



# Exploring the FLSA's Core Exemptions

Presented by  
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**Seyfarth Shaw LLP**

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# Speakers

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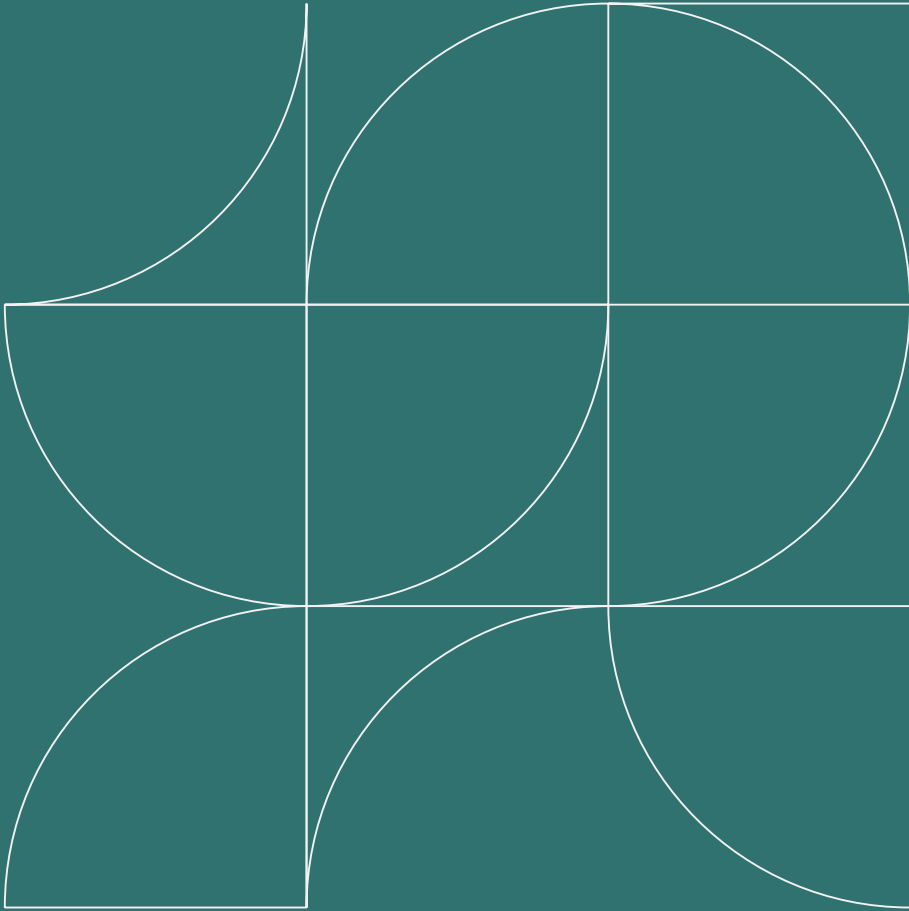
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# Agenda

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- 01** The Wage & Hour Landscape
- 02** The Exemptions' Pay Requirements
- 03** The Exemptions' Duties Requirements
- 04** State Law Variations

