



## The FLSA – You Can't Get There From Here

Catherine Burgett  
614-559-7287  
[cburgett@fbtlaw.com](mailto:cburgett@fbtlaw.com)

### Ever Ask for Directions in W.Va.?

Get off the 4-lane. Head down to where the Little General used to be but is now some pizza restaurant, but not the good pizza restaurant, the new one. Go past that. Head on up the road till you get to the church with the blue roof. Go straight. When the road forks at Sherry's Beer City, take the upper fork. Stay on that road till just past chicken wire bend. When you see the old oak tree with the big'ol knot in the field on the right, you're gonna turn left just past that. Follow that road down the mountain till you see Dale Earnhardt barn. Just after the barn, take the left fork. That's a gravel road, not red dog. If you're on a red dog road, you're going the wrong way. Follow the gravel road down the mountain. Be sure to stop before all the switchbacks and blow your horn to make sure nothing is coming up. When you get to the parking lot next to the river, you're there.



## Ever Ask for Legal Advice About the FLSA?

- Is my front line supervisor exempt?
- How much detail should I put in a job description?
- Do I need to track hours for my exempt employees?
- Is that bonus part of the regular rate?
- Should I use a fluctuating workweek?
- Can I deduct from my manager's salary?

Frost  
Brown Todd <sup>LLC</sup>  
ATTORNEYS



## WHY THE CONFUSION??

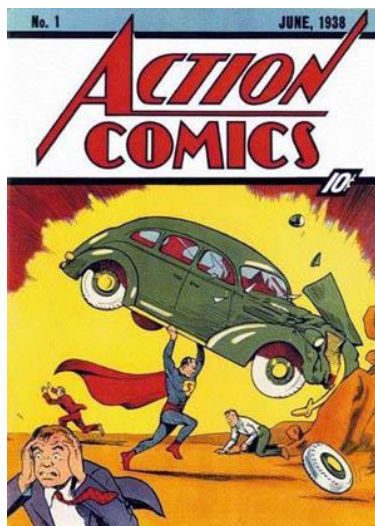
Frost  
Brown Todd <sup>LLC</sup>  
ATTORNEYS

1938 COST OF LIVING	
<u>LIVING</u>	
New House	\$3,900.00
Average Income	\$1,731.00 per year
New Car	\$860.00





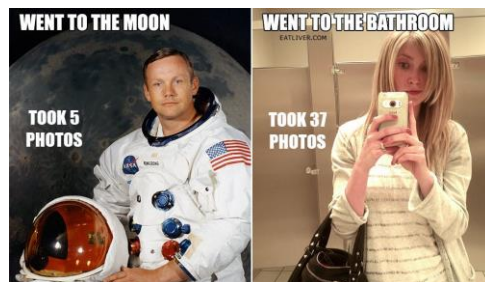
Frost  
Brown Todd <sup>LLC</sup>  
ATTORNEYS



Frost  
Brown Todd <sup>LLC</sup>  
ATTORNEYS

## Why the Confusion – 1938 vs. 2017

- Flex time
- Smart Phones
- Work Share
- Gig Economy
- Employee Preferences



Frost  
Brown Todd <sup>LLC</sup>  
ATTORNEYS

## Why Should I Care?

- Over 325% increase in FLSA suits since 2001
- 350 new DOL investigators; 50% increase since 2008
- Penalties
  - Backpay, Attorneys Fees, Liquidated Damages
  - Employers who willfully or repeatedly violate the FLSA are subject to a civil money penalty of up to \$1925 for each violation



Frost  
Brown Todd <sup>LLC</sup> <sup>it</sup>  
ATTORNEYS ATTORNEYS



## GETTING OFF THE FOUR-LANE



### FLSA Wage-Hour Basics

- Minimum Wage
  - \$7.25 under federal law
  - \$8.15 in Ohio
- Overtime
  - Over 40 hours per workweek
- Overtime Rate
  - One-and-one-half times the regular rate
- Enforcement
  - Department of Labor or private suit (collective actions)
  - Backpay, liquidated damages, penalties
  - Attorneys' fees



