

UTAH WAGE AND HOUR ISSUES

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A. *State Specific Wage and Hour Laws*

The vast majority of Utah employers¹ are governed by the provisions of the Payment of Wages Act.² Essentially, the act requires that “[a]ll wages shall be paid in full to . . . employee[s].”³ Additionally, non-salaried employees must be paid, at least, semimonthly and within ten days of the close of the pay period.⁴ Salaried employees⁵ may be paid on a monthly basis by the seventh of the month following the month in which the services were rendered.⁶ An employer may not deduct, withhold, or divert any part of an employees wage except in specific circumstances, including, court order, state or federal law, or express written authorization of the employee.⁷

When an employee is discharged for any reason by an employer, an employer must pay the employee “within 24 hours of the time of separation at the specified place of payment.”⁸ Failure to do so subjects the employer to penalties if the employee makes a written demand for payment of the wages and the employer fails to make payment within 24 hours.⁹ If an employee terminates his or her employment, the employer need only pay

¹ Utah Code Ann. § 34-28-1 exempts political subdivisions of the state and certain agricultural employers from the reaches of the act.

² Utah Code Ann. §§ 34-28-1 to -19.

³ *Id.* § 34-28-3(1)(e).

⁴ *Id.* § 34-28-3(1)(a), (b).

⁵ A salaried employee for purposes of the statute is paid a yearly salary. *Id.* § 34-28-3(1)(d).

⁶ *Id.* § 34-28-3(1)(d).

⁷ *Id.* § 34-28-3(5), (6). These statutory guidelines are further supplemented by administrative rules. *See* Utah Admin. Code R610-3-18. These rules are much more restrictive than the statutory language so employers should review them carefully. A more thorough discussion of these restrictions is noted in section E below.

⁸ *Id.* § 34-28-5(1)(a).

⁹ *Id.* § 34-28-5(1)(b); *see also id.* § 34-28-9(2)(a).

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the employee on the next regular payday.¹⁰ There are limited exceptions to this rule for “sales agent[s] employed on a commission basis who ha[ve] custody of accounts, money, or goods of the sales agent[s]’ principal.”¹¹ An employee may file a wage claim with the Utah Labor Commission, Antidiscrimination and Labor Division, Wage Claim Division, if there has been a violation of the Payment of Wages Act and the amount of wages claimed is between \$50 and \$10,000.¹² The Act further requires that all employers maintain “true and accurate records of time worked and wages paid each pay period to each employee” for, at least, one year.¹³

The Utah Minimum Wage Act requires all employers to pay its covered employees, at least, \$7.25 an hour.¹⁴ There is no Utah state law requiring the payment of overtime. However, failure to pay overtime wages when due does implicate the provisions of the Utah Payment of Wages Act since overtime is required to be paid by federal statute. Accordingly, the amounts owed would be considered wages.

B. What Qualifies as Overtime

As discussed above, there is no Utah state law requiring the payment of overtime. Accordingly, federal law entirely controls the payment of overtime in Utah. Federal law requires that “no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above at a rate not less than one and one-half times the regular rate at which he is employed.”¹⁵ The law clearly requires that overtime compensation be computed on a week-to-week basis. Accordingly, no averaging over a larger period is allowed.¹⁶ For instance, if an employee worked 30 hours in one week and then 50 in another, an employer would be required to pay ten hours of overtime for the second week’s overtime despite the fact that over the two week period the employee worked only

¹⁰ *Id.* § 34-28-5(2).

¹¹ *Id.* § 34-28-5(4).

¹² *Id.* § 34-28-9(1).

¹³ *Id.* § 34-28-10.

¹⁴ *Id.* § 34-40-103(2); Utah Admin. Code R610-1-3.

¹⁵ 29 U.S.C. § 207(a)(1).

