

**Fisher
Phillips**

Accurate Wage Recording and Avoiding Payroll Mistakes

FISHER PHILLIPS LLP 2017
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ON THE FRONT LINES OF WORKPLACE LAW™

The Primary Laws to Be Concerned About

- New York State
- Federal – Fair Labor Standards Act
- Migrant and Seasonal Agriculture Protection Act
- H-2A Law (8 USC § 1188) and Regulations

None of These Laws Permits Side Deals

- All of these laws require payment of all wages due when they are due.
- All provide for stiff penalties for failures to comply.
- All provide for protections for complaining about violations.

New York State Farm Workers Minimum Wage Order

- At least \$10.40 after December 31, 2017 except for NYC (\$12/13 if +10 employees), and Nassau, Suffolk, and Westchester counties (\$11.00).
- Minimum goes up each following year through December 31, 2020.
- Terminated workers must be paid no later than the regular pay day.
- MSPA detail of wage deductions and pay DOL WH-501 meets NY state detail requirements. § 190 –1.2.

“Employed on a Farm” NYS law § 190 –1.3 (g) and (h)

- Does not include service performed in connection with or other processing of any agricultural commodity not raised on the employer’s farm.
- Implications for overtime under State and Federal law.

Under the FLSA: “Agriculture” Is:

- Farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of title 12), the raising of livestock, bees, fur-bearing animals, or poultry, ***and***

FLSA “Agriculture” Also Is:

- Any practices (including any forestry or lumbering operations)
- *performed by a farmer or*
- *on a farm*
- *as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.*

Hours worked

- Under the FLSA, “employ,” means “to suffer or permit to work.”
 - Interns
 - Observers
- Workweek includes all time an employee is necessarily required to be
 - On the employer’s premises,
 - On duty, or
 - At a prescribed workplace.

Hours worked

- It does not matter:
 - If the work is active or passive— such as waiting
 - If the work is burdensome
 - If the work is not requested
 - If the work is not ok'd beforehand
 - If the employee volunteered to work
- If the employer knows or should have known of hours worked, the employee must be paid.

Hours Worked Issues

- Off the Clock Work
- Pre/Postliminary Acts
- Waiting Time
- On Call Time
- Rest/Meal Breaks
- Meeting / Training Time
- Travel Time
- Rounding Hours
- Recording Time



Off the Clock

Frequent Problems

- Told to punch out but employee continues working
- Ignoring pre- and post-shift work
- Remote work
- Errands on way home
- Altering time records
- Bad rounding rules

Preventative Steps



- Limit after hours communications with non-exempt employees that have mobile devices to emergencies.
- Block remote access of non-exempt employees to e-mail and other computer programs.
- Remind employees they must record all of their hours worked.
- Train managers and anyone who has say-so over pay.
- Enforce policies and pay employees for time worked.

Pre/Postliminary Activity

This exclusion applies
only to activities that are not

“integral”

and

“indispensable”

to the employee’s principal activities

Pre/Postliminary Activity

Indispensable = Necessary

Integral = Essential to Completeness

Waiting Time

Ultimate Issue

Is the Employee waiting to be engaged?

Or

Is the Employee engaged to wait?

Waiting Time

- Waiting to be engaged
 - Few restrictions on use of time
 - I.e., free to go
 - Enough time to make worthwhile
- Engaged to wait
 - Restrictions on use of time
 - E.g., machine down, field wet/rain to stop, sunrise coming

On-Call Time

Factors

- Agreement between the parties
- Nature and extent of restrictions
- Degree of interference with personal pursuits:
 - Number and frequency of calls
 - Required response time
 - Ability to engage in personal pursuits

Rest/Meal Breaks

- Not required under the FLSA, unless a minor
- Rest breaks are compensable time:
 - 5-20 minutes
 - Cannot be combined
- Meal breaks are not compensable time but they must be *bona fide*:
 - Complete relieved from duty
 - For purpose of eating regular meals
 - Ordinarily 30 minutes or more
 - Leaving premises not required

Meeting/Training Time

- Four-part test for meeting time to be non-compensable:
 - Attendance voluntary
 - No productive work performed
 - Outside work hours
 - Not job-related

Meeting/Training Time

- Must meet all four
- Not voluntary if attendance is implicitly required
- It is directly related if designed to make employee more effective at job
- State-required training:
 - Employee obligation
 - Employer obligation

Travel Time

- General rule:
 - Home to work: no pay
 - Travel between fields/jobs during workday: paid time
- What can convert normal home to work into compensable time?
 - Errands for the employer
 - Loading water, tools and equipment
 - Instructions for day's work
 - Driving other employees

Travel Time

Special rules apply to:

- Special one day out-of-town travel
 - Door to door
 - If traveling as a passenger, can deduct time commuting to airport/train station
 - Can also deduct meal time
- Overnight out-of-town travel
 - Considered worktime when it cuts across normal work hours (even on weekends)
 - Considered worktime when employee is actively working (including driving)
 - Not considered worktime when employee is passenger outside of normal working hours

Rounding Hours

- Rounding is permitted under the FLSA
- However, you can't round way in a way that is always advantageous to the employer –the clock must move in the same direction.
- USDOL “enforcement policy”: Nearest to 15 minutes– the 8/7 minute rule must move in the same direction.
- Ignoring time entries outside of the schedule is not “rounding.”
- May be harder to justify if you have a computer/electronic system that captures exact work time.

