in retail or service establishments who may devote up to 40% of the hours worked in the workweek to activities not directly or closely related to executive activities; or
    - (ii) An employee who owns at least a 20% interest in the enterprise in which he is employed.
- (2) Administrative exemption. N.J.A.C. 12:56-7.2. (Tests: (a),(b), (d), and (e) must *all* be met along with one of the three tests in (c).)
- (a) Primary duty is the performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers; and
  - (b) Customarily and regularly exercises discretion and independent judgment; and
  - (c) One of these three tests:
    - (i) Regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity, or

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- (ii) Performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or
    - (iii) Executes under only general supervision special assignments and tasks; and
  - (d) Does not devote more than 20% of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described above; with the exception of administrative employees in retail or service establishments who may devote up to 40% of the hours worked in the workweek to activities not directly and closely related to administrative activities; and
  - (e) Receives payment on a salary or fee basis at a rate of not less than \$400.00 per week.
- (3) Professional Exemption. N.J.A.C. 12:56-7.3. Tests: One of the alternate requirements under (a) and all of the requirements (b), (c), (d), and (e) must be met.
- (a) Employee must have as his primary duty either (1) work requiring knowledge of advanced type in a field of science or learning; or (2) original and creative work in an artistic field; or (3) work requiring theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and who is employed and engaged in these activities as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field, as provided in 29 C.F.R. § 541.303; and
  - (b) Work requires the consistent exercise of discretion and judgment; and
  - (c) Work must be predominantly intellectual and varied in character as opposed to routine mental, manual,

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- mechanical, or physical work and of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and
  - (d) Time spent in activities not an essential part of and necessarily incident to professional duties may not exceed 20% of employee's own weekly hours worked; and
  - (e) Receives payment on a salary or fee basis at a rate of not less than \$400.00 per week.
- (4) Outside Sales Exemption. Under New Jersey Law, an outside salesman is exempt if the employee meets tests set out in (a) and (c), along with *one* of the tests set out in (b).
- (a) Employee is customarily and regularly engaged away from the employer's place or places of business; and
  - (b) Employee is engaged either in:
    - (i) Making sales; or
    - (ii) Obtaining orders or contracts for services or facilities for which consideration will be paid; and
  - (c) Employee does not devote more than 20% of his time to non-exempt duties. N.J.A.C. 12:56-7.4.

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## **L. Pointers for Conducting Classification Audits**

1. Make sure that the audits are conducted by counsel or an experienced human resources professional familiar with the FLSA regulations, DOL interpretations and court decisions.
2. Choose a comprehensive or selective scope of analysis.
3. Choose a data collection method.
  - a. Questionnaires;
  - b. Employee and/or supervisor interviews;
  - c. Content analysis;
  - d. Detailed daily work logs; or
  - e. A combination of the above.
4. Focus on current job responsibilities and avoid reliance on traditional notions of how jobs are done.
5. Rely on job duties, not job titles.
6. Evaluate the scope of the employee's job responsibilities. Focus on what the employee does on a day-to-day basis and how they do it.
7. Do not confuse "salaried" with "exempt."
8. Not all "supervisors" are exempt.
9. Be careful not to prey to office politics in classifying employees.
10. Review and revise out-of-date job descriptions.
11. Implement the results of the audit!

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## IV. COMMON PITFALLS WHEN AUDITING PAYROLL PRACTICES

Once an employer determines that its employees have been properly classified as exempt and non-exempt, the hard work of ensuring that non-exempt employees are being properly compensated begins. Two major issues arise: (1) what hours need to be included as “hours” worked and (2) what rate needs to be paid? These issues are discussed in turn below.

### A. Working Time Under The FLSA - General Principles

#### 1. Work Defined

- a. “Employ,” under the Act, means “to suffer or permit to work.” 29 U.S.C. § 203(g). While Congress did not define the word “work,” courts have explained it as exertion or loss of an employee’s time that is:
  - (1) controlled or required by an employer,
  - (2) pursued necessarily and primarily for the employer’s benefit, and
  - (3) if performed outside the scheduled work time, an integral and indispensable part of the employee’s principal activities.
- b. Despite guidance from the courts, deciding what is “working time” is not easy, especially when it may involve unauthorized work, telecommuting, work through meal or rest breaks, donning and doffing of specialized clothing and equipment, on-call time, off-duty care for job-related equipment or assets, and travel time.
- c. Neither the FLSA nor PA law *requires* breaks for adult workers. As a practical matter, however, nearly all employers provide breaks anyway. Employers may also have other non-productive periods during the workday. Whether these periods are compensable depends on the length of time, what limits are in place on the employees’ activities, and who is benefited.
- d. Some of the most difficult “working time” determinations involve time spent by employees outside of their regular shifts and/or away from the employer’s premises. Particularly problematic areas include: on-call time; off-duty care for job-related equipment or assets such as uniforms, vehicles, real property (land or buildings),

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and animals; or other “off the clock” time. When paid, this work outside the shift can be paid at a different rate than the employee’s usual rate.

2. Even Unauthorized Overtime Is Work: “Work Is Work, After All.”
  - a. Again, employers must pay for all time when employees are suffered or permitted to work, even when the work is unrequested.
  - b. *Example:* A nursing staffing agency maintained a policy designed to limit unauthorized overtime. In cases where the agency had not authorized overtime or failed to negotiate an increased fee with a client hospital where a staffed nurse had worked some overtime, the nurse would receive a straight-time rate for the extra hours worked. The agency argued that because it neither benefited nor controlled the nurses’ unauthorized overtime, such time was not work time under the FLSA. The court, however, disagreed, and concluded, “Whether a nurse is working a morning, afternoon or night shift in emergency care, an operating room, or on a hospital floor, the overtime hours are indistinguishable from the straight-time hours. Such work from the nurses’ standpoint is fungible. Work is work, after all.” The court also found that an employer could not avoid liability by merely claiming that an employee’s work was unprofitable. Moreover, just because the agency claimed no control over a nurse’s decision to work overtime did not change the nature of the nurse’s exertion as compensable work. *Chao v. Gotham Registry, Inc.*, No. 06-2432, 2008 U.S. App. LEXIS 1327 (2d Cir. Jan. 24, 2008).
  - c. Note, however, that even though an employer must pay its employees for unauthorized overtime work, the employer may nevertheless discipline employees who perform unauthorized work. 29 C.F.R. § 785.13.
3. Telecommuting
  - a. The expansion of modern technology has resulted to an increasing number of telecommuters, raising potential overtime issues for employers. Whether or not an employee is entitled to overtime is determined by the employee’s actual job duties, not where the work is actually performed. The fact that the employee is working from home does not alter the requirement to pay overtime. The

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FLSA does not distinguish between work in an office and “work performed away from the premises or the job site, or even at home.” 29 C.F.R. §785.12.

