

## **Wage and Hour Pitfalls<sup>1</sup> Employment Roundtable**

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February 19, 2004*

One of the most frustrating aspects of legal compliance for employers is wage and hour regulation. Not only must employers comply with the federal standards governing payment of minimum wages and overtime, employers must also comply with corresponding state laws, which may be more restrictive than the federal counterparts. In addition, employers must comply with state laws governing other conditions of employment that affect wages, such as the establishment of pay days, meal and break periods, deductions from wages and the payment of final pay upon layoff or termination. These laws provide potentially expensive traps for the unwary employer, who may be exposed to claims for not only lost wages, but substantial civil penalties, attorney fees and criminal penalties. It is, therefore, critical that employers remain on top of their wage and hour obligations. This memorandum addresses some of the most common wage and hour mistakes made by employers.

### **1. Failure to Provide Meal and Break Periods**

Oregon law requires employers to provide all employees who work six or more hours an unpaid meal period of at least 30 minutes, during which the employee is relieved of all duties. The meal period is to be taken between the second and fifth hours of work during a six- or seven-hour shift, and between the third and sixth hours on shifts of more than seven hours.<sup>2</sup>

In addition to the meal period, employers must provide a paid rest period of at least ten minutes for each four-hour segment of work or major portion thereof in each “work period,” which is the period between the employee’s starting and ending time, including rest and meal periods. The rest period is to be taken in the middle of each four-hour segment of the work period, or as close to the middle as possible. Employees may not be permitted to skip or combine breaks in order to leave early or extend their lunch period.<sup>3</sup>

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<sup>1</sup> This memorandum contains a summary of information obtained from laws, regulations, court cases, administrative rulings and legal publications, and should not be viewed or relied upon as legal advice. Ater Wynne LLP urges readers of this memorandum to consult legal counsel regarding specific legal issues and factual circumstances.

<sup>2</sup> OAR 839-020-0050(1)(a).

<sup>3</sup> OAR 839-020-0050(1)(b).

The following chart illustrates the number of rest breaks and meal periods required for work periods of up to 24 hours:

<b>Length of Work Period</b>	<b>No. of Breaks Required</b>	<b>No. of Meals Required</b>
2 hours or less	0	0
2 hours, 1 minute – 5 hours, 59 minutes	1	0
6 hours	1	1
6 hours, 1 minute – 10 hours	2	1
10 hours, 1 minute - 13 hours, 59 minutes	3	1
14 hours	3	2
14 hours, 1 minute - 18 hours	4	2
18 hours, 1 minute - 21 hours, 59 minutes	5	2
22 hours	5	3
22 hours, 1 minute - 24 hours	6	3

There are certain circumstances under which the foregoing rules may be relaxed. However, the exceptions are inapplicable to most employers.<sup>4</sup> An employer who fails to insure that its employees receive the required meal and break periods is subject to a civil penalty and a fine of up to \$1,000 *per violation*.<sup>5</sup> Consequently, an employer could be subject to fine of up to \$9,000 per day for each employee, depending on the length of the shift.<sup>6</sup>

## **2. Failure to Establish Regular Pay Intervals**

Employers must establish regular paydays. A pay period may not exceed 35 days.<sup>7</sup> This means that the interval between the employee starting work and receiving his or her first pay check must not exceed 35 days. Payment must be made in cash or negotiable instrument payable at a bank or other financial institution (direct deposit is permissible).<sup>8</sup>

## **3. Unauthorized Deductions from Pay**

Employers may make deductions from an employee's pay only in the following circumstances:

- a. where withholding is required by law (e.g., taxes, FICA, garnishments);

<sup>4</sup> See OAR 839-020-0050(1)(b)(A) and (2), and (3).

<sup>5</sup> OAR 839-020-1010(1)(j), (k), 839-020-1020.

<sup>6</sup> OAR 839-020-1000. An employee cannot recover back wages for missed break periods, however. The only remedy for missed break periods is the civil penalty under ORS 653.256. *Talarico v. Hoffman Structures, Inc.*, CV No. 98-410-AS, 1999 U.S. Dist. LEXIS 20909 (D. Or. 1999).

