Jonathan J. Downes

- More than thirty years of experience and expertise in representing public and private employers in all aspects of labor and employment law and human resource management.
- Negotiated over 500 labor contracts.
- Represented employers in arbitrations, organizing campaigns, and administrative hearings.
- Defends employers in state trial and appellate courts, the Ohio Supreme Court, federal district courts and the United States Court of Appeals for the Sixth Circuit.
- AV Preeminent rated by Martindale Hubbell.
- Fellow in the College of Labor and Employment Lawyers.
- Recognized many times over as a subject-matter expert, Jonathan was selected as one of the Top 50 Central Ohio Lawyers of 2015 and every year since 2004 has been named an Ohio “Super Lawyer”.

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Zashin & Rich Co., L.P.A. ("Z&R") specializes in labor and employment law with offices in Cleveland and Columbus, representing both private and public employers. Members of Z&R have diverse backgrounds and experience which provides depth and understanding of the needs of its clients.

Z&R represents its clients with broad experience in labor negotiations, human resources matters, and civil service. Attorneys of Z&R have collectively negotiated over 1000 contracts and have represented private and public employers in numerous arbitrations, impasse proceedings and in litigation. Attorneys have extensive experience representing private employers, universities and colleges, state agencies, special districts, cities, counties, townships, housing authorities, hospitals and others. Attorneys handle matters at arbitrations, the National Labor Relations Board, the State Employment Relations Board as well as the State Personnel Board of Review, and local civil service commissions.
About Zashin and Rich...con’t

• Z&R representation includes all federal and state discrimination laws, administrative and court proceedings, employee handbooks and manuals, contract administration, strike situations, grievances and arbitration, discipline matters, public pension systems and workers’ compensation. Attorneys in the firm have extensive knowledge and experience, both in litigation and providing advice, with various federal laws including FMLA, FLSA, ADA and Title VII Civil Rights. The firm has an extensive insurance defense practice representing several national insurance companies including Chubb, Travelers, AIG, Pools, PERSO and PEP among others. The firm represents clients before the EEOC, OCRC and in state and federal courts in all parts of Ohio.

• The firm's Labor & Employment Group has received First Tier ranking in Employment Law-Management in the Cleveland Region and Labor Law-Management in both the Cleveland and Columbus Regions by U.S. News Best Lawyers® “Best Law Firms” in 2014 and 2015.
FLSA Updates and Proposed Changes

• Brief background of FLSA
• Proposed changes to overtime exemptions released by DOL
• Overview of the overtime exemptions - duty tests
• Improper deductions
• Meaning of “hours worked” or compensable time
• Off-duty work – suffer to work – working off the clock
• Travel time
• Meal and Lunch Breaks
• Compensatory Time for Public employees
• Rules for fire protection and law enforcement employees
The proposed rules also include a mechanism that would automatically update and increase the salary thresholds annually.

The proposed rule would affect an estimated 11 million salaried employees in the public and private sectors.

Impact for businesses with “independent contractors”
Fair Labor Standards Act

Final New Deal law    Enacted in 1938    29 U.S.C. 201, et seq

Purpose: Incentivize creation of new jobs and alleviate oppressive work conditions such as long workdays and weeks

Key Requirements:
- minimum wage
- standard work week
- required overtime pay
- regulated use of child labor
- required employers to maintain records
Coverage

Enterprises or businesses with 2 or more employees  With either

- total sales volume of $500,000 ($150,000 under Ohio law)  or
- hospitals, businesses providing medical care  or
- individuals engaged in interstate commerce
Fair Labor Standards Act

• “Public Agencies” are employers under FLSA
  (Garcia vs. San Antonio, US Supreme Court)
  ○ The federal government
  ○ State governments
  ○ Subdivisions of state governments, including local government
  ○ Federal, state, and local agencies
  ○ Interstate government agencies
Salary Test: Current Thresholds

• White-Collar Employees must earn a fixed salary of $455 per week ($23,660 per year).
• Highly-Compensated Employees must earn a minimum fixed salary of $100,000 per year.

Salary Test: Proposed Changes

• White-Collar Employees would have to earn a fixed salary of $921 per week ($47,892 per year).
• Highly-Compensated Employees would have to earn a minimum of $122,148 per year.
• The proposed changes include annual updates to the threshold requirements to tie them to the 40th percentile of earnings for full-time salaried workers.
Exemptions from Change in Salary

Exempt from proposed change to salary threshold

Lawyers and doctors in the bona fide practice of law or medicine

Teachers if primary duty is teaching, tutoring, instruction, lecturing
Courses of Action

- Do nothing and wait for the lawsuit
- Conduct an audit of positions to determine status
- Review the wage or salary
- Determine the economic impact
- Determine human resource impact
- Review policies for compliance
Options

• Raise affected employees’ salaries above the new salary thresholds provided those employees actually meet the duties requirements.

