

25  
May/17

**Fair Labor Standards Act  
(FLSA)**  
*& federal exemptions from overtime  
requirements*

**Mark Preiss**  
Attorney, Advisors Law Group, LLP

# Disclaimer

The material presented in this presentation represents the views of the speaker and is not intended to provide legal or tax advice as to any of the subjects mentioned, but rather is presented for general information only. You should not rely on this general information to address specific circumstances. You should consult knowledgeable legal counsel or other knowledgeable experts as to any legal or tax questions you may have.

# HRCI Certification

This webinar has been approved for 1.0 (General) recertification credit hour toward PHR, SPHR and GPHR recertification through the HR Certification Institute. Please be sure to note the program ID number on your recertification application form. For more information about certification or recertification, please visit the HR Certification Institute website at [www.hrci.org](http://www.hrci.org).



The use of this seal confirms that this activity has met HR Certification Institute's® (HRCI®) criteria for recertification credit pre-approval.

**enquiron®**  
Questions become answers.®

# Event Speaker



- **Mark Preiss, Esq.**
  - *Advisors Law Group, LLP*
  - Provides guidance to businesses concerning application of company policies and compliance with employment statutes
  - Counsels clients concerning effective employment law risk management strategies
  - Served as litigation counsel for eight years, representing businesses in employment law disputes before the Equal Employment Opportunity Commission (EEOC) and the Massachusetts Commission Against Discrimination (MCAD)
  - Admitted to practice law in the Commonwealth of Massachusetts in 2007
  - Also admitted to practice in the State of New York and the United States District Court, District of Massachusetts





# FLSA Overview

## Fair Labor Standards Act (FLSA) Overview

- Federal statute requiring that most employees be paid at least minimum wage for their hours worked.
- Requires that overtime is paid to non-exempt employees for all hours worked over 40 hours in one work week.
  - Note that this is NOT one pay period, but one seven-day work week.
- Requires that overtime is to be paid at time and one-half of an employee's regular rate.
- Most state laws follow the federal law on this issue.

# FLSA Coverage

- Enterprise Coverage
  - (1) Businesses engaged in interstate commerce, with two or more employees, and that have an annual dollar volume of sales or business done of at least \$500,000
  - (2) Coverage is automatic for hospitals, businesses providing medical or nursing care for residents, schools and preschools, and government agencies
- Individual Coverage
  - individual workers who are "engaged in commerce or in the production of goods for commerce."

