EMPLOYEE OBLIGATIONS UNDER THE FAIR LABOR STANDARDS ACT AND THE MASSACHUSETTS MINIMUM FAIR WAGE LAW

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The Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq. (“FLSA” or the “Act”), establishes the general rule that employees covered by the Act must be paid a minimum wage and must be compensated at a rate not less than one and one-half times their regular rate for all hours worked in excess of 40 in a single workweek. The Massachusetts Minimum Fair Wage Law, MASS. GEN. LAWS ch. 151, §1 et seq. (“Chapter 151”), establishes the same basic standards under Massachusetts state law, but with some differences in application. These materials address the basic provisions of the FLSA, reviewing when an employer is covered, what enforcement mechanisms are in place, what obligations an employer has under both statutes, and what categories of employees are exempt from coverage. This outline also addresses similarities and differences between the FLSA and Chapter 151 in each of these areas.

I. OVERVIEW

A. The FLSA’s Interaction With the Massachusetts Minimum Fair Wage Law. The FLSA does not preempt state minimum wage and overtime statutes that afford greater protection and benefits to employees. The FLSA sets a floor for minimum wage and overtime provisions. States may establish further obligations on employers. Chapter 151, for example, has a minimum wage above the FLSA’s. Chapter 151 has also been interpreted to have different standards for exemptions from minimum wage and overtime requirements than the FLSA and its accompanying regulations. This different application of exemptions is discussed more fully in Section II.D.3., infra.

B. Minimum Wage Standards

1. Minimum Wage Rate. The minimum wage under the FLSA is $5.15 per hour, except that employers may pay workers younger than 20 years old an “opportunity wage” of $4.25 per hour during the first 90 consecutive calendar days of their employment. See 29 U.S.C. § 206(g). As of January 1, 2001, the minimum wage under Chapter 151 is $6.75 per hour. Mass. Gen. Laws ch. 151, § 1. Pursuant to the interaction principles set forth above, the Massachusetts minimum wage essentially supersedes the $5.15 minimum wage set by the FLSA for employees working in Massachusetts, except in the rare cases in which an employee is exempt under state law but not exempt under the FLSA. It also essentially supersedes the “opportunity wage” provisions in the FLSA. 1

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1 Massachusetts law does allow employers to pay a minimum wage lower than the state minimum to qualified learners or apprentices. See Mass. Gen. Laws ch. 151, § 9. In order to pay this “apprentice wage,” employers must obtain a certificate from the Commissioner of Labor, see id., and in no case may the “apprentice wage” be less than 80% of the current applicable minimum wage. 455 C.M.R. §2.02(2). Under the current minimum wage requirements, the minimum “apprentice wage” would be $5.40, which is still greater than the federal minimum wage under the FLSA.
2. **Who is Covered?** Employers must pay all nonexempt employees the minimum wage. The distinction between exempt and nonexempt employees is explained in Section II, *infra.*

3. **Application to Salaried Employees.** Employers must pay the minimum wage to nonexempt employees, even if those employees are paid on a salary, rather than hourly, basis. 29 C.F.R. § 778.113 (discussing calculation of regular rate of pay in context of overtime payment requirements, noting that regular rate may not fall below minimum wage). To determine whether wages paid on a salary basis meet the minimum wage requirement, divide the total number of hours worked in any week into the total salary amount for that week. 29 C.F.R. § 778.113. If the hourly rate that results from this calculation is below the minimum wage, the employer must adjust the salary so that the employee is paid the appropriate wage rate.

4. **Application to Other Employees.** Similar principles apply to pieceworkers, see Section III.C.6., *infra,* and employees paid with bonuses, commissions, or other forms of compensation. There are detailed rules with respect to what kinds of compensation may be excluded from the calculation of an employee’s regular rate. These are discussed *infra* in Section III.C. In addition, credits apply for tips and employer-provided lodging and meals in certain circumstances under both the FLSA and the Massachusetts Minimum Fair Wage Law. 29 C.F.R. § 778.116; MASS. GEN. LAWS. ch. 151, § 2A; 455 C.M.R. §§ 2.03(a) & (b).

C. **Overtime Standards.** Employers must compensate nonexempt employees at a rate of time and one-half for all hours worked over 40 in a week. 29 U.S.C. § 207(a)(1), MASS. GEN. LAWS ch. 151, § 1A. Overtime standards and payment obligations, including the application of the standard and alternative methods for calculating overtime, are more fully discussed in Section III, *infra.*

D. **Coverage.** The FLSA only applies where: (1) the employer is “covered” under the Act; (2) an employer/employee relationship exists; and (3) the work done is performed in the United States or a U.S. possession or territory.

1. **Employer Coverage.** An “employer” is defined in the FLSA as “any person acting directly or indirectly in the interest of an employer in relation to an employee.” 29 U.S.C. § 203(d). Employers may be covered under the Act by virtue of their status as a covered “enterprise” or by virtue of their individual employees’ status as covered individuals. Most employers qualify as an “enterprise.”

a. **Enterprise Coverage.** The minimum wage and overtime provisions of the FLSA apply to any employer that is “an enterprise engaged in commerce or in the production of goods for commerce.” 29 U.S.C. §§ 206(a) & 207(a)(1). This concept of “enterprise” coverage for employers is defined by the FLSA as follows:

(1) **Engaged in Commerce.** The “enterprise” must have employees who are actually “engaged in commerce or the production of goods for commerce,” or employees who handle, sell or otherwise work on goods
that have been moved in or produced for commerce by any person, 29
U.S.C. § 203(s)(1)(A)(i); and

(2) **$500,000 Sales Volume or Specific Statutory Inclusion.**

   (a) The “enterprise” has an annual gross volume of sales made or
   business done of not less than $500,000. 29 U.S.C. § 203(s)(1)(A)(ii);
   or

   (b) Regardless of sales volume, health care institutions, hospitals, and
   schools (regardless of whether the enterprises are public or private or
   operated for profit or not for profit), as well as the activity of a public
   agency, are all considered “enterprises” that are covered by the Act.
   29 U.S.C. §§ 203(s)(1)(B) & (C). Based on the principles of
   sovereign immunity, the Supreme Court has held that states may not
   be sued under the FLSA. *See Alden v. Maine*, 527 U.S. 706 (1999)
   (holding that Maine citizens could not bring suit against their
   employer, the state of Maine, even in state court, because the FLSA
   does not abrogate sovereign immunity of the states).

b. **Employment of Covered Employees.** If two or more employees are covered
individually, then the employer is covered, as long as the sales volume test set
Individual coverage of employees encompasses those individuals who “in any
workweek [are] engaged in commerce or in the production of goods for
commerce.” 29 U.S.C. §§ 206(a) & 207(a)(1). Individual coverage for
employees engaged in commerce is carefully detailed in the regulations. 29
C.F.R. §§ 776.0 to 776.21.

2. **Employer/Employee Relationship.**

   a. **Definition of “Employ.”** An “employee” is defined in the FLSA as “any
   individual employed by an employer.” 29 U.S.C. § 203(e)(1) (emphasis
   added). According to the FLSA, “employ” means “to suffer or permit to
   work.” 29 U.S.C. § 203(g). For example, a business may not claim that it did
   not actually hire someone to work (and thus cannot be the person’s employer),
   if the business allowed the work to continue with its knowledge and tacit
   permission. In that case, the business would have “permitted” the individual to
   perform the work, and would thus be subject to the FLSA. *See Burry v.
   National Trailer Convoy, Inc.*, 338 F.2d 422, 426 (6th Cir. 1964) (wife of
   employee who was allowed to work in husband’s place while he was absent,
   where she was trained by company and worked with its knowledge, was
   employee).

   b. **Employee vs. Independent Contractor.** Independent contractors are not
   employees, and thus are not covered by the Act’s provisions relating to
   minimum wage and overtime requirements. In determining whether an
individual is in fact covered as an employee under the FLSA, courts apply the economic realities test.²

(1) Economic realities test. This test assesses whether the individual is economically dependent on the employer. This test is typically more expansive than other legal tests for determining whether an individual is an employee or an independent contractor, such as those known as the common law right to control test or the IRS 20 factor test. See Doe v. St. Joseph’s Hosp., 788 F.2d 411, 421-25 (7th Cir. 1986). The First Circuit has stated that this test should only be used in the context of determining employee status for wage and hour purposes under the FLSA. Speen v. Crown Clothing Corp., 102 F.2d 625, 631-32 (1st Cir. 1996). The Tenth Circuit set forth the following five factors to this test in Doty v. Ellis, 733 F.2d 720, 723 (10th Cir. 1984):

(a) Control. The greater the degree of control exerted by the employer over the individual, the more likely that an employment relationship will be found.

(b) Profit or Loss. The greater an individual’s genuine opportunity to realize a profit or loss from rendering services, the more likely the individual will be deemed an independent contractor.

(c) Investment. If the individual has made a significant investment in the business or in the equipment and materials required to render agreed upon services, it is likely he or she is an independent contractor.

(d) Permanence. The extent to which the working relationship is more permanent than fleeting indicates the individual is an employee, rather than an independent contractor.

