

IN THE KNOW:

## FLSA After-Hours Compensation

Andy Phillips & Patrick Henneger

The use of technology such as smartphones, e-mail, and other communication tools has made it easier for employers and their employees to accomplish more work anywhere and at any time. However, the use of advanced technology also exposes employers to Fair Labor Standards Act (FLSA) claims for failing to pay for compensable time outside of scheduled work hours.

Under the FLSA, nonexempt hourly employees are entitled to be paid one and one-half times their regular hourly rate for all hours worked over forty hours in a workweek. "Hours worked" is generally defined as those hours when the employee is within the "employ" of the employer. The FLSA defines the term "employ" to mean "suffer or permit to work." To "suffer or permit to work" means that if an employer requires or allows an employee to work, an employee must be compensated for the work time as "hours worked."

An employee is "required" to work when directed to do so by his or her employer. An employee is "allowed" to work when the employer does not direct the employee to work but "knows or has reason to believe that the employee is working." Work which is "allowed" under the FLSA is typically performed outside of work hours which the employer knows or has reason to know is being performed. Where an employer has reason to believe that work is being accomplished at home during off duty hours, the time is compensable.

Employees may perform a variety of potentially compensable job-related activities during their "off-the-clock" times, such as taking work home; making/receiving job-related telephone calls at home; sending, reviewing and responding to work-related texts, e-mails and other electronic

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SPECIAL REPORT: David Massart-NG Wealth

## The Federal Reserve Goes Global

In September, the Federal Open Market Committee (FOMC) failed to deliver on its first step towards normalizing monetary policy which surprised investors and many others across the globe. Despite improving economic growth prospects and improvements in labor market conditions, the Chair Yellen chose to delay acting as the Committee wants to see additional improvement in labor market conditions and more progress towards its inflation objective.

But here is where it got confusing. She noted the impacts that the appreciation of the dollar and slowdown in economies abroad were having, but she declined to indicate how important those factors were in the decision process. At the same time, Janet Yellen emphasized that the Committee's projections were not significantly different from the June meeting. So if little has changed and the inflation projections are on track, what more does the Committee need to see? On this point, she fell back on the need to see further improvement in labor market conditions, specifically to the desire to see a further drop in the U-6 measure of unemployment and reversal of the recent decline in the participation rate. As the chart shows, the participation rate has been declining ever since it peaked

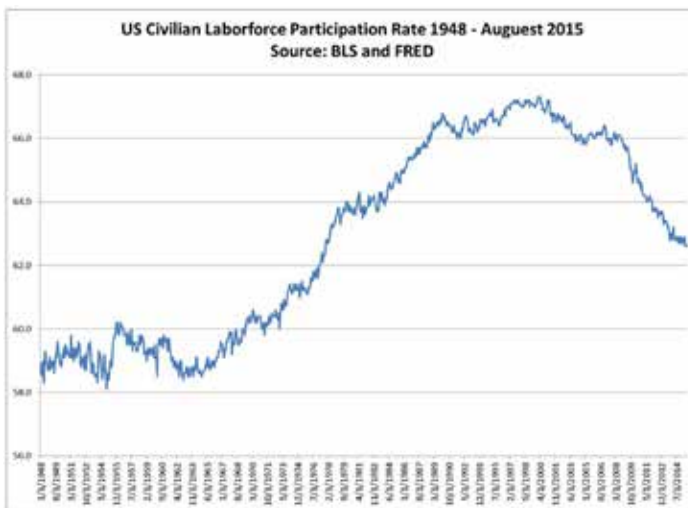
in 2000 at 67.3 percent. To us, it is not clear what trend line Chair Yellen was referencing.

In addition, more confusion has been introduced by the September "Summary of Economic Projections." As Chair Yellen indicated, there has been a slight decline in the median projections for Gross Domestic Product (GDP) growth in 2016 and 2017, some further improvement expected in unemployment from 2015 through 2017, and a slight downward revision in projected inflation. All of these differences are at most one to two tenths of a percentage point.

