

# Fair Labor Standards Act and the Texas Payday Law

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# What Wage and Hour Laws Do – U.S.

The FLSA covers:

- minimum wage (\$7.25/hour)
- Overtime (time and a half)
- child labor
- equal pay



# What the Texas Law Covers

The Texas Payday Law covers:

- timely payment of wages in full at least twice each month for non-exempt employees
- enforcement of the wage agreement
- wage deductions
- final pay
- wage claims



# What the Laws Do Not Require

- breaks
- premium pay
- shift differentials
- vacation or sick leave\*
- holiday pay\*
- severance pay\*
- raises
- pension benefits
- expense reimbursements\*\*

\* Texas Payday Law: some fringe benefits might be required, if promised in a written policy or agreement

\*\* unless business expenses take an employee below minimum wage



# Minimum Wage – Allowable Deductions

- payroll taxes and other legally-required deductions
- court-ordered garnishments (child support)
- meals, lodging, and other facilities
- voluntary wage assignments, loans, and advances
- vacation pay advances
- uniforms and uniform cleaning costs \*
- tip credits
- union dues
- cash losses due to misappropriation \*
- Keep the Texas Payday Law in mind (written authorization is generally needed for everything but the first two categories)!



# Question 1

Which of the following deductions can legally take an employee's pay below minimum wage?

- A. Damage to company property
- B. Child support
- C. Theft of a company cell phone
- D. Repayment of a wage advance
- E. B and C
- F. B and D



# Limits on Garnishments, Levies, and Attachments

- Child support – in most cases, 50% of disposable earnings (net after payroll taxes)
- Bankruptcy – up to 100% if ordered by court
  - Trustee takes care of living cost allowance for debtor and pays other costs, including child support
- Student loan – 15% of disposable pay
- IRS tax debt – see IRS Publ. 1494
- No written authorization needed



# Tip Credits

- Tipped employees are those who earn at least \$30/month in tips from customers
- Minimum cash wage is \$2.13/hour
- The difference between that and the minimum wage of \$7.25/hour is the “tip credit”
- Tip credit for overtime hours can be no more than the tip credit for non-overtime hours
- Tip credit for \$2.13/hour would be \$5.12/hour
- Overtime pay does not include excess tips above the tip credit



# More on Tipped Employees

- Employees must understand they'll be paid a cash wage of at least \$2.13/hour
- The wage agreement must give a specified tip credit
- Employees must be allowed to keep all of their tips, other than a defined contribution to a valid tip pool
- Participants in the tip pool must include only those who serve customers and participate in the customer experience – that usually excludes managers, dishwashers, cooks, and similar staff
- Dual-job servers: use the weighted-average method for calculating overtime pay
- Written wage agreement needed



# Misappropriation of Money

- Deductions for losses of cash or its equivalent may take the pay below minimum wage only in case of misappropriation
- Employer has the burden of proving misappropriation
- Monetary losses due to negligence may not take the pay below minimum wage – same for loss of equipment, tools, materials, and supplies
- Written authorization needed



