

# THE FAIR LABOR STANDARDS ACT: Revised and Updated

Richard L. Stokes, PHR, IPMA-CP  
Human Resource Consultant  
December 2011

THE UNIVERSITY of TENNESSEE   
MUNICIPAL TECHNICAL ADVISORY SERVICE

*In cooperation with the Tennessee Municipal League*



# THE FAIR LABOR STANDARDS ACT: Revised and Updated

Richard L. Stokes, PHR, IPMA-CP  
Human Resource Consultant

December 2011

## MTAS OFFICES

Knoxville (Headquarters) ..... (865) 974-0411  
Johnson City ..... (423) 854-9882  
Nashville ..... (615) 532-6827  
Jackson ..... (731) 423-3710  
Martin ..... (731) 881-7055

[www.mtas.tennessee.edu](http://www.mtas.tennessee.edu)

The Municipal Technical Advisory Service (MTAS) was created in 1949 by the state legislature to enhance the quality of government in Tennessee municipalities. An agency of the University of Tennessee Institute for Public Service, MTAS works in cooperation with the Tennessee Municipal League and affiliated organizations to assist municipal officials.

By sharing information, responding to client requests, and anticipating the ever-changing municipal government environment, MTAS promotes better local government and helps cities develop and sustain effective management and leadership.

MTAS offers assistance in areas such as accounting and finance, administration and personnel, fire, public works,

law, ordinance codification, and wastewater management. MTAS houses a comprehensive library and publishes scores of documents annually.

MTAS provides one copy of our publications free of charge to each Tennessee municipality, county and department of state and federal government. There is a \$10 charge for additional copies of "The Fair Labor Standards Act: Revised and Updated."

Photocopying of this publication in small quantities for educational purposes is encouraged. For permission to copy and distribute large quantities, please contact the MTAS Knoxville office at (865) 974-0411.

---



# TABLE OF CONTENTS

|                                                                      |    |
|----------------------------------------------------------------------|----|
| Introduction . . . . .                                               | 1  |
| Application to State and Local Governments . . . . .                 | 2  |
| What Does the Act Require? . . . . .                                 | 3  |
| Who's Covered by the Act and Who's Not? . . . . .                    | 8  |
| Executive Exemption Check List . . . . .                             | 25 |
| Highly Compensated Executive Employee Checklist . . . . .            | 26 |
| Administrative Exemption Checklist . . . . .                         | 27 |
| Highly Compensated Administrative Employee Checklist . . . . .       | 28 |
| Professional Exemption Checklist . . . . .                           | 29 |
| Highly Compensated Learned Professional Exemption Checklist. . . . . | 30 |
| Creative Professional Exemption Checklist . . . . .                  | 31 |
| Highly Compensated Creative Exemption Checklist . . . . .            | 32 |
| Hours Worked and Compensation . . . . .                              | 33 |
| Overtime Compensation . . . . .                                      | 40 |
| Computation of Regular Rate and Overtime Compensation . . . . .      | 47 |
| Overtime for Police and Firefighters – 207(k) Exemption . . . . .    | 52 |
| Record Keeping Requirements . . . . .                                | 56 |
| Enforcement, REmedies, Penalties and Settlements . . . . .           | 58 |
| Conclusion . . . . .                                                 | 61 |
| FLSA Resources . . . . .                                             | 62 |

---



# THE FAIR LABOR STANDARDS ACT:

## Revised and Updated

### INTRODUCTION

The Fair Labor Standards Act of 1938 (FLSA, herein referred to as “the act”), known primarily as the minimum wage and overtime law, was passed during a period when our nation was experiencing an economic recovery from the Great Depression. Administered by the U.S. Department of Labor’s (DOL) Wage and Hour Division, the act was designed to encourage employers to hire more employees in lieu of scheduling overtime and to prevent unfair competition by requiring all employers to pay a minimum wage and overtime for all work in excess of 40 hours per work week. By requiring overtime pay, the act created a monetary penalty for employers who did not spread their existing work among a greater number of employees. The act, in essence, provided an incentive to hire more people rather than increase the hours worked by existing employees. So when you hear an employer say, “I could hire another person for the amount of overtime I’m paying” you can say, “The intent of the act was in fact to encourage you to hire more employees!”

The act did not cover government employees until a series of amendments (1966 and 1974) and court challenges extended coverage to state and government employees [*Maryland v. Wirtz*, 392 U.S. 183 (1968); *Employees of the Department of Public Health and Welfare v. Missouri*, 411 U.S. 279 (1973); *National League of Cities v. Usery*, 426 U.S. 833 (1976); and *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)]. Even so, application of all the provisions of the act to governments was further delayed until August 1992. This delay was due to issues

of the salary basis test for public employers and exempt employees’ pay for partial-day absences (public accountability).

The FLSA contains minimum wage, overtime pay, and record keeping requirements and restricts child labor. These provisions apply to all state and local government employees except certain workers excluded from the FLSA definition of “employee” and employees who may qualify for exemption from the requirements of the act. The act establishes a definition of “hours worked” and provides the conditions under which overtime pay is due. It also provides a partial overtime exemption for certain categories of employees.

Though the act addresses many issues surrounding wages, it does not require:

- Extra pay for Saturday, Sunday, or holidays;
- Pay for vacations or holidays, or severance pay;
- Discharge notices;
- Limits on the number of hours of work for employees 16 years of age or over, as long as overtime pay provisions are met; or
- 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.)

The act can be enforced by private employee lawsuits or by action of the Department of Labor. If the DOL is involved, special investigative procedures are used. The Wage and Hour Division of DOL is responsible for implementing regulations under the FLSA and enforcing compliance with the act. Should the employer lose a case in court, the employee



generally collects back pay and liquidated damages. There is a two-year statute of limitation under the act, extending to three years if a violation is willful. Attorney fees, too, generally are recoverable.

## APPLICATION TO STATE AND LOCAL GOVERNMENTS

This document details the specifics of the act: what the act requires, who is covered and who is not covered, hours worked and compensation, overtime pay, record keeping, and penalties. It should become a well-used resource in your municipal government library.

When passed in 1938, the act did not apply to local governments. It specifically covered “employees engaged in interstate commerce, employees engaged in the production of goods for commerce, and employees in an enterprise engaged in commerce or in the production of goods for commerce” (private sector employees). State and local government employees first became subject to the minimum wage and overtime pay provisions of the Fair Labor Standards Amendments of 1966, which became effective February 1, 1967.

The 1966 amendments specifically extended coverage to state and local government employees engaged in the operation of hospitals, residential care facilities, schools and mass transit systems. The Education Amendments of 1972 extended the provisions to virtually all remaining state and local government employees who were not covered as a result of the 1966 amendments.

On June 24, 1976, the Supreme Court ruled in *National League of Cities v. Usery* (NLOC), 426 U.S. 833 (1976), that, under the 11th Amendment, “the minimum wage and overtime pay provisions of the FLSA were not constitutionally applicable to the integral operations of the states and their political subdivisions in areas of ‘traditional governmental functions.’” The

court specifically found that such functions included, among others, schools and hospitals, fire prevention, police protection, sanitation, public health, and parks and recreation. The court’s decision did not affect application of the minimum wage and overtime pay provisions to state and local government employees engaged in activities that were not traditional functions of government or of the other substantive provisions of FLSA (the child labor and the equal pay provisions).

On February 19, 1985, the Supreme Court ruled in *Garcia v. San Antonio Metropolitan Transit Authority et al.* 469 U.S. 528 (1985), and *Donovan v. San Antonio Metropolitan Transit Authority et al.*, 468 U.S. 1213, 104 S.Ct. 3582-83, 82L.Ed.2d 880 (1984), that the minimum wage and overtime pay provisions of FLSA applied to public mass transit employees of the San Antonio Metropolitan Transit Authority. In so doing, the courts overruled their earlier decision in *National League of Cities v. Usery*, thus allowing the minimum wage and overtime pay provisions to be applied “*in toto*” to state and local government employees who are engaged in traditional governmental activities.

The application of the *Garcia* decision, however, was delayed by legislative action in November 1985 with passage of the Fair Labor Standards Amendment of 1985. The amendment provided that no state or local government would be liable for minimum wage or overtime violations until April 15, 1986, and established new guidelines for compensatory time off and for volunteers. On April 18, 1986, the Department of Labor issued proposed regulations extending the minimum wage and overtime provisions of the act to state and local governments. The proposed regulations did not take effect until January 16, 1987.

In 1987, the final regulations were released by the Department of Labor, Wage and Hour Division (29 C.F.R. § 541 *et seq.*); however, on



May 5, 1986, the Wage and Hour Division of DOL issued a memo to all assistant regional wage and hour administrators stating that the DOL:

“... would not assert a violation of the act against any employer who, in good faith, relies on an interpretation contained in the proposed rules, which is subsequently revised in the final rules.”

The inclusion of public employees under the act presented some unusual problems for state and local governments resulting from the pay practices of public employers. Basically, the salary basis test eliminated the executive, administrative and professional exemptions from use by public employers because principles of public accountability prevented them from paying employees for time not worked. To remedy the situation, the DOL released final regulations in August 1992 to amend the salary basis test for public employers to allow docking of exempt employee's pay for partial-day absences. The regulations provided that “the executive, administrative and professional exemptions would not be lost for public sector employees who were subject to a pay system established by statute, ordinance or regulation or by a policy or practice established pursuant to principles of public accountability.” 29 C.F.R. § 541.710.

