

NORTH CAROLINA ASSOCIATION OF BROADCASTERS

A Primer on the USDOL's Wage & Hour Rules

Revised July 20, 2016

Prepared By:
BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, L.L.P.

Suite 1700, Wells Fargo Capitol Center
150 Fayetteville Street (27601)
Post Office Box 1800
Raleigh, North Carolina 27602

Phone: (919) 839-0300
Fax: (919) 839-0304

PREFACE

The Fair Labor Standards Act (“FLSA”) is the federal law that establishes minimum wage, overtime pay, recordkeeping, and youth employment standards for most employers. The FLSA is administered and enforced by the Wage and Hour Division of the United States Department of Labor (“USDOL”).

On May 18, 2016, the USDOL published a rule that made significant changes to, among other things, the requirements for an employee to be exempt from the FLSA’s overtime provisions. These new requirements will go into effect on December 1, 2016. The White House estimates that the new regulations will extend the right to overtime pay to 4.2 million workers who currently are exempt under their current employment arrangements.

This Primer summarizes federal wage and hour issues under FLSA and USDOL authority, highlighting the new regulations and issues that may be particularly relevant for broadcast stations.

Please contact any of our employment lawyers—Patricia Goodson, Nicole Crawford, or Jessi Thaller-Moran—at (919) 839-0300 if you have any questions.

**BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.**

Wade H. Hargrove
Mark J. Prak
Marcus W. Trathen
David Kushner
Coe W. Ramsey
Stephen Hartzell
Charles Marshall
Julia C. Ambrose
Elizabeth Spainhour
Eric M. David
Timothy G. Nelson
Patricia Goodson
Nicole Crawford
Jessi Thaller-Moran

Counsel to the North Carolina
Association of Broadcasters

© 2016 Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P.

I. INTRODUCTION

The FLSA applies to businesses having an annual gross sales or business volume of at least \$500,000, and which are engaged in commerce, the production of goods for commerce, or in a closely related activity. Alternatively, the FLSA applies to individual employees¹ who are engaged in interstate commerce or in the production of goods for interstate commerce as part of their job duties.

Those businesses with an annual gross sales volume of less than \$500,000 are still covered by North Carolina wage and hour requirements, which are similar to the federal requirements. The North Carolina Wage and Hour Act also includes some additional requirements, discussed below, which are applicable to all employers, including those covered by the FLSA.

Radio and television stations, and their employees, are generally considered to operate in interstate commerce and are, therefore, generally subject to the federal wage and hour laws. As discussed below, some radio and television station employees may be exempt from the minimum wage and/or overtime provisions that would otherwise apply to certain, specific employees.

II. GENERAL FLSA REQUIREMENTS

Under the FLSA, all covered non-exempt employees must be paid statutory minimum wage for the first forty hours worked each week, followed by at least time and one-half their regularly hourly wage for all additional hours worked. These wages must be paid on the regular payday for the applicable pay period, and may not be reduced for things like employee uniforms or merchandise shortages if the result decreases hourly pay below minimum wage. As of this writing, statutory minimum wage under both federal and North Carolina law is \$7.25 per hour.² The FLSA also requires all covered employers to keep certain records for each non-exempt worker, discussed in detail below.

¹ The FLSA will not apply to someone who properly is classified as an “independent contractor.” Because the FLSA broadly defines “employ” to include “suffer or permit to work,” an employer should exercise caution and consult with employment counsel before assuming that someone is exempt from FLSA requirements as an independent contractor.

² Federal law allows an employer to hire employees under the age of 20 and to pay them a \$4.25 per hour “Opportunity Wage” for their first ninety days of employment, unless they turn 20 before the expiration of that period. An employer may not replace an employee or reduce the employee’s hours in order to hire another employee who would be eligible for the lower Opportunity Wage.

The FLSA and associated regulations exempt several general categories of employees from some or all of these requirements. Relevant categories for purposes of the broadcast industry include:³

- Highly Compensated Employees
- Executive, Administrative, or Professional (“EAP”) Employees
- Outside Sales Employees
- Certain Computer Employees
- Small Market Broadcast Announcers, News Editors, and Chief Engineers

The requirements for each of the above-mentioned categories are discussed below. In general, exemptions depend on a combination of the particular employee’s primary duties and the manner in which that employee is paid. This analysis is fact-specific, and it is difficult to make bright-line generalizations. The job title or classification alone is not determinative, nor is the fact that someone else with the same title is performing duties that bring her within the scope of an exemption. Similarly, an employee may be exempt when hired, but could lose that exemption if her primary duties evolve away from those that originally qualified her as exempt.