<sup>7</sup> ORS 652.120.

<sup>8</sup> ORS 652.110.

- b. where the deduction is voluntarily authorized by the employee, provided: (1) the employee signs a written authorization, (2) the deduction is for the employee's benefit, and (3) the deduction is recorded in the employer's books (*e.g.*, a salary advance);
- c. where the employee has signed an authorization for the deduction and the ultimate recipient of the money is *not* the employer (*e.g.*, for a retirement plan or charitable contribution);
- d. where the deduction is authorized by union contract; or
- e. where the deduction is from a final paycheck for a loan to an employee, provided: (1) the employee has voluntarily signed a loan agreement, (2) the loan was paid in cash or by check to the employee, and (3) the loan was for the employee's sole benefit. A deduction from the final paycheck for repayment of a loan may not exceed the lesser of 25 percent of the employee's disposable earnings or the amount of disposable earnings in excess of \$170 per week.<sup>9</sup>

Deductions are prohibited to recoup the value of uniforms, broken or retained equipment, cash shortages, bad checks, a signing bonus or relocation payment that was not earned (for example, where the employee did not work the requisite period of time to earn the payment), or to fund a "bond" to insure the employer against such losses.<sup>10</sup> It is also important to note that the statute does not authorize deductions for overpayments made by the employer (*e.g.*, overpayment of wages, use of vacation in excess of amount accrued, etc.).<sup>11</sup>

The fact that a deduction is prohibited does not mean that the employer has no recourse. The employer may, for example, ask the employee to write a check for the amount at issue or, in some cases, reduce an at-will employee's pay on a prospective basis (with advance notice to the employee) until the overpayment is recovered. Alternatively, the employer may file a civil action to recover the debt.

Employees who have been subjected to unauthorized deductions have a private right of action for \$200 or actual damages, whichever is greater, plus attorney fees.<sup>12</sup> If the amount of the unauthorized deduction is not paid to the employee by the time he or she terminates employment, the employee may also recover an additional wage penalty under ORS 652.150 (eight hours' pay

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<sup>9</sup> ORS 652.610(3).

<sup>10</sup> *Taylor v. Werner Enterprises, Inc.*, 329 Or 461, 988 P2d 384 (1999).

<sup>11</sup> In *Duncan v. Office Depot*, 973 F Supp 1171 (D Or 1997), the court stated in *dicta* that such deductions are prohibited. Arguably, the case was wrongly decided because the employee never actually "earned" the wages. Moreover, the case was decided by a federal court and is, therefore, not binding in Oregon state courts. Nevertheless, making deductions to recoup overpayments is risky in light of the court's *dicta* in *Duncan*.

<sup>12</sup> ORS 652.615.

per day for each calendar day the penalty is late, up to a maximum of 30 days). In addition, employers are subject to a fine of up to \$1000 for each offense.<sup>13</sup>

Additional information, including answers to commonly asked questions about deductions, may be found at the Oregon Bureau of Labor and Industries' web site: *see* <http://www.boli.state.or.us/technical/tadeduct.html>.

#### 4. Final Pay Violations

One of the most common mistakes made by employers is failing to timely pay employees all of their final pay upon termination of employment. Final pay must include all wages that are earned but unpaid as of the date of termination, including vacation, sick pay, severance and earned commissions.<sup>14</sup> An employee's final pay must be made available at the employee's place of employment, unless the parties agree that it shall be paid by direct deposit, or the employee requests that the final pay be forwarded by mail.<sup>15</sup>

Employers may not retain any portion of an employee's final pay to insure the employee's performance of an obligation (*e.g.*, return of company property) or to offset amounts owed to the employer. Withholding such amounts is deemed an unauthorized deduction.<sup>16</sup>

The following chart sets forth the final pay deadlines:

Type of Termination	Final Pay Deadline
Termination	End of next business day
Quit with at least 48 hours' notice	Last day of employment
Quit without at least 48 hours' notice	Five working days or next regular pay day (whichever comes first)

A layoff is considered a termination of employment, unless the employee is reasonably expected to return to work within 35 days, in which case the employee's final pay is due on the next regular pay day.<sup>17</sup> A mutual agreement to terminate employment is also considered a termination.

