

HR OVERTIME ESSENTIALS





Michael Worth


Vice President of Sales

ComplianceHR

worth@compliancehr.com

Introducing the Navigator Suite


ComplianceHR SmartScreen



COVID-19 Screening
Efficiently screens your employees and tracks results as they return to work, while helping you ensure privacy and 50-state compliance.

+ Manage Employees 🔍 Track Results


COVID-19 Resource Center



COVID-19 Resource Center
Quickly delivers answers to the most pressing employment-related COVID-19 topics such as health and safety, leaves of absence and more.

🔍 Use FAQ Rapid Reference
🔍 View Resource Documents


PolicySmart



Be Confident. Stay Compliant.
PolicySmart's simple templates and checklists make it easy to create and maintain your policies. Ensure you never miss an update with our intuitive news and notifications about regulatory changes.

🔍 View Policy Documents 🔍 View Policy News
⚙️ Configure Jurisdictions


Navigator IC



Independent Contractor Assessment
Delivers an actionable risk assessment, a report on how to lower the risk of misclassification, and a summary of applicable laws

+ Create New Evaluation 🔍 View Evaluations
▶ IC Agreement


Navigator OT



Exempt Status Assessment
Provides a risk assessment of each applicable exemption, suggestions on how to lower the risk of misclassification, and a summary of the federal and state exemption standards

+ Create New Review 🔍 View Reviews
🔍 View Evaluations


Navigator Leave



Leave Compliance
Generates state and federal compliant forms, and quickly delivers federal and state-specific leave requirements (and paid sick leave or "PSL") through Rapid Reference tools.

+ Create New Form 🔍 View Forms
▶ Use PSL Rapid Reference ▶ Use Rapid Reference


Navigator Pay Practices



Wage and Hour Compliance
Delivers comprehensive reports on a federal and state-by-state basis for the most common wage and hour issues

▶ Find Minimum Wage ▶ Use Rapid Reference

Navigator Onboarding

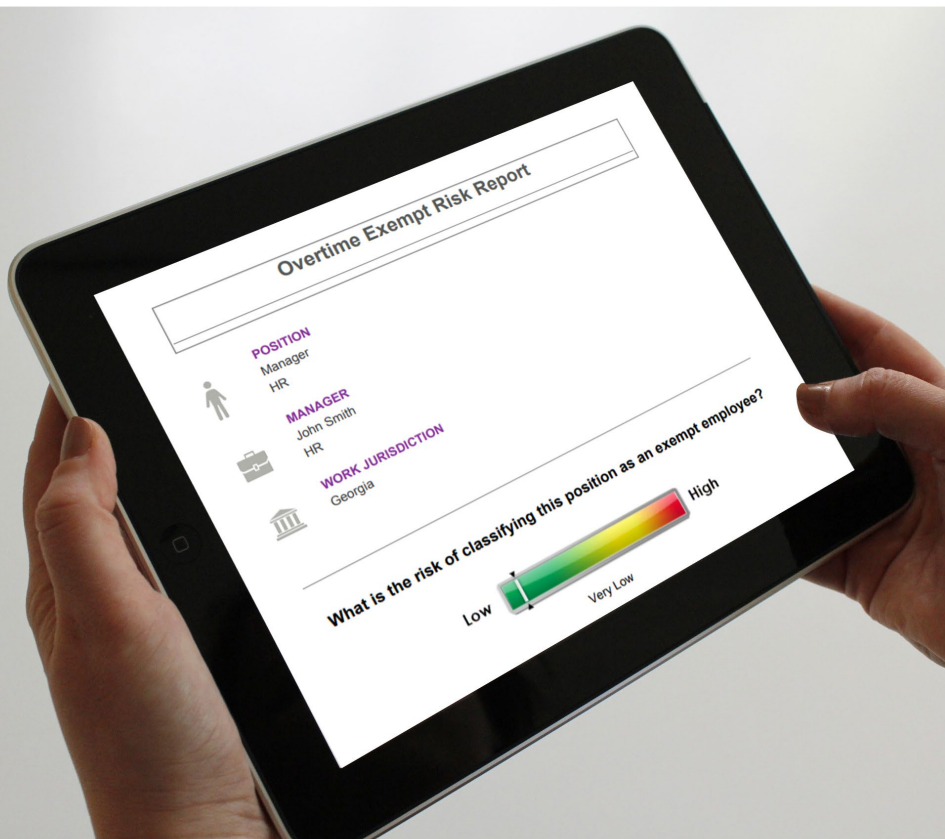


Onboarding Document Production
Produces state and federal compliant employment applications, offer letters, and employee non-disclosure documents

+ Create New Document



Navigator OT



- Determines employee as exempt or non exempt
- Applies all applicable federal and state tests
- Draws from a proprietary engine of **2,400+ reported court decisions** and DOL opinion letters
- Delivers reasoned suggestions on how to lower the risk of misclassification
- Provides the risk result, a summary of relevant federal and state exemption standards, and a transcript of answers



Navigator Pay Practices

- Are you confident in your ability to manage federal, state and local law for:
 - Minimum wage
 - Pay practices posters
 - Meal and rest
 - Business travel
 - Holiday pay
 - On-call employees
 - Voting pay
 - Rate changes
 - Pay frequency

What You'll Receive

- Full slide presentation (pdf format)
- Link to recorded audio presentation
- ComplianceHR demonstration and free trial!