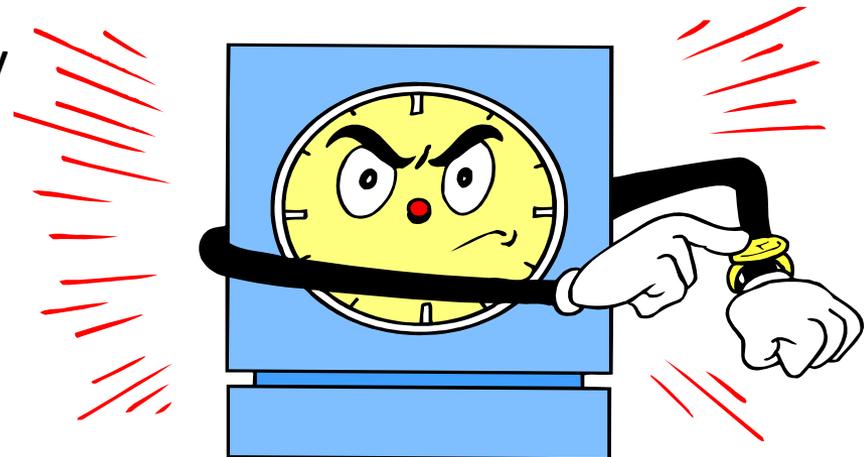
# Hours of Work

- Includes all time during which the employee is at the disposal of the employer, i.e., “suffered or permitted to work”
- Waiting or on-call time
- Breaks
  - Sleeping time
- Preparatory and concluding activities
- Time spent in meetings and training programs
- Travel time
- Time worked does not include paid leave
- Hours worked and the FMLA – goes by FLSA rules



# Voluntary or Unauthorized Overtime

- If overtime is worked, employer must pay for it
- Whether it was authorized or wanted is irrelevant
- Employer may handle unauthorized overtime as a disciplinary matter
- Employees may not voluntarily give up the right to overtime pay – agreements to contrary are **void**
- No working “off the clock” allowed



# Calculating Overtime Pay

- Hourly: time and a half over 40 hours
- Salary:  $\text{salary} \div \text{number of hours the salary is intended to compensate} = \text{regular rate}$ 
  - Regular hours < 40: add regular rate for each hour up to 40, then pay time and a half for hours over 40
  - Regular hours = 40: time and a half
  - Regular hours > 40: pay hours from 40 up to regular schedule at half-time, then time and a half past that
  - Irregular hours: regular rate =  $\text{salary} \div \text{total hours}$ , then pay half-time for all hours over 40
- Other pay methods: regular rate =  $\text{total pay} \div \text{total hours}$ ; add half the regular rate for each overtime hour



# Question 2

Which statement about overtime pay for non-exempt employees is true?

- A. If the employee works overtime, it must be paid at time and a half.
- B. Not paying overtime pay is permitted with the employee's written authorization.
- C. Only scheduled overtime needs to be paid.
- D. Not an issue for me – I only have salaried employees.



# Exempt White-Collar Employees

- Executive, administrative, professional, outside sales representative, computer professional
- Both salary and duties tests must be satisfied
- Minimum salary - \$455/week (\$970/week later in 2016)
- Duties test – focus is on “primary duty” of exempt work – exempt employees customarily and regularly perform an exempt duty as their primary duty
- Discretion and independent judgment as to the details of the work



# Easiest Ways to Tell If An Employee is Exempt

- They're your boss
- They sign your paychecks
- They design workplace policies
- They decide rates of pay
- They decide on promotions
- They're the ones the subordinate employees criticize behind their backs
- They do the work only a licensed professional can do



# Exempt Salaried Employees

- the company is buying results, not specific amounts of time
- no way to tell how long specific projects or tasks will last
- discretion and independent judgment are major criteria
- other employees look to exempt employees for leadership
- their decisions affect other employees' jobs and the company as a whole



# Salary Basis Test

- True salary
- No partial-day deductions
- Partial-week deductions only if specifically allowed (absences due to personal business, medical reasons, unpaid suspensions)
- Special exception for FMLA
- Special rules apply for governmental employers
- Extra pay for extra work is OK



# Executive Exemption

- Primary duty is management of the enterprise or a recognized department or division
- Customarily and regularly supervises two or more employees
- Authority to hire and fire, or else has substantial power to recommend such actions
- Examples: president, CEO, department head, COO, CFO, general manager



# Administrative Exemption

- Primary duty is office or non-manual work directly related to management or general business operations of employer or employer's customers
- Exercises discretion and independent judgment as to matters of significance
- Not "line employees"
- Examples: department head, personnel director, CFO, VP for Administration, marketing manager, database administration



# Professional Exemption

- Primary duty is work requiring advanced knowledge in a field of science or learning that is customarily acquired by a prolonged course of specialized intellectual instruction
- At least a four-year college degree in employee's field of work
- Not skilled trades, but rather established professions, generally involving state licensure or certification
- Examples: physician, attorney, teacher, engineer, architect, CPA, scientist, pharmacist, registered nurse



