FLSA/WAGE AND HOUR CRITICAL ISSUES

July 10, 2013

Joseph DeGiuseppe, Jr.
Bleakley Platt & Schmidt, LLP
One North Lexington Avenue
White Plains, NY 10601
Tel. No. (914) 949-2700
Fax No. (914) 683-6956
e-mail: jdegiuseppe@bpslaw.com

I. UPDATE AND OVERVIEW

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

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

President Obama has called for an increase in the federal minimum wage to $9.00 per hour. In addition, President Obama has also proposed indexing the minimum wage to inflation, so it would increase when the cost of living increases. The Fair Minimum Wage Act of 2013 has been introduced in the U.S. Senate and House of Representatives. If passed, it would raise the federal minimum wage from $7.25 to $10.10 per hour in three steps of 95 cents each by 2015, and adjust it each year after that to keep up with the rising cost of living. The legislation would also increase the minimum wage for employees who receive tips. The legislation is in committee and would need to be passed by both the Senate and the House for the increases to go into effect. Until legislation is passed there will be no date set for a minimum wage increase.

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

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

The new legislation does not provide for an increase in the minimum hourly wage rate applicable to food service and/or other tipped employees.

On November 6, 2012, certain amendments to the wage deduction provisions of Section 193 of the New York State Labor Law took effect which will expire and be deemed repealed three years after the effective date thereof unless extended by the Legislature. The amendment expands the list of categories for which deductions may be taken by employers with an employee's written consent and allows deductions for overpayments due to clerical or mathematical errors or for repayment of advances on wages or vacations paid to employees.

The following outline addresses some of the more critical wage and hour issues confronting employers who are subject to the provisions of FLSA and/or New York State law.

II. CONTRASTING FLSA AND NYS WAGE AND HOUR LAWS

A. Fair Labor Standards Act

FLSA is the federal law which sets minimum wage, overtime, recordkeeping, and youth employment standards. The current minimum wage under FLSA for covered "non-exempt" workers is still $7.25 per hour pending congressional action on the above described proposed amendments to the minimum wage rate. With the exception of "exempt" employees and certain other employees, overtime ("time and one-half") must be paid for work over forty hours a week for most employees.

1. Enterprise Coverage

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

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

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

2. Individual Coverage

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

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

B. New York State Law

1. Minimum Wage Orders:

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

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

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

2. WTPA Payroll Record Retention Requirements

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

imposition of the expanded civil and/or criminal penalties set forth in Sections 197 and 198, also effective on April 9, 2011.

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

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

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

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

(4) the employer's regular pay day;

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

(6) the telephone number of the employer; and

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

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

The Commissioner of Labor has issued Pay Notice templates in various languages, including English and Spanish, that comply with the WTPA's new reporting requirements. These templates are available at the following web address:

http://www.labor.ny.gov/formsdocs/wp/ellsformsandpublications.shtm.

3. Allowances:

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

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

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

4. <u>Wage Deductions</u>

A New York State employer may not deduct any money from an employee's paycheck unless the employee has voluntarily authorized the deduction in writing and the deduction is for the employee's own benefit. Section 193 of the New York Labor Law prohibits employers from making "any deduction from the wages of an employee," with two exceptions: (1) deductions required by law or (2) deductions that are expressly authorized by the employee in writing and that "are for the benefit of the employee."

Permissible deductions under the amendment "for the benefit of the employee" now include the following**:**

- prepaid legal plans;
- purchases made at events sponsored by a charitable organization affiliated with the employer;
- discounted parking or discounted passes, tokens, fare cards, vouchers, or other items that entitle the employee to use mass transit;
- fitness center, health club, and/or gym membership dues;
- cafeteria and vending machine purchases made at the employer's place of business, and purchases made at gift shops operated by the employer, where the employer is a hospital, college, or university;
- pharmacy purchases made at the employer's place of business;

- tuition, room, board, and fees for pre-school, nursery, primary, secondary, and/or post-secondary educational institutions;
- day care, before-school and after-school care expenses;
- payments for housing provided at no more than market rates by non-profit hospitals or affiliates thereof; and
- similar payments for the benefit of the employee.

