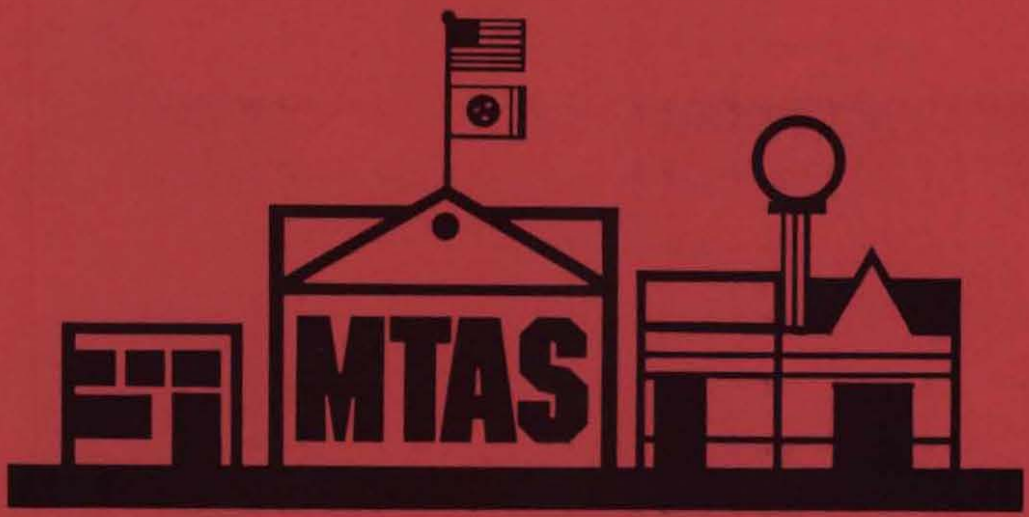


Guide to Compliance with the Fair Labor Standards Act for Tennessee Municipalities

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GUIDE TO COMPLIANCE WITH

THE FAIR LABOR STANDARDS ACT FOR TENNESSEE MUNICIPALITIES

By: **Richard M. Ellis**
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MUNICIPAL TECHNICAL ADVISORY SERVICE

INSTITUTE FOR PUBLIC SERVICE

THE UNIVERSITY OF TENNESSEE

in cooperation with the

TENNESSEE MUNICIPAL LEAGUE

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THE UNIVERSITY OF TENNESSEE
MUNICIPAL TECHNICAL ADVISORY SERVICE

891 Twentieth Street
Knoxville, Tennessee 37996-4400
(615) 974-5301

October 27, 1986

Dear City Official:

The application of the provisions of the Fair Labor Standards Act to municipal government has proven to be one of the higher impact items with which Tennessee Cities have been required to deal with over the past several years. MTAS has prepared several technical bulletins on this issue and has participated in state-wide briefings that were held in the past year.

In an attempt to provide you a comprehensive look at the Fair Labor Standards Act and its overall impact on your municipality, MTAS is providing you with this publication, "Guide to Compliance With the Fair Labor Standards Act for Tennessee Municipalities," which was prepared by Richard Ellis, MTAS Management Consultant located in Knoxville.

We would encourage you to keep up-to-date with this issue and call on us as specific questions arise. As new court cases, federal regulations, or federal legislation comes along to impact this area of concern, MTAS will issue technical bulletins providing you with updated information on this Manual.

If you have any questions or input, we would encourage you to contact your MTAS Management Consultant or the MTAS Personnel Management Consultant (Richard Stokes, MTAS Nashville, 615-256-8141) at your convenience.

Thank you for your continuing support and input.

Sincerely,

C. L. Overman
Executive Director

CLO:aal

Enclosure

GUIDE TO COMPLIANCE WITH THE FAIR LABOR STANDARDS ACT FOR TENNESSEE MUNICIPALITIES

OVERVIEW

On February 19, 1985, the United States Supreme Court, in the case of GARCIA v. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, reversed its previous decision in the 1976 case of NATIONAL LEAGUE OF CITIES v. USERY, and held that the Fair Labor Standards Act (FLSA), including the minimum wage and overtime requirements of that law, applies to almost all employees of state and local governments.

In 1974, Congress extended the coverage of the Fair Labor Standards Act to state and local government employees, and established special provisions for certain types of employees, particularly those involved in public safety and health services. The Department of Labor (DOL) promulgated rules and regulations for the implementation of these provisions which can be found in Chapter 29 of the Code of Federal Regulations (C.F.R.). These regulations and all other provisions of the FLSA which were designed to apply to state and local governments were stayed by an order of the Supreme Court on January 10, 1975. On June 24, 1976, the Supreme Court ruled in NATIONAL LEAGUE OF CITIES v. USERY, to prohibit the application of the FLSA to certain categories of state and local government employees. At that time, the Supreme Court's decision was based on the fact that the 10th Amendment of the U. S. Constitution, which reserves certain rights and powers to the states, precluded Congress from enacting, on the basis of the Commerce Clause, any regulation which would interfere with the employer/ employee relationship in areas of "traditional governmental functions". "Traditional governmental functions" by definition of the Court included such things as fire prevention, police protection, sanitation, public health, and parks and recreation. The NATIONAL LEAGUE OF CITIES case left

several important questions still to be litigated, including what categories of state and local government would not be considered to be engaged in "traditional governmental functions" and whether these categories would remain subject to the FLSA.

The DOL in 1979, promulgated regulations specifying certain functions of local government which were not to be considered as "traditional governmental functions" and extended provisions of the FLSA to those state and local government employees. As a result of these regulations, several state and local government employees engaged in activities that were determined to be non-traditional, such as mass transit, off-track betting, state-owned liquor stores, and state and municipally owned power or telephone companies, began to look toward the DOL for the enforcement of FLSA. Several lawsuits arose from this controversy. Local employees in areas classified as non-traditional sued to require the enforcement of the minimum wage and overtime provisions of the FLSA, while local officials argued that the DOL had erred in holding some of these as non-traditional functions.

The Supreme Court accepted the SAN ANTONIO case for review and decided in that case to reconsider its original ruling in the NATIONAL LEAGUE case. In the SAN ANTONIO decision the Supreme Court completely overruled the NATIONAL LEAGUE OF CITIES decision and effectively reinstated the FLSA provisions with respect to state and local government employees, including employees engaged in non-traditional functions.

The application of the GARCIA decision was delayed by legislative action in November 1985 with the passage of the Fair Labor Standards Amendment of 1985. This law provided that no state or local government would be liable for minimum wage or overtime violations of the FLSA until April 15, 1986, and established new guidelines for compensatory time off

and for volunteers. This had the effect of retroactively wiping out liability for overtime payments for state and local governments for "traditional governmental activities" that would otherwise have accrued between the effective date of the GARCIA decision through April 14, 1986. However, this has no effect on non-traditional governmental activities, and state and local governments have overtime and minimum wage liabilities as they always had since the 1976 NATIONAL LEAGUE OF CITIES case.

In April of this year, the DOL issued revised temporary regulations which implemented the changes brought about by the Fair Labor Standards Amendment of 1985. Because of the GARCIA decision, the legislation passed in November of last year, and the new regulations recently submitted by the DOL to implement the changes brought about by the legislation, it is now important that all local governments undertake a complete review of their employment practices to determine the extent to which they are not in conformity with the requirements of the FLSA. If not already accomplished, local governments should conduct studies to review job duties, write accurate job descriptions, assign properly descriptive job titles, and perform periodic audits or reviews to consider exemptions applicable to continued compliance with the FLSA's provisions.

The basic purpose of the FLSA is to establish a general minimum hourly wage rate for those employees who are within its coverage and not exempt from its requirements. It also provides for equal pay regardless of sex and the establishment of minimum wage rates lower than the general standard for certain classes of employment. Except for child labor restrictions, the FLSA does not impose any limitation on the number of hours that may be worked by employees covered under the Act. Instead, it seeks to limit the number of hours worked by requiring additional pay, called overtime pay, for hours worked in excess of the established 40-hour maximum. The FLSA does not require:

* extra pay for working on Saturdays, Sundays, or holidays;
* pay for vacations, holidays, or severance pay;
* discharge notices;
* limits on the number of hours of work for persons 16 years of age or over, as long as overtime pay provisions are met;
* time off for holidays or vacations. (If employees work on holidays, they need not be paid at time and one-half, or any other premium rate. Under the Act, holidays, like Sundays, are treated like any other days).

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I. WHO'S COVERED BY THE FLSA?

A. Overview

Not all employees of local governments are affected by the FLSA. Some employees are simply not covered by the Act (non-covered employees). Other employees, while covered by the FLSA, are exempted by specific provisions of the Act (exempt employees).

Non-covered employees include elected officials and their personal staffs, policy making appointees, and legal advisors, bona vide volunteers, independent contractors, and prisoners. Exempt employees generally fall into three (3) categories: executive, administrative, and professional. Also, certain seasonal recreation employees can be considered exempt from certain provisions of the Act. These areas of concern will be discussed in more detail in this section.

B. Non-Covered Employees

The FLSA provides that certain employees are not covered by the Act. Non-covered and exempt employees are basically treated the same under the FLSA except for the recordkeeping requirements. Employers are not required to keep records for non-covered employees, but must keep records for exempt employees.

As noted above, bona vide volunteers, independent contractors, prisoners, and certain other classes of employee, are generally not covered by the FLSA. The Act [29 U.S.C. 203(e)(2)(C)] stipulates that elected officials, their personal staffs, policy-making appointees, and legal advisors are not covered by the Act, so long as they are not subject to any local or state civil service laws.

1. **Elected Offical Exclusion**

This is a straightforward exclusion from the coverage of the FLSA. No elected mayor or member of a municipality's governing body would be covered by any provisions of the Act.

2. **Personal Staff Exclusion**

A more difficult issue is presented by the personal staff exclusion of non-civil service employees. The DOL, in a Wage and Hour Administrator Opinion Letter dated December 19, 1974, provided the following guidance:

> "Among the tests to be considered with respect to members of the personal staff of an elected office holder are as follows:
>
> (1) Is the person's employment entirely at the discretion of the elected official;
>
> (2) Is the position not subject to approval or clearance by the personnel department or division of any part of the government;
>
> (3) Is the work performed outside of any position or occupation established by a table of organization as part of the legislative branch or committee or commission formed by an act of the legislature;
>
> (4) Is the person's compensation dependent upon a specific appropriation or is it paid out of an office expense allowance provided to the office holder?"

Further clarification may be gained from the DOL's internal handbook for guidance of investigators, which indicates the following:

> "...Thus individuals such as pages, stenographers, telephone operators, clerks, typists, and others employed by the branch or commission as a whole, may be considered "employees" under the Act. Generally staff includes only persons who are under the direct supervision of the elected official and who have almost daily contact with him. IT WOULD, FOR EXAMPLE, INCLUDE AN OFFICIAL'S PRIVATE SECRETARY, but not the secretary to his

> assistant, or the stenographers in a pool that services the official's department, or staff members in an operational unit whose head reports to the elected official. It would typically not include all members of an operational unit, since all the members could not have a personal working relationship with the elected offical."

There is no hard and fast rule concerning what constitutues the personal staff of an elected official. There is considerable difference of opinion concerning the reach of the exemption. The DOL normally takes a very restrictive view concerning the exclusion, but a few court decisions have tended to be expansive in some areas. This area will more than likely be subject to increased judicial review in the future which will likely change the inter-pretation of what constitutes this exemption.

3. Policy-Making Appointees Exclusion

When a publicly elected official appoints an individual to serve on a policy-making board or commission, such an appointed individual is not covered by the Act. The most obvious examples of this policy are appointed members to planning and zoning commissions, recreation boards, or other boards and commissions which have specific policy-making and/or advisory responsibilities.

4. Legal Advisors Exclusion

Immediate legal advisors with respect to the legal powers of a local government who are outside any type of civil service are not covered by the Act. This would cover the city attorney who would be outside the coverage of the minimum wage, overtime, and recordkeeping provisions of the Act.

The application of this exclusion, however, depends on the immediacy of the legal advisor's contact with elected officials. The factors that go into an analysis of an exclusion rely upon the personal accountability to an elected official or elected governing body, highly sensitive

confidential legal work, and the giving of advice directly to an elected governing body or elected official without going through intermediaries. Other attorneys that may be employed by a local government may come under the Act, but would more than likely fall under the professional exemption section of the Act which will be explained in subsequent sections.

5. Bona Fide Volunteers Exclusion

The Fair Labor Standards Amendment of 1985 attempted to clarify the status of volunteers and how they may be compensated within the provisions of the Act. The amendment reads as follows:

> "...the term 'employee' does not include any individual who volunteers to perform services for a public agency which is a state, a political subdivision of a state, or an interstate governmental agency, if-
>
> (i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and
>
> (ii) such services are not the same type of services which the individual is employed to perform for such public agency."

The regulations which will implement the 1985 amendments to FLSA, that as of the writing of this guide have yet to be promulgated, are supposed to define nominal fees and reasonable benefits that could be given to volunteers. Until these regulations are finalized, local governments are not faced with FLSA liabilities for services performed by volunteers.

The legislative history of the Act gives some guidance as to who is a bona fide volunteer:

> "Thus, for example, a volunteer school crossing guard does not become an 'employee' because he or she receives a uniform allowance and/or travel expenses.

> "An individual employed by an employer may volunteer to perform a service for the same employer if that service is in a capacity different from that individual's regular job. For example, a clerk at a state mental hospital may volunteer to visit with patients or to take them on outings. However, an individual who is employed by one employer will be considered an 'employee' under the FLSA if the individual volunteers to provide the same type of services to the same employer. To illustrate, a nurse employed by a state mental hospital may not volunteer nursing services at a state-operated health clinic; the nurse may, however, perform such services as a volunteer at a county clinic." (House Report 99-331, 99th Congress 1st Sess. 25-26 [1985])

Special rules for fire and police volunteers are discussed further in the guide.

6. Independent Contractors Exclusion

It is common for local governments to contract with private employers for substantial portions of their work. As a general rule, independent contractors bid to perform government work and are evaluated based on results rather than day-to-day operations. Independent contractors control their own workers and must ensure that those workers are compensated in accordance with the FLSA. Local governments, therefore, need not be concerned with FLSA compliance for the employees of the independent contractors.

Local governments, however, are obviously not free to set up sham independent contractor relationships that violate the FLSA. They cannot, for example, designate a particular employee to be an independent contractor and then violate the FLSA with regard to the employee.

The legal test that establishes a true independent contractor is called the "economic reality test" which may be characterized as follows:

> "The focal point in deciding whether an individual is an employee is whether the individual is economically dependent on the business to which he renders a service or is, as a

matter of economic fact, in business for himself. In applying this test, the courts generally focus on five factors:

(1) the degree of control exerted by the alleged employer over the worker;

(2) the worker's opportunity for profit or loss;

(3) the worker's investment in the business;

(4) the permanence of the working relationship;

(5) the degree of skill required to perform the work."

Thus, if a so-called independent contractor does not meet this test of economic reality, the contractor may be treated as an employee for FLSA purposes.

7. Prisoners

Prisoners who are required to work by or for the government are not considered employees under the FLSA and need not be paid minimum wages or overtime. Use of inmate labor does not violate the FLSA if the prisoner works for or is required to work by the government having custody of the prisoner. However, if the inmates are contracted out, this creates an employment relationship requiring the payment of wages in accordance with the FLSA.

C. Exempt Employees

1. Overview

In addition to certain employees of local government who are not covered by the FLSA, other employees are exempted from minimum wage and overtime provisions of the Act. Exempt employees, unlike non-covered employees, are covered by FLSA recordkeeping requirements. The key reason that an employer would prefer that his or her employees be classified exempt under the FLSA is that exempt employees are not paid overtime when they work in excess of 40 hours in a workweek.

The major general exemptions of concern to local governments are set forth in section 13 (29 U.S.C. 213) of the Act, and relate to executives, administrative employees, and professionals, otherwise known as the white-collar exemptions. These exemptions are based upon specific job descriptions and duties of the employees involved and apply regardless of the nature of the employer's business.

The FLSA regulations on exemptions (29 C.F.R. Part 541) address the actual job duties of the employee and are not concerned with job titles, civil service classifications, or other group identifications. This makes it difficult to generalize whether any particular class of employee is exempt without looking at individual work duties.

Two independent FLSA tests are applied to determine if an employee meets the executive, administrative, or professional exemption. The first is generally known as the "long test" and specifies in some detail the duties, responsibilities, and obligations of the employee; it also requires that the employee be paid on a salary basis (rather than hourly) and specifies a minimum salary for the employee to qualify for an exemption.