- b. The FLSA provides that “[i]f the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked.” 29 C.F.R. §785.12. It also requires that an employer maintain payroll records accurately recording the total hours worked during the workweek. 29 C.F.R. §516.2(a)(7). Thus, to limit liability, an employer must establish some way to track the hours worked by a telecommuting employee.
- c. Despite working from home, the telecommuting arrangement may involve an element of travel, whether to and from the employer’s worksite, after the first principal activity in the workday, or even to a different location for special project. An employer should be aware of the travel rules (see below) that may render some of this travel time as hours worked and compensable. For instance, travel time beyond the normal commute time outside a city for a unique assignment is compensable. 29 C.F.R. §785.37.
- d. *Example:* Telecommuting medical claim processors employed by Cigna Healthcare of California, Inc., filed a class action lawsuit seeking overtime and mileage compensation for hours spent traveling to and from mandatory meetings during the workday. They also alleged that they were entitled to pay when the computer systems went down, despite an expectation that the employees would “stand by” during the outage. The case appears to still be in its early stages of litigation. *Swagerty v. Cigna Healthcare of Cal., Inc.*, No. 1:06-cv-01598 (E.D. Cal. Nov. 8, 2006).

## 4. Compensable Meal Periods Under The FLSA

- a. “Bona fide meal periods” are not working time and need not be paid. 29 C.F.R. § 785.19. There are two criteria for a “bona fide” (*i.e.*, unpaid) meal period:
  - (1) The break must generally be at least 30 minutes long, though in exceptional cases it may be shorter; and
  - (2) The employee must be completely relieved of all duties for the purpose of eating a meal.

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- b. *Example:* In case where management and corrections officers union agreed that 20 minutes would be long enough (because of, among other things, employees' proximity to dining hall) and where all parties wished to reduce 30 minute unpaid meal break to 20 minutes in exchange for an additional 10 minute paid rest break during shift, DOL found 20 minutes sufficient for a "bona fide meal period." See Wage & Hour Op. Letter FLSA 2004-22 (Nov. 22, 2004).
- c. *Example:* Employees at a manufacturer of surgical sutures and needles complained that the manufacturer forced them to use their thirty-minute lunch break for taking off and putting on their gowns. However, the circuit court upheld the district court's findings that the employees actually received 36 minutes for lunch, and 6 of these minutes were designated as paid time for gowning and degowning. In addition, the court noted that the manufacturer had procedures for complaining about the time actually worked, and no employee had ever reported that the 36 minute lunch period had forced the employee to lose lunch time due to gowning or degowning. *Bejil v. Ethicon Inc.*, 269 F.3d 477 (5th Cir. 2001).
- d. The employer may require the employee to stay on the premises, as long as the employee is otherwise completely freed from duties, whether active or passive (*e.g.*, eating at desk to answer the phone). However, work done *voluntarily* by an employee during his or her meal period can render the meal period compensable working time if the employer knows or has reason to know the employee is doing work.
- e. Employees who work through meal breaks that they have been promised under their employers' policies may have also claims under state wage payment laws. For instance, in recent years, hourly employees of Walmart filed class actions in several states claiming that they were forced to work off the clock and through lunch and meal breaks, one of which in Pennsylvania resulted in a \$62 million verdict in October 2007.

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## 5. Compensable Rest Periods Under The FLSA

- a. Rest periods, or breaks, of short duration (typically 5 – 20 minutes) must be paid as working time. *See* 29 C.F.R. § 785.18.
- b. *Example:* A manufacturer required its employees to take two 15-minute coffee breaks because it determined that the breaks increased efficiency. The court determined that these breaks should be treated as compensable work time because of the benefits they provided to the manufacturer and because they were too short for the employees to use them for their own personal purposes. *Mitchell v. Greinetz*, 235 F.2d 621 (10th Cir. 1956).
- c. Breaks that exceed an employer's rules need not be counted as working time if the employer has expressly and unambiguously communicated limitations on rest breaks and advised employees of the consequences for violating the policy. Where a break exceeds the length permitted under an employer's clearly established and communicated rules, only the duration of the unauthorized extension may be treated as unpaid, non-working time. Wage & Hour Op. Letter FLSA 2001-16 (May 19, 2001).

## 6. Waiting Time

- a. The regulations draw a distinction between when an employee is “engaged to wait” and when an employee “waits to be engaged.” 29 C.F.R. § 785.14. The former is compensable, while the latter is not. Even if the employee may leave the premises briefly during periods of inactivity, she must be paid for that time if she cannot use it for her own purposes. 29 C.F.R. § 785.14.
- b. For brief periods of time, employers may raise the de minimis rule, which provides that an employer, in recording working time, may disregard “insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes.” 29 C.F.R. § 785.47. The de minimis rule applies only where the time involved is “of a few seconds or minutes duration, and where the failure to count such time is due to . . . industrial realities. An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working

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time or practically ascertainable period of time he is regularly required to spend on duties assigned to him.” *Id.*

- c. *Example:* Assembly line workers at a frozen food packaging plant sought compensation for time spent waiting “off the clock” that was between 15 and 45 minutes. The court ruled that because they could not use time effectively for their own purposes, they must be compensated for the waiting time. However, they were not entitled to compensation for waiting times longer than 45 minutes, since they were not required to remain on employer’s premises. The court also found the “de minimis rule” to be inapplicable to periods of wait less than 15 minutes because the punching-clock system could adequately track those increments of time. *Mireles v. Frio Foods*, 899 F.2d 1407 (5th Cir. 1990).

## 7. Sleeping time

- a. If an employee is on duty for less than 24 hours, he is at work even when he is allowed to sleep or use down time for other personal activity. 29 C.F.R. § 785.21.
- b. If an employee must be on duty for 24 hours or more, the employer and employee may agree to exclude a bona fide sleep period. The sleep period must be regularly scheduled and not more than eight hours, and the employer should provide adequate sleeping facilities where the employee may take five hours of interrupted sleep. 29 C.F.R. § 785.22.

## 8. Meetings and Training

- a. Typically, time employees spend attending (and possibly traveling to) lectures, meetings, and training do not count as working time if all of the following conditions are satisfied:
  - (1) The session is outside of the employee’s regular working hours;
  - (2) Attendance is voluntary;
  - (3) The lecture, meeting or training is not “directly related” to the employee’s job; and

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- (4) The employee does not perform productive work during the lecture, meeting or training. 29 C.F.R. § 785.27-.29.
- b. If attendance is required by the employer or if an employee believes that her working conditions or her continued employment would be adversely affected by non-attendance, attendance is not voluntary and an employee must be compensated.
  - c. *Example:* The DOL has advised that where training is required by a child care employer, the “voluntary” element in 29 C.F.R. § 785.27 would not be met because the employer control the employee’s time. On the other hand, seminars or classes required by the state for individual licensing in the child care field, such as continuing education requirements, would be considered voluntary. *See Wage & Hour Op. Letter, 1996 WL 1031798 (Sept. 9, 1996).*
  - d. Training is “directly related” to the employee’s job if it is intended to increase an employee’s efficiency rather than training her for another skill or job.
  - e. *Example:* DOL suggested in the same opinion letter that attendance at training of general applicability that “enables the individual to gain or continue employment with any employer” need not be compensated. One important factor to consider is whether the state has imposed licensing requirements on the employer or the employee. In the former circumstance it is more likely that the time must be compensated; in the latter it is less likely. *See Wage & Hour Op. Letter, 1996 WL 1031798, (Sept. 9, 1996).*
  - f. *Example:* Post office clerks participated in a “scheme study,” which involved memorizing lists of specific address components and practicing manual distribution of mail, and in training on letter-sorting machines. The court ruled that the study and training time was compensable under FLSA because it was controlled by the postal service and the activities were being performed for the benefit of the postal service, plus activities are integral part of clerk’s principal activity of distributing mail. *Donovan v. U.S. Postal Service*, No. 78-602, 1981 U.S. Dist. LEXIS 17145 (D.D.C. Oct. 23, 1981).