The burden is always on the employer to demonstrate entitlement to an exemption. Erroneous classification of such an employee as exempt may result in substantial additional expenditures for back overtime, as well as fines and costs associated with enforcement of the law. For this reason, employers should exercise caution when classifying employees as “exempt,” and should consult employment counsel if an employee does not fall squarely within one of the exemptions.

III. MINIMUM WAGE AND OVERTIME

A. Minimum Wage

Non-exempt employees ***must*** be paid at least the federal or state statutory minimum wage, whichever is higher. This is calculated on an hourly basis if the employee is paid a wage, and otherwise by dividing the salary or other compensation basis by the hours worked. Employees cannot agree to receive less.

As of this writing, the minimum wage under federal and North Carolina law is \$7.25 per hour.

³ Other exemptions apply to industries such as agriculture, fishing, and domestic service, and are therefore not discussed here.

B. Overtime

Non-exempt employees must be compensated at a rate of at least one and one-half times the regular rate of pay for all hours worked in excess of 40 in a given work week.⁴

Each work week stands alone for calculating overtime pay. If, for example, an employee is paid monthly, and he works 50 hours the first and third weeks and 30 hours the second and fourth weeks, the employer cannot average the hours worked to 40 per week and avoid the overtime pay requirement. Rather, the employer must pay the regular hourly rate plus overtime pay for the 20 total overtime hours worked during the first and third weeks.

The federal laws and regulations on overtime pay discuss a number of different methods for calculating the rate of pay and other factors necessary to determine the overtime pay due. Questions about unique circumstances should be directed to legal counsel.

C. Compensatory Time

Private employers may not substitute compensatory time (“comp time”) for overtime. “Comp time” occurs when an employer allows employees who work more than 40 hours in one week to take the accrued amount of overtime as “vacation” at another time, rather than being paid time and one-half. The rule is simple: if a non-exempt employee works more than 40 hours in a particular work week for a private employer, the employee must be paid time and one-half for each hour worked over 40.

However, the employer can make scheduling adjustments during the same work week. If, for example, an employee works a double shift on the first day of the work week because someone is sick, the employer can tell the employee to take off some other day during that same work week, so that the employee will not work more than 40 hours that week. Unless the employer’s policy provides otherwise, the employee is not entitled to time and one-half for the extra shift he worked on Monday unless he works more than 40 hours that week. Using this method, the employer can reduce overtime expense, especially if the work week is established with the first day being the work day on which extra hours are most often needed.

IV. HOURS WORKED

A. Definition of “Hours Worked”

Problems frequently arise relating to the computation of overtime pay because of the difficulty in determining the number of “hours worked.” Regulations issued pursuant to the FLSA

⁴ A work week is any continuous seven day period, as established and maintained by the employer. It need not start on Monday, but it must be a consistent period of time and should not be changed in an effort to avoid payment of overtime.

generally define “hours worked” to include not only work requested by the employer, but also work that is not required but is “suffered or permitted” to be performed.

In other words, if an employer knows or has reason to believe that an employee is continuing to work, the time involved is working time. Moreover, it is the employer’s responsibility to exercise control to see that work is not performed if the employer does not want it to be performed. The employer cannot satisfy this duty by simply announcing a rule that extra work is not to be done. Rather, the employer must make an affirmative effort to enforce any such rule prohibiting extra work.

B. Off-Duty Time

Employees who remain on the premises after going off duty do not have to be compensated for “off duty” time. A question often arises as to what constitutes “off-duty” time. Basically, an employee must be completely relieved from duty for a period long enough to enable him to use the time “effectively for his own purposes.” The employee generally must know in advance that he or she may leave the job at a given time and will not be expected to commence work again until a specified later time.

In order for a meal break to constitute off-duty time, the break must generally be at least 30 minutes, and the employee must be relieved of all duties during the break.

C. Effect of Time Off

For the purpose of determining overtime compensation, time taken off for vacation, sick leave, holidays or other leave does not count as “hours worked.” An employee who uses a paid sick day on Monday and then works 10 hours the next four days before having the weekend off is not entitled to overtime, even though he will be paid for 48 hours of straight time (including the eight hours of sick leave), since the employee only worked 40 hours.

