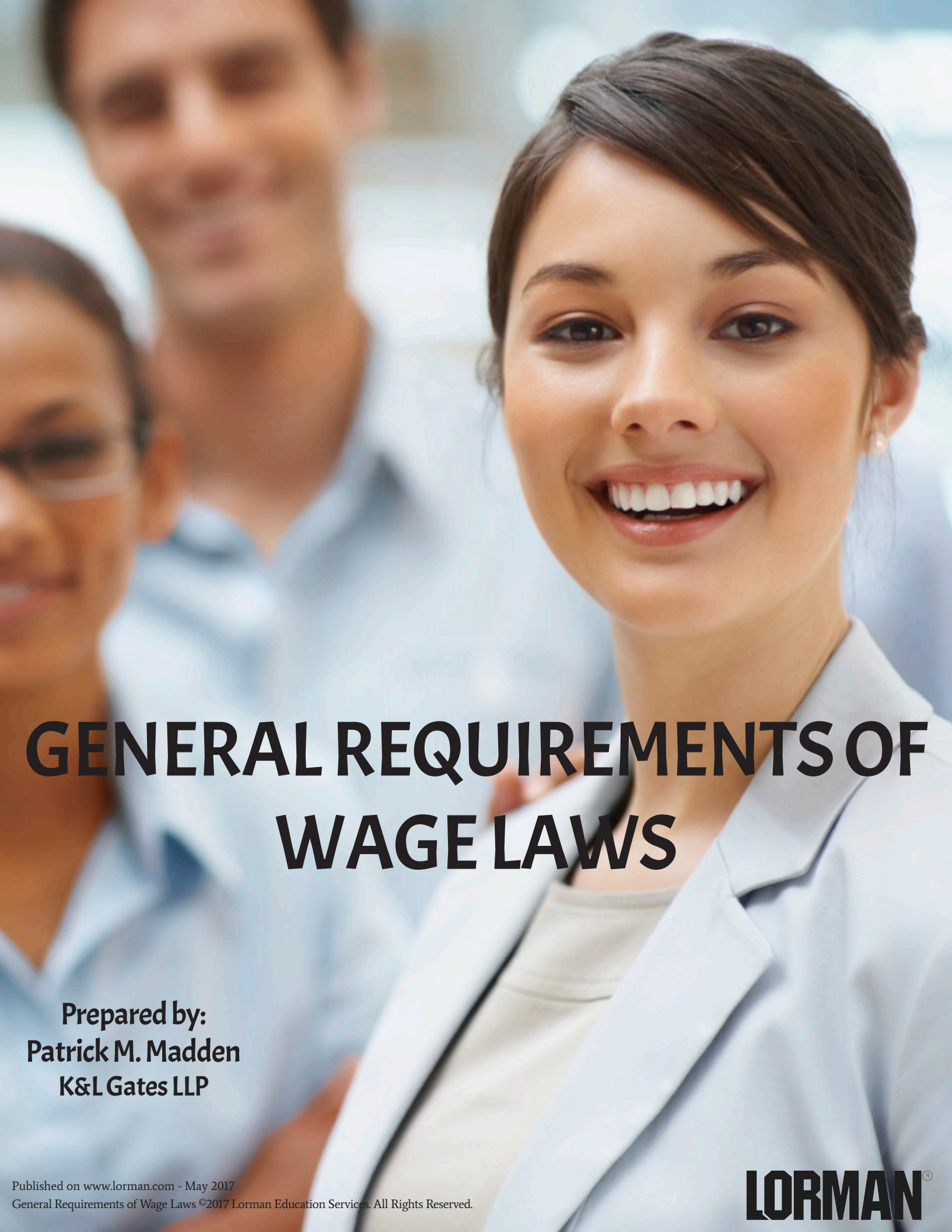

GENERAL REQUIREMENTS OF WAGE LAWS

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General Requirements of Wage Laws

A. Minimum Wage and Overtime

The federal Fair Labor Standards Act ("FLSA") was one of the earliest federal efforts to regulate the work environment and became effective on June 25, 1938. The FLSA is administered and enforced by the Wage and Hour Division of the Employment Standards Administration within the United States Department of Labor ("USDOL"). 29 U.S.C. § 204.

Among other things, the FLSA and many parallel state laws require the payment of a minimum wage for all hours worked. 29 U.S.C. § 206. In 2009, the federal minimum increased to $7.25 per hour. Many states and localities have requirements that exceed this level.

Under the FLSA, employers must also generally pay nonexempt employees overtime at a rate of at least one and one half times the regular rate of pay for all hours work in excess of 40 hours in a work week. 29 U.S.C. § 207. In contrast, the FLSA does not require an employer to provide premium pay for work beyond an employee's normal daily shift, work on holidays, or work on weekends. 29 CFR § 778.102. For adults, there is no limit on overtime hours that employees may work and overtime may be mandatory. 29 CFR § 778.102. Some states have daily or other overtime requirements and other states place limits on mandatory overtime.