Employers may invite a dispute by failing to distinguish between the employee's last day of *work*, and the employee's last date of *employment*. For example, an employer may notify an employee of a termination effective on future date, but relieve the employee of all duties in the

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<sup>13</sup> ORS 652.900.

<sup>14</sup> ORS 652.140. Whether or not compensation in the form of vacation, sick pay, severance and commissions are "earned" as of the employee's termination date depends upon the employer's policy and/or practice.

<sup>15</sup> OAR 839-001-0450.

<sup>16</sup> *See* ORS 652.610(3); *Taylor v. Werner Enterprises, Inc.*, 329 Or 461, 988 P2d 384 (1999).

<sup>17</sup> OAR 830-001-0430.

interim. In such circumstances, the employee's final pay should ordinarily be paid on the employee's last day of work.

Failure to comply with the final pay deadlines is an expensive mistake. The penalty for willfully withholding any wages or compensation due upon termination is one day's pay (calculated at eight times the employee's hourly rate) for each calendar day the payment is late, up to a maximum of 30 days, plus attorney fees.<sup>18</sup> Willfulness does not imply blame, only that the act is done knowingly and intentionally.<sup>19</sup>

## 5. Misclassification of Employees as Independent Contractors

Another common and potentially costly mistake made by employers is the misclassification of employees as independent contractors. Employers may wish to retain workers as independent contractors as opposed to employees on short-term projects, to avoid the payment of benefits, or to accommodate a worker's request. However, state and federal laws narrowly define the circumstances under which independent contractor status is available, and employers have certain duties to their employees under state and federal law. For example, employers must make appropriate withholdings and payments on behalf of employees (*e.g.*, taxes, FICA, workers' compensation, etc.), and employers that maintain benefit plans must provide benefits to those individuals (usually defined as "employees") who meet the stated requirements for plan participation.

While the definition of "employee" and "independent contractor" may differ under different statutes,<sup>20</sup> the tests used to distinguish between the two overlap significantly. The most important factor generally considered is the extent of the control exercised by the employer/organization over the worker. Courts may also consider the nature of the work and the way the work relates to the employer's overall business.<sup>21</sup>

Some of the varying contexts include the following:

- For federal tax purposes, the IRS uses a multi-factor test to determine whether an individual is an employee or independent contractor. The IRS test focuses on the

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<sup>18</sup> ORS 652.150, 652.200, 652.900, OAR 839-001-0470.

<sup>19</sup> *Nilsen v. Johnson*, 233 Or. 103, 108, 377 P2d 331 (1962). An employer's conduct is willful if it knows an employee is owed unpaid wages and the wages are not paid when the employment relationship is terminated. *Kling v. Exxon Corp.*, 74 Or App 399, 402, 703 P2d 1021 (1985). Proof that the employer maintained a bona fide belief that no wages were due precludes a finding that the failure to pay was willful. *Braddock v. Capfer*, 284 Or 237, 239, 586 P2d 340 (1978).

<sup>20</sup> For example, to determine if an individual worker qualifies as an "employee" for purposes of the Americans with Disabilities Act, ERISA, Age Discrimination in Employment Act (ADEA), and other statutes that do not provide a meaningful definition of employee, the common-law touchstone of control is the most important consideration. *Clackamas Gastroenterology Assoc. v. Wells*, 538 US 440 (2003). On the other hand, to determine the relationship between the parties for purposes of the Fair Labor Standards Act (FLSA), courts do not use this common-law test of master and servant, and rely instead on an economic realities test. See Department of Labor Fact Sheet No. 013, <http://www.dol.gov/esa/regs/compliance/whd/whdfs13.htm>; see also *infra* note 9 and accompanying text.

