

More Great Events And Training For Members!



The Manufacturers' Association

- **10/20/20: Wake-Up to Manufacturing: Employee Injuries and Disabilities –Free for members!**
- **10/27/20: The Leadership Accountability Workshop!**
- **11/10/20: Wake-Up to Manufacturing: Employment Law Update, What You May Have Missed While Trying to Forget 2020- Free for members!**

Did You Know?

The Manufacturers' Association runs the largest (and best) Apprenticeship Program in South Central PA? With 7 registered trades, 40 member companies and nearly 100 apprentices, we're your one stop shop for Mechatronics, Robotics, Machinist, Tool and Die Makers, Quality Technicians, IMT and Maintenance Mechanics!

COVID-19 Update

Manufacturers' Association Webinar

October 15th, 2020



www.mascpa.org
(717) 843-3891

Mfgs. COVID-19 Update – HR and Legal

Speakers Panel

- John C. Porter, Esq.– *Griffith, Lerman, Lutz & Scheib*
- Vicki Krotzer, PHR, SHRM-CP, HR Consultant – *The Manufacturers' Association*
- Becky Becker (Stauffer), SPHR, SHRM-SCP, HR Consultant – *The Manufacturers' Association*

Moderator: Brian Paterniti, Training & HR Guy



Mfgs. COVID-19 Update

AGENDA

- I. Legal Update, Revised Regulations For Employee Paid Leave Under The FFCRA From The DOL
- II. What's Being Litigated Since Covid-19?
- III. New PA Exempt Rules

Q&A



Coronavirus Legal Update –

John C. Porter, Esquire

In Conjunction with the Manufacturers' Association



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Coronavirus Legal Update –

REVISED REGULATIONS FOR EMPLOYEE PAID
LEAVE UNDER THE FFCRA FROM THE DOL



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• Families First Coronavirus Response Act – A Refresher

- **Emergency FMLA Expansion Act . . . expires 12/31/20**
- **Emergency Paid Sick Leave Act . . . expires 12/31/20**



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• Families First Coronavirus Response Act – A Refresher

- Emergency FMLA Expansion Act

The employee is unable to work (or telework) due to a need for leave to care for the employee's minor child:

- * If the school or place of care has been closed or
- * The child care provider is unavailable, due to a public health emergency



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• Families First Coronavirus Response Act – A Refresher

- Emergency Paid Sick Leave Act

Unable to work or telework due to:

1. a governmental quarantine or isolation order
2. advice of a health care provider to self-quarantine
3. symptoms of Covid-19 and is seeking a medical diagnosis
4. caring for an individual subject to a governmental quarantine or isolation order
5. caring for a son or daughter when school/place of care is closed, or the child care provider is unavailable
6. other similar condition specified by the Secretary of Health and Human Services



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DOL'S REVISED REGULATIONS

KEY DATES

- March 18, 2020 the Families First Coronavirus Response Act is signed into law
 - The law permits two exceptions to the Administrative Procedures Act
 - Regulations may be issued without prior public notice or public comment if there is good cause
 - Regulations thus issued may become effective immediately
- August 3, 2020, the Federal Court in the Southern District of New York ruled that four parts of the regulations are invalid
- September 16, 2020 the Secretary of Labor issues revised Regulations effective that date

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DOL'S REVISED REGULATIONS

FIVE KEY REVISIONS OR REAFFIRMATIONS

1. Reaffirms that EPSL and EFML may only be taken when the employee has work from which to take leave
2. Reaffirms that where intermittent leave is permitted, the employee must obtain employer approval
3. Further clarifies the definition of the term “health care provider”
4. Revises information that an employee must provide to the employer to support a leave request
5. Revises when an employee must notify the employer that leave is being taken



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DOL'S REVISED REGULATIONS

1. REAFFIRMS THAT EPSL AND EFML MAY ONLY BE TAKEN WHEN THE EMPLOYEE HAS WORK FROM WHICH TO TAKE LEAVE

- The qualifying reason for the FFCRA leave must be the actual reason the employee cannot work
- This is a “but for” causation standard
- The employer must have work for the employee
- “But for” the qualifying reason under the FFCRA, the employee would be able to work

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DOL'S REVISED REGULATIONS

2. REAFFIRMS THAT WHERE INTERMITTENT LEAVE IS PERMITTED, THE EMPLOYEE MUST OBTAIN EMPLOYER APPROVAL

- Intermittent leave that is taken in separate blocks of time due to a single qualifying reason
- This is only available when caring for one's son or daughter whose school, place of care, or child care provider is closed or unavailable
- Intermittent includes leave for hours, days, or weeks
- DOES NOT INCLUDE when school is operating on alternate days or other hybrid-attendance basis

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DOL'S REVISED REGULATIONS

4. REVISES INFORMATION THAT AN EMPLOYEE MUST PROVIDE TO THE EMPLOYER TO SUPPORT A LEAVE REQUEST

- Employee's name
- Dates for which leave is requested
- Qualifying reason for leave – this is the “but for” causation
- Oral or written statement that the employee is unable to work – this is the “but for” causation
- Additional information may be required

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DOL'S REVISED REGULATIONS

5. REVISES WHEN AN EMPLOYEE MUST NOTIFY THE EMPLOYER THAT LEAVE IS BEING TAKEN

- An employee **should** notify the employer of the need for leave “as soon as practicable”



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• Back To School

Department of Labor FAQ - Answer

The Department encourages employers to permit employees to take **Intermittent** Expanded Family and Medical Leave. Intermittent Expanded Family and Medical Leave is not required, but may be offered to employees.