D. Special Rules for Travel and Training

The rules for when hours are counted as work hours for travel and training activities are specific and complex. As a broad generalization, travel required for work during the work day (other than home to office and office to home) is compensable. As a broad generalization, training required by the employer and other training during working hours that is related to the employee’s job is, even if voluntary, compensable. Application of the specific rules to specific factual scenarios should be discussed with employment counsel.

V. SALARIED VERSUS EXEMPT

As discussed below, most exemptions require that the employee be paid on a salary or fee basis.⁵ “Salaried” means that the employee receives, on a weekly or less frequent basis, a predetermined amount of pay that is not subject to reduction because of variation in the quantity or quality of work performed, and reductions are permitted only in limited, defined circumstances.

An employer relying on the employee’s salary as a partial basis for one of the exemptions discussed below may not ordinarily make deductions from the employee’s salary. There are, however, certain narrow exceptions to the prohibition against deductions: an employer may deduct from an exempt employee’s salary for unpaid Family and Medical Leave Act leave, or a **full day’s** pay for a **full day’s** absence due to personal reasons, a sickness or disability plan, or certain disciplinary penalties (e.g., violation of “safety rules of major significance” or for suspensions of a **full day** or more for violation of workplace conduct rules, if pursuant to a **written** policy applicable to all employees).

This does not mean that an employee who is paid on a salaried basis is automatically exempt from overtime requirements. Employers cannot avoid paying overtime by putting all of their employees on salary. An employee receiving a salary who does not meet one of the exemptions set out in this Primer still must receive overtime for any hours worked over 40, generally calculated by dividing the employee’s regular salaried rate by 40 and multiplying that rate by one and one-half. This makes it particularly important for employers to carefully comply with the FLSA recordkeeping requirements (discussed below), because an employer must be certain any non-exempt salaried employee is receiving at least minimum wage and, when applicable, overtime.

VI. EXEMPTIONS

The following categories describe circumstances in which certain employees are exempt from the minimum wage and/or overtime provisions of the Act. Employees falling within any of the first six categories are exempt from both the **minimum wage** and **overtime** provisions. The seventh category—small market announcers, news editors, and chief engineers—describes broadcast employees who are exempt only from the **overtime** requirements.⁶

****The minimum salary requirements listed below are effective from December 1, 2016, to December 30, 2019. Beginning on January 1, 2020, minimum salary levels for these exemptions will automatically update every three years, with new salary levels being announced 150 days prior to the effective date.****

⁵ An employee is paid on a “fee basis” if the employee is paid an agreed sum for a single job, regardless of the time required for its completion.

⁶ A chart summarizing these exemptions is attached to the end of this Primer as **Appendix A**.

A. Highly Compensated Employees

A “highly compensated” employee is exempt from minimum wage and overtime if the following requirements are met:

- (1) The employee must earn at least \$134,004 annually,⁷ and at least \$913 per week, on a salary basis. Total annual compensation may include commissions, nondiscretionary bonuses, and other nondiscretionary compensation earned over a 52-week period. If necessary, the employer may, during the last pay period or within one month after the end of the 52-week period, make one final payment sufficient to achieve the required level.
- (2) The employee must customarily and regularly perform at least one of the exempt duties of an EAP employee (as described below).

B. Executive, Administrative, and Professional (“EAP”) Employees

EAP employees will be exempt from the minimum wage and overtime requirements of the FLSA if three conditions are met:

- (1) The employee must earn a salary.
- (2) The salary must be at least \$913 per week⁸ or \$47,476 per year. Under the newly-enacted requirements, employers may satisfy up to 10 percent of this requirement with nondiscretionary bonuses and incentive payments, such as commissions, that are paid on a quarterly or more frequent basis.⁹
- (3) The employee’s primary job duties must fall within one of the categories listed below, i.e. Executive, Administrative, or Professional.

1. Executive Employees

An employee is exempt as an “executive” employee if, in addition to meeting the salary requirements listed above, all of the following criteria are met:

- (1) The **primary duty** of the employee is the **management** of an enterprise or of a customarily recognized department or subdivision within the enterprise.

⁷ This salary corresponds with the 90th percentile for full-time salaried employees nationally.

⁸ This salary corresponds with the 40th percentile for full-time salaried workers in the lowest-wage Census Region, currently the South.

⁹ These types of payments are promised to employees as incentives for performance or to get them to stay with the company. By contrast, a surprise holiday bonus would not be counted towards the minimum salary requirement, because such a bonus would be given at the discretion of the employer.