- Q & A Box on your screen (questions are confidential – visible to presenters only)
- Interested in a demo? Submit a request in the Q&A Box



S. Libby Henninger
Shareholder, Littler Mendelson



Agenda

- Determining overtime classifications
- Updates to tip credits
- Refresh on calculating the regular rate

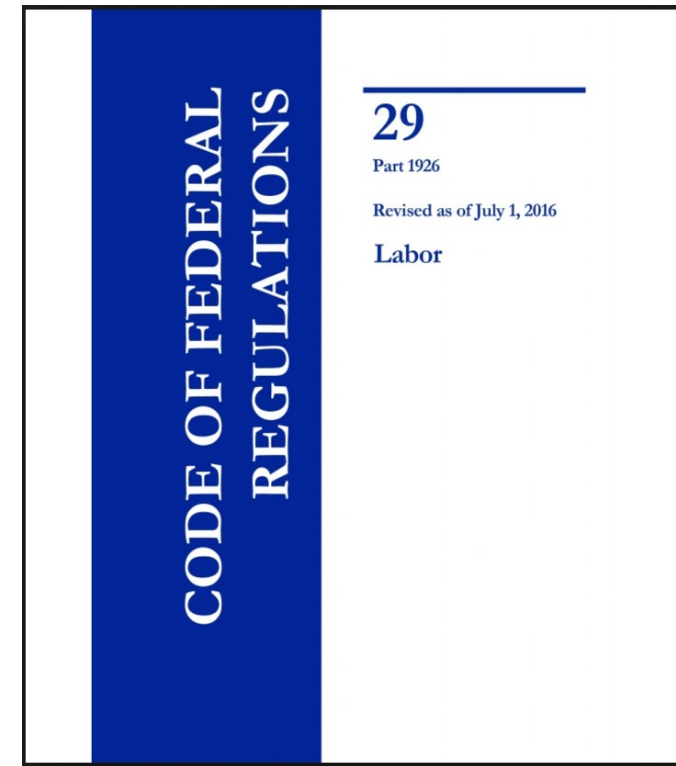
OVERTIME EXEMPTIONS



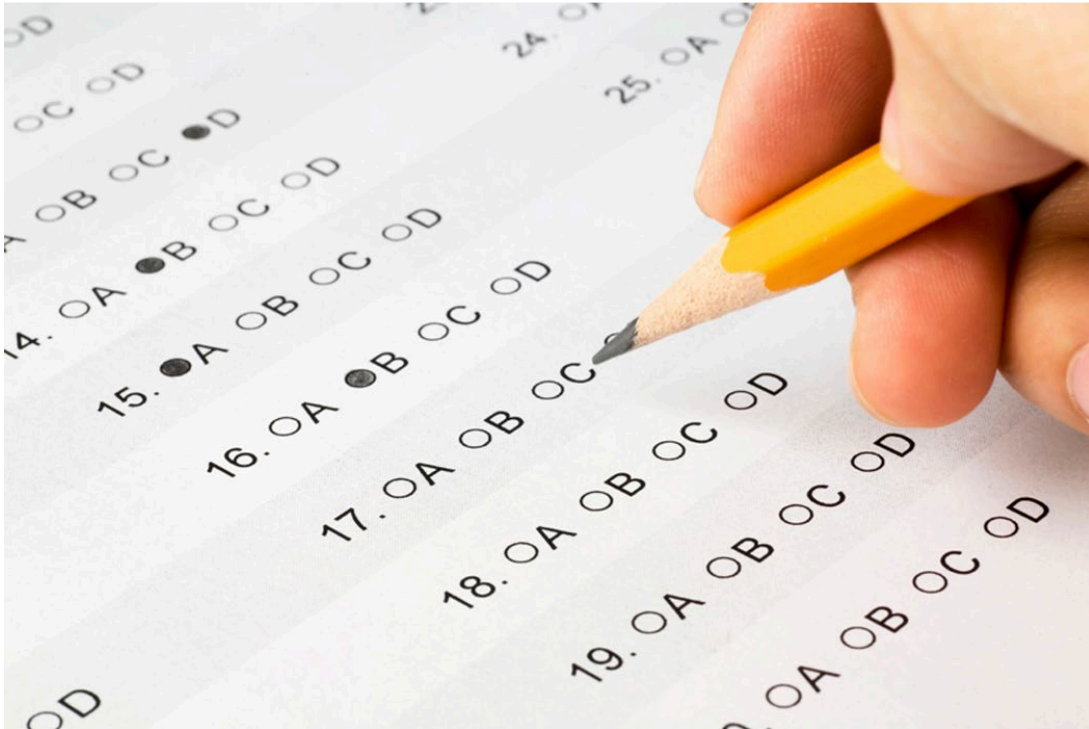
The Regulations

The Labor Department defined the “white collar” regulations at 29 C.F.R. Part 541