(e) Skill. The higher the degree of skill required to perform the work, the more likely the individual is an independent contractor.

(2) Examples. Each determination of whether an employee is an independent contractor or an employee is made on a case-by-case basis. It therefore depends on the facts and circumstances of each case. For example, an employer/employee relationship existed in Reich v. Circle C. Invs., 998 F.2d 324, 326-27 (5th Cir. 1993) (topless dancers at a nightclub); Donovan v. Unique Racquetball Clubs, 674 F. Supp. 77 (E.D.N.Y. 1987) (locker room attendants); Luther v. Z. Wilson, Inc., 528 F. Supp. 1166 (S.D. Ohio 1981) (real estate salesperson); and in Halferty v. Pulse Drug Co., 821 F.2d 261 (5th Cir. 1987) (ambulance service dispatcher). However, courts found that an employer/employee relationship did not exist and that the individual was an independent contractor in Dole v. Amerilink Corp., 729 F. Supp. 73 (E.D. Mo. 1990) (cable television installers); Baker v.  

² For more information regarding the distinction between employees and independent contractors, refer to the seminar materials prepared by the Labor Department of Goodwin Procter LLP for its September 1997 seminar entitled “Employing Contingent Workers.” Please contact the Department if you would like a copy of these materials.
3. **Coverage Under the Massachusetts Minimum Fair Wage Law.** Chapter 151 broadly applies to all “employers” in Massachusetts. Unlike the FLSA, there is no requirement under this chapter that employers have a specified amount of annual sales volume or engage in any particular kind of activity. However, some exemptions from the overtime requirements render the overtime standards of Chapter 151 inapplicable to some employers that are covered under the FLSA, such as hotels, motels, restaurants, gasoline stations, hospitals, nursing homes and non-profit schools and colleges. MASS. GEN. LAWS ch. 151, §1A.

**E. Enforcement**

1. **Department of Labor.** The Secretary of Labor may bring a suit on behalf of employees for damages or injunctive relief against an employer who is violating the minimum wage or overtime provisions of the Act. Employee consent is not necessary to the maintenance of the lawsuit. In fact, an employee’s withdrawal of a request for a lawsuit will have no bearing on the Secretary’s right to bring suit, though it certainly may affect the Secretary’s ability to meet her burden of proof, especially where the employee subsequently claims that the employer did not violate the provisions of the Act. Once the Secretary has filed suit on behalf of employees, the FLSA provides that the individual employee’s right to file suit or to join in another individual’s suit terminates. 29 U.S.C. §§ 216(b) & 216(c).

2. **Individual and Class Actions.** An individual employee may bring suit against his or her employer for violation of the Act on behalf of himself or herself individually or on behalf of himself or herself and a class of similarly situated plaintiffs who have agreed to “opt in” to the suit. In such a suit, they may seek to recover back wages and liquidated damages, along with attorney’s fees and costs. 29 U.S.C. § 216(b). For FLSA enforcement purposes, those subject to suit may include individual officers or others “acting directly or indirectly in the interest of the employer.” 29 U.S.C. §203(d).

3. **Remedies.**
   a. **Injunctive Relief.** The Secretary of Labor is authorized under Section 11(a) of the Act to seek injunctive relief to restrain violations of the FLSA with respect to the minimum wage and overtime provisions of the Act and to prevent prospective violations of those provisions. 29 U.S.C. § 211(a). Section 17 of the Act grants jurisdiction to the federal district courts to restrain violations of Section 15 of the Act. 29 U.S.C. § 217. Individual employees are not authorized to seek injunctive relief to restrain violations, except where the employees seek reinstatement or a similar remedy in a retaliation action. 29 C.F.R. §§ 215(a)(3) & 216(b).
   b. **Back Wages.** Both the Secretary of Labor, on behalf of employees, and employees themselves are authorized to bring suit to recover back wages owed
to employees for violations of the minimum wage and overtime provisions of the Act. 29 U.S.C. §§ 216(b) & (c). If the Secretary of Labor files suit on behalf of employees, the employees’ consent to such suit is unnecessary. Even if the employee withdraws a request for the Secretary to file suit, the Secretary may still pursue the claim.

c. **Civil Money Penalties.** The Secretary of Labor is authorized under Section 16(e) of the FLSA and its accompanying regulations, 29 C.F.R. pt. 578, to assess civil money penalties for repeated or willful minimum wage or overtime violations. No civil money penalties are authorized for violations of the Act’s recordkeeping requirements. A person may be subject to a penalty “not to exceed $1,000” for each violation of the minimum wage or overtime provisions of the Act. 29 C.F.R. § 578.1.

(1) **Factors Considered in Assessing Penalties.** In determining whether to assess civil money penalties, the Administrator of the Wage and Hour Division of the Department of Labor must consider the seriousness of the violations and the size of the employer’s business. 29 C.F.R. § 578.4(a). The Administrator may also consider whether the employer has made efforts in good faith to comply with the provisions of the Act, the employer’s explanation for the violations, and the previous history of violations by that employer, among other factors. 29 C.F.R. § 578.4(b).

(2) **Contesting Penalties.** An employer may contest the assessment of civil money penalties by commencing an administrative proceeding with an Administrative Law Judge. Such a proceeding may be commenced by the employer’s filing exceptions to the Administrator’s assessment of civil money penalties. See generally 29 C.F.R. pt. 580 (describing administrative procedure for assessing and contesting penalties).

d. **Liquidated Damages.** Both the Secretary of Labor and individual employees bringing suit may seek to recover liquidated damages for an employer’s violation of the minimum wage and overtime provisions of the Act. 29 U.S.C. §§ 216(b) & (c).

(1) **Computation of Award.** A liquidated damages award is computed by taking the total amount of unpaid minimum wages and unpaid overtime compensation and doubling it. 29 U.S.C. §§ 216(b) & (c). Attorney’s fees and costs, which are authorized for prevailing parties, see 29 U.S.C. § 216(b), should not be added to the total award before doubling. 29 U.S.C. § 216(b).

(2) **Discretion of Courts to Award Liquidated Damages.** A court may award liquidated damages in actions to recover unpaid minimum wages or overtime payments. See, 29 U.S.C. § 216(b) (an employer “shall be liable” for liquidated damages in the case of unpaid minimum wages or unpaid overtime compensation). The Portal to Portal Act of 1947 gives courts discretion to decide whether or not to award liquidated damages. The Act provides:
If the employer shows to the satisfaction of the court that the act or omission giving rise to [the lawsuit alleging violation of the Act] was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA], the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.


e. **Attorney’s Fees and Costs.** The FLSA provides that a court, in an action under the Act, must award “in addition to any judgment awarded to the plaintiff or plaintiffs . . . a reasonable attorney’s fee to be paid by the defendant, and the costs of the action.” 29 U.S.C. § 216(b). This mandatory award of attorney’s fees and costs to a prevailing plaintiff in an action under the FLSA differs from some other federal statutes, where awards of attorney’s fees to the prevailing party are discretionary with the court. For example, the statute governing attorney’s fees under several civil rights laws, 42 U.S.C. § 1988, authorizes a trial court to award attorney’s fees “in its discretion” to the prevailing party. 42 U.S.C. § 1988.

f. **Criminal Proceedings.** In addition to or in the alternative to civil proceedings, violations of the FLSA can result in criminal proceedings for willful violations, subjecting the employer to a fine of up to $10,000 and, for a second or subsequent offense, imprisonment of up to six months. 29 U.S.C. § 216(a).

4. **Statute of Limitations.** The Portal-to-Portal Act of 1947 imposed a uniform statute of limitations on claims for “unpaid minimum wages, unpaid overtime compensation, or liquidated damages.” 29 U.S.C. § 255. Prior to that time, each individual state’s statute of limitations applied to a cause of action under the FLSA. Currently, the FLSA provides two different limitations periods—two years “after the cause of action accrued” for nonwillful violations of the Act and three years for willful violations. 29 U.S.C. § 255(a). Case law has interpreted “willful” under the FLSA to mean that the defendant either knew its conduct violated the FLSA or showed reckless disregard for whether its actions complied with the Act. See *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988).

5. **Releases.** The Supreme Court has held that waivers or releases that are unsupervised by the DOL and that purport to waive an employee’s rights under the FLSA to liquidated damages and attorney’s fees are void against public policy because the rights granted to employees under the FLSA are unwaivable. See *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697 (1945). In a later case, the Court held that the remedy of “liquidated damages cannot be bargained away by bona fide settlement of disputes over coverage.” *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946). In *Gangi*, the employer argued, but did not persuade the Court, that the waiver was the result of a settlement of a bona fide dispute over coverage under the Act and that therefore the releases were not prohibited by *Brooklyn Savings Bank*. The Court did not comment on whether bona fide settlements of disputes over issues other than coverage could support valid releases of claims, and that remains
an open question. Most courts, however, uniformly reject settlement agreements that purport to waive claims under the FLSA.

6. **Retaliation.** The FLSA prohibits employers from retaliating against employees for filing a complaint or otherwise pursuing or testifying in FLSA proceedings. 29 U.S.C. §215(a)(3).