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- d. *Example:* Chicken processing plant workers were required by their employer to put on and take off safety and sanitary clothing, and engage in washing activities, 6 times a day, before and after their paid shifts and 2 daily meal breaks. The Third Circuit concluded that “exertion is not in fact, required for activity to constitute ‘work.’” Instead, donning and doffing activity is work if it is “controlled or required by the employer and pursued for the benefit of the employer.” *De Asencio v. Tyson Foods Inc.*, 500 F.3d 361 (3d Cir. 2007).
- e. In a union setting, the FLSA exempts employers from paying a unionized employee for “any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved . . . by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.” 29 U.S.C. § 203(o).
- f. *Example:* Unionized poultry plant employees were required to put on the protective equipment like smocks, hair or beard nets, gloves and hearing protection gear before a production line began running, and to take it off only after the line stopped. The poultry plant operator paid the employees only during the time the line was running, so they were not paid for the “donning and doffing” time. The court concluded that the operator was not required to compensate them employees for the donning/doffing time because the practice under a collective bargaining agreement did not require such payment. Interestingly, the court applied the FLSA exception for time spent changing clothes to the donning/doffing activities here even though the employees did not have to disrobe or remove other clothing and even though the policy was never discussed during union contract negotiations. *Anderson v. Cagle's Inc.*, 488 F.3d 945 (11th Cir. 2007).
- g. *Example:* Unionized employees sued their employer, a maker and manufacturer of various food products, for failure to pay for donning and doffing of sanitary and protective safety gear (hair nets, beard nets, safety glasses, and uniforms). The district court found that all of the items were “clothes” for purposes of § 203(o) - or, for the hair nets and beard nets, the time devoted to donning the items was de minimis. The court stated “whether a particular item of protective gear should be considered ‘clothes’ under

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§ 203(o) depends on the exact nature of the item and the exact circumstances under which it is used.” The court also said that there were three factors--time, knowledge, and acquiescence--to be considered when deciding whether there was a “custom or practice” for purposes Section 203(o) of the FLSA. Here, the record showed a six-year history of nonpayment for donning and doffing time. Yet, there was no evidence that the union had complained to management or that union employees had raised the issue of nonpayment amongst themselves, undermining the notion that the employees had knowingly acquiesced in the policy. Thus, the court denied the employer’s motion for summary judgment because the evidence was insufficient to establish a “custom or practice” under the relevant collective bargaining agreement of nonpayment for clothes-changing time. *Kassa v. Kerry, Inc.*, 487 F. Supp. 2d 1063 (D. Minn. 2007).

- h. Other types of preliminary and postliminary activities at the start and end of the shift are subject to the same analysis as donning and doffing time.
- i. *Example:* Employees of a nuclear power plant sought compensation for time spent on security-related activities entering and exiting the plant. The activities ranged from waiting in line at the vehicle entrance to the final card-swipe and handprint analysis. Analogizing these activities to the “preliminary” and “postliminary” activities defined in the Portal-to-Portal Act, the court found that they were necessary for security but not integral to principal work activities. The fact that the security precautions were rigorous and lengthy did not render them principal activities of the employment. *Gorman v. Consol. Edison Corp.*, 488 F.3d 586 (2d Cir. 2007).

## 10. On-Call Time

- a. Employers must compensate employees for on-call time when such time is spent “predominantly for the employer’s benefit.” *Armour & Co. v. Wantock*, 323 U.S. 126 (1944). Determining whether time spent is on-call time is fact-specific, case-by-case analysis. *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The inquiry focuses on the amount of freedom employees enjoy while on call and whether it is sufficient to allow employees to use the time

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effectively for their own purposes. 29 C.F.R. § 785.17. Some important factors to consider are:

- (1) The terms of the employment or collective bargaining agreement, if any;
- (2) Physical restrictions placed on the employee while on-call;
- (3) The frequency of calls during typical on-call periods;
- (4) How restrictive the fixed or expected response time is; and
- (5) How the employee actually uses his or her time while on-call.

- b. Regulation 553.221, which applies only to public sector employers, provides important guidance:

An employee who is not required to remain on the employer's premises but is merely required to leave word at home or with company officials where he or she may be reached is not working while on call. Time spent at home on call may or may not be compensable depending on whether the restrictions placed on the employee preclude using the time for personal pursuits. Where, for example, a firefighter has returned home after the shift, with the understanding that he or she is expected to return to work in the event of an emergency in the night, such time spent at home is normally not compensable. On the other hand, where the conditions placed on the employee's activities are so restrictive that the employee cannot use the time effectively for personal pursuits, such time spent on call is compensable.

29 C.F.R. § 553.221(d).

- c. *Example:* Plaintiffs were members of four specialty police units (SWAT, bomb squad, K-9, and an accident investigation unit) who were required to carry beepers at all times, to live within a “close geographical area” and to respond immediately if called. Plaintiffs claimed that they were entitled to overtime because of the requirement that they carry beepers at all time. The court found that the plaintiffs were not entitled to overtime, stating that the plaintiffs must show that the on-call policy results in “burdens that seriously interfere with their ability to use the time for personal

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pursuits.” The critical question was “whether, during [on-call] time, the employer imposes burdens on the employees so onerous that they prevent the employees from effectively using their time for personal pursuits.” The court found that “the off-duty time was not utilized predominantly for the employer’s benefit, but for the employees.” *Adair v. Charter County of Wayne*, 452 F.3d 482 (6th Cir. 2006).

- d. *Example:* Nurses sought payment for off-premises on-call time from their hospital employer. Few restrictions were placed on the on-call hours: “Short of drinking alcohol or taking mind-altering drugs, the [nurses] could pursue a virtually unlimited range of activities in town or at home.” It was also rare for the nurses to be called in more than once during their on-call hours. Utilizing a “practical approach based on the realities of each case,” the court determined this time was not compensable work. *Reimer v. Champion Healthcare Corp.*, 258 F.3d 720, 725, 726 (8th Cir. 2001)
- e. *Example:* Plaintiffs, two city employees, had to be accessible via pager and respond within thirty minutes to an hour, could not consume alcohol, and had to stay within the city. The court determined that these restrictions were not onerous enough to render the on-call time for the employer’s benefit, and thus, the employees were not entitled to compensation for the on-call time. *Gilligan v. City of Emporia*, 986 F.2d 410 (10th Cir. 1993).

