

# Bond

Manufacturing Week  
Webinar Series  
October 2-6, 2017

## Wage and Hour Traps for the Manufacturing Industry

*Presented by Erin S. Torcello*



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Manufacturing Week  
Webinar Series  
October 2-6, 2017

- October 2: Cybersecurity: What We Should Be Doing
- October 3: Protecting Your Manufacturing Business from IP Theft
- October 4: **Wage and Hour Traps for the Manufacturing Industry**
- October 5: Avoiding OSHA Liabilities
- October 6: Navigating Immigration Issues Within the Manufacturing Industry



## Roadmap

- Legal basics
- Common wage and hour issues
- Best practices



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## Do I Really Need To Be Concerned?

**Stewart's Shop involving emp** SoFi Hit With Class Action Lawsuit Over Wage Issues  
Jan 16, 2014, 7:08am EST Updated Jan 1 August 19, 2017 | By: deBanked Staff

**Disney Hit With Potential \$37.5M Class Action By Former Theme Park Employee**

**Law firm alleges Dinosaur Bar-B- rkers out of**

**Ruby Tuesday Hit With Unappetizing Wage and Hour Class Action**

kimping on workers'

By Jonathan R. Tung, Esq. on April 5, 2016 2:58 PM

March 30, 2015



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## FLSA Actions Are On The Rise

- 2011: 6,336
- 2012: 8,152
- 2013: 7,500
- 2014: 8,160
- 2015: 8,781 (7.6% over 2014; 39% over 2011)
- 2016: 8,308 – first decrease in 15 years



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## What's the Big Deal?

- Significant Damages
  - Back wages
  - 100% liquidated damages
  - Attorneys' fees
  - Civil Penalties
- Statutes of Limitations
  - FLSA - 2 years (3 for willful violations)
  - New York - 6 years



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## LEGAL BASIS



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## Legal Basics

- FLSA
  - FDR signed in 1938
  - Provides for
    - Minimum wages
    - Overtime pay
    - Recordkeeping
    - Child labor laws



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## Legal Basics

- New York Labor Law
  - Also provides for
    - Minimum wages
    - Overtime pay
    - Recordkeeping
    - Child labor laws
  - Generally stricter requirements than the FLSA



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## Legal Basics: Minimum Wage and Overtime Requirements Under the FLSA

- The current federal minimum wage for covered, non-exempt employees is **\$7.25/hour**
- Unless exempt, an employee covered by the FLSA must receive overtime pay for all hours worked over 40 in a workweek at a rate not less than one and one-half times her **“regular rate”** of pay



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## Legal Basics: NY Minimum Wage General Requirements – Upstate New York

<b>12/31/16</b>	<b>\$9.70</b>
12/31/17	\$10.40
12/31/18	\$11.10
12/31/19	\$11.80
12/31/20	\$12.50

- The NY minimum wage will continue to rise toward \$15.00, depending on NYDOL assessment
- Different rates apply in other locations and sectors, e.g., the hospitality industry



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## NY General Overtime Requirements

- Generally, a covered, non-exempt employee must be paid overtime at a rate of one and one-half times her “regular rate” of pay for all hours worked over 40 in a workweek.



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## EXEMPT VS NON-EXEMPT EMPLOYEES

	Mon	Tu	Wed
Start Time	9AM	9AM	
End Time	5PM	6PM	
Reg Time	8-	8-	
Over Time		1-	

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## What's the Difference?

- Employers are not legally required to comply with minimum wage or overtime requirements for employees properly classified as exempt

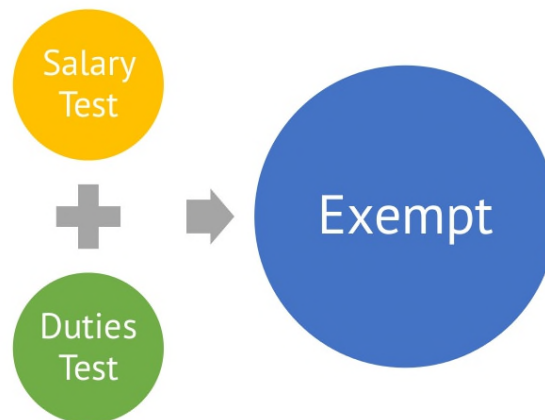
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## Who Is Exempt?