- Executive
- Administrative
- Learned Professional
- Creative Professional
- Computer
- Outside Sales



Three Tests for Exemption



- Salary Level
- Salary Basis
- Duties

Minimum Salary Level

Exceptions:

- Outside sales
- Doctors, lawyers and teachers
- Computer employees may also be paid at least \$27.63 per hour
- Commissioned employees of retail or service establishments
- Administrative and professional employees may be paid on a fee basis
- Exempt employees must be paid at least \$684 per week on a “salary basis”
- Can use bonuses/incentive payments (including commissions) to satisfy up to 10% of required salary level.



Highly Compensated Test

- Duties
 - Office or non-manual work
 - Customarily and regularly perform any one or more of the exempt duties identified in the standard tests for the executive, administrative or professional exemptions
- Compensation
 - Total annual compensation of at least \$107,432 (any 52-week period)
 - At least \$684 per week must be paid on a salary or fee basis



Duties Tests

- Each exemption has its own duties test
- **Primary Duty:**
 - The principal, main, major or most important duty that the employee performs
 - More than 50% not required, but will satisfy requirement

State Laws



Compliance **HR**

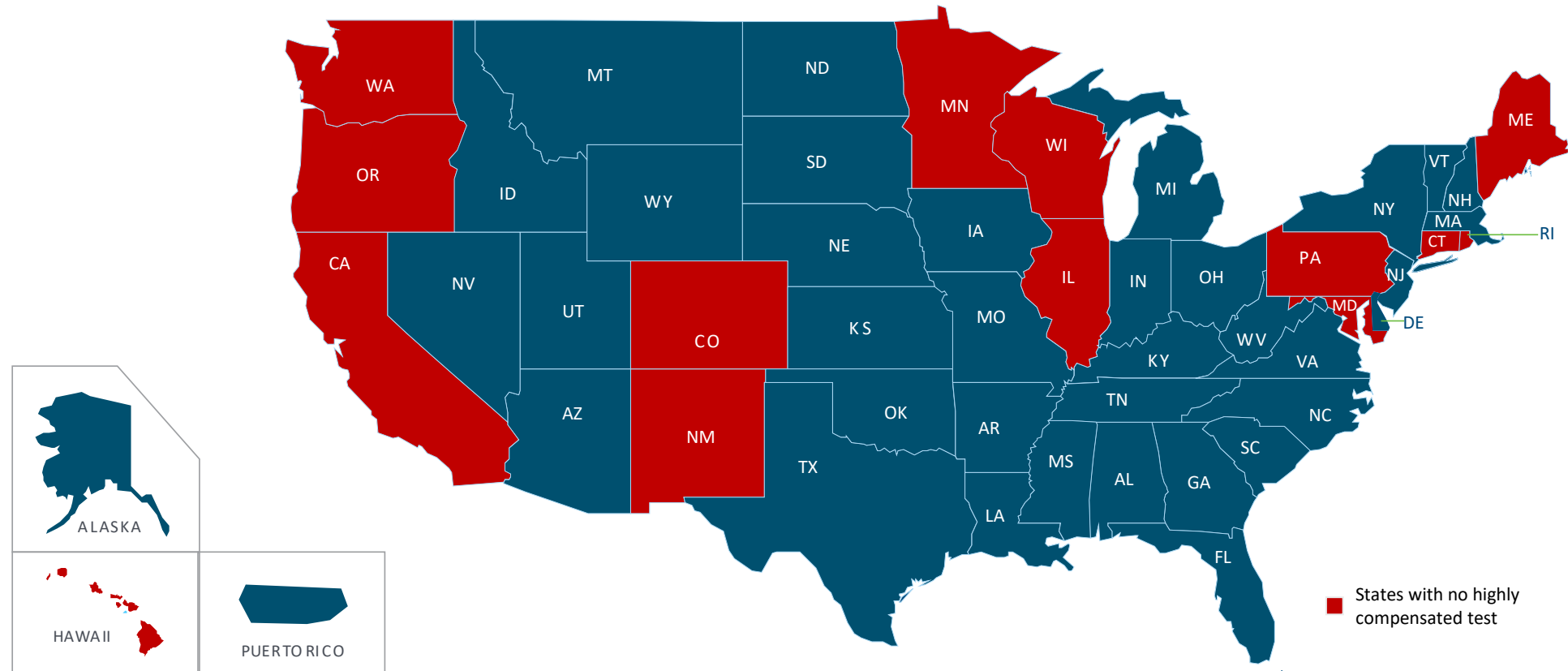
Different Minimum Salary

- Alaska
- California
- Colorado
- Connecticut
- Iowa
- Maine
- New York



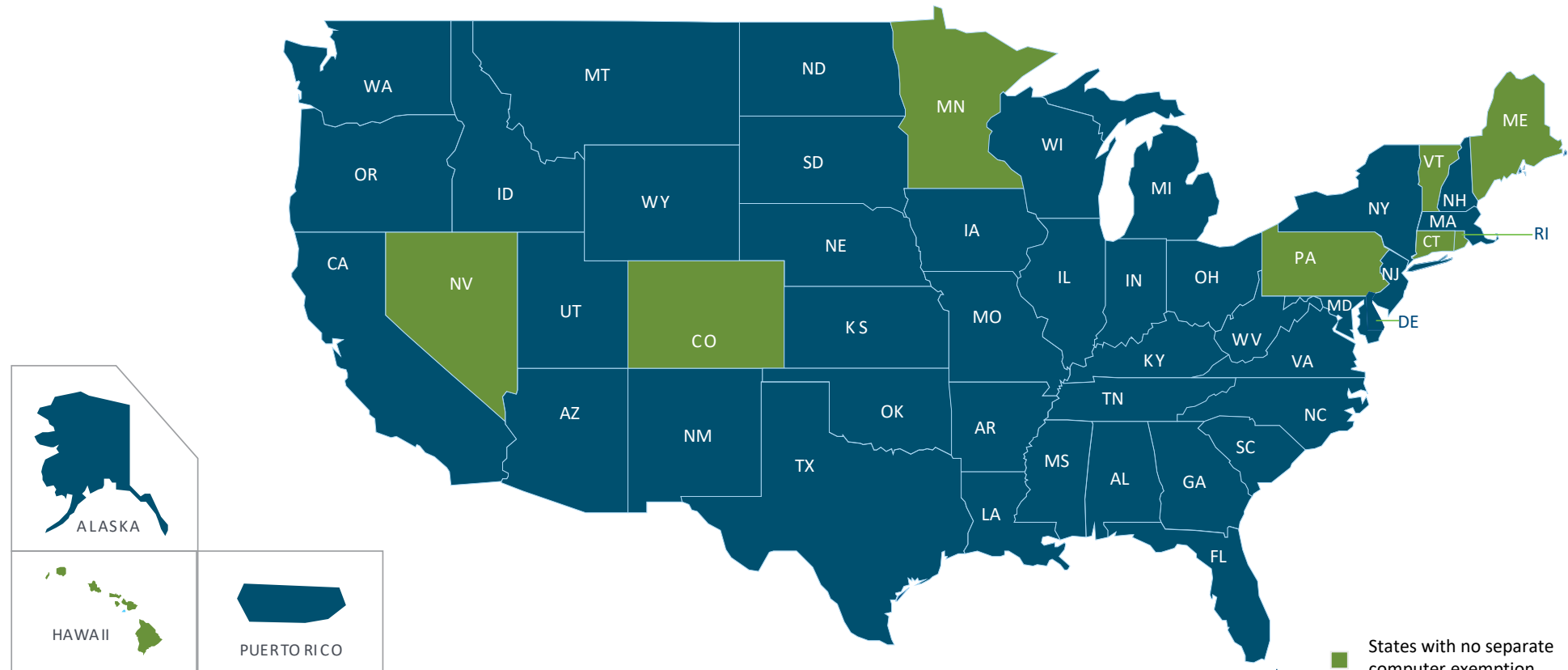
No Highly Compensated Test

- California
- Colorado
- Connecticut
- Hawaii
- Illinois
- Maine
- Maryland
- Minnesota
- New Mexico
- Oregon
- Pennsylvania
- Rhode Island
- Washington
- Wisconsin