This is true whether teleworking or not teleworking.

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#22>
<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#20>



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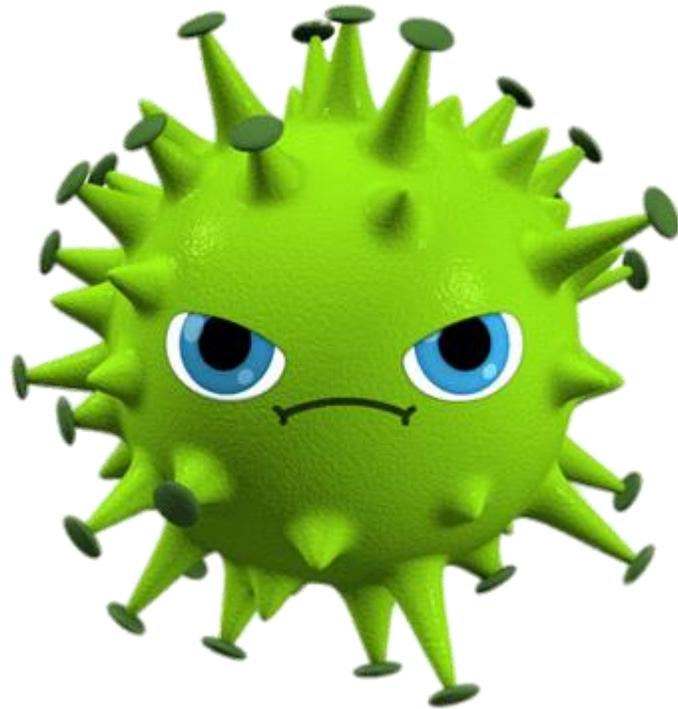
thank you!



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What's being litigated since COVID-19?



U.S. DEPARTMENT OF LABOR'S OSHA ANNOUNCES \$913,133 IN CORONAVIRUS VIOLATIONS

Since the start of the coronavirus pandemic through Oct. 1, 2020, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) has cited 62 establishments for violations, resulting in proposed penalties totaling \$913,133

OSHA inspections have resulted in the agency citing employers for violations, including failures to:

- Implement a written respiratory protection program;
- Provide a medical evaluation, respirator fit test, training on the proper use of a respirator and personal protective equipment;
- Failing to protect employees from COVID-19 – providing PPE and social distancing (under general duty clause)
- Report an injury, illness or fatality;
- Record an injury or illness on OSHA recordkeeping forms; and
- Failure to conduct respirator fit testing, effective training and compliant medical evaluations

OSHA has already announced citations relating to 37 establishments. In addition to those establishments, the 25 establishments below have received coronavirus-related citations totaling \$429,064 from OSHA

U.S. DEPARTMENT OF LABOR CITES SMITHFIELD PACKAGED MEATS CORP. FOR FAILING TO PROTECT EMPLOYEES FROM CORONAVIRUS

- ▶ OSHA cited Smithfield Packaged Meats Corp. in Sioux Falls, South Dakota, for failing to protect employees from exposure to the coronavirus. OSHA proposed a penalty of \$13,494, the maximum allowed by law.
- ▶ Based on a coronavirus-related inspection, OSHA cited the company for one violation of the general duty clause for failing to provide a workplace free from recognized hazards that can cause death or serious harm
- ▶ At least 1,294 Smithfield workers contracted coronavirus, and four employees died from the virus in the spring of 2020

- ▶ 39% of whistleblower complaints filed from February 2020 through May 2020 (approximately 1,600) were directly related to COVID-19
- ▶ These complaints included allegations of retaliation for claiming violations of social distancing guidelines and failure to provide personal protective equipment



Compensation and Schedule Changes - The COVID-19 pandemic caused financial difficulties for many businesses. Employers may need to consider reductions in compensation and hours of work for employees

Before implementing any compensation or schedule changes, employers should consider:

- Whether the employee is exempt or nonexempt from overtime so that any such changes comply with FLSA and other state or local wage-and-hour laws,
- Whether the employee has an employment agreement or is covered by a collective bargaining agreement (CBA) that restricts the employer from implementing any changes;
- Whether any company policy relates to the proposed changes in compensation or hours of work; During the COVID-19 global pandemic, businesses needed to react quickly to shutdown orders, quarantines and new safety requirements.
- Conducting a discrimination analysis to avoid discrimination/disparate impact issues; and
- Providing written notice of any compensation or schedule changes consistent with applicable law or any applicable agreement, including a CBA

Do's and Don'ts With Employees

- ▶ Can onsite employees be questioned about witnessed symptoms associated with COVID-19?

In the case of an employee having a persistent cough or difficulty breathing in the presence of other employees, it is compliant to:

- Address the coughing or breathing struggles directly
- Ask whether the employee has been to a doctor
- Ask whether the employee knows if she has or might have COVID-19

**This is now permissible because coughing is a primary symptom of someone who has contracted COVID-19. The fatal risks associated with it spreading to more members of your workforce make addressing and removing the risk the priority.



