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It's About Time –


What are 'Hours Worked' Under the FLSA

Presented by
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Today's Presenters



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Introduction & Overview

- Both federal and state law have minimum wage and overtime pay requirements. For most Michigan employers, federal law will apply to overtime requirements.

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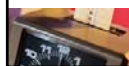


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Introduction & Overview

- Under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq.*, except as otherwise provided, covered employers shall not employ any employee “for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.” 29 U.S.C. § 207(a)(1)



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Introduction & Overview

- Overtime pay requirements do not apply to certain employees known as “exempt.” All others (who are entitled to overtime pay) are referred to as “non-exempt.” 29 U.S.C. § 213
- All non-exempt employees are required to be paid time and one half their regular rate for all hours in excess of 40 hours *actually worked* in a workweek.
- This webinar focuses on what is “time worked” and Code of Federal Regulations, Part 29.



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“Casual” Overtime

- Work not requested but “suffered or permitted” is work time. 29 CFR § 785.10
- Reason is immaterial. If employer knows or has reason to believe employee is continuing to work, it’s working time. 29 CFR § 785.10
- Employee cannot lawfully “volunteer” to perform work-related duties without pay.



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Work Performed Away From Employer's Premises or Worksite

- Rule is also applicable to work performed away from premises or job site, or even at home.
- If employer knows or has reason to believe that work is being performed, he must count time as hours worked. 29 CFR § 785.11



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Duty of Management

- It is the duty of employer to see that work is not performed if it does not want it to be performed. It cannot sit back and accept benefits without paying for them.
- Having a rule against such work is not enough. Management has power to enforce the rule and must make every effort to do so. 29 CFR § 785.13



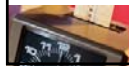
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Waiting Time

- Whether waiting time is hours worked depends upon particular circumstances, including:
 - Parties' agreement
 - Parties' conduct
 - Nature of the service
 - Its relation to the waiting time, and all of the circumstances

Continued



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Waiting Time

- Was employee engaged to wait or waiting to be engaged. *Skidmore v Swift*, 323 U.S. 134 (1944)
- Key inquiry: Degree to which employee is free to engage in personal activity during times when he is subject to call.



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Time Spent Waiting – On Duty

- Time spent “waiting” to perform work is hours worked.
- It may be hours worked even though employee is allowed to leave premises or job site during such periods of inactivity.

Continued



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Time Spent Waiting – On Duty

- Periods of waiting are generally unpredictable and usually of short duration.
- Employee is unable to use time effectively for his own purposes and belongs to, and is controlled by, employer.
- Waiting is an integral part of job and employee is engaged to wait. 29 CFR § 785.15



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Time Spent Waiting – Off Duty

- Periods when employee is completely relieved from duty and are long enough to use for his own purposes are not “hours worked.”
- Relief from duty and time for personal activity requires advance notice of time when duty ends and resumes.
- Determination depends on specific facts.
29 CFR § 785.16



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Pagers / On Call Time

- Whether employee is entitled to compensation for on-call time generally depends on how restrictive employer's on call rules are.
- Employee who is required to remain on call on employer's premises or so close thereto that he cannot use time effectively for his own purposes is working.

Continued



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Pagers / On Call Time

- Employee who is not required to remain on employer's premises but is merely required to leave word at his home or with company officials where he may be reached, is not working while on call. 29 CFR § 785.17
- Agreement with employee to remain at home to receive calls from customers when office is closed must take into account not only actual time on calls, but some allowance for restriction on employee's freedom. FOH 31b14

Continued



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Pagers / On Call Time

- 6th Circuit - Police officers were not entitled to overtime pay for "off duty" hours although they were required to carry pagers and remain within a specific geographic area. Court found that officers could engage in regular personal activities, pages were rare, and officers were not subject to discipline for failing to answer a page.

Continued



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Pagers / On Call Time

- Courts consider whether there are restrictions concerning how far from work employee can stray, how often free time is disrupted and duration of disruption, etc.
- More freedom employees have for personal pursuits, less likely the time needs to be compensated.



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Rest Periods / Meal Breaks

- Employers are not required to grant lunch time or break periods (except for minors).
- Breaks promote the employees' efficiency and are paid as working time.
- Employees must be paid for breaks unless they are *completely* relieved of their duties and have enough time to use the break for their own personal purposes.