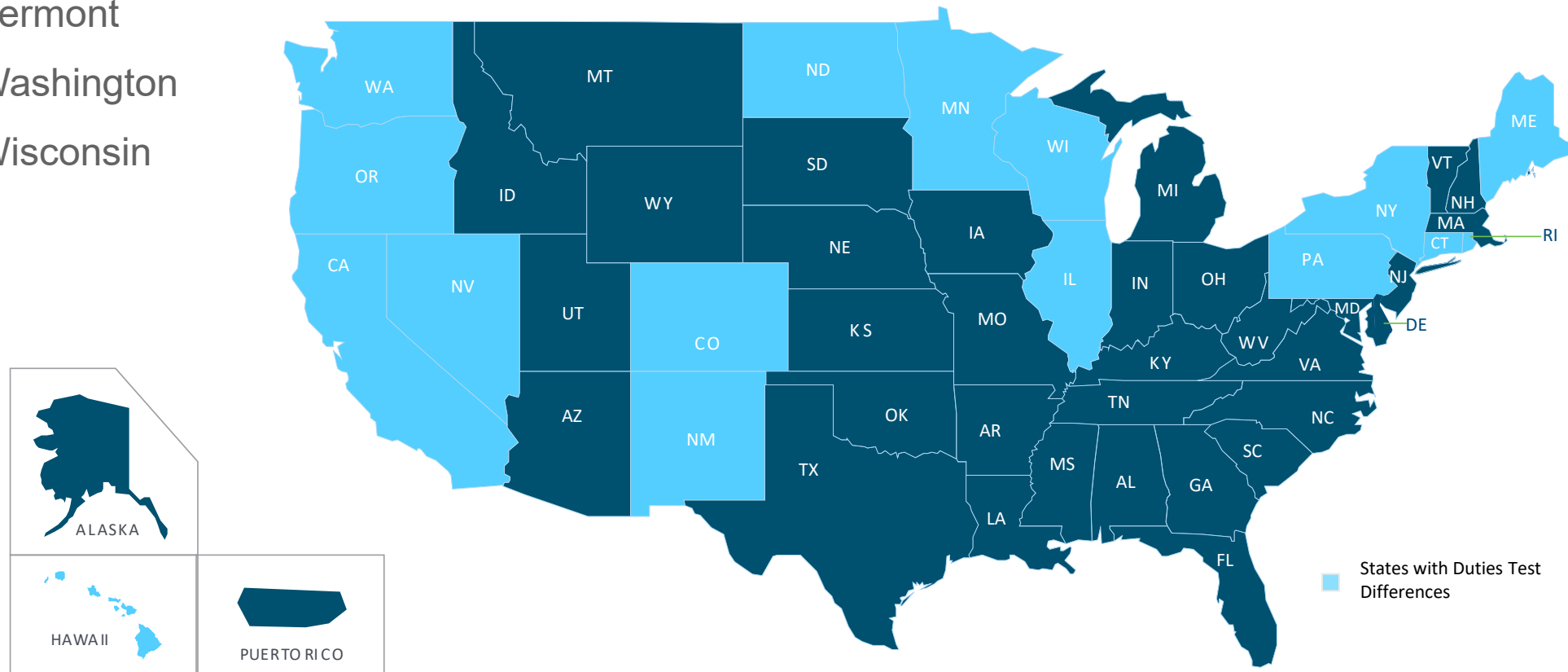
No Separate Computer Exemption

- Connecticut
- Hawaii
- Maine
- Minnesota
- Nevada
- Pennsylvania
- Rhode Island
- Vermont



States with Duties Test Differences

- California
- Colorado
- Connecticut
- Hawaii
- Illinois
- Maine
- Minnesota
- Nevada
- New Mexico
- New York
- North Dakota
- Oregon
- Pennsylvania
- Rhode Island
- Vermont
- Washington
- Wisconsin



Some Key Duties Differences

Outside Sales

- Time spent “outside”
 - California (50%)
 - Pennsylvania (80%)
 - Wisconsin (80%)
- Limit on non-sales work
 - Connecticut (20%)
 - Minnesota (20%)
 - New Mexico (20%)
 - North Dakota (20%)
 - Oregon (30%)
 - Pennsylvania (20%)

50% Primary Duty

- California
- Colorado executives

20% Non-Exempt Work Limit

- New Mexico, executive
- Wisconsin



TIP CREDIT



FLSA Tip Credit Requirements

- Minimum cash wage: \$2.13
- Maximum tip credit: \$5.12
- Tip credit may not exceed the amount an employee actually receives in tips
- Employees must be “informed by the employer of the provisions” of § 203(m)



New Tip Credit Rules

- Published October 28, 2021; effective December 28, 2021
- Restores “80/20” Rule
- Three categories of work
 - 1. Tip-Producing
 - 2. Directly Supporting
 - 3. Not part of tipped occupation
 - Any time in category 3 must be paid at full minimum wage



New Tip Credit Rules

- Time spent “directly supporting” tipped duties may be paid at a tip credit rate, but only not:
 - (1) more than 30 continuous minutes; or
 - (2) more than 20% of the hours in the workweek for which the employer has taken a tip credit.
- Idle time, time spent before/after business opens, or time spent on “side work” or prep work is subject to these limitations
- Any time spent on non-tipped work must be paid at minimum wage



Tip Pools

All tips must be retained by the employee, except for valid tip pools

- Limited to employees who customarily and regularly receive tips such as waiters/waitresses, bartenders
- Generally may not include employees such as dishwashers, cooks, chefs, and janitors
- May be mandatory
- No caps on contributions by employees to valid mandatory tip pools



Tip Pools

2018 Amendment to FLSA does permit pooling to any non-supervisor, non-manger, non-owner, if:

- No tip credit taken; and
- No distribution to house or management.



