

# Time Keeping | Fair Labor Standards Act



Presented by:

Mark R. Hunter, CRIS

801-671-2431

[mrhunter@summitrmi.com](mailto:mrhunter@summitrmi.com)

Rick Bjornson

801-815-1131

[rbjornson@summitrmi.com](mailto:rbjornson@summitrmi.com)

[www.Summit-Risk.com](http://www.Summit-Risk.com)



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# Major Provisions

- Coverage
- Recordkeeping
- Minimum Wage
- Overtime Pay
- Drive Time
- 1099 Independent Contractors Vs. W-2 Employees
- Youth Employment



# Recordkeeping

The FLSA requires that all employers subject to any provision of the Act make, keep, and preserve certain records

# Recordkeeping

An accurate record of the hours worked each day and total hours worked each week is critical to avoiding compliance problems



# Recordkeeping

- Records need not be kept in any particular form
- Time clocks are not required



# Recordkeeping

Every covered employer must keep certain records for each non-exempt worker

- Employee's full name, as used for Social Security 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
- Address, including zip code
- Birth date, if younger than 19
- Sex and occupation
- Time and day of week when employee's workweek begins
- Hours worked each day and total hours worked each workweek
- Basis on which employee's wages are paid (e.g., "\$9 per hour", "\$440 a week", "piecework")
- Regular hourly pay rate
- Total daily or weekly straight-time earnings
- Total overtime earnings for the workweek
- All additions to or deductions from the employee's wages
- Total wages paid each pay period
- Date of payment and the pay period covered by the payment



# Time Keeping Options

- **Traditional time clock**
  - Pros – Hard to falsify, easy to operate, equipment longevity
  - Cons – Manual input, equipment break down, remote workers, buddy punching
- **Handwritten cards or sheets**
  - Pros – Dirt cheap, easy to operate, nothing to break
  - Cons – Easy to falsify, manual calculation, data collection, repetitive data
- **Integrated time keeping/payroll**
  - Pros – Customizable, web based, hard to falsify, data transfer to payroll, geo fencing
  - Cons – Higher direct cost, set up, training

# Electronic Timekeeping

HOME RESOURCES MYSELF PEOPLE PROCESS REPORTS SETUP

### Company News and Announcements

**Open Positions:**

- Plating Operator
- Imaging Technician (grave shift)
- AOI Operator (grave shift)
- Business Development
- QC Inspector (Grave Shift)

### Quick Links

- 401K Website: [www.mykplan.com](http://www.mykplan.com)
- Kaiser Benefits Coverage/Costs: [www.kp.org/plandocuments](http://www.kp.org/plandocuments)
- Flexible Spending Accounts: <https://myspendingaccount.adp.com>
- Guardian Dental/Life/STD/LTD: [www.guardiananytime.com](http://www.guardiananytime.com)

### Common Time & Attendance Tasks

- INDIVIDUAL TIMECARD
- TIMECARD EXCEPTIONS
- SCHEDULES
- PREPARE FOR PAYROLL
- MOVE TO NEXT PAY PERIOD
- REPORTS

### My Time

Monday, Aug 22, 2016, 08:37 AM

- CLOCK IN
- CLOCK OUT
- LUNCH OUT
- TRANSFER & PUNCH
- MY TIMECARD
- LATE ARRIVAL
- ABSENCE

**No Activities**

### Forms

- 2016 W-4
- State Withholding Form
- Personal Information Change Form

### My Time Off

As of today

REQUEST TIME OFF

TIME OFF POLICY	BALANCE	REQUESTS PENDING	REQUESTS SCHEDULED
There are no records found			

\* Balance /Request Amount: D (Days); H (Hours)  
\* The balances include future transactions.