The second test, known as the "short test," sets forth fewer conditions related to employee duties and requires a higher minimum salary for the employee to be exempt. An employee whose duties satisfy EITHER the long or short test will be deemed exempt from the FLSA minimum wage and overtime standards.

The proper classification of employees will qualify them for the executive, administrative, or professional exemptions. Teachers, for example, are generally classified as exempt as professional employees, a factor that excludes most of the employees in a school system from minimum wage and overtime provisions of the Act. Thus, if local governments

analyze job descriptions and duties carefully and apply the two tests, they will limit dramatically the application to their workforce of the FLSA overtime requirements. These tests will be discussed for each exemption in subsequent sections.

2. Primary Duty Requirement

Each of the white-collar exemptions contains a primary duty requirement, which varies with each exemption. In 29 C.F.R. 541.103, a rule of thumb is provided that if an employee spends 50 percent of his or her time involved in the employee's primary duty, he or she will satisfy this requirement for the exemption. The 50 percent test is not mandatory, however, and less time may be sufficient. The regulations provide the following factors as a guide to determining whether an employee satisfies the primary duty requirement:

(1) The relative importance of managerial duties as compared with other types of duties;

(2) The frequency with which the employee exercises discretionary powers;

(3) The relative freedom from supervision;

(4) The relationship between the employee's salary and the wages paid other employees for the same kind of work.

3. Executive Employee Exemption

An employee who meets EITHER the "long test" or the "short test" for executives specified in 29 C.F.R. 541.1 and 541.101 is exempt.

a. Long Test for Executive Employees

An executive employee must meet ALL of the following requirements in order to be exempt from the FLSA minimum wage and overtime provisions:

(1) **DUTIES:** Primarily management of the agency, department, or subdivision.

(2) **SUPERVISION:** Customarily and regularly directs 2 or more other employees.

(3) **AUTHORITY:** Possesses the power to hire or fire employees, or whose suggestions are given substantial weight in such decisions, including promotions.

(4) **DISCRETION:** Customarily and regularly exercises discretionary power.

(5) **WORK RESPONSIBILITY:** Does not devote more than 20 percent of his or her hours in a workweek to the performance of activities not closely related to items (1) through (4).

(6) **COMPENSATION:** Is paid not less than $155 per week exclusive of board, lodging, or other facilities.

b. **Short Test for Executive Employees**

An executive employee must meet **ALL** of the following requirements to be exempt:

(1) **COMPENSATION:** Is paid not less than $250 per week exclusive of board, lodging, or other facilities.

(2) **DUTIES:** Primarily management of the agency, department, or subdivision.

(3) **SUPERVISION:** Customarily and regularly directs 2 or more employees.

c. Examples of Executive Employees

After a detailed analysis of their particular job duties, the following types of employees are GENERALLY categorized as "executive" employees who are exempt from the FLSA:

* executive directors of government agencies;
* department heads;
* city managers;
* chief clerks of a court; and
* police and fire chiefs.

d. Examples of Nonexempt Employees

The following are examples of employees who, after analysis of their job duties, do not generally qualify for the executive exemption:

* hourly employees, regardless of duties;
* working "foremen" who do not "primarily" manage;
* executives paid LESS than $250 per week who temporarily take over the work of striking employees.

e. Defining and Delimiting an Executive Employee

The regulations provide some guidance as to the application of the executive exemption test. For example, managerial and supervisory functions are described in the following manner at 29 C.F.R. 541.102(b):

"Interviewing, selecting, and training employees; setting and adjusting their rates of pay and hours of work; directing their work; appraising their productivity and efficiency for the purpose of recommending promotions or other changes in status; handling their greivances and complaints and disciplining them when necessary; planning

the work; determining the techniques to be used; apportioning the work among workers; determining the type of materials, supplies, machinery or tools to be used; providing for the safety of the men and property."

The supervision test is satisfied when an employee supervises one permanent employee and, on fairly frequent occasions, supervises additional temporary employees such that the supervisory employee supervises 2 or more employees for a total of 80 hours of work.

The words "customarily and regularly" regarding the exercise of discretion signify a greater frequency than occassional, but less than constant (29 C.F.R. 541.107).

Working foremen, strawbosses, or gang leaders who work alongside the workers in public works activities, maintenance, and other labor related tasks, are not considered exempt employees under the long test, but may well qualify under the short test (29 C.F.R. 541.115).

4. Administrative Employee Exemption

An employee who meets EITHER the "long test" or the "short test" for administrators provided in 29 C.F.R. 541.2 and 541.201 is exempt.

a. **Long Test For Administrative Employees**

An administrative employee must meet ALL of the following requirements in order to be exempt from the FLSA minimum wage and overtime provisions:

(1) **DUTIES:** Primarily consist of either:

(a) Non-manual or office work directly related to management policies or general management operations;

(b) performance of administrative functions in an educational establishment in work related to academic instruction or training.

(2) **DISCRETION:** Customarily and regularly exercises discretion and independent judgment.

(3) **SUPERVISION:**

(a) regularly and directly assists a person employed in an executive or administrative capacity; or

(b) performs under only general supervision work requiring special training, experience, or knowledge; or

(c) executes special assignments and tasks under only general supervision.

(4) **WORK RESPONSIBILITY:** Does not devote more than 20 percent of work time to activities not directly or closely related to performance of administrative work.

(5) **COMPENSATION:** Is paid not less than $155 per week exclusive of board, lodging, or other facilities.

b. **Short Test For Administrative Employees**

An administrative employee must meet ALL of the following requirements to be exempt:

(1) **COMPENSATION:** Is paid at least $250 per week exclusive of board, lodging, and other facilities.

(2) **DUTIES:** Primarily performance of office or non-manual work directly related to management policies or general

business operations, or the performance of functions in the administration of an educational establishment, or a department or subdivision thereof, in work directly related to the academic instruction or training.

(3) **RESPONSIBILITIES:** Primary duty INCLUDES work requiring the exercise of discretion and independent judgment.

c. Examples of Administrative Employees

Of the three FLSA exemptions, the administrative exemption is perhaps the most vague and subject to differing interpretation. Thus, it is worthwhile for local governments to consider carefully which employees may be exempt from FLSA coverage due to an administrative exemption. After a detailed analysis of their particular job duties, the following types of employees are GENERALLY categorized as "administrative" employees who are exempt from the FLSA:

* executive and administrative assistants (29 C.F.R. 541.201 [a][1]).
* staff employees such as finance directors, personnel directors, and budget analysts (29 C.F.R. 541.201[a][3]).
* office managers who do not supervise 2 or more employees yet exercise discretion and judgment (29 C.F.R. 541.208[f]).

d. Defining And Delimiting An Administrative Employee

The regulations (29 C.F.R. 541.201-541.215) provide some guidance as to the application of the administrative exemption test. For example, the phrase "directly related to managememt policies or general business operations" can include: advising management, planning, negotiation, representing the organization, consulting, safety direction, wage rate analysis, and systems analysis in computers.

Similar to the executive exemption, the "primary duty" requirement is not necessarily a 50 percent test, but is a rule of thumb.

The meaning of "work which is directly and closely related to performance of the work" is illustrated by examples found in C.F.R. 541.208.

5. Professional Employee Exemption

An employee who meets EITHER the "long test" or the "short test" for professionals specified in 29 C.F.R. 541.3 and 541.301 is exempt.

a. **Long Test For Professional Employees.**
A professional employee must meet ALL of the following requirements to be exempt from the FLSA minimum wage and overtime provisions.

(1) **DUTIES:** Primarily work requiring:

(a) advanced learning acquired by a prolonged course of specialized intellectual instruction as distinguished from general academic education, apprenticeships, or routine training; or

(b) original or creative work depending primarily on invention, imagination, or talent; or

(c) teaching, tutoring, instructing, or lecturing for a school system or educational institution.

(2) **DISCRETION:** Work requiring the consistent exercise of discretion and judgment.

(3) **WORK PRODUCT:** Predominantly intellectual and varied in character and which cannot be standardized in relation to a given period of time.

(4) **WORK RESPONSIBILITY:** Must devote not more than 20 percent of his or her hours to activities not essential, part of, or necessarily incident to the work.

(5) **COMPENSATION:** Is paid not less than $170 per week exclusive of board, lodging, or other facilities.

b. **Short Test For Professional Employees**

A professional employee must meet ALL of the following requirements to be exempt:

(1) **COMPENSATION:** Is paid not less than $250 per week exclusive of board, lodging, or other facilities.

(2) **DUTIES:** Primarily consist of performing work requiring advanced learning or work as a teacher.

(3) **DISCRETION:** Must include work which requires the consistent exercise of discretion and judgment or consist of work requiring invention, imagination, or talent in a recognized field of artistic endeavor.

c. **Examples of Professional Employees**

After a detailed analysis of their particular job duties, the following types of employees GENERALLY categorized as "professional" employees are exempt from the FLSA:

* the so-called "learned" professions, such as medicine, law, and dentistry (29 C.F.R. 541.302[e][1]).
* artistic professions and architects or degreed urban planners, depending on job duties (29 C.F.R. 541.303, 541.302[e][1]).

* teachers and professors (29 C.F.R. 541.302[g][2]).
* professional medical technologists (29 C.F.R. 541.306).
* registered nurses (29 C.F.R. 541.302[e][1]).
* accountants, depending on training and job duties, but not necessarily junior accountants or accounting clerks (29 C.F.R. 541.302[F]).
* engineers and scientists (29 C.F.R. 541.302[e][1]).

d. **Defining And Delimiting A Professional Employee**

The regulations (29 C.F.R. 541.301-541.315) provide some guidance as to the application of the professional exemption test.

The "primary duty" requirement is, by reference (29 C.F.R. 541.304), the same as that for executives and administrators.

Professional work is not merely mechanical or routine, since it involves discretion. "Predominantly intellectual" means that the job is varied and not routine mental, mechanical, manual, or physical work. In order for routine work to be exempt, it should be an essential part of and necessarily incident to the professional work.

6. Recreational Employee Exemption

The FLSA contains specific exemptions from minimum wage and overtime provisions for amusement or recreational employees. Section 213(a)(3) of 29 U.S.C. exempts any employee who is: employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or nonprofit educational conference center, if (A) it does not operate for more than 7 months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not

more than 33 1/3 percent of its average receipts for the other six months of such year.

a. Recreational Establishment

The key portion of this test is that the employee must be employed by a seasonal recreational "establishment." DOL has offered the following definition of "establishment" (Wage and Hour Opinion Letter, WH-388, August 10, 1976):

> "Certain facilities operate in close proximity while others operate at distances of up to 2 miles. In our view, there appears to be sufficient physical separation to conclude that these units are separate "establishments" within the contemplation of the Act. In this regard, the term "establishment" means a distinct physical place of business rather than an integrated business or enterprise. Thus, even though the units operate as a single economic unit, this fact of itself, negate the existence of separate establishments within the economic unit. It would be our view that we have one integrated business which is comprised of a number of single physically separate place of business "establishments" each of which is to be separately considered in determining its status under the law."

It should be noted that office personnel, warehouse workers, and similar occupations not employed in the recreational or amusement establishment itself but in the local government's central administrative office, are not exempt by virtue of this provision of the FLSA. In fact, the DOL appears to be requiring a distinct, separate working place for the recreational establishment employees.

b. Seasonal Operational Test

Since some local governments in Tennessee operate stadiums, convention centers, golf courses, swimming pools, zoos, museums, and other recreational establishments, this exemption from the Act can be significant.

Applying the test set forth in the statute, it is apparent that a municipal swimming pool which is open 7 months of the year or less would satisfy the first prong of the test. Thus, seasonal recreational employees of the swimming pool would be exempt from the overtime and minimum provisions of the FLSA. The same conclusion presumably would apply to seasonal parks, stadiums, and recreational department employees hired only for summer programs. Other local government programs which can qualify for the exemption include concessions in parks and other seasonal facilities, certain summer camps, and some seasonal recreation programs.

c. **Seasonal Receipts Test**

Since municipal pools and parks usually depend on tax funds for receipts, the requirements of the second prong of the test would be difficult or impossible to meet. The DOL in a 1975 ruling (W.H. Adm. Op. Ltr., Feb. 14, 1975) indicated that a "publicly operated amusement or recreational establishment whose operating costs are met wholly or primarily from tax funds would fail to meet the [second prong of the] test." A municipal pool or park could shift to user fees or close down part of the year and satisfy the test, but such action might be impractical or inappropriate.

D. Commonly Asked Questions On The Classification Of Employees

1. WOULD A MAYOR'S SECRETARY BE CONSIDERED AN EXEMPT EMPLOYEE?

Members of the personal staff of elected officials are excluded from the minimum wage and overtime provisions of the FLSA. If the employee is covered under civil service laws then he or she would not be excluded.

2. IF EXTRA EMPLOYEES ARE HIRED TO WORK IN A CITY'S LIBRARY FOR THE SUMMER, WOULD THEY BE EXEMPT UNDER THE "SEASONAL RECREATIONAL" PROVISIONS, EVEN THOUGH THE LIBRARY OPERATES ON A YEAR-ROUND BASIS?

Since the library is open on a year-round basis, it would not qualify under the first requirement for seasonal exclusion, that being open not more than 7 months in a calendar year. Also, a library more than likely depends upon tax funds for receipts which would negate the second requirement relating to the need for no more than 1/3 of the receipts be obtained in any 6 month period of the calendar year. Thus, employees hired by the library, being a non-seasonal facility, would not be exempt.

3. **WOULD PRISONERS WHO ARE "WORKING OUT" THEIR FINE FOR THE LOCAL GOVERNMENT BE CONSIDERED EMPLOYEES?**

Prisoners are not covered by the FLSA. Prison workers may perform functions for the local government and not be paid minimum wage.

4. **WOULD WORKING SUPERVISORS OR FOREMEN BE CONSIDERED EXEMPT UNDER THE EXECUTIVE CATEGORY?**

Under the "short test", which is primarily used because of the low earning level ($250 per week), a working foreman must have management as his or her primary duty before being classified as exempt, which means that approximately 50 percent of his or her time must be spent in performing management responsibilities.

5. **THE REGULATIONS PROVIDE FOR LONG AND SHORT TESTS FOR DETERMINING WHETHER EMPLOYEES ARE EXEMPT UNDER THE PROFESSIONAL, EXECUTIVE, OR ADMINIS-TRATIVE CATEGORIES. IN SOME INSTANCES, AN EMPLOYEE MAY QUALIFY FOR THE EXEMPTION UNDER THE SHORT TEST, BUT NOT THE LONG ONE. WHICH TEST SHOULD BE USED FOR DETERMINING WHETHER AN EMPLOYEE IS EXEMPT?**

Determining which test to use in classifying an employee depends on the salary of the employee. If the employee earns more than $250 per week, the employer is well-advised to use the "short test."

6. **WOULD STUDENTS WHO ARE HIRED IN THE SUMMER TO MAKE REPAIRS TO BALL PARKS QUALIFY UNDER THE SEASONAL RECREATIONAL EXEMPTION?**

If the ball parks are not open for more than 7 months in a calendar year or whose receipts for any 6 months during the preceding calendar year were not more than 1/3 of its average receipts for the other 6 months, then the students would qualify for the exemption.

7. **WHAT CONSTITUTUES THE "EXERCISE OF DISCRETION" IN TESTS OF WHETHER AN EMPLOYEE IS EXEMPT?**

An employee who exercises discretion or independent judgment is able to make decisions freely without needing to consult a superior. The work must require the employee to compare and evaluate possible courses of conduct and act or make a decision after various possibilities have been considered. The decision-making power should be real and substantial, free from immediate supervision, and exercised with regard to matters of consequence.

8. **CAN EMPLOYEES WHO ARE PAID HOURLY, BUT ARE DOING EXEMPT-TYPE WORK, BE CLASSIFIED UNDER ONE OF THE EXEMPT CATEGORIES?**

As long as an employee is paid hourly, regardless of the employees job responsibilties, he or she cannot be exempt.

9. **CAN A PERSON WHO IS DOING PROFESSIONAL WORK, BUT DOES NOT HAVE A DEGREE, BE CONSIDERED EXEMPT UNDER THE PROFESSIONAL CATEGORY?**

It depends to some extent on what the "professional work" is. "Professionals" includes licensed teachers and creative artists. Other than those categories, however, a degree is required for one to qualify as a "professional." However, the employee may well be able to qualify under the administrative category, since there is no specific education requirement.

10. **COULD AN EMPLOYEE WHO HAS TO GET GENERAL APPROVAL OF HIS OR HER WORK, BE CONSIDERED EXEMPT?**

It depends on how specific and frequent the "general approval" is. If the employee works only under general supervision, such a person could qualify for exemption under the administrative category if he or she met the conditions of the "short test."