# The Landscape

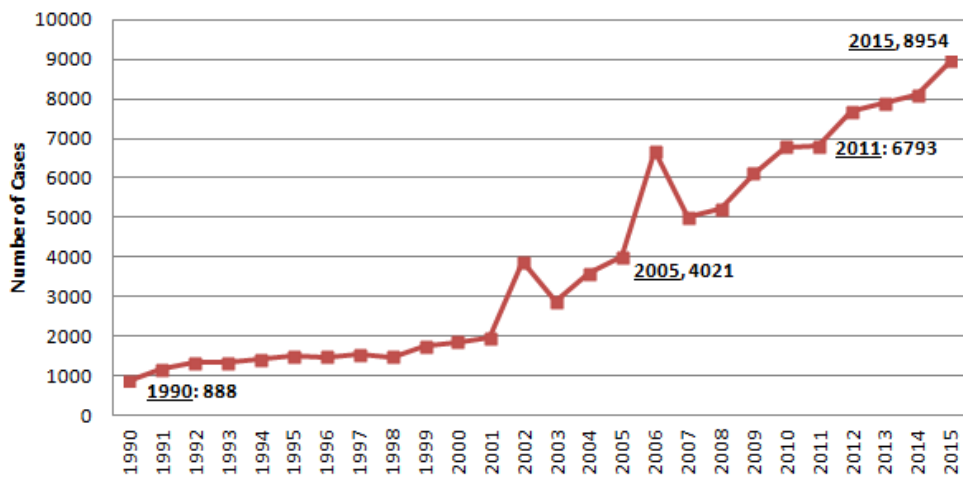


## Background on the FLSA

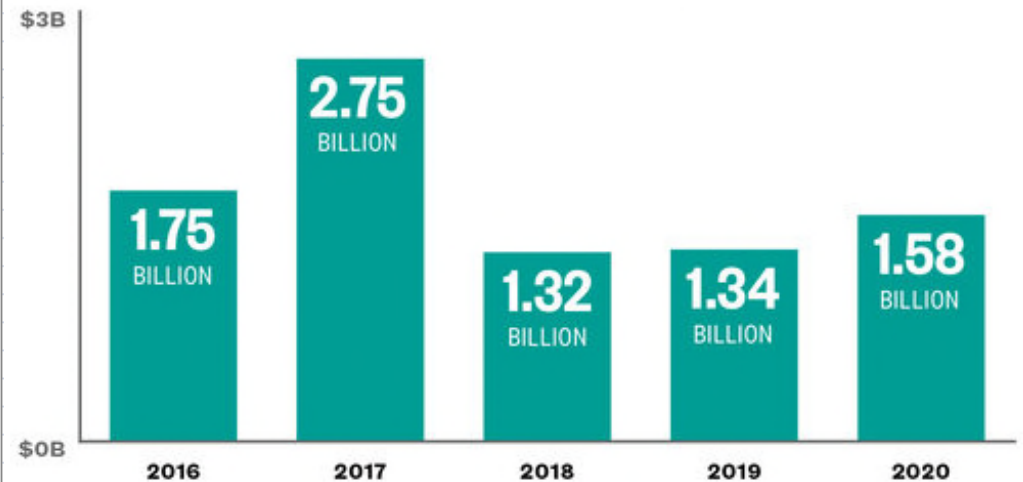
- 1930's Depression Era legislation
  - At the time, the United States was a manufacturing-driven economy
  - Today, we are a more service-based and highly technological economy
- Three core components of the Act:
  - Child labor heavily restricted
  - Minimum wage across the workweek
  - Overtime at 1.5x “regular rate” of pay for hours worked in excess of 40 in a workweek
    - *But some employees are exempt*

# The National Wage and Hour Litigation Explosion

### FLSA Cases Filed by Calendar Year



### Aggregate Settlement Amounts



# Common Claims

## Regular Rate

- Failed to properly calculate “regular rate” for purposes of determining OT wages
  - Failure to include non-discretionary bonuses
  - Failure to properly account for deferred bonuses
  - Commuter subsidies