Notice Requirements

- Direct wages to be paid
- Amount taken as tip credit
- Amount of tip pool contributions, and that
- Tip credit cannot exceed actual tips received
- All tips received by the employee must be retained by employee except under a valid tip pooling arrangement limited to employees who customarily and regularly receive tips
- Tip credit shall not apply to any employee who has not received the notice



State Law

- Tip credit prohibited in 7 states:
 - AK, CA, MN, MT, NV, OR, WA
- Higher minimum cash wage required in 26 states and DC:
 - AZ, AR, CO, CT, DE, FL, HA, ID, IL, IA, ME, MD, MA, MI, MO, NH, NY, ND, OH, OK, PA, RI, SD, VT, WI, WV
- No Mandatory Tip Pooling:
 - KY, MN, NH, ND, WY

Tip Resources from Navigator Pay Practices

Navigator Pay Practices

Minimum Wage

The employee must be paid no less than \$17.27 per hour for all hours worked, which is the minimum wage for non-exempt employees working for larger franchises or employers in Seattle.

Tip Credit

Tip credits are prohibited in Seattle, Washington.

Future Rate Increases

If a future state-level or city-level minimum wage is not listed, it likely means that either a future increase has not been contemplated or the amount of the increase has not yet been determined by the regulatory authority.

Washington

	Statewide	SeaTac	Seattle		
			Large Employer (>500 Employees)	Small Employer (500 Employees or less) minimum wage	Small Employer (500 Employees or less) minimum compensation
January 1, 2023	Annual future adjustments will be based on increase in cost of living	Annual future adjustments will be based on rate of inflation	Annual future adjustments will be based on rate of inflation	\$16.50	
January 1, 2024				\$17.25	

CALCULATING THE REGULAR RATE



The Regular Rate

All “remuneration for employment” paid to an employee in a workweek divided by all hours worked in the workweek



CA Note: Difference for “flat sum” bonuses (Alvarado v. Dart) – divide by straight time hours only

The Regular Rate – General Rules

- If an employee receives compensation in addition to hourly wages or salary, the regular rate will be higher than the employee's hourly rate
- The regular rate may change each week
 - Calculating a single regular rate for a bi-monthly or semi-monthly pay period can result in under-payments or over-payments
- It is the regular rate, not an employee's hourly rate, which is multiplied by 1.5 to obtain an employee's overtime pay rate



Compensation Included & Excluded

Included

- Hourly wages or salary
- Commissions
- Non-discretionary bonuses
- Prizes and awards related to work
- Shift or job differentials
- On-call pay

Excluded

- Employee benefits
- Payments for time not worked
- Business expense reimbursements
- Certain premium pay
- Gifts for Christmas or special occasions
- Discretionary bonuses

Exclusions - Employee Benefits

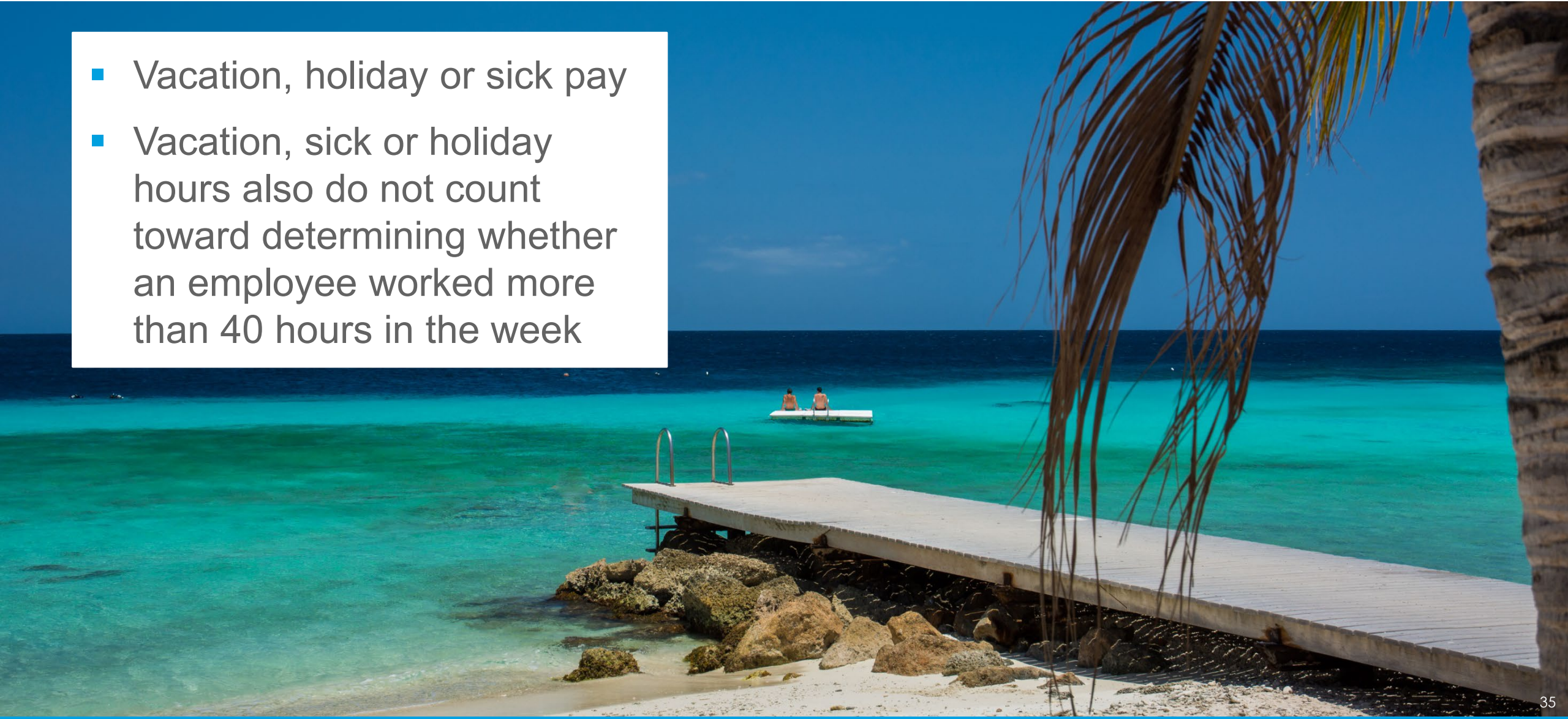
- Retirement, life, health, disability and similar benefits if irrevocable contributions to a trustee or third party under a bona fide plan
- Profit sharing, thrift or savings plans, stock option or appreciation rights if plan complies with the regulations