11. **WOULD AN EMPLOYEE BE CLASSIFIED UNDER THE RECREATIONAL EXEMPTION IF HE OR SHE WORKS 6 MONTHS IN A SEASONAL RECREATIONAL FACILITY AND THE REST OF THE TIME FOR ANOTHER DEPARTMENT IN THE SAME JURISDICTION?**

During the time the employee is working in the seasonal recreational facility, he or she would qualify for the recreational employee exemption. In other months, when the employee is working in a nonseasonal job, he or she would not be under the exemption.

II. HOURS WORKED AND COMPENSATION

A. Overview

All employees covered under the FLSA must be paid a minimum wage for all hours worked. While bona fide volunteers need not be paid, all others are entitled to pay. With the exception of the worker categories exempted by the FLSA, or variations permitted by the Act, all local government employees must be paid at least the minimum wage.

An important question under the FLSA is what constitutes working for which payment must be made. For example, lunch time and employee breaks generally need not be compensated. Similarly, nonproductive time spent prior to the employee's official starting time need not be paid for. The conditions under which such time is compensable are discussed below, along with other time which may or may not be compensable.

The concept of "hours worked" is a crucial determining factor in complying with the FLSA. According to the U.S. Supreme Court, an employee must be compensated for "all time spent in physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer." The FLSA does not define "work" but does define the workweek as including "all time during which an employee is necessarily required to be on the employer's premises, on duty or at the prescribed work place." Section 203(g) of the FLSA defines "employ" as including "to suffer or permit to work." This term has a broad meaning and is used by the DOL to identify hours which are to be counted as "hours worked."

Problems do not arise in calculating the number of hours worked as long as employees are performing the principal duties assigned to them by their employer. It is when they are engaged in incidental activities, such as make-ready, travel, or waiting, that employers face potential payroll problems.

The FLSA regulations (29 C.F.R. 785) provide detailed guidance as to what working time is compensable and what time is noncompensable. For example, preliminary activities, such as filling out time, material, or requisition sheets, checking job locations, removing trash, fueling cars, and picking up plans are all compensable work if done at the employer's behest and for the employer's benefit. In general, all hours worked within the employee's regular working hours are compensable if they are for the employer's benefit.

B. DE MINIMIS Rule

The courts and DOL have recognized that insubstantial or insignificant periods of time outside scheduled working hours may be disregarded in recording working time (29 C.F.R. 785.47). This rule applies, however, only where a few minutes of work are involved and where the failure to count such time is due to considerations justified by operational realities. Such time is considered DE MINIMIS, i.e., minor or trivial.

C. Voluntary Work

Employees who, albeit voluntarily, continue to work after their shift is over are engaged in compensable working time. The reason for the work is immaterial; as long as the employer "suffers or permits" employees to work on its behalf, proper compensation must be paid (29 C.F.R. 785.11). Management must make certain that overtime work it does not want performed is not in fact performed. Mere promulgation of a rule to that effect is not sufficient to avoid compensation for additional hours worked (29 C.F.R. 785.13). This situation should be contrasted with the case of bona fide "volunteers" who intentionally furnish services to a local government with no intention of being paid.

D. Waiting Time

Whether waiting time is compensable depends on the particular factual circumstances. The FLSA requires compensation for all time during which employees are required to wait while on duty or performing their principal activity (29 C.F.R. 785.15).

1. Waiting to Start Duties

Employees who wait before starting their duties because they arrived at the place of employment earlier than the required time are not entitled to be paid for the waiting time. However, if an employee reports at the required time and then waits because there is no work to start on, the waiting time is compensable work time.

2. Waiting While On Duty

All time spent by employees in waiting while on duty must be counted as hours worked. This is true even in cases where the employees are allowed to leave their job sites. The FLSA requires compensation because these waiting periods are of such short duration that the employees cannot use them for their own benefit.

Under the FLSA regulations (29 C.F.R. 785.16), waiting by an employee who has been relieved from duty need not be counted as hours worked, if:

(a) The employee is completely relieved from duty and allowed to leave his or her job; or

(b) The employee is told he or she is relieved until a definite specified time; or

(c) The relief period is long enough for the employee to use the time as he or she sees fit. (This depends upon the circumstances in each case.)

E. On-Call, Show-Up, Stand-By, And Rest Time

The following are general guidelines regarding on-call, show-up, stand-by, and rest time as compensable hours worked under the FLSA (29 C.F.R. 785.17).

1. On-Call Time

Whether or not the time an employee is on call need be counted as compensable working time depends upon the employee's freedom while on call. If employees must remain on the employer's premises or so near that they cannot use the time freely, the time is compensable. But if employees can come and go freely, even though they must leave a telephone number where they can be reached, the time can be excluded from hours worked.

2. Show-up, Call-in, Or Reporting Time

If an employee is REQUIRED to wait 10 or 15 minutes before being advised that no work is available, this waiting time is compensable. In such an instance, the employee is "engaged to wait" rather than "waiting to be engaged" (29 C.F.R. 785.14).

3. Stand-By Time

Workers who are required to stand by their posts ready for duty, whether during lunch periods, during machinery breakdowns, or during other temporary work shut-downs, must be paid for this time. Such periods of time are usually of short duration and their occurence is not predictable.

Since the employee is controlled by the employer during these periods, and is not able to use the time for his or her own purposes, this is working time.

4. Rest Periods

The FLSA (29 C.F.R. 785.18) does not require that employees be given rest periods, but if rest periods are provided, they must be counted as hours worked if they last 20 minutes or less. Coffee and snack breaks are compensable rest periods and cannot be excluded from hours worked as meal periods. The compensability of rest periods that last longer than 20 minutes depends upon an employee's freedom during breaks.

F. Bona Fide Meal Periods

A bona fide meal time when the employee is completely relieved from duty is not worktime. However, short periods, such as coffee breaks or snacks, are not meal time. Whether or not an employee's meal periods can be excluded from compensable working time under the FLSA (29 C.F.R. 785.19) depends on the tests presented below:

1. Employee Freedom Meal Test

Unless all of the following three conditions are met, meal periods must be counted as hours worked:

(a) The meal period generally must be at least 30 minutes, although a shorter period may qualify under special conditions.

(b) The employee must be completely relieved of all duties; if the employee must sit at a desk and incidentally answer the telephone, for example, this would be compensable time.

(c) The employee must be free to leave his or her duty post. However, there is no requirement that the employee be allowed to leave the premises or work site.

2. Voluntary Work Meal Test

All voluntary work done during meal periods must be counted as compensable working time if the employer knows or has reason to believe work is being performed. Where the employer has no reason to know of the work, and the employee's work during meal time was essentially DE MINIMIS, no compensation is required.

3. Meals On Business Trips

Meal time spent out of town on business trips is not generaly compensable time (29 C.F.R. 785.39). Of course, if an employee works during his or her meal, such time is compensable.

4. Round-The-Clock Duty And Meals

The meal periods of police, fire, and other public safety personnel who are on call more than 24 consecutive hours must be counted as working time, unless the time is excluded from hours worked by express or implied agreement (C.F.R. 553.15).

G. Sleeping Time

The regulations (29 C.F.R. 785.20) set forth two general policies regarding sleep time, one for employees on tours of duty of less than 24 hours and another for those who work around-the-clock.

1. Sleeping Time For Less Than 24-Hour Tours Of Duty

If an employee's tour of duty is less than 24 hours, periods during which he or she is permitted to sleep are compensable working time as long as he or she is one duty and must work when required. Allowing employees to sleep when they are not busy does not render the time to be sleep time; nor does the furnishing of facilities to sleep, as long as an employee is stil on duty (29 C.F.R. 785.21)

2. Sleeping Time For Round-the-Clock Duty

When an employee's tour of duty is 24 hours longer, up to 8 hours of sleeping time can be excluded from compensable working time if:

(a) An expressed or implied agreement excluding sleeping time exists;

(b) Adequate sleeping facilities for an uninterrupted night's sleep are provided;

(c) At least 5 hours of sleep is possible during the scheduled sleep periods; AND

(d) Interruptions to perform duties are considered hours worked.

Fire, police, jailers, and other public safety personnel who are on duty exactly 24 hours cannot have their sleep time excluded; they must work more than 24 hours (29 C.F.R. 553.15).

H. Training Programs, Lectures, And Meetings

The compensability of employee time spent in training programs, lectures, and safety meetings is determined under the general policies set forth beginning at 29 C.F.R. 785.27. All of the following four general principles must be met for the activity not to be counted as working time:

(1) Attendance must occur outside the employee's regular working hours;

(2) Attendance must in fact be voluntary (it is not voluntary if attendance is required by the employer or if the employee is led to believe that non-attendance will prejudice his or her working conditions or employment standing);

(3) The employee must do no productive work while attending; and

(4) The program, lecture, or meeting should not be directly related to the employee's job. However, if the program is directly related to the job, it may still be exempt if the training corresponds to that offered by independent bona fide institutions of learning (29 C.F.R. 785.31). An example would be training required for continuing certification of paramedics that is provided by community colleges. Attendance at these courses would not necessarily be considered compensable time if taken outside of normal duty hours.

Attending an independent trade school or pursuing a correspondence couse outside regular working hours is not compensable work, regardless of whether it is job related. Taking courses in a public school or training in a government-sponsored on-the-job training program is also not compensable.

I. Travel Time

Whether travel time is compensable depends entirely on the kind of travel involved. The employer generally is not responsible for time spent by the employee in walking, riding, or otherwise traveling to his or her principal activity. The following general guidelines, set forth beginning at 29 C.F.R. 785.33, apply in determining whether an employee's travel time is compensable.

1. Home-To-Work Travel

As a general rule, home-to-work is not compensable, even if an employee must travel from a town to an outlying site to get to the employer's premises. Generally, an employee is not at work until he or she reaches the work site. But if an employee is required to report to a meeting place where he or she is to pick up materials, equipment, or other employees, or to receive instructions, before traveling to the work site, compensable time starts at the time of the meeting.

2. Travel During The Workday

Traveling by an employee from one job site to another job site during the workday is compensable work. Also, traveling from an outlying job at the end of the scheduled workday to the employer's premises is compensable.

3. Call-Back Or Emergency Calls

Travel time might be compensable when an employee is called back to work after going home for the day. The DOL has taken no position on whether travel time to the job AND back home is worktime for an employee who receives an emergency call outside of working hours (29 C.F.R. 785.36).

4. Out-Of-Town Travel

An employee who is sent out of town for one day need not be paid for time spent traveling from his or her home to the local railroad, bus depot, or airline terminal, but he or she must be paid for ALL other travel time (except any time spent in eating while traveling). Employees who drive overnight are considered working all the time they are driving.

Where employees travel overnight on business (i.e., more than one day), they must be paid for time spent in traveling (except for meal periods) during the normal working hours on their non-working days, such as Saturday, Sunday, and holidays, as well as on their regular working days. Travel time as a PASSENGER on an airplane, bus, train, boat, or automobile outside of regular working hours is not considered worktime by the DOL (29 C.F.R. 785.39). Any actual work the employee does while traveling, however, remains worktime. Moreover, if an employee drives his or her car without being offered public conveyance, then this travel time is considered working time.

5. Transportation Provided By The Employer

Employees are not entitled to compensation for home-to-work travel merely because their employer furnishes their transportation. An employee who chauffeurs other employees to work at the direction of his or her employer, however, is entitled to compensation. An employee who uses a government-owned car is working while driving on business, but not while going to and from home. For example, a police officer who has use of his or her patrol unit and drives it home when off duty and to headquarters when going on duty is NOT entitled to compensation for that time, unless he or she otherwise proceeds to do work.

J. Examples Of Compensable Working Time

The following chart presents examples of compensable and non-compensable working time for which an employee is entitled, or not entitled, to receive compensation (see table on pages 32-35).

EXAMPLES OF WORKING AND NONWORKING TIME

Activity	Working Time Requiring Overtime After 40 Hours A Week	Nonworking Time
Changing clothes for the employee's benefit (29 CFR § 785.24)		x
Changing clothers as required by work or employer (29 CFR §785.44)	x	
Charitable work at the employee's option (29 CFR § 785.44)		x
Charitable work at the employer's direction (29 CFR § 785.44)	x	
Coffee Breaks, unless greater than 20 minutes (29 CFR §785.18)	x	
Holidays on which an employee does not work (29 CFR § 778.218(d))		x
Make-Ready Work such as caring for tools or machinery (29 CFR § 785.24)	x	
Meals of one half hour or more where the employee is free to pursue personal activities (29 CFR § 285.19)		x
Meal periods where employee is not free to pursue personal activities (29 CFR § 785.19)	x	

EXAMPLES OF WORKING AND NONWORKING TIME

(Continued from previous page)

Activity	Working Time Requiring Overtime After 40 Hours A Week	Nonworking Time
Medical attention at the employee's option (29 CFR § 785.43)		x
Medical attention at the employer's direction (29 CFR § 785.43)	x	
On-call time where employee must remain at the employer's premises or so close thereto that the employee cannot use the time for own purposes (29 CFR § 785.17)	x	
On-call time where the employee must simply leave a number where he or she can be reached, and is otherwise free to pursue personal activities (29 CFR § 785.17)		x
Rest periods of 20 minutes or less (29 CFR § 785.18)	x	
Actual sleeping time up to a maximum of 8 hours for employees on 24 hour duty, where 5 hours of uninterrupted sleep is guaranteed except under a 7(k) plan (29 CFR § 785.22)		x

EXAMPLES OF WORKING AND NONWORKING TIME

(Continued from previous page)

Activity	Working Time Requiring Overtime After 40 Hours A Week	Nonworking Time
Sleeping time of employees who are on less than 24 hour duty (29 CFR § 785.21)	x	
Travel time between an employee's home and employer's premises (29 CFR § 785.35)		x
Travel time from employer's premises to work site (29 CFR § 785.38)	x	
Travel time between work sites during the normal work day (29 CFR § 785.38)	x	
Periods of time during which employees are relieved of all duties and are free to pursue personal activities)		x
Waiting time during which employees are required to remain prepared for work (29 CFR § 785.15)	x	
Wash-up time at the employee's option (29 CFR § 790.7(g))		x
Wash-up time required by employer or necessitated by the employee's duties or activities (29 CFR § 790.9(g)	x	

K. Compensation For Hours Worked

The statute (29 U.S.C. 206 and 207) requires payment of prescribed wages, including overtime compensation, in either cash or check or similar medium. The statute also allows payment to include the "reasonable cost" or "fair value" of furnishing an employee with board, lodging, or other facilities. Thus an employee may be paid his or her wages in the following manner:

* cash;
* check or similar medium;
* board;
* lodging;
* other facilities.

1. Deductions From Employee Wages

Deductions may be made to wages for the employee's share of social security and unemployment insurance, as well as other federal, state, or local taxes, levies or assessments without affecting the minimum wage rate. No deductions can be made for any tax which the law requires to be bourne by the employer.

If the employer is required by court order to pay monies from wages to a third party under garnishment, wage attachment, trustee process, or bankruptcy proceedings, such deductions from wages are permissible so long as neither the employer nor anyone acting on the employer's behalf derives any profit or benefit from the transaction. Payments so made are equivalent to payments of wages to the employee (29 C.F.R. 531.39).

The FLSA also does NOT prohibit voluntary assignment by the employee of wages to a third party provided that neither the employer nor anyone acting on the employer's behalf, directly or indirectly, derives any profit or benefit from the transaction. Deductions can be made and the payment is equivalent to payment to the employee (29 C.F.R. 531.40). Such assignments cannot be for the purpose of evading payments required by the FLSA. Examples of assignments which are permissible pursuant to 29 C.F.R. 531.40(c) include the following:

* sums paid on the employee's behalf on U. S. Savings Bonds;
* insurance premiums paid to independent insurance agencies where the employer is under no obligation to furnish insurance and derives no benefit or profit;
* voluntary contributions to churches, charities, athletic, or social organizations from which the employer receives no benefit or profit.

2. Wage Deductions For Uniforms

If the wearing of a uniform is required by law or by the employer, the cost of the uniform is considered to be a business expense of the employer. If the employer requires the employee to bear the cost, it may not reduce the employee's wage below the minimum wage or cut into overtime compensation required by the Act. If the purchase of a uniform by an employee cuts into the minimum wage or overtime compensation required by the FLSA, the employee must be reimbursed no later than the next regular payday. So long as the employer is continuing to pay in excess of the minimum wage, the employer may prorate deductions for uniforms over a period of paydays.

L. Commonly Asked Questions About Working Time And Compensation

1. ARE EMPLOYEES ENTITLED TO BE PAID FOR LUNCH TIME IF THEY EAT AT THEIR DESKS?

If an employee chooses to eat at his or her desk and is completely relieved of duty, then that time would not be considered working time. However, if an employee is required to eat at his or her desk, then that time would be considered working time (29 C.F.R. 785.19). Be careful of employees who voluntarily eat at their desks, but answer phones or perform other work. They are "working" even though it is voluntary on their part.