## Hours Worked

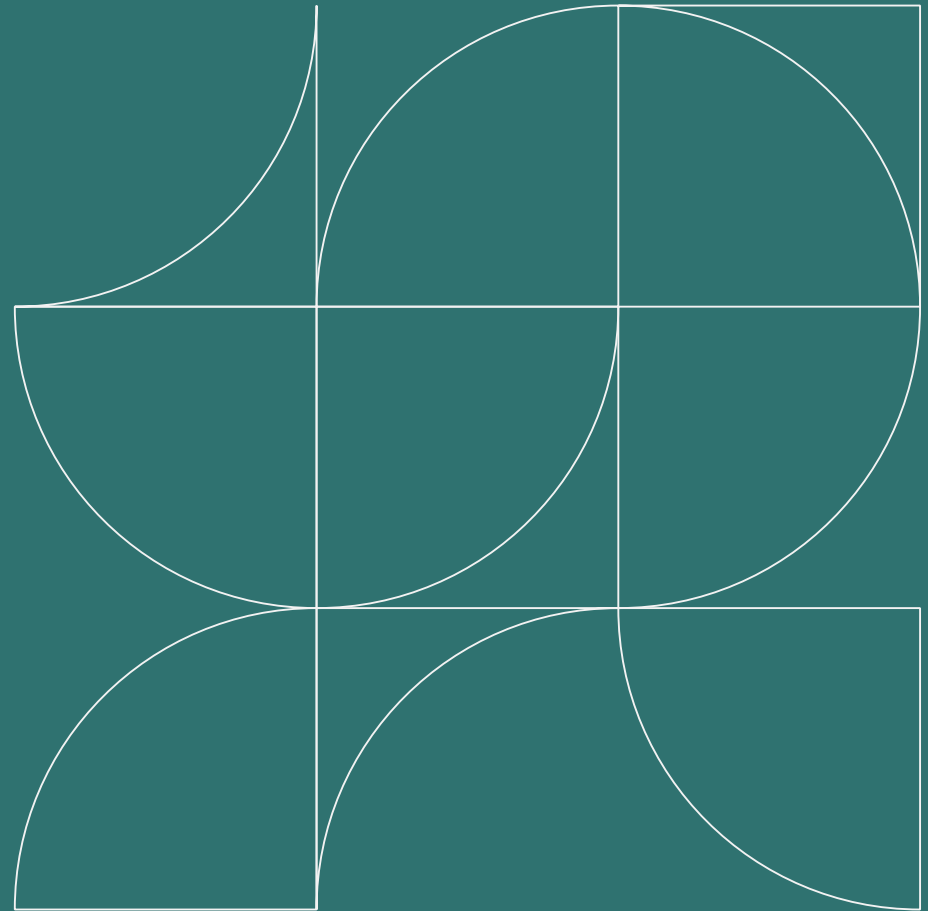
- Failed to include pre- or post-shift work
  - Donning/doffing
  - Emails/calls
- Deducted meal breaks that were not taken, or weren’t “bona fide” meal periods
- Unapproved overtime

## Misclassification

- Misclassification as independent contractor
- **Misclassification as exempt**
  - **Primary duty wasn’t exempt**
  - **Compensation not enough**
  - **Not paid on “salary basis”**



# Exemptions: Pay Requirements



# The FLSA's Core Exemptions

*There are more than 50 exemptions to the FLSA's minimum wage and/or overtime requirements—we focus on the most common exemptions*

## “EAP” Exemptions for Salaried Employees

- Executive exemption
- Administrative exemption
- Professional exemption

## Exemptions for Other “White-Collar” Employees

- Highly compensated employee (“HCE”) exemption
- Outside sales exemption
- Computer professional exemption

## Other Exemptions

- Motor Carrier Act (“MCA”) exemption

## EAP Exemptions: Salary Level & Basis

- **Fixed** and **predetermined** amount of at least **\$684/week** (note 10% allowance)
- No reduction due to **quality/quantity** of work performed
- Okay to pay **additional compensation** over and above the predetermined amount, **but...**
  - In the past, DOL has taken position that salary basis might be compromised if employee whose pay is calculated by hour/day/piece, with a guaranteed min., doesn't bear "**reasonable relationship**" to total comp
  - In sub-regulatory guidance, DOL has suggested the line for a reasonable relationship is 1.5:1
  - In 2004, DOL incorporated the requirement into salary basis rules, providing it applies to employees whose pay is calculated hourly/daily/piece with guaranteed min.