• Restrict the employees from working overtime and enforce that restriction, thus avoiding issues related to overtime pay.

• Require these employees to submit time cards with actual hours worked, retain these records.
Options

• Convert the employees from salary to an hourly rate and compensate the employees at one-and-a-half times the regular rate for all hours worked in excess of 40 hours per week. The hourly rate may not be the same as the regular rate if the employee receives any other forms of remuneration.

• Continue to pay the employees a salary, either at their existing rate or a reduced rate, pay overtime for time worked in excess of 40 hours per week at one-and-one-half times the employee’s regular rate. (calculations)
Employees with fluctuating work week

This is a safe harbor provision in the FLSA that requires careful calculation and clear mutual understandings with employees. This provision allows the payment of a regular salary with fluctuating work weeks. Overtime must still be paid.
Overtime Exempt Employees

Qualifying Employees as Overtime Exempt

• White-Collar Employees must meet the salary and duties requirements to be considered exempt as Executive, Administrative, or Professional employees.

• Highly-Compensated employees must meet the salary requirement and a duties test.

• Computer Employees must meet the salary requirements and a duties test.

• Currently no proposed minimum time
Salary Test for Exempt Positions

The salary must be fixed, paid for the full week in which work is performed, not subject to deductions based on the quality or quantity of the employee’s work.
Salary Reductions

Generally there is not “pay docking” for exempt employees. **Permitted deductions include:**

- Public employers may make partial day deductions for absences.
- Offset payment for jury or military duty
- Pro-rating full salary in first and last week of employment
- Intermittent unpaid leave taken pursuant to FMLA
- Discipline for one or more days, good faith, work related
- Major rule violations, safety violations
White-Collar Exemptions: Executive Employees

Executive Employees Duty Test:

• Primary duty must be the management of the enterprise or management of a customarily recognized department or subdivision of the enterprise **AND**

• Customarily and regularly direct the work of at least two other full-time employees or several part-time employees working hours equal to two full-time employees.

• Have the power and authority to hire and fire employees, or make suggestions and recommendations regarding the hiring, firing, advancement, promotions, or other changes of status of other employees is given particular weight: “Effectively recommend.”
White-Collar Exemptions:
Executive Employees

Management of the enterprise example duties:

• Interview, select, train, evaluate, discipline, apportion work, safety employees
• Set and adjust employees’ pay and hours
• Direct/plan the work of employees
• Handle employee complaints
• Control flow/distribution of materials, etc.
White-Collar Exemptions: Executive Employees

Example:

A police Captain oversees the department’s Investigation Division. The Captain meets the salary requirements. As part of his duties, he directs the work of a dozen subordinates, including sergeants and lieutenants, and he makes recommendations on hiring and firing of employees in his division. Sometimes the Captain engages in the same duties as his subordinates, such as briefing the department on leads and occasionally overseeing investigations in the field – tasks that he sometimes assigns to a lieutenant or sergeant. Does the Captain meet the duties test even though his duties sometimes overlap with those of subordinates?
White-Collar Exemptions: Executive Employees

Answer:

Yes, the Captain meets the duties requirements. It does not matter that some of his duties overlap with subordinates’ duties because he manages a subdivision, directs the work of at least two other full-time employees, and has the power and authority to make recommendations on hiring and firing and other career moves.
White-Collar Exemptions: Administrative Employees

Administrative Employee Duty Test

• Primary duty must consist of non-manual or office work directly related to the management or general business operations – in other words, work directly related to the running or servicing of the business. (Does not include “routine” administrative functions.)

AND

• Primary duty must include the “exercise of discretion and independent judgment” with respect to matters of significance or make recommendations for action to someone of a higher level.

• Substantial importance, high level skill or training
Administrative Exemption

Administrative Employee Duty Test:

• Authority to waive or deviate from established policies and procedures without approval.

• Carries out major assignments in conducting the operations of the business.

• Performs work that affects business operations to a substantial degree.