7. **Remedies, Statute of Limitations, Releases and Retaliation Under the Massachusetts Minimum Fair Wage Law.**

   a. **Criminal Penalties.** Chapter 151 provides that an employer or its officers or agents who violate the chapter’s minimum wage or overtime provisions may be subject to fines and/or imprisonment. MASS. GEN. LAWS ch. 151, § 1B. These fines and possible imprisonment terms are detailed at MASS. GEN. LAWS ch. 149, § 27C(1) and range from a fine not more than $10,000 and up to six months in jail for a nonwillful first offense to a fine not more than $50,000 and up to two years in jail for a subsequent willful offense.

   b. **Civil Citations.** If the Massachusetts Attorney General does not invoke criminal proceedings pursuant to §27C(1), he may alternatively issue a written warning or civil citation to the employer. The civil citation may require: “that the infraction be rectified, that restitution be made to the aggrieved party, or that a civil penalty of not more than $25,000 for each violation be paid to the commonwealth, within 21 days of the date of issuance of such citation.” MASS. GEN. LAWS ch. 149, § 27C(b)(1).

   c. **Treble Damages, Costs, and Attorney’s Fees.** An employee may recover individually in a civil suit against his or her employer “three times the full amount of . . . overtime . . . compensation [due to him or her] less any amount actually paid . . . by the employer.” MASS. GEN. LAWS ch. §151, § 1B. An employee may also recover any costs and reasonable attorney’s fees that a court allows. Id.

   d. **Statute of Limitations.** Chapter 151 imposes a two year statute of limitations on wage claims brought under its provisions. See MASS. GEN. LAWS ch. 151, § 20A.

   e. **Releases.** Chapter 151 provides that an employer and employee cannot agree that the employee will work for less than the statute requires. See MASS. GEN. LAWS ch. 151, § 1B. There are no reported cases in Massachusetts that address the validity of a release of claims under Chapter 151. However, the FLSA’s prohibition may be indicative of how Massachusetts courts would approach the issue.

   f. **Retaliation.** Chapter 151 includes broader prohibitions on retaliation than the FLSA. Chapter 151 prohibits retaliation not only for filing and otherwise pursuing a complaint, but also retaliation “because [the] employer believes that [the] employee . . . may complain of a violation . . . .” MASS. GEN. LAWS ch. 151, §19(1).

II. **Exemptions**
A. White Collar Exemptions

1. General Scope. White collar exemptions are those exemptions that exist for executive, administrative, professional, and outside sales employees. Exemptions for all four categories exist under the FLSA and Chapter 151.

2. Outside Salesperson. The outside salesperson exemption is codified at 29 C.F.R. § 541.5. An employee must meet the following requirements to qualify for the outside salesperson exemption:
   a. The employee must be employed for the purpose of making sales or obtaining orders or contracts for services or the use of facilities; and
   b. The employee must customarily and regularly leave the employer’s premises for the purpose of making such sales; and
   c. The employee must not spend more than 20 percent of his or her time in a given week engaged in other activities (excluding deliveries and collections which are incidental to the employee’s solicitations).

3. Executive, Administrative and Professional Exemptions. There are three basic requirements for these exemptions:
   a. The employee’s primary duty must be to perform work of an exempt nature; and
   b. The employee must be paid compensation in a specified form (e.g., on a salary or fee basis) and in at least a specified amount (e.g., $500 per week).

What constitutes “work of an exempt nature” for these purposes varies with the type of exemption, as addressed below.

4. Narrow Construction of Exemptions. Because the FLSA is a remedial statute, the exemptions to its requirements are “narrowly construed against the employers seeking to assert them,” and the exemptions only apply to “establishments [that are] plainly and unmistakably within their terms and spirit.” See Reich v. John Alden Life Ins. Co., 126 F.3d 1, 7 (1st Cir. 1997) (quoting Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960)). Moreover, employers bear the burden of showing that their employees fit within the narrow exemptions under the Act. Id. at 7.

B. Salary Basis Test

1. General Standard. The regulations require that an exempt white collar employee must “receive his full salary for any week in which he performs any work without regard to the number of days or hours worked.” 29 C.F.R. § 541.118(a). The “full salary” must be a predetermined amount, regularly received each pay period, id., which cannot be reduced due to “variations in the quality or quantity of work performed.” Id.

2. Permissible Deductions from Salary. The following are permissible deductions of less than one week from an employee’s predetermined amount of salary that do not affect the status of an employee as exempt under the salary basis test:
   a. Deductions during the initial and final weeks of an employee’s
employment for partial weeks worked;

b. Deductions from salary for personal absences of a day or more;

c. Deductions from salary for absences of a day or more due to sickness or disability provided the employer has a bona fide sick or disability pay plan;

d. Deductions from salary for absences taken pursuant to the Family and Medical Leave Act; and

e. Deductions from salary for absences (e.g., disciplinary suspensions) due to violations of safety rules of major significance.

See 29 C.F.R. § 541.118.

3. **Impermissible Deductions.** The following deductions taken from an employee’s pay could jeopardize that employee’s status as an exempt employee:

a. Deductions for absences occasioned by the employer (e.g., for lack of work);

b. Deductions for absences due to jury duty, attendance in court or other judicial proceeding as a witness, or temporary military leave;

c. Deductions for absences of less than one day. This does not prevent an employer from taking deductions from a leave bank, such as sick leave or vacation leave, for partial day absences as long as the employee receives payment equal to his or her guaranteed salary; and

d. Deductions for disciplinary reasons, for violations of ordinary rules governing employee conduct.

4. **Window of Correction.** The salary basis regulations permit an employer to maintain exempt status for its employees even after it has made improper deductions from their salary. See 29 C.F.R. § 541.118(a)(6) (“[W]here a deduction not permitted by these interpretations is inadvertent or is made for reasons other

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3 The Department of Labor currently interprets its regulations to permit deductions from accrued leave for partial day absences without jeopardizing an employee’s salaried status. In an unpublished opinion letter dated April 9, 1993, the DOL stated:

Where an employer has bona fide vacation and sick time benefits, it is permissible to substitute or reduce the accrued benefits for the time an employee is absent from work, even if it is less than a full day, without affecting the salary basis of payment, if by substituting or reducing such benefits, the employee receives in payment an amount equal to his or her guaranteed salary.

WH Admin. Op. (April 9, 1993); see also WH Admin. Op. (April 15, 1995) (applying same policy to leave bank deductions); WH Admin. Op. (Jan. 13, 1994) (same). See also McDonnell v. City of Omaha, 999 F.2d 293 (8th Cir. 1993) (following DOL rationale set forth in 1987 opinion letters that compats with language quoted in opinion letter above) and Barner v. City of Novato, 17 F.3d 1256 (9th Cir. 1994) (same). However, the First Circuit, which includes Massachusetts, has not addressed the issue to date. Moreover, it is arguable that establishing a negative leave bank violates this standard. See Klein v. Rush Presbyterian-St. Luke’s Med. Ctr., 990 F.2d 279 (7th Cir. 1993) (“comp time” policy that required nurses to use time from their comp time banks if they were late or left early and to go into “negative comp time” once their leave time had been exhausted was inconsistent with salary basis requirement).
C. **Short Tests vs. Long Tests.** The FLSA simply provides that the overtime provisions of the Act do not apply to administrative, executive, or professional employees. These exemptions are not defined in the FLSA itself; rather, the Secretary of Labor has set forth the requirements for each exemption in the regulations promulgated pursuant to the Act. *See 29 C.F.R. pt. 541.* These regulations set forth both a short test and a long test for determining an employee’s status under each of the three exemptions. For all intents and purposes, the long tests for the executive, administrative, and professional exemptions have been rendered functionally irrelevant. This is because the short test uses pay levels that are at such a low level that nearly every purportedly exempt employee meets the short test salary threshold, which currently stands at $250 per week. Until the regulations are changed and the salary level raised, the vast majority of employees that employers classify as exempt will meet the salary threshold for the short test.

D. **Executive Exemption, 29 C.F.R. § 541.1**

1. **Short Test.** To qualify for exemption as an “employee employed in a bona fide . . . executive . . . capacity,” employees who are paid at least $250 per week on a salary basis must:

   a. **Have a primary duty** (generally, but not necessarily, the duty that occupies more than 50 percent of the employee’s time) that consists of the management of the enterprise in which the employee works or of a customarily recognized department or subdivision of the enterprise, including but not limited to supervising two or more employees (determined on a full-time equivalent basis); and

   b. **Perform work** that includes the customary and regular direction of the work of two or more other employees.

2. **Long Test.** Employees who are paid between $155 and $250 per week on a salary basis can qualify for exempt status as executives provided that, in addition to satisfying (a) and (b) of the short test above, they also:
a. Have the authority to hire and fire other employees or to make effective recommendations regarding hiring, firing, promotion and demotion of other employees; and

b. Customarily and regularly exercise discretionary powers; and
c. Do not devote more than 20 percent of their time (40 percent in the case of retail or service establishments) to work that is not closely related to the work described above.

