

30 FREQUENTLY ASKED WAGE AND HOUR QUESTIONS

A. Three Major Sources of Wage and Hour Law

1. The Fair Labor Standards Act (the “FLSA”) establishes minimum wage, overtime payment, recordkeeping, and youth employment standards for both private and public sector employers.
2. The Colorado Wage Act (the “CWA”) addresses deductions from wages, vacation, commissions, bonuses, final pay, pay periods and paydays, and pay statements.
3. The Colorado Minimum Wage Order (the “CWO”) regulates overtime, meal and rest periods, tips and gratuities, uniforms, and record keeping for four major industries: retail and service, commercial support service, food and beverage, and health and medical.

B. Common Questions Regarding Wage and Hour Law

1. WHO IS COVERED BY THE FLSA, THE CWA, AND THE CWO?

- a. The FLSA contains provisions to cover both individuals and enterprises. Enterprise coverage applies to any business that has two or more employees and does \$500,000 of business annually. Individual coverage applies to any employee engaged in interstate commerce. Given these broad criteria, the FLSA applies to the majority of employees. The FLSA does not apply to independent contractors.
- b. The CWA covers all private sector employees in Colorado, but does not apply to public sector employees or independent contractors.
- c. The CWO applies to employees in retail and service, commercial support service, food and beverage, and health and medical.

2. WHO IS EXEMPT FROM THE FLSA, THE CWA, AND THE CWO?

- a. The FLSA provides a wide variety of exemptions, many with different scopes. Some employees are exempt from the overtime pay provisions, some from both the minimum wage and overtime pay provisions and some from the child labor provisions of the FLSA, as listed below.

Exemptions from Both Minimum Wage and Overtime Pay

- i. Executive, administrative, and professional employees (including teachers and academic administrative personnel in elementary and secondary schools), outside sales employees, and employees in certain computer-related occupations;

- ii. Employees of certain seasonal amusement or recreational establishments, employees of certain small newspapers, seamen employed on foreign vessels, employees engaged in fishing operations, and employees engaged in newspaper delivery;
- iii. Farmworkers employed by anyone who used no more than 500 “man-days” of farm labor in any calendar quarter of the preceding calendar year;
- iv. Casual babysitters and persons employed as companions to the elderly or infirm.

Exemptions from Overtime Pay Only

- i. Certain commissioned employees of retail or service establishments; auto, truck, trailer, farm implement, boat, or aircraft sales-workers; or parts-clerks and mechanics servicing autos, trucks, or farm implements, who are employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers;
- ii. Employees of railroads and air carriers, taxi drivers, certain employees of motor carriers, seamen on American vessels, and local delivery employees paid on approved trip rate plans;
- iii. Announcers, news editors, and chief engineers of certain non-metropolitan broadcasting stations;
- iv. Domestic service workers living in the employer’s residence;
- v. Employees of motion picture theaters; and
- vi. Farmworkers.

Partial Exemptions from Overtime Pay

- i. Partial overtime pay exemptions apply to employees engaged in certain operations on agricultural commodities and to employees of certain bulk petroleum distributors.
- ii. Hospitals and residential care establishments may adopt, by agreement with their employees, a 14-day work period instead of the usual 7-day workweek if the employees are paid at least time and one-half their regular rates for hours worked over 8 in a day or 80 in a 14-day work period, whichever is the greater number of overtime hours.
- iii. Employees who lack a high school diploma, or who have not attained the educational level of the 8th grade, can be required to spend up to 10 hours in a workweek engaged in remedial reading or training in

other basic skills without receiving time and one-half overtime pay for these hours. However, the employees must receive their normal wages for hours spent in such training and the training must not be job specific.

- iv. Public agency fire departments and police departments may establish a work period ranging from 7 to 28 days in which overtime need only be paid after a specified number of hours in each work period.
- b. The CWO also has a range of exceptions, similar to the FLSA, including administrative workers, executives, supervisors, and outside sales.
- c. Like the FLSA and the CWA, the CWO does not apply to public sector employees or independent contractors, as well as many other industries such as construction, manufacturing and wholesale.