Recording Hours

- The basic obligation: Keep accurate records of all time a non-exempt employee works each workday and each workweek
- Obligation belongs to Employer and legally may not be delegated to Employees
- In the absence of accurate time records, employee can prove hours by a “just and reasonable inference.”
- Common problems:
 - Matching to piece rate earnings
 - Daily hours (no stops/starts– no clear record of meal periods)
 - Incomplete records
 - Rounding

FLSA Recordkeeping

- An employer must maintain the following information on all employees:
 - Personal information, including the employee's full name, Social Security number, permanent home address, occupation, sex, and birth date (if under 19 years of age).
 - Time and day of week when employee's workweek begins
 - Statement of regular hourly rate, basis on which employee's wages are paid and the nature and amount of each payment excluded from the regular rate for any week in which overtime compensation is due

FLSA Recordkeeping– Note MSPA & H-2A Require More

- An employer must maintain the following information on all employees (continued):
 - Hours worked each day and total hours worked each workweek
 - The total daily or weekly straight-time earnings
 - Total overtime earnings for the workweek
 - Any deductions from or additions to the employee's wages
 - Total wages paid each pay period
 - The date of payment and the pay period covered

Recordkeeping

Retention – Mandatory and Minimum Time

- 3 Years – Payroll records
 - 2 Years – Timecards
 - New York – 6 years
- Guidance is 6 + ears



Partial Exemption FLSA (13)(b)(12) Secondary Agriculture (OT ONLY)

- Employees in non-agricultural jobs (driver, mechanic, clerk)
- Employed by farmer AND engaged only in that farmer's farming operations (even if off the farm)

OR

- Employed on a farm AND engaged only in that farm's farming operations (even if employer not a farmer)

MPSA Requires Additional Records and Payroll Disclosures:

- What is *agriculture* under MSPA?
 - Agricultural employment" means employment in any service or activity included within the provisions of section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)), or section 3121(g) of title 26 *and* the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.
- But this is not the end of the story as to which agricultural employers are covered under this law.

MSPA Applies Only to Migrant and Seasonal Agricultural Workers— so definitions are important

- “Migrant agricultural worker” means . . . an individual who is employed in *agricultural employment of a seasonal or other temporary nature*, and who is required to be absent overnight from his permanent place of residence but does not include:
 - any immediate family member of an agricultural employer or a farm labor contractor; or
 - any H-2A visa-holding, temporary nonimmigrant alien.

MSPA Only Applies to Migrant and Seasonal Agricultural Workers— so

- "Seasonal agricultural worker" means . . . an individual who is employed in *agricultural employment of a seasonal or other temporary nature* and is not required to be absent overnight from his permanent place of residence—
- (i) when employed on a farm or ranch performing field work related to planting, cultivating, or harvesting operations; **or**
- (ii) when employed in canning, packing, ginning, seed conditioning or related research, or processing operations, **and** transported, or caused to be transported, to or from the place of employment **by means of a day-haul operation** but does not include:
 - any migrant agricultural worker;
 - any immediate family member of an agricultural employer or a farm labor contractor; or
 - any H-2A visa-holding temporary nonimmigrant alien.

If MSPA Does Apply, It Requires Records Maintained by Employer and Provided to Employees Each Pay Period—DOL Form WH-501:

- Each worker's name, permanent address, and Social Security number;
- The basis on which wages are paid;
- The number of piecework units earned, if paid on a piecework basis;
- The number of hours worked;
- The total pay period earnings;
- The specific sums withheld and the purpose of each sum withheld; and
- The net pay;
- The employer's name, address, and employer identification number assigned by the Internal Revenue Service.

H-2A *Agriculture* Is:

- Agricultural labor as defined and applied in sec. 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. 3121(g);
- Agriculture as defined and applied in sec. 3(f) of the Fair Labor Standards Act of 1938 (FLSA) at 29 U.S.C. 203(f);
- The pressing of apples for cider on a farm; or
- Logging employment AND
- It must also be temporary or seasonal in nature.

H-2A Recordkeeping and Payroll Receipt Records Are Even More Complex

- The employer must keep accurate and adequate records ... including but not limited to field tally records, supporting summary payroll records, and records showing the nature and amount of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee [required under the regulations]); the hours actually worked each day by the worker; the time the worker began and ended each workday; the rate of pay (both piece rate and hourly, if applicable); the worker's earnings per pay period; the worker's home address; and the amount of and reasons for any and all deductions taken from the worker's wages.
- Reason hours worked by employee were fewer than offered.

H-2A Records That Must Be Provided to Employees on or Before Each Payday

- The worker's hourly rate and/or piece rate of pay;
- The hours of employment offered to the worker (showing offers in accordance with the three-fourths guarantee as determined in [the regulations], separate from any hours offered over and above the guarantee);
- The hours actually worked by the worker;
- An itemization of all deductions made from the worker's wages;
- If piece rates are used, the units produced daily;
- Beginning and ending dates of the pay period; and
- The employer's name, address and FEIN
- The worker's total earnings for the pay period;
- And MSPA records for all employees who are not exempt– i.e., US workers in corresponding employment.

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Thank You



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