• Has authority to commit the company in matters that have significant financial impact.
Administrative Exemption

Administrative Employee Duty Test:

• Has authority to formulate, affect interpret or implement management policies or operation practices.
• Provides consultation or expert advice to management.
• Is involved in planning long or short term business objectives.
• Investigates and resolves matters of significance on behalf of management.
• Represents company in handling complaints, arbitrating disputes or resolving grievances.
White-Collar Exemptions: Administrative Employees

- Tax
- Finance
- Accounting
- Budgeting
- Auditing
- Marketing
- Insurance
- Quality Control
- Advertising Research
- Some School Administration
- Safety and Health
- Personnel Management
- Human Resources
- Labor Relations
- Employee Benefits
- Computer Network
- Legal and Regulatory Compliance
- Internet and Database Administration
White-Collar Exemptions: Administrative Employees

Example:

A Marine Superintendent is employed by a State environmental agency, and she meets the salary requirements. Her duties include observation of oil transfers to ensure accuracy, legality, and safety; monitoring loading and unloading of cargo and reporting errors; monitoring and reporting on transfer compliance with safety policies and standards; quality control; and overseeing independent inspectors. She generally works in the field, often outdoors around major oil drilling equipment. Is she exempt?
White-Collar Exemptions: Administrative Employees

**Answer:**

Yes, the Marine Superintendent is exempt from overtime requirements. Even though she does not work in an office setting, her duties to oversee quality control and legal and safety compliance are considered administrative.
White-Collar Exemptions: Professional Employees

Professional Employees Duties Test:

• Employee’s primary duties must require knowledge of an advanced type in a field of science or learning customarily required by a prolonged course of specialized intellectual instruction ("Learned Professional") and may be acquired combination of intellectual instruction and work experience

  OR

• Employee’s primary duty requires invention, imagination, originality, or talent in an recognized field of artistic or creative endeavor ("Creative Professional")
White-Collar Exemptions: Professional Employees

Professional Employees Duties Test

• Work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgement.

• Must be paid on a salary or fee basis
White-Collar Exemptions: Professional Employees

Professional Employees Exceptions:

• **Doctors and Lawyers** - exempt so long as their primary duties are within the practice of medicine or law.

• **Teachers** - exempt if their primary duty is teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge.

• Do **not** have to meet the salary requirements.
White-Collar Exemptions: Professional Employees

Example 1:

A Mechanical Engineer works for the City’s public works department, and he earns a salary of $80,000 per year. His has over 25 years of on-the-job experience in mechanical engineering, belongs to the American Academy of Mechanical Engineers, and has taken several college-level courses in engineering (though he does not have a college degree). Some of his peers have college degrees in engineering, and some have high school degrees. Does he qualify?
White-Collar Exemptions: Professional Employees

Answer:

No, the Mechanical Engineer does not meet the Learned Professional Employee qualifications. Even though he has extensive knowledge of engineering gained through on-the-job experience, his duties do not require a degree typically acquired by a course of advanced intellectual instruction.
White-Collar Exemptions: Professional Employees

Example 2:

A Painter works for a major City’s public art works branch. He meets the salary requirements. He has obtained undergraduate and masters degrees in the fine arts. He designs murals to paint on walls throughout the City as part of a beautification project, with some input from the City as to the subject of the painting. Does he qualify?
Answer:

Yes, the painter qualifies for the Creative Professional exemption. He duties require invention, imagination, and originality. Painters generally qualify if at most they are given the subject matter of a painting.
Highly-Compensated Employees

Salary Test: Highly-Compensated Employees must earn a minimum fixed salary of $100,000 ($122,148) per year.

Duties Test:

• Primary duty must include performing office or non-manual work.

• Customarily and regularly perform at least one of the exempt duties or responsibilities of an exempt executive, administrative, or professional employee.
Highly-Compensated Employees

Example:

The Assistant City Manager in a major City earns a salary of $125,000 per year. He answers to the City Manager, who sets policy and assigns tasks for the department. The Assistant City Manager directs the work of two full-time staffers who work in the department. Does he qualify?
Highly-Compensated Employees

Answer:

Yes, the Assistant City Manager qualifies for the highly-compensated employee exemption. Although he does not meet all of the duties of a Executive employee, he does meet one because he directs the work of two full-time employees.
Salary Test:

Computer employees must earn a fixed salary of $455 per week, or an hourly rate of at least $27.63.
Duties Test: The employee must perform one of the following

• The application of systems analysis techniques and procedures, including consulting with users to determine hardware, software, or system functional specifications;

• The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

• The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

• A combination of these duties, the performance of which requires the same level of skill.
Example:

An employee in the City courthouse works at the Help Desk, where he meets the salary requirement. He provides assistance to courthouse employees with computer or other IT questions, sets up AV equipment for use during trials, and sets up computers and software for new employees. Does he qualify?
Answer:

No, the Help Desk employee does not qualify. He is not engaging in any of the required duties for the Computer Employee Exemption. While a manager of the Help Desk may qualify for the exemption if he engages in systems analysis or programming, many IT employees do not meet the duties test.
Compensable Time for Employees

• After determining whether an employee is owed overtime, the employer must determine what counts as work, what kind of work qualifies for overtime compensation, and how to pay it.