Creating a legally sound Remote Work Policy

In response to COVID-19, most companies are implementing work-from-home arrangements for their employees so they can keep things running. Along with all the cautions about online scams and email phishing, another pitfall awaits.

It's possible that without a legally sound remote work policy, your efforts can unexpectedly create big legal problems for you. Having a sound work-from-home policy keeps employees on track while working offsite and will also help avoid potential legal problems that can arise from remote work.

- ▶ **Can absent employees, or those working remotely, be asked if they have COVID-19 or know someone who has?**

Since these employees are not physically interacting with co-workers or worksite equipment, it is best to avoid these questions. Until an employee is returned to a worksite or interacting with other employees, they are entitled to the privacy rights and protections from before the pandemic. That said, consider distributing a policy update to your employees, including: the requirements for working onsite, what to expect if an employee presents symptoms, and the process surrounding temperature checks, questionnaires, and other necessary precautions.



▶ Can I ask employees about travel plans and possible family exposure?

It's best to avoid asking about an employee's family. The Genetic Information Nondiscrimination Act (GINA) prohibits employers from requesting the medical information or history of employees' family members. That said, you can implement a policy of having employees work remotely after traveling to high risk areas, so long as such a practice is applied uniformly and consistently throughout your organization.

*Do not ask an employee to be tested unless you have communicated your protocol to test individuals to all employees, after traveling.



► **Is COVID-19 recognized as a disability under the Americans with Disabilities Act?**

According to the EEOC, it is unclear whether COVID-19 is or could be considered a disability under the ADA. Regardless, it is considered a direct threat, so employers are permitted to bar an employee with the virus from entering the workplace.



▶ Can “high-risk” employees be asked to stay home or accept furlough?

It's best to refrain from requiring specific groups of individuals to forgo work or from being on site as it could be received as discriminatory. Under federal law, employers cannot target employees over 65 or pregnant employees for furlough or layoff based on their “at risk” status. That said, you are permitted and encouraged to allow employees over 65 or who are pregnant to work from home so long as the rest of your employees can do so as well.



► Can you request that employees refrain from traveling?

No, you cannot prohibit employees from traveling on their personal time, regardless of location or capacity. That said, you can ask your employees where they intend to travel to or where they have been visiting - especially because travel increases exposure risks exponentially during a pandemic. Since the U.S. Equal Employment Opportunity Commission remains in full effect, take extreme care with your word choice during these types of conversations. Consider creating a temporary or interim policy on how travel will affect employees' return to work. That way, your workforce knows exactly what to expect.



▶ Does disclosing information about infected employees violate confidentiality under the ADA?

Although you can inform your workforce that another employee has contracted COVID-19, do not share the identity of the employee to any unnecessary individuals. Widespread disclosure of an employee's identity risks direct non-compliance with the ADA. You are not obligated to share that a worker is on medical leave or working from home due to coronavirus. Even if employees figure out who it is due to being a smaller operation, you are still prohibited from confirming or revealing the employee's identity.



QUESTIONS ? ? ?



New Pennsylvania Exempt Rules

Becky Becker, MPA, SPHR, SCP



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PENNSYLVANIA**

No statutes or acts will be
found at this website.

The *Pennsylvania Bulletin*
website includes the following:
Rulemakings by State
agencies; Proposed
Rulemakings by State
agencies; State agency notices;
the Governor's Proclamations
and Executive Orders; Actions
by the General Assembly; and
Statewide and local court rules.

RULES AND REGULATIONS

Title 34—LABOR AND INDUSTRY

DEPARTMENT OF LABOR AND INDUSTRY

[34 PA. CODE CH. 231]

Minimum Wage

[50 Pa.B. 5459]

[Saturday, October 3, 2020]

The Department of Labor and Industry (Department) amends Chapter 231 (relating to minimum wage). The amendments are submitted in accordance with sections 5(a)(5) and 9 of The Minimum Wage Act of 1968 (act), (43 P.S. §§ 333.105(a)(5) and 333.109), for the purpose of carrying out the act and to safeguard the minimum wage rates established thereby.

Statutory Authority

This final-form rulemaking is issued under the authority provided in section 5(a) of the act, which requires the Secretary of Labor and Industry (Secretary) to define the terms "bona fide executive", "administrative" and "professionals", and section 9 of the act, which requires the Secretary to enforce the act and to