December 2019 Revisions:

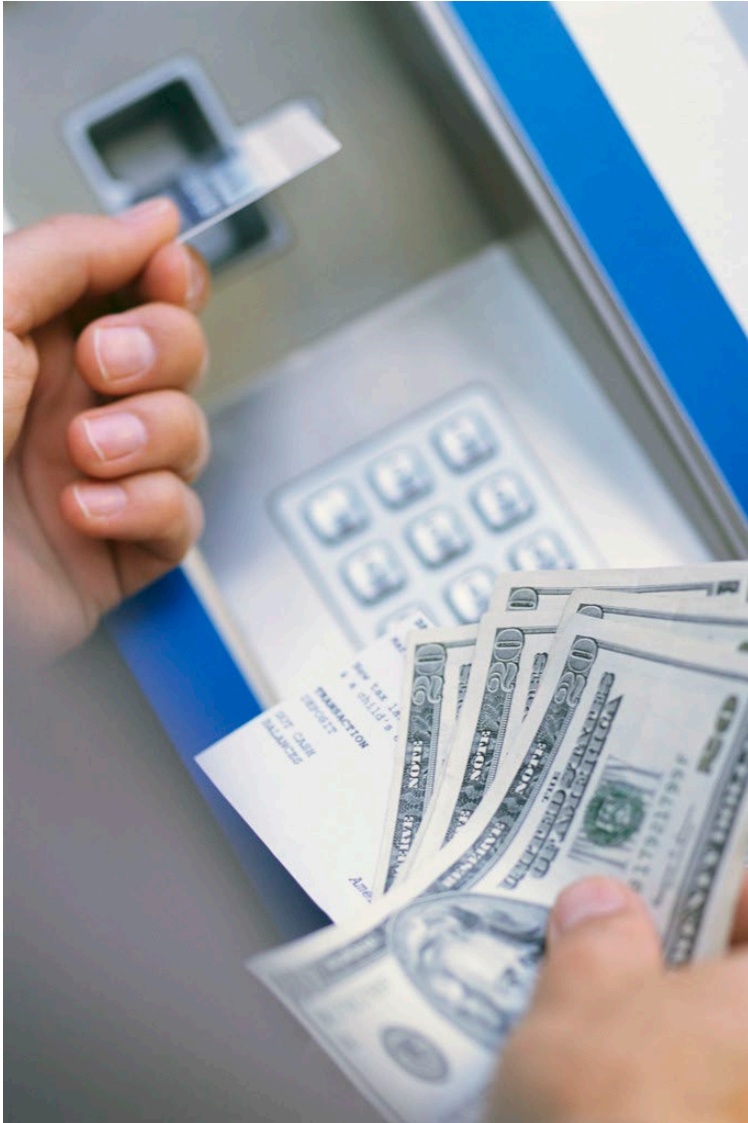
- Parking benefits like parking spaces
 - but not commuter subsidies
- Tuition benefits (paid to employee, education provider or student loan program)
- Cost to the employer to provide gym access, gym memberships, fitness classes, and recreational facilities
- Discounts on employer provided retail good and services

Exclusions - Payments for Non-Work Time

- Vacation, holiday or sick pay
- Vacation, sick or holiday hours also do not count toward determining whether an employee worked more than 40 hours in the week



Exclusions - Business Expenses



- Reasonable payments for traveling expenses, or other expenses, incurred by an employee in furtherance of his employer's interests and properly reimbursable by the employer
- The per diem/allowance problem:
 - Not enough = minimum wage violation
 - Too much = extra must be included in the regular rate

Exclusions - Premium Pay

- Extra pay for hours worked over 8 in a day or over 40 in a week
- Extra pay at 1.5 or more for work performed on Saturdays, Sundays, holidays, days of rest
- Such payments may also be used as a credit toward the overtime pay obligation

What about:

- Shift differentials?
- On-call pay?
- An extra \$2 per hour for working on Sunday?