¹⁶ *See* 29 C.F.R. § 778.104. There is an exception for certain industries. *See* 29 U.S.C. § 207(j), (k).

eighty hours.¹⁷ The workweek, once established by the employer, must remain fixed.¹⁸ Although overtime must be computed based on the amount of hours worked in a workweek, an employer may pay its employees the overtime at its regular pay intervals.¹⁹

1. Regular Rate

The law further requires that an employer pay an employee 1 ½ times that employee's "regular rate" of pay.²⁰ The regular rate is not required to be uniform from workweek to workweek and, in fact, in many instances is not.²¹ This is particularly true in instances where an employee is compensated solely on the basis of his or her commissions during a week and, thus, an employee's earnings are highly variable. In such cases, the regular rate is still computed by establishing an hourly rate derived from an employee's earnings during a workweek.²²

The regular rate is computed by totaling all creditable payments made to the employee for a workweek and then dividing that total by the number of hours actually worked during the workweek.²³ Payments to an employee that are not credited toward the regular rate include the following:

- Amounts paid as gifts on special occasions, as a reward for service, which are not measured or dependent on hours worked, production, or efficiency;
- Amounts paid for Vacation, Holiday, Sick, or Administrative leave
- Amounts paid to reimburse for business expenses such as travel expenses
- Amounts paid in recognition of service during a period if (1) the fact that the amount is paid and the amount are at the sole discretion of the employer, (2) the payments are made pursuant to a bona fide profit sharing plan or trust without regard to hours of work, production or efficiency, or (3) the amounts are for "talent fees"
- Amounts irrevocably contributed to employee welfare plans
- Amounts paid for daily or weekly overtime work
- Amounts paid for working on regular days of rest or holidays where the amount exceeds 1 ½ times the employee's regular pay rate

¹⁷ *See id.*

¹⁸ *See* 29 C.F.R. § 788.105. The fixed workweek may be changed if it is not changed to evade overtime regulations and the change is intended to be permanent. *See* 29 C.F.R. § 778.105.

¹⁹ *See* 29 C.F.R. § 788.106.

²⁰ *See* 29 U.S.C. § 207(a)(1).

²¹ *See* *Walling v. Wall Wire Products Co.*, 161 F.2d 470 (6th Cir. 1947).

²² *Masters v. Maryland Management Co.*, 493 F.2d 1329 (4th Cir. 1974).

²³ *See* 29 U.S.C. § 207(e).

- Amounts paid for working at hours outside of the employer's normal business hours where the amount exceeds 1 ½ times the employees regular pay rate
- Amounts for stock options, stock purchase programs, and the like²⁴

The Department of Labor has interpreted the payment of SPIFs, "Push Money," or PMs to be a payment that must be included in the calculation of the employee's regular rate.²⁵

In instances where an employee earns no money in a given week or earns less than the amount he or she would earn under federal minimum wage in that week and the employee works more than 40 hours, he or she must be compensated at the overtime rate calculated by using the minimum wage pay rate.²⁶

2. Penalties

Any employer who violates the overtime provisions by failing to compensate an employee at 1 ½ times his or her regular rate for working over 40 hours per week is subject to the following penalties:

- For a willful²⁷ violation
 - Criminal sanction
 - \$10,000 fine, and/or
 - imprisonment for up to six months
 - Administrative sanction
 - Unpaid compensation plus liquidated damages of full amount that was not paid
 - Civil penalty of \$1,000 for each violation
 - Private civil suit

²⁴ *Id.*

²⁵ See Wage and Hour Field Operations Handbook ¶ 32b07.

²⁶ *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446 (1948).

²⁷ (1) An employer's violation of [the overtime provisions of the FLSA] shall be deemed to be "willful" for purposes of [29 C.F.R. § 578.3] where the employer knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements of the Act. All of the facts and circumstances surrounding the violation shall be taken into account in determining whether a violation was willful.

(2) For purposes of this section [578.3], an employer's conduct shall be deemed knowing, among other situations, if the employer received advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful.

(3) For purposes of this section [578.3], an employer's conduct shall be deemed to be in reckless disregard of the requirements of the Act, among other situations, if the employer should have inquired further into whether its conduct was in compliance with the Act, and failed to make adequate further inquiry.

29 C.F.R. 578.3(c).

- Unpaid compensation plus liquidated damages of full amount that was not paid
 - Reasonable attorney fees
 - Costs of action
- For repeated²⁸ violations
 - Administrative sanction
 - Unpaid compensation plus liquidated damages of full amount that was not paid
 - Civil penalty of \$1,000 for each violation
 - Private civil suit
 - Unpaid compensation plus liquidated damages of full amount that was not paid
 - Reasonable attorney fees
 - Costs of action
- For a simple violation
 - Administrative sanction
 - Unpaid compensation plus liquidated damages of full amount that was not paid
 - Private civil suit
 - Unpaid compensation plus liquidated damages of full amount that was not paid
 - Reasonable attorney fees
 - Costs of action²⁹