A. Written Authorization Still Required

Under the amended law, deductions still are permitted only if expressly authorized in writing by the employee and if the deductions are, generally, for the benefit of the employee. The employer must retain each authorization for at least six (6) years following the termination of the employee's employment. The amendment requires that, before any deduction is made, the employee must receive "written notice of all terms and conditions of the payment and/or its benefits and the details of the manner in which deductions will be made."

An employer also must provide the employee with information regarding deductions and an updated total of all deductions from the employee's wages. Employees have the right to revoke authorization for any or all wage deductions at any time, and employers are required to cease those deductions as soon as possible.

B. Proposed NYSDOL Regulations

The NYSDOL recently issued proposed regulations on the timing, frequency, and notice requirements for these deductions, including a procedure that the employee may use to dispute the amount of the deduction which were open for public comment until

July 6, 2013. Significantly, the amended law also allows employers to make wage deductions to recover (1) "an overpayment of wages where such overpayment is due to a mathematical or other clerical error by the employer" and (2) "repayment of advances of salary or wages made by the employer to the employee," in accordance with the following provisions:

- **Repayment of Wage Advances**: The amount recovered through deduction per wage payment shall be determined by the written terms of the advance authorization, and may include total reclamation through deduction of the last wage payment should employment end prior to the expiration of the other terms of the written advance authorization.
- **Deductions for Overpayments:** 1) In such cases where the entire overpayment is less than or equal to the net wages earned after other permissible deductions in the next wage payment, the employer may recover the entire amount of such overpayment in that next wage payment; and (2) Where the recovery of an overpayment *exceeds* the **net** wages after other permissible deductions in the immediately subsequent wage payment, the recovery may not exceed 12.5% of the gross wages earned in that wage payment nor shall such deduction reduce the effective hourly wage below the statutory state minimum hourly wage.
- Employers should refrain from entering into any wage deduction agreement with employees based on the amended law until after its effective date and after the NYSDOL has finalized the new regulations.

III. EMPLOYEE CLASIFICATIONS

Section 13(a)(1) of the FLSA provides an exemption from both the minimum wage and overtime pay requirements for employees employed as *bona fide* executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $455 per week; for N.Y.S. employees the minimum weekly salary must be at least $543.75.

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

A. Administrative Exemption

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

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

- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

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

B. <u>Executive Exemption</u>

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

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and

- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Under a special rule for business owners, an employee who owns at least a *bona fide* 20-percent equity interest in the enterprise in which employed, regardless of the type of business organization (*e.g*., corporation, partnership, or other), and who is actively engaged in its management, is considered a *bona fide* exempt executive.

C. Professional Exemption

1. Learned Professional Exemption

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

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

- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Fields of science or learning include law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but is not in a field of science or learning.

2. Creative Professional Exemption

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

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

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

3. Teachers

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

D. Outside Sales Exemption

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

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

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

An outside sales employee makes sales at the customer's place of business, or, if selling door-to-door, at the customer's home. Any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property.

E. Computer Employee Exemption

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

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

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

    2. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

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

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

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

F. Highly Compensated Employees

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

G. Independent Contractors

According to the USDOL, for the purpose of determining FLSA coverage, an employee, as distinguished from a person who is engaged in a business of his or her own,

is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which he or she serves. The employer-employee relationship under the FLSA is tested by "economic reality" rather than "technical concepts." It is not determined by the common law standards relating to master and servant.

There is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. Rather, it is the total activity or situation which controls. Among the factors which the U.S. Supreme Court has considered significant in determining "independent contractor"/"employee" status are: 1) The extent to which the services rendered are an integral part of the principal's business; 2) The permanency of the relationship; 3) The amount of the alleged contractor's investment in facilities and equipment; 4) The nature and degree of control by the principal; 5) The alleged contractor's opportunities for profit and loss; 6) The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor; and 7) The degree of independent business organization and operation.