3. WHAT IS THE WHITE COLLAR EXEMPTION?

- a. The most common FLSA minimum wage and overtime exemption -- often called the “541” or “white collar” exemption -- applies to certain executive employees, administrative employees, professional employees, outside sales employees, and computer employees.
- b. If the requirements of this exemption are met, the employer is not required to (1) pay overtime to the exempt employee or (2) guarantee that the employee receives at least the minimum wage for each hour worked.
- c. To qualify for exemption, employees must meet three tests for each exemption:
 - i. Salary Level: an exempt employee must earn a minimum amount.
 - ii. Salary Basis: the minimum amount must be paid on a salary basis.
 - iii. Job Duties: exempt employees must perform certain executive, administrative, professional, outside sales, or computer professional job duties set forth in the regulation.
- d. Salary Level
 - i. The minimum salary level required for exemption is \$455 per week, which must be paid “free and clear” – that is, the \$455 cannot include the value of any non-cash items that an employer may furnish to an employee, like board, lodging, or other facilities (for example, meals furnished to employees of restaurants).
 - ii. For employers that have adopted pay periods longer than one week, the equivalent of the \$455 per week salary level is \$910 for biweekly

pay periods; \$985.83 for semimonthly pay periods; and \$1,971.66 for monthly pay periods.

e. Salary Basis

- i. Generally, “salary basis” means that an exempt employee must regularly receive, each pay period and on a weekly or less frequent basis, a “predetermined amount” of compensation that cannot be reduced because of variations in the quality or quantity of work performed. But for a few identified exceptions, the exempt employee must receive the full salary for **any** week in which the employee performs any work, regardless of the number of days or hours worked. However, exempt employees need not be paid for any workweek when they perform no work.
- ii. An employee is not paid on a salary basis if the employer makes deductions from the predetermined salary, for example, for absences caused by the employer or because of the operating requirements of the business. If the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.
- iii. The regulations contain seven exceptions to this salary basis, “no pay-docking” rule. Employers may make deductions from salary of exempt employees in the following situations:
 - a. An absence from work for one or more full days for personal reasons, other than sickness or disability
 - b. An absence from work for one or more full days due to sickness or disability if deductions made under a bona fide plan, policy, or practice of providing wage replacement benefits for these types of absences
 - c. To offset any amounts received as payment for jury fees, witness fees, or military pay
 - d. Penalties imposed in good faith for violating safety rules of “major significance,” such as “no smoking” rules in explosive plants, oil refineries, and coal mines
 - e. Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of written workplace conduct rules, such as rules prohibiting sexual harassment or workplace violence
 - f. Proportionate part of an employee’s full salary may be paid for time actually worked in the first and last weeks of employment

- g. Unpaid leave under the Family and Medical Leave Act
 - iv. The regulations provide a safe harbor for employers who have a clearly communicated policy prohibiting improper deductions. If an employer (1) has such a clearly communicated policy which prohibits improper deductions and includes a complaint mechanism, (2) reimburses employees for any improper deductions, and (3) makes a good faith commitment to comply in the future, then the employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints.
 - f. Job Duties
 - i. Executive
 - a. Applies only if the following three duties requirements are met: 1) the employee's primary duty must be management; 2) the employee must customarily and regularly direct the work of two or more employees; and 3) the employee must have the authority to hire or fire other employees, or have his/her suggestions and recommendations as to hiring, firing, advancement, promotion or any other change of status given particular weight.
 - ii. Administrative
 - a. Applies only if: 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; and the employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.
 - b. Work "directly related to management or general business operations" includes, but is not limited to, work in such areas as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; advertising; marketing; research; safety and health; human resources; public relations; legal and regulatory compliance; and similar activities.
 - iii. Financial Services
 - a. Financial services employees may meet the duties requirements for the administrative exemption if their duties include 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, a financial services employee whose primary duty is selling financial products does not qualify for the administrative exemption.

iv. Professional Employees

- a. The professional exemption applies only if the primary duty is the performance of work that requires 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.
- b. Fields of science or learning are occupations with recognized professional status, as distinguished from the mechanical arts or skilled trades. Fields of science or learning include: law; theology; medicine; pharmacy; accounting; teaching; architecture; engineering; and the physical, chemical, or biological sciences.
- c. Exempt learned professionals may include: doctors, lawyers, teachers, accountants, pharmacists, engineers, actuaries, chefs, certified athletic trainers, and funeral directors or embalmers, where the regulatory tests are satisfied, such as completion of a prolonged course of specialized intellectual instruction.
- d. Employees who **do not** meet the requirements for the learned professional exemption include: accounting clerks and bookkeepers who normally perform a great deal of routine work; cooks who perform predominantly routine mental, manual, mechanical, or physical work; paralegals and legal assistants; and engineering technicians.