On April 23, 2004, the DOL unveiled sweeping changes to its regulations implementing the “white collar” exemption to the FLSA. The rule changes established a new salary test and pay-docking rules, adjusted the job duty test and established a new “highly compensated employee” provision.

The Fair Minimum Wage Act of 2007 made the first increase in the minimum wage rate since 1997. Introduced on January 5, 2007, the act established an incremental increase in the minimum wage. The first increase was effective July 24, 2007, and raised

the minimum wage from \$5.15 per hour to \$5.85 per hour. The second increase became effective July 24, 2008, and raised the minimum from \$5.85 per hour to \$6.55 per hour. The final increase was effective July 24, 2009, and increased the minimum wage from \$6.55 per hour to \$7.25 per hour.

## WHAT DOES THE ACT REQUIRE?

The FLSA requires employers to comply with the minimum wage, overtime pay, equal pay, record keeping and child labor standards for employees who are covered by the act. Except for the child labor restrictions, the act does not impose any limitations 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 during any seven consecutive 24-hour periods. Work may begin at any time of day and any day of the week.

## Minimum Wage

State and local governments must pay their employees a minimum wage of not less than \$7.25 per hour as of July 24, 2000. Under the act, “employees do not have to be paid on an hourly basis merely because the statute specifies a minimum wage on this basis. Employees may be paid on an hourly, salaried, commission, monthly, piecework or any other basis as long as pay covering each work week equals or exceeds the minimum wage standard. The minimum wage need not be paid in cash; it can be paid in whole or in part in board, lodging or other facilities.” 29 C.F.R. § 531.29.

## Special Sub-minimum Wages

The FLSA allows sub-minimum wages for learners, student-learners, messengers, apprentices, disabled workers, patient workers and full-time students of institutes of higher learning. Special certificates must be obtained from the Wage and Hour Division



for workers to be employed at sub-minimum rates (except for workers qualifying for the youth “opportunity wage”). Employers may not displace other employees to hire workers at the lower rate of pay or make partial displacements by reducing hours, wages or employment benefits.

“Employers are allowed to pay employees less than 20 years of age an ‘opportunity’ wage of \$4.25 per hour for the first 90 days of their employment. Similarly, hiring an employee less than 20 years of age and then discharging them at the end of the 90-day period is illegal. Approval/certificates of the ‘opportunity wage’ are not issued if lower wage rates limit full-time job opportunities for others in the work place.” 29 U.S.C. § 206(g) 29 C.F.R. §§ 520.201 – 520.503 also provide the procedures to apply for special certification. 29 C.F.R. § 520.506 provides information about how to comply with the terms of the certificate, and 29 C.F.R. § 520.508 provides record keeping compliance information.

“Students in institutions of higher education may be employed at a sub-minimum wage. If the appropriate certificate procedures are followed and regulatory requirements are met, then full-time students of institutions of higher education may be paid no less than 85 percent of the federal minimum wage for work they perform for their school.” 29 C.F.R. § 519.11. “Full-time students at any educational level (but at least 14 years of age) employed by retail or service establishments, or in agriculture, may be paid wages no less than 85 percent of the minimum wage.” 29 C.F.R. § 519.1. “Additionally, student-learners who receive instruction at an accredited school, college or university and work part-time in a bona-fide vocational training program may be paid no less than 75 percent of the minimum wage.” 29 C.F.R. Part 520, Subpart E.

Special certificates authorizing the employment of apprentices in skilled trades at sub-minimum wages may also be requested. Section 29 C.F.R. § 520.300 defines a “skilled trade” as one with the following characteristics:

- (1) It is customarily learned in a practical way through a structured, systematic program of on-the-job supervised training.
- (2) It is clearly identified and commonly recognized throughout an industry.
- (3) It involves manual, mechanical or technical skills and knowledge which require a minimum of 2,000 hours of on-the-job work experience.
- (4) It requires related instruction to supplement the on-the-job training.
- (5) It is not merely part of an apprentice occupation and does not fall into any of the following categories: marketing; sales administration; administrative support; executive and managerial; professional and semi-professional occupations (occupations for which entrance requirements customarily include education of college level).

A special sub-minimum wage also may be paid to learners. “A learner is a worker ‘who is being trained’ for an occupation, which is not customarily recognized as an apprentice trade, for which skill, dexterity and judgment must be learned and who, when initially employed produces little or nothing of value.” 29 C.F.R. § 520.300. “Learners must be paid no less than 95 percent of the minimum wage (special rules apply for piece rate wages). An employee cannot, however, be considered a learner once he or she has acquired 240 hours of job-related and/or vocational training with the same employer or training facility during the past three years. Employers must also apply to DOL for learners’ certificates prior to employing learners at the sub-minimum wage rate.” 29 C.F.R. §§ 520.201 – 520.503.



29 C.F.R. Part 525 provides greater flexibility in establishing the hourly wages paid to disabled workers in sheltered workshops. “A disabled worker is one whose earning or productive capacity is impaired by age, physical or mental deficiency or injury.” 29 C.F.R. § 525.3(d). “The regulations

stipulate that certificates will be issued only to those individuals whose earning capacity is impaired to the extent that the individual is unable to earn at least the minimum wage.” 29 C.F.R. § 525.12. No fixed percentage is set. The rate is subject to DOL approval and may be appealed by the worker.

## ELIGIBLE SUB-MINIMUM PAY

| TYPES OF EARNERS                                                                                                                                                                    | ELIGIBLE EMPLOYERS                             | % OF MINIMUM WAGE                                                                                                                                                    |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Students</b> <ul style="list-style-type: none"><li>• Full-time students of institutions of higher education. 29 C.F.R. § 519.11.</li></ul>                                       | Institutions of higher education               | No less than 85%                                                                                                                                                     |
| <ul style="list-style-type: none"><li>• Full-time students at any level, at least 14 years of age. 29 C.F.R. § 519.1.</li></ul>                                                     | Retail, service or agricultural establishments | No less than 85%                                                                                                                                                     |
| <ul style="list-style-type: none"><li>• Part-time student-learners, at least 16 years old, working in a bona fide vocational training program. 29 C.F.R. § 520 Subpart E.</li></ul> | Accredited school, college or university       | No less than 75%                                                                                                                                                     |
| <b>Disabled</b> <ul style="list-style-type: none"><li>• Disabled or aged workers. 29 C.F.R. § 525.1.</li></ul>                                                                      | All employers                                  | No fixed percentage; rate subject to DOL approval and may be appealed by the worker                                                                                  |
| <b>Apprentices</b><br>29 C.F.R. § 520 Subpart D                                                                                                                                     | Most employers, with certain exceptions        | No less than the special minimum wage specified in the Apprentice Program and Apprentice Agreement unless DOL administrators issue a certificate modifying the terms |
| <b>Learners</b><br>29 C.F.R. § Part 520 Subpart D                                                                                                                                   | Most employers, with certain exceptions        | No less than 95%; special rules for piece rate wages                                                                                                                 |



## Overtime Pay

Overtime pay required by the FLSA is “extra pay for hours worked over 40 during a workweek.”

A workweek is any seven consecutive 24-hour periods. The workweek may begin at any time of day and any day of the week. Work periods for firefighters, police and hospital workers may vary.

The act specifically directs an employer to pay covered employees one and one-half times their regular hourly rate for hours worked in a work week beyond 40. The time and one-half overtime premium generally is calculated by first determining the regular hourly rate of the employee. This is done by dividing the employee’s total regular pay (including salary, mandatory bonuses, incentive pay, goods, food, lodging, etc.) by the number of hours worked during the work week. The calculation produces an hourly rate that is the basis upon which employers pay time and one-half for hours worked in excess of 40 hours per workweek.

## Equal Pay Act

The Equal Pay Act (EPA), 29 U.S.C. § 206(d), enacted in 1963 as an amendment to the Fair Labor Standards Act, prohibits compensation discrimination between employees on the basis of sex when the work is performed under similar working conditions and requires equal skill, effort and responsibility. The provisions of the EPA apply not only to employees covered by the minimum wage and overtime requirements, but to all employees of a covered enterprise. Men are protected under the EPA equally with women. 29 C.F.R. § 1620.1(c).

Under the EPA, a wage differential is permitted between men and women if one of four justifications is shown:

1. A bona fide seniority system;
2. A merit system;
3. A system that measures earnings in terms of quantity or quality of production; or
4. Any other factor other than sex.

The EPA also prohibits employers from complying with the provisions by reducing the wage rate of any employee. For example, if a woman was 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, but in 1979 this responsibility was transferred to the Equal Employment Opportunity Commission.

## Child Labor Provisions

The FLSA was recently amended on July 19, 2010, making changes to the provisions of the Child Labor Law. The new provisions included lifting restrictions limiting the industries 14- and 15-year-olds were permitted to work; establishing new prohibition on youth peddling and setting higher penalties for violations resulting in serious injury or death.