## 11. Off-Duty Care For Job-Related Equipment Or Assets

- a. Again, for an activity to constitute work, an FLSA plaintiff must prove that the activity was (1) undertaken for the benefit of the employer, (2) known or reasonably should have been known by the employer to have been performed; and (3) controlled or required by the employer. Moreover, for work to be compensable, the amount of time devoted to it must be more than de minimis. Whether overtime activity “benefits” the employer is an issue that frequently arises in the area of off-duty care for job-related equipment or assets.
- b. For example, in *Hellmers v. Town of Vestal*, 969 F. Supp. 837 (N.D.N.Y. 1997), Plaintiff employee, a police officer, brought suit under the FLSA, claiming that he was entitled to overtime

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compensation for “off duty” time spent caring for his police dog and cleaning a police-issued weapon and vehicle. The court determined that time spent grooming, bathing, exercising, cleaning, and training the police dog were “required by the employer and [were] pursued necessarily and primarily for the benefit of” the Vestal Police Department. The court found that making and receiving dog-related phone calls and preparing police paperwork connected with canine duties were less clearly activities that were “controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.” In addition, the court determined that “Hellmers’ cleaning of his police firearm and cleaning of his police vehicle were not activities performed for his own convenience, but were required by his employer and were an integral and indispensable part of the principal work activity of the Vestal Police Department,” entitling him to compensation performing these activities. With respect to the time spent cleaning his uniform, the court determined that, while cleaning is the type of activity that is generally compensable under the FLSA, the Collective Bargaining Agreement provided a stipend for such activity, so he was not entitled to overtime.

- c. *Example:* Federal custom’s agency canine enforcement officers used training and reward towels to train dogs to detect contraband. They devoted off-duty hours to the laundering and processing of these towels, but were not compensated for it. The fact that both laundering process and its significance were part of the officers’ initial training and that the agency compensated officers for these tasks during the workday suggested that the agency valued the benefit from these tasks. Thus, off-duty laundering and processing activities provided a benefit to agency and those hours worked were compensable. *Bull v. United States*, No. 01-56C, 2005 U.S. Claims LEXIS 293 (Fed. Cl. Oct. 14, 2001).
- d. *Example:* Officers claimed wages for off the clock care for police dogs. The district court found that “[T]he FLSA requires employers to compensate dog handlers for the off the clock time they spend caring for and maintaining their dogs.” The district court determined that the dogs are “essential pieces of equipment that assist the officers in the efficient enforcement of the laws.” The district court concluded that because time plaintiffs spend performing those activities is critical to the performance of their

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duties and to the preservation of the Sheriff Department's equipment, plaintiffs' off the clock time caring for and maintaining the dogs is integral and indispensable to their principal activities and performed for defendants' benefit. *Albanese v. Bergen County*, 991 F. Supp. 410, 420 (D.N.J. 1997).

## 12. Other “Off The Clock Time”

- a. Work includes exertional and non-exertional acts, provided that they are controlled by the employer. Allegations of uncompensated, non-exertional off-the-clock time can prove costly to employers. Recently, a federal judge in the Northern District of California approved a \$ 4 million settlement in a case where security guards claimed that their employer failed to compensate them for attending fifteen-minute security briefings before their eight-hour shifts. *Adams v. Inter-Con Sec. Sys.*, No. 06-05428 (N.D. Cal. 2006).
- b. *Example:* An employer required an employee to attend counseling sessions outside of the normal workday. The court found such time compensable, relying on a Department of Labor opinion letter stating that an employee required to undergo an “off the clock” medical or psychological evaluation as a prerequisite to continued employment is compensable under the FLSA. *Shie v. City of Aurora*, No. 03-C-945, 2003 U.S. Dist. LEXIS 13051 (N.D. Ill. July 28, 2003), *aff’d*, No. 04-2308, 2005 U.S. App. LEXIS 28781 (7th Cir. Dec. 27, 2005).

## 13. Travel Time

- a. General Principles
  - (1) Generally, the Portal-to-Portal Act exempts from the FLSA: “walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform.” 29 U.S.C. § 254(a)(1); *see also* 29 C.F.R. § 790.7(c).
  - (2) That said, under the FLSA, different rules may apply to different types of travel:
    - (a) Travel to-and-from work;

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- (b) Travel during the workday;
  - (c) Special one-day trips away from home; and
  - (d) Overnight trips away from home
- (3) Whether, and to what extent, employees must be compensated for time spent traveling depends on which set of rules apply and how the travel occurs.
- b. Travel To-And-From Work
- (1) “Normal travel from home to work is not worktime.” 29 C.F.R. § 785.35. “This is true whether [an employee] works at a fixed location or at different job sites.” 29 C.F.R. § 785.35. Generally, an employee is not considered to be at work until he or she reaches the worksite. However, if an employee is required to report to a meeting place to pick up materials or equipment or receive instructions before going to the worksite, compensable time starts when the employee arrives at the meeting place. 29 C.F.R. § 785.38.
- (2) *Example:* Police officers spent time commuting from their homes to mandatory off-site training. The court held that under the Portal-to-Portal Act, the police officers were not entitled to pay for their commuting time to the training. Under the Act, “principal activities” included activities where are an “integral and indispensable part of the principal activities,” and law enforcement training was one such activity. *Imada v. City of Hercules*, 138 F.3d 1294 (9th Cir. 1998).
- (3) *Example:* A refrigerator and utility mechanic, who did not have a fixed work location, was required to travel more than fifty stores, sometimes to more than one site a day. He was compensated from the travel time between work sites, but not for the travel time between home and the first and last work sites. He usually drove his own truck, but occasionally used an employer vehicle. The court held that under the FLSA regulations, regardless of the distance the employee traveled, the travel time to the first work site and from the last one was not compensable because this travel

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time was a “contemplated, normal occurrence” for the job. *Kavanagh v. Grand Union Co.*, 192 F.3d 269, 273 (2d Cir. 1999).

## c. Travel During The Workday

- (1) Employees must be compensated for travel from one job site to another during the workday. 29 C.F.R. § 785.38. Employees must also be paid for the return trip from the job site to the employer’s premises at the end of the workday. An employee need not be paid for travel time between the work site and his home at the end of the day when he does not report back to the employer’s premises at the end of the day, choosing to go home instead, unless, the employee must pay for time the employee spends driving a company vehicle.
- (2) *Example:* Engineers from a public works department drove county vehicles from county parking sites to the first work-site of the day, and from the last work-site of the day back to the county parking site. The county vehicles contained various tools and equipment that the employees used for their jobs, such as drawings, specifications, permits, manuals, tape measures, levels, safety vests, hard hats, wet weather gear, cell phones, and calculators. The court determined that the engineers were entitled to overtime compensation because the travel time was required by the county. *Burton v. Hillsborough County*, 181 F. App’x 829 (11th Cir. 2006).