Continued



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Rest Periods / Meal Breaks

- Department of Labor's position - breaks of 20 minutes or less must be paid. 29 CFR § 785.19
- If "rest period" is 20 to 30 minutes, employee is free to go where they want, and it is long enough for employee to use for own purpose, and not an attempt to avoid FLSA rules, it is not "hours worked." FOH 31a01

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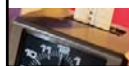
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Rest Periods / Meal Breaks

- Paid breaks may not be used as offset against other working time such as compensable waiting time or on-call time. *Mitchell v Greinetz*, 235 F. 2d 621, 13 W.H. Cases 3 (10th Cir. 1956)
- *Bona fide* meal periods are longer than breaks, and employee is completely relieved from duty to eat meals and rest. 29 CFR § 785.19. *Bona fide* meal periods are not work time.

Continued



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Rest Periods / Meal Breaks

- Ordinarily, 30 minutes or more is long enough for a *bona fide* meal period.
- Shorter period may be long enough, if:
 - Work related interruptions are sporadic and minimal
 - There is sufficient time to eat meals and there is an agreement between employer and employee to this effect

Continued



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Rest Periods / Meal Breaks

- It is at a time during shift when meals are normally consumed
- Neither state nor local law require longer lunch periods.

FOH 31b23



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Rest Periods / Meal Breaks

- Employees are not “relieved of duty” if required to perform any work, whether active or inactive, while eating. For example, employees required to eat at their desks or factory workers required to be at their machines are working while they eat.
- Employee does not have to be able to leave premises if he is otherwise completely freed from duties. 29 CFR § 785.19

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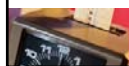
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Rest Periods / Meal Breaks

- Employee's unauthorized extension of break is not “hours worked,” if employer has clearly told employee:
 - Break may only last specific time
 - Extensions are contrary to work rules
 - Extensions will result in disciplinary action.

FOH 31a01



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Sleeping Time

- Employee “may” be considered working even though some of his time is spent sleeping under certain circumstances.
29 CFR § 785.20

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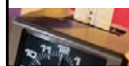
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Sleeping Time

- Employee who is on duty for **less than 24 hours** is working even though he is permitted to sleep or engage in other personal activities when not busy. (i.e., telephone operator required to be on duty for specified hours is working, even if she is permitted to sleep when not busy answering calls and is furnished facilities for sleeping since her time is given to her employer) 29 CFR § 785.21; FOH 31b00

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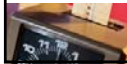
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Sleeping Time

- Where employee is required to be **on duty for 24 hours or more**, employer/employee may agree to exclude *bona fide* meal periods and regularly scheduled period for sleep, if adequate sleeping facilities are furnished by employer and employee usually enjoys an uninterrupted night's sleep. 29 CFR § 785.22

Continued



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Sleeping Time

- When sleeping period is longer than eight hours, only eight hours will be non-working time.
- Where no expressed or implied agreement exists, eight hours of sleeping time and lunch periods constitute "hours worked."

Continued



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Sleeping Time

- If sleep is interrupted by call to duty, interruption is time worked. If period is interrupted to such an extent that employee cannot get a reasonable night's sleep, entire period must be counted. 29 CFR § 785.22
- DOL - employee must get at least five hours of sleep during scheduled period or it is all working time.



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Employees Residing on Employer's Premises

- If employee resides on employer's premises on a permanent basis or extended period is not working all the time, if he may engage in normal private pursuits such as eating, sleeping, entertaining, and there are periods when he can leave the premises and have complete freedom from all duties.

Continued



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Employees Residing on Employer's Premises

- Such circumstances make it difficult to determine exact hours worked and any reasonable agreement of parties which takes into consideration all pertinent facts will be accepted (i.e., to pumper of a stripper well who resides on premises of his employer)
29 CFR § 785.23



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Lectures, Meetings & Training

- Attendance at lectures, meetings, training programs and similar is *not* hours worked, if:
 - Attendance is outside employee's regular working hours
 - Attendance is voluntary
 - Course, lecture or meeting is not directly related to employee's job
 - Employee does not perform any productive work during such attendance. 29 CFR § 785.27

Continued



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Lectures, Meetings & Training

- Attendance is not voluntary if employer requires it, or employee is led to believe that his working conditions or continuance of his employment would be adversely affected by nonattendance. 29 CFR § 785.28

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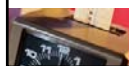
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Lectures, Meetings & Training

- “Directly related” to employee’s job means it is designed to enable employee handle his job more effectively as distinguished from training him for another job, or to a new or additional skill.
- For example, stenographer, who is given a course in stenography, is engaged in activity to make her a better stenographer (hours worked) as compared to course in bookkeeping (which is not hours worked). 29 CFR § 785.29

Continued



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Lectures, Meetings & Training