3. The Executive Exemption Under Massachusetts Law. Although the Massachusetts Minimum Fair Wage Law contains an exemption for “bona fide executive employees,” there are no state statutes or regulations that define the term. In Goodrow v. Lane Bryant, 432 Mass. 165 (2000), the Supreme Judicial Court of Massachusetts analyzed the applicability of the executive exemption under state law to a retail sales employee. The plaintiff in Goodrow was a co-sales manager at a Lane Bryant retail clothing store. Her job duties involved basic retail sales work, including keeping the store neat and presentable and providing on-the-job assistance to sales associates. On some occasions, the plaintiff assumed the duties of store management when there was no store manager. In analyzing whether the plaintiff fit within the overtime exemption for executive employees under state law, the SJC applied the FLSA standard for assessing whether an employee is a “bona fide executive” and found that the plaintiff was not exempt under this standard. The SJC also noted that it was not bound by the federal interpretation of the executive exemption as defined by the federal regulations. The court then applied a “common understanding” standard of the executive exemption, which took into account dictionary definitions of the terms in the definition. Under that standard, the court also concluded that the plaintiff did not qualify for the executive exemption. Id. at 172.

4. Illustrative Cases. The First Circuit, in Donovan v. Burger King, 672 F.2d 221 (1st Cir. 1982) applied the short test to individuals employed as assistant restaurant managers in several Burger King locations. The court held that the “primary duty” of those assistant managers was managerial. Id. at 226-27. Some of the functions the assistant managers performed were determining how much food should be prepared, running cash checks, scheduling employees, keeping track of inventory, and assigning employees to particular jobs. Id. Accordingly, the First Circuit concluded that such employees were “executive employees” for purposes of the FLSA. In a similar case in the Second Circuit, Donovan v. Burger King, 675 F.2d 516 (2d Cir. 1982), the court reached the same conclusion with respect to assistant restaurant managers who made more than $250 per week because they applied the short test, which focuses on the “primary duty” of the employee. Id. at 520. However, the court applied the long test to some assistant managers because they made less than $250 per week. Id. at 519. Under the long test, the assistant restaurant managers were not exempt because more than 50% of their time was spent doing nonexempt work, regardless of what their “primary duty” was. Id.

5. Examples of Exempt Executive Occupations. The following occupations have been determined by various courts to be exempt under the executive white collar
exemption. These occupations are listed by way of example only. Any court will undertake its own analysis of an employee’s status, irrespective of job title, in determining whether an exemption will apply in any given case.

- Golf course manager who spent time doing non-manual tasks
- Working foreman who did not spend more than 20% of working time performing nonexempt production work
- Dietary manager for retirement community
- Aquatics director responsible for day-to-day operations of aquatics department

Other decisions have found that the following positions were not exempt executive positions. Again, the facts of each individual case are critical:

- Foreman at car repair center who devoted almost all of his working time to repairing vehicles, waiting on customers, and cleaning service area
- Real estate company crew supervisor who worked along with crew and performed common laborer’s tasks

E. Administrative Exemption, 29 C.F.R. § 541.2

1. **Short Test.** To qualify for exemption as an “employee employed in a bona fide . . . administrative . . . capacity,” employees paid at least $250 per week on a salary or fee basis must:
   a. **Have a primary duty that consists of either:**
      (1) The performance of office or nonmanual work directly related to the management policies or general business operations of their employer or their employer’s customers; or
      (2) The performance of administrative functions in a school system or educational institution directly related to academic instruction or training; and
   b. **Perform work that includes the exercise of discretion and independent judgment.**

2. **Long Test.** Employees who are paid between $155 and $250 per week on a salary or fee basis can qualify for exempt status as administrative employees provided that, in addition to satisfying (a) and (b) of the short test above, they also:
   a. **Perform work that includes the customary and regular exercise of discretion and independent judgment; and**
   b. (i) Regularly and directly assist a proprietor or executive or administrative employee, or (ii) perform under only general supervision work along specialized or technical lines which requires special training, experience or knowledge, or (iii) execute special assignments or tasks under only general supervision; and
   c. **Do not devote more than 20 percent of their time (40 percent in the case of retail or service establishments) to work that is not closely related to the**
work described above.

3. The Administrative Exemption Under Massachusetts Law. No Massachusetts court decisions have interpreted Chapter 151’s exemption for administrative employees. However, given that the SJC applied the “common understanding” test to the interpretation of the executive exemption in Goodrow v. Lane Bryant, discussed in Section II.D.3, supra, the SJC may well apply a similar approach to evaluating a claimed administrative exemption.

4. Applying the Exemption.

      (1) Production Workers vs. Administrative Workers. The regulations of the U.S. Department of Labor (“DOL”) distinguish between “administrative” work and “production” work for purposes of examining what constitutes “management policies or general business operations” under the short test for the administrative exemption. See 29 C.F.R. § 541.205(a). For example, in Dalheim v. KDFW-TV, 918 F.2d 1220, 1230 (5th Cir. 1990), the court held that:

         [t]he distinction § 541.205(a) draws is between those employees whose primary duty is administering the business affairs of the enterprise from those whose primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce and market.

         Id. The production/administration distinction prevents application of the administrative exemption to many employees who perform what otherwise would be considered “white collar” work. The regulations provide, however, that employees who perform administrative work for their employers’ customers may be treated as exempt, even though their work constitutes “production” for their employers. 29 C.F.R. § 541.205(d). For example, tax experts provide administrative services for their employers’ customers and therefore may qualify for the administrative exemption (provided that they meet all of the other requirements), even though they produce the service that the accounting firms that employ them exist to produce and market. Id.

      (2) Substantial Importance.

         Not only must work be “administrative” rather than “production” in nature, but it also must be of “substantial importance.” This may be limited to the effect on a segment of the business. However, the work must, in any event, “affect[] business operations to a substantial degree.” 29 C.F.R. §541.205(c).

   b. Requirement that Administrative Exempt Employees Exercise Discretion and Independent Judgment.

      (1) Standard. In order to qualify for the administrative exemption, employees must have the authority to make or recommend decisions “with respect to matters of consequence.” 29 C.F.R. § 541.207(d)(1). While an administrative employee’s decision-making authority need not be final, 29 C.F.R. § 541.207(e)(1), the regulations provide that “the kinds of
decisions normally made by clerical and similar types of employees” do not satisfy the statutory requirement. 29 C.F.R. § 541.207(d)(2).

(2) Application of Skill and Knowledge Not Sufficient. The regulations distinguish the required “discretion and independent judgment” from the routine application of skill, knowledge and procedures. 29 C.F.R. § 541.207(c)(1). For example, inspectors who determine whether products meet manufacturing standards make judgments “along standardized lines involving well-established techniques and procedures” do not exercise a sufficient amount of independent judgment to meet the requirements for the exemption. 29 C.F.R. § 541.207(c)(2). Similarly, in Brock v. National Health Corp., 28 Wage & Hour Cas. (BNA) 342, 349 (M.D. Tenn. 1987), the court found that staff accountants did not exercise ample discretion and independent judgment to qualify for the administrative exemption. The staff accountants’ primary responsibility, on which they spent approximately 80 to 90 percent of their time, consisted of conducting monthly audits of nursing home books and reporting any problems to their supervisors. Id. at 344-45. When they began employment, they were issued manuals which contained step-by-step instructions for completing the audits. Id. at 344. The court concluded that the accountants were little more than bookkeepers and refused to apply the administrative exemption. Id. at 349.

c. Illustrative Case. The First Circuit examined the administrative exemption in Reich v. John Alden Ins. Co., 126 F.3d 1 (1st Cir. 1997). In that case, the Secretary of Labor sued John Alden Insurance Company claiming that its marketing employees were not exempt under the FLSA and should be paid overtime. In so claiming, the Secretary maintained that the insurance company’s business was “sales” of insurance policies. Based on this characterization, the Secretary of Labor contended that the marketing employees’ assistance in producing sales made them production employees, rather than administrative employees under the Act. The First Circuit disagreed, noting that the marketing employees’ independent relationship with insurance agents, their activities in conducting work related to management and operations, and the fact that the company’s principal business was the creation of insurance policies (and not merely sale of policies), all led to the conclusion that the marketing employees were not engaged in production activities and therefore were appropriately classified as exempt.

5. Examples of Exempt Administrative Occupations. The following occupations have been determined by various courts to be exempt under the administrative white collar exemption. These occupations are listed by way of example only. Any court will undertake its own analysis of an employee’s status, irrespective of job title, in determining whether an exemption will apply in any given case.

- Buyers who have significant responsibility for purchasing inventory or setting prices
• Credit managers who decide on credit limits, terms, and approval of credit applications
• Assistants with a high level of responsibility, including arranging interviews and meetings, responding to correspondence, and handling callers and meetings in the absence of the superior
• Claims adjusters with significant and uncontrolled settlement authority

Other decisions have found that the following positions were not administrative positions that qualified as exempt under the Act. Again, the facts of each individual case are critical:
• Purchasers with no discretion as to how to carry out their jobs
• Bookkeepers who merely review figures, tabulate results, and compile reports
• Clerical employees who exercise only a small amount of discretion
• Building inspectors who analyze compliance with exact specifications or generally accepted standards

F. Professional Exemption, 29 C.F.R. § 541.3

1. Short Test (General). Employees who are paid at least $250 per week on a salary or fee basis and whose work includes the consistent exercise discretion and independent judgment and whose primary duty consists of:
   a. Work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study; or
   b. Teaching, tutoring, instructing, or lecturing in a school system or educational institution; or
   c. Work requiring the theoretical and practical application of highly specialized knowledge in computer systems analysis, programming, and software engineering. Such employees need not receive a salary of $250 per week provided that their hourly rate of pay is greater than 6½ times the minimum wage.