<sup>21</sup> *Rubalcaba v. Nabaki Farms, Inc.*, 333 Or 614, 619 n.2, 43 P3d 1106 (2002).

behavioral and financial control the employer exerts over the worker, as well as key characteristics of the relationship to which the parties have agreed.<sup>22</sup>

- For Oregon income and unemployment tax, contractor licensing and other purposes, the individual must satisfy each of eight requirements for an individual to qualify as an independent contractor. Among other things, (1) the employee must have control and direction over the means and manner of her work; (2) the employee must be paid on completion of specific portions of work; and (3) the employee must represent to the public that he/she is an independently established business.<sup>23</sup>
- For purposes of Oregon's workers compensation laws, a court will first consider the employer's right to control the employee's performance.<sup>24</sup> If the court finds some evidence of control, the court may then consider factors relevant to the nature of the work, including "whether the work is integral to the employer's business, and whether the individual, in relation to the employer's business, is in a business or profession of his or her own."<sup>25</sup>
- For purposes of a wage claim, ORS 652.210(2) defines an employee as an individual, *other than a copartner or an independent contractor*, who renders service to an employer for a fixed salary or rate.<sup>26</sup> In this context, the terms and

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<sup>22</sup> See IRS Publication 15-A. The elements of behavioral control include: (a) the instructions the business gives the worker, and (b) the training the business gives the worker. Financial control includes: (a) the extent to which the worker has unreimbursed business expenses, (b) the extent of the worker's investment, (c) the extent to which the worker makes services available to the relevant market, (d) how the business pays the worker, and (e) the extent to which the worker can realize a profit or loss. The issues related to the type of relationship between the parties includes: (a) definitions in written contracts describing the relationship the parties intended to create, (b) whether the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay, (c) the permanency of the relationship, and (d) the extent to which services performed by the worker are a key aspect of the regular business of the company. For a further explanation, see IRS Publication 15-A, <http://www.irs.gov/pub/irs-pdf/p15a.pdf>; see also <http://www.irs.gov/govt/fslg/article/0,,id=110344,00.html>.

<sup>23</sup> ORS 670.600; see *Pacificab Co. v. Employment Dept.*, 187 Or App 693, 69 P3d 774 (2003) (for purpose of unemployment compensation eligibility, cab driver was employee and not an independent contractor because she did not represent to the public that her services were provided by an independently established business). In the 2003 legislative session, the Oregon legislature amended the definition of "independent contractor" for the purpose of Oregon tax law, but delayed its implementation until January 1, 2006. The legislature also created a task force to study issues relating to the statutory definition. See SB 232 (2003).

<sup>24</sup> ORS 656.005(30) (defining worker as any person who furnishes services for remuneration subject to the direction and control of an employer).

<sup>25</sup> *Rubalcaba v. Nabaki Farms, Inc.*, 333 Or 614, 619 n.2, 627, 43 P3d 1106 (2002).

<sup>26</sup> *Thompson v. Bolliger, Hampton & Tarlow*, 118 Or App 700, 849 P2d 526 (1993).

conditions of the employment relationship, as defined by contract or agreement, are relevant.<sup>27</sup>

Although no one factor is conclusive, any of the following circumstances would suggest employee, as opposed to independent contractor, status:

- a. The individual is hired to perform duties that are currently being performed by employees working for the employer;
- b. The individual will be supervised by an employee of the employer;
- c. The individual will work exclusively for the employer;
- d. The individual will be paid a consistent, periodic payment regardless of the quantity of work performed during the period;
- e. The individual will be reimbursed for business/travel expenses;
- f. The individual will work on the employer's premises, use the employer's equipment, and/or be integrated into the employer's business (*e.g.*, have a telephone extension, attend meetings, receive training, regularly interact with the employer's employees in connection with performance of his/her duties);
- g. The individual works for the employer for an extended period of time.

The failure to properly characterize those individuals who meet the definition of "employee" could have serious consequences. Non-complying employers may be required to pay amounts that should have been withheld or paid on the employees' behalf, plus penalties, damages (*e.g.*, minimum wages, overtime, the value of lost benefits) and/or attorney fees.<sup>28</sup> Workers sustaining work-related injuries, who would otherwise be required to rely on solely on workers compensation benefits, may also be able to assert a negligence claim against the employer.