If an employer can prove that it complied in good faith with an existing “administrative regulation, order, ruling, approval, or interpretation of” the Secretary of Labor or Administrator of the Wage and Hour Division, it is exempt from “any liability or punishment” for its failure to comply with the law as it is determined to be in the

²⁸ An employer’s violation of [the overtime provisions of the FLSA] shall be deemed to be “repeated” for purposes of this section [29 C.F.R. § 578.3]:

(1) Where the employer has previously violated [the overtime provisions of the FLSA], provided the employer has previously received notice, through a responsible official of the Wage and Hour Division or otherwise authoritatively, that the employer allegedly was in violation of the provisions of the Act; or

(2) Where a court or other tribunal has made a finding that an employer has previously violated [the overtime provisions of the FLSA], unless an appeal therefrom which has been timely filed is pending before a court or other tribunal with jurisdiction to hear the appeal, or unless the finding has been set aside or reversed by such appellate tribunal.

29 C.F.R. § 578.3(b).

²⁹ See 29 U.S.C. § 216.

administrative or litigation matter then pending with the employer.³⁰ Additionally, “if the employer show to the satisfaction of the court that the act or omission giving rise to [an action to recover unpaid overtime compensation] was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act . . . the court may, in its sound discretion, award no liquidated damages. . . .”³¹

C. *Differences to Be Aware of: Salaried Exempt vs. Salaried Non-Exempt*

If an employer can show that its employee is an employee exempt from the overtime laws it can avoid having to pay overtime entirely. Although there are dozens of exemptions, the most often discussed exemptions are the so-called “white collar employee” exemptions.

The provisions of . . . section 207 of this title shall not apply with respect to-- . . . any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary . . .)³²

Pursuant to this statute, the Department of Labor has created certain white collar exemptions.³³

1. Executive Exemption

An employee is exempted as an “employee employed in a bona fide executive capacity” if he or she meets the following standards:

- He or she is compensated on a salary basis at a rate of not less than \$455 per week
- His or her primary duty is management of the business or of a “customarily recognized department or subdivision thereof”
- He or she customarily and regularly directs the work of two or more other employees
- He or she has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement,

³⁰ See 29 U.S.C. §§ 258, 259.

³¹ 29 U.S.C. § 260.

³² 29 U.S.C. § 213(a)(1).

³³ Because the other exemptions, professional and outside sales are less often used as exemptions, this article does not explain the application of the exemptions in details.

promotion or any other change of status of other employees “are give particular weight”³⁴

a. Salary Basis

The regulations provide that an employee is being paid on a salary basis “if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee’s compensation, which amount is not subject to reduction because of variations in the quality or quantity of work.”³⁵

i. Deducting Penalties from Salaries

This means that generally penalties which result in a reduction of pay are not permitted.³⁶ However, deductions from pay are allowed for, among other reasons,

- “infractions of safety rules of major significance,”³⁷
- “unpaid disciplinary suspension of one or more full days imposed in good faith for infractions of workplace conduct rules,”³⁸

“An employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer did not intend to pay employees on a salary basis.”³⁹

ii. Commissions in Addition to Salary are Permissible

Further, if an employer pays an employee a commission in addition to the salary, so long as the employee is guaranteed to receive at least \$455 per week, the exemption is not lost.⁴⁰

b. Management

Activities that count as management for purpose of this regulation are:

- Interviewing, selecting, and training employees
- Setting and adjusting employees’ rates of pay and hours of work

³⁴ 29 C.F.R. § 541.100.

³⁵ 29 C.F.R. § 541.602(a).

³⁶ See 29 C.F.R. 541.602.

³⁷ 29 CFR 541.602(b)(4).

³⁸ *Id.* 541.602(b)(5).

³⁹ *Id.* 541.603(a).

⁴⁰ See 29 C.F.R. § 541.604.