- See: <https://www.dol.gov/whd/regs/compliance/whdfs14.htm>







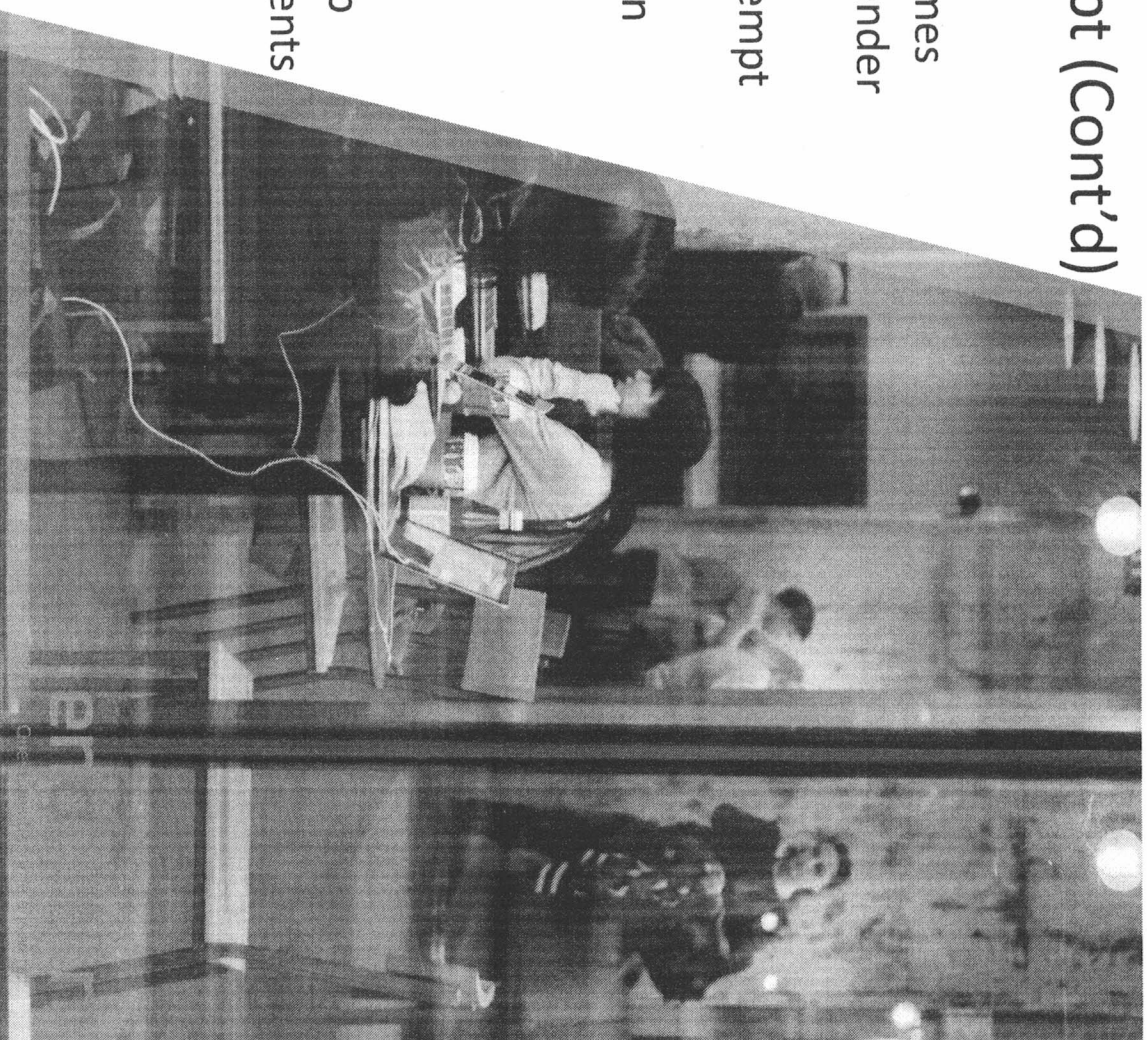
## Exempt vs. Non-Exempt

- What does it mean to be “exempt” vs. “non-exempt”
- Exempt status depends upon:
  - (1) The duties that the employee performs, and;
  - (2) Their form of compensation (salary vs. non-salary).
    - Currently, that amount is equal to \$455 per week/\$23,660 per year.
    - Changes to the standard salary level have been stayed.



## Exempt vs. Non-Exempt (Cont'd)

- Payment on salary (or sometimes a fee) basis alone does NOT render an employee “exempt.”
  - Employees can be non-exempt and paid via salary.
- A component of the exemption status is contingent upon the DUTIES that the employee performs on a primary basis.
  - Job title does NOT resolve whether an individual's job duties meet the requirements for exempt status.





## Exempt vs. Non-Exempt (Cont'd)

- Last but not least...
- It is not **REQUIRED** that an employee be classified as exempt if they **DO** meet all the requirements for exempt classification;
- However, it is **REQUIRED** that an employee be classified as non-exempt if they do **NOT** meet the requirements for any exemption.



A black and white photograph of a modern interior space, likely a library or study area. The room features large windows with dark frames, allowing natural light to enter. In the foreground, there is a curved, light-colored desk or table. Behind it, several dark, modern chairs are arranged. The background shows more windows and a bright, possibly outdoor area. The overall atmosphere is clean and contemporary.