v. Computer

- a. The employee's primary duty must be:
 - i. The application of systems analysis techniques and procedures, including consulting with users, to

determine hardware, software, or system functional specifications;

- ii. 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;
- iii. The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
- iv. A combination of the above requiring the same level of skills.

b. The employee must also receive either

- i. A guaranteed salary or fee of \$455 per week or more, or
- ii. An hourly rate of not less than \$27.63 per hour.

vi. Outside Sales

- a. The employee's primary duty must be making sales or obtaining orders or contracts for services or use of facilities for which a consideration will be paid by the client or customer, and the employee must be customarily and regularly engaged away from the employer's place or places of business in performing these duties.
- b. Work performed that is incidental to and in conjunction with, or which furthers, the employee's own outside sales or solicitation efforts is considered exempt outside sales work, even when performed at the employer's establishment.

4. WHAT IS THE DIFFERENCE BETWEEN AN INDEPENDENT CONTRACTOR AND AN EMPLOYEE?

- a. The FLSA generally defines an employee as "any individual employed by a ... political subdivision of a State ..." 29 U.S.C. § 203(e)(1), (e)(2)(C). Because this definition is quite vague, courts generally determine employee status by looking at the economic reality of the relationship between the entities. The focal point is "whether the individual is economically dependent on the business to which he renders service ... or is, as a matter of economic fact, in business for himself." *Johnson v.*

Unified Government of Wyandotte County/Kansas City, Kansas, 371 F.3d 723, 729 (10th Cir. 2004)

- b. The 10th Circuit provides six factors generally considered in determining economic reality and employee status:
 - (1) the degree of control exerted by the alleged employer over the worker;
 - (2) the worker's opportunity for profit or loss;
 - (3) the worker's investment in the business;
 - (4) the permanence of the working relationship; and
 - (5) the degree of skill required to perform the work.
 - (6) the extent to which the work is an integral part of the alleged employer's business.

None of the factors is to be considered dispositive; the test is instead based on the totality of the circumstances. *Id.*

- c. In *Barlow v. C.R. England, Inc.*, 816 F.Supp.2d 1093, 1107 (D.Colo. 2011), the court found that a janitor was an independent contractor based on the following facts: the janitor provided janitorial services through a company that was formed with another person and for which he obtained a cleaning license; the company invoiced defendant for the provided services, and defendant issued checks made payable to the company, and the company had its own bank account and filed a separate corporate tax return as a limited liability company. Although the defendant directed the janitor of the janitorial tasks that needed to be performed, the janitor was allowed freedom to decide how to accomplish those tasks.
- d. The CWA and the CWO have a parallel approach to determining independent contractor status. The Colorado Division of Labor examines three main factors in determining status: behavioral control, financial control, and the type of relationship.
 - i. Behavioral Control generally requires an examination of facts that show whether the business has a right to direct and control how the work is performed, through instructions, training, or other means. Employees are generally told:
 - (1) when, where, and how to work;
 - (2) what tools or equipment to use;
 - (3) what workers to hire or assist with their work;

- (4) where to purchase supplies and services;
 - (5) what work must be performed by a specific individual; and
 - (6) what order or sequence to follow in performing tasks
- ii. Financial Control requires an examination of facts that show whether the business has a right to control the business aspects of the worker's job. Financial aspects that may be examined include:
- (1) the extent to which the worker has un-reimbursed expenses;
 - (2) the extent of the worker's investment;
 - (3) the extent to which the worker makes services available to the relevant market;
 - (4) how the business pays the worker; and
 - (5) the extent to which the worker can realize a profit or loss
- iii. Facts that show the nature of the relationship between the two parties include:
- (1) written contracts describing the relationship the parties intended;
 - (2) whether the worker is provided with employee-type benefits;
 - (3) the permanency of the relationship; and
 - (4) how integral the services are to the principal activity.

In summary, to classify someone as an independent contractor under the CWA and CWO, the employer typically has control over the result of the work performed, whereas the independent contractor exerts control over the means and methods of accomplishing the result.