## d. Use Of Employer–Provided Transportation

- (1) Employers must pay for travel time when the travel is a principal activity that the employee is hired to perform, but not if the travel is a preliminary or postliminary activity. *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956). Principal activities are activities performed as “regular work of the employees in the ordinary course of business,” “necessary to the business” and “primarily for the benefit of the employer.” *Vega v. Gasper*, 36 F.3d 417, 424 (5th Cir. 1994).

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- (2) *Example:* Migrant workers traveled four hours to and from the worksite in their contractor's buses. This travel time was not compensable because the migrant workers did not work before getting on or while on the bus and use of the bus was voluntary. *Vega v. Gasper*, 36 F.3d 417 (5th Cir. 1994).
- (3) Generally, with regard to standards on employer-provided vehicles, in a 1994 opinion letter, the DOL advised:
  - (a) [I]t is our opinion that those employees who elect to travel as passengers in the employer's vehicles to the job site at the beginning and end of the workday are engaged in ordinary home to work travel that is not compensable under the FLSA. This is true whether the employees work at a fixed location or at different sites. The mere fact that the employer provides employees with transportation does not convert such travel to a principal activity....However, with regard to those employees who drive company-owned vehicles, such driving time is not considered "hours worked" in instances where an employee elects to transport other employees to and from work and such employee is driving the employer's vehicle for his/her own convenience. On the other hand, where the driver is directed by the employer to report to the company [facility] as a pickup point, then time spent driving the employees from such point to the workplace is hours worked.

Wage & Hour Op. Letter, April 5, 1994.

- (4) Two types of issues arise concerning use of employer-provided vehicles:
  - (a) Whether employees must be paid for time spent riding on an employer-provided vehicle from a meeting site to the worksite and back again?
  - (b) Whether employees must be paid for time spent driving from their homes to and from work in an

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employer-owned vehicle that they take home at the end of the workday?

- (5) Employees who travel to or from work on transportation provided by the employer are not entitled to be paid for their travel time where the transportation is optional, is provided for the convenience of the employees and the employees do not perform work while they are traveling.
- (6) *Example:* Bus drivers were not entitled to pay for time spent on a shuttle provided by their employer to the location for the first run of the day and back from the last run of the day because use of the shuttle was voluntary and was provided for the convenience of the employees. *United Trans. Union Local 1745 v. Albuquerque*, 178 F.3d 1109 (10th Cir. 1999).
- (7) *Example:* County fire inspectors were entitled to overtime compensation for time spent driving from county parking lot to first work site of the day and from last work site of the day back to the lot, where county policy required inspectors to drive county cars during shift, prohibited inspectors from driving the cars home and required the cars to be picked up and dropped off each day in a central, secure county lot. *McGuire v. Hillsborough County*, 511 F. Supp. 2d 1211 (M.D. Fla. 2007).

e. Driving The Employer's Vehicle

- (1) Use of an employer's vehicle for travel by an employee, and activities performed by an employee that are incidental to the use of that vehicle, are not part of the employee's principal activities if:
  - (a) The travel is within the normal commuting area for the employer's business and
  - (b) Employee and employer have an agreement governing use of the vehicle. 29 U.S.C. § 254.
- (2) The employer must keep record of the agreement.

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- (3) The length of employee's commute does not determine whether travel time is compensable as long as a lengthy commute is an expected part of the employee's job. *Kavanagh v. Grand Union Co.*, 192 F.3d 269, 273 (2d Cir. 1999) (employee not entitled to compensation for extensive travel time because it was a contemplated, normal occurrence under the parties' employment relationship). The DOL has analogized a lengthy commute to a work site in an employer-provided vehicle to situations governed by 29 C.F.R. § 785.37 when employees are on special one-day out-of-town assignments. *See Wage & Hour Op. Letter*, Jan. 29, 1999. The employer must pay the employee for time spent traveling for such assignments but may deduct a reasonable commuting time from the hours paid. In that opinion letter, DOL stated that it would not object to one hour being treated as a reasonable commuting time.
- (4) If an employee merely uses a company vehicle to travel from his home to the work site, then the employer may be able to treat the travel time as non-compensable, if an agreement is reached with the employee over use of the company vehicle. This is true even if the driver voluntarily uses the vehicle to transport other employees as well. *See Wage & Hour Field Operations Handbook* §31c01.
- (5) On the other hand, when employees drive specially-equipped vehicles to and from home, their travel time in those vehicles may be compensable, even if agreements are reached with the employees about use of the vehicles.
- (6) *Example:* An employee traveled to the worksite in a specially-equipped truck that contained necessary tools to perform his job servicing rigs located in several states. The court noted that each case involving travel time "must be decided on its particular facts." Here, because the employee transported equipment needed to service the rigs, he was performing an activity so closely related to his work that it was an integral and indispensable part of his principal activity. Accordingly, the court determined that the employee was entitled to be compensated for time spent traveling to and from drill sites in his truck. *Crenshaw v.*

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*Quarles Drilling Corp.*, 798 F.2d 1345, 1350 (10th Cir. 1986).

- (7) *Example:* Federal law enforcement officers were issued government-owned police vehicles and required to commute directly from home to work, refrain from personal errands during commute, have their weapons and other law-enforcement related equipment ready, and monitor communication equipment. The court held that they were not entitled to be compensated for their commuting time. *Adams v. United States*, 471 F.3d 1321 (Fed. Cir. 2006), *cert. denied*, 128 S. Ct. 866 (2008).

## f. Overnight Travel Away From Home

- (1) Time spent by an employee traveling away from home on an overnight trip as a passenger must be counted as work time if it “cuts across the employee’s workday.” 29 C.F.R. § 785.39. Employers must pay for travel time if it occurs during the employee’s regular working days and regular working hours. Employers also must pay for such travel time when it occurs during the employee’s regular working hours on non-working days.
- (2) Employers need not pay for travel time on overnight trips when it does not occur during regular working hours. But, if an employee performs any work for the employer while traveling, then the employer must pay the employee for all time actually worked. 29 C.F.R. § 785.41.
- (3) These rules apply to employees who travel as passengers and to employees who are offered transportation but choose to drive themselves to the destination. 29 C.F.R. § 785.40. If an employee is required to drive to the destination, then he or she is working while traveling and the employer must pay the employee for all time spent driving. 29 C.F.R. § 785.39. An employer must pay an employee who is required to ride with the driver as an assistant or helper. 29 C.F.R. § 785.41.

# Watch Your Step: Auditing Your Way Through the Wage and Hour Minefield

- g. Rate Of Pay For Travel Time
  - (1) An employer may pay employees at a lower rate for their travel time, provided that it agrees in advance with its employees that it will do so.
  - (2) In a 1999 opinion letter, an employer asked the DOL whether it could compensate employees who visited various job sites throughout the day at a lower rate of pay for their travel time between job sites (generally 5 to 15 minutes). *See Wage & Hour Op. Letter, Jan. 22, 1999.* The DOL opined that the FLSA did not prevent an employer from paying employees different rates of pay for different types of work or work performed at different times, as long as all wages are in excess of the minimum wage. The DOL said “it is our opinion that the organization could pay a rate lower than the ‘production’ hourly rate for travel time, provided that rate is no less than the statutory minimum wage.”