But the really interesting information is reflected in the so-called dot chart. First, all but 4 Federal Reserve participants are clearly leaning towards a rate increase in 2015, with 7 seeing one increase in the range of 25-50 basis points. Another six have the federal funds range even higher by the end of 2015. So this would seemingly put both of the upcoming FOMC meetings, in October and December respectfully, as reasonable time periods to increase rates. However, this looks inconsistent with Thursday's overly cautious no-change decision, given their modest revisions in the forecasts. Second, moving to 2016, the dots imply several policy moves are envisioned, and this

too appears inconsistent with Chair Yellen's and Vice Chairman Fishers' recent emphasis that further moves would be gradual and patient. Again, the dots also suggest a more aggressive path than implied by the Committee's very benign and modest projections for

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## Turnaround Consultants: Helping Businesses Succeed Again

The recent “great recession” was not kind to business. Robust and growing companies suddenly found themselves on the brink of financial ruin. Then the phone rings. It’s the bank telling them to hire a turnaround consultant.

### **An Outsider Telling Me How to Run My Business?**

Most frequently, a bank asks a business to hire a turnaround consultant when a borrower violates financial covenants or otherwise defaults under the loan documents. It may also happen when a loan is nearing maturity and the loan officer doesn’t think the loan committee will approve a renewal or modification.

Often, hiring a turnaround consultant is a hard pill for an owner to swallow. Times are tough, why add costs? What can a hired gun tell me that I don’t know? Is this consultant a mole for the lender?

Moreover, we’ve all heard the horror stories of the high-priced consultant who moves in and never leaves or the slash-and-burn consultant who cuts costs until the business goes out of business.

Hiring “any” consultant is not a magic bullet. Hiring the right consultant should be an investment that pays for itself.

### **A GOOD TURNAROUND CONSULTANT:**

- **Brings a dispassionate view to a business.**

A good consultant brings a fresh, objective set of eyes to the situation. The consultant cares, but does not have the same investment in the problems. Objectivity allows them to set aside emotion and make recommendations based on real experience.

- **Provides suggestions based on experience advising businesses in similar circumstances.**

Every business owner believes that his or her business is unique. In reality, troubled businesses have very similar problems. A good consultant understands those similarities, sees patterns and the tell-tale signs of the changes the business needs to make.

- **Talks in terms a lender understands.**

Maybe things are not as dire as a lender believes or the business is really on the verge of turning things around. A good consultant knows what persuades lenders and what they will not believe. A consultant also knows what substantiation will persuade the lender.

- **Customizes suggestions for short-term cash flow and long-term growth.**

Good consulting is a balancing act between managing short-term cash flow, lender requirements, and long-term growth needs. A good consultant knows that cutting too many costs will choke

the business to death. As well, he or she knows that long-term plans mean nothing if the business does not survive long enough to turn things around.

- **Responds quickly to challenges and changes the plan, if necessary.**

During the engagement, facts come to light or circumstances change which require the turnaround plan to change. A banker might take a negative view of an owner changing a plan versus a consultant’s new recommendations. Logic suggests, the banker views a consultant as the expert guide who is experienced in handling these situations.

- **Gets in and out.**

Consultants are expensive. A good consultant’s goal is to minimize the turnaround timeline. Beware of consultants who pitch that they will be there to help for years. Such parasitic advising is usually a death knell.

- **Recommends alternative financing.**

There are many sources of financing. In addition to banks, there are asset-based lenders, private capital investors, receivables financiers, and others. If all else fails, cash can be obtained through a sale of some equipment or inventory. Each has pros and cons. A good consultant will present options.

- **Can help sell the business, if needed. Initially, the goal is to save the business.**

If that is not going to work, selling it is a better alternative than giving it to the lender to liquidate. A good consultant should help coordinate the sale or assist a competent broker or investment banker.

- **Helps align the right team of advisors.**

A good consultant can objectively assess whether advisers (lawyers, internal and external accountants, etc.) are the right people to help the business during this crucial time of need.

- **Recommends alternatives to handing the keys to the lender.**

A good consultant, who the owner pays and engages, is working for the business. He or she is there to offer competent counsel, to explore options, even options the lender might not like.

Can the business reorganize through a Chapter 11 bankruptcy? Wisconsin has a good receivership process. Perhaps a lender will give a business more time if they authorize a Chief Restructuring Officer or embark on a definitive sales process. A good consultant explains options early in the process if the business cannot be turned around.