The regulations previously limited the occupations local governments could employ minors as a part of their regular workforce or in a summer jobs for youth program. The FLSA provided that “minors who were between 14 and 16 years old were permitted to work in any non-agricultural occupation not deemed hazardous by the Secretary of Labor as long as the employment does not interfere with their schooling or their health and well-being.” 29 C.F.R. § 570.34.



Now, 14- and 15-year-olds may work not only in state and local governments, retail, food service and gasoline service establishments, but also in other environments such as banks, insurance companies, advertising agencies and information technology firms.

Fourteen- and 15-year-olds may now perform “work of an intellectual or artistically creative nature such as computer programming, the writing of software, teaching or performing as a tutor, serving as a peer counselor or teacher’s assistant, singing, playing a musical instrument and drawing. Fifteen-year-olds may now work as lifeguards at traditional swimming pools and certain water amusement park attractions such as wave pools, lazy rivers and baby pools and elevated water slides. Fourteen- and 15-year-olds may load and unload onto and off of motor vehicles “light, non-power driven, hand tools” (such as rakes or shovels) and “personal protective equipment” used as part of their own work, as well as personal items like backpacks or lunch boxes. Fourteen- and 15-year-olds may perform work requiring them “to occasionally enter freezers only momentarily to retrieve items.”

“Minors between 14- and 16-years-old may work outside school hours. Fourteen- and 15-year-olds who are excused from compulsory school attendance may now work at businesses that use machinery to process wood products. They may not work more than eight hours in any one day when school is not in session. They may not work more than three hours in any one day when school is in session. They may not work more than 40 hours in any one week when school is not in session. They may not work more than 18 hours in any week when school is in session. Finally, minors may work only between 7 a.m. and 7 p.m. in any one day, except during the summer (June 1 through Labor Day) when the evening hour is 9 p.m.” 29 C.F.R. § 570.35(a). 29 C.F.R. § 570.35(b) provides an exception to the above restrictions for minors 14 and 15 years of age for “minors who are employed to perform sports

concession services at professional sporting events.” 29 C.F.R. § 570.35(b).

The revisions prohibit 14- and 15-year-olds from riding on a motor vehicle “outside of an enclosed passenger compartment” such as a bed of a pick-up truck, the running board of a van or the bumper of a garbage truck. These workers may ride inside passenger compartments, but only under specific conditions. The changes also expand the list of prohibited “power-driven machinery” 14- and 15-year-olds are not allowed to operate to include lawn mowers, golf carts, all-terrain vehicles, trimmers, cutters, weed-eaters, edgers, food slicers, food grinders, food choppers, food processors, food cutters, and food mixers. Fourteen- and 15-year-olds are specifically prohibited from “catching and cooping” all kinds of poultry in preparation for transport to market.

“Minors between 16 and 18 years of age are also prohibited from working in certain hazardous occupations.” 29 C.F.R. § 570.2(a)(ii). “Minors under 17 years of age are prohibited from driving on public roads as part of employment.” 29 U.S.C. § 213(c)(6). Sixteen- and 17-year-olds may now operate power-driven pizza dough rollers and portable, counter-top food mixers.

There were also changes to the hazardous occupations for 16- and 17-year-olds, most of which are new prohibitions. First, the prohibition against working in logging and in the operation of saw mills is expanded to include working in forest fire fighting and other forestry service. While the current regulations prohibit them from operating power-driven hoisting devices, the new regulations expand this to include most work with elevators, cranes, derricks and man-lifts. The meat-processing prohibition was expanded to include working in slaughtering, meat-processing and rendering occupations including poultry-slaughtering establishment.



The new regulations expand the old prohibition against the operating and unloading of certain paper balers and paper box compactors to “all balers and compactors. The saw and shears prohibition now includes chain saws and other power-driven saws and wood chippers, and abrasive cutting discs. Counter-top Mixers and Pizza Dough Roller are the only areas where DOL relaxed the regulations now allowing 16- and 17-year-olds to operate portable counter-top mixers, such as those used in private homes, and allowing minors to operate certain pizza dough rollers.

The act, however, continues to provide that 17-year-old workers may drive cars and trucks at work during daylight hours only. They must have a valid driver's license with no record of moving violations at the time of hire and have completed a state-approved driving school. The vehicle must have a seat belt and the employer must instruct the employee to use it. The vehicle must not weigh more than 6,000 pounds and the driving must not involve towing of vehicles, urgent deliveries, route deliveries or sales. The 17-year-old must not travel more than 30 miles from the place of employment. Finally, the driving must be occasional and incidental to the teen's employment. The act also restricts the transportation of goods and passengers by 17-year-old drivers.

### WHO'S COVERED BY THE ACT AND WHO'S NOT?

The FLSA covers a wide range of employees in the public sector. The act does not, however, apply to all employees. Some individuals simply are not covered (non-covered employees). Others, while covered by the act, are exempt from certain provisions (exempt employees). Non-covered employees are not bound by any provisions of the FLSA. Exempt employees, while covered by the FLSA, are exempt from its minimum wage and overtime provisions. Employers must keep records for exempt employees; there is no FLSA record keeping requirement for non-covered employees.

The central overtime provision of the FLSA states that **“no employer shall employ any of his employees ... for a workweek longer than forty hours unless such employee receives compensation ... at a rate not less than one and one-half times the regular rate at which he is employed.”** 29 U.S.C. § 207(a)(1). Section 29 U.S.C. § 203(d) of the act defines an employer to include “any person acting directly or indirectly in the interest of an employer in relation to an employee,” including a public agency.

### Non-Covered Employees

The act defines an “employee entitled to the protection of the act” 29 U.S.C. § 203(e)(2)(C) to include:

- (C) any individual employed by a state, political subdivision, or an interstate governmental agency, other than such an individual —
  - (i) Who is not subject to the civil service laws of the state, political subdivision, or agency;
  - (ii) Who -
    - I. holds a public elective office of that state, political subdivision, or agency;
    - II. is selected by the holder of such an office to be a member of his personal staff;
    - III. is appointed by such an office holder to serve on a policy-making level;
    - IV. is an immediate advisor to such an office holder with respect to the constitutional or legal powers of his office; or
    - V. is an employee in the legislative branch of that state, political subdivision, or agency.



Elected officials, their personal staffs, policy-making appointees, and legal advisors are not covered (non-covered employees) as long as they are not subject to the civil service laws of their state or local government. Therefore, any non-elected individual employed by a municipal government who is subject to a civil service system is covered. According to the DOL regulations 29 C.F.R. § 553.11(c), the term “civil service” refers to:

“... a personnel system established by law which is designed to protect employees from arbitrary action, personal favoritism, and political coercion, and which uses a competitive or merit examination process for selection and placement. Continued tenure of employment under civil service, except for cause, is provided.”

In 1985, a new non-covered employee category was added to 29 U.S.C. § 203(e)(2)(C)(i-v) of the act. The amendment “excluded employees not subject to civil service law who work in the legislative branch of a state or one of its political subdivisions.” Thus, almost all non-civil service employees in the state legislature or county, city council or board are excluded by this provision. Additionally the Department of Labor has determined that “no matter what activity an elected official performs, he/she is not considered an employee for FLSA purposes.” DOL Wage and Hour opinion letter, December 3, 1986.

Also not covered by the act are personal staff members who are selected or appointed by elected public officials. According to 29 C.F.R. § 553.11(b), “the term ‘personal staff member’ includes only persons who are under the direct supervision of the selecting elected official and have regular contact with such officials.” “Personal staff member does not include individuals supervised by someone other than the official, even if

initially selected for the position by the elected official.” 29 C.F.R. § 553.11(b). Furthermore, to qualify for the exemption, a personal staff member must not be subject to the civil service laws of the employing agency. It would not include all members of an operational unit, since all the members could not have a personal working relationship with the elected official.

To determine whether an employee is a member of an elected official’s personal staff, the Department of Labor (DOL) issued a Wage and Hour Opinion dated December 19, 1974, that provides a test of exclusion based on personal staff membership. Among the tests to be considered are the following:

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 formed by an act of the legislature; and
4. Is the person’s compensation dependent upon a specific appropriation or is it paid out of an office expense allowance provided to the officeholder?

DOL further elaborates on this issue by stating in an opinion letter dated April 30, 1975, that, “individuals such as pages, stenographers, telephone operators, clerks, typists and others may be considered employees under the act.”

Also classified as non-covered under the act are policy-making appointees. When a publicly elected official appoints an individual to serve on a policy-making level, such an appointed individual is not covered by the act. To fall within the policy-making appointee exception, the staff member must be appointed by and serve solely at the pleasure or



discretion of the elected official and must formulate policy rather than simply implement or apply the policy to others. In *Elrod v. Burns*, 427 U.S. 347, 1976, the courts ruled that “in determining whether an employee occupies a policymaking position, consideration must be given to whether the employee acts as an advisor or formulates plans for the implementation of broad goals.”

Immediate legal advisors to elected officials also are not covered by the act. “Immediate advisors are defined as ‘staff who serve as advisors on constitutional matters or legal matters and who are not subject to the civil service rules of the employing agency.’” 29 C.F.R. § 553.11(d). City attorneys are clearly outside the coverage of the act because they advise on legal matters and generally are not subject to the civil service rules of the organization.