# Electronic Timekeeping

Current Pay Period: 8/15/2016 - 8/28/2016 APPROVE TIMECARD

Timecard | Totals | Schedule | Time Off Balances

APPROVE	WEEK 1	IN - OUT	PAY CODE	HOURS	DEPARTMENT	DAILY TOTALS	REGULAR	OVERTIME
<input checked="" type="checkbox"/>	Mon 08/15	09:20 PM - 02:42 AM		5.37	000220		5.37	0.00
<input checked="" type="checkbox"/>	Tue 08/16	03:13 AM - 06:09 AM		2.93	000220	8.30	2.63	0.30
<input checked="" type="checkbox"/>	Tue 08/16	09:24 PM - 02:13 AM		4.82	000220		4.82	0.00
<input checked="" type="checkbox"/>	Wed 08/17	02:43 AM - 06:14 AM		3.52	000220	8.33	3.18	0.33
<input checked="" type="checkbox"/>	Wed 08/17	09:26 PM - 02:02 AM		4.60	000220		4.60	0.00
<input checked="" type="checkbox"/>	Thu 08/18	02:32 AM - 06:03 AM		3.52	000220	8.12	3.40	0.12
<input type="checkbox"/>	Thu 08/18	09:24 PM - 02:28 AM		5.07	000220		5.07	0.00
<input type="checkbox"/>	Fri 08/19	02:58 AM - 06:03 AM		3.08	000220	8.15	2.93	0.15
<input type="checkbox"/>	Fri 08/19	09:13 PM - 02:15 AM		5.03	000220		5.03	0.00
<input type="checkbox"/>	Sat 08/20	02:45 AM - 06:18 AM		3.55	000220	8.58	2.97	0.58
<input type="checkbox"/>	Sun 08/21	07:02 PM - 12:32 AM		5.50	000220		0.00	5.50
<input type="checkbox"/>	Mon 08/22	01:03 AM - 06:00 AM		4.95	000220	10.45	0.00	4.95
<b>WEEK 1 TOTALS</b>						<b>51.93</b>	<b>40.00</b>	<b>11.93</b>
APPROVE	WEEK 2	IN - OUT	PAY CODE	HOURS	DEPARTMENT	DAILY TOTALS	REGULAR	OVERTIME
<input type="checkbox"/>	Tue 08/23	-		0.00	000220	0.00	0.00	0.00
<input type="checkbox"/>	Wed 08/24	-		0.00	000220	0.00	0.00	0.00
<input type="checkbox"/>	Thu 08/25	-		0.00	000220	0.00	0.00	0.00
<input type="checkbox"/>	Fri 08/26	-		0.00	000220	0.00	0.00	0.00
<input type="checkbox"/>	Sat 08/27	-		0.00	000220	0.00	0.00	0.00
<input type="checkbox"/>	Sun 08/28	-		0.00	000220	0.00	0.00	0.00
<b>Pay Period (51.93)</b>						<b>Week 1 (51.93)</b>	<b>Week 2 (0.00)</b>	

SAVE REFRESH PREFERENCES Legend

# EXAMPLE

Roofing Contractor– Ogden, Utah - \$275,000  
in back wages



# Minimum Wage

# Minimum Wage: Basics

- Covered, non-exempt employees must be paid not less than the federal minimum wage for all hours worked
- The minimum wage is \$7.25 per hour effective July 24, 2009
- States may have higher requirements



# Minimum Wage: Issues

- Compensation Included
- Deductions
- Hours Worked



# Compensation Included

- Wages (**salary, hourly, piece rate**)
- Commissions
- **Certain bonuses (non-discretionary)**
- Reasonable cost of room, board and other “facilities” provided by the employer for the employee’s benefit (**this is not per diem**)
- **Personal use of a company vehicle – There are rules on this (go to [www.UT-CE.com](http://www.UT-CE.com) for a IRS link on this rule)**



# Deductions

- Deductions from pay illegal if
  - Deduction is for item considered primarily for the benefit or convenience of the employer; and
  - The deduction reduces employee's earnings below required minimum wage
- Examples of illegal deductions
  - Tools used for work
  - Damages to employer's property
  - Cash register shortages



# Minimum Wage Example

Employee receives \$9 per hour for 40 hours plus \$5 in commission and \$20 in reasonable cost of board, lodging or other facilities

Total earnings =  $\$360 + \$5 + \$20 = \$385$

Total earnings/total hours  $\$385/40 = \$9.63$





# Hours Worked: Issues

- Suffered or Permitted
- Waiting Time
- Meal and Rest Periods
- Training Time
- Travel Time