- Training to prepare for advancement that is not intended to make employee more efficient in his *present* job, and is not considered “directly related” to employee’s job, even if it happens to improve his skill in doing his regular work (and is not hours worked). 29 CFR § 785.29

Continued



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Lectures, Meetings & Training

- If employee, on own initiative, attends school or college after hours, time is not hours worked for his employer, even if courses are related to his job. 29 CFR § 785.30
- If employee takes courses offered by his employer, similar to courses offered by an independent school, college or vocational training facility, time taking courses is not hours worked just because they are offered by employer. 29 CFR § 785.31

Continued



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Lectures, Meetings & Training

- Time spent by employees in organized program of related, supplemental instruction by employees (i.e., *bona fide* apprenticeship program), may be excluded from hours worked, if:
 - Employee is under written apprenticeship agreement or program which substantially meets Department of Labor rules
 - Such time does not involve productive work or performance of employee's regular duties

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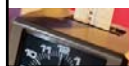


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Lectures, Meetings & Training

- Mere payment, or agreement to pay, for time spent in such related instruction does not constitute an agreement that such time is "hours worked" for purposes of FLSA.
29 CFR § 785.32



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Portal-to-Portal Act

- PTPA excludes from “hours worked” time spent traveling to and from worksite and “activities which are preliminary or postliminary” to employee’s principal work activities. 29 USC 251-62
- PTPA does not affect computation of hours worked within “workday” (i.e., period between time when employee commences and ceases his principal activity or activities). 29 CFR § 785.24

Continued



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Portal-to-Portal Act

- Example: lathe operator cleaning and greasing his machine before his shift begins are integral steps to principal activity and part of workday.
- Therefore, “workday” may be longer than scheduled shift.
- Duration may vary from day to day depending upon when employee commences/ceases “principal” activities.

Continued



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Portal-to-Portal Act

- Employee's use of company vehicle for commuting to and from work for employee's convenience and activities, incidental to such use, are not considered "principal" activities, if such use is within normal commuting area for employer's business and there is an agreement between parties.

Continued



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Portal-to-Portal Act

- If employee also uses company vehicle for emergency calls after hours, determination must be made whether use is for employee convenience or employer's benefit based on, among other things, frequency of emergency calls. FOH Insert No. 1608 (31c01)

Continued



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Portal-to-Portal Act

- Transporting other employees in company vehicle:
 - Not time worked if employee option
 - If driver ordered to meet other employees at “pick up point” and then drive to work, time worked commences from pick-up point.
 - “Vanpools” not time worked if for employee benefit, voluntary, or the driver and pick up points are selected by employees without employer control. FOH Insert No. 1608 (31c02)



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Donning & Doffing of Work Clothes / Equipment

- Time spent changing clothes or washing at beginning or end of shift may be excluded from time worked by custom or practice under a collective bargaining agreement. 29 USC 203(o)

Continued



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Donning & Doffing of Work Clothes / Equipment

- “Clothes” are articles that cover the body and are regarded as clothing. This will include protective items of apparel such as hard hats and steel toe boots. *Sanifier v US Steel*, Sup Ct 2014
- Changing includes substituting items or altering dress (i.e., adding articles of clothing on top).



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Donning & Doffing

- Items that are not commonly regarded as articles of dress are not included (i.e., ear plugs, glasses, respirator).
- Issue when donning & doffing clothes *and* non-clothing items is whether, period at issue can, *on whole*, be fairly characterized as time spent in changing clothes or washing.
- If so, union and management can bargain over whether this time is compensable. *Sandifer* (S. Ct. 2014)



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Travel Time

- Time spent traveling to and from work, (*i.e.*, commuting) generally is not hours worked, unless employee is performing work-related duties on the way, (such as driving a coworker, or picking up supplies).
29 CFR § 785.35

Continued



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Travel Time

- Travel during employee's normal work day, *i.e.*, between sites generally is hours worked.
29 CFR § 785.38
- If, while traveling, employee has idle time during normal working hours and employer chooses to pay employee as "hours worked," such time must then be treated as "hours worked" for all purposes, including overtime pay. FOH 31a03



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Travel Time: After Hours

- Employee sent to different worksite to perform work after his normal quitting time, is working during his/her travel to other site.
- If he goes home from other site, travel time to home is not hours worked.
- If he has to return to his normal work site before going home, his travel there is hours worked.

29 CFR § 785.38



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Travel Time: After Hours

- Travel from home to work after employee has completed his normal day's work due to being called out to work at substantial distances from home is hours worked.