- (2) The employee customarily and regularly directs the work of at least two or more other full-time employees or their equivalent (e.g., one full-time and two half-time employees).
- (3) The employee has the authority to hire and fire, or to make suggestions relating to hiring, firing, advancement, promotion or a change of status for other employees, and such authority will be given particular weight.

Illustrative examples of “exempt” work that qualify for the executive employee exemption are:

- (1) Interviewing, selecting and training employees;
- (2) Setting and adjusting rates of pay and hours of work;
- (3) Directing the work of other employees;
- (4) Planning and apportioning work and determining work techniques;
- (5) Maintaining production or sales records for use in supervision and control;
- (6) Appraising productivity and efficiency for the purpose of recommending promotions or other changes in status;
- (7) Handling employee complaints and grievances;
- (8) Disciplining employees;
- (9) Determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold;
- (10) Controlling the flow and distribution of materials or merchandise and supplies;
- (11) Providing for the safety and security of the employees or the property;
- (12) Planning and controlling the budget; and
- (13) Monitoring or implementing legal compliance measures.

Other types of work may qualify if they are clearly management work or directly and closely related to management. Management trainees who are not yet actively performing managerial functions as their primary duty are not exempt during their training period.

The FLSA makes clear that performance of non-exempt duties (e.g., clerical duties or some manual labor) will not, by itself, render an individual non-exempt, nor is there any specific

percentage of time which an exempt employee may spend on non-exempt duties,¹⁰ so long as the individual's **primary duty** is exempt. "Primary duty" is the "principal, main, major or most important duty that the employee performs."

Finally, any person who owns 20% or more of the equity in the employing company and is actively engaged in management qualifies for the executive exemption.

2. Administrative Employees

An employee is exempt as an "administrative" employee if, in addition to meeting the salary requirements listed above, the following criteria are met:

- (1) The employee's **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.

- * To meet this requirement, the work performed must directly relate to assisting with the running or servicing of the business, and not merely carrying out the day-to-day affairs of the business.
- * Examples of categories of work that meet this requirement include but are not limited to the following:

Accounting	Labor Relations
Advertising	Legal & Regulatory Compliance
Auditing	Marketing
Budgeting	Personnel Management
Computer Network	Procurement
Employee Benefits	Public Relations
Finance	Purchasing
Government Relations	Quality Control
Human Resources	Research
Insurance	Safety & Health
Internet & Database	Tax
Administration	

- (2) The employee's **primary duty** must include the **exercise of discretion and independent judgment** with respect to **matters of significance**:

- * Generally, the **exercise of discretion and independent judgment** involves the comparison and evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. It should be distinguished from specialized knowledge or skill.

¹⁰ Note that non-exempt duties directly related to exempt duties (e.g., filling out disciplinary paperwork) is considered exempt work.

- * “**Matters of significance**” refers to the level of importance or consequence of the work performed.

Regulations related to this exemption emphasize that an administrative employee should have discretion with regard to “matters of significance.” Thus, for example, an employee whose responsibilities include budgeting or purchasing, with limited oversight, would likely qualify for this exemption.

3. Professional Employees (Learned Professionals and Creative Professionals)

The “professional” employee exemption includes both “learned professionals,” such as certified public accountants, and “creative professionals,” such as painters or novelists whose works are primarily driven by their own creativity rather than an employer’s expectations. In addition, the professional exemption applies to teachers and the practice of law or medicine.

(a.) Requirements for “Learned Professional”:

A “learned professional” employee is deemed exempt from minimum wage and overtime if the employee’s **primary duty**:

- (1) Requires advanced knowledge in a field of science or learning customarily acquired through a prolonged course of specialized intellectual instruction and study rather than general academic education or apprenticeship training in the performance of routine mental, manual, or physical processes. Advanced knowledge cannot be attained at the high school level.
- (2) Requires the consistent exercise of discretion and judgment.

Professions which typically meet this requirement include law, medicine, nursing, accounting, actuarial computation, architecture, teaching and various types of physical, chemical and biological sciences, including pharmacy. "Prolonged course of specialized intellectual instruction" is interpreted generally to require an advanced academic degree.

(b.) Requirements for “Creative Professional”:

A “creative professional” employee is deemed exempt from minimum wage and overtime if the employee’s **primary duty** includes the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Please Note: This exemption depends on the **extent** of the invention, imagination, originality or talent exercised by the employee.

Typical recognized fields of artistic endeavor that satisfy this requirement include art, music, theater and writing. In broadcasting, certain creative writers, creative artists, and special program performers may qualify for this exemption, though such determination should be made

on a case-by-case basis and such determinations may warrant the involvement of employment counsel.