# Creative Professionals

- Primary duty is work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor
- Does not include work that primarily depends upon intelligence, diligence, and accuracy, or that can be done with general manual ability or training
- Examples: musician, novelist, playwright, actor, painter, photographer, cartoonist, editorial writer, investigative journalist



# Outside Salespeople

- Customarily and regularly engaged in the primary duty of making sales outside of the employer's principal place of business
- Paid by commission – no salary or minimum wage necessary
- Overtime exemption as well



# Computer Software Professional / Computer Employee Exemption

- Top computer programmers, systems analysts, or network administrators
- Webmasters arguably included as well, depending upon scope of job
- Straight-time hourly pay of at least \$27.63 per hour, or salary of at least \$455/week (\$970/week later this summer)



# Question 3

Which of the following salaried employees is entitled to overtime pay?

- A. Company president
- B. Company bookkeeper
- C. General manager
- D. Staff pharmacist
- E. Human resources director



# Coverage of the Texas Payday Law

- all private employees
- all private employers
- governmental employers and employees are generally not covered, but state personnel laws usually provide the same types of coverage and wage protections
- independent contractors and volunteers are not covered



# Purposes of the Texas Payday Law

- Enforces the wage agreement that was in effect when the work was performed
- Prohibits illegal wage deductions – only legal if:
  - ordered by a court
  - required or specifically authorized by a law
  - made for a lawful purpose and authorized in writing by the employee
- Requires timely payment of wages due, at least twice/month for non-exempt employees and once/month for exempt employees
- Provides a deadline for final pay
- Provides a claim and appeal process for wage claims



# Deductions Under the Texas Payday Law

- deductions do not have to be authorized in writing by the employee if they are ordered by a court (child support), or else are required or specifically authorized by law (payroll taxes, etc.)
- deductions made for any other reason must be authorized in writing by the employee
- have all employees sign wage deduction authorization forms listing all reasons you are likely to ever need to deduct pay (a sample form is online at [http://www.twc.state.tx.us/news/efte/wage\\_deduction\\_authorization\\_agreement.html](http://www.twc.state.tx.us/news/efte/wage_deduction_authorization_agreement.html))



# Pay Agreements

- verbal or written – enforceable either way
- any pay method is allowed
- the more complicated the arrangement is, the more important it is to put it in writing
- methods and rates of pay may be changed, but never in such a way that a retroactive pay cut results
- pay whatever the agreement promises



# Question 4

Non-required deductions from pay should be:

- A. Only as high as the employee feels comfortable with – otherwise, they might quit.
- B. Performed in front of a notary public.
- C. Authorized by the employee in writing.
- D. Based only on what the employee originally told you, since the law prohibits changes to the original agreement.



# Methods of Pay

- hand-delivery to employee at work
- hand-delivery at other place agreed to by employee
- registered mail, to arrive no later than payday
- delivery to another person designated by the employee in writing by a method similar to first three methods
- any reasonable method agreed to by employee in writing
- direct deposit if employee has bank account



# Direct Deposit

- Permitted under both FLSA and the Texas Payday Law
- Must be voluntary on employee's part, according to DOL (minimum wage issue)
- EEOC issues as well (minimum wage and disparate impact)
- The Texas law does not cover the issue of forcing an employee to have a bank account – the Consumer Financial Protection Bureau prohibits employers from requiring employees to have a specific bank
- Advance written notice to employees
- Payment by debit card needs written authorization



# Question 5

Which statement is false?

- A. An employer may not pay wages via a debit card without the employee's written authorization.
- B. The DOL would not like a payroll card that involves transaction fees that take the pay below minimum wage.
- C. Retroactive pay cuts are always illegal.
- D. A wage agreement that is not in writing, as required, is unenforceable.