5. DO I HAVE TO GIVE MY EMPLOYEES PAID BREAKS?

- a. The FLSA and the CWA do not require breaks. However, if the employer provides breaks that are less than 20 minutes, then those breaks must be compensated. There is a gray area if the break is 20 minutes or more, but less than 30 minutes.
- b. In determining the compensability of a rest period, the 10th Circuit considers whether idle time is spent predominantly for the employer's or employee's benefit, and whether the time is of sufficient duration and taken under such conditions that it is available to employees for their own use and purposes disassociated from their employment time.

- c. In *Mitchell v. Greinetz*, 235 F.2d 621 (10th Cir. 1956), the court found that two fifteen minute breaks per shift were compensable because the periods benefitted the employer as much or more than they benefitted the employees and the duration of the rest periods were such that the periods could not effectively be used for purposes not connected with the plaintiffs' employment. It was undisputed that the employees stayed on the production floor during their breaks—despite the fact that, in theory, they were free to leave the work area—because they worked on the third floor of a building with no elevator and simply did not have enough time to do as they pleased.
- d. If the break is more than 30 minutes and the employee is completely relieved of duty, the break is not compensable.
- e. Employees covered by the CWO should be given a compensated ten minute break every four hours.

6. DO I HAVE TO GIVE MY EMPLOYEES A LUNCH BREAK?

- a. Neither the FLSA nor the CWA require a lunch break. However, if you do provide a lunch break and if the lunch break is 30 minutes or more, it can be unpaid if it is a bona fide meal period. To be bona fide, the employee must be completely released from work. You do not have to let employees leave, but the time they remain on site will be counted if they are required to perform any duties, whether active or inactive.
- b. Employees covered by the CWO should be given a thirty minute meal break for each shift over five hours. When the nature of the job renders such a break impracticable, employees should be allowed a paid, “on-duty” meal.

7. CAN I FORCE MY EMPLOYEES TO WORK OVER 8 HOURS PER DAY?

- a. Yes, under Colorado and federal law. Employers may discipline or even terminate employees who refuse to work scheduled overtime. Note that workers under the age of 18 are restricted from working over certain hourly thresholds depending on their age.

8. DO I HAVE TO PAY VACATION PAY?

- a. The FLSA, CWA, and CWO do not require vacation pay.
- b. The CWA does treat vacation pay as wages if the pay is earned in accordance with the terms of an employment agreement or the employer’s policy provides that it will pay out unused vacation time. An employer can have a “use it or lose it” provisions or place a condition precedent on receiving payment for the unused vacation.

9. DO I HAVE TO PAY HOLIDAY PAY?

- a. The FLSA and CWA do not require holiday pay.
- b. For exempt employees, if the employee is “ready, willing, and able” to perform work in the workweek, the employer must pay the exempt employee for the entire workweek, but need not pay the employee additional amounts to the guaranteed salary.

10. DO I HAVE TO PAY SEVERANCE PAY?

- a. No. Whether or not an employer pays severance pay depends entirely on the employer’s policies. Some employers choose to offer severance as a means only to obtain a release of any possible claims. Note that an employer’s severance pay plan may be an employee benefits plan under ERISA, which has other requirements.

11. IS AN EMPLOYEE REQUIRED TO GIVE TWO WEEKS NOTICE?

- a. No. An at-will employee is not required to give two weeks notice. However, the employer can provide an incentive or disincentive, such as withholding unused vacation pay, if notice is not given.

12. WHEN DO I HAVE TO PAY FINAL WAGES TO A TERMINATED EMPLOYEE?

- a. Under federal law, final payment must be made by the next payday or as soon as can be calculated.
- b. Under the CWA, final wages are due immediately upon discharge. However, if the discharge occurs at a time when the payroll is not scheduled to be operational, there is additional time. If payroll is handled on site, payment is due within 6 hours after the start of the next workday. If payroll is offsite, the payment is due within 24 hours of the accounting unit’s next workday. There is an exception regarding the timing of payment for employees who work on commission or whose duties require an audit to determine the amount due.
- c. A Colorado employee who quits or resigns may be paid on the next regular payday.

13. DO I HAVE TO HAVE A TIME CLOCK?

- a. No, but the employer must keep records which “accurately report time worked.” If an employer does use a time clock, it can disregard early or late punches by employees who voluntarily arrive early or stay late, so long as the employees do not perform any work during those periods.