## FLSA Wage-Hour Basics (cont.)

- Equal Pay
- Child Labor
- Exemptions to minimum wage and/or overtime
  - Employer exemptions
    - Seasonal Recreational Establishments
  - Employee exemptions
    - “White Collar” Employees
      - Administrative
      - Executive
      - Professional
    - Other exemptions
- Only “employees” covered by the FLSA – but be careful with “independent contractors”



**Frost  
Brown Todd** LLC  
ATTORNEYS

## “White Collar” Exemptions

- Salaried employees must be paid overtime unless exempt
- Executive, Administrative, Professional Exemptions
- Highly-Compensated Employee Exemption
- Three tests to satisfy for “white collar” exemptions:
  - (1) Salary Level Test
  - (2) Salary Basis
    - Guaranteed minimum and limits on deductions
    - Exception for teachers, lawyers, doctors, outside sales employees
  - (3) Primary Duties Test
    - Duties depend on position



**Frost  
Brown Todd** LLC  
ATTORNEYS

## What Does the FLSA NOT Require?

- Vacations and holidays
- Lunch breaks
- Rest periods
- Premium pay (i.e., pay for 8+ hours a day or weekends)
- Maximum hours
- Paid sick days

15



## Comp Time

- Alternative to overtime pay for public employers
- Must be at least 1 ½ hours of comp time for each hour of overtime, generally up to 240 a year
- Must be agreed to pursuant to CBA or (for non-union employees) by individual agreement prior to performance of the overtime work
- Earned/unused come time must be paid out on termination of employment

16





# THE NEW PIZZA RESTAURANT (UPDATES)



## DOL Salary Rule - What The H\*#! Happened





## RED DOG ROADS (WRONG TURNS)



### Common Wrong Turns

- Tracking Time
- Wage and Hour Policies/AOs/GOs/Codes
- Regular Rate of Pay
- Bonuses
- Travel Time
- Payroll Deductions
- Volunteering



## Tracking Time

- Employers required to keep records of non-exempt employees hours of work.
  - Full name
  - Home address
  - Birthdate (under 19)
  - Sex and occupation
  - Time and day that begins workweek
  - Regular hourly rate of pay
  - **Hours worked each workday**
  - **Total hours worked each workweek**
  - Straight-time earnings
  - Premium pay
  - Additions and deductions from pay
  - Total wages paid
  - Date of payment and pay period
  - Retroactive payments



Frost  
Brown Todd <sup>LLC</sup>  
ATTORNEYS

21

## How long must I maintain the records?

- The FLSA requires that these records be kept for three years from the last date of entry.



Frost  
Brown Todd <sup>LLC</sup>  
ATTORNEYS

## A Quick Word on Hours Worked . . .

- Relevant standard: whether the employer “suffers or permits” the employee to work for the “employer’s benefit”
- Burden is on employer to control
- Standard is IF YOU KNEW OR HAD REASON TO KNOW
- Particularly difficult to manage in modern workplaces
- Difficult balancing act for employers



**Frost  
Brown Todd** LLC  
ATTORNEYS

## Tracking Time

- Employer’s burden to maintain records of time worked
- Implement processes
  - System where employee reviews and approves timesheet before submission
  - Written “exception log” for employees to report under-recorded hours and pay employees for such reported hours
  - Pay overtime for all reported hours worked even if working overtime without prior approval is against policy

**Frost  
Brown Todd** LLC  
ATTORNEYS

## Tracking Time

- Implement processes
  - Encourage rather than discourage reporting of overtime hours through well-established, thoroughly communicated policies
    - Multiple avenues to report OT
  - Review employees' time sheets regularly to verify, to the extent possible, that the records are accurate
  - Consider adding to evaluation process to ensure hours aren't being hidden by employees or supervisors



## Common “Off-the-Clock” Work Issues

- Employee begins to work early without clocking in or stays to work late after clocking out
- Employee fails to record all working time on timesheets
- Employee meets with supervisor before or after regular work hours or takes a call to answer questions while off work
- Employee performs work remotely by logging in from home or doing work on his/her smart phone
- Supervisors ask employees to work off the clock