Overtime requirements focus on the work week. The work week can be any fixed and recurring 168 hour period. 29 CFR § 778.105.

Because overtime requirements focus on the work week, hours cannot be averaged between work weeks. Thus, if an employee works 38 hours one week and 42 hours the next week, the employer must pay overtime for two hours in the second week even though the average number of hours worked during the two-week period is 40. 29 CFR § 778.104.

Employers found liable for violations of the FLSA may be assessed damages for the unpaid overtime or minimum wages, liquidated damages equal to the amount of unpaid overtime or minimum wages, and reasonable attorneys fees and costs. 29 U.S.C. § 216(b). Willful violations may carry criminal penalties upon conviction with fines of not more than $10,000 or imprisonment for not more than six months, or both. 29 U.S.C. § 216(a). There are also civil money penalties (payable to the Secretary of Labor) for repeated and willful violations of minimum wage and overtime requirements. 29 U.S.C. § 216(e); 29 CFR Part 578.

Employers must use caution when evaluating whether they comply with minimum wage and overtime requirements. Compliance with the FLSA may not be sufficient. Many states and some localities have requirements, and those requirements do not always mirror FLSA standards. Thus, employers must be certain that they are complying with the FLSA as well as state and local requirements in every state where they have employees. A review of state and local laws and requirements is beyond the scope of these materials.

B. Hours Worked

Under the FLSA, it is an absolute rule that employers must pay their employees for all hours the employees work. *E.g.*, 29 CFR §§

785.6-785.7; *Kuebel v. Black & Decker Inc.*, No. 10-2273-cv, slip op. at 11 (2d Cir. May 5, 2011). The question that has always caused confusion in the work place and that has recently resulted in a spate of class action lawsuits is "What constitutes hours worked?"

The FLSA does not define the term "work." Thus, early Supreme Court cases defined the term broadly. In *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944), the Court found that time spent traveling from the entrance of ore mines to the underground working areas was work time and defined "work" as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." Later in the same year, the Court clarified that "exertion" is not necessary for an activity to count as "work" and that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen." *Armour & Co. v. Wantock*, 323 U.S. 126 (1944); *see also Alvarez v. IBP, Inc.* 339 F.3d 894, 902 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005) ("'exertion' is not the sine qua non of 'work'"). Two years later, in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), the Court defined "workweek" to include "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace" and held that time employees spent walking from time clocks at a factory entrance to their workstations was compensable work time.

In response to the *Anderson* decision, Congress passed the Portal-to-Portal Act of 1947.[1] The Portal-to-Portal Act was specifically aimed at limiting the liability of employers for certain activities, such as (1) walking, riding and traveling to and from the actual place of work;
(2) clothes changing in certain circumstances; and (3) other activities that are preliminary to or postliminary to principal work activities. *E.g.*, *Aiken v. City of Memphis*, 190 F.3d 753, 758 (6th Cir. 1999) (the Act amended the FLSA "'to delineate certain activities which did not constitute work,' and which are therefore non-compensable"); 29 U.S.C. §§ 203(o), 254. However, the Portal-to-Portal Act did not change the Supreme Court's earlier definitions of the term "work." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 28 (2005).

Taking these legal interpretations into account, the USDOL has adopted regulations that help define what does and what does not count as time worked. Essentially, activities that are primarily for the benefit of the employer and that are suffered or permitted by an employer constitute compensable work time. 29 CFR § 785.11. In the litigation context, courts have fashioned a general rule that an employer is liable for off-the-clock work if the employer knew or should have known that the employee was working. *Id.*

In the *IBP* case, the Supreme Court reaffirmed the USDOL's position in relation to two key concepts (integral and indispensable

[1] Some states have never adopted a similar provision and, thus, activities that are not compensable work under the Portal-to-Portal Act may be compensable in those states. *See, e.g., Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 995 P.2d 139 (2000) (no Portal-to-Portal Act under California law); *Anderson v. Dep't of Soc. & Health Servs.*, 115 Wn. App. 452 (2003) (same under Washington law).

activities, and the continuous workday rule) that impact what counts as work and when work time starts and ends.