- Directing the work of employees
- Maintaining production or sales records for use in supervision or control
- Appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status
- Handling employee complaints and grievances
- Disciplining employees
- Planning the work
- Determining techniques to be used
- Apportioning work among employees
- Determining the type of materials, supplies, machinery, equipment, or tools to be used
- Determining merchandise to be bought, stocked, and sold
- Controlling the flow and distribution of materials or merchandise and supplies
- Providing for the safety and security of the employees or the property
- Planning and controlling the budget
- Monitoring or implementing legal compliance measures⁴¹

To qualify to be managing a “customarily recognized department or subdivision” for purposes of the executive exemption the department or subdivision “must have a permanent status and a continuing function” as opposed to being a “mere collection of employees assigned from time to time to a specific job or series of jobs.”⁴²

c. Two or more other employees

To qualify for this part of the exemption, a manager must direct the work of “two full-time employees or their equivalent.”⁴³ This means that a manager may direct one full-time employee and two half-time employees and qualify for the exemption.⁴⁴

d. Hiring and Firing

A person whose suggestions are given “particular weight” in hiring and firing decisions are those:

- who, as part of their job duties, make such suggestions and recommendations,
- from whom, the suggestions and recommendations are regularly sought, and

⁴¹ 29 C.F.R. § 541.102.

⁴² *Id.* § 541.103.

⁴³ 29 C.F.R. § 541.104(a).

⁴⁴ *Id.*

- whose recommendations are regularly relied upon.⁴⁵

Further, “an executive’s suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs.”⁴⁶

2. Administrative Exemption

In order to qualify as an administrative employee subject to exemption, an employee must meet the following test:

- He or she is compensated on a salary basis at a rate of not less than \$455 per week
- His or her 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; and
- His or her primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.⁴⁷

a. *Salary Basis*

See discussion in section C.1.a above.

b. *Primary Duty Is Work Related to Management of Business or Client’s Business*

An employee can meet this test if his or her work is related either to the management of the employer’s business or the employer’s customer’s or client’s business.⁴⁸

i. Employer’s Business

In order to qualify as exempt work that relates to the employer’s business “an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.”⁴⁹

This work includes works in such areas as:

- tax

⁴⁵ 29 C.F.R. § 541.105.

⁴⁶ *Id.*

⁴⁷ 29 C.F.R. § 541.200.

⁴⁸ 29 C.F.R. § 541.201(a).

⁴⁹ *Id.*

- finance
- accounting
- budgeting
- auditing
- insurance
- quality control
- purchasing
- procurement
- advertising
- marketing
- research
- safety and health
- personnel management
- human resources
- employee benefits
- labor relations
- public relations
- government relations
- computer network
- internet and database administration
- legal and regulatory compliance⁵⁰

ii. Employer's Clients or Customers

“[E]mployees acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may be exempt.”⁵¹

c. *Discretion and Independent Judgment*

Perhaps the most significant element of the administrative exemption is the requirement that the employee exercise discretion and independent judgment as to matters of significance. The regulations state that in order to determine whether an employee is exercising sufficient judgment, an employer must consider many factors including:

- whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices
- whether the employee carries out major assignments in conducting the operations of the business

⁵⁰ *Id.* § 541.201(b).

⁵¹ *Id.* § 541.201(c).

- whether the employee performs work that affects business operations to a substantial degree, even if the employee’s assignments are related to operation of a particular segment of the business
- whether the employee has authority to commit the employer in matters that have significant impact
- whether the employee has authority to waive or deviate from established policies and procedures without prior approval
- whether the employee has the authority to negotiate and bind the company on significant matters
- whether the employee provides consultation or expert advice to management
- whether the employee is involved in planning long- or short-term business objectives
- whether the employee investigates and resolves matters of significance on behalf of management
- whether the employee represents the company in handling complaints, arbitrating disputes, or resolving grievances⁵²

Although an employee that is subject to this exemption generally will have “authority to make an independent choice, free from immediate direction or supervision,” the exemption “does not require that the decisions made by an employee have a finality that goes with unlimited authority and complete absence of review.”⁵³ Their decisions may be subject to “review at a higher level.”⁵⁴

Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer’s income, assets, investments or debts; determining which financial products best meet the customer’s needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing, or promoting the employer’s financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.⁵⁵

Additionally, employees who lead teams of other employees generally meet the terms of the exemption as well as administrative assistants if the employee without

⁵² *Id.* § 541.202(b).

⁵³ *Id.* § 541.202(c).