## Common “Off-the-Clock” Work Issues (cont.)

- Employee takes meal periods in work area and continues to work during breaks
- Automatic deductions for meal periods, but employee works through them
- Meal periods are not work time
  - Meal periods generally must be at least 30 minutes
  - Rest breaks of less than 20 minutes must be paid
  - Breaks of 20-30 minutes: The burden is on the employer to prove that no work was performed



Frost  
Brown Todd<sup>LLC</sup>  
ATTORNEYS

## Policies/AOs/GOs/Codes

- Explain who is eligible for OT – non-exempt employees
- OT must be approved.
  - Even if not approved – all OT worked must be paid
  - But unapproved OT is subject to discipline



Frost  
Brown Todd<sup>LLC</sup>  
ATTORNEYS

## Handbook Policies

- Safe Harbor language – include it!
  - Prohibits improper pay deductions
    - Reporting mechanism
    - Reimburse for improper pay deductions
    - Commitment to comply with future
  - Complaint mechanism for improper pay
    - Includes complaints re OT
    - Non-retaliation



Frost  
Brown Todd <sup>LLC</sup>  
ATTORNEYS

29

## What is the “Regular Rate” of Pay?

- 29 C.F.R. 778.109: "the regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions under section 207(e)) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid."
- "Total remuneration" means all wages earned by the employee during that week from whatever work was done and by whatever pay methods are used.
- For example, if an employee is paid an hourly rate plus a commission, the regular rate would be the straight-time hourly earnings plus the commission for that workweek, divided by the total number of hours worked during the workweek. If on top of that a productivity bonus is paid, the bonus would be added to the hourly earnings and the commission and then divided by the number of hours worked to arrive at the regular rate for that workweek.
- "Hours actually worked" does not include paid leave or holiday hours.

Frost  
Brown Todd <sup>LLC</sup>  
ATTORNEYS

## What is the “Regular Rate” of Pay?

- Regular rate is the rate used to calculate overtime
- All of the following must be included in the regular rate for non-exempt employees:
  - ***Non-discretionary*** bonuses
  - Shift differential
  - Production bonuses
  - Safety bonuses
  - Attendance bonuses
  - Longevity pay
  - Retention bonuses



Frost  
Brown Todd <sup>LLC</sup>  
ATTORNEYS

## Bonuses - Oh My!

- Bonuses paid during pay period
- Bonuses paid over series of pay periods
- Shift Differentials
- Salary paid to non-exempt employee



Frost  
Brown Todd <sup>LLC</sup>  
ATTORNEYS



## Travel Time



Frost  
Brown Todd <sup>LLC</sup>  
ATTORNEYS

33

## Travel Time

- An employee who travels to work 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 from place to place during the workday (e.g., from job site to job site) must be counted as work time
- Stopping some place for work on the way to work is compensable
- Employee works remotely in the morning, then drives to work – compensable?

Frost  
Brown Todd <sup>LLC</sup>  
ATTORNEYS

## Travel Time (cont.)

- For a one-day special assignment trip in another city, all travel time is compensable, excluding time the employee would normally commuting to the regular work site (e.g. travel from Columbus to Cincinnati for a meeting) and meals



Frost  
Brown Todd <sup>LLC</sup>  
ATTORNEYS

## Travel Time (cont.)

- For a multi-day trips, travel time during normal working hours is compensable (including travel during normal working hours on nonworking days). To the extent that the employee is working during non-normal working hours (not being a passenger), the time is also compensable



Frost  
Brown Todd <sup>LLC</sup>  
ATTORNEYS

## Payroll Deductions

- Cannot make deductions that bring pay below minimum wage
- Examples of deductions that are illegal if they bring pay below minimum wage
  - Fines/disciplinary penalties
  - Repayment for shortages
  - Repayment for theft (unless employee has been convicted)
  - Deposit or cash bond paid by employee (even if not a payroll deduction)
  - Repayment of loan, with interest, if employer is the lender