Another group of individuals not covered by the act include bona fide volunteers, independent contractors, prisoners and trainees. Rule 29 U.S.C. § 203(e)(4)(A) provides that “employee does not include any individual who volunteers to perform service for a public agency that is a state, a political subdivision, or an interstate governmental agency, if:

1. 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
2. Such services are not the same type of service which the individual is employed to perform for such public agency.”

There are several issues to be evaluated when determining the volunteer status of an individual in the public sector. The first has to do with whether two agencies of the same state or local government constitute the same or separate public agencies. The second issue arises when considering whether the employee is volunteering for the “same type of

services” that the individual is employed to perform for the same agency.

The bottom line is that individuals may not volunteer to do what they are otherwise paid for. DOL will consider:

1. The duties and other factors contained in the Dictionary of Occupational Titles;
2. The facts and circumstances in a particular case, including whether the volunteer service is closely related to the actual duties performed by or responsibilities assigned to the employee. 29 C.F.R. § 553.103(a).

Examples of when an employee **would not** be considered a volunteer are:

**Example**

A nurse employed by a state hospital who volunteers nursing services at a state operated clinic (which is not a separate agency);

or

A firefighter [who] volunteers as a firefighter at the same public agency.

(**Note:** A January 7, 1988, DOL opinion letter stated that a firefighter may volunteer to perform the same services for a different public agency in another jurisdiction without incurring any entitlement to overtime compensation.)

The following employees, however, **would** be considered bona fide volunteers because they are not engaged in volunteering the “same type of services”:

**Example**

A city police officer who volunteers as a part-time referee in a city basketball league;

or

An employee of the city parks department who serves as a volunteer firefighter;

or

An office employee of a city hospital who volunteers to spend time with a disabled or elderly person in the same institution during off-duty hours.



In several opinion letters, the DOL emphasized that public employees can volunteer for the same agency that employs them if the volunteer position is substantially different from their paid work. An employee cannot be both a “paid” employee and a “non-paid” volunteer while performing the same type of work for the same employer.

Another class of non-covered individuals is independent contractors. As a general rule, independent contractors bid to perform government work and are evaluated based on results rather than their day-to-day operations. Independent contractors control their own workers and must ensure that those workers are compensated in accordance with the FLSA. The legal test that establishes a true independent contractor is called the “economic reality test,” which looks at the degree of control exerted, the worker’s opportunity for profit or loss, the worker’s investment in the business, the permanence of the working relationship and the degree of skill required to perform the work. *Doty v. Elias*, 733 F.2d 720 (10th Cir. 1984). Failure to meet the economic reality test means the individual is not an independent contractor and must be treated as an employee for FLSA purposes. Other courts have developed similar standards (*Donovan v. Dial Am. Marketing Inc.*, 757 F.2d 1376 (3rd Cir. 1985) and *Brock v. Superior Care Inc.*, 840 F.2d 1054 (2nd Cir. 1988).

The best strategy when hiring an independent contractor is to negotiate a contract that gives the contractor the greatest possible freedom as to the manner and schedule for performing the work. Also, the employing agency should avoid, if possible, long-term or exclusive contracts and other onerous requirements that may be deemed to make the contractor dependent on the business. The contractor should bear all or at least a portion of the risk of loss under the contract and should supply his or her own tools and materials needed

to perform the work. Once the work is done, the employing agency should avoid, if possible, any ongoing supervision or direction of the work.

Prisoners who are required to work by or for the government also are not considered employees under the FLSA and need not be paid minimum wage or overtime. Thus prisoners can be worked long hours by a governmental entity without an FLSA violation. Moreover, it is not a violation of the Constitution, since they have no right to any pay. *Woodall v. Partilla*, 581 F. Supp. 1066, 1074 (N.D. Ill. 1984).

Finally, the last groups of non-covered individuals are trainees. The DOL issued an opinion letter dated January 6, 1969, which established guidelines for determining whether trainees are employees covered by the act.

Whether trainees are employees depend upon all of the circumstances surrounding their activities on the premises of the employer. If all six apply, the trainees are not employees:

- (1) The training, even though it includes actual operation of the facilities ..., is similar to that which would be given in a vocational school.
- (2) The training is for the benefit of the trainee.
- (3) The trainees do not displace regular employees, but work under close observation.
- (4) The employer that provides the training derives no immediate advantage from the activities of the trainees, and on occasion his operations may actually be impeded;
- (5) The trainees are not necessarily entitled to a job at the completion of the training period.
- (6) The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.



## **Exempt White-collar Employees — The Executive, Administrative, Professional and Computer Employees Exemptions**

In addition to certain elected, appointed, and volunteer employees not covered by the FLSA, other employees are exempt from the minimum wage and overtime provisions of the act. Like non-covered workers, exempt employees are covered by the Equal Pay Act provisions, but unlike non-covered employees they still are covered by FLSA record keeping requirements.

The exemptions we are concerned with relate to executive, administrative, professional and computer employees, and are otherwise known as the “white-collar or EAP exemptions.” The exemptions are based on the specific job description and duties of the employee involved.

On April 23, 2004, the U.S. Department of Labor issued final regulations revising Section 13(a)(1) (the white-collar exemption) and Section 13(a)(17) (computer employee exemption) of the Fair Labor Standards Act. 29 C.F.R. Part 541. The new rules, known as the Fair Pay Initiative, expand the number of workers eligible for overtime by nearly tripling the salary threshold and specifically establishing that the exemptions do not apply to certain jobs. The regulations also contain new definitions regarding which employees must be paid a minimum wage and premium overtime wages when they work more than 40 hours in a workweek.

29 C.F.R. § 541.99 of the Fair Labor Standards Act provides “an exemption from the act’s minimum wage and overtime requirements for any employee employed in a bona fide executive, administrative, or professional capacity.” 29 C.F.R. § 541.303 provides “an exemption from the minimum wage and overtime requirements for computer system analysts, computer programmers, software engineers, and other similarly skilled computer employees.”

The Fair Pay Initiative modified the old exemption tests for each category of exempt employees by adopting a single standard duties test for each exemption category, rather than the “long” and “short” duties tests. Previously, each category had a long and short test, each with a salary component and a duty component. The new rules provide three standards to be met for the exemption to apply:

1. The employee must be paid a pre-determined and fixed salary that is not subject to reductions because of variations in the quality or quantity of work performed (the “salary basis test” as defined in 29 C.F.R. § 541.602);
2. The amount of salary paid must meet minimum specified amounts (the “salary level test” as determined in 29 C.F.R. § 541.600); and
3. The employee’s job duties must primarily involve executive, administrative or professional duties (the “duties tests”) as determined in 29 C.F.R. § 541.700.

### **The Salary Level Test**

The amended section of the FLSA contains a revised salary provision. The minimum salary level previously was updated in 1975. Now, to qualify as an exempt executive, administrative or professional employee, an employee must be compensated on a salary basis at a rate of not less than \$455 per week, exclusive of board, lodging or other facilities. The requirement will be met if the employee is compensated biweekly on a salary basis of \$910, semimonthly on a salary basis of \$985.83, monthly on a salary basis of \$1,971.66 or annually on a salary basis of \$23,659.92. The shortest period of payment that will meet this compensation requirement is one week. In the case of computer employees the compensation requirement also may be met by providing compensation on an hourly basis at a rate not less than \$27.63 an hour or annually on a salary basis of \$57,470.40.



In the case of professional employees, an exception to the salary basis requirement is in effect. It does not apply to certain professionals. “Among those excluded are teachers (29 C.F.R. § 541.303(d)); employees who hold a valid license or certificate permitting the practice of law or medicine or any of their branches and are actually engaged in the practice; or to employees who hold the requisite academic degree for the general practice of medicine and are engaged in an internship or resident program. The exception from the salary or fee requirement also does not apply to pharmacists, nurses, therapists, technologists, sanitarians, dietitians, social workers, psychologists, psychometrics, or other professions that service the medical profession.” 29 C.F.R. § 541.304(d).

An employee with total annual compensation of at least \$100,000 is deemed exempt if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee. A high level of compensation is a strong indicator of an employee’s exempt status, thus eliminating the need for a detailed analysis of the employee’s duties. This exemption applies only to employees whose primary duty includes performing office or non-manual work.

## The Salary Basis Test

As in the old regulations, an employee is considered to be paid on a “salary basis” if the employee regularly receives each pay period, on a weekly or less frequent basis, a pre-determined amount constituting all or part of the employee’s compensation, which is not subject to reduction because of variations in the quality or quantity of work performed. An exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked unless subject to the exemptions provided by the law.

The prohibition against deductions from pay is subject to the following exceptions:

1. Deductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability. 29 C.F.R. § 541.602(b)(1). Thus, if an employee is absent for two full days to handle personal affairs, the employee’s salaried status will not be affected if deductions are made from the salary for two full-day absences. However, if an exempt employee is absent for one and a half days for personal reasons, the employer can deduct only for the one full day absence.
2. Deductions from pay may be made for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability. 29 C.F.R. § 541.602(b)(2). The employer is not required to pay any portion of the employee’s salary for full-day absences for which the employee receives compensation under the plan, policy or practice. Deductions for such full-day absences also may be made before the employee qualifies under the plan, and after the employee has exhausted the leave allowance provided by the benefit. For example, if an employer maintains a short-term disability insurance plan providing salary replacement for 12 weeks starting on the fourth day of absence, the employer may make deductions from pay for the three days of absence before the employee qualifies for benefits under the plan; for the 12 weeks in which the employee receives salary replacement benefits under the plan; and for absences after the employee has exhausted the 12 weeks of salary replacement benefits.
3. Deductions may not be made for absences of an exempt employee because the employee serves on jury duty; for attendance as a witness; or



temporary military leave, the employer can offset any amount received by an employee as jury fee, witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption. 29 C.F.R. § 541.602(b)(3).