Pennsylvania EXEMPTIONS

Salary Test

Pay Correctly

Duties Test



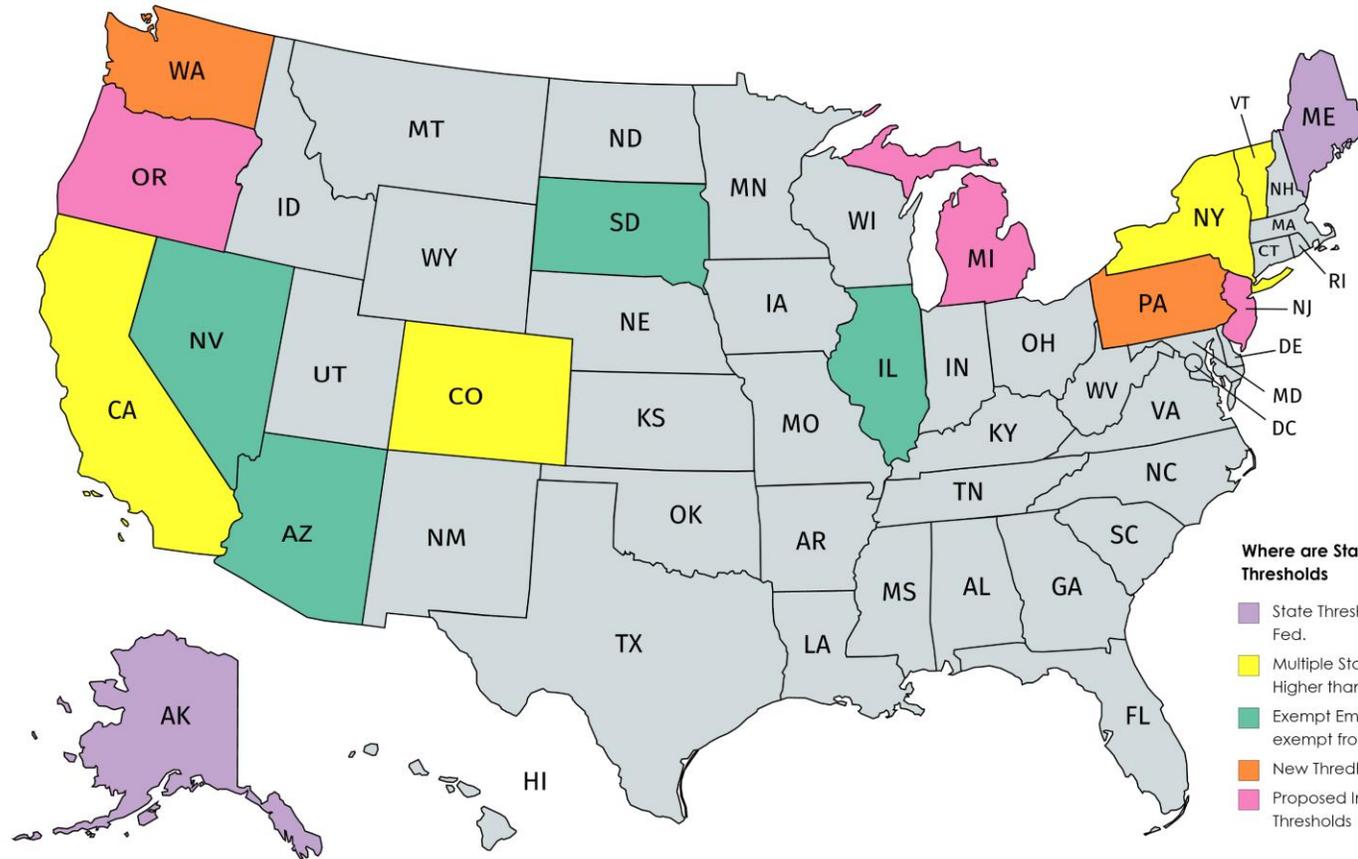
What does Pennsylvania hope to accomplish?

1 Salary thresholds

2 Mechanism for future increases

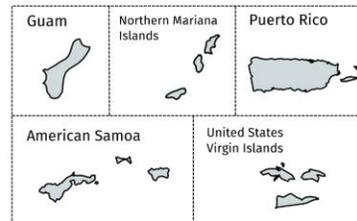
3 More closely align PA duties test to Federal duties tests

4 Reduce misclassified workers



Where are States Exemption Thresholds

- State Threshold Higher than Fed.
- Multiple State Thresholds Higher than
- Exempt Employees are not exempt from state Minimum Wage
- New Thredholds in 2021
- Proposed Increases to Thresholds



Non-Exempt v. Exempt (FLSA)

Non-Exempt (Not Exempt from Overtime)

- ▶ Typically paid by the hour
- ▶ Must be paid at least minimum wage
- ▶ After 40 hours must be paid at “time and one half” (7-day workweek)
- ▶ All employees can be non-exempt



It is possible to have a salaried employee owed overtime.

Exempt (Exempt from Overtime)