In light of the potential risks, it is important to properly characterize the employment relationship at its inception, and to confirm that the characterization is consistent with the employer's definitions and intent as set forth in any company benefit plans. Prior to entering into a consulting or independent contractor relationship with anyone, the employer should, at a minimum, confirm the following:

- a. Whether or not the individual holds a business license;
- b. Whether or not the individual works for any other individual or entity and, if so, in what capacity;

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<sup>27</sup> *Id.*, 118 Or App at 701-702.

<sup>28</sup> *See, e.g., Vizcaino v. Microsoft*, 173 F3d 713, *amended*, 184 F3d 1070 (9<sup>th</sup> Cir 1999), *cert. denied*, 528 US 1105 (2000).

- c. Whether the individual owns or has rights to the information, equipment and services to be provided;
- d. Whether the individual carries business insurance.

It is important to remember that the foregoing factors and considerations are not exhaustive. In each case, the employer must make a determination based on the particular facts.

## **6. Misclassification of Hourly Employees as Exempt from Overtime**

Employers must pay employees overtime at the rate of 1.5 times the regular hourly rate for each hour worked in excess of 40 hours in one work week, unless the employees are properly classified as exempt under both state and federal law. To qualify for exemption, the employee's duties must satisfy specified criteria and the employee must ordinarily be paid on a "salary" or "fee" basis.<sup>29</sup> Where the applicable tests under state and federal law are different, as is often the case, the employee must qualify under both.<sup>30</sup> Where there is no corresponding state law, Oregon courts typically look to federal law for guidance in interpreting the Oregon regulations.<sup>31</sup>

Exempt executive, administrative and professional employees must receive a minimum, predetermined salary that is not subject to reduction for the quantity or quality of the work performed.<sup>32</sup> Under Oregon law, this amount must be at least 40 times the minimum wage rate (currently \$282 per week, or \$1222 per month).<sup>33</sup> The minimum salary requirement must be met even if the employee works part-time.<sup>34</sup>

Exempt employees must be paid their full salary for each week in which *any* work is performed, without regard to the number of days or hours worked.<sup>35</sup> This rule is subject to limited exceptions, under which it is permissible to dock an employee's salary for absences only in the following circumstances:

- When the employee is absent for a full day or more (in increments of a full day) for personal reasons, other than sickness or accident;

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<sup>29</sup> The salary test is inapplicable to outside sales positions under Oregon and federal law. See 29 CFR § 541.501; ORS 653.020(6); OAR 839-020-0005(4).

<sup>30</sup> For example, federal law provides an exemption from overtime for individuals who are paid on a salary basis and meet the definition of a "computer programmer." 29 CFR § 541.303. Oregon only exempts computer programmers from overtime if they are paid at least \$27.63 per hour. OAR 839-020-0125(h).

<sup>31</sup> *Northwest Advancement v. State*, 96 Or App 133, 772 P2d 934.

<sup>32</sup> 29 CFR § 541.118; OAR 839-020-0004(29) and (30).

<sup>33</sup> ORS 653.025; OAR 839-020-0004(29).

<sup>34</sup> See U.S. Dept. of Labor Opinion Letter dated February 27, 1997, 1997 WL 998007.

<sup>35</sup> 29 CFR § 541.118; OAR 839-020-0004(29) and (30). However, exempt employees need not be paid for any week in which no work is performed. 29 CFR § 541.118; OAR 839-020-0004(30).

- When the employee is absent for part of a day and the absence qualifies for leave under state and federal family medical leave laws;<sup>36</sup>
- When the employee is absent due to sickness or disability, provided the deduction is made pursuant to the employer's plan, policy or practice of providing paid sick or disability leave, or the employee has exhausted applicable benefits;
- Where the reduction is made as a disciplinary measure for violation of a safety rule of *major* significance<sup>37</sup> (such as smoking in an explosive plant), or the employee is suspended for a full work week.

