



# FLSA – COMMON PITFALLS – WHAT YOU DON'T KNOW CAN HURT YOU



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## Overview

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- Misclassification of employees
- “Off the Clock” work
- Bonuses and overtime calculations



# SUMMARY OF IMPORTANT FLSA DECISIONS SINCE MARCH 2024

- Burden of Proof
  - E.M.D. Sales, Inc. v Carrera
    - Classification case, where outside sales team argued should have been classified as non-exempt.
    - The “default” is that all employees are covered by the FLSA, *i.e.*, “Non-exempt” from the statute’s overtime requirements.
    - Employer has the burden of “proving” that the employee is exempt.
  - United States Supreme Court resolved split in the federal courts over the appropriate standard and found that “preponderance of the evidence” is the burden of proof in exemption cases.
    - Why does it matter?
    - Applies to all exemption cases, not just sales.



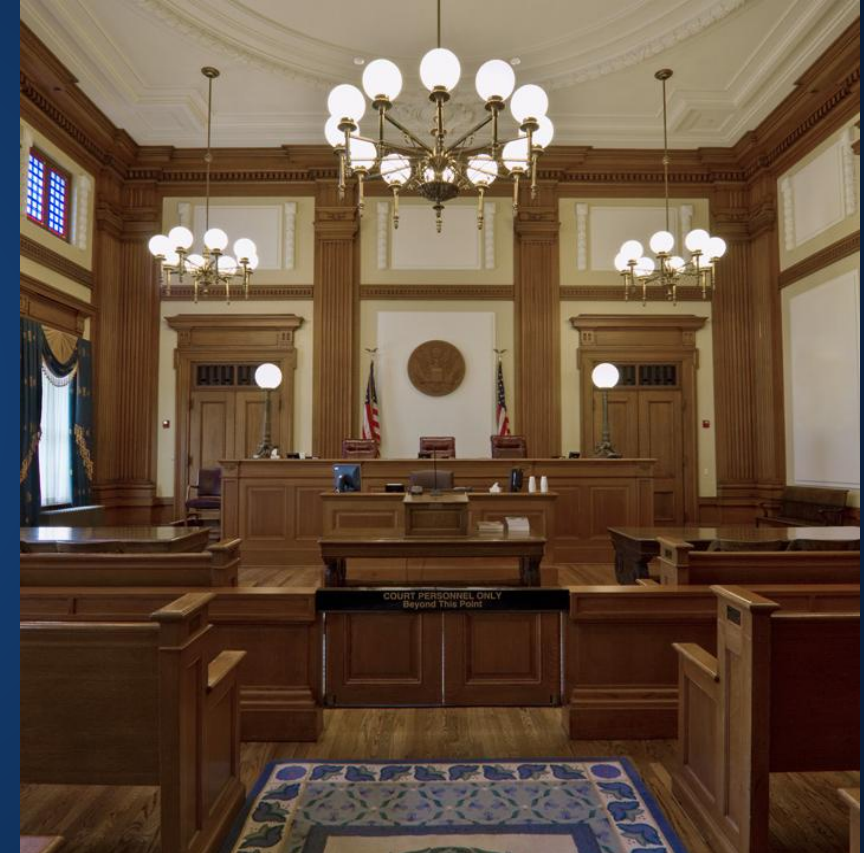
# SUMMARY OF IMPORTANT FLSA DECISIONS SINCE MARCH 2024

- Salary Threshold for Executive, Administrative and Professional Exemption.
  - *Plano Chamber of Commerce, et al v. United States Department of Labor*
    - Executive, administrative and professional employees are exempt.
    - Statute does not contain any description of the specific duties for the exemption of or even mention salary thresholds. The only “clue” in statute is the phrase “bona fide,” which means “genuine,” and the use of the terms “executive, administrative and professional.”



# SUMMARY OF IMPORTANT FLSA DECISIONS SINCE MARCH 2024

- Department of Labor made regulations soon after the statute was passed.
- You're familiar with them. For "administrative" exemption, "the employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers."
- Always had a salary component, but the salary component was meant to be a proxy for the duties test and not a "white collar" minimum wage. Historically set at the 10% percentile of average salary in the South (where salaries and wages tend to be lower). In most cases, in the real world, if an employee did not meet the salary threshold, he or she also did not meet the duties test.



# SUMMARY OF IMPORTANT FLSA DECISIONS SINCE MARCH 2024

- Rule changed in 2004. The threshold was raised to the 20% percentile. This is likely because the minimum wage had not been adjusted since 1997.
- Rule changed in 2016 and nearly doubled the salary threshold into the 40th percentile. It also provided for automatic, indexed adjustment every three years. Changed the status of 4.2 million employees.
- Rule changed in 2019, with a modest increase that stayed within the 20th percentile and no automatic adjustments.
- Rule changed in 2024. Two-tiered increase in salary threshold from \$684 to \$844 on July 1, 2024, and to \$1,128 on January 1, 2025. This would change the status of 5 million employees. Also included the automatic increases.





# MISCLASSIFICATION OF EMPLOYEES

## ■ Independent Contractor

- Rule implemented in 2024, and is a “totality of the circumstances” test, which means that there is no bright line.
- On May 1, 2025, **new** Department of Labor issued a “Field Assistance Bulletin” stating that 2024 rule will no longer be applied in DOL field investigations. DOL will rely on 2008 guidance, which considers the following to be the relevant factors:
  - 1) The extent to which the services rendered are an integral part of the principal's business.
  - 2) The permanency of the relationship.
  - 3) The amount of the alleged contractor's investment in facilities and equipment.
  - 4) The nature and degree of control by the principal.
  - 5) The alleged contractor's opportunities for profit and loss.
  - 6) The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor
  - 7) The degree of independent business organization and operation.



# MISCLASSIFICATION OF EMPLOYEES

- Case filed in January 2025 by a salesman who was classified as an “independent contractor” of a company that sold gutter filters.
- Not allowed to turn down sales call.
- Case where “degree of control” may be the deciding factor.
- Regulations clearly state distinguish between those employees who produce the widgets and those employees who “assist with the running or servicing of the business.”





# MISCLASSIFICATION OF EMPLOYEES

## Exempt v. Non-Exempt

Explosion of collective action cases on this issue.

Interplay of employment cites and litigation.



# DEDUCTIONS FROM SALARIES

- EAP – Must be actually salaried
- Uncontrollable Absence



# OFF-THE-CLOCK WORK

- Must pay all time “suffered or permitted to work”.
- Does not have to authorize or know about it. Employee does not have to report overtime for the employer to be obligated to pay overtime.
- Cannot divide preparatory or wind-down activities into “incremental” tasks to avoid this rule within the *de minimis* rule.
- How to avoid unauthorized “off the clock” work.
- Probationary employees must be paid.





# BONUS AND OVERTIME CALCULATIONS

- Shift premiums
- Non-discretionary bonuses
- Employer cannot reduce wage as a way to avoid actual overtime



# BREAKS

- Issues arise when employer does not pay for meal breaks and automatically deducts for meal breaks.
- Even if employees are required to notify employer when they don't use meal break, the employees can come back and sue later for unpaid wages.



# TRAVEL TIME

- Do not have to compensate for:
  - Commuting to and from work.
  - If employee works two shifts, the commute home in between shifts is not paid work.
- Do have to compensate for:
  - Mandatory travel between work locations.
  - Mandatory return to site at end of shift.
  - To load or unload.
  - Safety checks.





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# QUESTIONS



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THANK YOU



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