⁵⁴ *Id.*

⁵⁵ *Id.* § 541.203(b).

specific instructions or prescribed procedures has been delegated matters of significance.⁵⁶

3. Professional Exemption

In order to qualify as an administrative employee subject to exemption, an employee must meet the following test:

- He or she is compensated on a salary basis at a rate of not less than \$455 per week
- His or her primary duty is the performance of work;
 - Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or
 - Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.⁵⁷

a. *Salary Basis*

See discussion in section C.1.a above.

b. *Knowledge of an Advanced Type*

An employee can meet this test if he or she meets three elements:

- He or she performs work requiring advanced knowledge
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.⁵⁸

i. Requiring advanced knowledge

This requirement means work that is “predominantly intellectual in character” and “require[s] the consistent exercise of discretion and judgment.”⁵⁹ The work must not be “routine mental, manual, mechanical or physical work.”⁶⁰ The regulations make clear that “[a]dvanced knowledge cannot be attained at the high school level.”⁶¹

In order to qualify as exempt work that relates to the employer’s business “an

⁵⁶ *Id.* § 541.203(c), (d).

⁵⁷ 29 C.F.R. § 541.300.

⁵⁸ 29 C.F.R. § 541.301(a).

⁵⁹ *Id.* § 541.301(b)

⁶⁰ *Id.*

⁶¹ *Id.*

employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.”⁶²

ii. Field of science or learning

This requirement means means that the work must be performed in “the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status.”⁶³

iii. Customarily acquired by a prolonged course of instruction

This requirement “restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession.”⁶⁴ The regulations site the possession of an academic degree as the best evidence that the element is met.⁶⁵ means work that is “predominantly intellectual in character” and “require[s] the consistent exercise of discretion and judgment.”⁶⁶ The work must not be “routine mental, manual, mechanical or physical work.”⁶⁷ The regulations make clear that “[a]dvanced knowledge cannot be attained at the high school level.”⁶⁸

iv. Specific examples

The regulations identify the following jobs as presumptively falling into the exemption in most circumstances:

- Registered or certified medical technologists
- Registered nurses
- Dental hygienists
- Physicians assistants
- Certified public accountants
- Chefs
- Athletic trainers

⁶² *Id.*

⁶³ *Id.* § 541.301(c)

⁶⁴ *Id.* § 541.301(d)

⁶⁵ *Id.*

⁶⁶ *Id.* § 541.301(b)

⁶⁷ *Id.*

⁶⁸ *Id.*

- Funeral directors or embalmers⁶⁹

In contrast, the regulations identify these professions as falling outside of the exemption:

- Licensed practical nurses
- Accounting clerks and bookkeepers
- Cooks
- Paralegals and legal assistants⁷⁰

c. Creative professionals

An employee can meet this test if he or she performs work “requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.”⁷¹ The recognized fields includes fields such “as music, writing, acting and the graphic arts.”⁷² Because the duties of such employees “vary widely,” the regulations require a “case-by-case” analysis. Generally, however, actors, musicians, composers, conductors, soloists, painters, cartoonists, essayists, novelists, short-story writers, and screen-play writers are subject to the exemption.⁷³ Copyists, animators, or retouchers are generally not covered by the exemption.⁷⁴ Journalists, in certain circumstances, are also exempt.⁷⁵

d. Teachers

“[A]ny employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed” is a bona fide professional covered by the exemption.⁷⁶

e. Lawyers and Doctors

Essentially, all properly licensed lawyers and doctors, including osteopathic doctors, podiatrists, dentists, and optometrists, are exempt as professionals.⁷⁷

⁶⁹ *Id.* § 541.301

⁷⁰ *Id.* § 541.301.

⁷¹ 29 C.F.R. § 541.302(a).

⁷² *Id.* § 541.302(b).

⁷³ *Id.* § 541.302(c).

⁷⁴ *Id.*

⁷⁵ *Id.* § 541.302(d).

⁷⁶ *Id.* § 541.303(a).

⁷⁷ *Id.* § 541.304.

f. Computer professionals

“Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field” are also exempt so long as they meet the following criteria:

- They receive a salary of not less than \$455 per week or are compensated on an hourly basis of not less than \$27.63 per hour.
- Their primary duty consists of:
 - the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
 - the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
 - the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
 - a combination of the duties above, the performance of which requires the same level of skills.⁷⁸

4. Highly Compensated Employee Exemption

The regulations implementing the “White Collar Employees” exemptions also include an exemption for employees who are highly compensated. To qualify for this exemption an employee must:

- Receive total annual compensation of, at least, \$100,000
- “[c]ustomarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee
- receive, at least, \$455 per week paid on a salary basis
- have primary duties including the performance of office or non-manual work⁷⁹

a. Annual Compensation of \$100,000

An employee must make \$100,000 within the employment year. An employer may use any 52-week period as the year, such as a calendar year, a fiscal year, or an

⁷⁸ *Id.* § 541.400.