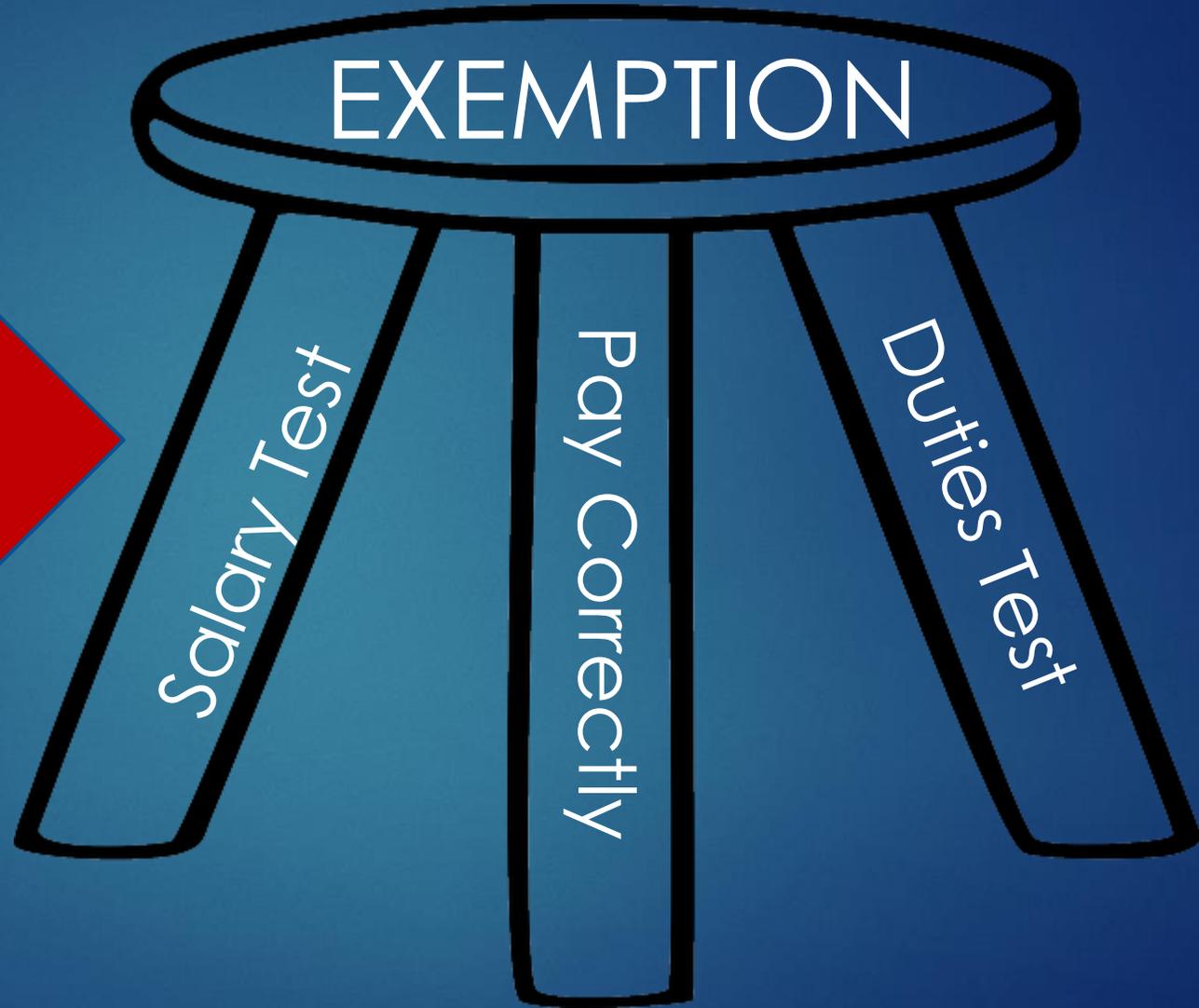
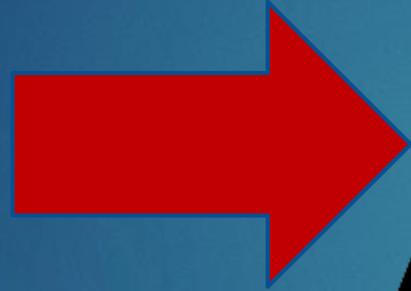
- ▶ Salary Test
 - ▶ Must meet Federal and **State** Exempt Salary Test
- ▶ Duties Test
 - ▶ Must pass Federal and **State** tests to be exempt
- ▶ Must be Paid Correctly
 - ▶ Must be paid on a weekly basis does not get overtime
 - ▶ Improper deductions from weekly salary could cause loss of deduction

Supreme Court has ruled

- ▶ “That the FLSA Exemptions are available only when employers and establishments clearly and unmistakably meet the letter as well as the spirit of the law. As a result employers should assume that a position is non-exempt unless they can clearly document the right to the exemption... If anyone of the statutory exemptions is not met the exemption does not apply.” – The Payroll Answerbook 8-23