## **B. Calculating The “Regular Rate” and Other Payroll Issues**

- 1. Calculating the “Regular Rate”
  - a. Correctly determining an employee’s “regular rate of pay” is critical for ensuring compliance with the FLSA because it is the basis upon which the employer must calculate employee’s overtime pay.
  - b. The “regular rate” includes “all remuneration for employment paid to, or on behalf of, the employee.” 29 U.S.C. § 207(e).
  - c. “An employee’s regular rate is a mathematical computation in which all forms of remuneration, except those excluded by statute, are combined and then divided by the total number of hours worked” for a given period. *See Wage & Hour Op. Letter FLSA2004-14NA (Sept. 20, 2004).*
  - d. Exclusions from the regular rate
    - (1) Section 207(e) excludes from the “regular rate” the following items, among others:

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- (a) Sums paid as gifts made at the holidays or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent upon hours worked, production or efficiency;
  - (b) Payments to an employee that “are not made as compensation for his hours of employment,” such as vacation, holidays, sick pay, and expense reimbursements (e.g., travel expenses);
  - (c) Bonuses paid in recognition of services during a given period, so long as both the fact and amount of payment are in the sole discretion of the employer and payment is made at or near the end of the period, and without any prior announcement or promise that would lead employees to believe payment is guaranteed;
  - (d) Contributions to a bona fide benefit plan (e.g., retirement plan, life insurance, accident or disability plan, health insurance, etc.);
  - (e) Value or income derived from stock options or stock purchase plans that meet certain criteria;
  - (f) Extra compensation provided at a premium rate for certain hours of work pursuant to a private agreement delimiting the employee’s normal work day or regular working hours; and
  - (g) Premium pay under a CBA or agreement exceeding one-and-a-half times an employee’s agreed-upon normal rate if paid as compensation for normal work done on weekends, holidays, or the like, or for overtime hours.
- e. Payments offered to induce employees to work harder, more productively or more efficiently, or “compensation for performing a duty involved in the employee’s job,” even if not for “specific hours of work,” are included in the regular rate.

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- f. Other forms of working time compensation such as shift differential pay (*Bell v. Iowa Turkey Growers Coop.*, 407 F. Supp. 2d 1051, 1057 (S.D. Iowa 2006)) and longevity pay (because it is non-discretionary) must also be included.
- g. Examples
  - (1) *Acton v. City of Columbia*, 436 F.3d 969, 977 (8th Cir. 2006).
    - (a) Approximately one hundred current and former firefighters brought suit against the City for failing to include sick leave buy-back, longevity pay, step-up pay, meal allowance, and standby programs in the regular rate of pay.
    - (b) While the firefighters' motion for summary judgment was pending, the parties entered into a settlement agreement on the firefighters' claims that longevity pay, step-up pay, and standby pay should be included in the regular rate of pay, leaving claims related to the sick leave buy-back and meal allowance.
    - (c) Under the meal allowance program, at the beginning of each six-month period, the City provided a meal allowance based on the number of 24-hour shifts the firefighter was anticipated to work. If the firefighter did not work the anticipated number of 24-hour shifts, he or she had to pay back the meal allowance for that shift.
    - (d) Under the sick leave buy-back program, firefighters who worked 24-hour shifts accumulated ten sick days per year. Firefighters who accumulated at least six months of sick leave were able to "sell" their sick leave time in exchange for a lump sum payment.
    - (e) The district court granted the firefighters' motion for summary judgment in part and denied it in part, finding that sick leave buy-back monies should be included in the firefighters' regular rate of pay

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while monies received under the meal allowance program should be excluded.

- (f) The court found that sick leave buy-back was the equivalent of a non-discretionary bonus and, therefore, should be included in the regular rate of pay.
- (g) The court determined that meal allowance was for the City's convenience and, therefore, should be excluded from the regular rate of pay.
- (h) The court of appeals affirmed the district court's decision, reasoning that, although sick pay would not ordinarily be included in the regular rate, the FLSA requires inclusion of "all monies paid as compensation for a general or specific work-related duty."
- (i) The court found that the buy-back pay program compensated firefighters for a work-related duty insofar as it was created as an incentive "to encourage firefighters to come to work regularly over a significant period of their employment tenure." The court recognized "consistent workplace attendance to be a general duty of employment" and on that basis ruled that "sick leave buy-back monies constitute remuneration for employment."

(2) *Chao v. Wal-Mart Stores, Inc.*, (W.D. Ark. 2007).

- (a) Wal-Mart agreed to pay more than \$33 million in back wages, plus interest, to approximately 87,000 employees nationwide after reporting to the Department of Labor that its own internal review of payroll records showed that it had not been computing overtime correctly.
- (b) Wal-Mart filed a consent judgment in federal district court to settle all claims.
- (c) Wal-Mart's violations included the following:

# Watch Your Step: Auditing Your Way Through the Wage and Hour Minefield

- (i) Failing to include “locality” premium payments under a “geographic assistance program” in the regular rate.
  - (ii) Not including all nondiscretionary premiums, incentives, bonuses, and earning supplements when calculating the regular rate.
  - (iii) Failing to include paid time off in calculating bonuses that were subject to overtime.
  - (iv) Computing regular rates from bi-weekly totals in the two-week pay period instead of on a weekly basis.
- (d) Why the consent judgment?
- (i) Under the FLSA, private settlements cannot be used to avoid the requirement that overtime be paid to all non-exempt workers for all hours worked over 40. Accordingly, if Wal-Mart did not involve the Department of Labor, the employees could have accepted the money and still filed a class action.

## 2. Bonuses and Lump Sum Payments

- a. Generally, bonuses paid to non-exempt employees must be included in the employee’s regular rate for overtime purposes during the period for which the bonus is paid unless the bonus satisfies one of the exclusions in 29 U.S.C. § 207(e):
  - (1) Sums paid as gifts made at the holidays or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent upon hours worked, production or efficiency;
  - (2) Bonuses paid in recognition of services during a given period, so long as both the fact and amount of payment are in the sole discretion of the employer and payment is made

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at or near the end of the period, without any prior announcement or promise that would lead employees to believe payment is guaranteed.

b. Discretionary vs. nondiscretionary bonuses

- (1) Bonuses are generally divided into two categories: discretionary and nondiscretionary.
- (2) Only discretionary bonuses are excluded from the “regular rate.”
- (3) A bonus generally will be includable (nondiscretionary) if:
  - (a) an employer announces in advance that it intends to pay a bonus at a specific time;
  - (b) a bonus of a particular amount is promised in advance; or
  - (c) the bonus has been guaranteed to employees by agreement, promise or contract, including in a collective bargaining agreement.