# Texas Payday Law – Miscellaneous Rules

- wage payments in kind must be authorized in writing by the employee (meals, lodging, and other facilities - keep exact records as required by DOL regulation 29 C.F.R. § 531.27!)
- fringe benefits are payable only if promised in a written policy or agreement - payable as promised - if the policy is silent, the benefit is not enforceable under the Texas Payday Law



# Paying on Time

- No specific penalty in the Texas law for paying late, but it can result in a bad faith penalty if prior violations have occurred
- Employer cannot hold paycheck pending return of items or repayment of loans
- Employer cannot hold paycheck pending submission of timesheets, unless there is no way to calculate pay otherwise
- Excessive late payments may lead to a bonding requirement



# Final Pay

- Must include all components of final pay
- Layoff or discharge: within six calendar days of layoff or discharge
- Voluntary quit: by the next regularly-scheduled payday after the effective date of resignation
- Exception: commissions, bonuses, and fringe benefit payments covered by written contract, policy, or agreement – simply follow the agreement and the timeline in it
- Nature of work separation is determined by TWC's rules on unemployment claims



# Special Problems with Final Pay

- Deceased employee: final pay belongs to the estate
- Executor or administrator can claim the final paycheck on behalf of the estate
- Spouse can file an affidavit alleging no executor or administrator, and then claim the final pay, but is responsible to repay the estate if that turns out to be wrong
- Unclaimed final pay must be reported to Unclaimed Property Division of the Comptroller's Office after one year



# Property Return Security Deposit

- Method for encouraging return of property
- Small deduction each pay period for PRSD
- 100% return to employee upon work separation if everything is returned in decent shape; offset against PRSD for replacement cost if some items are not returned
- State law compliance: written authorization for deduction; written policy; the two can be combined into one form for ease of use
- A sample form is in the book online at [http://www.twc.state.tx.us/news/efte/property\\_return.html](http://www.twc.state.tx.us/news/efte/property_return.html)



# Question 6

How long can an employer hold the final paycheck?

- A. As long as it takes to teach the employee a lesson – after all, he stiffed your company on the required notice of resignation.
- B. As long as the Texas Payday Law permits a final paycheck to be held.
- C. Until she turns in her company cell phone.
- D. Until she submits her documentation of work performed.



# Minimum Wage for Final Pay Period

- Two ways to do this legally – otherwise, it can look like a retroactive pay cut, which violates the law
  - as part of a written wage agreement (requires careful wording)
  - in conjunction with a "resignation notice security deposit" agreement (more accounting for the payroll staff)



# New Test for Interns

*Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376 (2d Cir. 2015), amended by 2016 WL 284811, at \*5 (2d Cir. Jan. 25, 2016) gives a new seven-part test focused on internships:

- No expectation or promise of compensation whatsoever
- Training similar to that given in an educational environment, including clinical and other hands-on training
- Tied to the intern's formal education program by integrated coursework or the receipt of academic credit
- Accommodation of the intern's academic commitments by corresponding to the academic calendar



# New Test for Interns (cont'd)

- Duration is limited to the period in which the intern receives beneficial learning
- Intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern
- No expectation by either party that the internship will turn into a paid job at the conclusion of the internship
- This seven-part test was adopted by the 11th Circuit in *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199 (11th Cir. 2015)



# Impact on Other Laws

- NLRA issue with salary confidentiality policies
  - Employer can't prohibit wage discussions between employees regarding their own wages
  - Employer can prohibit improper access of confidential wage information, including inducing others to allow such improper access
  - Employer also doesn't have to allow such discussions during work time, but should be consistent
- Unemployment cases:
  - Failure to submit timesheets properly is usually not cause to delay wages, but can be misconduct
  - Frequent late wage payments can be good cause to quit



# Enforcement of Wage Judgments

- Final written ruling
- Collection letters
- Notice of lien – can be assigned to claimant
- Notice of assessment – same weight as ruling of a district court
- Bank freeze and levy
- Court action
- Requirement to post bond to continue employing workers in the state



# Tips for Compliance

- Educate yourself about wage and hour law
- Train other managers and payroll department staff
- Call DOL and your state labor law agency for help, advice, and training if possible
- Correct violations ASAP!
- If higher-ups balk, remind them of personal liability risk (“individual liability”)
- Document your advice to senior management and advise them of the possible consequences



# Thanks for your attendance!

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