- Three tests must be applied and satisfied before an employee is considered exempt –
  - (1) Duties test
  - (2) Salary Basis Test
  - (3) Salary Level Test

## DUTIES TEST





## Duties Tests – In a Nutshell

- Executive
  - Is their primary duty managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise?
  - Do they customarily and regularly direct the work of two or more full-time employees?
  - Do they have the authority to hire or fire other employees, or their recommendations regarding hiring, firing promotion, etc. are given particular weight?



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## Duties Tests – In a Nutshell

- Administrative
  - Is their primary duty office or non-manual work directly related to the management or general business operations?
  - Does this work require the exercise of discretion and independent judgment with respect to matters of significance?



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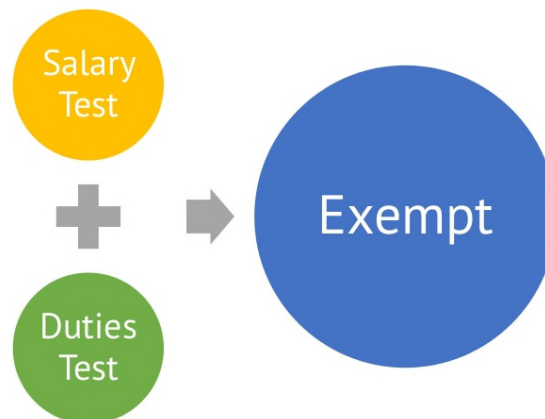
## Duties Tests – In a Nutshell

- Professional
  - Does their primary duty involve work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction?

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## SALARY BASIS TEST



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## Salary Basis Test

- Salary Basis - Employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis
  - If the employee is ready, willing, and able to work, his/her salary may not be reduced except in limited circumstances

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## Permissible Deductions

- Full-day absences
  - Absences for sickness or injury or other personal reasons - employer may **deduct for full-day** absences (without violating the salary basis test) if:
    - the absence is for personal reasons other than sickness or injury; or
    - the absence is because of sickness or injury, as long as the employer has a bona fide plan, policy or practice providing for such a deduction

(cont'd)

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## Permissible Deductions

- Full-day absences
  - Disciplinary suspensions - employer may make deductions for unpaid disciplinary suspensions of **one or more full days** imposed in good faith for infractions of workplace conduct rules
    - Suspensions must be imposed pursuant to a written policy applicable to all employees
    - Must be for a violation of a serious “workplace conduct” rule (e.g., workplace violence, sexual harassment)



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## Impermissible Deductions

- Examples of deductions violating the FLSA’s “Salary Basis” Test:
  - Deductions for poor performance
  - Repayment for employer losses (spoilage, breakage, cash shortages, etc.)
  - Fines or penalties for lateness, misconduct, or quitting without notice
  - Recoupment of unauthorized expenses
  - Fees, interest or employer’s administrative costs



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## Tackling the Problem

- Review your payroll practices regarding payment of salary to exempt employees
  - No deductions for:
    - Partial-day (non-FMLA) absences
    - Leaving early
    - Taking long lunches
    - Absences caused by jury duty, attendance in court as a witness, or temporary military leave

(cont'd)



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## And Because Mistakes Happen...

- Adopt and act in accordance with a safe harbor policy
  - Clearly communicate your policy prohibiting improper deductions and establishing a complaint mechanism
  - When errors are reported/discovered:
    - Reimburse employees for improper deduction
    - Take steps to insure such errors do not occur in the future



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## SALARY LEVEL TEST



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## Is The Salary Level Test Satisfied?