## EAP Exemptions: Salary Deductions

- **Fixed** and **predetermined** amount of at least **\$684/week** (note 10% allowance)
- No reduction due to **quality/quantity** of work performed
- Permissible deductions:
  - First/last weeks of employment
  - Absence of 1+ full days for personal reasons, other than sickness or disability
  - Absence of 1+ full days due to sickness/disability if deductions made under policy for providing wage replacement for these types of absences
  - Unpaid suspension of 1+ full days imposed in good faith for violations of workplace conduct rules
  - Penalties for violating significant safety rules
  - Unpaid leave pursuant to the FMLA
  - Offset payment for jury/witness fees or military pay

## EAP Exemptions: Salary Safe Harbor

- Improper deductions that are isolated or inadvertent won't result in loss of exemption if the employer promptly reimburses
- But if evidence shows employer didn't intend to pay employees on a salary basis, or has actual practice of making improper deductions, that can jeopardize exempt status of all employees in same job classification who work for same managers responsible for the deductions
- Employers can avoid this drastic result, if the employer can show that it:
  - Has a **clearly communicated policy** that **prohibits improper deductions** and **includes a complaint mechanism**;
  - **Reimburses** for any improper deductions; and
  - Makes a **good faith commitment** to comply in the future.

# Exemptions: Duties Requirements



# EAP Exemptions: What's a Primary Duty?

*“[T]he principal, main, major or most important duty that the employee performs.”*

29 C.F.R. § 541.700(a)

## The FLSA's Primary Duty Test is QUALITATIVE

- Relevant factors:
  - Relative **importance of the exempt duties** as compared with other types of duties
  - Amount of **time** performing exempt work
  - Relative **freedom from direct supervision**
  - Relationship between employee's salary and wages paid to other employees whose non-exempt duties overlap
- **Concurrent performance** of exempt and non-exempt duties **does not doom the exemption**

# EAP Exemptions: Duties Requirements

## Executive

- **Primary duty** is **management** of dept. or subdivision;
- **Customarily and regularly directs work of 2+ FTEs**; and
- Authority to hire or fire (**or suggestions/recs.** as to hiring, firing, promotion, or other changes of status are **given particular weight**)

## Administrative

- **Primary duty** is **office or non-manual work** directly related to **management or general business operations** of employer or its customers; and
- Primary duty includes exercise of **discretion and independent judgment** with respect to **matters of significance**

## Professional

- **Primary duty** is performance of **work requiring advanced knowledge...**
- In a **field of science or learning...**
- That is **customarily acquired** by **prolonged course of specialized intellectual instruction**



- Primary duty is **management**

- Interviewing, selecting, and training employees
- Setting and adjusting pay and work hours
- Planning and apportioning work
- Appraising employee productivity and efficiency
- Handling complaints and discipline
- Maintaining production or sales records
- Determining techniques, materials, or tools to be used
- Providing for safety/security of employees or property
- Planning and controlling budget
- Monitoring or implementing compliance measures

- ◆ “My super calls the shots.”
- ◆ “The budget sets itself.”
- ◆ “I’m just here to help avoid the need for overtime pay.”

## **EAP Exemptions: Executive**

- **Customarily and regularly** directs work of **2+** employees
  - “Customarily and regularly” means more than occasional, but needn’t be constant
  - “Two or more other employees” means two *full-time* employees or the equivalent

## **EAP Exemptions: Executive**

- Recs on hiring, firing, promotion, *or* other change in status given **“particular weight”**
  - Whether it is part of employee’s job duties to make suggestions and recommendations
  - Frequency with which suggestions and recommendations are made or requested
  - Frequency with which employee’s suggestions and recommendations are relied upon

◆ “I’m not involved in hiring.” ◆ “I’m merely a witness to terminations.”  
◆ “I merely screen applicants for objective minimum requirements.” ◆ “My recommendations are seldom followed.”

## EAP Exemptions: Executive

## EAP Exemptions: Administrative

- Primary duty is office or non-manual work **“directly related to the management or general business operations...”**
  - Work must be directly related to assisting with running or servicing of the business
  - Does not include working on manufacturing line or selling
    - Tax, finance, accounting, budgeting, or auditing
    - Advertising, marketing, or PR
    - HR, benefits, or labor relations
    - Quality control
    - Insurance, safety, health, legal, or compliance
    - Purchasing or procurement
    - Network, internet, and database administration

◆ “My main job is to sell.”  
◆ “I’m a producer.”