According to the USDOL, there are certain factors which are immaterial in determining whether there is an employment relationship. Such facts as the place where work is performed, the absence of a formal employment agreement, or whether an alleged independent contractor is licensed by State/local government are not considered to have a bearing on determinations as to whether there is an employment relationship. Additionally, the Supreme Court has held that the time or mode of pay does not control the determination of employee status.

According to the USDOL, "The Department of Labor is committed to ensuring that employees are classified properly so that they receive both the pay they rightfully earn and the protections to which they are entitled — including minimum and overtime wages, family and medical leave, and unemployment insurance." Recently, the USDOL obtained the entry of a consent judgment to recover $1.3 million in back wages for more than 14,500 workers of kgb USA Inc., Bethlehem, Pennsylvania, in the U.S District Court for the Eastern District of Pennsylvania. The consent judgment and order was the result of an investigation by the WHD which found that the company had misclassified employees as independent contractors and paid them a piece rate based on the numbers of text messages and inquiries they responded to, without regard to the number of hours they worked. FLSA violations resulted when piece rate earnings failed to yield at least the federal minimum wage of $7.25 per hour.

The WHD investigation also revealed that the company failed to record and maintain accurate records of employees' hours worked, in violation of FLSA record-keeping requirements. Under the terms of the consent judgment, the company was ordered to pay the back wages found due in full and was enjoined from violating the FLSA in the future. The agreement further required compliance with all minimum wage, overtime and record-keeping provisions of FLSA, and specifies that kgb USA shall not classify any worker as an "independent contractor" unless the worker is a *bona fide* independent contractor and fails to meet the definition of an "employee" under the FLSA.

IV. COMPENSABLE TIME

The workweek ordinarily includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place. "Workday," in general, means the period between the time on any particular day when such employee commences his/her "principal activity" and the time on that day at which he/she ceases such principal activity or activities. The workday may therefore be longer than the employee's scheduled shift, hours, tour of duty, or production line time.

A. Waiting Time

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

B. On-Call Time

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

C. Rest and Meal Periods

Rest periods of short duration, usually 20 minutes or less, are common in industry (and promote the efficiency of the employee) must be counted as hours worked. Unauthorized extensions of authorized work breaks need not be counted as hours worked when the employer has expressly and unambiguously communicated to the employee that the authorized break may only last for a specific length of time, that any extension of the break is contrary to the employer's rules, and any extension of the break will be punished.

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

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

D. Sleeping Time and Certain Other Activities

An employee who is required to be on duty for less than 24 hours is working even though he/she is permitted to sleep or engage in other personal activities when not busy. An employee required to be on duty for 24 hours or more may agree with the employer to exclude from hours worked *bona fide* regularly scheduled sleeping periods of not more than eight hours, provided adequate sleeping facilities are furnished by the employer and

the employee can usually enjoy an uninterrupted night's sleep. No reduction is permitted unless at least five hours of sleep is taken.

E. Lectures, Meetings and Training Programs

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

F. Travel Time

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

G. Home to Work Travel

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

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

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

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

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

J. Travel Away from Home Community

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

V. NUMBERS: REGULAR AND OVERTIME PAY ISSUES

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

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

Averaging of hours over two or more weeks is usually not permitted. In general, overtime pay earned in a particular workweek must be paid on the regular pay day for the pay period in which the wages were earned.

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

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

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

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

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

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

VI. DEALING WITH THE USDOL

FLSA requires employers to keep certain records relating to employees'

compensation. 29 U.S.C. § 211(c). Section 11(c) of the FLSA requires employers to make, keep and preserve records of employees and of their "wages, hours, and other conditions and practices of employment." *Id*. The recordkeeping requirements of the FLSA, along with USDOL regulations, specify the types of information that employers must keep for all covered employees, as well as information that must be retained for exempt employees to substantiate their exempt status. In addition, certain wage-hour practices, such as commissions and tips, require employers to document their compliance with the special rules governing such practices. 29 U.S.C. § 201 et seq.; 29 C.F.R. § 516 et seq.

While the FLSA requires no particular form for these records, it does require that the records include certain identifying information about the employee and accurate data about hours worked and wages earned. 29 C.F.R. § 516.1.