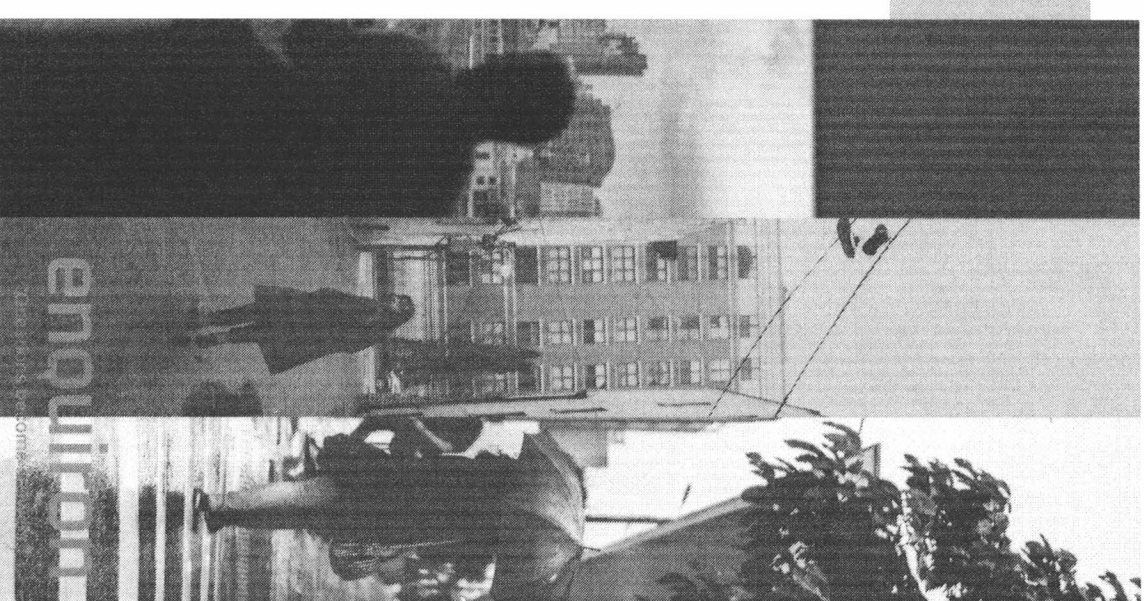
# Exemptions

# Executive Exemption

- Questions to Consider:
  - Is the individual paid via salary?
  - Does the individual earn at least \$455/week (\$23,660/year)?
  - Does the employee manage the business OR a department or subdivision of the business?
  - Does the employee customarily and regularly direct the work of two or more other full-time employees?
  - Does the employee have the authority to hire/fire employees OR does their opinion have particular weight in the hiring/firing/promotion of other employees?

See: [https://www.dol.gov/whd/overtime/fs17b\\_executive.pdf](https://www.dol.gov/whd/overtime/fs17b_executive.pdf) for this and further information concerning the

Executive exemption.





# Administrative Exemption

- Questions to Consider:
  - Is the individual paid via salary or on a fee basis (i.e., an agreed amount for a single job regardless of the time required to complete the job)?
  - Does the individual earn at least \$455/week (\$23,660/year)?
  - Is the employee's primary duty the performance of office or non-manual work directly related to the management or general operations of the employer or its customers?
  - Do the employee's duties include the exercise of discretion and independent judgement with respect to matters of significance?



## Administrative Exemption, (Cont'd)

- Office or non-manual work
- "customarily and regularly exercises discretion and independent judgment."
- Comparing and evaluating possible courses of conduct and making decisions.
- The employee must have the authority or power to make an independent choice, free from immediate direction or supervision and with respect to important matters.

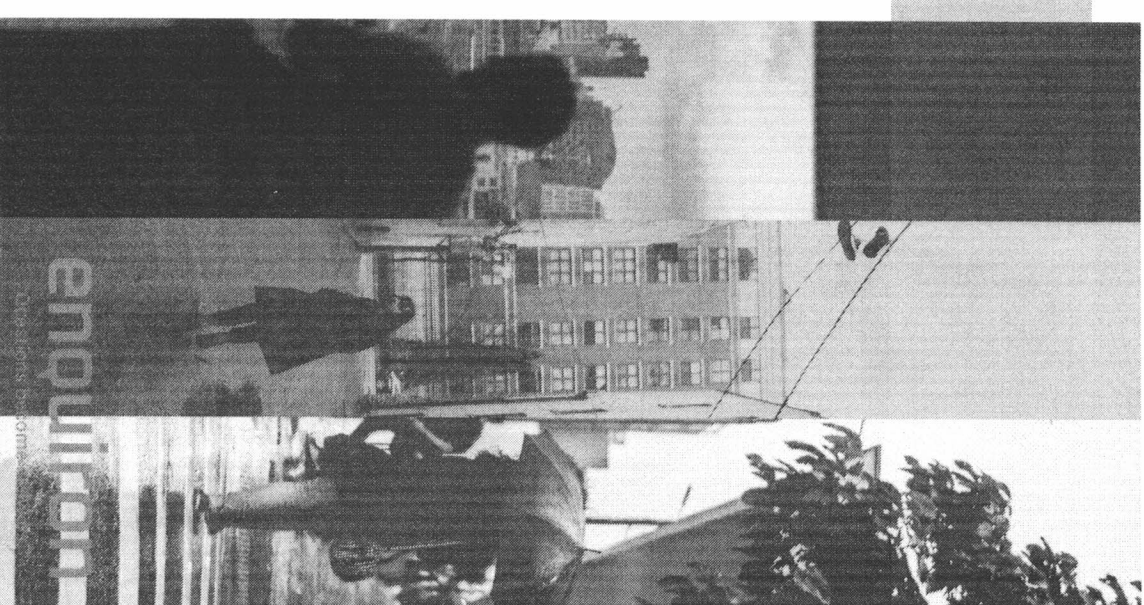
## Administrative Exemption, (Cont'd)