• Generally, employees must be paid for all time when they are required to be on the employer’s premises, on duty, or at a proscribed work place. Of course, there are exceptions and exemptions.

• Hours "actually worked."
Compensable Time (time worked):

• Waiting Time: If the employee is “engaged to wait.”
• On-Call Time: If the employee must remain on the employer’s premises while on-call, or if there are additional restraints on the employee’s freedom.
• Rest and Meal Breaks: Short breaks of generally 20 min or less are compensable.
• Sleeping Time: Employees who are on duty for less than 24 hours are working even if permitted to sleep or engage in personal activities when not busy. Employees on duty for 24 hours or more may agree with the employer to exclude regularly scheduled sleeping periods of 8 hours or less from compensable time, so long as facilities are furnished by the employer and 5 hours of sleeping occurs.
Compensable Time for Employees

Time Not Compensable (non work time):

• **Waiting**: If the employee is “waiting to be engaged.”

• **On-Call**: If the employee may leave the premises, be at home, or leave contact information where they may be reached.

• **Rest and Meal Breaks**: Bona fide meal periods, generally 30 minutes or longer, if the employee is completely relieved of duties and may leave his or her post.

• **Sleeping Time**: If employees on duty for 24 hours or longer agree with the employer to exclude bona fide sleeping periods of 8 hours or less.
Compensable Time for Employees

Compensable Time:

• Preliminary or Postliminary Time: Only if integral and indispensable to a principal activity.

• Donning and Doffing Time: Depending on whether the activity is integral and indispensable to a principal activity (e.g. putting on protective gear).

• Training: Generally, time spent at employer-sponsored lectures, meetings, and training programs is compensable.
Compensable Time for Employees

Not Compensable:

- Preliminary and Postliminary Time: Generally not compensable.
- *De Minimis* Time: Insignificant and infrequent amounts of time spent before or after the working duties.
- Donning and Doffing: If not considered integral and indispensable to the principal activity.
- Training: Attendance is outside of normal working hours, is voluntary, not directly related to the employee’s job, and employee cannot perform productive work there.
Compensable Time for Employees

Case Update – doffing and donning uniforms:

- **Sandifer v. U.S. Steel**: In this case, the Supreme Court determined that employers and unions may agree that time spent donning and doffing protective clothing is not compensable. The Court also adopted a plain meaning interpretation of the word “clothes,” finding that it includes protective gear worn as clothes, but not tools or equipment attached to clothes.
Case Update - Union CBA, doffing & donning:

- *Mitchell, et al. v. JCG Industries & Koch Foods, Inc.*: In this case, the Seventh Circuit found that an employer and union may agree in a collective bargaining agreement that time spent “donning and doffing” at the beginning and end of a bona fide lunch break is not compensable.
Case Updates – Lunch breaks:

- *Ruffin v. MotorCity Casino*: Recently, the Sixth Circuit considered the question of whether casino guards’ 30 minute lunch break is non-compensable when the employer requires the guards to carry their radios and listen for emergency codes during that time. The Court decided that the lunch break is still non-compensable because the guards may eat, drink, socialize, and leave their posts during the break.
Case Updates – Security screening:

• *Integrity Staffing Solutions v. Busk*: The Supreme Court recently found that time spent by employees undergoing security screening on the premises of the employer is not compensable, even when it takes 25 minutes per day, because it is preliminary or postliminary to primary activities.
Off-Duty Working

In its Spring 2015 regulatory agenda, the DOL indicated that it will be seeking information on how smart phone use affects hours worked under the FLSA. This may lead to more formal rulemaking from the DOL concerning employee use of smart phones (and other electronic devices) while off-the-clock.
Off-Duty Working - 24/7 Workers

24/7 workers present challenges under FLSA

- Electronic devices, texts, emails, documents, projects
- Clients, customers, managers, time-zone differences
- Control and liability issues, e.g. W.C.
- De minimis time challenges
- Is the response required?
Off-Duty Working

Some best practices concerning employee use of smart phones for work while off-duty:

• Restrict the network to prevent remote access from non-exempt employees
• Remind employees of policies against performing unauthorized work and off-the-clock work
• Suspend email or remote access privileges for employees who do violate unauthorized work policies
• Monitor employees’ use of email, smart phones, and the network (unless prohibited by a collective bargaining agreement)
• Consider ways to track employees’ off-duty time spent on smart phones or otherwise working
“Working Off the Clock”