4. Deductions from pay of exempt employees may be made for penalties imposed in good faith for infractions of safety rules of major significance (those related to the prevention of serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries and coal mines). 29 C.F.R. § 541.602(b)(4).
5. Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions on one or more full days imposed in good faith for infractions of workplace conduct rules. 29 C.F.R. § 541.602(b)(5). Such suspensions may be imposed pursuant to a written policy, applicable to all employees.

“An employer is not required to pay the full salary in the initial or terminal week of employment.” 29 C.F.R. § 541.602(b)(6). An employer may pay a proportionate part of an employee’s full salary for the time actually worked in the first and last week of employment. In such weeks, the payment of an hourly or daily equivalent of the employee’s full salary for the time actually worked will meet the requirement.

“An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act.” 29 C.F.R. § 541.602(b)(7). Rather, when an exempt employee takes unpaid leave under the act, an employer may pay a proportionate part of the full salary for time actually worked. DOL’s regulations under the FMLA provide that deductions may be made from the salaries of exempt executive, administrative and professional employees “for any hours taken as intermittent or reduced FMLA leave

within a workweek, without affecting the exempt status of the employee.” 29 C.F.R. § 825.206(a). Thus, the deduction can be hour for hour.

FMLA regulations state that this special exemption to payment on a salary basis “applies only to employees of covered employers who are eligible for FMLA leave, and to leave which qualifies as one of the four type of FMLA leave.” 29 C.F.R. § 825.206(c). Deductions may not be made from the salary of an exempt employee (1) who works for an employer with fewer than 50 employees; (2) who works at a site with fewer than 50 employees within a 75-mile radius; or (3) where the employee has not worked the required 1,250 hours necessary to qualify for FMLA leave.

When calculating the amount of allowed deduction from pay, the employer may use the hourly or daily equivalent of the employee’s full weekly salary or any other amount proportional to the time actually missed by the employee. A deduction from pay as a penalty for violations of major safety rules may be made in any amount.

The revised regulations allow an employer to provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirements if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. Similarly, the exemption is not lost if an exempt employee who is guaranteed at least the minimum weekly required amount paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. Such additional compensation may be paid on any basis (e.g., flat sum, bonus, straight-time hourly amount, time and one-half or any other basis), and may include paid time off.

Bona fide administrative and professional employees also may be paid on a fee basis, rather than on



a salary basis. “An employee will be considered to be paid on a fee basis if the employee is paid an agreed sum for a single job regardless of the time required for its completion. A fee is paid for the kind of job that is unique rather than for a “series of jobs repeated an indefinite number of times and for which payment on an identical basis is made over and over again”. Payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis. “To determine whether the fee payment meets the minimum salary required for exemption, the amount paid to the employee will be tested by determining the time worked on the job and whether the fee payment is at a rate that would amount to at least \$455 per week if the employee had worked 40 hours.” 29 C.F.R. § 541.605.

The regulations (29 C.F.R. § 541.710) also provide that

[A]n employee of a public agency who otherwise meets the salary basis requirements of 29 C.F.R. § 541.602 shall not be disqualified from exemption under 29 C.F.R. §§ 541.100, 541.200, 541.300, or 541.400 on the basis that such employee is paid according to a pay system established by statute, ordinance or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee’s pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work day when accrued leave is not used by an employee because:

- Permission for its use has not been sought or has been sought and denied;
- Accrued leave has been exhausted; or
- The employee chooses to use leave without pay.

Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee’s pay is reduced accordingly.

As 29 C.F.R. § 541.710 states, “The special pay-deduction rule for public sector employers is based on ‘principles of public accountability.’”

DOL explains that:

Public accountability embodies the concept that elected officials and public agencies are held to a higher level of responsibility under the public trust that demands effective use of public funds in order to serve the public interest. It includes the notion that the use of public funds should always be in the public interest and not for individual or private gain, including the view that public employees should not be paid for time they do not work that is not otherwise guaranteed to them under the pertinent civil service employment agreement (such as personal or sick leave), and the public interest does not tolerate wasteful and abusive excesses such as padded payrolls or “phantom” employees.

57 Fed. Reg. 37,676 (Aug. 19, 1992).

As a result of this rule, public sector employers may make certain types of deductions from the salary of otherwise exempt employees that a private sector employer would not be permitted. These include deductions for partial day absences when leave was not used or has been exhausted. The regulation also allows exempt employees to be furloughed for budget reasons without affecting their exempt status, except for the workweek in which the furlough occurs. 57 Fed. Reg. 37,674-75 (Aug. 19, 1992). The exceptions, however, apply only if the pay systems are established by statute, ordinance, regulation, policy or practice.



“If an employer discovers it has made deductions from the pay of an otherwise exempt employee that could potentially destroy the salary basis method or payment and, therefore, the exempt status of their employee, the employer that makes improper deductions from the salary shall lose the exemption if the facts demonstrate that the employer did not intend to pay the employee on a salary basis.” 29 C.F.R. § 541.603(a). The employer’s intent is the “central inquiry” in determining whether the exemption should be forfeited. 69 Fed. Reg. 22,179.

The salary basis regulations include a “window of correction” and a “safe harbor,” both of which permit employers to retain the exempt status of their employees in certain situations involving improper pay docking. “Improper deductions from employee salaries that are either isolated or inadvertent will not result in the loss of the exemption if the employer reimburses the employee for such improper deduction.” 29 C.F.R. § 541.603(c). This is called the “Window of Correction.”

“If an employer has a clearly communicated policy that prohibits improper deductions and a complaint mechanism, reimburses employees for the improper deduction and makes a good faith commitment to comply with the FLSA’s salary basis test in the future, the employer will not lose the exemption unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints. DOL refers to this new rule as a “safe harbor” provision.” 29 C.F.R. § 541.603(d).

The safe harbor provision applies regardless of the reasons for the improper pay deduction. The safe harbor is available for both improper deductions made because there is no work available and improper deductions made for reasons other than lack of work. DOL has provided a sample policy to

help employers comply with the new salary basis test regulations. The written salary test policy may be included in the employer’s employee handbook or given directly to exempt employees, but there is no indication in the 2004 rules that employees must sign that they have received such a policy.

### **Sample Safe Harbor Policy**

It is the employer’s policy to comply with applicable wage and hour laws and regulations. The improper pay deduction specified in Title 29 of the Code of Federal Regulations § 51.602(a) may not be made from the pay of employees who are subject to the salary basis test under the Fair Labor Standards Act.

If you believe that any deduction has been made from your pay that is inconsistent with your salaried status, you should immediately contact \_\_\_\_\_ at \_\_\_\_\_.

Every complaint will be resolved within a reasonable time given all the facts and circumstances. If an investigation reveals that you were subjected to an improper deduction from pay, you will be reimbursed, and the city will take whatever action it deems necessary to ensure compliance with the salary basis test in the future.

### **The Duties Test**

To qualify for exemption under the regulations, the employee also must meet the “duty test.” To qualify, an employee’s “primary duty” must be the performance of exempt work. The term “primary duty” means:

... the principle, main, major or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s



job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of non-exempt work performed by the employee. 29 C.F.R. § 541.700(a).

The amount of time spent performing exempt work can be a useful guide to determine whether exempt work is the primary duty of an employee. "Employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirements if the other factors support such a conclusion." 29 C.F.R. § 700(b).

Work that is "directly and closely related" to the performance of exempt work also is considered exempt work. "The phrase 'directly and closely related' means tasks that are related to exempt duties and that contribute to or facilitate performance of exempt work. 'Direct and closely related' work may include physical and/or menial tasks that arise out of exempt duties, and the routine work without which the exempt employee's work cannot be performed properly (e.g., record keeping, monitoring and adjusting machinery; taking notes; using the computer to create documents or presentations; opening the mail for the purpose of reading it and making decisions; and using a photocopier or fax machine)." 29 C.F.R. § 541.703.

## The Executive Exempt Employee

An employee in a bona fide executive capacity is an employee (1) who is compensated on a salary basis at a rate of not less than \$455 per week, exclusive of board, lodging or other facilities, (2) whose primary duty is management of the organization in which the employee is employed or of a customarily recognized department or subdivision, (3) who customarily and regularly directs the work of two or more other employees, and (4) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

"Management" as defined by the DOL regulation (Section 541.102) "includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; ... appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; providing for the safety and security of the employees or the property; planning and controlling the budget." This is not an exhaustive list, and other activities also may be management duties.