- **Will maintain confidentiality.**

Unless the lender hired the consultant, the consultant’s duty is to the business.

The consultant can’t share information with the lender unless the owner agrees.

- **Makes recommendations that help avoid, if possible, an owner’s personal bankruptcy while attempting to save the business.**

Too often, in trying to save the business, owners violate many of the cardinal rules of turning around a business. Business owners will “defer” paying sales and withholding taxes; invest retirement dollars back into the business, thereby losing exempt assets and creating a personal tax liability; or run up credit card debt. Sometimes, even after the business is hopeless, they provide new personal guaranties.

It is terrible to lose a business. It is even worse to lose a home, savings, and retirement because a business owner waited too long to take decisive actions.

Part of advising a troubled business involves understanding the owner’s personal situation worse.

### **Expectations: Hiring a consultant**

- The consultant requires a retainer up front which is sufficient to pay for the time it takes to get a basic understanding of a business.
- The consultant does a physical inspection, asks a lot of questions, meets the team, and digs into the books. This takes as little as a couple of days or as much as a week or two.
- The consultant should provide a preliminary report which includes: what is needed to move forward, a proposal of work to be done, a budget with an explanation of costs, a payment plan for the additional services, and an explanation of expectations.

### **Finding a GOOD consultant**

A good bankruptcy/creditors’ rights attorney knows the experts, the charlatans, and the pretenders. The attorney can point a business to the right person with the right skills needed to help that business. A good attorney also knows who is acceptable to a particular lender.



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## After Hours Compensation continued...

communications; working through lunch; working before or after regular shifts or taking care of/maintaining work-related equipment. Unless otherwise covered by an exception under the FLSA or the employer does not know about the work, an employer generally must pay for all "off-the-clock" time worked by the employee and all such time must be counted as "hours worked" for purposes of determining whether the employee is entitled to premium overtime pay. Simply stated, all time spent by an employee performing work-related activities that the employee is required or allowed to work is considered "hours worked" whether on premises or not. Work performed at home or at a place other than the normal work site is "hours worked" and must be counted.

### Recommended Policies and Practices to Avoid FLSA Liability for "Off-the-Clock" Hours

The simplest way to curb liability for employees under the FLSA for hourly non-exempt employees would be to not provide those employees with smartphone devices or computers which will allow the employee to perform work outside of scheduled hours. Non-exempt employees also should not be given remote access to employer computer systems. Liability will fall to the employer to pay for those hours worked responding to electronic messages because the employer would be on notice that the employee has the capability to work while off-the-clock.

A policy prohibiting non-exempt employees from having employer-owned smartphone devices and laptops will shelter an employer from liability while employees are off-the-clock and not expected to be working. Managers and supervisors should be trained to limit the emails sent to non-exempt employees during off duty hours and only with a directive to the employee not to respond or perform work until the employee's next regularly scheduled shift. Where a policy is in place prohibiting employees from working when they are not supposed to be working, employees may then be disciplined if they violate a policy by working while off-the-clock (nothing in the law prohibits discipline for "off clock" work even though it may be compensable).

In order to meet the technology challenges of smartphone use, where employees are provided with technology which allows them to work outside a normal shift, employers should periodically audit timekeeping and payroll to ensure accuracy in reporting. Policies and procedures should be revised and adopted to correct errors in recorded time worked, and to prevent errors moving forward. Supervisors and employees should be trained on how to properly

record time. Requiring employees to review and sign timesheets that include a verification that the recorded information is correct, and requiring employees to timely report discrepancies in time records, will also serve to ensure proper recordkeeping. Lastly, employees should be required to provide copies of any privately recorded work time records or pay calculations to ensure they match the employer's time records.

### "Time is of the essence for employers to get policies and procedures in place to prevent nonexempt employees from working off the clock."