# Suffered or Permitted

Work not requested but suffered or permitted is work time



# Waiting Time

- Counted as hours worked when
  - Employee is unable to use the time effectively for his or her own purposes; and
  - Time is controlled by the employer
- Not counted as hours worked when
  - Employee is **completely relieved** from duty; and
  - Time is long enough to enable the employee to use it effectively for his or her own purposes (defined as 20 or more minute's)



# Waiting Time

Waiting to engage: Employee was told to be at the job site at 7:00 am, but decides to show up at until 6:00 am because his ride was early. The time waiting does not count toward hours worked, unless the employee actually starts working.

Engaged to wait: Employee was told to be at the job site at 6:00 am, but the materials don't show up until 7:00 am. The time waiting must count toward hours worked, including overtime hours if applicable.



# On-Call Time

On-call time is hours worked when

- Employee has to stay on the employer's premises
- Employee has to stay so close to the employer's premises that the employee cannot use that time effectively for his or her own purposes

On-call time is not hours worked when

- Employee is required to carry a pager
- Employee is required to leave word at home or with the employer where he or she can be reached



# Meal and Rest Periods

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) and are customarily paid for as working time. These short periods 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 (Employee Handbook). 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. (Safety meeting, answering phone calls, emails, etc.)



# Training Time

Time employees spend in meetings, lectures, or training is considered hours, unless

- Attendance is outside regular working hours
- Attendance is voluntary
- **The course, lecture, or meeting is not job related**
- The employee does not perform any productive work during attendance



# Independent Training Time

If an employee on his/her own initiative attends an independent school, college or independent trade school after hours, the time is not hours worked for his employer even if the courses are related to his/her job.





# Apprenticeship Training

As an enforcement policy, time spent in an organized program of related, supplemental instruction by employees working under bona fide apprenticeship programs may be excluded from working time if the following criteria are met:



# Apprenticeship Training

(a) The apprentice is employed under a written apprenticeship agreement or program which substantially meets the fundamental standards of the Bureau of Apprenticeship and Training of the U.S. Department of Labor; and



# Apprenticeship Training

(b) Such time does not involve productive work or performance of the apprentice's regular duties.

If the above criteria are met the time spent in such related supplemental training shall not be counted as hours worked unless the written agreement specifically provides that it is hours worked. The mere payment or agreement to pay for time spent in related instruction does not constitute an agreement that such time is hours worked.



# Travel Time

- **Travel Time**: The principles which apply in determining whether time spent in travel is compensable time depends upon the kind of travel involved.
- **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.



# Travel Time

- Section 4(a) further provides that the use of an employer's vehicle for travel by an employee and activities that are incidental to the use of such vehicle for commuting are not considered principal activities when the use of such vehicle is **within the normal commuting area for the employer's business or establishment** and is subject to an agreement on the part of the employer and the employee or the representative of such employee.



# Travel Time (cont)

- 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. **Not typical construction employees (maybe white collar)**



# Travel Time (cont)

- 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.



# EXAMPLE

- Painting Contractor – Utah County - \$67,000 in back wages.





# Travel Time (cont)

- 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 employee is simply substituting travel for other duties.
- The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days. Thus, if an employee regularly works from 9 a.m. to 5 p.m. from Monday through Friday the travel time during these hours is worktime on Saturday and Sunday as well as on the other days.



# Travel Time (cont)

- As an enforcement policy the Division will not consider as work time that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile. (Driving = working, Passenger = normal work hours on both normal and not normal work days)



# Typical Problem

- 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.



# Overtime

# Overtime Pay

Covered, non-exempt employees must receive one and one-half times the regular rate of pay for all hours worked over forty in a workweek (Some states have added requirements such as 8 hours in a work day in California)



# Workweek

- Compliance is determined by workweek, and each workweek stands by itself
- Workweek is 7 consecutive 24 hour periods (168 hours)



# EXAMPLE

- Concrete Tilt-Up Construction Company in Salt Lake City - \$397,000 in back wages



# Regular Rate

- Is determined by dividing total earnings in the workweek by the total number of hours worked in the workweek
- May not be less than the applicable minimum wage (can be an average between different job categories eg: Drywall work, Painting, Wait Time, Drive Time, etc. and rate of pay by job class should be established with employee in advance).