29 C.F.R. § 778.211.

(4) Examples of nondiscretionary bonuses:

- (a) Bonuses announced to employees to induce them to work more steadily, rapidly or efficiently;
- (b) Attendance bonuses;
- (c) Individual or group production bonuses;
- (d) Bonuses for quality and accuracy of work; and
- (e) Bonuses contingent upon the employee’s continuing in employment until the time payment is to be made.

29 C.F.R. § 778.211

# Watch Your Step: Auditing Your Way Through the Wage and Hour Minefield

- (5) *Example:* Pursuant to a written policy, employer pays a \$50 “finder’s fee” to retail cashiers for each unauthorized credit card they identify and confiscate. According to the DOL, such fees are considered remuneration that must be included in an employee’s regular rate of pay because they are rewards for job performance and efficiency. They are also bonus payments promised in advance, and cannot, therefore, qualify as discretionary bonuses. See Wage & Hour Op. Letter FLSA2001-6 (Feb. 14, 2001).
- (6) An employer must be cautious in tying the amount of the bonus to employee performance, lest it be considered a production or incentive bonus or a bonus for quality and accuracy of work. All such bonuses are considered nondiscretionary and must be included in the “regular rate.”
  - (a) *Example:* Employer sets aside a pool of money each year for bonuses, and at the end of the year disburses employees’ bonuses based on subjective factors, including individual employee performance. The DOL takes the position that this is a bonus “intended as an inducement to affect the employee’s **performance**” which must be included in the employee’s regular rate for purposes of calculating overtime premiums. See Wage & Hour Op. Letter, Nov. 5, 1999.
  - (b) Impact on the regular rate
    - (i) Nondiscretionary bonuses must be included in the regular rate, “apportioned back over the workweeks of the period during which it may be said to have been earned.” See 29 C.F.R § 778.209.
    - (ii) *Example:* A retention bonus is offered to employees to work until a certain date (e.g., date of a facility closing). Once the performance is complete (i.e., employees have worked until the pre-determined date) and the bonus is paid, its value must be apportioned back over the period from that

# Watch Your Step: Auditing Your Way Through the Wage and Hour Minefield

date the offer was accepted until the agreed-upon completion date. All overtime paid during that period must then be recalculated based on a regular rate that includes the bonus. See Wage & Hour Op. Letter FLSA2005-47 (Nov. 4, 2005).

- (iii) An employer may, however, pay a non-discretionary bonus without having to include it in the regular rate if the bonus itself is calculated as a percentage of the employee's total earnings.
- (iv) Bonus must be paid as a percentage of total earnings, including overtime compensation, paid over the designated time period.
- (v) Such bonuses may be tied to employee performance. For example, an employer's policy may provide for a bonus of 2% of total compensation for marginal performers, 5% for good performers and 10% for exceptional performers. The key is that the percentage is based on all compensation, including overtime premiums, paid during the operative period. See 29 C.F.R. § 778.210; Wage & Hour Op. Letter FLSA2005-22 (Aug. 26, 2006).

### 3. Pay for Work at Multiple Rates

- a. The FLSA and its regulations provide two alternative methods for determining the proper overtime rate for a non-exempt employee who is paid on the basis of more than one pay rate by the same employer:
  - (1) Blended rate method, set forth in 29 C.F.R. § 778.115, requires the use of a weighted average of the multiple rates.
  - (2) The other, found in 29 U.S.C. § 207(g) and 29 C.F.R. § 778.419, permits an employer to pay based on the type of work being performed under a prior agreement between the employer and employee that follows certain rules.

# Watch Your Step: Auditing Your Way Through the Wage and Hour Minefield

## b. Blended rate method

- (1) Generally, if an employee gets paid at more than one rate during the same workweek, the employer must take the “weighted average” of such rates to determine the regular rate of pay for that week:
- (2) Total earnings (except statutory exclusions) are computed to include compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs.

29 C.F.R. § 778.115.

## c. Specific rate pursuant to agreement

- (1) Alternatively, an employer may enter into an agreement to calculate overtime pay based on the regular rate that is paid for the type of work the employee will actually be performing during his or her overtime:
  - (a) Must be agreement or understanding with the employee in advance;
  - (b) Rate must be at least one and one-half times the rate for that work when performed during non-overtime hours;
  - (c) Rate must be at least minimum wage and must include all other forms of compensation required to be included in the regular rate;
  - (d) Hours must actually be payable as overtime or overtime premium under FLSA, CBA or individual agreement (e.g., hours over 40, daily overtime, weekend or shift premium at least 1 ½ x rate, clock pattern premiums paid at least 1 ½ x rate).
- (2) In sum, under this alternative method, the employer and employee may reach an agreement that specifies that the overtime rate for a particular type of work may be based only on a pre-established normal (i.e., non-overtime) hourly rate for that type of work, rather than a premium rate based

## Watch Your Step: Auditing Your Way Through the Wage and Hour Minefield

on a blending of the pre-established rates for both (or all, if more than two) types of work identified in the parties' agreement. The agreement need not be in writing.

# Patricia A. Smith Profile

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- » Litigation
- » Labor, Employment & Immigration
- » Health Care

## EDUCATION

Rutgers University  
School of Law J.D.  
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Patricia A. Smith is a partner in the Litigation Department and a member of the Labor, Employment & Immigration Group and the Health Care Group. She represents management in all areas of employment and labor law and litigation.

Ms. Smith represents employers in litigation raising claims of sex, race, age, and disability discrimination, sexual harassment, defamation and wrongful discharge as well as claims of denial of employee benefits. She has significant jury trial experience in state and federal courts. Ms. Smith also prepares affirmative action programs and represents clients during government audits and investigation. She has an active ERISA litigation practice and counsels employers to avoid and resolve employment-related problems.

Ms. Smith also practices traditional labor law, and has handled numerous arbitrations, union organizing campaigns, collective bargaining negotiations, and unfair labor practice charges.

Representative engagements include:

- » Successful defense before a jury of two age-discrimination employment suits against a nationally recognized construction company;
- » Successful defense of numerous claims of employment discrimination and retaliation claims on the basis of race, sex, age, disability, national origin, and whistleblower status in numerous state and federal courts throughout the country;
- » Successful defense of ERISA individual and class action matters;
- » Development and implementation of strategies to preserve confidential corporate information and to avoid the loss of valuable employees to competitors; and
- » Successfully obtaining and enforcing temporary restraining orders and injunctions in connection with massive strike activity.

# Patricia A. Smith Profile

Ms. Smith regularly provides advice and counseling to employers concerning the implementation of reductions in force and other difficult employment decisions. She has lectured and written widely on numerous employment law topics, including sexual harassment, defamation, employee piracy and union avoidance, and has experience in a variety of industries, including computers, construction, health care, transportation, oil refining, manufacturing and commercial lending.

Ms. Smith is listed in the 2007 and 2008 editions of *Chambers USA: America's Leading Lawyers for Business*, a directory built primarily on client interviews, as a leader in the field of labor and employment law. She regularly speaks before business, bar and community groups on labor and employment law topics, including before the American Bar Association, the New Jersey Institute for Continuing Legal Education and the Council on Management.