2. Short Test (Artistic). Employees who are paid at least $250 per week on a salary or fee basis and whose primary duty consists of work that requires invention, imagination, or talent in a recognized field of artistic endeavor.

3. Long Test. Employees who are paid between $170 and $250 per week on a salary or fee basis (or doctors, lawyers or teachers at any salary) and who:
   a. Have a primary duty that consists of:
      (1) Work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study; or
(2) Work that requires invention, imagination, or talent in a recognized field of artistic endeavor, the result of which depends on the invention, imagination or talent of the employee; or

(3) Teaching, tutoring, instructing, or lecturing in a school system or educational institution; or

(4) Work requiring the theoretical and practical application of highly specialized knowledge in computer systems analysis, programming, and software engineering; and

b. Perform work that includes the consistent exercise of discretion and independent judgment; and

c. Perform work that is predominantly intellectual and varied in character and is of such character that the output produced or result accomplished cannot be standardized in relationship to a given period of time; and

d. Do not devote more than 20 percent of their time to work that is not an essential part of and necessarily incident to the work described above.

4. Interpretations of the Massachusetts Professional Exemption. There are no Massachusetts cases interpreting the professional exemption under state law. As noted above in section II.E.3.a., however, Massachusetts courts may well apply a “common understanding” test to determine whether or not an employee fits within any white collar exemption to Chapter 151.

5. Illustrative Case Law. The Federal District Court in Massachusetts has interpreted the “specialized instruction” aspect of the professional exemption to exclude specialized on-the-job training. In Palardy v. Horner, 711 F. Supp. 667, 671 (D. Mass. 1989), the court noted that employees of the U.S. Navy who perform “technical tasks relating to the proper design, repair, testing and overhaul of naval ship systems are equipment” and who “prepare drawings and schematics used in installing and reconfiguring equipment on navy vessels” are not exempt as professionals because the work is practical rather than theoretical and training is obtained on the job. The only education required for the position was a high school diploma. The Navy had classified the employees as exempt for purposes of the FLSA and the employees successfully challenged that classification.

6. Examples of Exempt Professional Occupations. The following occupations have been determined by various courts to be exempt under the professional white collar exemption. These occupations are listed by way of example only. Any court will undertake its own analysis of an employee’s status, irrespective of job title, in determining whether an exemption will apply in any given case.

a. Learned Professionals: pilots with commercial licenses and instrument ratings; microwave field engineers; lawyers; doctors; and pharmacists.

b. Artistic Professionals: musicians; composers; conductors; painters; cartoonists; essayists; and novelists.

c. Teaching Professionals: kindergarten teachers; teachers of gifted or handicapped students; teaches of skilled trades; secondary school teachers;
teachers in higher education; and, potentially, teachers in correctional facilities or daycare facilities.

Other decisions have found that the following “professional” positions were not exempt professional occupations under the Act. Again, the facts of each individual case are critical:

- Those learning a profession
- Trainees
- Persons with professional training who are not actually performing professional work, e.g., an “engineer” who is actually a draftsperson

G. Application to Particular Occupations

1. Computer Related Occupations. Persons employed in computer related occupations may qualify for one of two exemptions under the FLSA: a computer professional “white collar” exemption or an administrative “white collar” exemption.

   a. Computer Professional Exemption. Congress amended the FLSA in 1990 so that “computer systems analysts, computer programmers, software engineers, or other similarly skilled workers in the computer software field are eligible for exemption as professionals” under the Act. 29 C.F.R § 541.303(a). Although job titles alone are not determinative of whether an employee fits within this professional exemption, the regulations note that the following job titles would be common to the exemption: computer programmer, systems analyst, computer systems analyst, computer programmer analyst, applications programmer, applications systems analyst, software engineer, software specialist, systems engineer, and systems specialist. Id. The regulations specifically note that the exemption does not include trainees or employees in entry level positions. 29 C.F.R. § 541.303(c). To qualify, employees must be “highly skilled employees who have achieved a level of proficiency in the theoretical and practical application of a body of highly-specialized knowledge in computer systems analysis, programming, and software engineering.” Id.

   b. Administrative Exemption. An employee in a computer related occupation may qualify as exempt under the administrative exemption if he or she meets the criteria set forth in 29 C.F.R. § 541.2(e)(2) with regard to the performance of office or nonmanual work related to management and the exercise of discretion and independent judgment. See Section II.E., supra. Courts have applied the administrative exemption to computer personnel when the employee designs and modifies computer programs and performs tasks of a similar level. Courts have rejected application of this exemption to employees who are largely engaged in debugging and other related tasks that merely require the employee to follow basic directions. Exempt work includes knowledge of system capability, system design, determining how a problem may be processed, and specifying the result. For example, in Horne v. Singer Bus. Mach. Inc., 22 Wage & Hour Cas. (BNA) 1006 (W.D. Tenn. 1976), the court applied the administrative exemption to an employee who modified and
designed computer programs and computer systems for customers. Similarly, in Grevemberg v. North Oaks Med. Ctr., 3 Wage & Hour Cas.2d (BNA) 507 (E.D. La. 1996), the court applied the administrative exemption to an employee who installed and maintained computer systems, designed computer programs, and modified computer software.

2. **Journalists.** Some occupations, of which many journalism occupations are a good example, do not fit within any white collar exemption to the FLSA, despite the fact that persons in the occupation may exercise considerable discretion and independent judgment. In Reich v. Newspapers of New England, Inc., 44 F.3d 1060 (1st Cir. 1995), the First Circuit found that reporters for the Concord Monitor did not qualify for the learned professional exemption because their work did not require knowledge of an advanced type in a field of science or learning. *Id.* at 1078. Specifically, the court relied on the finding that “[n]o particular academic degree is a prerequisite for entrance into the field and applicants are not required to demonstrate mastery over a specific body of knowledge.” *Id.* This decision comports with the DOL’s interpretations of its regulations, 29 C.F.R. § 541.303(f)(1), which state that newspaper writers, “with possible rare exceptions,” do not meet the requirements for the learned professional exemption. The Monitor’s reporters also did not qualify for the artistic professional exemption because their work depended more on “intelligence, diligence and accuracy” than on “invention, imagination or talent.” *Id.* at 1075. Even the newspaper’s sports photographers did not meet the standard for exemption as artistic professionals because their work consisted primarily of routine coverage of sporting events. *Id.* at 1076-77. *See also* Reich v. Gateway Press, Inc., 13 F.3d 685, 697-98 and n.15 (3d Cir. 1994) (holding that reporters were not exempt artistic professionals and that they never fall within the exemption for learned professionals). In contrast, one federal court has held that a *Washington Post* reporter qualified for the exemption for artistic professionals because his “primary duty . . . consisted of work requiring invention, imagination, and talent.” Sherwood v. The Washington Post, 871 F. Supp. 1471, 1478 (D.D.C. 1994). The court based its decision on its finding that, to “gather news and present it to readers in a clear, fair, balanced, and expert fashion,” the plaintiff was required to generate story ideas, cultivate sources, piece together facts and “produce artful writing.” *Id.* at 1473-76.

3. **Sales and Sales Support.** The interaction between “sales” and “production” has led to disputes concerning the application of exemptions to employees who work in sales for an employer. In Martin v. Cooper Electric Supply Co., 940 F.2d 896 (3d Cir. 1991), the court held that inside sales employees were not exempt under the administrative exemption because they were engaged in the production of sales, rather than administration of the employer’s business. The court found that because the employer did not manufacture any products of its own, its primary business was selling. To the extent that employees generated the very product the company existed to market, *i.e.*, sales of electrical products, they were nonexempt production employees. The Secretary of Labor attempted in the years following Cooper Electric to apply the production designation to numerous sales employees. But as the First Circuit held in Reich v. John Alden Ins. Co., discussed supra at Section II.E.3.d., this exemption can apply to at least some sales-related employees
who assist with the sale of what a company actually produces. See also Reich v. Haemonetics Corp., 907 F. Supp. 512 (D. Mass. 1995) (holding that business analysts who assisted in the sale of medical devices manufactured by their employer were exempt as administrative employees because they were engaged, for example, in the structuring of deals related to the employer’s general business operations—selling medical devices).