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Travel Time: After Hours

- If employee is given advance notice that he will be required to work at customer's place of business, outside his normal work time, is not an "emergency call," so travel there is not hours worked. FOH 31c06
- DOL has no position on whether travel from home to employee's normal worksite is hours worked when an employee receives an emergency call to report back to his normal worksite. 29 CFR § 785.36; FOH 31c06



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Travel Time – One-day Assignment in Another City

- Time spent traveling to and from home to another city, for one-day assignment there, outside employee's normal work hours, generally, is hours worked.
 - Entire day, excluding meal time, is hours worked.

Continued



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Travel Time – One-day Assignment in Another City

- If employee uses public transportation to travel to other city, his travel to and from home to public transport site is not hours worked.

29 CFR § 785.37



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Travel Time – Overnight Stay in Another City

- Time spent traveling, as passenger, to and from home to another city, for overnight assignment there, during employee's normal work hours, generally, is hours worked, even on days outside his normal workdays.

Continued



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Travel Time – Overnight Stay in Another City

- Time spent traveling, as passenger, to and from home to another city, for overnight assignment there, outside employee's normal work hours, generally, is not hours worked.
- Time spent traveling not as passenger, (i.e., driving), to and from home to another city, for an overnight assignment there, during or outside employee's normal work hours, generally, is hours worked.

29 CFR § 785.39



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Travel Time – Overnight Stay in Another City

- If employee traveling to another city for overnight assignment is offered public transportation by his employer, but asks to drive his own car instead, employer may count as hours worked either time employee spends driving his car or time employee would have traveled during normal work hours if employee had used public transportation. 29 CFR § 785.40

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Travel Time – Overnight Stay in Another City

- If employee is required to perform while traveling as a passenger, time is hours worked. 29 CFR § 785.41



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Travel Time : Use Of Employer Vehicle

- Employee's use of his employer's vehicle and activities incidental to such use, is not hours worked, if:
 - Vehicle is one normally used for commuting
 - Travel time is within normal hours worked
 - Use does not cost employee more than normal
 - Distance is within employee's normal commute area
 - Use of vehicle is subject to agreement



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Miscellaneous

- Time spent adjusting grievances between employer and employees during time employees are required to be on premises is hours worked.
- If *bona fide* union is involved, counting of such time will be left to process of collective bargaining or to custom or practice under collective bargaining agreement. 29 CFR § 785.42

Continued



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Miscellaneous

- Time employee spends waiting for and receiving medical attention (on premises or at employer's direction) during normal working hours/days is hours worked. 29 CFR § 785.43.
- Same is true when employee is required to stay beyond end of their normal shift.
FOH 31b10

Continued



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Miscellaneous

- Time spent in work for public or charitable purposes at employer's request, direction or control, or while employee is required to be on company premises, is hours worked.
- However, if voluntarily and outside of employee's normal working hours, it is not hours worked.

29 CFR § 785.44

Continued



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Miscellaneous

- If employee reports, but is immediately sent home for lack of work, no time is worked.
- If employee reports, starts work (or is permitted to wait for work), but is then sent home for lack of work, time spent waiting or working is "hours worked." FOH 31a00



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Timekeeping Records

- Time clocks are not required.
- If time clock used, employees who voluntarily come in before or stay after their regular shift, do not have to be paid for early or late clock punching if they do not work before or after shift.
- Minor differences between time clock records and actual hours worked is normal, but major discrepancies should be avoided since they raise doubts about accuracy. 29 CFR § 785.48

Continued



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Timekeeping Records

- Where time clocks are used, starting and stopping time may be rounded to nearest five minutes, one-tenth or quarter hour.
- Rounding should average out so employees are fully compensated for all time actually work.
- Rounding is permitted, unless it is used in a manner that will, over time, results in failure to compensate employees for all time actually worked. 29 CFR § 785.48



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Questions?



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What are 'Hours Worked' Under the FLSA?

The Informed Employer Webinar Series

May 15, 2014 • Noon to 1:15 p.m. (EDT) • Complimentary Webinar

Plunkett Cooney invites you to attend our webinar

IT'S ABOUT TIME - WHAT ARE 'HOURS WORKED' UNDER THE FLSA?

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- **June 12** – How did That Happen? – Protecting Your Company in a “BYOD” Era
- **September 11** – EEOC Investigations
- **November 13** – Healthcare Reform – What's Left? Where are we now?

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Thank You!



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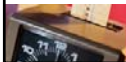
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Information can become outdated or inaccurate as the result of subsequent amendments to laws or the issuance of new regulations or court decisions interpreting the laws differently.

When legal advice is needed, always consult an attorney experienced in the relevant area of law.



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