Provision 29 C.F.R. § 541.103 provides that "the phrase 'a customarily recognized department or subdivision' is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function." It provides that when an organization "has more



than one establishment, the employee in charge of each establishment may be considered in charge of a recognized subdivision of the enterprise.” For example, a large human resources department might have subdivisions for labor relations, pensions and other benefits, equal employment opportunity, and personnel management, each of which has a permanent status and function. A recognized department or subdivision does not have “to be physically within the employer’s establishment and may move from place to place. Continuity of the same subordinate personnel is not essential to the existence of a recognized unit with a continuing function.” Use of a staffing pool, however, does not destroy the exempt employee’s status.

The phrase “customarily and regularly” means a frequency that is recurrent and performed every workweek. 29 C.F.R. § 541.701. DOL, in an August 20, 1992, opinion letter, further defined “customarily and regularly” to entail “over a significant time span,” especially in smaller organizations.

The phrase “two or more other employees means two full-time employees or their equivalent.” 29 C.F.R. § 541.104(a). “The supervision can be distributed among two, three or more employees, but each such employee must customarily and regularly direct the work of two or more other full-time employees or their full-time equivalent (FTE).” 29 C.F.R. § 541.104(b). “An employee who merely assists the manager of a particular department and supervises two or more employees only in the actual manager’s absence does not meet this requirement. Hours worked by an employee cannot be credited more than once for different executives. Thus shared responsibility for supervision of the same two employees in the same department does not satisfy this requirement.” 29 C.F.R. § 541.104(d)(e). In *Secretary of Labor v. Daylight Dairy Products Inc.*, 779 F.2d 784 (1st Cir. 1985), the court stated that a manager

who meets the 80 hour rule only 76 percent of the time falls short of the requirement to customarily and regularly supervise 80 employee-hours of work.

The exempt executive employee must have the authority to hire or fire other employees. Alternately, the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight. 29 C.F.R. § 541.105(c). “To determine whether an employee’s suggestions and recommendations are given ‘particular weight,’ factors to be considered include, but are not limited to, whether it is part of the employee’s job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee’s suggestions and recommendations are relied upon.” 29 C.F.R. § 541.105.

DOL’s regulation 29 C.F.R. § 541.3(b)(1) emphasizes that the executive exemption does not apply to **non-management** law enforcement, fire and emergency personnel. Thus “police officers, detectives, investigators, ... inspectors, correctional officers, parole or probation officers, firefighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work” do not qualify for exemption.



Also, 29 C.F.R. § 541.3(a) provides that the executive exemption does “not apply to manual laborers or other blue collar workers who perform work involving repetitive operations with their hands, physical skill and energy. Such non-exempt blue-collar employees gain their skills and knowledge ...through apprenticeships and on-the-job training.” Earlier provisions, however, make it clear that blue-collar workers in managerial roles can be exempt.

### **Concurrent Duties of Executive Employees**

“Concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption if the requirements of § 541.100 are met. Generally, exempt executive employees make the decision regarding when to perform nonexempt duties and remain responsible for the success or failure of business operations under their management while performing the nonexempt work” while nonexempt employees who perform exempt work generally are directed by a supervisor to perform the work. “An employee whose primary duty is ordinary production work or routine, recurrent or repetitive tasks cannot qualify for exemption as an executive.” 29 C.F.R. § 541.106(a).

### **Highly Compensated Executive Employees**

A managerial employee who is “highly compensated” may qualify as an exempt executive employee under what DOL calls a “short-cut test.” 69 Fed. Reg. 22,174. Accordingly, a high level of compensation is a strong indicator of an employee’s exempt status, thus eliminating the need for a detailed analysis of the employee’s job duties. DOL regulations (29 C.F.R. § 541.601(b)(4)) define a highly compensated employee as one having a “total annual compensation of at least \$100,000.” That total may include several forms of compensation provided that at least \$455 per week is paid on a salary or fee basis. (Note: Discretionary bonuses are not included in the definition of total annual compensation. 69 Fed. Reg. 22,175.

The DOL exemption for the highly compensated employee is applicable only to employees whose primary duties include performing office or non-manual work. Therefore, “production line workers and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, construction workers, laborers and other employees who perform work involving repetitive operations with their hands, physical skills and energy” cannot be exempt as “highly compensated employees” no matter how highly paid they are. 29 C.F.R. § 541.601(d).

### **The Administrative Employee**

An employee in a bona fide administrative capacity is an employee (1) who is compensated on a salary or fee basis at a rate of not less than \$455 per week, exclusive of board, lodging or other facilities, (2) whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers, and (3) whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

An employee may qualify for the administrative exemption if the employee’s primary duty is “the performance of work directly related to the management or general business operations of the employer’s customers.” (Employees acting as advisers or consultants to their employer’s clients or customers may be exempt.) “The phrase ‘directly related to the management or general business operations’ refers to the type of work performed by the employee... an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.” 29 C.F.R. § 541.201(a).



“Work directly related to management or general business includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.” 29 C.F.R. § 541.201(b).

Exempt administrative workers include not only those who participate in forming management policies or in operating the business as a whole, but it also includes a wide variety of employees who either carry out major assignments in conducting the operations of the business or whose work affects business operations to a substantial degree, even though their assignments are tasks related to the operation of a particular segment of the business. 69 Fed. Reg. 22,138.

The requirement that the work performed by an exempt administrative employee be “office or non-manual work.” 29 C.F.R. § 541.200(a)(2) restricts the exemption to “white-collar” employees only. The regulations state specifically that they do not apply to “blue-collar” workers who perform work involving repetitive operations with their hands, physical skill and energy. Employees who use tools to perform their work normally are considered blue-collar workers.

The exercise of discretion and independent judgment involves comparing and evaluating possible courses of conduct and acting or making a decision after the various possibilities have been considered. According to 29 C.F.R. § 541.202(b), factors to consider in determining whether an administrative employee exercises discretion and independent judgment include:

- (1) whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices;
- (2) whether the employee carries out major assignments in conducting the operation of the business;
- (3) whether the employee performs work that affects business operations of the business;
- (4) whether the employee has the authority to commit the employer in matters that have significant financial impact;
- (5) whether the employee has authority to waive or deviate from established policies and procedures without prior approval;
- (6) whether the employee has the authority to negotiate and bind the company on significant matters;
- (7) whether the employee is involved in planning long- or short-term business objectives;
- (8) whether the employee investigates and resolves matters of significance on behalf of management; and
- (9) whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

“The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision ... the term discretion and independent judgment does not require that the decision made by an employee have a finality that goes with unlimited authority and complete absence of review.” 29 C.F.R. § 541.202(c).

Closely related to whether the employee exercises “discretion and independent judgment” for purposes of applying the administrative exemption is whether the employee’s decision-making ability is limited by manuals or standard operating procedures. DOL’s revised exemption regulation 29 C.F.R. § 541.704 states:



The use of manuals, guidelines or other established procedures containing or relating to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skill does not preclude exemption under section 13(a)(1) of the act or the regulations in this part. Such manuals and procedures provide guidance in addressing difficult or novel circumstances and thus use of such reference material would not affect an employee's exempt status. The section 13(a)(1) exemptions are not available, however, to employees who simply apply well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances.

An administrative employee who is "highly compensated" may qualify as an exempt administrative worker if the employee performs only one of the exempt duties or responsibilities. 29 C.F.R. § 541.601(a). Accordingly, the highly compensated employee likely would need to exercise discretion and independent judgment in order to be exempt.

DOL's revised regulation (29 C.F.R. § 541.708) states that "employees who perform a combination of exempt duties, as set forth for executive, administrative, professional, and computer employees, may qualify for exemption." Thus, for example, an employee whose primary duty involves a combination of exempt executive and exempt administrative work would qualify for exemption.

## The Professional Employee

The professional exemption of the FLSA actually covers two exemptions: one for "learned professionals" and one for "creative professionals." An individual employed in a bona fide professional capacity is an employee:

1. Who is compensated on a salary or fee basis at a rate of not less than \$455 per week, and
2. Whose primary duty is to perform work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction (29 C.F.R. § 200(a)(2)(i) or, requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. 29 C.F.R. § 541.200(a)(2)(ii).

To qualify as an exempt "learned professional," an employee must have a primary duty that requires knowledge of an advanced type in a field of science or learning. DOL regulation 29 C.F.R. § 541.301(b) states "the phrase 'work requiring advanced knowledge' means work which is predominately intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment... Advanced knowledge cannot be attained at the high school level." 29 C.F.R. § 541.301(b). Note that the employee cannot be exempt as a "learned professional" unless the employee's work requires knowledge of an advanced type. Thus, an employee who has an advanced degree, but whose work does not require that level of education, will not qualify for the exemption.

Included within these requirements is a criterion that the employee's primary duty must include the "consistent exercise of discretion and judgment." The regulations do not define "discretion and judgment" as applied to the professional exemption except to say that an exempt learned professional generally uses his or her advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. DOL notes that the "exercise of discretion and judgment" standard under the learned professional exemption is less stringent than the "exercise of discretion and independent judgment" standard under the administrative exemption. 69 Fed. Reg. 22,151, citing *De Jesus Rentas v. Baxter Pharmacy Services Corp.*, 286 F.Supp. 2d 235 (D.P.R. 2003).