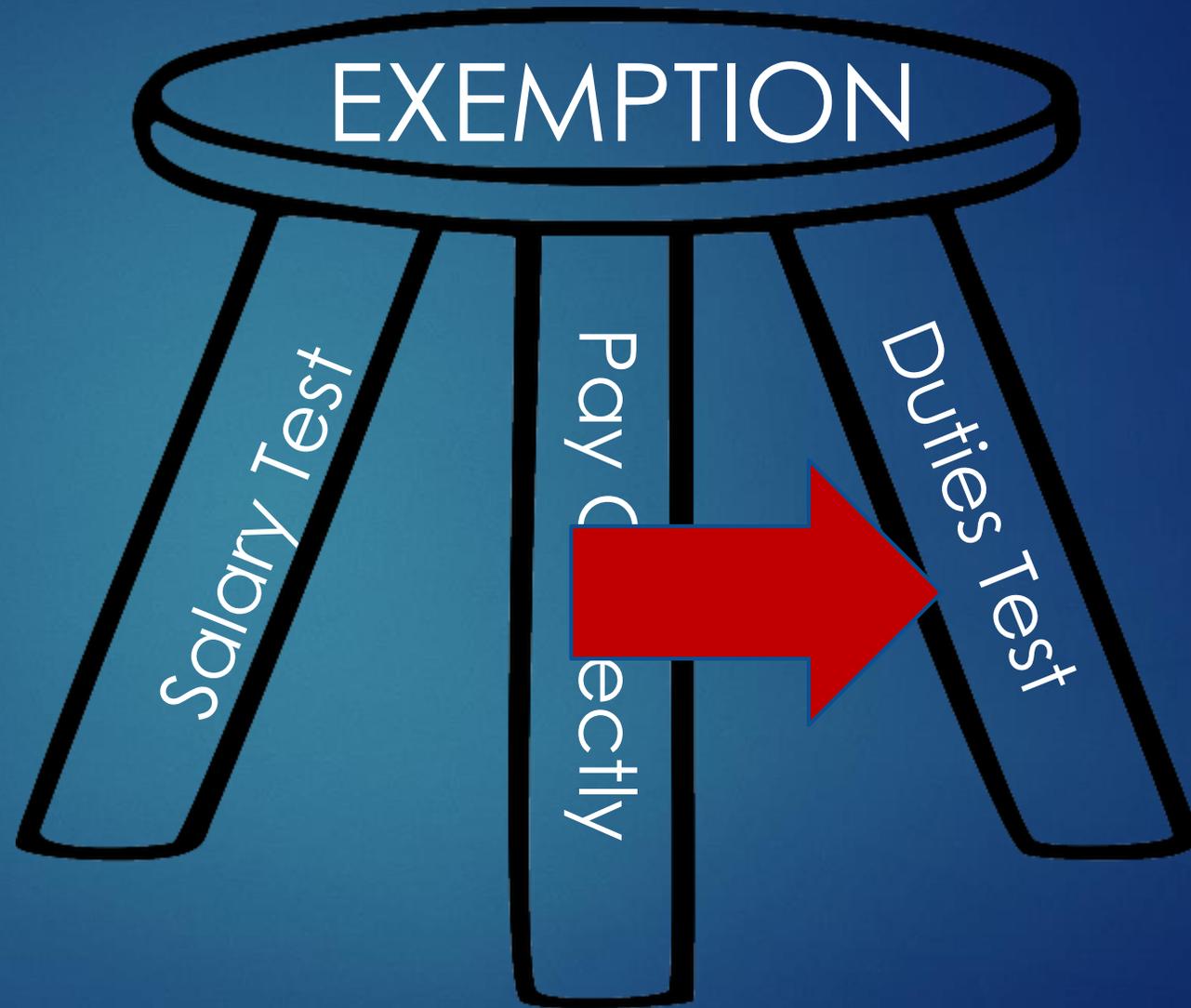
Proving an
Exemption-
Three
Legged
Stool



How much do I need to pay my exempt employees in Pennsylvania?

Salary Threshold	Federal DOL	Pennsylvania DL&I
2020	\$684 per week since January 1, 2020	
2021		<p>\$684 per week, \$35,568 annually, on January 1, 2021 (note: this is the current level required by federal law; it has been in effect since January 1, 2020 per federal regulations)</p> <p>October 3, 2021 - \$780 per week, \$40,560</p>
2022		<p>October 3, 2022 \$875 per week, \$45,500 annually</p>
2023		Automatic Increases/ 3 years

Proving an
Exemption-
Three
Legged
Stool



Duties Tests- White Collar Exemptions

	Federal Exemptions (FLSA)	Pennsylvania Exemptions (PMWL)
Executive Exemption	X	X
Highly Compensated Employee – HCE \$107,432	X	NO
Professional Exemption	X	X
Computer Professional Exemption	X	NO
Administrative Exemption	X	X
Outside Sales Exemption	X	X
Inside Sales Exemption	LIMITED	X

A yellow rectangular sign with rounded corners and a black border, containing the word "EXEMPT" in bold, black, uppercase letters.

EXEMPT

- ▶ High level of independent judgement
- ▶ Significant decisions on behalf of the business

Your support makes a difference. Subscribe to PennLive.

Pennsylvania Real-Time News

U.S. judge approves \$1.8M settlement of overtime pay dispute against Sheetz Inc.

Updated Jun 26, 2019; Posted Jun 26, 2019



A federal judge has approved a \$1.8 million settlement of an overtime pay dispute against Sheetz Inc.



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https://pechmanlaw.com/blog/wawa-to-pay-1-4-million-to-assistant-managers-for-unpaid-overtime



Wawa to Pay \$1.4 Million to Assistant Managers for Unpaid Overtime

Posted: August 23, 2019 Blog

Convenience chain Wawa is paying \$1.4 million to settle an lawsuit brought by its assistant general managers. The assistant managers claimed the company intentionally misclassified them as exempt employees and failed to pay them overtime wages, in violation of the Fair Labor Standards Act (FLSA). The settlement will cover 333 assistant general managers in six states.

Executive Exemption

Management – 60/40-ish Rule

Supervision – 80 hrs of people time weekly (2FTEs)

Authority – Heavy Weight



Professional Exemption

(aka Science and Learning Exemption)

Advanced knowledge
- 4 year degree

Degree must be
necessary for the
position





Artistic and Creative Endeavors Exemption

- ▶ Creative endeavor must be the full-time focus of the position.
- ▶ The Creative or Artistic position must require:
 - ▶ Invention
 - ▶ Imagination
 - ▶ Originality
 - ▶ Talent

Computer Professional Exemption

- ▶ MUST BE HIGH LEVEL PERFORMER – NOT TECH SIMPLE SUPPORT
- ▶ TECHNICAL DEGREE NOT REQUIRED
- ▶ MUST EARN \$684/WK
 - ▶ OR
- ▶ \$27.63/HR EXEMPT FROM OVERTIME