2. MUST EMPLOYEES WHO COME IN EARLY TO WORK BE PAID FOR THAT TIME?

If an employee comes in early and merely waits until work is to begin, this time would not be considered working time. However, if the employee comes in early and begins working and the employer knows that the employee is working, then that time must be considered working time (29 C.F.R. 785.11).

3. IS ON-CALL TIME CONSIDERED WORKING TIME?

The issue of pay for on-call time depends largely upon the employee's freedom while on-call, including how quickly he or she is required to respond to the call. If the employee can come and go freely while on-call, then that time is not compensable (29 C.F.R. 785.17). However, if the employee must remain on the employer's premises or remain close to the premises and the employee cannot use the time freely, then that time is considered working time and is compensable (29 C.F.R. 785.17). An employee who is required to leave a telephone number where he or she may be reached would not be compensated for on-call time unless a very short response time, e.g., within a few minutes, is required. Providing "beepers" to employees can alleviate most on-call time problems.

4. **DURING TIMES WHEN A CITY COUNCIL MEETING IS BEING HELD AFTER HOURS AND A SECRETARY IS REQUIRED TO BE PRESENT, WOULD THIS BE CONSIDERED WORKING TIME FOR THE SECRETARY?**

   If attendance is required by the employer, then the time attending the council meeting would be considered working time if the employee is covered by the FLSA (29 C.F.R. 785.28).

5. **DO HOURS SPENT BEING TREATED (AT THE SUGGESTION OF THE EMPLOYER) FOR AN ON-THE-JOB INJURY COUNT AS WORKING TIME?**

   Time spent by an employee waiting for and receiving medical attention at the direction of the employer during the employee's normal working hours on days when the employee is working would be considered working time (29 C.F.R. § 785.43).

6. **MUST EMPLOYEES BE PAID FOR THE TIME THEY SPEND WAITING TO PUNCH IN ON THE TIME CLOCK?**

   Most "preliminary and postliminary" activities outside an employee's principal activities are not considered compensable. They are only compensable if there is a custom or practice to pay for such time (29 C.F.R. 790.7[g]).

7. **ARE COFFEE BREAKS CONSIDERED WORKING TIME?**

   They are compensable rest periods and cannot be excluded from hours worked as bona fide meal periods. These rest periods must be counted as hours worked if they last 20 minutes or less (29 C.F.R. 785.15).

8. ARE SLEEPING PERIODS CONSIDERED WORKING TIME?

The FLSA regulations (29 C.F.R. 785.20) set forth two general policies regarding sleep time. For employees on tours of duty of less than 24 hours, sleeping time is compensable as long as the employee is on duty during that period and must work when required. For employees who work 24 hours or more, up to 8 hours of sleeping time can be excluded from compensable working time if:

(1) An expressed or implied agreement excluding sleeping time exists (this means simply informing the employee of the employer's practice to exclude such time);

(2) Adequate sleeping facilities for an uninterrupted night's sleep are provided;

(3) At least 5 hours of sleep is possible during the scheduled sleeping period (though the 5 hours need not be consecutive hours);

(4) Any interruption to the designated sleep period to perform work will be considered working time.

Firefighters, police officers, and other public safety personnel who are on duty exactly 24 hours cannot have their sleeping time excluded (29 C.F.R. 553.15). They must work duty shifts in excess of 24 hours (even though it may only be 15 minutes) before sleeping time can be excluded.

III. OVERTIME COMPENSATION

A. Overview

The FLSA does not limit the number of hours that an employee may work, either daily or weekly. It simply requires that overtime pay must be paid at a rate of not less than one and one-half times the nonexempt employee's regular rate of pay for each hour worked in a workweek in excess of the maximum hours applicable to the type of employment in which the nonexempt employee is engaged. This usually means overtime for those in excess of 40 hours per week. Of course, overtime payments need not be made to exempt or non-covered workers. Only nonexempt employees are entitled to overtime under the Act.

The FLSA's workweek for nonexempt employees is generally a fixed period of 168 hours - 7 consecutive 24-hour periods (29 C.F.R. 778.105) - which is established by the employer for each employee. It may begin on any day of the week and on any hour of the day; it need not coincide with the calendar week.

The FLSA also provides for the declaration of a longer "work period" for law enforcement and fire protection personnel. For the purposes of FLSA compliance, "work period" and "workweek" are identical. The special overtime rules for law enforcement and fire protection personnel are presented in Section V.

In computing hours worked, the FLSA requires that each workweek stand alone (29 C.F.R. 778.104). It does not permit the averaging of hours over 2 or more weeks, with the exception of police, firefighters, and certain hospital and nursing home employees. This is true regardless of whether an employee works on a standard or swing-shift schedule and regardless of whether he or she is paid on a daily, weekly, bi-monthly, or other basis.

B. Regular Rate Of Pay

Under the FLSA (29 C.F.R. 778.108), the "regular rate" may be more than the minimum wage, but it cannot be less. Except for certain types of payments that are specified in 29 U.S.C. 207(e), an employee's regular rate includes all payments made by the employer to, or on behalf of, that employee, assuming that the employee receives no compensation other than that stated.

1. Examples Included In Regular Rate

The following are examples of compensation paid to nonexempt employees that are includable in the regular rate of pay:

* On-call pay (29 C.F.R. 778.223).
* Bonuses promised for good attendance, continuation of the employment relationship, incentive, production, and quality of work (29 C.F.R. 778.208).
* Employee lunch or meal expenses paid by the employer (29 C.F.R. 778.217[d]), unless the expense is incurred on the employer's behalf or for the employer's benefit (e.g., supper money while working late or meal expenses while out of town on business).
* Salaries.
* Salary increases, including retroactive increases.
* Shift differentials.
* Travel expenses of employees going to and from work, if they are paid by the employer (29 C.F.R. 778.217[d]).

2. Computation Of Regular Rate

The following chart provides information on how to compute overtime for various types of employees:

COMPUTATION OF REGULAR RATE AND OVERTIME COMPENSATION

Type of Employee	Regular Rate Equals	Overtime Compensation
HOURLY: No guaranteed overtime	Hourly rate + other forms of compensation (including bonuses and premiums)	1.5 x regular rate for hours worked past 40 per week
HOURLY: Guaranteed overtime up to 60 hours per week*	Hourly rate and other forms of compensation ÷ 40* *This is a "Belo" plan, which may be used only in limited circumstances	a) 1-1/2 x overtime hours guaranteed, which may not exceed 60 hours; or b) 1-1/2 x additional overtime hours guaranteed
SALARIED: Fixed workweek of 40 hours	Salary and other forms of compensation ÷ 40 (hours/week)	1.5 x regular rate for hours worked past 40 per week
SALARIED: Representing payment for all hours worked in more-than-40 hour workweek	Salary and other forms of compensation ÷ number of hours worked in week (this number will vary with each week)	1/2 x regular rate for hours over 40 per week
SALARIED: Fixed workweek under 40 hours	Weekly salary and other forms of compensation ÷ number of hours worked in week (this number will vary with each week)	Straight time at regular rate for hours up to 40 hours per week

COMPUTATION OF REGULAR RATE AND OVERTIME COMPENSATION

(Continued from previous page)

Type of Employee	Regular Rate Equals	Overtime Compensation
SALARIED: Fixed weekly salary for workweek of 48 hours	Salary and other forms of compensation ÷ 48 (hours/week)* *or other number of hours employee is contracted to work	1/2 x regular for hours up to 48 or other contracted maximum 1-1/2 x regular rate for hours above contracted minimum
SALARIED: Paid semi-monthly for all hours worked	[(Salary and other forms of compensation x 24) ÷ 52] ÷ by number of hours worked	1/2 x regular rate for hours worked past 40 per week
SALARIED: Paid monthly for all hours worked	[Salary and other forms of compensation x 12) ÷ 52] ÷ number of hours worked	1/2 x regular rate for hours worked past 40 per week
SALARIED: Paid semi- monthly for 40 hours of work per week	[(Salary and other forms of compensation x 24) ÷ 52] ÷ 40 (hours/week)	1-1/2 x regular rate for hours worked past 40 per week
SALARIED: Paid monthly for all irregular hours worked	[(Salary and other forms of compensation x 12) ÷ 52] ÷ numbers of hours worked	1/2 x regular rate for hours worked past 40 per week
PIECEWORK	a) Weekly earnings and other compensation ÷ number of hours worked; or b) Piece rate so long as it equals minimum wage each week	a) 1/2 x regular rate for hours worked past 40 per week; or b) 1-1/2 x straight time piece rate if bona fide

3. Wage Deductions Includable In Regular Rate

In most cases, the FLSA does not prohibit deductions from wage payments, but regular rates and overtime pay must be figured before deductions are made. In other words, employee deductions and contributions are permissible, but overtime is calculated on the regular rate before the deductions are made (29 C.F.R. 778.304).

a. Examples

The following are examples of wage deductions that are includable in the regular rate:

* voluntary assignments by the employee;
* charitable contributions by the employee;
* garnishments;
* health and welfare plan contributions by the employee;
* insurance premiums paid for the employee's convenience;
* pension plan contributions by the employee;
* repayment of salary advances;
* savings plan contributions by the employee;
* withholding of taxes for or on behalf of the employee, including federal income tax, social security, and unemployment compensation;
* U.S. savings bond purchases.

b. Antidiscrimination Provisions And Reduction Of Wages

The issue of reducing wages paid employees to cope with budgetary problems created by the imposition of the FLSA on local governments has proved controversial. The 1985 amendments to the Act set forth a special provision which stated:

"Sec. 8. A public agency which is a State, political subdivision of a State, or an interstate governmental agency and which discriminates or has discriminated against an employee with respect to the employee's wages or other terms or conditions of employment because on or near February 19, 1985, the employee asserted coverage under section 7 of the Fair Labor Standards Act of 1938 shall be held to have violated section 15(a)(3) of such Act. The protection against discrimination afforded by the preceding sentence shall be available after August 1, 1986, only for an employee who takes action described in section 15(a)(3) of such Act."

This nondiscrimination provision appears to give employees rights arising on or after February 19, 1985, from discriminatory acts, but does not define what constitutes discrimination. The language of the Conference Report (H.R. Conference Report 99-357, 99th Cong., 1st Sess. pp. 8-9 [1985]) appears to do the following: prevent retaliation by the employer against an employee who may assert his or her rights under the FLSA; allows adjustments to the work schedule; prevents recoupment of cash overtime already paid at time and one-half due to the extension of the effective date of the Amendment to the Act; and, prevents unilateral reduction in wages or fringe benefits in response to extension of FLSA coverage. The Conference Report, however, remains neutral as to the lawfulness of any previous reductions in wages or fringe benefits instituted prior to the enactment of the 1985 Amendments. It would appear that those local governments who reduced wages prior to the effect of the 1985 Amendments are "grandfathered" in and are still in compliance with the Act.

Prior to the enactment of the 1985 Amendments, the issue of reducing employees wages as a method of controlling the budgetary consequences of the FLSA was acceptable under the original provisions of the FLSA. Thus, while reduction in wages may be

suspect after the 1985 Amendments, local governments who reduced employees' wages to comply with the FLSA prior to the enactment of the 1985 Amendments, were apparently acting in compliance with then-existing law.

4. Computing Overtime

Section 207 of the FLSA requires the payment of overtime at one and one-half times the employee's regular rate of pay, which must be equal to or exceed the minimum wage set by the FLSA. The method of computing the regular rate of pay and overtime compensation are presented in Table 2 presented on pages 46 and 47. There are other matters relating to overtime compensation that are presented below:

(1) Multiple Jobs/Dual Employment

An employee paid on an hourly basis who performs 2 or more different kinds of work for the same employer, each with different pay scales, may be paid on the basis of regular rates calculated as the weighted average hourly rate earned during the week (29 C.F.R. 778.115). Such an employee may agree with his or her employer in advance to be paid overtime for the type of work that is performed during the overtime hours (29 C.F.R. 778.419).

Where an employee performs two different jobs, however, such jobs must aggregated together to determine what overtime over 40 hours is due, and then the regular rate is fixed by one of the above procedures. Thus, employees must check their records carefully and properly compensation such dual employees.

A special provision giving local governments some additional flexibility was put into the 1985 Amendments to the FLSA. Section 207 (p 92) of 29 U.S.C. was amended to provide the following:

> "If an employee of a public agency which is a state, political subdivision of a state, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in calculation of the hours for which the employee is entitled to overtime compensation under this section."

Thus, the dual employment problem has been ameliorated by the 1985 Amendments for sporadic or occasional employment. Examples of "occasional or sporadic" employment as provided in the legislative history include the following:

> "Public recreation and park facilities and related stadium and auditorium activities often provided this type of occasional employment opportunities. Types of employment might typically include officiating at youth or other recreation or sports events, even if the events or activities follow a regular schedule on a seasonal or other basis, taking of tickets, security for special events, and food and beverage sales at special events (House Report 99-331, 99th Cong. 1st Sess. p. 24 [1985])."

Regular part-time jobs, where the employee works scheduled hours will not qualify under this provision. Similarly, performance of work similar to work regularly performed, even after regular working hours, will not qualify an employee for this provision. In such events, the hours worked in both jobs still must be aggregated and overtime calculated as set forth above.

(2) Joint Employment

When a worker is employed by 2 or more separate employers, this normally presents no special FLSA problems. Ordinarily each employer is considered separately and each must pay overtime for all hours worked in excess of 40 hours per week.

However, if an employee works for two separate departments within a local government, he or she would be considered a dual employee and subject to the provisions presented in the previous section, Multiple Jobs/Dual Employment.

The 1985 Amendments to the FLSA did provide a special joint employment provision for law enforcement, fire protection, and correctional employees. This provision allows public safety employees on an optional (i.e., voluntarily) basis to be employed by special detail to separate and independent employers in fire protection, law enforcement, or related activity without aggregating together the employees' hours of work for the 2 or more employers. Even if the governing body requires that the second employer hire its public safety employees for particular work, or is in any other way involved (e.g., approves the job, work, or is in any other way involved (e.g., approves the job, collects compensation from the second employer, and then directly pays the employee), the hours of the public safety employee still are NOT aggregated. Thus for firefighters and (more importantly) police, the agency can facilitate the employment of its officers by other separate agencies without creating a joint compensation problem.

C. Half-Time Plans For Salaried Employees

1. Overview

Regulations under the FLSA include a special overtime rule for employees who work a fluctuating workweek for a fixed salary. Under this special overtime plan, an employee's hours may fluctuate from week to week. In a half-time plan, an employee may be paid by a fixed SALARY, covering all time worked, for what-ever hours are worked. With straight time already compensated in the salary, only one-half the basic rate, (i.e., half-time) must be paid for overtime.

Half-time may not be used unless the workweek by necessity fluctuates and the fixed salary is large enough to insure that no workweek will be worked in which the employee's hourly earnings from the salary falls below the FLSA minimum wage. The FLSA also requires that the employee understand that the salary covers whatever hours the job may demand in a particular workweek, and that the employer pay the salary even though the workweek is one in which a full schedule of hours is not worked (29 C.F.R. 778.114).

If the employer and employee agree that the employee will be paid a fixed salary for the week, regardless of how many hours the employee works, then the pay for the time over 40 hours each week is computed as half-time. To avoid future problems, such an understanding should be in writing and thoroughly explained to the employee.

2. Calculating Half-Time

To calculate half-time, first determine the regular rate by dividing the weekly salary by the number of hours actually worked by the employee during the week. The employee's half-time premium would be determined by multiplying the regular rate by one-half. Thus, the extra half-time pay would be calculated by multiplying the half-time premium by the number of hours over 40 worked in a week (29 C.F.R. 778.114, see also the chart below).

CALCULATING HALF-TIME

(1)	Regular Rate	=	Weekly Salary	+	Number of Hours Worked
(2)	Half-time Premium	=	Regular Rate	x	1/2
(3)	Extra "Half-time" Pay	=	Half-time Premium	x	Number of Hours Worked Over 40

For example, if a salaried employee works 50 hours in a week at a $500 salary, his or her regular rate would be $10 an hour. Under half-time, he or she would be entitled to one-half the $10 rate for all overtime hours worked. Thus, he or she would be entitled to $5 an hour multiplied by the 10 hours of overtime, or $50 in extra overtime pay. In this example, the regular one-and-one-half FLSA overtime premium would come to $187.50. Thus, half-time is much more advantageous to the employer.

The DOL has done this half-time calculation for employers on Form WH-134, a copy of which is presented on page 52.