“The phrase ‘field of science or learning’ includes the traditional professions of law, medicine, theology, accounting, actuarial computations, engineering, architecture, teaching, various types of physical, chemical and biological science, pharmacy and other similar occupations. The regulations specifically define “field of science or learning” as “occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.” 29 C.F.R. § 541.301(c).

“The phrase ‘customarily acquired by a prolonged course of specialized intellectual instruction’ restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession.” 29 C.F.R. § 541.301(d). The best evidence that an employee meets this requirement is possession of the appropriate academic degree. “The word, ‘customarily’ means that the exemption is also available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degree employee, but who attained the advanced knowledge through a combination of work experience and intellectual instruction.” 29 C.F.R. § 541.301(d). The exemption is not available for “occupations in which most employees have acquired their skill by experience, rather than by advanced specialized intellectual instruction.” This does not allow an employee to qualify as exempt based on equivalent training in the military, technical schools or community colleges.

“To qualify for the creative professional exemption, an employee’s primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical

work.” 29 C.F.R. § 541.302(a). “The work performed must be in a recognized field of artistic or creative endeavor. This includes such fields as music, writing, acting and the graphic arts.” 29 C.F.R. § 541.302(b). The exemption does not apply to work that can be produced by a person with general manual or intellectual ability and training. “This requirement is generally met by actors, musicians, composers, conductors, and soloists; painters who at most are given the subject matter of their painting; cartoonists who are merely told the title or underlying concept of a cartoon and must rely on their own creative ability to express the concept; essayists, novelists, short story writers and screen play writers who choose their own subjects and hand in a finished piece of work to their employers.” 29 C.F.R. § 541.302(c).

A professional employee who is “highly compensated” may qualify as an exempt professional worker under the DOL revised regulations (29 C.F.R. § 601(a); however, the duty test for a highly compensated professional employee is stricter than the duty test for the other exemptions.

### **The Exempt Computer Employee**

Employees who work as “computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field” are eligible as an exempt computer employee. The exemption applies to “any computer employee compensated on a salary or fee basis at a rate of not less than \$455 per week and to any computer employee compensated on an hourly basis at a rate not less than \$27.63 an hour.” 29 C.F.R. § 541.400(b).

The exemption, however, applies “only to computer employees whose primary duty consists of: (1) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional



specifications; (2) the design, development, documentation, analysis, creation, testing or modifications of computer systems or programs, including prototypes, based on and related to user or system design specifications; (3) the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or (4) a combination of the above, the performance of which requires the same level of skills.” 29 C.F.R. § 541.400(b)(1-4).

The computer exemption “does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs, but who are not primarily engaged in computer system analysis and programming or other similarly skilled computer related occupations also are not exempt computer professionals.” 29 C.F.R. § 541.401.

### **Recreational Employee Exemption**

The FLSA contains specific exemptions from the minimum wage and overtime provisions for amusement or recreational employees.

29 U.S.C. § 213(a)(3) exempts any employee who:

... is employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if (a) it does not operate for more than seven (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.

The key point of this test is that the employee must be employed by a seasonal amusement or recreational establishment. Since some governments operate stadiums, convention centers, amusement

parks and facilities, and recreational establishments like nature centers, ice skating rinks, state fairgrounds, tennis courts, golf courses, parks, gymnasiums, outdoor and indoor swimming pools, zoos and museums, this exemption from the act can be significant. Office personnel, warehouse workers and similar employees, not employed in the recreational or amusement establishment itself but in the local central administrative office, are not exempt. A 1970 Wage and Hour opinion letter dated July 21, 1970, seems to suggest that only amusement or recreational employees who work in a distinct, separate workplace for the recreation and amusement activities would be covered.

### **Non-exempt Employees**

The regulations make it clear that the “Executive, Administrative and Professional” exemptions do not apply to “blue collar workers who perform work involving repetitive operations with their hands, physical skill and energy. Such non-exempt blue collar employees gain the skills and knowledge required for performance of their routine manual and physical work through apprenticeships and on the job training, not through the prolonged course of specialized intellectual instruction ... Non-management production line employees and non-management employees in maintenance, construction, and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the FLSA and are not exempt under this part no matter how highly paid they might be.” 29 C.F.R. § 541.3(a).

The regulations also do not apply to “police officers, detectives, investigators, inspectors, park rangers, firefighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees regardless of rank or pay level who perform work



such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime, or accident victims, preventing or detecting crimes; conducting investigations or inspections for violations of laws; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspects and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports or other similar work.”  
29 C.F.R. § 541.3(b)(1).

Such non-exempt employees “do not qualify as exempt executive employees because their primary duty is not management of the enterprise in which the employee is employed ... Such employees are not exempt administrative employees because their primary duty is not the performance of work directly related to the management or general business operations of the employer ... Such employees are not exempt under the professional exemption because their primary

duty does not involve the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by prolonged course of specialized intellectual instruction or the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.”  
29 C.F.R. § 541.3(b)(2).

## Who’s Covered and Who’s Not Covered – A Summary

The following chart provides an overview of the special categories of employees affected by the Fair Labor Standards Act. The first column lists those employees not covered by the act. The second column lists those employees who are exempt from the overtime provisions but not the record keeping provisions. The third column lists all non-exempt employees who are covered by the overtime and record keeping provisions of the act. Finally, the special category of employees is listed in column four.

### FAIR LABOR STANDARDS ACT

| Non-Covered Employees      | Exempt Employees | Non-Exempt Employees | Special Categories                  |
|----------------------------|------------------|----------------------|-------------------------------------|
| Elected Officials          | Professionals    | Hourly               | Police                              |
| Staff of Elected Officials | Administrative   | Piecework            | Firefighters                        |
| Political Appointees       | Executive        | Blue Collar          | School Personnel                    |
| Legal Advisors             | Seasonal         | Police               | Hospital and Nursing Home Employees |
| Bona Fide Volunteers       | Recreational     | Fire                 | Other                               |
| Independent Contractors    | Computer         | EMT and Paramedics   |                                     |
| Prisoners                  | Others           |                      |                                     |
| Certain Trainees           |                  |                      |                                     |



## EXECUTIVE EXEMPTION CHECK LIST

**Employees who meet the five criteria below are bona fide executive employees under DOL's revised exemption regulations. If any of the questions below are answered in the negative, the employee is not exempt as an executive employee unless he or she is highly compensated.**

- ☐ 1. Is the employee paid a minimum of \$455 per week exclusive of board, lodging or other facilities?
- ☐ 2. Is the employee paid on a salary basis? With certain limited exceptions, he or she must:
  - Experience no reduction in salary for variations in the quality and quantity of work;
  - Experience no deductions for partial-day absences; and
  - Receives each pay period a pre-determined amount constituting all or part of his or her compensation; or
  - Pay deductions are based on the principle of public accountability.
- ☐ 3. Does the employee's "primary duty" consist of managing the enterprise or a customarily recognized department or subdivision thereof?
  - The primary duty means the principle, main, major or most important duty that the employee performs.
  - The primary duty must be managing a customarily recognized department or subdivision, not a mere collection of employees assigned from time to time to a specific job or series of jobs.
  - See page 17 for examples of "management" duties under the regulations.
- ☐ 4. Does the employee regularly and customarily supervise two or more employees?
  - The employee must supervise two full-time employees or the equivalent (for example, one full-time and two half-time employees).
  - Employees supervised must be employed in the department that the "executive" is managing.
  - A shared responsibility for the supervision of the same two (or more) employees in the same department does not fulfill the requirement; however, a single department can have more than one manager if there is a ratio in the department of at least two full-time equivalents to each manager.
- ☐ 5. Does the employee have the authority to hire or fire other employees, or are the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any change of status of other employees given particular weight?
  - To determine whether an employee's suggestions and recommendations are given "particular weight," factors to consider include, but are not limited to, whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon.



## Highly Compensated Executive Employee Checklist

**Employees who meet the four criteria below are bona fide highly compensated executive employees under DOL's revised exemption regulations.**

- ☐ 1. Is the employee's total annual compensation at least \$100,000?
- ☐ 2. Is the employee paid a minimum of \$455 per week exclusive of board, lodging or other facilities?
- ☐ 3. Is the employee paid on a salary basis? With certain limited exceptions he or she must:
  - Experience no reduction in salary for variations in the quality and quantity of work;
  - Experience no deduction for partial-day absences; and
  - Receive each pay period a pre-determined amount constituting all or part of his or her compensation; or
  - Pay deductions are based on the principle of public accountability.
- ☐ 4. Does the employee regularly and customarily perform one or more exempt duties?



## Administrative Exemption Checklist

**Employees who meet the four criteria below are bona fide administrative employees under DOL's revised exemption regulations. If any of the questions below are answered in the negative, the employee is not exempt as an administrative employee unless he/she is highly compensated.**

- ☐ 1. Is the employee paid a minimum of \$455 per week exclusive of board, lodging or other facilities?
- ☐ 2. Is the employee paid on a salary basis? With certain limited exceptions he or she must:
  - Experience no reduction in salary for variations in the quality and quantity of work;
  - Experience no deduction for partial-day absences; and
  - Receives each pay period a pre-determined amount constituting all or part of his or her compensation; or
  - Pay deductions are based on the principle of public accountability.
- ☐ 3. Does the employee's "primary duty" consist of performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers?
  - The primary duty means the principle, main, major or most important duty that the employee performs.
  - The employee should not be a "blue-collar" worker or a "production worker" (except if the organization's business is producing management services or other business operations for clients, then a production worker may be exempt).
- ☐ 4. Does the employee have a primary duty that includes the exercise of discretion and independent judgment with respect to matters of significance?
  - Exercising "discretion and independent judgment" involves comparing and evaluating possible courses of conduct and acting or making a decision after the various possibilities have been considered.
  - Use of manuals and standard operating procedures does not preclude exemption if the manuals contain or relate to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills.