- Employees must be paid if the employer “knows or has reason to believe” that work is being performed.
- Test: “suffer or permit to work”.
- Employees engaged in unauthorized work can be disciplined up to and including discharge even if they have to be paid.
- “In all such cases, it is the duty of management to exercise its control and see that the work is not to be performed if it does not want it to be performed.”
Bartlett v. City of Chicago  Case 1:10-cv-03183

Plaintiffs failed to meet burden of showing that they were not compensated for work performed on the BlackBerry devices while off duty as a result of an unwritten policy of the City of Chicago to deny compensation for that work, or that the City suffered or permitted that work to be performed without compensation. Decided 12-10-2015
Case Update:

• *Allen v. City of Chicago*: In a second police-overtime case in the Northern District of Illinois that recently went to trial, a class of Chicago police officers in the Bureau of Organized Crime seek overtime pay for time spent emailing and otherwise attending to messages sent via Blackberry smartphones. At issues is an “unwritten” policy requiring officers to be reachable by their mobile device even when off duty, with some officers testifying to receiving up to 100 emails per day.
When is it Compensable?

• Traveling to and from work:
  – When the employee is required to report to a meeting place and then travel to another work location
  – When the employee works while commuting
  – When the employee must pick up other employees before reporting to work and drive them to work
  – When the employer required the employee to return to work for an emergency call-back, and the employee must travel a significant distance back
Travel Time

When is it Compensable?

• Travel for one-day or overnight trips:

  When the employee travels to another city on a one-day assignment or when the employee stays overnight
  The employer may deduct from the travel time the amount of time it normally takes an employee to get to and returns from work.

  The employer may deduct the time it takes for an employee to get to an airport, bus station, or train station if the employee is traveling that way.
Meal and Rest Break

• Not required to provide meal or rest breaks.

• Rest breaks of 5 to 20 minutes must be paid.

• Lunch breaks of 30 minutes are ordinarily not compensable.
Compensatory Time

• State or local government employees may receive comp time for overtime work, at a rate of one-and-a-half hours for each hour of overtime worked in lieu of cash overtime pay.

• Generally, public employees may accrue up to 240 hours of comp time.

• Law enforcement, fire protection, emergency response personnel, and employees engaged in seasonal work may accrue up to 480 hours of comp time.

• Employees must be allowed to use the comp time on the date requested unless doing so would “unduly disrupt” the operations of the agency.
While generally, employers must pay overtime for work in excess of 40 hours actually worked per week, different rules apply to firefighters and law enforcement employees.
Fire Protection Employees:

- Includes firefighters, paramedics, emergency medical technicians, rescue workers, ambulance personnel, and hazardous material workers.
- Must be paid overtime for time actually worked in excess of 106 hours in a 14-day period (or as proportionate to the established work period).
Law Enforcement Employees:

• Includes employees who:
  – Are empowered by state and local ordinance to enforce laws designed to maintain peace and order, protect life and property, and prevent and detect crime
  – Have the power to arrest
  – Have undergone training in law enforcement

• Must be compensated for time actually worked in excess of 171 hours in a 28 day period (proportioned to the established work period)
Section 207(k):

• Allows public agencies to calculate overtime based on an established work period lasting 7 to 28 days (as opposed to a week) for employees in fire protection and law enforcement.

• A work period is any “established and regularly occurring period of work.”
Case Updates:

Rosano v. Township of Teaneck

The Court considered whether the township owed police officers compensation for overtime, time spent in muster, and time spent donning and doffing uniforms based on the officers’ argument that the township had not properly established a work period.

The Court found township had established a work period and that the police officers failed to adequately establish damages by refuting the township’s official time records.

Court also found that the collective bargaining agreement included compensation for muster time in officers’ base salaries and excluded donning and doffing from compensable time.
Case Update:

*Watkins v. City of Montgomery, Alabama*

54 fire suppression lieutenants sought overtime compensation, arguing that they were not exempt employees because of the city’s deductions from their salaries. The 11th Circuit found that the City’s deductions were for violations of safety rules or major workplace conduct rules, so the fire department lieutenants still met the salary test.
Fire Protection & Law Enforcement

Case Update:

*Misewicz v. City of Memphis, Tennessee*

The City of Memphis requires all firefighters to be trained paramedics. A group of paramedics sought overtime compensation for time spent in training. The 6th Circuit found that the training met the exception for it to be non-compensable time because it was required by law within the jurisdiction.

The 6th Circuit rejected the argument that non-compensable training must meet the requirements of both exceptions for public agencies.
Additional Issues

- Independent contractor vs. Employee
- Joint Employer
- Record keeping
- Improper deductions
- Volunteering time
- Damages and attorneys fees
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THANK YOU!

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