- Additional factors to consider include,
  - Implement management policies or operating practices;
  - Carries out major assignments;
  - Work that affects business operations to a substantial degree;
  - Authority to commit the employer;
  - Authority to waive or deviate from established policies and procedures

See: [https://www.dol.gov/whd/overtime/fs17c\\_administrative.pdf](https://www.dol.gov/whd/overtime/fs17c_administrative.pdf) for this and further guidance concerning the Administrative exemption.

# Professional Exemption: Learned Professional

- Questions to Consider:
  - Is the individual paid via salary or on a fee basis (i.e., an agreed amount for a single job regardless of the time required to complete the job)?
  - Does the individual earn at least \$455/week (\$23,660/year)?
  - Is the employee's primary duty performing work that requires advanced knowledge, predominantly intellectual in character, requiring consistent exercise of discretion and judgement?
  - Is the advanced knowledge required of the employee in a field of science or learning?
  - Is the advanced knowledge obtained by this employee customarily acquired by a prolonged course of specialized instruction?





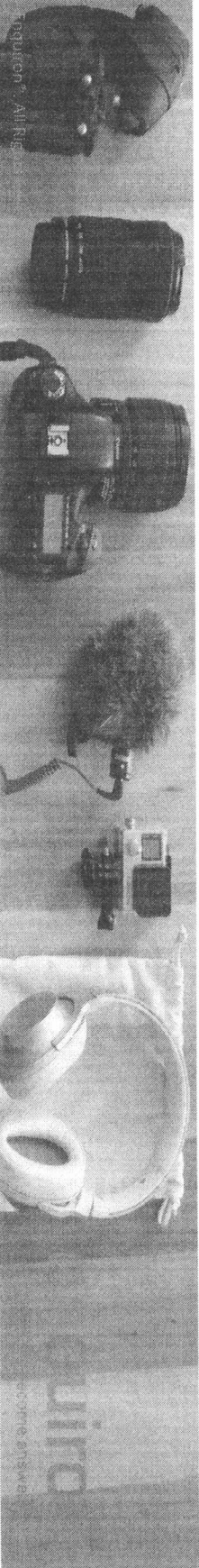
# Teachers

- Exempt if:
  - primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and,
  - employed and engaged in this activity as a teacher in an educational establishment.
  - The salary and salary basis requirements do not apply to bona fide teachers.

## Professional Exemption: Creative Professional

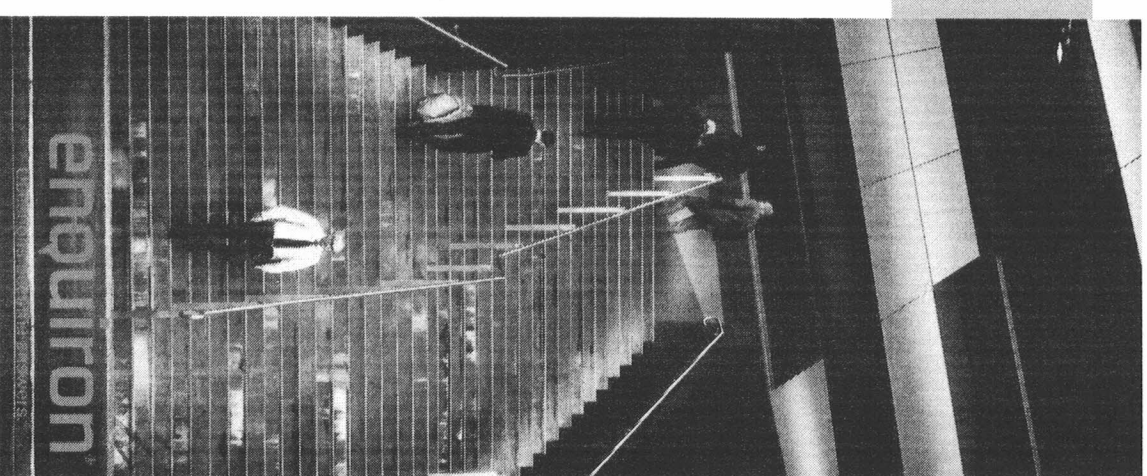
- Questions to Consider:
  - Is the individual paid via salary or on a fee basis (i.e., an agreed amount for a single job regardless of the time required to complete the job)?
  - Does the individual earn at least \$455/week (\$23,660/year)?
  - Is the employee's primary duty the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic/creative endeavor?