Pennsylvania law does not contain an exemption to overtime for these employees. Accordingly, overtime must be paid to computer employees, if they are unable to qualify for an exemption recognized by Pennsylvania law. - Dli.pa.gov

Administrative Exempt

“ADMINISTRATOR” DUTIES

– Advise Management

INDEPENDENCE AND DISCRETION

– Must touch matters of significance



Administrative Functions of a Business

University of Buffalo, SUNY

Taxes
Finance
Accounting
Budgeting
Auditing

Safety and Health
Personnel Management
Human Resources
Employee Benefits
Labor Relations

Advertising
Marketing
Research

Public Relations
Government
Relations
Legal and Regulatory
Compliance

Internet and
Database
Administration
Computer
Network

Quality Control
Purchasing
Procurement

NOT INCLUDED: routine and structured tasks such as Bookkeeping, data tabulation or clerical duties.



Outside Sales Exemption

OUTSIDE SALES

NO SALARY REQUIREMENT

DO NOT MICRO-MANAGE –
KEEP THEM IN THE FIELD

§231.85. Outside salesman. (PA Code)

- ▶ Outside salesman means an employe who is employed for the purpose of and who is customarily and regularly engaged more than 80% of work time away from the employer's place or places of business in the following manner:
 - ▶ (1) Making sales, including any sale, exchange, contract to sell, consignment for sale, or other disposition or selling, and delivering articles or goods.
 - ▶ (2) Obtaining orders or contracts for the use of facilities for which a consideration will be paid by the client or customer. In addition, the employe may not spend more than 20% of the hours worked in any week in work of a nature not directly related to and in conjunction with the making of sales; provided however, that work performed incidental and in conjunction with the employe's own outside sales or solicitations, including incidental deliveries and collections, shall be not regarded as nonexempt work.

Inside Sales Exemption



U.S. Department of Labor
Wage and Hour Division



Fact Sheet #11: Automobile Dealers under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information concerning the application of the [FLSA](#) to automobile dealers.

Characteristics

Automobile dealers are non-manufacturing establishments engaged in the business of selling new or used automobiles and trucks to the ultimate purchaser.

Coverage

There are two types of coverage under the FLSA. Either or both may apply in a given situation depending on the circumstances.

Enterprise coverage applies to all employees of new or used automobile dealerships that have at least \$500,000 per year in gross sales.

Individual coverage applies to any employee whose work regularly involves commerce between states ("interstate commerce") even if the employer's annual sales are less than \$500,000.