## EAP Exemptions: Administrative

- Primary duty includes exercise of “**discretion and independent judgment**” with respect to “**matters of significance**”
  - **Comparison and evaluation** of possible courses of conduct, and acting **after possibilities are considered**
    - Decisions and recommendations **may be reviewed** at a higher level and, upon occasion, revised or reversed
  - Factors include, but are not limited to:
    - Authority to formulate, affect, interpret, or implement management policies or practices, or to deviate therefrom
    - Authority to negotiate and bind the company
    - Planning business objectives or major assignments
    - Providing consultation or expert advice to management
    - Investigating and resolving major matters on behalf of management

- ◆ “My decisions are dictated by a written protocol.”
- ◆ “My job is mainly data entry.”
- ◆ “I gather data and send it to my manager for analysis.”

- Primary duty is work requiring **“advanced knowledge”**
  - **Predominantly intellectual in character**
  - The knowledge is generally used to **analyze, interpret, or make deductions** from varying facts/circumstances
    - Not work involving routine mental, manual, mechanical, or physical work
- ...in a **“field of science or learning”**
  - Law, accounting, engineering, architecture, chemical science, physics, biology, medicine

◆ “Yes I’m a CPA, but I don’t use that as an Account Rep.”     ◆ “I lean on my marketing degree quite often to drive sales.”

## EAP Exemptions: Professional

- **“Customarily”** acquired by **“prolonged course of specialized intellectual instruction”**
  - Specialized academic training is prerequisite for entering the profession (best evidence is possession of appropriate academic degree)
  - Generally not available where general knowledge acquired by academic degree in any field will do
    - *Do most employees gain the requisite skills via prior education/training or on-the-job training?*

## **EAP Exemptions: Professional**

## Other Exemptions

- Outside salesperson exemption
- Computer employee exemption
- Highly-compensated employee (“HCE”) exemption
- Motor Carrier Act (“MCA”) exemption



- **Primary duty** must be making sales or obtaining orders or contracts for services or for use of facilities for which money is paid by customer; and
- Employee must be **customarily and regularly engaged away from employer's place of business**
  - Under the current rules, a home office is not “away” from the employer's business
- There is no salary requirement for this exemption

## Other Exemptions: Outside Sales

The FLSA includes an OT/MW exemption for high-level computer employees who satisfy three criteria:

1. At least **\$684/week paid on a salary or fee basis or hourly rate of at least \$27.63**; and
2. Working as **analyst, software engineer, or programmer**
3. Employee's primary duty must consist of:
  - Application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specs;
  - Design, development, documentation, analysis, creation, testing, or modification of systems or programs based on and related to user or system design specs;
  - Design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
  - Combination of these duties

## Other Exemptions: Computer Employee

This is for employees who are within the authority of the DOT to establish hours of service maximums

Generally, must satisfy three criteria:

1. Employed by a **motor carrier or motor private carrier** (49 U.S.C. § 13102)
2. Working as **drivers, driver's helpers, loaders, or mechanics** whose duties affect the safety of operation of motor vehicles in transportation on public highways in interstate or foreign commerce
  - Can be travel across state lines, or part of the **continuous flow** of interstate commerce
  - Continuous flow looks at what employee is transporting, where it started, where it was intended to go, whether it came to rest or changed, etc.
3. Not covered by the **small vehicle exception**
  - Exemption doesn't apply to an employee in a week when they are working on vehicles that weigh 10,000 pounds or less (with exceptions for some passenger vehicles)