See: [https://www.dol.gov/whd/overtime/fs17d\\_professional.pdf](https://www.dol.gov/whd/overtime/fs17d_professional.pdf) for this an further information concerning the Professional and Creative exemptions.



# Computer Employees Exemption

- Questions to Consider:
  - Is the employee paid
    - on a fee basis (i.e., an agreed amount for a single job regardless of the time required to complete the job), OR
    - via a salary of at least \$455/week (\$23,660/year) OR
    - paid on an hourly basis no less than \$27.63/hour?
  - Is the employee a computer systems analyst, computer programmer, software engineer or similarly skilled worker?
  - Does the employee's primary duties consist of:
    - The application of systems analysis techniques and procedures;
    - The design, development, documentation, analysis, creation, testing or modification of computer systems or programs;
    - The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
    - A combination of the aforementioned duties, the performance of which requires the same level of skills.



# Outside Sales Exemption

- Questions to Consider:
  - Is the employee's PRIMARY DUTY making sales or obtaining orders for services or for the use of facilities that a client or customer would be paying for?
  - Is the employee customarily engaged away from the employer's place of business?
  - There is no minimum salary basis that applies and, therefore, the salary amount whether derived from a base salary, commission, or some other combination is not relevant.

See: [https://www.dol.gov/whd/overtime/fs17f\\_outsidesales.pdf](https://www.dol.gov/whd/overtime/fs17f_outsidesales.pdf) for this and for further information on the

Outside Sales exemption.



## Inside Sales Exemption

- Applies to the duty to pay overtime – employers are not excused from the requirement to pay minimum wage.
- Requirements:
  - 1. the employee must be employed by a retail or service establishment, and
  - 2. the employee's regular rate of pay must exceed one and one-half times the applicable minimum wage for every hour worked in a workweek in which overtime hours are worked, and
  - 3. more than half the employee's total earnings in a representative period must consist of commissions.

See: <https://www.dol.gov/whd/regs/compliance/whdfs20.pdf>

# Highly Compensated Employees (HCE)

- A highly compensated employee is deemed exempt under Section 13(a)(1) if:
  - 1. The employee earns total annual compensation of \$100,000 or more, which includes at least \$455 per week paid on a salary basis;
  - 2. The employee's primary duty includes performing office or non-manual work; and
  - 3. The employee customarily and regularly performs AT LEAST ONE of the exempt duties or responsibilities of an exempt EXECUTIVE, ADMINISTRATIVE or PROFESSIONAL employee.

See: [https://www.dol.gov/whd/overtime/fs17h\\_highly\\_comp.pdf](https://www.dol.gov/whd/overtime/fs17h_highly_comp.pdf) for more information