14. CAN I ROUND EMPLOYEE TIME?

- a. The Department of Labor and CWA allows rounding to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour, provided that it is used in such a manner that will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked. Rounding up and down need to occur equally over time so that the employee is not disadvantaged. Practices that only benefit the employer are improper.

15. DO I HAVE TO PAY FOR ALL TIME WORKED IF THE EMPLOYEE DOES NOT REPORT THAT TIME ON HIS/HER TIME CARD?

- a. If the employer knew or should have known that the employee worked the time, the employer must pay the employee, whether or not that time is more or less than what is reported on the time card. However, note that if you deviate from the time card, it may go to an inaccurate recordkeeping issue. It is the employer's burden to keep accurate records of time worked.

16. DO I HAVE TO PAY AN EMPLOYEE OVERTIME FOR WORKING ON A HOLIDAY, SATURDAY, OR SUNDAY?

- a. Under the FLSA, an employer is not required to pay the employee overtime, unless the hours worked are over 40 hours in a week. However, the employer may have to pay a different rate of pay if they have agreed to such a pay rate in a collective bargaining agreement.
- b. In Colorado, there is no obligation on private employers absent a contract. State employees who must work on legal holidays must get additional comp or another day off.

17. CAN I REDUCE AN EMPLOYEE'S WAGES OR SALARY WITHOUT NOTICE?

- a. Yes, an employer may reduce an employee's wages or salary without notice. The CWA and the FLSA do not contain any notice requirement.
- b. An employer may not reduce a non-exempt employee's hourly wage to circumvent the minimum wage and overtime requirements. An employer may also reduce an exempt employee's salary, but only if it is a permanent reduction and not because of a reduction in the quality or quantity of work.

18. IF AN EMPLOYEE WORKS 40 HOURS AND GETS 8 HOURS HOLIDAY PAY, DO I HAVE TO PAY OVERTIME FOR THE HOURS OVER 40?

- a. No. The employer must pay overtime only for actual hours worked.

19. DO I HAVE TO PAY OVERTIME FOR WORK OVER 8 HOURS PER DAY?

- a. The employer must pay overtime for only hours worked over 40 hours per week. The rule may be different if the employer has agreed to a different standard under a collective bargaining agreement.
- b. The CWO require overtime for work over 12 hours per day or over 12 consecutive hours.

20. IF AN EMPLOYEE WANTS TO WORK OVERTIME AND WILL ACCEPT STRAIGHT TIME, CAN HE/SHE WAIVE HIS/HER RIGHT TO OVERTIME PAY?

- a. No. An employee cannot waive his or her right to overtime.

21. CAN I GIVE EMPLOYEES COMPENSATORY TIME OFF RATHER THAN PAY OVERTIME?

- a. In the private sector, for non-exempt employees, it is impermissible to bank overtime to use as compensatory time.
- b. The use of compensatory time for non-exempt employees is not allowed for employers covered under the CWO.
- c. Compensatory time is permissible in the public sector, however. If the employee works in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time. If the employee works in any other kind of work, the employee engaged in such work may accrue not more than 240 hours of compensatory time. Any such employee who has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation. Such time is in addition to that employee's FMLA leave.

22. HOW LONG DO I HAVE TO KEEP MY WAGE AND HOUR RECORDS?

- a. The FLSA requires records be kept for three years, while Colorado requires only two years. However, it is a best practice to retain all records for three years, as the employer bears the burden of proving or rebutting accurate time records.

23. DO I HAVE TO PAY FOR WORK I DID NOT REQUEST?

- a. Maybe. The key concept is whether the employee was "suffered or permitted to work."

- b. An employer does not need to pay an employee for extra hours worked where the employer has a policy that prohibits unauthorized overtime and the employer neither knows of, nor consents to, the extra work hours. If the employer knows about the extra work time, even though the policy forbids it, the employer has to pay the employee for this time. An immediate supervisor's knowledge of overtime work can be imputed to the employer.
- c. The best way to protect against overtime liability is to have a policy against working unauthorized overtime and to enforce it. Thus, if an employee works unauthorized overtime, while you may still pay the employee, you may give the employee a warning and ultimately discharge the employee if he or she fails to abide by the policy.