The disadvantages of using half-time include problems of employee morale, difficulty in retaining good personnel, and administrative problems in calculating pay. To obviate some of these disadvantages, it is possible to offer modified half-time plans that, for example, pay double-half-time wages after 50 hours. It is important to note, however, that the weekly salary must result at all times in an hourly rate that is at least as much as the FLSA minimum hourly wage.

D. Compensatory Time And Time-Off Plans

It is not uncommon to find employers giving so-called compensatory time (comp time) to employees who work overtime. Compensatory time is time off in lieu of a cash payment.

The 1985 Amendments to the FLSA dramatically changed the rules regarding comp time. One provision of the law specifically allows the use of comp time so long as it is provided for under an employment agreement or understanding. If the municipality had a practice prior to April 15, 1985, to pay comp time, that practice shall suffice as an "understanding" permitting comp time. Notice to the employee may be sufficient to satisfy the

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION

COEFFICIENT TABLE FOR COMPUTING EXTRA HALF-TIME FOR OVERTIME

This Form has been prepared for use by employers who may find the coefficient table to be a time-saver when computing the extra half-time for hours worked over 40 in a workweek.

Hours	Even	1/4	1/2	3/4	1/10	2/10	3/10	4/10	6/10	7/10	8/10	9/10
40		0.003	0.006	0.009	0.0012	0.0025	0.0037	0.0049	0.0074	0.0086	0.0098	0.0110
41	0.012	.015	.018	.021	.0134	.0146	.0157	.0169	.0192	.0204	.0215	.0227
42	.024	.027	.029	.032	.0249	.0261	.0272	.0283	.0305	.0316	.0327	.0338
43	.035	.038	.040	.043	.0360	.0370	.0381	.0392	.0413	.0423	.0434	.0444
44	.045	.048	.051	.053	.0465	.0475	.0485	.0495	.0516	.0526	.0536	.0546
45	.056	.058	.060	.063	.0565	.0575	.0585	.0595	.0614	.0624	.0633	.0643
46	.065	.068	.070	.072	.0662	.0671	.0680	.0690	.0708	.0717	.0726	.0736
47	.074	.077	.079	.081	.0754	.0763	.0772	.0781	.0798	.0807	.0816	.0825
48	.083	.085	.088	.090	.0842	.0851	.0859	.0868	.0885	.0893	.0902	.0910
49	.092	.094	.096	.098	.0927	.0935	.0943	.0951	.0968	.0976	.0984	.0992
50	.100	.102	.104	.106	.1008	.1016	.1024	.1032	.1047	.1055	.1063	.1071
51	.108	.110	.112	.114	.1086	.1094	.1101	.1109	.1124	.1132	.1139	.1146
52	.115	.117	.119	.121	.1161	.1169	.1176	.1183	.1198	.1205	.1212	.1219
53	.123	.124	.126	.128	.1234	.1241	.1248	.1255	.1269	.1276	.1283	.1289
54	.130	.131	.133	.135	.1303	.1310	.1317	.1324	.1337	.1344	.1350	.1357
55	.136	.138	.140	.141	.1370	.1377	.1383	.1390	.1403	.1409	.1416	.1422
56	.143	.144	.146	.148	.1435	.1441	.1448	.1454	.1466	.1473	.1479	.1485
57	.149	.151	.152	.154	.1497	.1503	.1510	.1516	.1528	.1534	.1540	.1546
58	.155	.157	.158	.160	.1558	.1564	.1569	.1575	.1587	.1593	.1599	.1604
59	.161	.162	.164	.165	.1616	.1622	.1627	.1633	.1644	.1650	.1656	.1661
60	.167	.168	.169	.171	.1672	.1678	.1683	.1689	.1700	.1705	.1711	.1716
61	.172	.173	.175	.176	.1727	.1732	.1737	.1743	.1753	.1759	.1764	.1769
62	.177	.179	.180	.181	.1779	.1785	.1790	.1795	.1805	.1810	.1815	.1820
63	.183	.184	.185	.186	.1830	.1835	.1840	.1845	.1855	.1860	.1865	.1870
64	.188	.189	.190	.191	.1880	.1885	.1890	.1894	.1904	.1909	.1914	.1918
65	.192	.193	.195	.196	.1928	.1933	.1937	.1942	.1951	.1956	.1960	.1965
66	.197	.198	.199	.200	.1974	.1979	.1983	.1988	.1997	.2001	.2006	.2010
67	.201	.203	.204	.205	.2019	.2024	.2028	.2033	.2041	.2046	.2050	.2054
68	.206	.207	.208	.209	.2063	.2067	.2072	.2076	.2085	.2089	.2093	.2097
69	.210	.211	.212	.213	.2106	.2110	.2114	.2118	.2126	.2131	.2135	.2139
70	.214	.215	.216	.217	.2147	.2151	.2155	.2159	.2167	.2171	.2175	.2179
71	.218	.219	.220	.221	.2187	.2191	.2195	.2199	.2207	.2211	.2214	.2218
72	.222	.223	.224	.225	.2226	.2230	.2234	.2238	.2245	.2249	.2253	.2257
73	.226	.227	.228	.229	.2264	.2268	.2271	.2275	.2283	.2286	.2290	.2294
74	.230	.231	.232	.232	.2301	.2305	.2308	.2312	.2319	.2323	.2326	.2330
75	.233	.234	.235	.236	.2337	.2340	.2344	.2347	.2354	.2358	.2361	.2365
76	.237	.238	.239	.239	.2372	.2375	.2379	.2382	.2389	.2392	.2396	.2399
77	.240	.241	.242	.243	.2406	.2409	.2413	.2416	.2423	.2426	.2429	.2433
78	.244	.244	.245	.246	.2439	.2442	.2446	.2449	.2455	.2459	.2462	.2465
79	.247	.248	.249	.249	.2472	.2475	.2478	.2481	.2487	.2491	.2494	.2497
80	.250	.251	.252	.252	.2503	.2506	.2509	.2512	.2519	.2522	.2525	.2528
81	.253	.254	.255	.255	.2534	.2537	.2540	.2543	.2549	.2552	.2555	.2558
82	.256	.257	.258	.258	.2564	.2567	.2570	.2573	.2579	.2582	.2585	.2587
83	.259	.260	.261	.261	.2593	.2596	.2599	.2602	.2608	.2611	.2613	.2616
84	.262	.263	.263	.264	.2622	.2625	.2628	.2630	.2636	.2639	.2642	.2644
85	.265	.265	.266	.267	.2650	.2653	.2655	.2658	.2664	.2666	.2669	.2672

TO CONVERT INTO WEEKLY EQUIVALENT: Multiply SEMIMONTHLY salary by 0.4615; MONTHLY salary by 0.2308; ANNUAL salary by 0.01923.

TO CONVERT INTO STRAIGHT-TIME HOURLY EQUIVALENT FOR 40 HOURS: Multiply WEEKLY salary by 0.025; SEMIMONTHLY by 0.01154; MONTHLY salary by 0.00577; ANNUAL by 0.00048.

TO CONVERT INTO TIME AND ONE-HALF HOURLY RATE BASED ON 40 HOUR WEEK: Multiply WEEKLY salary by 0.0375; SEMIMONTHLY by 0.0173; MONTHLY salary by 0.00866; ANNUAL by 0.000721.

CAUTION: Be sure straight-time earnings are not below legal minimum.

(SEE INSTRUCTIONS ON REVERSE SIDE)

Form WH-134
(Rev. Aug. 1974)

INSTRUCTIONS

General. In determining the extra half-time that is due for overtime pay after 40 hours, the method of calculation commonly used is to divide the straight-time earnings by the total number of hours worked and multiply the result by the number of overtime hours divided by two. For instance, the

Computation for 48 hours would be $\frac{\text{Earnings}}{48} \times \frac{8}{2}$; for 50 hours, $\frac{\text{Earnings}}{50} \times \frac{10}{2}$; for 47 ¾ hours,

$\frac{\text{Earnings}}{47\frac{3}{4}} \times \frac{7\frac{3}{4}}{2}$. The table on the reverse side contains the decimal equivalents of the fraction,

$\frac{\text{O.T. Hours}}{\text{Total Hr. X 2.}}$

For example, the decimal for 48 hours is $\frac{8}{48X2} = \frac{1}{12} = .083$; for 50 hours it is $\frac{10}{50X2} = \frac{1}{10} = .1$;

and for 47 ¾ hours $\frac{7\frac{3}{4}}{47\frac{3}{4} \text{ X } 2} = \frac{7.75}{95.5} = .081.$

How to use: (a) Multiply the straight-time earnings for an overtime week by the applicable decimal and the result will be the extra half-time due. Thus, by using the decimals in the table (on the reverse side) the computations performed are, in effect, exactly the same as if the equivalent fractions were used, with the advantage of having eliminated the long division necessitated by the fractions. For example:

(1). A pieceworker earns varying wages each week. In a 43 9/10 hour week he earned $109.75 straight-time. The coefficient for 43 9/10 hours is .0444. .0444 X $109.75 = $4.87, additional half-time due. $109.75 + $4.87 = $114.62, the pieceworker's total pay for the week.

(2). Jones is paid a weekly salary of $138.00. He worked 51½ hours. The coefficient for 51½ hours is .112. .112 X $138.00 = $15.46. $138.00 + $15.46 = $153.46, Jones total pay for the week.

(b) The decimal table can also be used effectively when back wages are due because of additions to wages (such as a weekly bonus) that were not included in the regular rate in computing overtime. For example:

(1). An employee worked 48 hours and received a production bonus of $9.60 which was not included in the regular rate. Thus, $9.60 X .083 = $0.80, the additional half-time due on the bonus.

(2). Jones in the same week (example (a), (2) above) received a production bonus of $25.00. .112 X $25.00 = $2.80, the additional half-time due on the bonus. $138.00 + $15.46 + $25.00 + $2.80 = $181.26, Jones' total earnings. A further short-cut (combining (a), (2), and (b), (2)) would be: $138.00 + $25.00 = $163.00 X .112 = $18.26 + $163.00 = $181.26, Jones' total earnings.

(c) Short-cuts For Computing Back Wages. When both the overtime hours and the earnings vary, individual weekly computations must be made. However, if an employee is paid at a constant hourly rate, time can be saved by adding the unpaid overtime hours during the period and multiplying the total by one-half the hourly rate. When the weekly hours vary and the straight-time earnings are constant, add the decimals for the overtime weeks and multiply the total by the earnings for 1 week. When the weekly hours are constant but the earnings vary, add the earnings for the overtime weeks and multiply the total by the decimal for 1 week. For example:

VARYING HOURS–CONSTANT EARNINGS

Hours	Decimal	Earnings
42	0.024	$138.00
43	.035	138.00
46	.065	138.00
	.124 × $138.00 = $17.11	

CONSTANT HOURS–VARYING EARNINGS

Hours	Earnings
47	$141.00
47	117.50
47	145.70
	$404.20 × .074 = $29.91

GPO 883-619

requirement. The agreement or understanding should, however, meet the following conditions:

> "The agreement or bilateral understanding to provide time off as compensation for overtime may take the form of an expressed condition of employment, so long as (1) the employee knowingly agrees to it as a condition of employment, and (2) the employee is informed that the compensatory time received may be preserved, used, or cashed out consistent with the provisions of this new subsection. The agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time so long as those provisions are consistent with this subsection and the remainder of the Act (House Report 99-331, 99th Cong. 1st Sess. p. 10 [1985])."

The amendments allow a local government to grant employees comp time in lieu of overtime if the comp time is given at a premium rate of time and one-half. The comp time earned by an employee constitutes a legal liability for the employing jurisdiction. Employees generally may accrue up to 240 hours of comp time; employees who work in a public safety activity may accumulate up to 480 hours of comp time.

After the employee has accumulated the maximum comp time and not used it as leave, all overtime must be paid in cash. Further, an employee who has accumulated overtime may request comp time, and such comp time leave must be given within a reasonable amount of time so long as it does not unduly disrupt the employer's operations. The question of what is "unduly disruptive" may prove troubling. The legislative history provides the following direction:

> "Use of the term 'reasonable' is intended to accomodate varying work practices based on the facts and circumstances of each case. When an employer receives such a request for the use of compensatory time, that request should be honored unless to do so would be unduly disruptive. By the term 'unduly disrupt,' the Committee means something more than mere inconvenience. For example, a request for a snow plow operator in Vermont to use 40 hours of compensatory time in February probably would be 'unduly disruptive.' This would

> be true whether the request was made 48 hours or several months in advance. On the other hand, the same request by the same employee for the same number of hours in June or hunting season probably would not be unduly disruptive (House Report 99-331, 99th Cong. 1st Sess. p. 23 [1985])."

It is likely that this provision will be a fertile source of disputes between employees and employers.

Accrued balances of comp time at the termination of employment must be paid at the rate not less than the average rate received by such employee over the last three years of employment or the final regular rate, whichever is higher.

Local governments may also utilize a "time-off plan" that is customarily used in the private sector. The time-off plan is similar to comp time, but involves leave taken during the same pay period. Time-off plans are only allowed under the following conditions:

(1) The employee must get time off at time and one-half for all hours over 40 worked in a week; AND

(2) The employee must take the compensatory time off during the same pay period in which it was accrued.

Thus, an employee who works 50 hours the first week of a 2-week pay period can take off (or be ordered to do so) 15 hours and, accordingly, only work 25 hours the second week without any overtime premium. However, if the 50-hour week occurs in the second week of the pay period, then the overtime premium must be paid. Local governments are free to use such time-off plans in addition to comp time, but such plans are unwieldy and difficult to administer and, as a consequence, rarely used.

Of course, if an employee is not covered by the FLSA or is exempt from its overtime provisions, then any kind of comp time agreement the employer and employee wish to reach would be permissible. Thus, an exempt professional employee could be given comp time to be taken later in the pay period, or at any time the employer desires, as a part of the employer's policy of compensation and may accumulate an unlimited amount of comp time. A part-time employee or one who works less than full-time may be given comp time for all hours worked up to 40 hours or less per week, as well as accumulating comp time under the 1985 Amendments.

E. Part-Time And Under 40-Hour Workers

Many employees work only a part-time work schedule (e.g., 15 to 20 hours per week). Other employees who ostensibly work full-time may work, for example, 35-or 37 1/2-hour workweeks. In all such instances, overtime premiums at time and one-half pay under the FLSA need not be paid to employees until they work in excess of 40 hours in a workweek. Of course, the employer MAY pay such premiums as a part of his or her agreement with employees.

For example, employees working 5-day weeks from 9:00a.m. to 5:00p.m., with one-half hour off for lunch, would usually work 371/2 hours per week of compensable working time. If such workers were paid on an hourly basis, then they would be entitled to their regular rate of straight time pay for hours worked up to 40 hours in excess of 371/2 per week. If such employees were paid on a salary basis, and their salary was understood to cover only the 371/2 hour workweek, they would also be entitled to straight time pay up to 40 hours per week (29 C.F.R. 778.113). However, if the workers were paid on a salary basis, and the salary represented payment for all hours worked up to 40 hours as understood by the employees, then no further compensation would be required for up to 40 hours worked per week. This could, of course, cause a morale problem among such employees. In any case, there

would be NO entitlement to a time and one-half premium for these 21/2 hours since the FLSA requires an overtime premium only after 40 hours are worked in a workweek.

Similarly treated would be part-time employees who would not be entitled to overtime premium until they work at least 40 hours in a workweek. The employer could put part-time employees and those who are almost full-time on salary (and agree with the employees that the salary represents payment for all hours worked), the legal right under the FLSA to have them work up to 40 hours in a week and thereby have no additional straight-time payment (i.e., no additional payment for hours worked between the part-time schedule and 40). However, if the part-time employee's salary only covers, for example, 20 hours a week of work, then a straight-time premium up to 40 hours is required. At all times the hourly wage paid part-time and less than full-time workers must equal the minimum wage.

F. Commonly Asked Questions About Overtime Compensation

1. CAN COMP TIME BE SUBSTITUTED FOR OVERTIME PAY?

Under the 1985 Amendments to the FLSA, local governments may award comp time instead of paying overtime. However, there are certain stipulations in the use of comp time. First, comp time must be awarded at time and a half for hours worked over 40. Second, law enforcement, fire protection, and emergency response employees can accrue 480 hours of comp time before any overtime payment must be made. All other employees can accrue up to 240 hours of comp time. During the same pay period, a time-off plan where the employee is furloughed may also be used.

2. IF A POLICE OFFICER WORKS 40 HOURS A WEEK IN A LAW ENFORCEMENT CAPACITY AT ONE RATE OF PAY AND WORKS 10 HOURS ON THE WEEKEND DRIVING A CITY BUS AT A DIFFERENT RATE OF PAY, HOW IS HIS OR HER OVERTIME CALCULATED?