Federal law also permits the employer to dock an exempt employee's accrued leave for partial-day absences for personal reasons, so long as the employee's salary is not subject to reduction when the employee's accrued leave is exhausted.<sup>38</sup>

Under federal law, an exempt employee who performs any work during the work week while serving on jury duty, as a witness or in military service, must be paid for the entire week. The employer may, however, offset amounts received by the employee for jury or witness fees or military pay (or have the employee pay these amounts to the employer and pay the employee in full).

Employees who are misclassified as exempt may recover unpaid overtime payments going back up to three years. Under federal law, misclassified employees may also recover liquidated damages in an amount equal to their unpaid overtime, plus attorney fees.<sup>39</sup> Under Oregon law, employees may recover an overtime penalty calculated in the same manner as the final pay penalty under ORS 652.150. If the overtime remains unpaid when the employee terminates employment, the employee may also recover an additional final pay penalty under Oregon law.<sup>40</sup>

In industries where there are many employees working in the same job function, misclassification mistakes can cost millions of dollars. Not surprisingly, collective actions (similar to a class

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<sup>36</sup> See *Rowe v. Laidlaw Transit, Inc.*, 244 F3d 1115 (9<sup>th</sup> Cir. 2001) (reduction of employee's salary due to reduced schedule during FMLA qualified leave did not affect exempt status as noted at 29 CFR § 826.206(a)). A salary reduction is not permitted if the absence only qualifies for leave under the Oregon Family Leave Act.

<sup>37</sup> Pay docking for this reason is not expressly authorized by Oregon statute or regulation.

<sup>38</sup> See *Barner v. City of Novato*, 17 F3d 1256 (9<sup>th</sup> Cir 1994) (holding limited to private sector employees).

<sup>39</sup> Liquidated damages are mandatory unless the employer can establish that it in good faith intended to comply with the law and reasonably believed its actions were in compliance with the law. 29 USC § 260 (2003); see also *Local 246 Utility Workers Union of America v. Southern California Edison*, 83 F3d 292, 298 (9<sup>th</sup> Cir. 1996). Even if the employer can show subjective and objective good faith, the court may still impose liquidated damages. *Id.*

<sup>40</sup> *Cornier v. Tulacz*, 176 Or App 245 (2001) (permitting recovery of penalty for overtime violation and failure to pay wages due upon termination); see also, e.g., *Allen v. WTD Industries*, Civ. No. 99-249-RE (D Or 2000) (unpublished) (court required 130 plaintiffs asserting overtime claims to elect between state and federal overtime penalties, but allowed recovery of final pay penalties regardless of election).

action) for overtime pay are on the rise. Employers are, therefore, well advised to review their exempt positions for compliance with applicable regulations.

## **7. Failure to Pay Minimum Wages**

Many businesses, especially start-up companies, assume that it is permissible to pay employees in stock or options instead of cash. This is not the case.

Subject to limited exceptions, both state and federal law require employers to pay non-exempt employees an amount which satisfies the applicable minimum wage.<sup>41</sup> Exempt executive, administrative and professional employees are excluded from the minimum wage requirement, but they must be paid an amount sufficient to satisfy the salary component of the tests for exemption from overtime.<sup>42</sup> Wages must be paid in cash or by negotiable instrument.<sup>43</sup>

Employers who pay less than the minimum wage are liable to the affected employees for the amount of the unpaid wages, penalties, and attorney fees under both state and federal law.<sup>44</sup>

## **8. On Call Time**

Employees may be required to remain on call. Whether or not the time spent on call is working time for which a non-exempt employee must be paid depends upon whether or not the time is spent primarily for the benefit of the employer, and whether the employee can use the time effectively for his or her own purposes.<sup>45</sup>

An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call." An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call.<sup>46</sup>

The regulations do not require that employees be free to maintain the same degree of freedom and flexibility they normally enjoy during non-working hours. Courts consider a number of factors in determining whether or not an employee can effectively use time spent on call for personal purposes, including: (1) whether the employee has to remain on the employer's premises; (2) whether there are excessive geographical restrictions on the employee's movements; (3) whether the frequency of calls is unduly restrictive; (4) whether the employer

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<sup>41</sup> 29 USC § 216; ORS 653.025. As of January 1, 2004, Oregon's minimum wage is \$7.05.