24. WHAT MUST BE INCLUDED IN COMPUTING OVERTIME?

- a. The employee's regular rate of pay includes all things that might be wages. A good rule of thumb is to include anything that would be included on W-2 wages.
- b. There are a few statutory exclusions. For example, the regular rate of pay does include shift differentials, on call pay (even if the on call time is not working time), safety and attendance bonuses, production bonuses, commissions, and hazardous duty pay.
- c. Statutory exclusions include discretionary bonuses, holiday type bonuses, and contributions to bona fide benefit plans.

25. HOW IS OVERTIME COMPUTED FOR AN EMPLOYEE PERFORMING TWO OR MORE DIFFERENT TYPES OF WORK FOR WHICH DIFFERENT RATES ARE PAID?

- a. The employer should pay the employee either (1) a blended rate of the two hourly rates, or (2) by paying overtime at the rate the employee was working at the time the employee worked the overtime.

26. MAY AN EMPLOYEE ALSO BE A VOLUNTEER?

- a. Yes, but the employee must not be working in the same job, must not be working during the same hours, must not be coerced by the employer, should not displace another employee, should not be primarily for the employee's benefit (e.g. United Way Coordinator), and it should not involve a substantial amount of time.
- b. Individuals who volunteer or donate their services, usually on a part-time basis, for public service, religious or humanitarian objectives, not as employees and without contemplation of pay, are not considered

employees of the religious, charitable or similar non-profit organizations that receive their service.

- c. Under the FLSA, employees may not volunteer services to for-profit private sector employers.

27. IS TIME ON FAMILY AND MEDICAL LEAVE PAID OR UNPAID?

- a. Generally unpaid, but the employer cannot treat such employees less favorably than employees on other types of leave.

28. DO I HAVE TO PAY AN EMPLOYEE FOR DONNING AND DOFFING?

- a. Maybe. 29 U.S.C. § 203(o) states that when determining hours worked under the FLSA, an employer may exclude any time spent changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement.
- b. The 10th Circuit has ruled that the term “changing clothes” in § 203(o) is ambiguous. *Salazar v. Butterball, LLC*, 644 F.3d 1130, 1137 (10th Cir. 2011). The court went on to hold that “clothes” under § 203(o) includes personal protective equipment that is not “so cumbersome, heavy, complicated, or otherwise different in kind from traditional clothing that it should not be considered “clothes.” The unique PPE in *Salazar* consisted of mesh gloves, arm guards, and knife holders. The court reasoned these items are quite similar to ordinary gloves, sleeves, and belts or holsters.
- c. In an earlier case, *Reich v. IBP, Inc.*, 38 F.3d 1123, 1126 (10th Cir. 1994), the donning, doffing, and cleaning of special protective gear used by the knife-workers at a meat packing plant was found to be compensable. The court reasoned that because the items were heavy and cumbersome, and required physical exertion, time, and a modicum of concentration to put them on securely and properly, the protective gear was not “clothing.” Thus, in addition to being essential to their work, putting on the special protective equipment is work itself, and is compensable.
- d. Although putting on just one or two items of extra gear could be de minimis, the necessity to combine several items coupled with the need to regularly and thoroughly clean the equipment creates measurable additional working time. It is worth noting that the court stated that as little as ten minutes of working time goes beyond the level of de minimis and triggers the FLSA.
- e. The Wage and Hour Division has repeatedly shifted its position when asked to interpret the meaning of “changing clothes.”

- i. In 1997, it issued an opinion letter determining that “clothes” in § 203(o) did not encompass “protective safety equipment which is generally worn over ... apparel and may be cumbersome in nature.” *Wage and Hour Division, Opinion Letter Fair Labor Standards Act* dated Dec. 3, 2007, 1997 WL 998048.
- ii. The Division then reversed this position in 2002, determining upon “a reexamination of the statute and legislative history,” that “changing clothes” applies to “the putting on and taking off of the protective safety equipment typically worn in the meat packing industry....” *Wage and Hour Division, Opinion Letter Fair Labor Standards Act FLSA 2002–2* dated June 6, 2002, 2002 WL 33941766.
- iii. In 2010, the Division reverted to its previous interpretation and determined that § 203(o) “does not extend to protective equipment worn by employees that is required by law, by the employer, or due to the nature of the job.” *Wage and Hour Division, Opinion Letter Fair Labor Standards Act FLSA 2010–2* dated June 16, 2010, 2010 WL 2468195.