Since such dual employment is not sporadic or occasional, it does not qualify for the provision found at 29 U.S.C. 207(p)(2). Similarly, the employee is not on special detail doing law enforcement related activities as defined in 29 U.S.C. 207(p)(1). Thus, the employee may be paid overtime on the basis of a regular rate of pay calculated as the weighted average hourly rate for both the police and the bus driving jobs (29 C.F.R. 778.115). In the alternative, he or she may be paid overtime on the basis of an established policy of the employer agreed to by the employee, such as paying for the overtime on the basis of the work performed during the overtime hours (29 C.F.R. 778.419). Remember that a "20% rule" applies to the use of the 28-day work period for law enforcement and firefighting personnel; i.e., the time spent in non-public safety related work cannot exceed 20% of the employee's working time during the work period.

3. **HOW SHOULD A LOCAL GOVERNMENT COMPENSATE AN EMPLOYEE WHO HAS BUILT UP COMP TIME PRIOR TO APRIL 15, 1986? DOES THE LOCAL GOVERNMENT HAVE TO PAY ALL THE COMP TIME ON THE BOOKS OR JUST THE TIME FROM APRIL 15?**

The DOL has yet to establish its policy on the treatment of existing comp time balances. Such balances may be grandfathered in and could be kept in separate books from all comp time earned on or after April 15, 1986. This could allow each employee to accumulate FLSA comp time on a clean slate. On the other hand, DOL may aggregate existing comp time into the FLSA limits. DOL probably will not concern itself with overtime worked prior to the date; accordingly, if that is the case, an emplpoyer can deal with comp time accrued prior to that time as it wishes.

4. **WHAT IS THE REGULAR RATE OF PAY FOR AN EMPLOYEE WHOSE ACTIVITIES ARE PART OF A TASK SYSTEM SUCH AS A SANITATION WORKER WHO IS DONE FOR THE DAY AFTER COMPLETION OF A DESIGNATED ROUTE?**

Generally, such employees are paid for a day's work for doing a particular job, regardless of the number of hours worked in the day or at the job. If the employee receives no other form of compensation for services, the regualr rate would be determined by totaling all the sums received at the day rates or job rates in the workweek and dividing by the total hours actually worked. The employee would be entitled to extra half-time pay at the rate for all hours worked in excess of 40 in the workweek (29 C.F.R. 778.112). In the alternative, the employee may be paid for hours worked in excess of 40 for the week at time-and-a-half the hourly or daily rate paid for that work during the first 40 hours.

5. **IF AN EMPLOYEE WORKS 40 HOURS DURING THE WEEK AND THEN VOLUNTEERS TO HELP PAINT A CITY BUILDING ON THE WEEKEND, WOULD HE OR SHE HAVE TO BE PAID OVERTIME?**

If the employee truly "volunteered" to work on the weekend without contemplation of pay, then that time would not be compensable. However, an employee cannot work for the same employer as a nonpaid volunteer doing the same type work for which he or she is paid during the regular workweek.

6. **IF EMPLOYEES VOLUNTEER TO WORK OVERTIME, DO THEY HAVE TO BE PAID OVERTIME?**

An employee who volunteers to work overtime must be paid for that time because he or she is being suffered or permitted to work for the benefit of the employer (29 C.F.R. 785.11). The employer must instruct the employee not to work overtime and, if necessary, take steps to discipline employees who do work unauthorized overtime so the employer has not suffered or permitted the work.

7. IF AN EMPLOYEE MOONLIGHTS FOR ANOTHER DEPARTMENT WITHIN THE GOVERNMENT, WOULD THAT PERSON HAVE TO BE PAID OVERTIME FOR THE HOURS WORKED OVER 40?

Law enforcement and fire protection employees may moonlight in such occupations without incurring overtime liability under a joint employment relationship.

Other employees may do sporadic or occassional part-time work in a different capacity without creating an overtime problem. However, where the work is not sporadic, but is a scheduled job, an employee would be working for the same employer and would therefore have to be paid over

8. CAN HOURS WORKED BE AVERAGED OVER SEVERAL WORKWEEKS THROUGH THE USE OF COMP TIME IN ORDER TO AVOID PAYING OVERTIME?

In computing hours worked, the FLSA requires that each workweek stand alone (C.F.R. 778.104). It does not permit the averaging of hours over 2 or more weeks, with the exception of police, fire-fighters, and certain hospital and nursing home employees. This is true regardless of whether an employee works on a standard or swing-shift schedule and regardless of whether he or she is paid on a daily, weekly, bimonthly, or other basis. However, comp time may be given rather than paid overtime at time and one-half.

9. MUST EXEMPT EMPLOYEES WHO WORK OVERTIME BE PAID FOR THAT OVERTIME?

Exempt employees are not subject to the overtime provisions of the FLSA. Employers may pay overtime or comp time if they wish, but they are not required to under the FLSA.

10. **ON WHAT RATE OF PAY WOULD OVERTIME BE BASED FOR AN EMPLOYEE WHO WORKS 40 HOURS PER WEEK IN A FULL-TIME EXEMPT CLASSIFICATION DURING THE DAY AND ONE NIGHT A WEEK IN A NONEXEMPT CLASSIFICATION?**

Generally NO overtime pay would be required.

11. **MUST THE ACTUAL OVERTIME PAY BE INCLUDED IN THE PAYCHECK FOR THE PAY PERIOD IN WHICH THE OVERTIME WAS WORKED?**

The FLSA does not provide when employees are paid. However, a delay beyond the pay period AFTER the period in which the overtime work was performed would be considered a violation by the DOL. Remember, work periods need not coincide with pay periods.

12. **WHEN MAY A JURISDICTION USE THE "HALF-TIME" METHOD FOR CALCULATING OVERTIME PAY?**

Overtime may be calculated by the "half-time" method for salaried employees who work a fluctuating workweek for a fixed salary. Half-time may not be used unless the fixed salary is large enough to ensure that no workweek in which the employee's hourly earnings (as calculated from the salary) fall below the FLSA minimum wage. An employee must understand that the salary covers whatever hours the job may demand in a particular workweek, and that the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked (29 C.F.R. 778.114).

13. **HOW SHOULD OVERTIME BE CALCULATED FOR PART-TIME EMPLOYEES?**

Under the FLSA, overtime premiums need not be paid to employees until they work in excess of 40 hours a week. There is no requirement in the FLSA to pay overtime for hours worked in excess of 8 per day. Part-time workers may receive comp time for hours worked up to 40 hours in a week.

14. MUST AN EMPLOYEE BE PAID TIME AND A HALF FOR WORKING HOLIDAYS?

There is NO requirement under the FLSA that employees be given premium pay for holidays, weekends, or evening shifts. Overtime is only required for time actually worked in excess of 40 hours per week.

15. IF AN AMBULANCE CREW WORKS EITHER 24 HOURS ON, 48 HOURS OFF, OR 48 HOURS ON AND 48 HOURS OFF, WHEN MUST OVERTIME BE PAID?

Ambulance and rescue service employees whose services are deemed substantially related to firefighting or law enforcement activities would qualify for the section 7(k) exemption for overtime which permits computation of hours worked on the basis of a work period and which bases the overtime requirements on a work period concept. Under section 7(k) the work period must be not less than 7 days nor more than 28 days.

The work period, rather than the shift cycle, would determine when overtime would be paid. EMS personnel who are part of a municipal fire department are entitled to overtime over 212 hours in a 28 day period; if connected with the police department, overtime is required for time worked in excess of 171 hours in the work period. If the EMS is independent of the police and fire departments, the 212-hour 28-day work period would apply, although this may be amended in the future.

IV. OVERTIME FOR POLICE AND FIREFIGHTERS

A. Overview

Under the FLSA, as a general rule, an employer must pay an employee overtime for hours worked in excess of 40 hours per week. This overtime premium is one and one-half times the regular rate at which he or she is employed. However, the FLSA provides that employees engaged in law enforcement or fire protection activities with 28-consecutive-day work periods are entitled to one and one-half times the regular rate of pay if they work excess hours. For fire protection employees, overtime must be paid for hours worked beyond 212 hours during the 28-day work period; for law enforcement employees, working more than 171 hours during the 28-day work period triggers the overtime premium. Such overtime may be compensated under the "half-time" plan as presented previously.

1. Public Safety Agencies With Fewer Than Five Employees

The FLSA provides a complete overtime exemption for any employee of a public agency engaged in law enforcement or fire protection if that agency employs fewer than 5 employees during the workweek (29 U.S.C. 213[b][2]). For purposes of this exemption, the number of law enforcement and fire protection employees are considered separately. Part-time employees are counted in determining the number of public safety employees. Volunteers, however, are not counted. Exempt employees are included in the count, i.e., fire and police chiefs would be counted.

2. Declaring Work Periods for Law Enforcement and Fire Protection Personnel

Pursuant to the partial overtime exemption established in section 207(k) of the FLSA, local governments must declare work periods for employees engaged in law enforcement and fire protection. A work period

is any established and regularly recurring period of work which cannot be less than 7 consecutive days nor more than 28 consecutive days. Except for these limitations, the work period can be of any length, and it need not coincide with the pay period or with a particular day of the week or hour of the day.

The work period must be declared by the mayor, city manager, or whatever the designation is for the chief executive officer of the municipality.

Establishing the work period in most circumstances is an administrative declaration, and does not normally require governing board approval. It is required that the declaration be dated and that it contain the length of the work period, the groups or groups of employees covered, and a statement that the declaration is made pursuant to section 207(k) of the Act and C.F.R. Part 553. Once the work period is established, it remains fixed. It may be changed only if the change is intended to be permanent at the time it was made.

The FLSA does not require the same work period for all law enforcement and fire protection personnel. Separate work periods can be declared for different employees or groups of employees.

Unless an agency claims the section 207(k) exemption by establishing a work period, it is possible that overtime will be computed on a 40 hour workweek basis. This would prevent the agency from utilizing a greater than 40 hour workweek without paying overtime.

B. Computing Overtime Pay For Less Than A 28-Consecutive-Day Work Period

The following chart sets forth the maximum number of hours for each work period after which the employee is entitled to one and one-half times his or

her regular rate. It is important to note that, in order to be exempt from the 40-hour per week overtime standards, the work period must be at least 7 consecutive work days up to a maximum of 28 consecutive work days.

HOURS WORKED (ROUNDED)

BEFORE OVERTIME:

Consecutive-Day Of Work Period	Of Fire Protection	Of Law Enforcement
28	212	171
27	204	165
26	197	159
25	189	153
24	182	146
23	174	141
22	167	134
21	159	128
20	151	122
19	144	116
18	136	110
17	129	104
16	121	98
15	114	92
14	106	86
13	98	79
12	91	73
11	83	67
10	76	61
9	68	55
8	61	49
7	53	43

It is important to note that, in order to be exempt from the normal 40-hour per week overtime standards, the work period must be at least 7 consecutive work days up to a maximum of 28 consecutive work days.

The figures presented on the above chart come from the DOL publication entitled "State and Local Government Employees Under the Fair Labor Standards Act" at page 20. The referenced DOL publication is for general information and compliance therewith, especially after the 1985 Amendments, cannot be relied upon as a good faith defense under the Act. There are two statistical quirks or errors in the DOL compilation of schedules for law enforcement employees. If a 14-day schedule is selected, the DOL allows an 86-hour work week. Thus, by selecting a 14-day work period, an employer can work police officers 172 hours in a 28-day period, which is one more hour without overtime than if the employer selected the 171-hour 28-day option. A similar problem exists with regard to the 141 hours for a 23-day schedule allowed for in the DOL publication. Thus, it may be more advantageous to fix a 14-day work period if the fluctuating schedule of police officers allows such a schedule.

C. Definition Of Employees Covered By Section 207(k)

For the purposes of these special regulations (29 C.F.R. Part 553), only certain law enforcement and fire protection personnel are covered by the section 207(k) or 13(b)(20) exemptions. A discussion of the types of employees covered by section 207(k) exemption is presented below. All other personnel who do not qualify for the exemption, even though they are employed in a police, fire, or other public safety agency, are regulated by the 40-hour overtime standard of the Act.

1. Fire Protection Employees

To be covered by the section 207(k) or 13(b)(20) exemption for fire protection, an employee must:

(a) Be employed by an organized fire department or fire protection district and, pursuant to the extent required by state law or local

ordinance, have been trained and have the legal authority and responsibility to engage in the prevention, control, and extinguishment of a fire of any type; and

(b) Perform activities which are required for, and directly concerned with, the prevention, control, or extinguishment of fires, including such incidental nonfirefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills, and inspecting homes and schools for fire hazards.

Employees who satisfy the above definition are considered fire protection employees regardless of their status as trainee, probationary, or permanent. Those not qualifying for section 207(k) exemptions are civilian employees of fire departments, such as dispatchers, clerks, or alarm operators.

2. **Law Enforcement Employees**

To be covered by the section 207(k) exemption for law enforcement officers, an employee, regardless of his rank or status as trainee, probationary, or permanent, must meet ALL of the following criteria:

* Be a uniformed or plainclothes member of a body of officers and subordinates; and
* Be empowered by statute or local ordinance to enforce laws designed to maintain public peace and order, protect life and property from accident or willful injury, and to prevent and detect crime; and
* Have the power to arrest; and
* Have participated in a special course of instruction or study (or will undergo on-the-job training) which typically includes: self-defense, physical training, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid, and ethics.

a. Examples Of Law Enforcement Employees Exempt Under Section 207(k)

Employees who meet the tests presented in the previous section are covered by the special overtime rules contained in section 207(k) regardless of their rank as trainees or probationary or permanent employees. Included in this exemption are city or county:

* Police officers;
* Sheriffs and deputy sheriffs who are regularly employed rather than those who are deputized temporarily;
* Public agency rescue and ambulance personnel, if such personnel form an integral part of the law enforcement activities;
* Security personnel in local government correctional institutions;
* Airport safety officers.

b. Examples of Law Enforcement Employees Not Exempt Under Section 207(k)

The following examples are law enforcement personnel who are NOT covered by the 207(k) exemptions include:

* Building and health inspectors;
* Animal control personnel;
* Civilian traffic employees who direct vehicular and pedestrian traffic at specific intersections (school crossing guards);
* Building guards who protect life and property within a limited area of a building;
* Civilian employees such as dispatchers, radio operators, maintenance and repair workers, and clerical personnel.

3. Public Safety Employees

Some public agencies employ public safety officers who serve as both law enforcement and fire protection personnel (29 C.F.R. 553.6). The dual

assignment will not defeat the section 207(k) exemption, provided that the activities performed meet the definition of "fire protection" or "law enforcement" prescribed above. The combined duties of law enforcement and fire protection personnel should comprise at least 80 percent of the employee's duties.

4. Emergency Medical Service Employees

Many cities have emergency medical services personnel who function under the umbrella of their fire departments. Such ambulance and rescue personnel may qualify under either the law enforcement or fire protection provisions. If these workers are organized under the fire department, they may work up to 212 hours in a 28-day period without receiving overtime. If they are organized under the police department, 171 hours in a 28-day period is the limit triggering overtime payments.

If emergency medical service employees work for a separate department that is not a part of the police or fire departments, they will qualify for section 207(k) treatment if their services are substantially related to firefighting or to law enforcement activities in that they have been trained in treating fire injuries and are regularly dispatched to fires, riots, natural disasters, and accidents (29 C.F.R. 553.8[a]). Ambulance and rescue service employees of the following public agencies are not exempt under section 207(k): hospitals, institutions primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises, and other non-public safety agencies and institutions. It should be noted that ambulance and rescue service employees of private agencies are not exempt even if their activities are substantially related to the fire protection and law enforcement activities performed by a public agency.

D. Bona Fide Volunteers

The 1985 Amendments to the FLSA provided special statutory provisions allowing volunteers to work for local governments. In addition, predating this legislation, there were special rules allowing for police and firefighter volunteers. Individuals who volunteer to perform fire protection or law enforcement activities, usually on a part-time basis as a public service, are not considered to be employees of a public agency (29 C.F.R. 553.11). Volunteers in law enforcement or fire protection may be employed in another occupation by the same public agency. Also, police officers and firefighters of one jurisdiction can be volunteers in a law enforcement or fire protection activity for another jurisdiction.

The 1985 Amendments to the FLSA clarified the issue of compensation for volunteers. The Amendments state that volunteers may be paid "expenses, reasonable benefits, or a nominal fee" to perform the services for which they volunteer. Furthermore, employees who perform work other than law enforcement or fire protection for a public safety agency may volunteer for law enforcement or fire protection work and are not entitled to FLSA benefits for this time.