Broadcast employees may be exempt under this provision if their primary duty requires invention, imagination, originality, or talent, as opposed to primarily depending on intelligence, diligence, and accuracy. Thus, journalists who perform on-air on radio or television, conduct investigative interviews, analyze or interpret public events, or write editorials, opinion columns, or commentary, may be exempt under this provision. For example, a program announcer or performer who conducts special farm, fashion, or home economic programs, or acts as narrator or commentator of sports or public events programming, may qualify as an exempt professional. Again, such determinations must be made on a case-by-case basis.

Conversely, employees are not exempt under this provision if they only collect, organize, and record information that is routine or already public. Thus, staff announcers whose principal duties consist primarily of giving station identification and time signals, announcing the names of programs and records, and other similar routine work do not normally qualify for exemption as creative professionals. Similarly, reporters who focus on “general assignment” work, such as hearings, police activity, or local events, likely will not be exempt as creative professionals.

With this exemption, in particular, broadcast employers should resist the temptation to classify entire an entire class or title of employees as “exempt” creative professionals. A case-by-case approach is necessary.

A federal appeals court case from Texas, *Dalheim v. KDFW-TV*, 918 F.2d 1220 (5th Cir. 1990), illustrates the complexities of this overtime exemption, and highlights the need for a fact-based analysis of each employee’s duties. The plaintiffs in *Dalheim*—general-assignment reports, producers, directors, and assignment editors—alleged that the defendant improperly had failed to pay them for overtime. The court agreed, finding the following as to each class of employees:

- * The **reporters** did not fall into the “creative professional” exemption, because the process that the reporters used to assemble their pieces “relie[d] not upon the reporter’s creativity, but upon her skill, diligence, and intelligence.” More importantly, the reporters received direction on what the stories should cover, what they were expected to shoot, and the intended angle or focus of each story. Thus, the work produced by the reporters was not original or creative in character.
- * The **producers** did not fall into the “creative professional” exemption, because their duties—rewriting reporters’ copy and formatting of the newscasts—were performed within a well-defined framework of management policies and editorial convention. To the extent that they exercised discretion, it was governed more by skill and experience than by originality and creativity.
- * The **producers** were also not exempt as “administrative” employees, because their responsibilities began and ended with the ten-to-twelve minute portion of the newscast they were working on. They were not responsible for setting business policy, planning the long- or short-term objectives of the news department,

promoting the newscast, negotiating salary or benefits with other department personnel, or any of the other types of “administrative” tasks noted in the USDOL regulations. In other words, their primary duty was to produce the commodity, not to manage the business affairs of the enterprise.

- * The **producers** were not exempt as “executive” employees, since their duties did not include training, supervising, disciplining, and evaluating employees.
- * Ultimately, the court concluded that the **producers** performed none of the duties that would exempt them from the applicable regulations, thus also making it unnecessary to explore the possibility of a “combination” exemption.
- * The **directors** did not meet any of the exemptions. Although they were highly skilled coordinators, they were not managers.
- * The **assignment editors** were not exempt because they had no real authority, and participated in no decisions of consequence.

Conversely, in a New York court case, *Freeman v. NBC*, 80 F.3d 78 (2d Cir. 1996), the court found that the plaintiffs—employees serving as television news writers, editors, producers, or field producers for NBC or at its “New York flagship station”—were “creative” professionals exempt from overtime regulations. As part of its analysis, the Second Circuit Court of Appeals noted that the plaintiff news writer was responsible for coordinating all United States-sourced news with the exception of D.C., for writing “headlines, teasers, transitions, voice-overs, lead-ins, and stories to be read by the anchor,” and served as one of two writers for Nightly News, “among the most highly coveted jobs in broadcast journalism, the pinnacle of the profession.” Similarly, the plaintiff producer was “one of a handful of persons” responsible for putting together the Weekend Nightly News program, and one of his major responsibilities included the generation of story ideas for the program. Finally, the plaintiff field producer “directed the camera crew and exercised his judgment as to whom was to be interviewed, whether the interview was on-camera, the questions to be asked, and the visual elements to be videotaped.”

The dichotomy between the Texas and New York cases illustrates the fact-intensive analysis that must be performed in order to determine whether a particular employee is exempt from FLSA requirements. If in doubt, broadcasters should consult with an employment attorney prior to presuming that any employee falls under the “professional” exemption.