## Other Exemptions: MCA Exemption

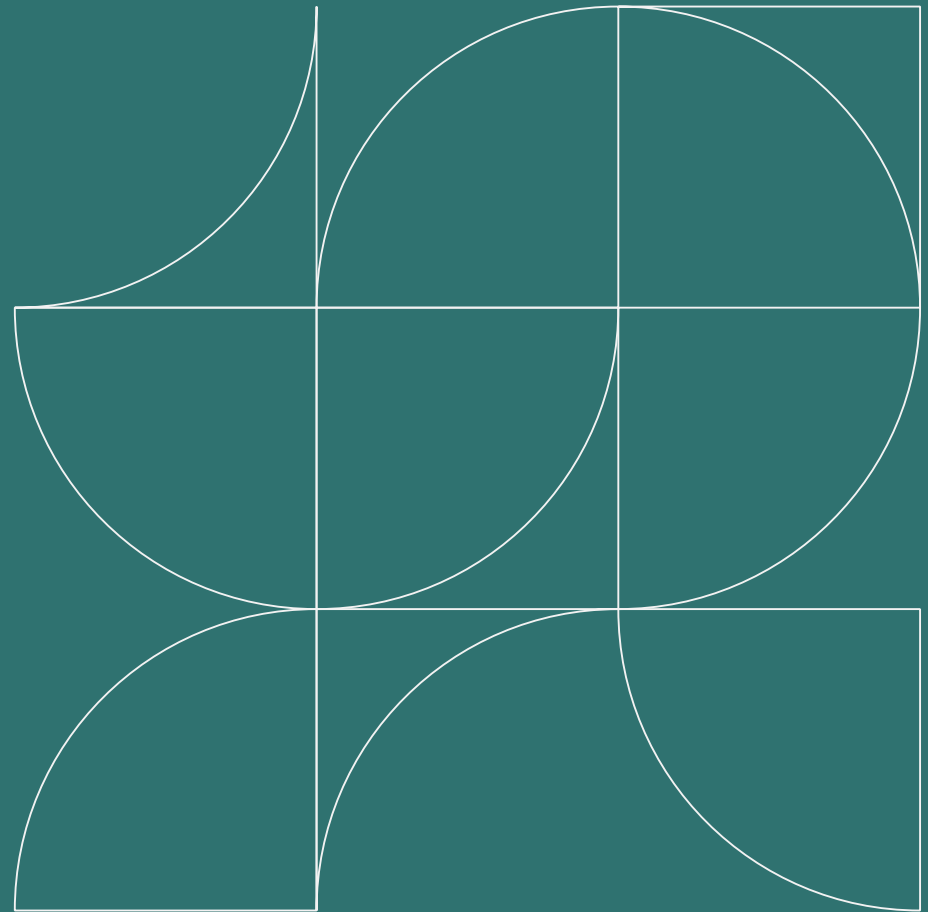
In short, this exemption provides a “light” duties test to employees who are paid at a sufficiently high level

To qualify for the exemption, an employee must meet three requirements:

1. Total annual comp must total at least **\$107,432**, inclusive of at least **\$684/week paid on a salary basis** and **non-discretionary compensation (e.g., commissions)**
  - A catch-up payment is allowed within one month after the 52-week period
  - DOL’s proposed rule would increase total annual compensation threshold to \$143,988, including minimum salary of \$1,059/week
2. Primary duty must include **office or non-manual** work; and
3. Must **customarily and regularly performing any exempt duty** identified in EAP tests

## Other Exemptions: HCE Exemption

# Notable State Law Variations



# Notable (But Not All) State Law Distinctions

## Some Exemptions Aren't Recognized

- Some states don't recognize certain exemptions
- Plenty of states don't recognize HCE exemption
- Many states don't recognize the computer employee exemption
- Some have different interpretations of certain exemptions, like what it means to be an administrative or professional employee

## Some Set Higher EAP Salary Thresholds

- Plenty of states set salary threshold for exempt EAP employees that exceed the federal minimum
- For example:
  - California: \$66,560
  - Washington State: \$67,724.80

## Some Have Quantitative "Primary Duty" Test

- Some states (most notable example: CA) have **quantitative** primary duty test
- Primary duty is what the employee spends at least 50% of their time doing

A close-up photograph of a camera lens, showing its intricate internal elements and the outer barrel. The lens is positioned on the left side of the frame, with a shallow depth of field that blurs the background. The background consists of a soft, out-of-focus bokeh of colorful lights in shades of blue, yellow, orange, and red, suggesting a night scene or a light display. The overall composition is clean and modern, with a dark background that makes the lens and the bokeh stand out.