Initially, the Court concluded that work includes both an employee's principal activities as well as activities that are "integral and indispensable" to the principal activities. *IBP*, 546 U.S. at 37; *see also Steiner v. Mitchell*, 350 U.S. 247, 256 (1956) (finding that changing into and out of old work clothes at a battery plant was an integral and indispensable part of the employees' work and, thus, compensable); *Mitchell v. King Packing Co.*, 350 U.S. 260, 263 (1956) (finding that time spent by workers in a meat packing plant sharpening knives was integral and indispensable and, thus, compensable). It then made clear that activities that are integral and indispensable to principal activities are themselves principal activities under 29 U.S.C. § 254(a) that start the work day. *IBP*, 546 U.S. at 37; USDOL Wage and Hour Advisory Memorandum No. 2006-2 at 2 (May 31, 2006) ("USDOL Memo No. 2006-2").

The Court then fully embraced the USDOL's interpretation of the continuous workday rule, stating: "[C]onsistent with our prior decisions interpreting the FLSA, the Department of Labor has adopted the continuous workday rule, which means that the 'workday' is generally defined as 'the period between the commencement and completion on the same workday of an employee's principal activity or activities.'" *IBP*, 546 U.S. at 29; *see also* 29 CFR § 790.6(b). Note, however, that the Court recognized that preliminary and postliminary activities, such as walking between a time clock and an employee's work area and waiting to punch a clock or receive gear, that occur

outside of the continuous workday do not count as compensable work time. *IBP*, 546 U.S. at 37.

C. The *De Minimis* Doctrine

Even if activities constitute work, under some circumstances, the amount of time spent on such activities is so minimal or *de minimis* that it is not compensable. This *de minimis* doctrine was set forth by the Supreme Court in *Anderson*, 328 U.S. at 692:

> The workweek contemplated . . . must be computed in light of the realities of the industrial world. When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.

See also De Asencio v. Tyson Foods, Inc., 500 F.3d 361, 374 (3d Cir. 2007) (the doctrine "provides a limiting principle to compensation for trivial calculable quantities of work"). The U.S. Court of Appeals for the Ninth Circuit has subsequently set forth a three-pronged test to determine when the doctrine should be applied: "we will consider (1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work." *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984). Applying these factors, the Ninth Circuit then held that seven to eight minutes per day spent by employees in pre-shift activities was *de minimis* and not compensable because there was wide variance in the amount of pre-shift time spent on the activities, there were interwoven social activities, and the employer would have difficulty monitoring the pre-shift work. *Id.*; *see also Reich v. New York Transit Auth.*, 45 F.3d 646, 652-53 (2d Cir. 1995) ("time spent by

handlers in dog-care duties during the commute" was *de minimis* and non-compensable because they were "neither substantial, nor regularly occurring" and it would be administratively difficult to track); 29 CFR § 785.47 ("[I]nsubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded . . . . [S]uch trifles are de minimis."); USDOL Opinion Letter FLSA2004-8NA at 1 (August 1, 2004).

The *de minimis* doctrine was recognized, but not clarified, in the Supreme Court's *IBP* decision. The Court let stand a holding by the district court and Ninth Circuit in the *Alvarez* case that time spent donning and doffing safety hats and goggles was *de minimis* as it was insubstantial and difficult to monitor. *See Alvarez,* 339 F.3d at 904. Similarly, the Court discussed that the jury in a consolidated case, *Tum v. Barber Foods*, 331 F.3d 1 (1st Cir. 2004), found that time spent donning lab coats, hairnets, earplugs, and safety glasses was *de minimis*, but reversed and remanded that case so that the court (and, presumably, a new jury) could consider whether the time was *de minimis* when combined with post-donning walking and waiting time. *But see Sandifer v. U.S. Steel Corp.*, 134 S.Ct. 870, 879-81 (2014) (disposing of claims for time donning and doffing glasses, earplugs, and respirators, but not under the *de minimis* doctrine).

D. Accurate Time Records

The USDOL has adopted regulations that address recordkeeping requirements. *See* 29 CFR Part 516; 29 CFR §§ 785.46 to .48. The types of records that must be maintained by employers include information regarding the employee, the work week, the hours worked

each day, the basis of pay, the regular rate, straight time and overtime compensation, deductions and additions to wages, the applicable pay period, the wages paid each pay period, and the date of payment.

An employer has a duty to assure that these records are detailed and accurate. 29 CFR § 785.13. This duty may not be delegated to employees. Thus, policies regarding time entry, reporting of time, and following posted schedules are helpful but are not a defense to claims for uncompensated hours. Neither are policies that prohibit unauthorized work or overtime. Likewise, time cards or time records by themselves are not necessarily sufficient evidence of hours actually worked. 29 CFR § 785.48.

Under federal law, employers must maintain most records for three years, 29 CFR § 516.5, although some source documents and other basic information may be discarded after two years, 29 CFR § 516.6. Even though the FLSA allows employers to discard some source materials after two years, employers should maintain all records for three years if this is practicable. Because the statute of limitations may not run after the two-year period, it is important for employers to maintain source materials to defend against possible wage claims. These materials may include records created or signed by the employee that can be used for impeachment purposes.