C. Outside Sales Employees

An “outside sales” employee is exempt from minimum wage and overtime if the following requirements are met:

- (1) The employee’s **primary duty** must be making sales or obtaining orders or contracts for services or for the use of facilities for which consideration will be paid by the client or customer.

- (2) The employee must be regularly engaged **away** from the employer's place of business.
- (3) There is no minimum salary requirement necessary to qualify for the outside sales person exemption.

Obtaining orders for the "use of facilities" generally would include the selling of time on radio or television and the solicitation of advertising for newspapers.

Any fixed site used by a salesperson as headquarters or for telephone solicitation of sales, including the salesperson's home, is considered the employer's "place of business." Sales made inside the employer's place of business and other inside work generally are non-exempt unless done directly in conjunction with and incidental to outside sales and solicitation—for example, a telephone call from the business as an adjunct to a personal visit to a customer. Other work by an employee that is generally exempt as being "incidental to and in conjunction with the employee's own outside sales or solicitation" includes the writing of sales reports, the planning of the employee's itinerary, and attendance at sales conferences.

The outside sales person exemption does not include employees training to become outside sales people who are not yet actually performing the duties of such an employee.

D. Computer Employees

A "computer professional" employee is exempt from minimum wage and overtime if all the following requirements are met:

- (1) The employee must be compensated at least \$913 per week if they are paid on a salary basis, or at least \$27.63 per hour if they are paid on an hourly basis.
- (2) The employee must be a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker.
- (3) The employee's **primary duty** must be:
 - * 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 or 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 these duties, the performance of which requires the same level of skills.

Although the exemption does not specifically require the employee to have a particular academic degree or any license or certification, the exemption is intended to apply to highly skilled employees who have reached a level of proficiency in both the theoretical and practical application of highly specialized knowledge. As such, exempt employees are those who have attained a level of proficiency that allows them to work independently and generally without close supervision. Often this will be achieved through a combination of education (bachelor's degree level or higher) and field experience. The exemption does not include trainees or entry level employees learning to become proficient.

Employees engaged in the operation of computers or the manufacture, repair, or maintenance of computer hardware and related equipment do not fall within this exemption. Likewise, employees whose work is highly dependent upon computers and computer software programs (e.g., engineers, drafters and designers), but who are not in computer systems analysis or programming occupations, do not qualify for the exemption.

E. Small Market Announcers, News Editors, and Chief Engineers

In addition to the above exempt employee categories, the FLSA exempts radio and television announcers, news editors, and chief engineers in "small markets" from the overtime pay requirement of the Act. **This exemption does not extend to the FLSA minimum wage requirement**, which means such employees must be paid at least the applicable minimum wage. The new regulations that are effective as of December 1, 2016, do not change the requirements for this specific exemption.

This exemption applies if:

- (1) The employee is an **announcer** (i.e., appears before the microphone or camera to introduce programs, read announcements, and present routine on-air material), a **news editor** (i.e., gathers, edits, and rewrites the news), or a **chief engineer** (i.e., primarily supervises the operation, maintenance, and repair of the studio's electronic equipment and is licensed by the FCC as a Radio Telephone Operator First Class); **and**
- (2)
 - (a) The main studio of the station is located in a city or town with a population of 100,000 or less, and is not located within a metropolitan statistical area ("MSA") with a total population in excess of 100,000; **or**
 - (b) The main studio of the station is located in a city or town which is part of an MSA with a total population greater than 100,000, but which itself has a population of 25,000 or less and is at least 40 airline miles from the principal city in the MSA.

F. Combination Exemptions

An individual who performs a combination of the duties described above may combine the exemptions. For example, an employee who spends part of his/her time managing a department

(supervising two or more full-time employees) and is thus an executive employee, and spends the remainder of his/her time performing exempt administrative functions, qualifies as an exempt employee.

VII. RECORD KEEPING

A. Type of Records

The FLSA requires employers to keep records on wages, hours, and other items. No particular form of records is required, but employers must “maintain and preserve basic records of payroll data.” If an employee is subject to both FLSA’s minimum wage and overtime pay provisions, then the employer must maintain records regarding the employee showing at least:

1. Name and address (including zip code);
2. Birth date, if under 19;
3. Sex;
4. Occupation;
5. Hour and day when work week begins;
6. Regular hourly pay rate;
7. Hours worked each work day and total hours worked each work week;
8. Total daily or weekly straight time earnings;
9. Total overtime pay for the work week;
10. Deductions or additions to wages;
11. Total wages paid each pay period; and
12. Date of payment and pay period covered.