A. FLSA Recordkeeping Requirements for Non-Exempt Employees

Every employer must maintain and preserve payroll or other records containing the following information for each non-exempt employee: (a) Employee's full name and current home address; (b) Employee's date of birth, if under 19 years of age; (c) Employee's sex and occupation; (d) Employee's workweek (time of day and day of week on which the employee's workweek begins); (e) Employee's regular rate exclusions (the amount and nature of each payment that is excluded from the regular rate); (f) Employee's wage basis (the wage, salary, or other earning rate used in determining the employee's straight time (non-overtime) earnings for each pay period); (g) Employee's hours worked (includes total hours for each workday and workweek); (h) Employee's

straight time earnings (daily or weekly straight time earnings, including all earnings received on the basis of hourly rates, piece rates, commissions or salary); (i) Employee's weekly overtime pay; (j) Deductions from and additions to the employee's wages; (k) Pay period covered (records must show the date each employee was paid and the pay period covered by the payment); and (l) Wages paid (total wages paid on each pay period). 29 C.F.R. § 516.2(a).

The FLSA's recordkeeping requirements are not satisfied by merely maintaining copies of employees' paychecks.

For employees working on fixed schedules, an employer may instead maintain records showing the schedule of daily and weekly hours the employees work. 29 C.F.R. § 516.2(c). However, if the employer elects this option, it must also indicate that the employee actually worked this schedule. 29 C.F.R. § 516.2(c)(1). For any week in which an employee works more or less than the scheduled hours, the employer must record the exact number of hours worked for each day and each week. 29 C.F.R. § 516.2(c)(2).

There are slightly different requirements for employees who earn commissions or tips. For employees on commission, an employer need only maintain the information required by items (a) through (e), (g), (j) and (1) above, as well as a copy of the commission agreement or understanding and the total compensation paid each pay period. 29 C.F.R. § 516.16.

For tipped employees, the employer must maintain all the information in (a) through (1) above, as well as the following: (a) A notation identifying each tipped

employee; (b) The weekly or monthly amount of tips received by the employee. The amount of each tipped employee's wages that derive from tips; (c) The hours worked each workday in any job in which the employee does not receive tips; and (d) The hours worked each workday in any job in which the employee receives tips and the total straight-time earnings for such hours.

B. FLSA Retention Periods and Locations

1. Three Years

An employer must preserve the above records for at least three years from the date of last entry. The employer must also retain copies of collective bargaining agreements, sales and purchase records, written employment agreements, and memoranda summarizing oral employment agreements for at least three years. 29 C.F.R. § 516.5.

2. Two Years

An employer must preserve for at least two years records on which wage computations are based (*e.g.*, time cards, piece work tickets, wage rate tables, work and time schedules, and records of additions to or deductions from wages). 29 C.F.R. § 516.6. The employer must also retain for two years customer orders and invoices, shipping records, customer billings, and all records used to determine the original cost, operating and maintenance cost, and depreciation and interest charges, if such costs are involved in the calculation of wages paid. 29 C.F.R. § 516.6.

The records may be kept at the place of employment or in a central records office. 29 C.F.R. § 516.7. Wherever they are kept, the records must be available for inspection by the USDOL within 72 hours of the USDOL's notice to inspect them. 29 C.F.R. §

516.7.

C. USDOL Workplace Investigations

An investigator from the WHD may conduct an investigation to determine whether employees are paid and employed properly according to FLSA and the USDOL's regulations. The WHD does not require an investigator to previously announce the scheduling of an investigation, although in many instances the investigator will advise an employer prior to opening the investigation. The investigator has sufficient latitude to initiate unannounced investigations in many cases in order to directly observe normal business operations and develop factual information quickly.

The WHD conducts investigations for a variety of reasons, each having to do with the enforcement of FLSA and certain other laws, thereby assuring an employer's compliance. WHD does not typically disclose the reason for an investigation, although many are initiated by complaints from an employer's workers. In addition to employee complaints, WHD selects certain types of businesses or industries for investigation. The WHD targets low-wage industries, for example, because of high rates of violations or egregious violations, the employment of vulnerable workers, or rapid changes in an industry such as growth or decline. Occasionally, a number of businesses in a specific geographic area will be examined.