H. Other Exemptions

1. **Motor Carrier Act.** Employees are exempt from the overtime pay provisions of the FLSA if they are employed in a category of work over which the Secretary of Transportation has power to regulate hours of work under the Motor Carrier Act (“MCA”), 49 U.S.C. § 3102. See 29 U.S.C. § 213(1)(b). The Secretary of Transportation’s authority to regulate hours of work under the MCA extends to, among others, those employed by “motor private carriers.” Motor private carriers include employers that transport property across state lines by automobile, own the property that is being transported and transport the property “to further a commercial enterprise.” 49 U.S.C. § 10102(16). Many employees fall within the literal terms of this standard. Courts have held that the unambiguous language of the exemption requires its application when its literal terms apply, even in cases in which exemption otherwise would seem “implausible.” See Friedrich v. U.S. Computer Services Inc., 974 F.2d 409, 417, 419 (3d Cir. 1992) (applying Motor Carrier Act exemption where field technicians regularly traveled across state lines carrying replacement parts and tools). Chapter 151 also specifically exempts some of those individuals covered by the Motor Carrier Act. See MASS. GEN. LAWS ch. 151, § 1A(8) (exempting from the chapter those employees who are employed “as a driver or helper on a truck” with respect to whom the Motor Carrier Act applies).

2. **Commissioned Employees.** Employers are not required to pay overtime to employees who (a) work for a retail or service establishment; (b) earn more than one-half their monthly pay from commissions; and (c) are paid at least one and one-half times the minimum wage. 29 U.S.C. § 207(i). Because the minimum wage is expressed as an hourly rate, employers must monitor the hours of employees subject to this exemption and determine their regular hourly rates of pay to make the comparison required by subsection (c) listed above. As described in Section III.D.4., infra, employees’ commissions generally should be included in determining their regular rates. Although Chapter 151 also specifically exempts an employee who is employed as an “outside salesman,” see MASS. GEN. LAWS ch. 151, § 1A(4), it does not include an exemption comparable to the FLSA exemption for retail commissioned employees. However, the exclusion of commissions from the regular rate for purposes of Chapter 151 limits the effect of the unavailability of this exemption. See Section III.D.8., infra.

3. **Amusement and Recreation Employees.** The FLSA exempts from its minimum wage and overtime provisions amusement or recreational employees. Any employee who is employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference is exempt if (1) the establishment does not operate for more than seven months in any calendar year; or (2) during the preceding year, the establishment’s
average receipts for any six months of such year were not more than 33⅓% of its average receipts for the other six months of such year. 29 U.S.C. § 213(a)(3). Chapter 151 includes a similar but not identical exemption. Chapter 151 exempts an employee who is employed “in an amusement park containing a permanent aggregation of amusement devices, games, shows, and other attractions operated during a period or accumulated periods not in excess of one hundred and fifty days in any one year.” MASS. GEN. LAWS ch. 151, § 1A(20).

4. **Other Exemptions.** The FLSA is replete with occupations that are exempt from either the overtime requirements or both the minimum wage and overtime requirements. Exemptions from both minimum wage and overtime provisions are in place for switchboard operators, 29 U.S.C. § 213(a)(10), and casual babysitters, 29 U.S.C. § 213(a)(15), for example. Exemptions from only the overtime requirements are in place for a range of professions from agricultural workers, 29 U.S.C. § 213(b)(12), and taxicab drivers, 29 U.S.C. § 213(b)(17), to federal criminal investigators, 29 U.S.C. § 213(b)(30), and domestic employees, 29 U.S.C. § 213(b)(21). Similarly, Chapter 151 contains a list of its own particular exemptions from the chapter’s provisions, ranging from those employed at “a gasoline station,” MASS. GEN. LAWS ch. 151, § 1A(13), to those employed as “a golf caddy, newsboy or child actor or performer.” MASS. GEN. LAWS ch. 151, § 1A(1).

### III. Compensation of Nonexempt Employees

**A. Workweek Standard.** For purposes of the FLSA, each workweek stands alone. 29 C.F.R. § 778.105. The regulations explain:

> The Act . . . does not permit averaging of hours over 2 or more weeks. Thus, if an employee works 30 hours one week and 50 hours the next, he must receive overtime compensation for the overtime hours worked beyond the applicable maximum in the second week, even though the average number of hours worked in the 2 weeks is 40.

This is true regardless of whether the employee works on a standard or swing-shift schedule and regardless of whether he is paid on a daily, weekly, biweekly, monthly or other basis.

29 C.F.R. § 778.105.

**B. Hours Worked for Overtime Payment Purposes** Issues often arise as to whether time spent on various job-related activities is compensable. 29 C.F.R. pt. 785 sets forth the answers to some of the most frequently raised questions about “hours worked.”

1. **Waiting Time.** Whether waiting time is compensable depends on the particular circumstances of each case. 29 C.F.R. § 785.14. The Supreme Court held in *Armour & Co. v. Wantock*, 323 U.S. 126 (1944), that time spent waiting for work is compensable if it is spent “primarily for the benefit of the employer.” *Id.* at 132-34. In determining whether the time “primarily benefits” the employer, courts examine the degree of control the employer has over the employee during the waiting time and whether the employee can effectively use that time for his or her own purposes. “A stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, a fireman who plays checkers while waiting for alarms and a factory worker who talks to his
fellow employees while waiting for machinery to be repaired are all working during the period of inactivity.” 29 C.F.R. § 785.15.

2. **On-Call Time.** “An employee who is required to remain on call on the employer’s premises or so close thereto that he cannot use the time effectively for his own purposes is working” and must be compensated for that time. 29 C.F.R. § 785.17. For example, forestry service employees who were required to respond to emergency calls within 30 minutes of receiving them and were subject to 24-hour on-call status had to be compensated for their on-call time in *Cross v. Arkansas Forestry Comm’n*, 938 F.2d 912, 916-17 (8th Cir. 1991). But in *Owens v. Local No. 169*, 971 F.2d 347, 348-50 (9th Cir. 1992), pulp mill mechanics who had to respond to their employer’s call within 10 minutes, but who only had to respond to one third of the calls they received and only accepted about six calls per year did *not* have to be compensated for their on-call time. In general, courts find on-call time non-compensable where the restrictions that an employer places on employees while they are on call are not so burdensome that they prevent the employees from using the time for their own benefit.

3. **Rest Periods and Meal Periods.** The regulations provide that rest periods must be counted as hours worked and are therefore compensable. 29 C.F.R. § 785.18. If a rest period is a bona fide meal period, it is not work time, and does not have to be compensated. To be bona fide, the employee must be “completely relieved from duty for the purpose[] of eating.” 29 C.F.R. § 785.19(a). The regulations note that ordinarily, 30 minutes or longer is enough for a bona fide meal period. An employee who is required to perform any duties during meals, whether active or inactive, is not relieved of duty and must be compensated. *Id.*

4. **Sleeping Time.** During a period of work that is longer than 24 hours where the employer and employee have agreed in advance that a regularly scheduled sleep period of not more than 8 hours will be excluded from time worked, the sleep time is not counted as hours worked. If a shift is less than 24 hours, an employer cannot exclude even *authorized* sleeping time from the total of hours worked. 29 C.F.R. §§ 785.20 to 785.22.

5. **Preparatory and Concluding Activities.** Employees must be compensated for preparatory and concluding activities where those activities “are an integral and indispensable part of the employees’ principal activities.” 29 C.F.R. § 785.25 (citing *Steiner v. Mitchell*, 350 U.S. 247 (1956) (time during which employees changed clothes and showered after working in a battery plant to remove toxic and caustic materials was compensable) and *Mitchell v. King Packing Co.*, 350 U.S. 260 (1956) (time during which employees in meatpacking plant sharpened knives before and after their shifts was compensable)). For example, courts have found that caring for and transporting police dogs, *see Graham v. City of Chicago*, 828 F. Supp. 576, 582 (N.D. Ill. 1993), and implementing workplace safety precautions, *see Barrentine v. Arkansas-Best Freight Sys.*, 750 F.2d 47, 50 (8th Cir. 1984), are activities compensable as preparatory and concluding activities. But reporting early to relieve coworkers, *see Lindow v. United States*, 738 F.2d 1057, 1060-62 (9th Cir. 1984), and riding to a work site on an employer-provided shuttle, *see Vega
v. Gasper, 36 F.3d 417, 424-27 (5th Cir. 1994), are not compensable preparatory or concluding activities.

6. **Travel Time.** An employee does not have to be compensated for commuting time to and from his or her regular place of employment. 29 C.F.R. § 785.35. Where an employee has returned home after completing a regular work day and is called to go to an employer’s customer in an emergency situation, time spent traveling to the customer is compensable work time. 29 C.F.R. § 785.36. The DOL has taken “no position on whether travel to the job and back home by an employee who receives an emergency call outside of his regular hours to report back to his regular place of business to do a job is working time.” Id. (emphasis added). With regard to employees who must travel out of the area to go to work on particular occasions, the DOL has approved at least one employer’s practice of deducting one hour of travel time to a worksite as non-compensable commuting time. See DOL Opinion Letter (Jan. 29, 1999). Similarly, where an employee drives to the airport to take a flight for work, the employer is not required to pay the employee for time spent driving to the airport, but may be required to pay for the time spent on the airplane traveling to the day’s assignment. See 29 C.F.R. § 785.37. Each employee’s travel situation is unique, however. Therefore, the DOL will examine compensation for travel time on a case-by-case basis.