Requirements

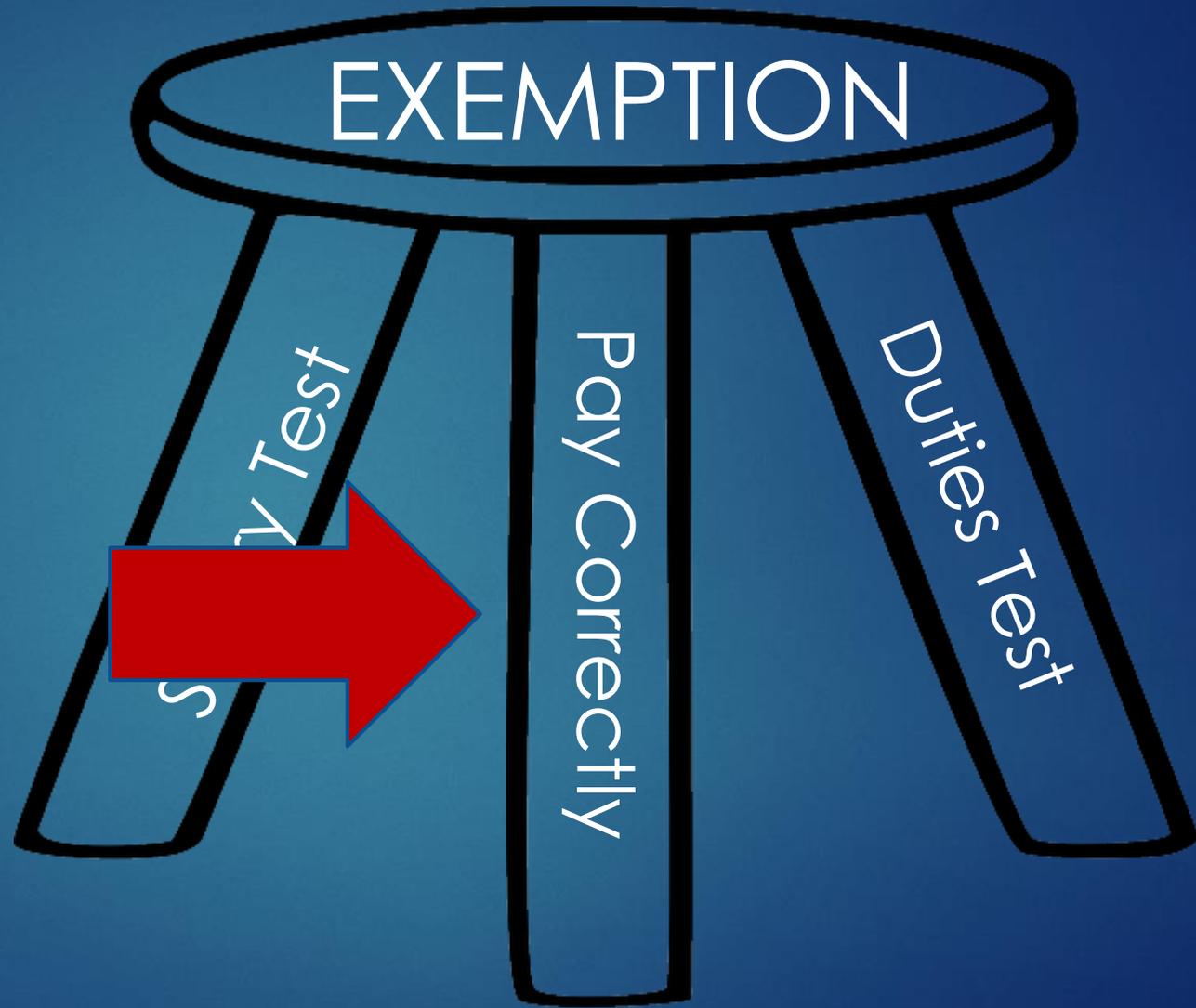
DOL Guidance May 2020

The FLSA's inside sales overtime exemption applies to employees who satisfy each of the following conditions:

1. The employee must be employed by a retail or service establishment;
Here, a "retail or service establishment" is one where 75% of the annual sales are not for resale, and that is recognized as retail sales or service establishment in the particular industry.
2. The employee's regular rate of pay must exceed one-and-one-half times (1.5x) the minimum wage for every hour worked in a workweek in which any overtime hours are worked; and
3. More than half of the employee's total earnings in a representative period (of at least one month) represents commissions.

<https://www.jdsupra.com/legalnews/dol-issues-important-overtime-update-77756/>

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▶ Don't lose the Exemption by "Improper Docking".

FLSA 2005-7 Fact Sheet #17G

UNITED STATES DEPARTMENT OF LABOR

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Wage and Hour Division

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For Workers

For Employers

For States

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Wage and Hour Division (WHD)

FLSA2005-7

January 7, 2005

Dear *Name**,

This is in response to your request for an opinion concerning whether an employer may deduct from an exempt employee Time Off Bank (PTO) for absences of less than a day due to personal reasons, accident, or illness, as well as whether it is for the employer to reduce an employee's salary for absences of one or more full days due to illness or injury when the PTO bank has been exhausted.

U.S. Department of Labor Wage and Hour Division



U.S. Wage and Hour Division
(Revised July 2008)

Important information regarding recent overtime litigation in the U.S. District Court of Eastern District of Texas.

Fact Sheet #17G: Salary Basis Requirement and the Part 541 Exemptions Under the Fair Labor Standards Act (FLSA)

Copy

Exempt Salary Rules

Exempt workers are paid when they work:

- Any part of a day
- OR
- Any part of a week

No deductions for quality or quantity of work performed

Exempt workers may receive extra pay, time off, and/or benefits



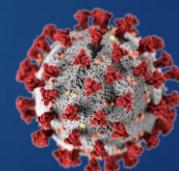
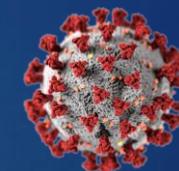
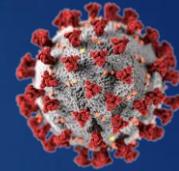
Exempt Salary Deductions (need a written policy)

- Only when an Exempt employee is absent (does NO work) for an entire day.
 - Personal Reasons
 - Sickness or Disability if you have a bona fide “PTO” plan
- Company may suspend in FULL day increments
 - ▶ Safety Infractions
 - ▶ Misconduct

Must pay a full day any day an Exempt employee works. (Including voicemail, text messages, phone calls etc.)

Exempt Salary Deductions (need a written policy)

- In the employee's initial (first) or terminal (last) week of employment if the employee does not work the full week, or
- For unpaid leave taken by the employee under the Federal Family and Medical Leave Act.
- The Employee is absent for an entire workweek and preforms no work.



Exempt Employees PTO, VACATION AND LEAVE

- ▶ MAY NOT
 - ▶ Don't try to deduct partial days from negative leave balances of an Exempt Employee

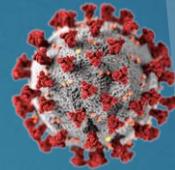
Leave banks: Only if you have a policy, YOU MAY.

- ▶ May reduction in leave **by the hour**
- ▶ Deduction from leave banks for weather and power-related days.



You may not take deductions for

- ▶ Absences occasioned by the employer or by operating requirements of the business
- ▶ Absences because of Jury Duty, Witness Testimony, Temporary Military Leave
- ▶ No deductions for Cash Shortages, Breakages



- ▶ Review the Salary Thresholds
- ▶ Review the Job Descriptions against FLSA and PMWL criteria
- ▶ Review you how you are paying Exempt Employees.
- ▶ If employees are “misclassified” work with an employment attorney.



Resources

FLSA Guidance to Small Business on Exemptions

https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/overtime_complianceguide.pdf

PA DLI- Exemptions

<https://www.dli.pa.gov/Individuals/Labor-Management-Relations/llc/minimum-wage/Pages/Minimum-Wage-Act-Exemption.aspx>

PA Bulletin (October 3rd)

<http://www.pacodeandbulletin.gov/>

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I advise businesses on HR Risk Management and Strategy |
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