# Regular Rate Exclusions

- Sums paid as gifts
- Payments for time not worked
- Reimbursement for expenses
- **Discretionary bonuses (must incl. non-discretionary bonuses – this for that)**
- Profit sharing plans
- Retirement and insurance plans
- Overtime premium payments
- Stock options



# Regular Rate (RR)

Step 1: Total Straight Time Earnings (Minus Statutory Exclusions) Divided By Total Hours Worked = Regular Rate

Step 2: Regular Rate x .5 = Half Time Premium

Step 3: Half Time Premium x Overtime Hours = Total Overtime Premium Due



# Example: Hourly Rate + Production Bonus

Total Hours = 48  
Hourly Rate = \$9.00  
Bonus = \$10

48 hours x \$9.00 = \$432.00  
Bonus + \$10.00  
Total = \$442.00

\$442.00/48 hrs = \$9.21 (Regular Rate)  
\$9.21 x 0.5 = \$4.61  
\$4.61 x 8 hrs = \$36.88 (Overtime Due)



# Example: Different Hourly Rates

Janitor Rate \$8.50, Janitor Hours 21

Cook Rate \$9.00, Cook Hours 26

$$21 \text{ hours} \times \$8.50 = \$178.50$$

$$26 \text{ hours} \times \$9.00 = \underline{\$234.00}$$

$$\text{Total} = \$412.50$$

$$\$412.50 / 47 \text{ hours} = \$8.78 \text{ (Regular Rate)}$$

$$\$8.78 \times 0.5 = \$4.39$$

$$\$4.39 \times 7 \text{ hours} = \$30.73 \text{ (Overtime Due)}$$



# Example: Piece Rates

Piece Rate Earnings \$391.00 for 46 Hrs  
Waiting Time Rate \$7.25 for 4 Hrs  
Production Bonus \$12.50

46 hours = \$391.00  
4 hours x \$7.25 = \$29.00  
Production Bonus = \$12.50  
Total = \$432.50

$\$432.50 / 50 \text{ hrs} = \$8.65$  (Regular Rate)  
 $\$8.65 \times 0.5 = \$4.33$   
 $\$4.33 \times 10 \text{ hrs} = \$43.30$  (Overtime Due)



# EXAMPLE

Contractor in Las Vegas –  
\$17,000 check X's 200  
Workers = \$3.4m



# Example: Salaried for Fixed Hours

Salary Earnings \$420.00 (for a 40 hour workweek)

Hours Worked 48

Regular Rate \$10.50 (\$420/40 hours)

Overtime Rate \$15.75

Salary Equals = \$420.00  
8 hours x \$15.75 = \$126.00  
Total Due = \$546.00



# Example: Fixed Salary for Fluctuating Hours

Fixed Salary \$420.00 (for all hours worked)

Week 1 Hours Worked 49

Regular Rate \$8.57 ( $\$420 / 49$  hours)

Additional Half-Time Rate \$4.29

Salary Equals = \$420.00

9 hours x \$4.29 = \$38.61 (Overtime Due)

Total Due = \$458.61





# Example: Fixed Salary for Fluctuating Hours

Fixed Salary \$420.00 (for all hours worked)

Week 2 Hours Worked 41

Regular Rate \$10.24 ( $\$420 / 41$  hours)

Additional Half-Time Rate \$5.12

Salary Equals = \$420.00

1 hour x \$5.12 = \$5.12

Total Due = \$425.12



# Overtime may NOT be waived

**Overtime Pay May Not Be Waived:** The overtime requirement may not be waived by agreement between the employer and employees. An agreement that only 8 hours a day or only 40 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.**



# Exemptions and Exceptions

There are numerous exemptions and exceptions from the minimum wage and/or overtime standards of the FLSA



# Exemptions and Exceptions

- **Construction Workers**
- The exemptions provided by FLSA Section 13(a)(1) do not apply to manual laborers or other “blue collar” workers, including non-management construction workers, who perform work involving repetitive operations with their hands, physical skill and energy. Such nonexempt “blue collar” employees gain the skills and knowledge required for performance of their routine manual and physical work through apprenticeships and on-the-job training, not through the prolonged course of specialized intellectual instruction required for exempt learned professional employees.