C. **Recordkeeping Requirements**

1. **Basic Obligations.** Employers are obligated to keep accurate time and payroll records for all employees. This information must be kept for the three prior years, except for “basic earnings records” like weekly time cards” and wage rate tables, which must be kept for only two years. 29 C.F.R. §§ 516.5 & 516.6. The regulations require a different level of recordkeeping for nonexempt employees than they do for exempt employees, but some records must be kept for each type of employee. 29 C.F.R. § 516.1.

2. **Nonexempt Employee Recordkeeping Requirements.** According to 29 C.F.R. § 516.2(a)(1) – (12), employers must keep the following information on file for each employee that is covered by Section 6 of the Act (the minimum wage provision), or by both Section 6 and Section 7 (the overtime provisions):

   a. Name in full, as used for Social Security recordkeeping purposes, and on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records;

   b. Home address, including zip code;

   c. Date of birth, if under 19;

   d. Sex and occupation in which employed;

   e. Time of day and day of week on which the employee's workweek begins;

   f. (i) Regular hourly rate of pay for any workweek in which overtime compensation is due under section 7(a) of the Act; (ii) explain basis of pay by indicating the monetary amount paid on a per hour, per day, per week, per piece, commission on sales, or other basis, and the amount and nature
of each payment which is excluded from the “regular rate;”

g. Hours worked each workday and total hours worked each workweek;
h. Total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation;
i. Total premium pay for overtime hours;
j. Total additions to or deductions from wages paid each pay period including employee purchase orders or wage assignments;
k. Total wages paid each pay period;
l. Date of payment and the pay period covered by payment.

Chapter 151 also imposes recordkeeping obligations on employers. However, the Chapter 151 requirements are less detailed. See MASS. GEN. LAWS, CH. 151, §15.

3. Exempt Employee Recordkeeping Requirements. 29 C.F.R. § 516.3 provides that with respect to exempt employees, employers do not have to keep the information listed in section (f) through (j), above. In addition to the remaining information listed above, employers must record the “basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee’s total remuneration for employment including fringe benefits and perquisites.” 29 C.F.R. § 516.3.

4. Recording Time.

a. Rounding Practices. Generally, the practice of rounding employees’ working hours to the nearest five minutes, or to the nearest one-tenth or quarter of an hour, is permitted under the regulations. 29 C.F.R. § 785.48(b). However, this practice is permitted on the assumption that such rounding practices average out “so that the employees are fully compensated for all the time they actually work.” Id.

b. De Minimis Rule. The Supreme Court held in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946) that insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes may be disregarded as de minimis. See also 29 C.F.R. § 785.47 (codifying Mt. Clemens Pottery rule).

5. Consequences of Failure to Maintain Records. Failure to keep records can result in an injunction against future violations, see 29 U.S.C. §§ 211(c), 215(a)(5) & 217, or criminal sanctions. 29 U.S.C. § 216(a). However, where the recordkeeping requirements may be most significant is in avoiding the onerous burden of proof placed upon an employer in a suit for back wages in the absence of records. 29 U.S.C. § 215(a)(5). In Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946), the Supreme Court held that where an employer has failed to keep any employment records, back wages should nonetheless be awarded to the employee if (a) the evidence shows that the employer did not properly compensate the employee for
work performed; and (b) the amount and extent of the work can be reasonably inferred. *Id.* at 687. This inference may be made merely from the employee’s testimony in a case brought by an individual for back wages, or from representative testimony by a few employees in a larger class of employees. See *McLaughlin v. Ho Fat Seto*, 850 F.2d 586 (9th Cir. 1988) (five employees’ testimony was enough to determine back wages amount for group of 28 employees). If the employee provides sufficient evidence to permit a reasonable inference, even of only an approximate amount, the burden of proof to negate the inference shifts to the employer. *Mt. Clemens*, 328 U.S. at 687-88.

D. **Determining the Regular Rate.** Regardless of whether an employee is paid on an hourly, piecework, commission, or salary basis, the employee’s wages must be converted to an equivalent hourly rate, the “regular rate,” from which the overtime rate can be calculated.

1. **Definition.** The regular rate is “the hourly rate actually paid the employee for the normal, non-overtime workweek for which he is employed.” 29 C.F.R. § 778.108. Basically, once the regular weekly compensation is determined, determining the regular rate is as simple as dividing the weekly wage by the hours worked. 29 C.F.R. § 778.109.

2. **Salaried Employees.** If an employee is paid the same weekly rate, regardless of the number of hours worked in a week, the regular rate for that employee is calculated by dividing the weekly compensation by the number of hours worked in a particular week. Thus, the regular rate may vary from week to week, depending on the number of hours worked in that particular week. Since the weekly salary as described above compensates an employee for all hours worked during the week, only one-half the regular rate must be multiplied by the hours over 40 to compensate the employee for overtime. 29 C.F.R. § 778.114(a). When an employee is not paid a salary on a weekly basis, but rather on a biweekly or monthly basis, the salary must be converted to its weekly equivalent. For semimonthly salary amounts, for example, the semimonthly salary must be multiplied by 24 (the number of pay periods in a year) and then divided by 52 (the number of weeks in a year) to arrive at the weekly salary amount. 29 C.F.R. § 778.113(b).

3. **Employees Paid at Two or More Hourly Rates.** The regular rate of employees paid at two or more hourly rates is the weighted average of those rates. For example, if an employee works 40 hours in a week and 15 of those hours were worked at a rate of $7.00 per hour, while 25 of those hours were worked at a rate of $8.00 per hour, the weighted average of the two hourly rates is $7.63 (15 hours times $7.00 per hour plus 25 hours times $8.00 per hour, divided by 40 hours). 29 C.F.R. § 778.115. The regulations also allow employees and employers to agree in advance what the overtime rate will be for overtime work performed on a specific task or day, as long as the rate and the agreement fulfill certain requirements. See 29 C.F.R. § 778.419.

4. **Commissions.** Commissions are included when calculating an employee’s regular rate. 29 C.F.R. § 778.117. Because employers often defer payment of
commissions, the regular rate for a particular week cannot be determined until after
the commission is paid. Thus, employers must pay employees an overtime rate of
one and one-half times their hourly rate for each week they work until the rate can
be adjusted to account for commissions. Once commissions are paid for past pay
periods, an employer must recalculate the regular rate for those weeks and adjust
the overtime payments accordingly. 29 C.F.R. § 778.119.

5. **Bonuses.**

   a. **Bonuses Included in the Regular Rate.** If a bonus is an entitlement, as
      opposed to a discretionary award, it must generally be included in the weekly
      salary computation for purposes of determining the regular rate. 29 C.F.R. §§
      778.209 & 778.211(a). The regulations specifically provide that the regular
      rate does not include gifts made at Christmas or other special occasions, so
      long as the amount of the bonus is not measured by hours worked. 29 C.F.R. §
      778.112. These bonuses may be excluded even if the bonus is paid so
      regularly that the employee has come to expect it. Also, payments made to an
      employee pursuant to a bona fide profit sharing plan under the FLSA must be
      excluded. The regulations specifically define bona fide profit sharing plan.
      For example, including individual performance factors in determining profit
      sharing payments will result in including bonus plan compensation when
      determining overtime pay. 29 C.F.R. pt. 549.

   b. **Calculating the Regular Rate With Bonuses.** If an includable bonus can be
      tied specifically to a particular workweek, then the regular rate for that
      workweek must be adjusted. If an includable bonus cannot be identified with a
      particular week or weeks, the employer must adopt “some other reasonable and
      equitable method of calculation” that allows the regular rate to be adjusted to
      account for the bonus payments. 29 C.F.R. § 778.209(b).

6. **Piecework.** If employees are paid on the basis of how many “pieces” they produce
while working, they are paid on a piecework basis. That employee’s regular rate is
determined by averaging the employee’s total earnings over the hours worked in a
particular workweek. 29 C.F.R. § 778.111(a). For example, if an employee
worked 50 hours in a week and produced 250 “pieces” at a rate of $2.00 per piece,
the employee would have earned $500 over 50 hours of work. The employee’s
regular rate is $500 divided by 50, or $10.00. Overtime is paid to that employee at
a rate of one-half the regular rate for the hours worked over 40. ($10.00 divided by
2, or $5.00, times 10 overtime hours worked equals $50.00 in additional overtime
pay due to the employee for that week).

7. **Exclusions from the Regular Rate.** The FLSA provides for specific exclusions
from the regular rate in Section 7(e). These exclusions include gifts, 29 C.F.R.
§ 207(e)(1); vacation, holiday, or sick pay, or reimbursable travel expenses,
§ 207(e)(2); discretionary bonuses, § 207(e)(3); contributions made to pension or
other similar benefit plans, § 207(e)(4); premium pay for hours worked more than
eight in a day, § 207(e)(5); premium pay for hours worked by an employee on
holidays or weekends, § 207(e)(6); and, premium pay for hours worked above the
regular work day or workweek and compensated pursuant to a collective
bargaining agreement, § 207(e)(7). Amounts paid under these provisions are not only excluded from the calculation of the regular rate of pay, they are credited towards the statutorily required overtime payments under Section 7 of the Act. 29 C.F.R. §§ 778.202, .203 & .206.