1. Mutual Aid

Prior to the 1985 Amendments to the FLSA, the time an employee provided on a voluntary basis to an adjoining jurisdiction for which his or her employer had a mutual aid agreement was compensable. The same went for law enforcement employees who volunteered their services to communities who had a mutual aid agreement with their employer. The 1985 Amendments, however, nullified these restrictions on the use of mutual aid agreements. The Amendments provide that regardless of the existence of a mutual aid agreement between two jurisdictions, a local government employee may serve as a volunteer in another jurisdiction without the primary employer being deemed a joint employer. Thus, mutual aid agreements no longer present a joint employment problem.

E. Nonexempt Work Limited To 20 Percent

Employees in law enforcement or fire protection may also engage in nonexempt work without losing their section 207(k) exemptions if the nonexempt activity is less than 20 percent of the employee's total hours in a work period (29 C.F.R. 553.5). If the employee's nonexempt activity exceeds the 20 percent tolerance test, then that employee is not eligible for the section 207(k) exemption.

F. Fire Protection And Law Enforcement Employees Who Perform Unrelated Work

An employee regularly engaged in exempt fire protection or law enforcement activities who also works for another department or agency of the same local government loses the section 207(k) partial exemption if the other work is unrelated to fire protection or law enforcement activities, and is not otherwise exempt from provisions of the FLSA (29 C.F.R. 553.9). For example, in the case of a police officer who works part-time as a lifeguard at a city pool during the summer seasonal period, he or she would retain the 207(k) exemption since the seasonal work would be considered exempt. If, however, the same police officer were to work as a clerk (nonexempt position) in the finance department for over 20 percent of his or her time, overtime hours for all hours worked for the two departments would have to be based on a 40-hour per week period since the clerical job is not related to fire protection or law enforcement activities.

G. Rules for Determining The Tour Of Duty, Work Period, And Compensable Hours

Where the employer elects the 207(k) exemption, there are special rules for determining the tour of duty, work period, and compensable hours of work of employees. An agency that chooses the normal 40-hour work week standards

for determining its employees' entitlement to overtime may not take advantage of the special section 553 provisions relating to the balancing of hours over an entire work period, trading time, and early relief.

The tour of duty means the "scheduled" or "unscheduled" periods governing the time when an employee is on duty. Scheduled period refers to work shifts or special details, while unscheduled period refers to the hours spent in court by police officers, time worked in emergency situations, or time spent after a shift to complete required work.

If a local government elects to compute overtime for law enforcement and fire protection personnel under section 207(k), a tour of duty should be defined for each affected employee (29 C.F.R. 553.13).

H. Compensable Hours Of Work

Compensable hours of work generally include all of the time during which:

* An employee is on duty;
* An employee is on the employer's premises;
* An employee is at a prescribed work place;
* All other time during which an employee has suffered or been permitted to work for the employer.

Such hours include all pre-shift and post-shift activities which are the integral part of the employee's principal activity, or which are closely related to performance.

The time spent by an employee away from the employer's premises under conditions so circumscribed that they restrict the employee from effectively using the time to pursue personal interests constitutes compensable time

worked. For example, the time of a police officer, who must be in constant state of readiness, is required to spend at home waiting to be summoned to testify in a court case constitutes compensable time.

1. Sleeping And Meal Time As Compensable

Sleep and meal time may be excluded from compensable time for law enforce-ment and fire protection employees on duty more than 24 hours, but only if there has been an expressed or implied agreement between the local agency and the employee. Absent such an agreement, sleep and meal time will constitute hours of work. If the agreement provides for the exclusion of sleep time, that time cannot exceed 8 hours in a 24-hour period. If this sleep time is interrupted by a duty call, the interruption must be counted as hours worked; if after such an interruption, the employee cannot get a reasonable night's sleep, the entire night must be counted as hours worked. As long as the total hours the employee gets is 5 hours or more, despite interruptions, this would be sufficient.

2. More Than One Work Period Permissible

Prior approval is not required from the DOL's Wage and Hour Division for declaring different work periods for different employees or groups of employees (29 C.F.R. 553.16[b]). However, there are special recordkeeping requirements which will be discussed in the subsequent section on record-keeping.

3. Early Relief

When fire protection employees relieve the previous shifts prior to their scheduled starting time, the compensable hours worked should not be affected if this early relief is voluntary on the part of the employees and

does not result over a period of time in their failure to receive proper compensation for all hours worked (29 C.F.R. 553.17). However, if the practice is required by the agency, then such early relief time is compensable.

4. Trading Time

In many fire departments and law enforcement agencies, there is a common practice of permitting an employee to trade a tour of duty with another employee. The FLSA (29 C.F.R. 553.18) permits such a practice. In enacting section 207(k), Congress made it clear that it intended for the continued use of trading time without the local government employer being subject to (additional) overtime compensation by virtue of voluntary trading of time by employees. The practice of trading time will have no effect on hours of work if the following criteria are met:

(1) Trading is done voluntarily;

(2) Trades are for the employee's personal benefit and not the employer's benefit;

(3) A record is maintained by the employer of all time traded by his or her employees; and

(4) The period in which time is traded and paid back does not exceed 12 months.

5. Special Detail Assignments

An exception to the joint employment provisions of the Act applies to public safety employees. The 1985 FLSA Amendments allow public safety employees employed by special detail to a separate and independent employer

to seek work without aggregating the total hours worked together in both jobs. This reduces overtime due to, for example, a police officer who also serves part-time as a security guard. The legislative history sets forth some of the circumstances where this exception would apply:

> "These special details include the police officer who accepts extra employment from a school board to direct traffic at a football game, or from a promoter to furnish crowd control at a rock concert or convention. Such opportunities may result from a local legal requirement promulgated by the governing body which is also the employee's primary employer. The requirement may specify that a separate and independent employer must hire sworn law enforcement personnel for these functions, pay such personnel through the primary employer's payroll system, or otherwise adjust or alter their ordinary working conditions. In these situations, the current FLSA joint employment regulations require that the hours worked for the separate and independent employer be combined with the hours worked in the employee's primary job in the calculation of overtime. Under this subsection, the joint employment rule would not apply so long as (1) the special detail is worked solely at the employee's option; (2) the two employers are in fact separate and independent; and (3) the primary employer requires, facilitates or affects the performance of the work, as set forth in subsections 7(p)(1)(A), (B), and (C). For example, a school system's employment of police officers to direct traffic at a football game where local ordinance requires that only sworn police officers be used for such duty and where the work is solely at the option of the police officers would qualify for separate treatment under the exception of the FLSA. By contrast, the assignment of special details of police officers to cover the extra load of police work required by a large convention where that assignment is not solely at the option of these officers would not qualify. This would be true even if the body holding the convention reimburses the primary employer for the costs of the services. An employee choosing to work for a separate branch of his or her employer does not qualify for the special detail provisions (House Report No. 99-331, 99th Cong. 1st Sess. page 24 [1985])."

The critical issue here is what constitutes a "separate and independent employer." While a school board is considered separate from the police department, it is unclear whether, for example, the library would be separate from the police department or is simply a branch of the same employer.

6. Substitution Of Work Schedules

The 1985 amendments to the FLSA provide that fire protection, law enforcement, and jailers, at their option, and with the approval of the public agency, may agree to substitute during scheduled work hours for another employee. Employees may work substitute schedules where "the substitution was: (1) voluntarily undertaken and agreed to solely by the employees; and (2) approved by the employer." (House Report 99-331, 99th Cong. 1st Sess. page 25[1985].) The traded time will not be considered, and each employee will be considered to have worked his or her normal schedule. In such event, the hours worked as a "substitute" employee may be excluded from the calculation of overtime compensation. Moreover, the employer of an employee who performs such substitute work is not required to keep a record of the hours of substitute work. (See 29 U.S.C. 211[c].)

I. Special Recordkeeping Requirements

The recordkeeping requirements for law enforcement and fire protection personnel are the same as the requirements for all employees set forth in 29 C.F.R. Part 516, except where the section 207(k) exemption is claimed. The records for section 207(k) employees can be kept on a work period basis up to 28 days rather than on a work week basis. In addition, if there are different work periods for different employees or groups of employees, the employer is required to keep adequate records for the work period for each employee, and the record should indicate the length of that period and its starting time.

J. Commonly Asked Questions Concerning Police And Firefighters

1. IS THE TIME A POLICE OFFICER SPENDS IN COURT WAITING TO TESTIFY CONSIDERED WORKING TIME?

The time spent by a police officer waiting to testify is considered working time under the FLSA, The regulations state that time spent away from the employer's premises under conditions which restrict an employee from using the time effectively for personal pursuits constitutes compensable hours of work (29 C.F.R. 553.13). For example, a police officer who is required to remain at home until summoned to testify in a pending court case and thereby must be in a constant state of readiness is engaged in compensable hours of work. If a "beeper" system could be worked out, such waiting time would not be compensable.

2. ARE VOLUNTEER FIREFIGHTERS CONSIDERED EMPLOYEES OF THE JURISDICTION?

Bona fide volunteer firefighters who work on a part-time basis as a public service are not considered to be employees of a public agency. However, a full-time paid firefighter could not be a volunteer firefighter part of the time in the same jurisdiction.

3. IS A POLICE OFFICER WHO WORKS A SECOND JOB AS A SECURITY GUARD FOR A PRIVATE COMPANY AND WEARS HIS POLICE UNIFORM WHILE ON DUTY ENTITLED TO OVERTIME PAY BY THE JURISDICTION?

The jurisdiction would not be responsible for the hours a police officer worked on a second job as a security officer, as long as he worked for and was paid by the second employer. However, if while on the second job the police officer responds to an emergency or makes an arrest for the jurisdiction, then that time would be compensable by the jurisdiction.

4. **MUST FIREFIGHTERS OR POLICE OFFICERS WHO ARE OFF THEIR SHIFTS, BUT STILL ON CALL FOR THE REST OF THE TIME, BE PAID FOR THE ON-CALL TIME?**

The answer depends upon the restrictions placed on the employee during the on-call periods. It would not be deemed working time in most cases if the employee is free to engage in his or her own pursuits subject only to the employee leaving word where he or she can be reached by the employer. The ability of the employee to leave the jurisdiction while otherwise on-call would virtually insure that the on-call time is not compensable. If the employee responds to a call, the time worked in responding to the call would be compensable. If an employee is not really free to use the on-call time freely, then that time would be considered compensable (29 C.F.R. 785.17).

5. **WOULD IT BE CONSIDERED WORKING TIME IF A POLICEMAN IS OFF DUTY BUT RESPONDS TO AN EMERGENCY?**

The time spent responding to an emergency when a police officer is offduty would be considered compensable time (29 C.F.R. 553.14). Generally, all time during which the employee is "suffered or permitted" to work for the employer is compensable time.

6. **ARE POLICE OFFICERS ELIGIBLE FOR OVERTIME COMPENSATION WHEN THEY ARE EXTRADITING A PRISONER?**

A police officer who is engaged in extraditing a prisoner would be entitled to compensation for that work (29 C.F.R. 553.14). All the time with the prisoner would be working time, except any time in which the officer is completely free from duty to eat or sleep.

7. **WOULD EMERGENCY MEDICAL SERVICE TECHNICIANS BE CONSIDERED EXEMPT UNDER THE PROFESSIONAL OR ADMINISTRATIVE DEFINITIONS?**

Physicians and registered nurses who might be part of the emergency medical service (EMS) team would be exempt professionals. The head of the EMS team, if a nonprofessional, might qualify as either an executive or administrative employee; the rest of the team most likely would not qualify. Any such determination is highly dependent on the facts in each case - what do they do, and do they do it without direct supervision and exercising genuine discretion and independent judgment in their work. Nonexempt EMS personnel qualify under the section 207(k) treatment as police and firefighters, if: (1) They have received special training in rescue work; and (2) They are regularly dispatched to fires, riots, natural disasters, and accidents.

8. **IF A PERSON IS A FIREFIGHTER, BUT ALSO DRIVES AN AMBULANCE FOR THE FIRE DEPARTMENT, WOULD THAT EMPLOYEE STILL BE ELIGIBLE FOR THE SECTION 207(K) EXEMPTION?**

Yes, if the ambulance driving includes calls at fires. Under the FLSA regulations, police officers and firefighters may perform such non-exempt work as long as it doesn't exceed 20 percent of the employee's total hours of work in the work period (29 C.F.R. 553.5).

9. **CAN POLICE OFFICERS AND FIREFIGHTERS TRADE OFF ON SHIFTS WITHOUT HAVING TO BE PAID OVERTIME, IF THE TRADE-OFF MEANS THE EMPLOYEE WOULD BE WORKING MORE THAN 40 HOURS A WEEK?**

According to the FLSA regulations (29 C.F.R. 553.18), fire and police personnel may trade tours of duty without the employer being

subject to additional overtime compensation by virtue of the voluntary trading time by such employees. In addition to trading time, the 1985 Amendments allow police and fire personnel voluntarily to substitute for another employee without creating an overtime liability.

10. **WOULD A PUBLIC WORKS EMPLOYEE WHO IS A VOLUNTEER FIREFIGHTER BE ELIGIBLE FOR OVERTIME COMPENSATION WHEN FIGHTING A FIRE?**

Individuals who volunteer to perform fire protection or law enforcement activities, usually on a part-time basis, are not considered to be employees of the jurisdiction and would therefore not be eligible for overtime compensaton for fighting a fire as a volunteer. Volunteers may include individuals who are employed in some other capacity for the same public agency (29 C.F.R. 553.11).

V. CHILD LABOR PROVISIONS

A. Overview

The FLSA's child labor provisions (29 C.F.R. 570 et. seq.) regulate the minimum age and maximum hours which govern the employment of minors in certain occupations. Local governments may employ minors as a part of their regular work force or in summer jobs for youth programs. But in either context, they must be careful to comply with federal law, as well as state and local laws regulating child labor.

B. Child Labor Restrictions (Ages 16 Through 18)

Eighteen years is the minimum age requirement for employment in any non-agricultural occupation declared by the Secretary of Labor to be particularly hazardous for the employment of minors or detrimental to their health or well-being. Sixteen years is the minimum age for employment in:

1. Any non-agricultural occupation not declared hazardous by the Secretary of Labor, although age 14 is the minimum under certain conditions (29 C.F.R. 570.31);

2. Any agricultural occupation during school hours;

3. Any agricultural occupation that the Secretary of Labor has declared to be particularly hazardous for the employment of minors.

It is this 16-year minimum age that will be of most concern to local governments.

C. Child Labor (Ages 14 Through 16)

Fourteen is the minimum age for employment outside school hours in a variety of non-manufacturing, non-mining, and non-hazardous occupations for a limited number of hours under specified conditions of employment. Employment of minors 14 to 16 years of age in any qualified occupation (see 29 C.F.R. 570.33 and 570.50), shall be confined to the following periods (29 C.F.R. 570.35):

1. Outside school hours;

2. Not more than 40 hours in any week when school is not in session;

3. Not more than 18 hours in any one week when school is in session;

4. Not more than 8 hours in any one day when school is not in session;

5. Not more than 3 hours in any one day when school is in session;

6. Between 7:00 a.m. and 7:00 p.m. in any one day, except during the summer (June 1 through Labor Day) when the evening hour will be 9:00 p.m.

D. Certificates Of Age

Employers are required to obtain proof of age of all employees under the age 19 in order to comply with the FLSA. To protect the employer from unwitting violations of the FLSA minimum age standards, the employer should have on file a federal or state certificate of age.

A certificate of age is a government document that an employer generally can rely upon as a defense in a child labor suit. The employer

must provide to the DOL or the state DOL (29 C.F.R. 570.9) information on the sex and address of the minor, his or her signature, and the nature of the employment (29 C.F.R. 570.6). This information must be accompanied by some proof of birth: a birth certificate, an attested transcript of birth, a signed statement issued by the registrar of vital statistics for births in the area, a baptism record, a family bible record, a passport, a certificate of arrival in the United States, OR certain school records accompanied by a physician's certificate (see 29 C.F.R. 570.7).

E. Penalties

Any person who violates the child labor provisions or any related regulations is subject to a civil penalty, not to exceed $1,000 for each violation. In certain cases, the FLSA provides criminal penalties for oppressive child labor violations, including fines of up to $10,000 and 6 months imprisonment.

VI. EQUAL PAY

A. Overview

The Equal Pay Act of 1963 (EPA), 29 U.S.C. 209, was enacted as an amendment to the FLSA. The equal pay regulations under the FLSA (29 C.F.R. 800) prohibit an employer from discriminating between employees on the basis of sex by paying employees of one sex less than employees of opposite sex for work performed under similar working conditions within an establishment on jobs which require equal skill, effort, and responsibility. It is important to note that these equal pay provisions apply not only to employees covered by the minimum wage and overtime requirements of the FLSA, but to ALL employees of a covered enterprise.