⁷⁹ 29 C.F.R. §§ 541.601(a), (b)(1), (d).

anniversary of hire year.⁸⁰ If an employer does not designate the method, by default the calendar year is used.⁸¹

In the event that an employee does not meet the \$100,000 threshold in a year, the employer may within one month after the end of the year, make one final payment to achieve the \$100,000 threshold (“Top Up Payment”).⁸² Additionally, if an employee is employed for less than the full year, the employee may qualify if he or she receives a pro rata proportion of the minimum amount.⁸³ Additionally, an employer may choose to use pay a Top Up Payment to achieve the required proportionate distribution within one month of the end of employment if the employee leaves before the end of the year or within one month of the end of the year if the employee began employment during the course of the year.⁸⁴

b. Employee’s Job Duties

“A high level of compensation is a strong indicator of an employee’s exempt status, thus eliminating the need for a detailed analysis of the employee’s job duties.”⁸⁵ Thus, an employee who performs customarily and regularly any one of the exempt duties of an executive, administrator, or professional employee, he or she will qualify as exempt.

D. Options for Employees Reporting Time Worked

The Fair Labor Standards Act and the Utah Payment of Wages Act require that employers keep accurate records. These statutes state that requirement as a duty “to preserve” records⁸⁶ or to keep the records “safe and accessible.”⁸⁷ An employer could be subject to a penalty for failing to take adequate steps to correctly keep employee time records. Additionally, employers should provide adequate facilities for the protection of stored records from the consequences of natural disasters or accidents such as fires and

⁸⁰ See 29 C.F.R. § 541.601(b)(4).

⁸¹ *Id.*

⁸² *Id.* § 541.601(b)(2).

⁸³ *Id.* § 541.601(b)(3)

⁸⁴ *Id.*

⁸⁵ 29 C.F.R. § 541.601(c).

⁸⁶ See 29 U.S.C. § 211(c); 29 U.S.C. § 657(c)(1); 42 U.S.C. § 2000e-8(c); 42 U.S.C. § 12117.

⁸⁷ 29 C.F.R. § 516.7(a); see also Utah Code Ann. § 34-28-10.

floods.⁸⁸ It is clear from applicable cases and regulations that destruction of records in natural disasters or accidents does not excuse an employer from its burden of proving (1) that it, in fact, did keep those records or (2) the facts found within those records.⁸⁹ To comply with their statutory and administrative obligations and to avoid potential liability, it is in the best interest of employers to adopt record maintenance and storage practices that would indeed have the effect of protecting the employers' records. Special attention should be given to determinations to store back-up copies of documents digitally or in computerized form. Many digital storage media have limited life spans. For instance, CDs can become damaged quickly and have short life spans. Additionally, digitally-stored media may become obsolete. If, for instance, an employer saves a document in a particular computerized format in 2005, will a computer in 2020 be able to read that document in that format?

Additionally, employers should be aware of their duty to preserve records for a certain amount of time. The following chart illustrates the FLSA retention period:

RETENTION PERIOD	RECORD
2 years from date of last entry ⁹⁰	Records supporting hours, basis for wage determinations, and wages paid Records supporting additions or withdrawals from wages
2 years after last effective date ⁹¹	Wage rate tables Work time schedules
3 years from date of last entry ⁹²	Name found on social security card and complete home address Date of birth (if under age 19) Sex and occupation

⁸⁸ It bears noting that in Utah public employers have a higher duty to preserve records that come into their "hands for any purpose." Utah Code Ann. § 76-8-412. The statute states that any official who, *inter alia*, falsifies, removes, or destroys any such record is guilty of a felony of the third degree. Although this probably does not apply to a breach of a duty to provide for protection against destruction, a careless official who causes the destruction of a record before the statutory destruction period arguably could be liable under this statutory provision. Statutory destruction period will be discussed more fully later.

⁸⁹ See, e.g., *Allen v. Commissioner of Internal Revenue*, 117 F.2d 364, 367-68 (1st Cir. 1941); *Gill v. United States*, No. 296-81T, 1997 W.L. 820693, at *41 (Fed. Cl. Oct. 9, 1997); 26 C.F.R. § 1.274-5T(c)(5).

⁹⁰ 29 C.F.R. § 516.6.

⁹¹ *Id.*

⁹² 29 C.F.R. § 516.5.