29. DO I HAVE TO PAY AN EMPLOYEE FOR TRAVEL TIME?

- a. Ordinary home to work travel is travel from the employee’s home before the regular workday and return travel to the employee’s home at the end of the workday. This travel is normally not counted as hours worked.
- b. Travel between job sites during the day is work time. If the employee is required to report to a meeting place to receive instructions, perform other work there, or to pick up equipment or tools, the travel from the designated meeting place to the work place is part of the day's work, and must be counted as hours worked. The same is true at the end of the day. If the employee is required to return to the employer’s office or job site, the travel time back to the office is counted as hours worked.
- c. Special rules apply when employees travel away from their home community. Travel for a special one day assignment in another city is not ordinary home-to-work travel. Because it is performed for the employer’s benefit and at the employer’s request, it is like travel that is all in the day's work. The normal home-to-work travel time may still be deducted.
- d. When an employee travels away from home and stays overnight, the travel time is worktime when it cuts across the employee's workday. The employee is simply substituting travel for other duties. The time is not only hours worked on regular working days during normal working hours but also during the corresponding hours on nonworking days.

30. IS ON CALL TIME COMPENSABLE?

- a. Maybe. In *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the United States Supreme Court classified an employee as either “engaged to wait” or “waiting to be engaged.” An employee who is required to stay very close to the workplace in time and distance, and has very little freedom to use the time as their own is “engaged to wait” and the time is classified as work time for compensation purposes. If the employee has only minimal restrictions on the use of their time while on call, and has a fair amount of time to respond to the call, they are “waiting to be engaged” and the on call time is not hours worked for compensation purposes.
- b. The following factors may be considered in making the determination whether on call time is compensable. All of these factors should be considered in conjunction with other relevant information in making the decision.
 - i. **GEOGRAPHIC OR RESPONSE TIME LIMITATIONS:** A narrow geographic restriction, or strict time limitations, may be indicative of an employee engaged to wait. For example, requiring an employee to remain close to the workplace, or requiring the employee to respond in 5 minutes, are indications that the employee may have been engaged to wait.
 - ii. **THE FREQUENCY OF THE EMPLOYEE’S CALL INS:** If an employee is required to respond to a call every time he or she is on duty, then the on call duty is more disruptive to nonworking time and is more indicative of an employee engaged to wait.
 - iii. **THE USE OF A PAGER OR CELL PHONE:** The widespread availability of cell phones and pagers has made it less likely that on call time will be considered working time, as the employee is not required to wait near a home phone or other specific location. Merely requiring an employee to carry a cell phone or wear a pager does not, in itself, make the time compensable.
- c. In *Knapp v. America West Airlines*, 207 F.App’x. 896, 899 (10th Cir. 2006), a pilot’s reserve time was not compensable even though she could not drink alcohol, she had to be available by and answer the telephone, and she had to be able to report to the airport within one hour of being called. She could be at home (or apparently anywhere else she was reachable by telephone), so long as she could answer a call and then report to the airport within one hour.
- d. Other FLSA cases in the 10th Circuit have presented similar, or even more restrictive, circumstances and the court has held that the employees’ activities were not so curtailed as to require the on-call time to be

considered compensable working time. *See Andrews v. Town of Skiatook*, 123 F.3d 1327, 1329-30, 1332 (10th Cir. 1997) (involving restrictions such as constant availability by pager, clean and appropriate dress, inability to drink alcohol, and ability to be in the ambulance responding to a call within five to ten minutes); *Armitage v. City of Emporia*, 982 F.2d 430, 432-33 (10th Cir. 1992) (involving requirements that detectives on call remained sober, could be reached by beeper, and could report to duty within twenty minutes); *Norton v. Worthen Van Serv., Inc.*, 839 F.2d 653, 654-56 (10th Cir. 1988) (involving requirement that drivers be able to report to facility within twenty minutes).

- e. Only two 10th Circuit cases have found on call time compensable. Both cases involved a high frequency of call-ins. In *Renfro v. City of Emporia*, 948 F.2d 1529, 1535 (10th Cir. 1991), firefighters had as many as 13 call ins per 24 hour on call period and were subject to discipline if they did not respond in 20 minutes. In *Pabst v. Oklahoma Gas & Elec. Co.*, 228 F.3d 1128, 1131 (10th Cir. 2000), security guards responded to three to five alarms nightly and were on call twenty four hours a day.