- FLSA Minimum Salary Level
  - Currently: **\$455 per week (\$23,660 per year)**
  - Effective 12/1/16 ~~\$913 per week (\$47,476 per year)~~  
**PENDING INJUNCTION**

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## Changes to NY Salary Threshold

- NYLL identifies its own minimum salary threshold for executive and administrative employees to be exempt
  - No minimum salary under NYLL for professional employees
- NY threshold tied to the minimum wage (75 x minimum wage)
  - Currently  $75 \times \$9.70 = \$727.50$  per week/\$37,830 per year (for employers outside of NYC, Long Island and Westchester)



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## Exempt Status NY Salary Thresholds

Per December 2016 NYDOL Regulations, the NY minimum salary level will continue to increase in the years ahead...

Date	“Upstate” Employers	“Large” NYC Employers	“Small” NYC Employers	Nassau, Suffolk, & Westchester
12/31/16	\$727.50	\$825	\$787.50	\$750
12/31/17	\$780	\$975	\$900	\$825
12/31/18	\$832	\$1,125	\$1,012.50	\$900
12/31/19	\$885	\$1,125	\$1,125	\$975
12/31/20	\$937	\$1,125	\$1,125	\$1,050
12/31/21	\$937	\$1,125	\$1,125	\$1,125



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## HOURS WORKED



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## Compensable Time

- Employees must be paid for all time they are “suffered or permitted” to work
- If you require or allow an employee to work, the time spent is generally hours worked
- Even if you do not require or request work to be performed, but you allow (e.g., you know or have reason to know) such work to be performed, that time is compensable

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## Hours Worked - Challenges

- Preliminary and postliminary work
- Travel time
- Training & seminars
- Call-In Pay



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## Preliminary and Postliminary Work

- Employees must be paid for work performed before or after their scheduled shift if:
  - they do so at the request of the employer, or
  - they perform work the employer has actual or constructive knowledge of



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## Tackling the Problem

- Step 1 - Ensure supervisors know that employees must be paid for all hours they require, request or allow employees to work
- Step 2 - Ensure employees
  - accurately record all hours worked – even if unauthorized
  - are paid for all hours worked – even if unauthorized
- Step 3 - If employees routinely perform work before or after their scheduled shift without required authorization, counsel and, if necessary, discipline them



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## Preparing/Finishing Activities

- Donning and Doffing may be compensable.
  - Must be paid if integral and indispensable to employee's principal work activities.
- Donning and doffing is only compensable if the nature of the job mandates that it occur on the employer's premises (i.e., employee does not have the option of getting changed at home).



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## Preparing/Finishing Activities

- Examples may include:
  - Time spent putting on and taking off protective gear
  - Pre-shift and/or post-shift showering
- It will be compensable as hours worked if performed at employer's direction and for the employer's benefit.



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## Preparing/Finishing Activities

- De Minimis Exception:
  - Minor or trivial work performed outside of scheduled working hours (generally less than 10 minutes per work day)



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## Tackling the Problem

- Conduct an analysis:
  - Find out whether your employees are donning and doffing
  - Does it occur before or after they punch in or out?
  - How much time is spent on those activities?
  - Are the activities integral and indispensable?
- If the activity is one that can be done at home, require that it be done at home
- Enforce that directive and discipline where necessary



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## Travel Time

- “Regular commuting time” is generally not compensable
  - Special Rule:
    - Employee reports to a meeting place to pick up/drop off tools, equipment, or other employees - all the time spent traveling from/to the meeting place will generally be compensable time



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## Special One Day Assignments

- Travel upon special request and outside regular working hours is compensable
  - Example:
    - Employee's regular hours are 9-5 in Buffalo
    - Employee is given a special one-day assignment in Albany
    - Employee departs at 8:00 am in a car driven by an exempt co-worker and arrives back in Buffalo at 7:00 pm
    - Compensable hours?
      - 8:00 am to 7:00 pm (11 hours)
      - Commute from home to meeting location where coworker is met and from that location home not compensable



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## Training Time

- Attendance at lectures, meetings, training programs and similar activities must be counted as working time unless all of the following criteria are met:
  - it is outside normal hours,
  - it is voluntary,
  - it is not job-related, and
  - no other work is concurrently performed



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## Tackling the Problem

- Ensure supervisors and those who process payroll know rules regarding travel and training time and include appropriate time in hours worked