## Payroll Deductions

- Certain deductions ARE permissible, even if they bring pay below minimum wage
  - Taxes
  - Reasonable cost of board and lodging
  - Union dues
  - Insurance premium payments
  - Repayment of loans from third parties OR free and clear advances from employer
  - Wage attachments, garnishments



## Permissible Deductions – Exempt Employees

- When the employee has performed no work at all during the entire workweek
- When the employee is absent for a full day for personal reasons other than illness or disability (including a work-related accident)
- When the employee is absent for a full day or more because of sickness or disability where the deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation for loss of salary due to sickness, and the employee has not yet become eligible to participate in the plan or has exhausted all accrued leave allowed under the plan



## Permissible Deductions – Exempt Employees

- When an employee has violated a safety rule of major significance and is suspended for one or more full days – the employer must have a written policy applicable to all employees in order to do this.
- When an employee misses any work (whether a full day or partial day) due to taking leave under the Family and Medical Leave Act (FMLA)
- When the employee is in the initial or terminal week of employment, an employer may pay a proportionate part of an employee's full salary for the time actually worked
- Offset jury, witness fees or military pay



## Volunteering



- Non-exempt employees cannot volunteer to do work that involves the same type of work that the employee performs in their regular job - e.g., custodian volunteering to clean up after a basketball game
  - NOTE - Volunteering must be coercion free
  
- In exchange for performing the volunteer work, they must:
  - Receive no compensation; or
  - Be paid expenses, reasonable benefits, or a nominal fee (such as a stipend)



## Working Multiple Jobs

- Employees working two non-exempt positions must be paid overtime at a “blended rate” if their hours worked in both positions combined exceed 40
  - “Regular rate” is by assigning a weight to each rate based on how many hours the employee worked in each position
  - Employee must then receive time-and-a-half pay for hours worked over 40
  
- Employees performing exempt and non-exempt work
  - “Primary Duties” test
  - E.g., head custodian performing regular custodial work





## SWITCHBACKS (TRICKY LITTLE IDEAS)



### Workweeks for Exempt Employees

- Workweek is a fixed, regularly occurring period of seven consecutive, 24-hour periods that is expressly adopted to be a workweek for FLSA purposes
- Need for one both exempt AND non-exempt
- Don't have to be the same



## Poor Performance and Exemptions

- Exempt employees must “primarily” perform their exempt job duties
- It is an employees’ actual work that determines their exemption
- Courts are split on whether failure to adequately perform job duties can destroy an exemption



Frost  
Brown Todd<sup>LLC</sup>  
ATTORNEYS

## Other Common Trouble Scenarios

- Office secretary also takes board meeting minutes
- Food service workers show up early to prep food
- Teachers are docked pay for showing up late



Frost  
Brown Todd<sup>LLC</sup>  
ATTORNEYS

## Other Common Trouble Scenarios



- Comp time agreed to after the OT work was performed
- Required notices posted only in one area
- Secretaries coordinate substitute teachers/employees before normal work hours
- Time sheet functions only as a “sign in” sheet



47

## An Ounce of Prevention

- Be sure that you have it right!
- Review your job descriptions, pay policies, and pay practices annually
- Make sure your policies are clear, and enforce them
- Train managerial/supervisory employees regularly
- Train non-exempt staff regularly, too!
- Prohibit unauthorized overtime—but don't withhold pay as a punishment



48



## An Ounce of Prevention

- Implement a reporting mechanism for violations or mistakes
- Ensure accuracy of records—do they pass your “smell test”?
- Make sure notices are posted where all employees can see them
- Limit non-exempt employees’ “extracurriculars”
- When in doubt (or trouble), give your lawyer a call



49

## WHERE TO NEXT?





- Opinion Letters?
- Exclude incentive payments from regular rate?
- Record keeping presumption?
- Highly paid employee exemption?

 Frost  
Brown Todd <sup>LLC</sup>  
ATTORNEYS



 Frost  
Brown Todd <sup>LLC</sup>  
ATTORNEYS