# Exemptions and Exceptions

- **Construction Workers (Cont)**

FLSA-covered, non-management employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the FLSA, and are not exempt under Section 13(a)(1) of the FLSA nor the regulations at 29 CFR Part 541, no matter how highly paid they might be.



# “White Collar” Exemptions

# “White Collar” Exemptions

The most common FLSA minimum wage and overtime exemption -- often called the “541” or “white collar” exemption -- applies to certain

- Executive Employees
- Administrative Employees
- Professional Employees
- Outside Sales Employees
- Computer Employees



# Three Tests for Exemption

**Salary Level**

**Salary Basis**

**Job Duties**





# Standard Salary Level

- **Standard salary level - pursuant to 29 CFR 541.600**

Current

\$455 per week

- **Highly Compensated Employee (HCE) - pursuant to 29 CFR 541.601**

Current

\$100,000 per annum



**SUMMIT**

RISK MANAGEMENT & INSURANCE

# Salary Basis Test

- Regularly receives a predetermined amount of compensation each pay period (on a weekly or less frequent basis)
- The compensation cannot be reduced because of variations in the quality or quantity of the work performed
- Need not be paid for any workweek when no work is performed



# Deductions From Salary

- An employee is not paid on a salary basis if deductions from the predetermined salary are made for absences occasioned by the employer or by the operating requirements of the businesses
- If the employee is ready, willing and able to work, deductions may not be made for time when work is not available



# Permitted Salary Deductions

Seven exceptions from the “no pay-docking” rule

1. Absence from work for one or more full days for personal reasons, other than sickness or disability
2. Absence from work for one or more full days due to sickness or disability if deductions made under a bona fide plan, policy, or practice of providing wage replacement benefits for these types of absences
3. To offset any amounts received as payment for jury fees, witness fees, or military pay



# Permitted Salary Deductions (continued)

Seven exceptions from the “no pay-docking” rule (cont.)

4. Penalties imposed in good faith for violating safety rules of “major significance”
5. Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of written workplace conduct rules
6. Proportionate part of an employee’s full salary may be paid for time actually worked in the first and last weeks of employment
7. Unpaid leave taken pursuant to the Family and Medical Leave Act



# Effect of Improper Deductions

- An actual practice of making improper deductions from salary will result in the loss of the exemption
  - During the time period in which improper deductions were made
  - For employees in the same job classifications
  - Working for the same managers responsible for the actual improper deductions
- Isolated or inadvertent improper deductions, however, will not result in the loss of exempt status if the employer reimburses the employee



# Safe Harbor

- The exemption will not be lost if the employer:
  - Has a **clearly communicated** policy prohibiting improper deductions and including a complaint mechanism
  - Reimburses employees for any improper deductions; and
  - Makes a good faith commitment to comply in the future
- **Unless** the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints



# Executive Duties

- Primary duty is management of the enterprise or of a customarily recognized department or subdivision
- Customarily and regularly directs the work of two or more other employees
- Authority to hire or fire other employees or recommendations as to the hiring, firing, advancement, promotion or other change of status of other employees given particular weight





# 20% Owner Executives

- The executive exemption also includes employees who
  - own at least a bona fide 20-percent equity interest in the enterprise
  - are actively engaged in management of the enterprise
- The salary level and salary basis requirements do not apply to exempt 20% equity owners



# Administrative Duties

- Primary duty is 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
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance



- Tax
- Finance
- Accounting
- Budgeting
- Auditing
- Insurance
- Quality Control
- Purchasing
- Procurement
- Advertising
- Marketing
- Research
- Safety and Health
- Human Resources
- Employee Benefits
- Labor Relations
- Public and Government Relations
- Legal and Regulatory Compliance
- Computer Network, Internet, and Database Administration