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## Call-In Pay

- Under New York Labor Law (NYLL), wages owed to employees for reporting to work on a given day even if they are sent home early or assigned no actual work
- An employee who reports for work must be paid at least 4 hours, or the number of hours in the regularly scheduled shift, whichever is less, at the basic minimum hourly wage



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## Tackling the Problem

- Review pay practices to ensure compliance
- As minimum wage increases, so do potential concerns – different obligations in different regions
- Reconsider on-call arrangements



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## BREAKS & MEAL PERIODS



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## Meal Periods

- Employees working a shift of more than 6 hours must be provided a meal period of at least 30 minutes
- Employees on shifts beginning before 11 AM and ending later than 7 PM are allowed an additional 20-minute break between 5 PM and 7 PM
- Also, employees who work in excess of six hours during the period of 1 p.m. to 6 a.m. are entitled to a 45-minute meal break (60 minutes for factory employees)



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## One-Employee Shift Exception

- Where only one person is on duty or is the only one in a specific occupation, the employee is permitted to eat on the job without being relieved so long as they consent to this arrangement

(cont'd)



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## One-Employee Shift Exception

- DOL requires employer to:
  - explain to the employee that the nature of the position necessitates one-employee shifts and employee's meal periods may be interrupted;
  - obtain an acknowledgement, preferably in writing (acceptance of a job or continued employment without objection does not constitute an acknowledgement); and
  - pay employee who works through a meal period due to one-employee shift exception
- Note: According to the DOL, affirmative acknowledgement by an employee cannot be revoked absent a change in circumstances



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## Tackling the Problem

- Step 1 - Determine if all employees are receiving required meal periods
- Step 2 - If you're relying on one-employee shift exception insure it applies and has been properly implemented
- Step 3 - Develop/revise meal period policy. Require employees to report if meal period not provided

(cont'd)



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## Tackling the Problem

- Step 4 - Educate supervisors on meal period obligations
  - When meal periods are required
  - Meal periods cannot be waived
  - Employees must be relieved from all duties during meal periods
  - When an employee is frequently interrupted during his/her meal period, he/she must be paid for their entire meal period
- Step 5 - Hold supervisors who do not comply with meal period obligations accountable



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## Automatic Deductions for Meal Periods

- Proceed with caution if automatically deducting for meal periods
  - Highly frowned upon by US and NY DOL
  - Requires adoption and enforcement of policies designed to ensure employees are paid for all working time

(cont'd)



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## Tackling the Problem

- If you automatically deduct for meal periods, take steps to insure time records accurately reflect working time
  - Develop and promulgate policy
  - Advise employees of automatic deduction
  - Require employees to take action to correct time records if automatically deducted meal period is not accurate
    - Counsel and, if necessary, discipline employees who fail to do so
  - Direct supervisors to insure time records accurately reflect meal periods taken by employees
    - Counsel and, if necessary, discipline supervisors if they fail to do so



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## TIMEKEEPING & RECORDKEEPING



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## Recordkeeping Obligations

- Employer's time and payroll records are at the center of any DOL audit or wage and hour litigation
- FLSA does not specify the form in which records must be kept (e.g., paper, computer data, microfilm), but employer must be able to convert the data into a form that can be viewed and inspected within 72 hours



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## Accurate Recordkeeping Is Not Only Required, It's A Good Idea...

- An employer must be able to demonstrate that its time records are accurate and reliable
- The DOL might find time records unreliable where:
  - Supervisors direct employees to falsify time records
  - Supervisors alter time records without defensible, legitimate business reason
  - Employer knows or has reason to know time records are inaccurate
- And if the employer's records are inaccurate or unreliable...



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## Tackling the Problem

- Step 1 - Review/draft timekeeping policy that requires employees to accurately record their working time (not their scheduled hours of work)
- Step 2 - If rounding is utilized, review practice to insure it's defensible
- Step 3 - Educate supervisors:
  - Not to alter time records without explanation
  - Not to instruct, direct or ratify the falsification of time records
- Step 4 - Insure time and payroll records are preserved (state law requires six years, consider retaining permanently)



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## Questions?



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## Wage and Hour Traps for the Manufacturing Industry



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