Exclusions - Gifts

Gifts made at Christmas time or on other special occasions as a reward for service

- Not dependent on hours worked, production or efficiency
- Not so substantial that employees consider the payment as a part of the wages
- Not paid pursuant to contract
- Amount of the gift may differ based on salary, hourly rate or length of service



Exclusions - Discretionary Bonuses

- Discretionary both as to the fact and amount of payment
 - A bonus which is announced to employees in advance is not discretionary as to the fact of payment
 - A bonus payment determined according to any type of formula is not discretionary as to the amount of payment
- A bonus is not discretionary if employees expect to receive such payments regularly
- Very few bonuses are discretionary as defined by the FLSA regulations



Bonuses, Prizes & Awards

Included:

- Retention bonus
- Safety bonus
- Bonus to employees based on reaching productivity goals
- Value of trip to Hawaii awarded to high performing sales employees

Excluded:

- Recruitment bonus, unless employee is a recruiter or retention required to earn
- Prize for best Halloween costume
- Gold watch for 30 years of service
- Holiday bonus equal to two weeks wages
- Bonus calculated as a percentage of total wages

Calculating the Regular Rate

$$\text{ST Pay} = (45 \times \$20) = \$900$$

- ✓ But we need to add in the \$10 shift differential and the \$50 bonus

$$\text{RR} = \$960 / 45 = \$21.33$$

$$\text{OT Pay} = \$21.33 \times \frac{1}{2} \times 5 = \$53.33$$

$$\text{Total Pay} = \$960 + \$53.33 = \$1,013.33$$

- Jill earns \$20 per hour working a production line in a manufacturing plant
- She worked 45 hours
- Jill also earned an additional \$2 per hour for 5 hours that she worked on third-shift (\$10)
- Jill also exceeded her production goals for the week and earned a \$50 bonus

Monthly, Quarterly or Annual Comp

Payment of overtime may be delayed until the employer can compute the amount of overtime due

- But in no event may payment be delayed beyond the next payday after such computation can be made
- Thus, overtime due as the result of monthly, quarterly or annual bonuses need not be calculated or paid until the bonus is paid

$$\hat{\gamma}_y(3) = \frac{1}{10} \sum_{t=1}^7 (y_{t+3} - \bar{y})(y_t - \bar{y})$$

Formula:









(Total Bonus / Total Hours in Bonus Period) x ½ x OT Hours in Bonus Period

CA Note: Flat sum bonus formula

(Total Bonus / Actual Straight Time Hours in Bonus Period) x 1.5 x OT Hours in Bonus Period

How Can ComplianceHR Help?

- Overtime
- Pay Practices
- Handbook
- Rapid Reference Information
- Independent Contractor
- COVID-19 apps

ComplianceHR SmartScreen  COVID-19 Screening Efficiently screens your employees and tracks results as they return to work, while helping you ensure privacy and 50-state compliance. + Manage Employees Q Track Results	COVID-19 Resource Center  COVID-19 Resource Center Quickly delivers answers to the most pressing employment-related COVID-19 topics such as health and safety, leaves of absence and more. Q Use FAQ Rapid Reference Q View Resource Documents	PolicySmart  Be Confident. Stay Compliant. PolicySmart's simple templates and checklists make it easy to create and maintain your policies. Ensure you never miss an update with our intuitive news and notifications about regulatory changes. Q View Policy Documents Q View Policy News Q Configure Jurisdictions
Navigator IC  Independent Contractor Assessment Delivers an actionable risk assessment, a report on how to lower the risk of misclassification, and a summary of applicable laws + Create New Evaluation Q View Evaluations ▶ IC Agreement	Navigator OT  Exempt Status Assessment Provides a risk assessment of each applicable exemption, suggestions on how to lower the risk of misclassification, and a summary of the federal and state exemption standards + Create New Review Q View Reviews Q View Evaluations	Navigator Leave  Leave Compliance Generates state and federal compliant forms, and quickly delivers federal and state-specific leave requirements (and paid sick leave or "PSL") through Rapid Reference tools. + Create New Form Q View Forms ▶ Use PSL Rapid Reference ▶ Use Rapid Reference
Navigator Pay Practices  Wage and Hour Compliance Delivers comprehensive reports on a federal and state-by-state basis for the most common wage and hour issues ▶ Find Minimum Wage ▶ Use Rapid Reference	Navigator Onboarding  Onboarding Document Production Produces state and federal compliant employment applications, offer letters, and employee non-disclosure documents + Create New Document	

Questions?

[Compliancehr.com/webinar-demo](https://compliancehr.com/webinar-demo)



Littler[®]

Compliance **HR**

Thank you!



Littler[®]

Compliance **HR**