## Both Exempt and Non-Exempt Job Functions

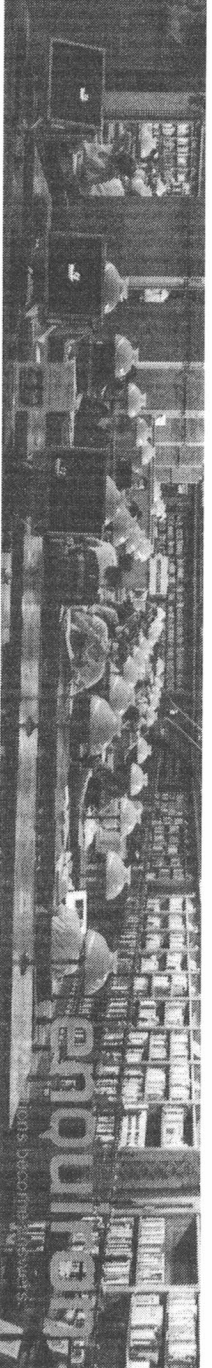
- An employee can perform different duties or work in two or more different positions for the same employer, but an employee may not be BOTH exempt and non-exempt for the same employer.
- If the employee's PRIMARY DUTIES qualify as exempt work, the employer may treat the employee as exempt for all hours worked in both the exempt position and in any additional non-exempt role.
  - Example: a warehouse manager, exempt under the executive exemption, also performing a non-exempt role.



## Part-Time/Exempt

- Not an express violation of the FLSA.
- Conduct the same duties analysis and compensation analysis.
- Must not be scheduled to work a set number of hours.

See: [https://www.dol.gov/whd/opinion/FLSANA/2006/2006\\_06\\_01\\_10NA\\_FLSA.pdf](https://www.dol.gov/whd/opinion/FLSANA/2006/2006_06_01_10NA_FLSA.pdf).

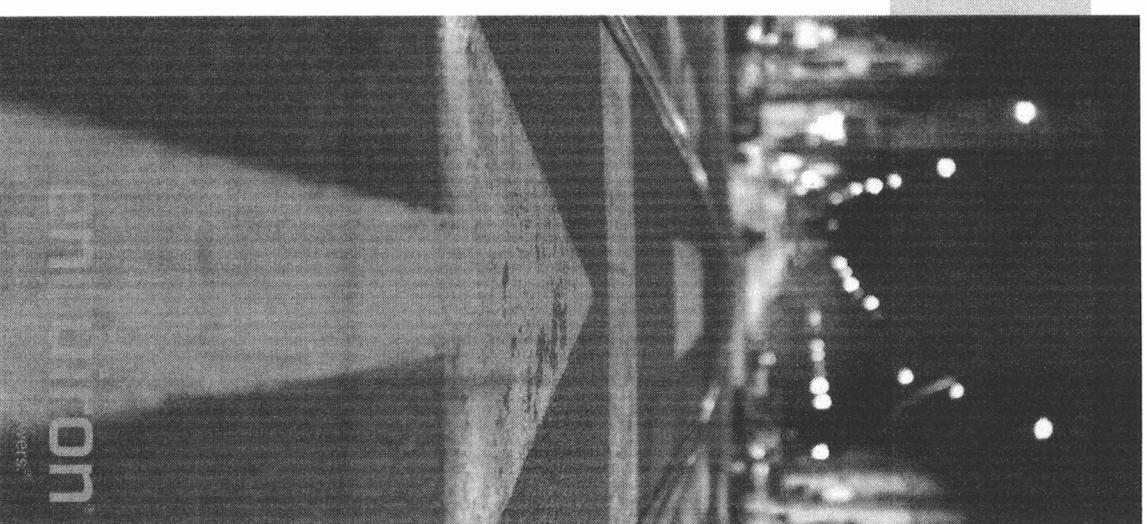


## Exempt Employee Scheduling and Time Tracking

- Scheduling
  - No set schedule or hours to be worked
  - No set number of hours
- Time Tracking
  - May NOT be linked to the employee's compensation

## Conclusion – Helpful Links

- If you have concerns about appropriate employee classification, you may find the DOL's online interactive tool available at <http://webapps.dol.gov/elaws/overtime.htm> to be helpful in assisting you in determining proper classification of employees as well.
- Also, employers can consider speaking with local employment counsel who can review the necessary materials and offer a written opinion as to classification for any individual position.
- The U.S. Department of Labor makes excellent summaries available concerning the all of the exemptions discussed today, which can be viewed through DOL Fact Sheet 17A: [https://www.dol.gov/whd/overtime/fs17a\\_overview.htm](https://www.dol.gov/whd/overtime/fs17a_overview.htm)





An aerial photograph of a tropical coastline. The top half of the image shows a dense line of palm trees along a road or path. Below the trees, the terrain is a mix of light and dark patches, possibly sand and vegetation. The bottom half of the image is a solid, light gray area.

# Questions & Answers