A wage differential is permitted to exist between men and women under the EPA if one of 4 justifications is shown: (1) a bona fide seniority system; (2) a merit system; (3) a system which measures earnings in terms of quantity or quality of production; or (4) any other factor other than sex.

The EPA also prohibits an employer from complying with its provisions by reducing the wage rate of any employee. For example, if a woman were being paid $600 for a job found to be equal in skill, effort, and responsibility to that of a male being paid $700, the employer would not be permitted to reduce the male employee's compensation to $600 to comply with the EPA.

Administrative enforcement of the EPA was originally delegated to the Secretary of Labor. Effective July 1, 1979, this responsibility was transferred to the Equal Employment Opportunity Commission (EEOC).

B. Work Within An Establishment

As previously noted, the EPA prohibits discrimination on the basis of sex for equal work performed "within any establishment" (29 C.F.R. 800).

"Establishment" has been defined in the DOL's regulations (which were subse-quently adopted by the EEOC) as a distinct physical place of business. In the public sector, all the departments of a local government taken together are usually held to be a single establishment.

C. Equal Pay For Equal Work

The EPA requires only that there be equal pay when there is equal work being performed by employees of both sexes. In determining what constitutes equal work, the courts have generally not required that the jobs be identical, but only substantially equal. The "substantially equal" test has not been universally accepted. Where it is utilized, it permits the finding that 2 jobs are equal for EPA purposes even though one job performs tasks not performed by the other.

"Equal work" is defined by the EPA itself, with jobs considered equal if they require equal skill, effort, and responsibility and if they are performed under similar working conditions. In adopting this equal pay standard, Congress expressly considered and rejected a formula of equal pay for comparable work. The precisely drawn equal pay standard was designed to ensure that neither courts nor federal government would infringe on management's right to classify jobs validly. An assessment of what constitutes equal work is made on the basis of job content and not job descriptions or job titles. Thus, only if there is an appreciable difference in skill, effort, or responsibility between otherwise identical jobs will they not be found to be substantially equal.

When comparing 2 jobs for purposes of applying the EPA, the mere fact that one job requires additional duties in and of itself is not sufficient to find that the jobs are not substantially equal. The additional duties will be deemed to make a difference only if they require a substantial portion of a worker's time to perform and expends the worker extra skill, effort, or responsibility.

In reviewing job content to determine if 2 jobs are equal in terms of skill, effort, and responsibility, it is important to note that each of these terms - skill, effort, and responsibility - constitutes a separate test, each of which must be satisfied in order for the equal pay requirements to apply (29 C.F.R. 800.122). The equal skill factor is measured in terms of job performance requirements and takes into consideration experience, training, education, and ability (29 C.F.R. 800.125). The focus is on the position rather than the incumbent; therefore, if an incumbent possesses skills beyond those needed to perform the job adequately, these additional skills cannot be taken into consideration in assessing equality of skill.

The equal effort standard deals with the amount of physical or mental exertion utilized in performing a job (29 C.F.R. 800.127). It is important to note that equal effort may be found to exist in 2 jobs, one of which requires physical exertion and the other of which requires mental exertion. It is the degree of effort, not the type of effort, that is measured.

Equal responsibility focuses on the degree of accountability involved in the performance of the job, with emphasis being placed on the importance of the job obligation (29 C.F.T. 800.129).

In determining whether 2 positions are performed under similar working conditions, the U.S. Supreme Court has held that the term "working conditions" encompasses 2 subfactors: surroundings and hazards (CORNING GLASS WORKS v. BRENNAN, 417 U.S. 188, 202 [1974]). Surroundings include consideration of things such as toxic chemicals or fumes encountered in the work environment. Hazards emcompass physical hazards encountered on the job and include consideration of the severity of injury that may be caused by them.

VII. RECORDKEEPING

A. Overview

Employers who are subject to the FLSA must keep records for BOTH covered and exempt employees (29 C.F.R. Part 516). The regulations do not prescribe a particular order or form of records to be retained. Rather, recordkeeping requirements vary depending upon the nature of the work performed by an employee. Records required for exempt employees differ from those required for nonexempt employees. Special information is required on employees under unusual pay arrangements such as public safety personnel who fall under the section 207(k) overtime exemptions. In addition to certain recordkeeping requirements, employers are required to display the Wage and Hour Division's minimum wage poster which briefly describes the requirements of the FLSA.

B. Recordkeeping For Employees Subject To The FLSA

Employers covered by the FLSA are required to keep records on wages, hours, sex, occupations, and other terms and practices of employment. Most of this required information is the kind employers usually maintain in ordinary personnel management practices and compliance with other laws and regulations. No particular form of records is required under the FLSA.

With respect to employees subject to, not exempt from, the FLSA's minimum wage and overtime pay provisions, the following records are required (29 C.F.R. 516.2):

1. Name, home address, and birth date if under age 19;
2. Sex and occupation;
3. Hour and day when workweek begins;
4. Regular hourly pay rate for any week when overtime is worked;

5. Total daily or weekly straight time earnings;
6. Total overtime pay for the workweek;
7. Deductions or additions to wages;
8. Total wages paid each pay period;
9. Date of payment and pay period covered.

C. Recordkeeping For Exempt Employees And Special Arrangements

Special employee records are required by the FLSA at 29 C.F.R. 516(b) when the following exempt employees and arrangements are concerned:

1. Employees completely exempt from minimum wage and overtime requirements, such as executive, administrative, and professional employees, and seasonal recreational employees (29 C.F.R. 516.11, 516.18);

2. Employees exempt from the FLSA overtime pay requirements (29 C.F.R. 516.12);

3. Learners, apprentices, handicapped workers, or students employed under special certificates (29 C.F.R. 516.30);

4. Overtime based on a half-time plan (29 C.F.R. 548.1);

5. Overtime pay where the employee works at two or more jobs with different pay rates in the same workweek (29 C.F.R. 516.29);

6. Hospitals basing overtime pay on a 14-day work period under 29 U.S.C. 207(j) of the Act (29 C.F.R. 516.23).

D. Preservation Of Records

The FLSA requires (29 C.F.R. 516.5) each employer to perserve for at least 3 years:

1. Payroll records;

2. Certificates and individual contracts;

As provided for in 29 C.F.R. 516.6, employers must perserve for 2 years:

1. Basic employment and earnings records;

2. Wage rate tables;

3. Worktime schedules;

4. Records of additions to or deductions from wages paid.

It would be advisable for the employer to become familiar with Tennessee state law concerning the retention of records.

The willful falsification of records that are required to be maintained under the FLSA may subject an employer to criminal action.

VIII. ENFORCEMENT AND REMEDIES

A. Overview

Employees can sue their employers for the recovery of back wages and liquidated damages (i.e., an amount equal to the back wages). This recovery of back pay and an equal sum as liquidated damages is sometimes referred to as double back pay.

The Secretary of Labor can also bring a lawsuit on the employee's behalf for the recovery of back wages and liquidated damages, or for back wages and an injunction enjoining the employer from committing any further violations of the FLSA (29 U.S.C. 216,217). If the Secretary seeks an injunction, however, the employer cannot be liable for liquidated damages. Also, an employee who sues can recover attorney's fees, while the Secretary of Labor cannot.

Additionally, the Department of Justice can criminally prosecute persons who commit willful violations of the Act. The penalty for a first offense is a fine of up to $10,000, and for subsequent violations a fine of up to $10,000 and/or imprisonment for up to 6 months.

The Secretary of Labor has the power to initiate investigations to determine whether an employer has violated any provisions of the Act.

Finally, an employer cannot retaliate against an employee for "whistle blowing" (i.e., he or she cannot discharge an employee for filing a complaint or participating in a FLSA proceeding). Certain antidiscrimination provisions of the Act also protects the employee.

B. Investigation

The FLSA provides that authorized representatives of the Secretary of Labor (usually from the Wage nad Hour Division) may investigate and gather data regarding an employer's wages, hours, and other conditions and practices of employment. The investigators may enter and inspect an employer's premises and records and question employees (29 U.S.C. 211).

The Supreme Court has ruled in DONAVAN v. LANE STEER INC. (104 S.Ct. 769 [1984]) that the employer must allow investigators onto an employer's premises to serve an ADMINISTRATIVE subpoena to bring records for Wage and Hour Division compliance officers to review, even when the investigators do not have a warrant. If an employer feels a subpoena is not sufficiently limited in scope, relevancy, or purpose so that compliance is unreasonably burdensome, the employer can question the reasonableness of the subpoena by raising objections in an action in district court before suffering any penalties for refusing to comply with it.

The Wage and Hour Division initiates investigations when complaints are filed or when a particular class of employers, such as local governments, are targeted for investigation. When complaints are filed, the agency assigns compliance officers to investigate, but actual investigations may be considerably delayed if investigators have particularly heavy caseloads.

If local governments were to be targeted for investigation, enforcement officials from an area office decide which particular governments will be examined, taking into account factors such as resources available for the investigation, the reputation of the employer, and so forth. In general, investigators will not inform employers of whether investigations are triggered by complaints or are a part of a compliance audit.

During investigations, Wage and Hour Division compliance officers will generally make suggestions regarding any changes necessary or desirable regarding payroll, recordkeeping, or other practices to help employers to comply with the law. Complaints, records, and other information obtained from employers and employees are treated confidentially.

1. DOL Investigative Procedures

The DOL has identified the following investigative procedures which should be followed when a compliance officer from DOL calls upon an employer. The compliance officer will:

* Identify him- or herself and show proper credentials;

* Confer with a proper representative of the local government (city mananger, mayor, personnel director, etc.), making any necessary explanations about the records needing to be seen and approach to be taken. The compliance officer will also ask permission to conduct private interviews with a number of employees;

* Ask to have space made available for use by the investigator and for the employer to provide staff members to assist with questions about records and payroll;

* Review payrolls and time records, often on a spot-check basis, and make notes and transcriptions essential to the investigation. Information from records are kept in strictest confidence;

* Interview certain employees privately. Generally, the purpose of the interviews is to confirm payroll or time records, to identify workers' duties in sufficient detail to decide what, if any, exemptions apply, and to determine if minors are illegally employed;

* When all the fact-finding steps have been completed, the compliance officer will meet with the proper representative of the local government to discuss the investigative findings. If no violations were discovered, this will be reported and no further action is taken. If violations were found, they are delineated and information is provided as to how they may be ameliorated. If back wages are due, the employer is asked to compute them and to pay the amount due.

2. **Posting Notices**

Pursuant to regulations promulgated in conjunction with the record-keeping requirements in section 11 of the Act, employers are required to post notices (a copy of which is on page 97) informing employees of their rights under the Act (29 C.F.R. 516.4). The regulation requires that the notices be conspicuously placed to allow ready access by the employees.

C. Recovery Of Back Pay

Under the FLSA, the employee or Secretary of Labor may sue for back pay and liquidated damages. If the employee brings suit, he or she can be awarded attorney's fees and court costs (29 U.S.C. 216[b] and [c]). The Secretary of Labor may also sue to enjoin the employer from any further violation of the law. If he does so, the Secretary cannot ask for, and the employer is not liable for, liquidated damages.

The employee or the Secretary must file suit within 2 years after a violation occurs, or 3 years if the employer has "willfully" broken the law (29 U.S.C. 255). "Willful" means that the employer knew the FLSA was in force or that it might apply. The overwhelming majority of FLSA violations are considered willful and are subject to a 3-year statute of limitations. An employee may not bring suit if (1) he or she has received back pay for

Your Rights Under The Fair Labor Standards Act

Minimum Wage

$3.35

Minimum Wage of at least **$3.35** per hour

This minimum wage applies to workers engaged in or producing goods for interstate commerce or employed in certain enterprises.

Certain full-time students, student learners, apprentices, and handicapped workers may be paid less than the minimum wage only under special Department of Labor certificates.

TIP CREDIT—The tip credit which an employer may claim with respect to "Tipped Employees" is 40 percent of the applicable minimum wage.

Overtime Pay

at least 1½ times your regular rate of pay for all hours worked over 40 in one workweek.

Child Labor

You must be at least 16 years old to work in most nonfarm jobs, at least 18 to work in nonfarm jobs declared hazardous by the Secretary of Labor. Youths 14 and 15 may work in various jobs outside school hours under certain conditions. Different rules apply to agricultural employment.

Enforcement

The U.S. government may bring action against employers who violate the law. Courts may order payment of back wages. Employers may be fined up to $1,000 for each child labor violation. No employer can discriminate against you or fire you if you file a complaint or participate in a proceeding under this law.

For Additional Information

Certain occupations or establishments may not be covered by the minimum wage or overtime. If you have any questions, call the Wage and Hour office which is listed in your telephone directory under U.S. Government, Department of Labor.

wages due under the FLSA under supervision of the DOL, (2) the Secretary has filed suit to recover the unpaid wages or liquidated damages, or (3) the Secretary has filed suit to enjoin the employee's right to sue in his or her own name and recover liquidated damages (29 U.S.C. 216[c]). However, if an employee files suit before the Secretary, the employee's suit can continue.

D. Liquidated Damages

The FLSA allows employees to recover liquidated damages (an amount equal to the wages improperly withheld). Thus, an employee entitled to $1,000 in back wages could possibly collect that sum plus another $1,000 in liquidated damages (the double back pay)(29 U.S.C. 216[b]). However, if an employer shows that its action was taken in good faith, and it had reasonable grounds for believing it was complying with the FLSA, the court may excuse the employer from paying all or part of the liquidated damages. Even when employers act in good faith, courts may award partial liquidated damages to compensate employees for delays in paying the wages that are due them. It is important to note that an employee cannot waive liquidated damages by signing a release or accepting a check in the amount of the back wages. The waiver does not eliminate the likelihood of further litigation.

E. Attorney's Fees

The FLSA provides that when an employee sues in his or her own behalf and wins, the court shall require the employer to pay the employee's reasonable attorney's fees (29 U.S.C. 216[b]). The trial court sets the amount of fees which the employer must pay, based on factors such as the time lawyers have spent on the case, the difficulty of the questions presented, and the size of the award.

The prevailing employee will ordinarily recover reasonable attorney's fees at the trial and any appellate levels if the trial court's decision is appealed. When an employer prevails in a court action, the employer is generally not entitled to attorney's fees, since there is no provision for this situation in the FLSA. Unless a statute provides otherwise, each side in a lawsuit usually pays its own attorney's fees when an employer prevails.

F. Interference With Enforcement

An employer cannot discharge, retaliate against, demote, harass, or in any other manner discriminate against an employee for filing a FLSA complaint or participating in an FLSA proceeding (29 U.S.C. 215[a][3]). Such actions could subject employers to fines of up to $10,000 for a first offense, and fines of up to $10,000 and imprisonment for up to 6 months for subsequent violations. In addition, the employee can obtain an injunction from the court ordering his or her reinstatement.

G. Commonly Asked Questions About Enforcement Of The FLSA

1. WHAT ARE LIQUIDATED DAMAGES AND WHEN MUST THEY BE PAID?

Liquidated damages under the FLSA is an amount equal to the wages improperly withheld from the employee. It is commonly called "double back pay." An employee who wins a suit against an employer will generally be eligible to collect liquidated damages. However, if the employer can present a "good faith" defense and has reasonable grounds for believing it was complying with the FLSA, then the court, in its discretion, may excuse the employer from paying all or part of the liquidated damages.

2. **WHAT IS THE WORST THAT CAN HAPPEN TO A UNIT OF GOVERNMENT THAT DOES NOT COMPLY WITH THE FLSA?**

Failure to comply with the FLSA could result in any of the following:

* Payment of liquidated damages (double back pay);
* Payment of attorney's fees;
* Fines and jail terms for cases of willful violations.

3. **IS COMPLIANCE WITH THE FLSA RETROACTIVE?**

The DOL's original policy was to make compliance reviews retroactive to April 15, 1985, for traditional government activities. Non-traditional activities have always been covered by the FLSA back to 1976. However, the 1985 Amendments retroactively wiped out such liability for traditional functions. Local governments were given until April 16, 1986, to achieve compliance with FLSA and enforcement was suspended until August 1, 1986, to allow payment of monetary overtime compensation.

4. **HOW WILL THE FLSA BE ENFORCED?**

The Wage and Hour Division within the DOL will initiate investigations when complaints are filed or during a compliance audit. The DOL can bring suit on an employee's behalf in appropriate cases where the Wage and Hour Division finds that FLSA violations have occurred. Additionally, the Department of Justice can criminally prosecute persons who commit willful violations of the Act.