# Outside Sales

- Primary duty is
  - Making sales or
  - Obtaining orders or contracts for services or facilities for consideration paid by customer and
- Customarily and regularly engaged away from the employer's place(s) of business in performing such primary duty
- No compensation test



# Independent Contractors

- **Determining Whether an Employment Relationship Exists: Is a Worker an Employee or Independent Contractor?**

In order for the FLSA's minimum wage and overtime provisions to apply to a worker, the worker must be an "employee" of the employer, meaning that an employment relationship must exist between the worker and the employer. The FLSA defines "employ" as including to "suffer or permit to work", representing the broadest definition of employment under the law because it covers work that the employer directs or allows to take place. Applying the FLSA's definition, workers who are economically dependent on the business of the employer, regardless of skill level, are considered to be employees, and most workers are employees. On the other hand, independent contractors are workers with economic independence who are in business for themselves.



# Independent Contractors (cont)

A number of “economic realities” factors are helpful guides in resolving whether a worker is truly in business for himself or herself, or like most, is economically dependent on an employer who can require (or allow) employees to work and who can prevent employees from working. The Supreme Court has indicated that there is no single rule or test for determining whether an individual is an employee or independent contractor for purposes of the FLSA. The Court has held that the totality of the working relationship is determinative, meaning that all facts relevant to the relationship between the worker and the employer must be considered.

While the factors considered can vary, and while no one set of factors is exclusive, the following factors are generally considered when determining whether an employment relationship exists under the FLSA (i.e., whether a worker is an employee, as opposed to an independent contractor):



# Independent Contractors (Cont)

- 1) **The extent to which the work performed is an integral part of the employer's business.** If the work performed by a worker is integral to the employer's business, it is more likely that the worker is economically dependent on the employer and less likely that the worker is in business for himself or herself. For example, work is integral to the employer's business if it is a part of its production process or if it is a service that the employer is in business to provide.



# Independent Contractors (Cont)

- 2) **Whether the worker's managerial skills affect his or her opportunity for profit and loss.** Managerial skill may be indicated by the hiring and supervision of workers or by investment in equipment. Analysis of this factor should focus on whether the worker exercises managerial skills and, if so, whether those skills affect that worker's opportunity for both profit and loss.





# Independent Contractors (Cont)

- 3) **The relative investments in facilities and equipment by the worker and the employer.** The worker must make some investment compared to the employer's investment (and bear some risk for a loss) in order for there to be an indication that he/she is an independent contractor in business for himself or herself. A worker's investment in tools and equipment to perform the work does not necessarily indicate independent contractor status, because such tools and equipment may simply be required to perform the work for the employer. If a worker's business investment compares favorably enough to the employer's that they appear to be sharing risk of loss, this factor indicates that the worker may be an independent contractor.



# Independent Contractors (Cont)

- 4) **The worker's skill and initiative.** Both employees and independent contractors may be skilled workers. To indicate possible independent contractor status, the worker's skills should demonstrate that he or she exercises independent business judgment. Further, the fact that a worker is in open market competition with others would suggest independent contractor status. For example, specialized skills possessed by carpenters, construction workers, and electricians are not themselves indicative of independent contractor status; rather, it is whether these workers take initiative to operate as independent businesses, as opposed to being economically dependent, that suggests independent contractor status.



# Independent Contractors (Cont)

- 5) **The permanency of the worker's relationship with the employer.** Permanency or indefiniteness in the worker's relationship with the employer suggests that the worker is an employee, as opposed to an independent contractor. However, a worker's lack of a permanent relationship with the employer does not necessarily suggest independent contractor status because the impermanent relationship may be due to industry-specific factors, or the fact that an employer routinely uses staffing agencies.



# Independent Contractors (Cont)

6) **The nature and degree of control by the employer.** Analysis of this factor includes who sets pay amounts and work hours and who determines how the work is performed, as well as whether the worker is free to work for others and hire helpers. An independent contractor generally works free from control by the employer (or anyone else, including the employer's clients). This is a complex factor that warrants careful review because both employees and independent contractors can have work situations that include minimal control by the employer. However, this factor does not hold any greater weight than the other factors. For example, a worker's control of his or her own work hours is not necessarily indicative of independent contractor status; instead, the worker must control meaningful aspects of the working relationship. Further, the mere fact that a worker works from home or offsite is not indicative of independent contractor status because the employer may exercise substantial control over the working relationship even if it exercises less day-to-day control over the employee's work at the remote worksite.