8. **Regular Rate Under Chapter 151.** Under Chapter 151, at least some of these amounts need not be counted in determining the regular rate. Chapter 151 provides that, for overtime pay purposes, “[s]ums paid as commissions, drawing accounts, bonuses or other incentive pay based on sales or production, shall be excluded in calculating the regular rate. . . .” MASS. GEN. LAWS ch. 151, §1A.

E. **Overtime Payment Methods**

1. **Standard Method of Making Overtime Payments.** Employers are required to pay one and one-half times the regular rate of pay for each hour worked over 40 in a workweek. When the employee’s “regular rate” is the same as a specified hourly wage rate, the overtime calculation is straightforward. The overtime provisions do not require overtime pay for hours worked over eight in a day, or hours worked on weekends or holidays. Absent conflict with state or other laws that require premium pay on Saturdays or holidays, for example, an employer is only obligated to pay overtime for hours worked over 40 in one week, whenever those hours fall within that week. 29 C.F.R. § 778.102.

2. **Day Rates.** Under this payment methodology, an employer may pay an employee a set rate for all work performed in a day, regardless of how many hours the employee worked in that day. 29 C.F.R. § 778.112. The employee’s regular rate under this methodology is calculated by totaling all the sums received for each day in the workweek and dividing that total by the number of hours worked in that week. The employee is then entitled to an additional one-half time payment for each hour worked over 40 in that week. *Id.* Under the language of § 778.112, it is unclear whether supplemental or other payments made to employees, in addition to their day rate pay, will affect the viability of using the “day rate” method. In any case, the basic method for determining the regular rate, as set forth in § 778.109 would allow the regular rate to be calculated by dividing the total number of hours worked in a week into the total amount of compensation received in that week. 29 C.F.R. § 778.109.

3. **Fluctuating Workweeks.** Under the fluctuating workweek method of paying overtime, an employer pays an employee the same salary every week, regardless of the number of hours worked, whether few or many. To determine the employee’s regular rate, employers divide the number of hours worked *in a particular week* by the weekly wage. This amount will differ each week depending on the number of hours worked. Overtime pay is then made to an employee at a rate of one-half the regular rate for all hours worked over forty in a given week. 29 C.F.R. § 778.114. This half-time payment is permissible as overtime compensation, because the employee has already been paid straight time for every hour worked over forty in the week.
4. **Belo Contracts.** Section 7(f) of the FLSA provides for *Belo* contracts, which allow employers to pay employees the same amount every week, regardless of how many hours they worked, as long as the regular rate each week is guaranteed to reach the statutory minimum set in §§ 6(a) or (b) of the Act. The amendment creating this section of the Act was added after the Supreme Court’s decision in *Walling v. A.H. Belo Corp.*, 316 U.S. 624 (1942), which upheld an employer’s method of paying employees the same amount each week, regardless of the number of hours worked. There are several requirements which must be met in order for an employer to use *Belo* contracts, see 29 C.F.R. §§ 778.402-414:

- a. The employee’s duties must necessitate irregular or variable hours of work from week to week such that, over time, the employee’s hours fluctuate both above and below 40 hours per week;
- b. There must be a bona fide individual agreement or a collective bargaining agreement that specifies a regular rate not less than the statutory minimum;
- c. The agreement must state that the employees will receive at least one and one-half times the employees’ regular rate for all hours worked in excess of the applicable statutory maximum;
- d. The agreement must contain a weekly guarantee of pay;
- e. The weekly guarantee of pay must be for not more than 60 hours during the workweek; and
- f. The guaranteed wage must be weekly, not semimonthly or monthly.
EMPLOYER OBLIGATIONS UNDER THE FAIR LABOR STANDARDS ACT
AND THE MASSACHUSETTS MINIMUM FAIR WAGE LAW

Table of Contents

I. OVERVIEW ...........................................................................................................................1

A. The FLSA’s Interaction With the Massachusetts Minimum Fair Wage Law .........................................................1

B. Minimum Wage Standards ...............................................................................................................1

1. Minimum Wage Rate ...................................................................................................................1

2. Who is Covered? .......................................................................................................................2

3. Application to Salaried Employees ..........................................................................................2

4. Application to Other Employees ...........................................................................................2

C. Overtime Standards ..................................................................................................................2

D. Coverage .................................................................................................................................2

1. Employer Coverage. ..............................................................................................................2

2. Employer/Employee Relationship ..........................................................................................3

3. Coverage Under the Massachusetts Minimum Fair Wage Law ...............................................5

E. Enforcement ............................................................................................................................5

1. Department of Labor ..............................................................................................................5

2. Individual and Class Actions. .................................................................................................5

3. Remedies ................................................................................................................................5

4. Statute of Limitations ...............................................................................................................7

5. Releases ..................................................................................................................................7

6. Retaliation ...............................................................................................................................8

7. Remedies, Statute of Limitations, Releases and Retaliation Under the Massachusetts Minimum Fair Wage Law ..............................................................................................................8

II. EXEMPTIONS ......................................................................................................................................8

A. White Collar Exemptions ..............................................................................................................9

1. General Scope ............................................................................................................................9

2. Outside Salesperson ..................................................................................................................9

3. Executive, Administrative and Professional Exemptions ............................................................9

4. Narrow Construction of Exemptions .........................................................................................9

B. Salary Basis Test ......................................................................................................................9

1. General Standard ........................................................................................................................9

2. Permissible Deductions from Salary .......................................................................................9

3. Impermissible Deductions ........................................................................................................10

4. Window of Correction ..............................................................................................................10

C. Short Tests vs. Long Tests .........................................................................................................11
# Table of Contents

## D. Executive Exemption, 29 C.F.R. § 541.1
1. Short Test .......................................................... 11
2. Long Test .......................................................... 11
3. The Executive Exemption Under Massachusetts Law .......... 12
4. Illustrative Cases ................................................. 12
5. Examples of Exempt Executive Occupations .................. 12

## E. Administrative Exemption, 29 C.F.R. § 541.2
1. Short Test .......................................................... 13
2. Long Test .......................................................... 13
3. The Administrative Exemption Under Massachusetts Law ... 14
4. Applying the Exemption ......................................... 14
5. Examples of Exempt Administrative Occupations ............ 15

## F. Professional Exemption, 29 C.F.R. § 541.3
1. Short Test (General) ............................................. 16
2. Short Test (Artistic) .............................................. 16
3. Long Test .......................................................... 16
4. Interpretations of the Massachusetts Professional Exemption 17
5. Illustrative Case Law ............................................. 17
6. Examples of Exempt Professional Occupations ............... 17

## G. Application to Particular Occupations
1. Computer Related Occupations ............................... 18
2. Journalists ......................................................... 19
3. Sales and Sales Support ........................................ 19

## H. Other Exemptions
1. Motor Carrier Act .............................................. 20
2. Commissioned Employees .................................... 20
3. Amusement and Recreation Employees .................... 20
4. Other Exemptions ............................................... 21

## III. Compensation of Nonexempt Employees

### A. Workweek Standard ........................................... 21

### B. Hours Worked for Overtime Payment Purposes
1. Waiting Time .................................................... 21
2. On-Call Time ..................................................... 22
3. Rest Periods and Meal Periods ............................... 22
4. Sleeping Time .................................................... 22
5. Preparatory and Concluding Activities ..................... 22
6. Travel Time ....................................................... 23
# Table of Contents

(continued)

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>C. Recordkeeping Requirements</td>
<td></td>
</tr>
<tr>
<td>1. Basic Obligations</td>
<td>23</td>
</tr>
<tr>
<td>2. Nonexempt Employee Recordkeeping Requirements</td>
<td>23</td>
</tr>
<tr>
<td>3. Exempt Employee Recordkeeping Requirements</td>
<td>24</td>
</tr>
<tr>
<td>4. Recording Time</td>
<td>24</td>
</tr>
<tr>
<td>5. Consequences of Failure to Maintain Records</td>
<td>24</td>
</tr>
<tr>
<td>D. Determining the Regular Rate</td>
<td></td>
</tr>
<tr>
<td>1. Definition</td>
<td>25</td>
</tr>
<tr>
<td>2. Salaried Employees</td>
<td>25</td>
</tr>
<tr>
<td>3. Employees Paid at Two or More Hourly Rates</td>
<td>25</td>
</tr>
<tr>
<td>4. Commissions</td>
<td>25</td>
</tr>
<tr>
<td>5. Bonuses</td>
<td>26</td>
</tr>
<tr>
<td>6. Piecework</td>
<td>26</td>
</tr>
<tr>
<td>7. Exclusions from the Regular Rate</td>
<td>26</td>
</tr>
<tr>
<td>8. Regular Rate Under Chapter 151</td>
<td>27</td>
</tr>
<tr>
<td>E. Overtime Payment Methods</td>
<td></td>
</tr>
<tr>
<td>1. Standard Method of Making Overtime Payments</td>
<td>27</td>
</tr>
<tr>
<td>2. Day Rates</td>
<td>27</td>
</tr>
<tr>
<td>3. Fluctuating Workweeks</td>
<td>27</td>
</tr>
<tr>
<td>4. Belo Contracts</td>
<td>28</td>
</tr>
</tbody>
</table>