Investigations may be conducted under any one or more of the laws enforced by WHD, including FLSA. Section 11(a) of the FLSA authorizes representatives of the USDOL to investigate and gather data concerning wages, hours, and other employment

practices; enter and inspect an employer's premises and records; and question employees to determine whether any person has violated any provision of the FLSA.

A WHD investigation consists of the following steps:

- Examination of records to determine which laws or exemptions apply. These records include, for example, those showing the employer's annual dollar volume of business transactions, involvement in interstate commerce, and work on government contracts.
- Examination of payroll and time records, and taking notes or making transcriptions or photocopies essential to the investigation.
- Interviews with certain employees in private. The purpose of these interviews is to verify the employer's payroll and time records, to identify workers' particular duties in sufficient detail to decide which exemptions apply, if any, and to confirm that minors are legally employed.
- Interviews are normally conducted on the employer's premises. In some instances, present and former employees may be interviewed at their homes or by mail or telephone.

When all the fact-finding steps have been completed, the WHD investigator will ask to meet with the employer and/or a representative of the firm who has authority to reach decisions and commit the employer to corrective actions if any violations have

occurred. The employer will be told whether violations have occurred and, if so, what they are and how to correct them.

If back wages are owed to employees because of minimum wage or overtime violations, the investigator will request payment of back wages and may ask the employer to compute the amounts due. Employers may be represented by their accountants or attorneys at any point during this process. When the investigator has advised the employer of his/her findings, the employer or representative may present additional facts for consideration if violations were disclosed.

The New York State Department of Labor conducts similar unannounced investigations at an employer's worksite generally in response to an employee's wage and hour complaint.

VII. THE DOWNSIDE OF NON-COMPLIANCE

A. FLSA Remedies and Penalties

An employee may file a private lawsuit for back pay and an equal amount as liquidated damages, plus attorney's fees and court costs. FLSA further provides for collective actions to be brought by groups of employees to recover unpaid minimum wage or overtime pay on behalf of themselves "and other employees similarly situated." These "collective actions" are a form of representative class action in which each plaintiff must affirmatively file a "Consent Form" with the court to be included in the action.

The FLSA statute of limitations for both private and collective actions is two years. The statute of limitations period may be extended to three years upon a showing that the employer's violation of FLSA was "willful." A finding of willfulness requires a

showing that the employer knew or had reckless disregard for whether its conduct was prohibited by the FLSA.

Failing to maintain records required by the FLSA can result in a variety of penalties. Although the USDOL has no authority to impose civil monetary penalties for recordkeeping violations, a person found to have willfully violated the recordkeeping requirements can face criminal sanctions. 29 U.S.C. § 216(a). Criminal sanctions may include up to $10,000 in fines, six months imprisonment, or both. 29 U.S.C. § 216(a). In addition, courts can issue injunctions against future recordkeeping violations. 29 U.S.C. § 216(a).

B. New York State Remedies and Penalties

The NYDOL helps collect underpayments for workers who have not received the required minimum wage overtime payments. Generally, the Department recovers the funds without resorting to court action.

1. Minimum Wage Law: An employer that violates the Minimum Wage Law is subject to criminal prosecution and penalties. Action may also be taken in civil court. The Commissioner of Labor may require an employer to pay interest up to 16 percent and civil penalties up to 200 percent of the unpaid wages in addition to minimum wage underpayments. There is a six year statute of limitations in New York under the Minimum Wage Law.

2. WTPA Remedies: Violations of the notice and recordkeeping provisions of the WTPA may include the following: If an employer does not provide an employee with a required WTPA pay statement, then the employee may

recover $100 for each work week during which the violations occurred or continues to occur up to a maximum of $2,500, together with attorneys' fees and costs.

If an employer fails to provide an employee with the required Pay Notice within ten (10) business days of his/her first day of employment, then the employee may recover $50 for each work week during which the violation occurred or continues to occur up to a maximum of $2,500 together with attorneys' fees and costs.