# Independent Contractors (Cont)

There are certain factors which are **immaterial** in determining the existence of an employment relationship. For example, the fact that the worker has signed an agreement stating that he or she is an independent contractor is not controlling because the reality of the working relationship – and not the label given to the relationship in an agreement – is determinative. **Likewise, the fact that the worker has incorporated a business and/or is licensed by a State/local government agency has little bearing on determining the existence of an employment relationship.** Additionally, the Supreme Court has held that employee status is not determined by the time or mode of pay.



# Youth Employment

Federal youth employment rules set both hours and occupational standards for youth



# Youth Employment

- 16 Sixteen- and 17-year-olds may be employed for unlimited hours in any occupation other than those declared hazardous by the Secretary of Labor
- 14 Fourteen- and 15-year-olds may be employed outside school hours in a variety of non-manufacturing and non-hazardous jobs for limited periods of time and under specified conditions
- Under 14  
Children under 14 years of age may not be employed in non-agricultural occupations covered by the FLSA



# Common Errors to Avoid



# Common Errors to Avoid

- Assuming that all employees paid a salary are not due overtime
- Improperly applying an exemption
- Failing to pay for all hours an employee is “suffered or permitted” to work (meal breaks)
- Limiting the number of hours employees are allowed to record



# Common Errors to Avoid

- Failing to include all pay required to be included in calculating the regular rate for overtime
- Failing to add all hours worked in separate establishments for the same employer when calculating overtime due
- "Banking" of overtime hours or payment of overtime in the form of "comp time"
- Failure to pay for travel from shop to work-site and back



# Common Errors to Avoid

- Making improper deductions from wages that cut into the required minimum wage or overtime. Examples: shortages, drive-offs, damage, tools, and uniforms
- Failure to combine the hours worked for overtime purposes by an employee in more than one job classification for the same employer within the same workweek
- Treating an employee as an independent contractor
- Confusing Federal law and State law



# The FLSA Does Not Require

- Vacation, holiday, severance, or sick pay
- Meal or rest periods, holidays off, or vacations
- Premium pay for weekend or holiday work
- A discharge notice, reason for discharge, or immediate payment of final wages to terminated employees
- Any limit on the number of hours in a day or days in a week an employee at least 16 years old may be required or scheduled to work
- Pay raises or fringe benefits



# Enforcement

- FLSA enforcement is carried out by Wage and Hour staff throughout the U.S
- Where violations are found, Wage and Hour advises employers of the steps needed to correct violations, secures agreement to comply in the future and supervises voluntary payment of back wages as applicable
- A 2-year statute of limitations generally applies to the recovery of back pay. In the case of a willful violation, a 3-year statute of limitations may apply



# Enforcement

**In the event there is not a voluntary agreement to comply and/or pay back wages, the Wage and Hour Division may:**

- Bring suit to obtain an injunction to restrain the employer from violating the FLSA, including the withholding of proper minimum wage and overtime
- Bring suit for back wages and an equal amount as liquidated damages



# Employee Private Rights

An employee may file a private suit for back pay and an equal amount as liquidated damages, plus attorney's fees and court costs



# Penalties

- Employers who willfully violate the Act may be prosecuted criminally and fined up to \$11,000
- Employers who violate the youth employment provisions are subject to a civil money penalty of up to \$11,000 for each employee who was the subject of a violation
- Employers who willfully or repeatedly violate the minimum wage or overtime pay requirements are subject to a civil money penalty of up to \$1,100 for each such violation





# Thank you



Presented by:  
Mark R. Hunter, CRIS

801-671-2431

[mrhunter@summitrmi.com](mailto:mrhunter@summitrmi.com)

Rick Bjornson

801-815-1131

[rbjornson@summitrmi.com](mailto:rbjornson@summitrmi.com)

[www.Summit-Risk.com](http://www.Summit-Risk.com)



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