If employers fail to maintain required (or accurate) records, then courts shift the burden of proof in subsequent litigation. Essentially, courts allow employees to provide generalized and unsubstantiated testimony as to the hours they believe they worked and require that employers disprove the testimony. *E.g.*, *Anderson v. Mt. Clemens*

Pottery Co., 328 U.S. 680 (1946). Thus, a court or jury may award damages even though the measure of damages is imprecise. *E.g.*, *Reich v. Stewart*, 121 F.3d 400 (8th Cir. 1997).

E. Other Wage Requirements of Interest

The FLSA and parallel state laws set forth a broad range of other requirements. A few requirements that are of particular relevance here include:

1. Rest Break Requirements

The FLSA does not require employers to provide rest breaks; however, it provides that rest periods of short duration, "running from 5 minutes to about 20 minutes," must be counted as hours worked. 29 CFR § 785.18.

In contrast, many state laws require rest breaks. Those laws often require a minimum amount of rest break time (*e.g.*, 10 or 15 minutes for every 4 hours worked) and place limits on how many continuous hours an employee may work without a break (*e.g.*, no more than 3 continuous hours without a break). *E.g.*, *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 84 (2002).

2. Meal Period Requirements

Under the FLSA, bona fide meal periods do not count as hours worked. 29 CFR § 785.19. For a meal period to be bona fide, an employee must be completely relieved from duty for the purpose of eating a regular meal. *Id.* Thirty minutes is ordinarily required for a bona fide meal period; however, the USDOL has recognized that 20 minutes may be sufficient. Brief interruptions may be acceptable. *See Brown v. Howard Indus.*, 116 F. Supp. 2d 764 (S.D. Miss. 2000); USDOL Wage & Hour Opinion Letter No. 1760. If meal periods are not

taken or are often interrupted, however, they constitute work time. *See Hartsell v. Dr. Pepper Bottling Co. of Tex.*, 207 F.3d 269 (5th Cir. 2000). Moreover, an employee who is required to remain in a particular work location for business or "security" reasons may not be completely relieved of duties and thus may need to be paid for meal periods. *See Reich v. Southern New England Telecommunications Corp.*, 121 F.3d 58 (1st Cir. 1997).

Unlike the somewhat flexible FLSA standards, some state laws require a minimum of 30 minutes for uncompensated meal periods and prohibit any interruptions during the meal time. *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003). For example, under Washington State law, if meal periods are interrupted or last less than 30 minutes, employers must either allow for a new 30-minute meal period or count the meal period as hours worked (and pay for it). *See id.*; *Pellino v. Brink's Inc.*, 164 Wn. App. 668 (2011) (employees must receive full 30 minutes of their meal period time).

3. Salary Basis Requirements

Employers that claim employees as exempt under the executive, administrative, and professional exemptions must, with minor exceptions, pay those employees on a salary basis. Payment on a salary basis involves more than simply payment of a salary. The salary basis test requires that an exempt employee be paid a predetermined amount, on a weekly or less frequent basis, that is not subject to reduction because of variations in the quality or quantity of work performed. 29 CFR § 541.600 to .606. The salary basis test rests on a simple rule: employees must receive their full salary for any

week in which they perform any work without regard to the number of days or hours worked.

Despite this rule, the salary basis regulations provide that an employer may make certain deductions in a salaried exempt employee's pay without negating that employee's salaried status. Initially, the FLSA allows deductions for a complete work week. *See Paresi v. City of Portland*, 182 F.3d 665 (9th Cir. 1999) (week-long suspensions do not violate the FLSA); *Childers v. City of Eugene*, 120 F.3d 944, 946 n.2 (9th Cir. 1997) (week-long suspensions do not violate the FLSA); *Leslie v. Ingalls Shipbuilding, Inc.*, 899 F. Supp. 1578 (S.D. Miss. 1995). In addition, the FLSA permits deductions in full-day increments for: (1) personal absences of one day or longer, USDOL Opinion Letter FLSA2005-7 (Jan. 7, 2005); (2) absences due to sickness or disability lasting one day or longer if done in accordance with a bona fide plan, policy, or practice of providing compensation for loss of salary occasioned by both sickness and disability, USDOL Opinion Letter FLSA2005-7 (Jan. 7, 2005), USDOL Opinion Letter FLSA2003-3NA (May 5, 2003); and (3) unpaid disciplinary suspensions of one or more full days "imposed in good faith for infractions of workplace conduct rules," 29 CFR § 541.602(b)(5). Finally, although the salary basis test generally does not allow partial-day deductions, an employer may make such deductions if taken in accordance with intermittent FMLA requirements. 29 CFR § 825.206. Any other partial day deductions violate the salary basis test and may invalidate the exempt status of employees.