B. Failure to Keep Records

If an employer fails to keep the required records in adequate detail, the courts will allow speculation about the number of hours worked, based on estimates compiled by an investigator and testimony from employees. The government, or the employee, has the initial burden to show that the employee has worked hours for which he was not compensated. However, if that initial burden is met, the burden then shifts to the employer to show the exact hours worked by the employee or to prove that the estimates made by the government or the employee are not reasonable.

Thus, for protection against exaggerated claims from employees, employers should keep detailed and accurate time records and should make the employee’s obligation to accurately keep the time worked a work rule within the company’s policies. Since the employer can be held accountable for violations and for hours allegedly worked “off the clock,” employers should diligently monitor and enforce this policy.

C. Retention Period for Records

Employers must retain payroll records and employment contracts for three years. Basic supplementary employment and earnings records (e.g., time cards), wage rate tables and work-time schedules must be retained for two years.

VIII. UNPAID INTERNSHIPS

The USDOL has released guidance clarifying whether federal wage and hour laws apply to interns hired by for-profit businesses, including commercial broadcasters who have established internship programs as part of their FCC Equal Employment Opportunities outreach requirements.

The USDOL has long taken the position that an internship in the for-profit private sector will almost always be viewed as “employment” requiring compensation, even if the intern “voluntarily” refuses payment.

The broadest exception to this rule exempts from FLSA wage and hour rules an employer that provides aid or instruction to an intern whose work serves only the intern’s own interest. The practical effect of this exception has traditionally been that stations will hire unpaid interns if the interns are receiving academic credit for their work. Recognizing that this exemption is open to a wide range of interpretations, the USDOL in its 2010 guidance said that whether an internship or training program qualifies as an exemption depends on “all of the facts and circumstances of each such program.”

The USDOL has identified six criteria that must be examined when determining whether an intern is an “employee” under the FLSA. If all of the factors listed below are met, there is no “employment” relationship and the FLSA’s minimum wage and overtime provisions do not apply. The criteria are:

1. **The internship, even though it includes actual operation of the facilities of the broadcaster, is similar to training which would be given in an educational environment.** In general, the more an internship program is structured around a classroom or academic experience as opposed to the broadcaster’s actual operations, the more likely the internship will be viewed as an extension of the individual’s educational experience. So where a college or university exercises oversight of the internship program and provides educational credit, this criterion will generally be met.
2. **The internship experience is for the benefit of the intern.** To meet this criterion, it will generally be the case that the intern should not perform the “routine” work of the employer on a regular and recurring basis, and the employer should not be dependent upon the work of the intern. The USDOL has not clarified the definition of “routine” work, but it did say that if the intern is engaged in the operations of the employer or is performing productive work—such as “filing, performing other

clerical work, or assisting customers”—then the fact that they may be receiving some benefits of their own in the form of a new skill or improved work habits will not exclude them from the FLSA’s minimum wage and overtime requirements.

3. **The intern does not displace regular employees, but works under close supervision of existing staff.** If a broadcaster uses interns as substitutes for regular workers or to augment its existing workforce during specific time periods, these interns should be paid at least the minimum wage and overtime compensation for hours worked over 40 in a week. Similarly, if the broadcaster would have hired additional employees or required existing staff to work additional hours had the interns not performed the work, then the interns may be viewed as employees and entitled to compensation under the FLSA.
4. **The employer derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded.** Where the broadcaster is providing job shadowing opportunities that allow an intern to learn certain functions under the close and constant supervision of regular employees, but the intern performs no or minimal work, the activity is more likely to be viewed as a bona fide education experience. Of course, if the intern receives the same level of supervision as the broadcaster’s regular workforce, this would suggest an employment relationship rather than training.
5. **The intern is not necessarily entitled to a job at the conclusion of the internship.** According to the USDOL, the internship should be of a fixed duration, established prior to the outset of the internship. Further, unpaid internships generally should not be used by the broadcaster as a trial period for individuals seeking employment at the conclusion of the internship period. If an intern is placed with the employer for a trial period with the expectation that he or she will then be hired on a permanent basis, that individual generally would be considered an employee under the FLSA.
6. **The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.**

The new USDOL internship guidance only applies to for-profit businesses, but the USDOL is currently evaluating the need for additional guidance on internships in the non-profit sector, including noncommercial broadcasters.