**Upcoming Webinars**



## Webinar Series . . .

- 1 | Defeating or Limiting Plaintiffs' Motions to Distribute Collective Action Notice
- 2 | Winning the Battle over Class Action Certification and Collective Action Decertification
- 3 | The Rise of Mandatory Arbitration Programs

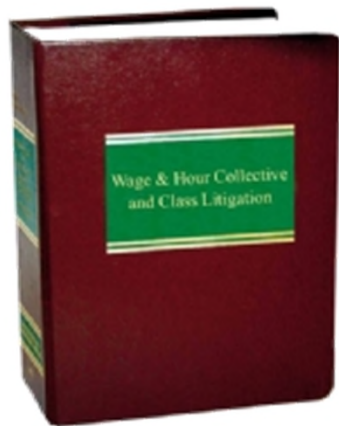
### **Today's Program:**

- 4 | Developing and Defending Exempt Status Classifications

### **And still to come...**

- 5 | The Shifting Concept of Employment
- 6 | What is "Work?"





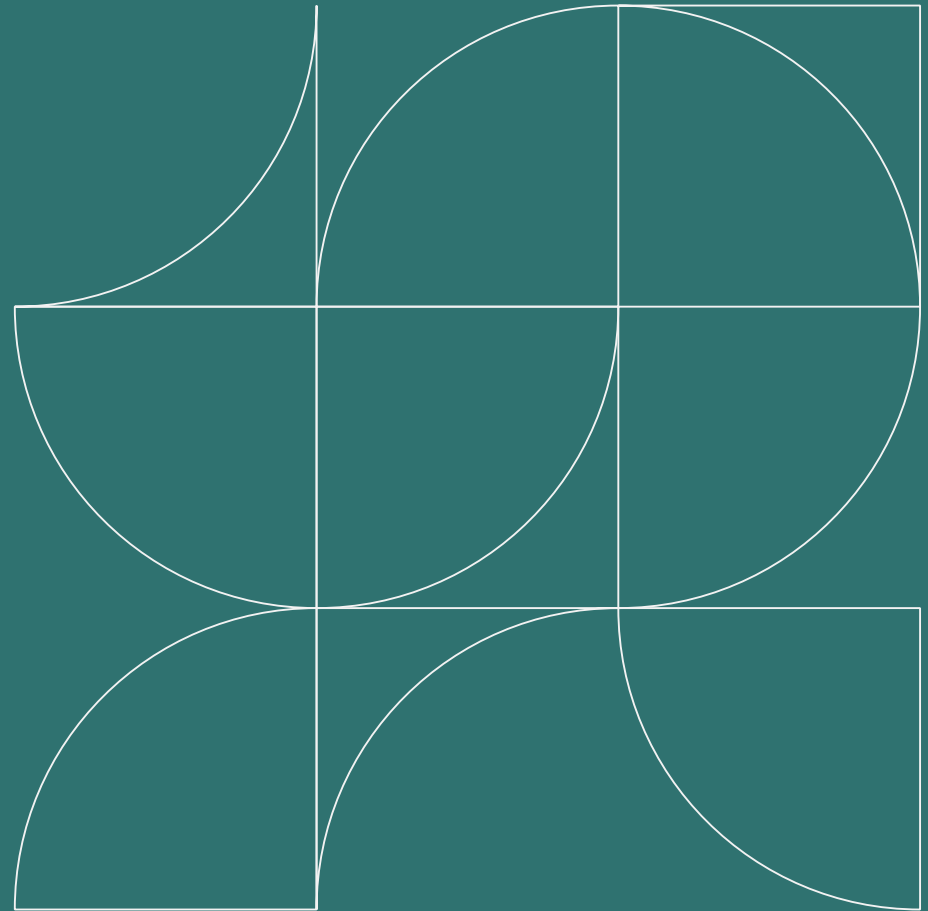
## The Authoritative Wage & Hour Litigation Treatise

If you don't already have a copy of the treatise, the book can be purchased here:

<https://www.lawcatalog.com/wage-hour-collective-and-class-litigation.html>

The order link will be provided in our webinar follow up materials, or please reach out to your favorite Seyfarth attorney to order a copy.

# Questions?



# Thank You!

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