<sup>42</sup> 29 CFR § 541.118; OAR 839-020-0004(29).

<sup>43</sup> ORS 652.110.

<sup>44</sup> 29 USC § 216; ORS 653.055.

<sup>45</sup> *Owens v. Local No. 169*, 971 F2d 347, 350 (9th Cir 1992). In the Ninth Circuit's most recent examination of on-call time, it considered most important "(1) the degree to which the employee is free to engage in personal activities; and (2) the agreements between the parties." *Brigham v. Eugene Water & Electric Board*, 2004 WL 193856, \*2 (9th Cir 2004) (where employees were required to live on the employer's premises, court relied on 29 CFR § 785.23 and considered parties' agreement to determine whether they characterized time spent on-call as working time).

<sup>46</sup> OAR 839-020-0041(3); *see also* 29 CFR § 785.17 (state and federal regulations are identical).

imposes a fixed and unreasonably short response time; (5) whether employees on call could easily trade on call responsibilities; (6) whether the use of a pager could ease the restrictions; and (7) whether the employee actually engages in personal activities during time spent on call. The list is not exhaustive, and no one factor is dispositive.<sup>47</sup> The courts consider each case on the basis of its own facts.

## 9. 9. Travel Time

Employees need not be paid for their regular commute to and from work.<sup>48</sup> However, there are some circumstances under which travel time must be paid.

**Travel during the workday.** A non-exempt employee must be paid for travel time incurred while engaged in the employer's business during the regular work day (*e.g.*, travel from worksite to worksite during the normal business day, even if the time spent is outside the employee's regular working hours).<sup>49</sup>

**Travel on a one-day assignment.** A non-exempt employee who ordinarily works at a fixed location, but travels out of town on a one-day assignment, with no overnight stay required, must be paid for travel time, except for the time that would ordinarily be spent traveling from home to work and back.<sup>50</sup>

**Overnight travel.** An employee who travels away from home overnight must be paid for all travel time incurred during the employee's regular working hours. This rule applies whether or not the travel is accomplished on the employee's normally scheduled work days. In other words, if the employee ordinarily works 9:00 a.m. to 5:00 p.m. Monday through Friday, but travels on Saturday and Sunday, the employee must be paid for the weekend travel that occurs between 9:00 a.m. and 5:00 p.m. on the weekend days. Travel time that occurs outside of the employee's regular working hours is not considered work time, unless the employee is required to perform work while traveling (*e.g.*, bus drivers). Usual meal times are also not considered hours worked.<sup>51</sup>

## 10. Training Time

Time spent training is considered working time for which non-exempt employees must be paid. However, an employer is not required to pay for training time when all of the following conditions are met: (1) attendance at the training is voluntary; (2) attendance at training takes place outside the employee's regular working hours; (3) the training provided is not directly

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<sup>47</sup> *Ragnone v. Belo Corp.*, 131 F Supp 2d 1189 (D. Or. 2001) (citing *Berry v. County of Sonoma*, 30 F3d 1174, 1183 (9<sup>th</sup> Cir. 1994)).

<sup>48</sup> See 29 USC § 254(a) (Portal to Portal Act, amending FLSA to relieve employers of liability for compensating employees for travel to and from work); OAR 839-020-0045(1).

<sup>49</sup> 29 CFR § 785.38; OAR 839-020-0045(3).

<sup>50</sup> 29 CFR § 785.37; OAR 839-020-0045(4).

<sup>51</sup> 29 CFR § 785.41; OAR 839-020-0045(5) and (7); 29 CFR § 785.39.

related to the employee's current position; and (4) the employee does not perform any productive work during the training session.<sup>52</sup>

An employee who seeks training on his or her own initiative outside working hours at an independent college or trade school is not entitled to compensation for the time spent, even if the courses are directly related to the employee's job. Similarly, when the employee is required by law to obtain a license or certification, time spent outside of working hours obtaining the certification or license is not compensable.

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<sup>52</sup> OAR 839-020-0044; *see also* 29 CFR § 785.28-785.30.