IX. ENFORCEMENT

Violations of the FLSA may subject employers to investigation and enforcement efforts by the U.S. Department of Labor or to lawsuits brought directly by employees (or, more often, by former employees). The employees may seek to recover unpaid wages and overtime compensation. Employees who are successful often are awarded double the amount of their

damages, as liquidated damages, and they also may receive reasonable attorneys' fees and costs. In certain cases, additional civil penalties of up to \$1,100 per employee may also be imposed (for willful or repeated violations). Note that the FLSA also prohibits retaliation or discrimination against employees asserting claims or cooperating with investigations under the Act, and violation of these provisions likewise subjects the employer to liability.

X. NORTH CAROLINA WAGE AND HOUR PROVISIONS

The minimum wage and overtime provisions under the North Carolina Wage and Hour Act (the "North Carolina Act") currently are equivalent to the FLSA provisions. Employers covered by the FLSA are not subject to the North Carolina minimum wage and overtime provisions. However, the North Carolina Act also includes the following provisions which apply to all employers within the State, including those covered by the FLSA.

A. Forfeiture of Wages or Vacation Pay

The North Carolina Act requires employers to notify employees, orally or in writing, at the time they are hired, of various matters, including the rate of pay, vacation and sick leave policies, and the day and place for payment of wages. Employers also must make policies regarding vacation pay, sick leave and other benefits available to their employees in writing or through a posted notice. Notice of changes in benefits resulting in a decrease must be provided to employees in writing **prior** to the reduction in wages or benefits.

An employer may adopt a policy that employees will forfeit any unused vacation upon termination, such as termination for cause, but the policy must be communicated to the employees in writing (or through a posted notice) in advance. The vacation or other benefits cannot be forfeited retroactively.

B. Wage Withholding

North Carolina law prohibits an employer from withholding or making any deductions from an employee's pay, other than for taxes or other items required by law, unless the employee provides specific written authorization in advance for the deduction. The North Carolina Act imposes strict requirements and restrictions on such withholding authorizations, which often include allowing the employee the opportunity to withdraw the authorization. The circumstances pertaining to such withdrawals may vary. Specific questions should be directed to legal counsel.

C. Retaliation

Employees may not be retaliated against for exercising their rights under the North Carolina Act. Prohibited retaliation includes not only discharge but "any other unfavorable action." Such unfavorable action may include transfer or demotion to a less prestigious position after an individual reports alleged wage and hour violations or testifies on behalf of another employee.

Employees can report violations of the retaliation statute to the North Carolina Workplace Retaliatory Discrimination Division of the North Carolina Department of Labor, which may pursue enforcement or authorize a private law suit. The employee may seek reinstatement, back pay, lost benefits and other economic losses. If the violation was willful, the employee's damages may be trebled, and an employee who successfully proves the violation also may receive attorneys' fees and costs.

* * * * *

This Primer should in no way be construed as legal advice or a legal opinion on any specific set of facts or circumstances. Therefore, you should consult with legal counsel concerning any specific set of facts or circumstances.

APPENDIX A: SUMMARY OF FLSA EXEMPTIONS

Exemption	Requirements	Exempt from Overtime Requirements	Exempt from Minimum Wage Requirements
Highly Compensated Employees	<ul style="list-style-type: none"> Earns at least \$134,004 annually Primary duty is office/non-manual Customarily and regularly performs at least one EAP duty 	X	X
EAP Employees	<ul style="list-style-type: none"> Paid on salary or fee basis Salary must be a minimum of \$47,476 annually, or \$913 per week Primary job duties are executive, administrative, or professional in nature 	X	X
Outside Sales Employees	<ul style="list-style-type: none"> Primary duty must be making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer. Must be regularly engaged away from the employer's place of business. 	X	X
Certain Computer Employees	<ul style="list-style-type: none"> Earns at least \$913 per week if paid on a salary basis, or \$27.63 if paid on an hourly basis Must be a computer systems analyst, computer programmer, software engineer, or similarly skilled Primary duty must involve the application of systems analysis, design, development or modification of computer systems, or a combination of these duties which require the same level of skills. 	X	X
Small Market Broadcast Employees	<ul style="list-style-type: none"> Employed as a radio or television announcer, news editor, or chief engineer. Primary studio is located in a city or town of 100,000 people or less, and the MSA in which the city is located consists of 100,000 people or less; <u>OR</u> Primary studio is located in a city or town of 25,000 people or less, greater than 40 airline miles from the principal city in such area, and in an MSA with greater than 100,000 people 	X	