	<p>Day and time of beginning of employee workweek</p> <p>Regular rate of pay for overtime weeks, basis for determining rate, and payments excluded from rate</p> <p>Hours worked each workday and workweek</p> <p>Regular and overtime earnings</p> <p>Additions and deductions from wages for each pay period</p> <p>Total wages paid for each pay period</p> <p>Date of payment and pay period</p>
3 years after last effective date ⁹³	<p>Collective bargaining agreements</p> <p>Certificates authorizing employment of minors, students</p> <p>Total sales volume and goods purchased</p>

No particular form of an employee time record is required by the Fair Labor Standards Act. For acceptable formats for recordkeeping and options of record keeping systems, please see the Department of Labor Employment Standards Administration Wage and Hour Division's, *Fact Sheet #21: Recordkeeping Requirements Under the Fair Labor Standards Act*.

E. Handling Deductions from Wages

In Utah, an employer may not deduct, withhold, or divert any part of an employees wage except in specific circumstances, including as required by court order, by state or federal law, or by express written authorization of the employee.⁹⁴ The regulations implementing this statutory provision are very restrictive with respect to express written authorizations that are permitted.⁹⁵

1. Deduction to Pay for Goods and Services

An employer may not deduct from wages payment for the purchase of goods or services unless the “[e]mployee has . . . possession of the goods or services” and the

⁹³ *Id.*

⁹⁴ *Id.* § 34-28-3(5), (6). These statutory guidelines are further supplemented by administrative rules. *See* Utah Admin. Code R610-3-18.

⁹⁵ *See* Utah Admin. Code R610-3-18.

employee has given written authority for the deduction.⁹⁶ An employer may also not deduct for tools of the job unless the above conditions are met plus the employer must repurchase the item at the employee's option at a "fair and reasonable price" at the termination of the employment relationship.⁹⁷

2. Deduction for Negligent or Criminal Acts of Employees

An employer may not deduct damages suffered due to the "employee's negligence" unless the negligence and damage "arise out of the course of employment," the employer has not received payment from another source including insurance, the withdrawal is related to the amount of damage, and the damage is above ordinary wear and tear.⁹⁸ However an employee's negligence and the amount of damage can only be determined "by a judicial proceeding," by a pre-published and written procedure and the employee's signed written authorization, or any other provision allowed by law.⁹⁹

Additionally, an employer may not deduct for damages or loss caused by an employee's criminal conduct unless (1) the employee has been adjudged guilty, (2) the crime arose out of the employment relationship, (3) (a) the property of the employer cannot be recovered, or (b) the employee willfully **and admittedly** in fact destroyed the company property.¹⁰⁰

An employer is also prohibited from deducting amounts for cash shortages unless (1) an employee has signed a written acknowledgment that he or she will be responsible for shortages, (2) the employee verifies the amount in the register and the employee gives a written acknowledgment of the verification at the beginning and end of his or her shift, and (3) the employee is the sole user of the register.¹⁰¹

An employer is further restricted from deducting for lost tools unless the item was assigned during the employment, the employee gave written acknowledgment of the receipt of the item, and the item was not returned to the employer upon termination.¹⁰²

⁹⁶ *Id.* R610-3-18.F.

⁹⁷ *Id.* R610-3-18.L.

⁹⁸ *Id.* R610-3-18.G.1.

⁹⁹ *Id.* R610-3-18.G.2.

¹⁰⁰ *Id.* R610-3-18.J.

¹⁰¹ *Id.* R610-3-18.K.

¹⁰² *Id.* R610-3-18.M.

The Fair Labor Standards Act is also implicated in deductions. If a deduction is made against a salaried employee's salary, he or she could lose an overtime exemption if the deduction takes the employee below the statutorily required minimum salary. This means that generally penalties which result in a reduction of pay are not permitted.¹⁰³ However, deductions from pay are allowed for, among other reasons,

- “infractions of safety rules of major significance,”¹⁰⁴
- “unpaid disciplinary suspension of one or more full days imposed in good faith for infractions of workplace conduct rules,”¹⁰⁵

“An employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer did not intend to pay employees on a salary basis.”¹⁰⁶

¹⁰³ See 29 C.F.R. 541.602.

¹⁰⁴ 29 CFR 541.602(b)(4).

¹⁰⁵ *Id.* 541.602(b)(5).

¹⁰⁶ *Id.* 541.603(a).



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