Ms. Smith is a graduate of Rowan University (B.A., *magna cum laude*, 1973) and Rutgers University School of Law (J.D., *cum laude*, 1981).

# Edward T. Groh Profile

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## EDUCATION

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Edward T. Groh is an associate in the Litigation Department and a member of the Labor, Employment & Immigration Group. Mr. Groh concentrates his practice in labor and employment and commercial litigation matters and has represented clients in both federal and state courts. Mr. Groh's recent client representations include:

- » Obtaining summary judgment from the U.S. District Court for the District of New Jersey in favor of a multinational insurance company on an ERISA complaint challenging the denial of disability benefits;
- » Obtaining summary judgment in favor of a client on a CEPA action in New Jersey state court;
- » Defending a telecommunications company against claims of discrimination and hostile work environment under New Jersey's Law Against Discrimination;
- » Pursuing breach of contract and trademark violation claims under the Lanham Act for a multinational marketer of petroleum and petrochemical products in New Jersey state and federal courts;
- » Pursuing a multi-million dollar asset recovery claim by a national telecommunications firm in the U.S. District Court for the Eastern District of Pennsylvania;
- » Obtaining an Order from the U.S. District Court for the Eastern District of Pennsylvania opening a confessed judgment obtained by a surety company against a construction company under a general agreement of indemnity; and
- » Defending against denial of disability benefit (ERISA) claims in New Jersey and New York federal district courts.

# Edward T. Groh Profile

Before joining Ballard Spahr, Mr. Groh was an associate with a major law firm in New Jersey. Prior to that, he was a senior surety underwriter for a national insurance company in Philadelphia, where he was responsible for assessing financial risk associated with the issuance of contract surety bonds to construction companies.

Mr. Groh is listed in the 2007 and 2008 editions of *Chambers USA: America's Leading Lawyers for Business*, a directory built primarily on client interviews, as a leader in the field of labor and employment law.

Mr. Groh is a member of the American Bar Association, the New Jersey Bar Association, the New York Bar Association, and the Pennsylvania Bar Association and is also admitted to practice before the U.S. District Courts for the District of New Jersey, the Southern District of New York, the Eastern District of New York, and the Eastern District of Pennsylvania. Mr. Groh is the author of "Terrorism: The New 'War' in Insurance Agreements" ABA's *The Brief* (Spring 2002).

Mr. Groh is a graduate of Pennsylvania State University (B.S. 1989) and Rutgers University School of Law - Camden (J.D., high honors, 2001).

# Labor, Employment & Immigration Group Information

## Labor, Employment & Immigration Group General Group Description

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The Labor, Employment & Immigration Group is a national practice that provides advice and handles litigation on behalf of clients in the private and public sectors in the areas of labor-management relations, employment, and ERISA.

Our Labor, Employment & Immigration Group has experience in counseling and litigating a broad array of labor, employment, and ERISA matters in the public, private, profit and nonprofit sectors; and in representing a large variety of industries. The types of matters that are handled regularly on behalf of clients include:

- » Representing employers in collective bargaining negotiations, interest arbitration, private and AAA labor arbitration, NLRA and state labor law compliance advice, labor implications of mergers, acquisitions and asset purchases, strike prevention and control, union campaigns, union-free training of management and supervisors, and unfair labor practice proceedings before the NLRB and state labor boards;
- » Employment discrimination advice and defense of claims on grounds of protected class membership such as age, race, gender, sexual orientation, disability, religion, national origin, sexual harassment; Equal Pay Act claims; immigration advice;
- » Preparation and defense of affirmative action plans under Executive Order 11246 and other federal and state laws, including advice on implementation of monitoring processes; plan analyses and drafting; and advice, counseling, and litigation over OFCCP audits;
- » ERISA and other employee benefits advice and litigation, including administrative claims appeals; breach of fiduciary duty claims; litigation of benefit claims and interference with protected rights; ERISA preemption; and plan design counseling for litigation avoidance and defense;
- » Defense of class action and collective action cases, including claims of wage and hour violations brought against employers, brought against employers, benefit plans and benefit plan fiduciaries;
- » Defense of at-will employment, wrongful discharge and employment tort claims;
- » Design and implementation of corporate-wide HR and labor strategies and initiatives;

# Labor, Employment & Immigration Group Information

- » Preparation of, and advice and litigation concerning, employment agreements, executive compensation programs, restrictive covenants and trade secret agreements, and employment terminations;
- » Advice and litigation on behalf of public employers such as cities, states, school districts, authorities, and municipalities in traditional labor and employment matters, as well as under specialized labor laws regarding police, fire and other personnel (e.g., Heart and Lung Act and Civil Service Laws);
- » Training of managers and employees on topics such as: sexual harassment; EEO compliance; ADA; FMLA; chronic absenteeism; managing the difficult employee; health and safety compliance; hiring, interviewing and wage and hour compliance;
- » Review and legal audit of personnel policies, manuals and employment forms, formulation of personnel policies such as FMLA and applicable state leave laws, sexual harassment and drug and alcohol abuse and testing, privacy rights and ADA compliance;
- » Advice concerning OSHA and state health and safety laws, including compliance and self-audits; governmental investigations and citations; negotiations with OSHA; and litigation before the OSHRC and the courts;
- » Wage and hour investigations and FLSA advice;
- » Immigration law, including employer sanctions and compliance; employment-based immigrant petitions; nonimmigrant visa petitions for intra-company transfers and specialty workers; labor certifications; investor visas; family-based immigration services; and litigation before administrative and judicial courts on immigration matters;
- » Public and private school law matters;
- » Reduction in force design, counseling, and litigation, including WARN compliance, early exit programs, severance pay, and effective use of releases; and
- » Representation of professional athletes and professional sport franchises.

# Ballard Spahr Overview

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Ballard Spahr Andrews & Ingersoll, LLP was founded in 1886 by a group of lawyers committed to excellence in the practice of law. Today, we remain dedicated to that fundamental principle. We have grown to be one of the largest law firms in the country, with more than 550 lawyers and 12 offices located throughout the United States. As a large, multi-practice, multi-regional law firm, we are able to combine a national scope of practice with strong local market knowledge to represent companies, individuals, and other entities in virtually every state and around the world.

### Specialty Practice Areas:

- » Antitrust
- » Appellate Practice
- » Bankruptcy, Reorganization and Capital Recovery
- » Biotechnology Patent Practice
- » Business & Finance
- » Business Litigation
- » Chemical Patent Practice
- » Climate Change
- » Construction
- » Construction Dispute Resolution
- » Consumer Financial Services
- » Corporate Compliance and Investigations
- » Distressed Real Estate Initiative
- » Electrical and Communications Technology Practice
- » Eminent Domain
- » Employee Benefits and Executive Compensation
- » Energy and Project Finance
- » Environmental
- » Family Wealth Management
- » Franchise and Distribution
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