Time is of the essence for employers to get policies and procedures in place to prevent nonexempt employees from working off the clock. The Department of Labor ("DOL") has issued proposed revisions to the FLSA regulations that drastically increase the minimum salary requirement for an employee to be exempt from overtime requirements. Currently, an overtime-exempt employee must earn \$455 per week (\$23,660 per year) and perform certain job duties to be exempt from FLSA overtime requirements. Under the proposed revised regulations, an

exempt employee must earn at least \$970 per week (\$50,440 per year). In addition, the proposed revised regulations would create a mechanism to automatically update minimum salary and compensation levels either in coordination with a fixed percentile of earnings or changes in the Consumer Price Index for Urban Consumers (i.e., inflation). Thus, the number of nonexempt employees will rise dramatically once the rules are finalized as expected in mid-2016. Employers who do not address employees working "off-the-clock" could see their overtime liability rise dramatically as well. ■



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## YEAR-END WRAP UP SURVEY

Our year-end issue of **Connect** will feature stories and statistics gleaned from readers and Ozaukee County leaders as they look back at 2015 and glance at their plans for 2016. We'd like to hear your story.

If you would like your comments to be considered for publication, please answer at least one of the following questions and send or e-mail to Connect.

### --- SURVEY ---

- 1 Compared to 2014, did your business grow, shrink, or remain the same over the past twelve months? Why?
- 2 Looking ahead, do you expect the economy to improve, stay the same, or worsen in the Ozaukee County in the next twelve months? Why?
- 3 Do you think things in Ozaukee County are going in the right direction or on the wrong track? Why?
- 4 What is your company's #1 priority for 2016?

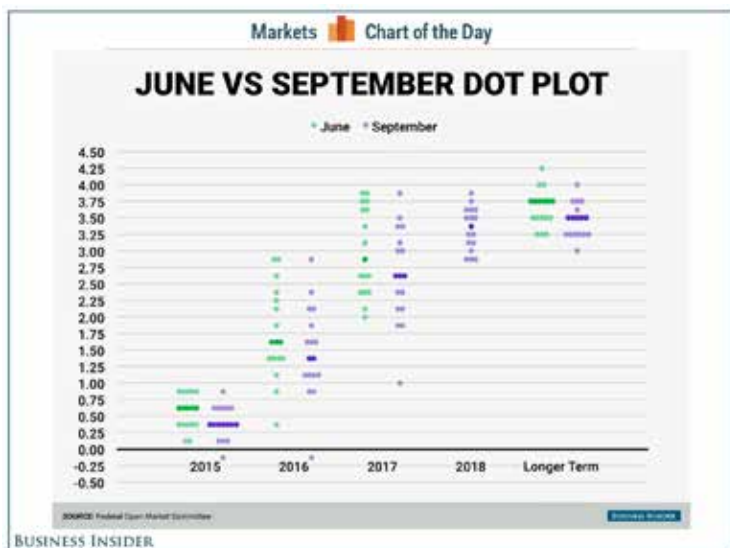
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GDP growth and lack of progress on the Committee’s inflation objective. Third, there is the striking position taken by one participant who indicated that the appropriate funds rate should actually be negative and kept there through 2016.

This recent monetary policy decision was extremely biased toward lower interest rates (dovish) for a longer period of time. Not only did the FOMC stress inflation expectation levels at deteriorated levels, they lowered expectations for growth, inflation, and the Fed Funds rate in their “Summary of Economic Projections.” Furthermore, the Chair Yellen highlighted the global

economies and its financial conditions as key motivations for reducing their outlook.

While Janet Yellen claimed in her Q&A that the Committee does not react to short-term financial market developments, it’s nearly impossible to look at the balance of global and domestic economic data versus asset performance over the past two months and come to a different conclusion. In our view, this policy statement was a complete surrender to the market, and an embrace of a responsibility to manage the global economy rather than the domestic economy. Given the near-panicked downward revisions and dovish language relative to the actual developments in the US economy, we can only conclude that the FOMC will not begin an extended period of rising interest rates until inflation begins moving up dramatically. And they don’t expect that to take place any time soon.

Rest assured a 0.25 percent rate increase will not impact our investment strategies. We are not reacting or making short-term decisions based on the Federal Reserve Board. ■



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Ozaukee County Business **Connect** is a quarterly publication by business owners for business owners in Ozaukee County to:

- Provide a resource to facilitate connections between the business owners and leaders of this County
- Highlight resources available in this area
- Foster the development of mutually beneficial business partnerships
- Engage the business community to work together for a common purpose
- Exchange ideas and best practices
- Develop networking opportunities for further discussion of topics readers want to explore in greater depth.

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