## Highly Compensated Administrative Employee Checklist

**Employees who meet the four criteria below are bona fide highly compensated administrative employees under DOL's revised exemption regulations.**

- ☐ 1. Is the employee's total annual compensation at least \$100,000?
- ☐ 2. Is the employee paid not less than \$455 per week exclusive of board, lodging or other facilities?
- ☐ 3. Is the employee paid on a salary basis? With certain limited exception, he/she must:
  - Experience no reduction in salary for variations in the quality and quantity of work;
  - Experience no deduction for partial-day absences;
  - Receives each pay period a pre-determined amount constituting all or part of his/her compensation; or
  - Pay deductions are based on the principle of public accountability.
- ☐ 4. Does the employee regularly and customarily perform one or more exempt administrative duties involving office or non-manual work either:
  - Directly related to management or general business operations of the employer or the employer's customers; or
  - That includes the exercise of discretion and independent judgment.



## Professional Exemption Checklist

**Employees who meet the criteria below are bona fide learned professionals under DOL regulations. If any of the questions below are answered in the negative, the employee is not exempt as a learned professional employee unless he or she is “highly compensated.”**

- ☐ 1. Is the employee paid a salary or on a fee basis a minimum of \$455 per week exclusive of board, lodging or other facilities?
  - (a) Is the employee paid on a salary basis? With certain limited exceptions he or she must:
    - Experience no reduction in salary for variations in the quality and quantity of work;
    - Experience no deduction for partial-day absences;
    - Receive each pay period a pre-determined amount constituting all or part of his her compensation; or
    - Pay deductions are based on the principle of public accountability.
  - (b) Alternatively, is the employee paid on a fee basis?
  - (c) Or, is the employee one of the professionals — physicians, lawyers, teachers and film-making industry employees — exempted from the salary or fee basis test? (If yes, then the \$455 minimum salary or fee also does not apply.)
  
- ☐ 2. Does the employee’s “primary duty” consist of performing work that requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction?
  - The primary duty means the principle, main, major or most important duty that the employee performs.
  - The employee must consistently exercise discretion and judgment — i.e., he or she must generally use his or her advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances.
  - The work must be predominately intellectual in character.



## Highly Compensated Learned Professional Exemption Checklist

**Employees who meet the criteria below are bona fide highly compensated learned professional employees under DOL's regulations.**

- ☐ 1. Is the employee's total annual non-discretionary compensation at least \$100,000?
- ☐ 2. Is the employee paid on a salary basis or on a fee basis a minimum of \$455 per week exclusive of board, lodging or other facilities?
  - (a) Is the employee paid on a salary basis? With certain limited exceptions he or she must:
    - Experience no reduction in salary for variations in the quality and quantity of work;
    - Experience no deduction for partial-day absences;
    - Receive each pay period a pre-determined amount constituting all or part of his or her compensation; or
    - Pay deductions are based on the principle of public accountability.
  - (b) Alternately, is the employee paid on a fee basis?
  - (c) Or, is the employee one of the professionals — physicians, lawyers, teachers and film-making industry employees — exempted from the salary or fee basis test? (If yes, then the \$455 minimum salary or fee also does not apply.)
- ☐ 3. Does the employee regularly and customarily perform one or more exempt professional duties?



## Creative Professional Exemption Checklist

**Employees who meet the criteria below are bona fide creative professionals under DOL's regulations. If any of the questions below are answered in the negative, the employee is not exempt as a creative professional employee unless he or she is "highly compensated."**

- ☐ 1. Is the employee paid on a salary or fee basis a minimum of \$455 per week exclusive of board, lodging or other facilities?
  - (a) Is the employee paid on a salary basis? With certain limited exceptions he or she must:
    - Experience no reduction in salary for variations in the quality and quantity of work;
    - Experience no deduction for partial-day absences;
    - Receives each pay period a pre-determined amount constituting all or part of his or her compensation; or
    - Pay deductions are based on the principle of public accountability.
  - (b) Alternately, is the employee paid on a fee basis?
  - (c) Or, is the employee one of the creative professionals in the film-making industry exempted from the salary basis test? (If yes, then the \$455 minimum salary or fee also does not apply.)
- ☐ 2. Does the employee's "primary duty" consist of performing work that requires invention, imagination, originality or talent in a recognized field of artistic or creative endeavor?
  - The primary duty means the principle, main, major or most important duty that the employee performs.



## Highly Compensated Creative Exemption Checklist

**Employees who meet the criteria below are bona fide highly compensated creative professional employees under DOL's regulations.**

- ☐ 1. Is the employee's total annual non-discretionary compensation at least \$100,000?
- ☐ 2. Is the employee paid on a salary or fee basis a minimum of \$455 per week exclusive of board, lodging or other facilities?
  - (a) Is the employee paid on a salary basis? With certain limited exceptions he or she must:
    - Experience no reduction in salary for variations in the quality and quantity of work;
    - Experience no deduction for partial-day absences;
    - Receive each pay period a pre-determined amount constituting all or part of his or her compensation; or
    - Pay deductions are based on the principle of public accountability.
  - (b) Alternately, is the employee paid on a fee basis?
  - (c) Or, is the employee one of the creative professionals in the film-making industry exempted from the salary or fee basis test? (If yes, then the \$455 minimum salary or fee also does not apply.)
- ☐ 3. Does the employee regularly and customarily perform one or more exempt professional duties involving work that requires invention, imagination, originality or talent in a recognized field of artistic or creative endeavor?



## HOURS WORKED AND COMPENSATION

All employees not exempted or excluded from the FLSA must be paid a minimum wage for all hours worked. Hours worked has been defined as “all hours that an employee is ‘suffered or permitted to work’ for the employer.” 29 U.S.C. § 203(g). Hours worked include any time in which the employee is required to be on the employer’s premises, on duty or at a prescribed work place. 29 C.F.R. § 785.7.

Understanding the concept of “hours worked” is crucial to complying with the FLSA. According to the U.S. Supreme Court (*Tn. Coal, Iron & R.R. Co. v. Muscodol Local No. 123*, 321 U.S. 590 (1944)), 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 courts and DOL, however, 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. The rule applies 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 called *de minimis*, i.e., minor or trivial. The Portal-to-Portal Act of 1947 helps clarify the working time issue. (See the discussion of the Portal-to-Portal Act in this section on Travel Time.)

Employees, who, with the knowledge or consent of their employer, continue to work after their shifts are over, though voluntarily, 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, overtime compensation may be due. 29 C.F.R. § 785.11.

This is true whether the work takes place at the place of business or the employee’s home. For example, preliminary activities such as filling out time, material or requisition sheets; checking job locations; removing trash; and fueling cars are

all compensable work if done at the employer’s behest and for the employer’s benefit. This broad definition of hours worked may require employers to compensate employees for time worked that the employer may not consider “working time,” such as waiting time, travel time, certain meals and training time.

### Wait Time

Whether waiting time is compensable depends on the particular circumstances. The FLSA requires compensation for all time during which employees are required to wait while on duty or performing their principle activities. 29 C.F.R. § 785.15. This is particularly true where waiting periods are of such short duration that employees cannot use them for their own benefit.

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

1. The employee is completely relieved from duty and allowed to leave the job; or
2. The employee is relieved until a definite, specific time; and
3. The relief period is long enough for the employee to use the time as he or she sees fit.

A street department employee who must wait for a vehicle to be removed from the road, a firefighter who watches television at the firehouse while waiting for alarms, and a worker who talks to fellow employees while waiting for equipment to be repaired, all are working during their periods of inactivity. The rule applies also to an employee who works away from the employer’s premises.

Employees who wait before starting their duties because they arrived at the workplace 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. 29 C.F.R. § 790(h).

DOL has defined “off duty” as:

... period[s] during which an employee is completely relieved from duty and which are long enough to enable the employee to use the time effectively for his/her own purpose are not hours worked. The employee is not completely relieved from duty and cannot use the time effectively for his/her own purposes unless the employee is definitely told in advance that he or she may leave the job and that the employee will not have to commence work until a specified hour has arrived. 29 C.F.R. § 785.16(a).

## On-Call Time

On-call time is time spent by employees, usually off the working premises, in their own pursuits, where the employee must remain available to be “called back” to work on short notice. 29 C.F.R. § 785.17. The FLSA requires employers to compensate their workers for on-call time when such time is spent “predominantly for the employer’s benefit.” The regulations state that:

“... an employee who is required to remain on call on the employer’s premises or so close thereto that he cannot use the time effectively for his own purpose is working while “on call. An employee who is not required to remain on the employer’s premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call.”

It is important to note that on-call payments may alter an employee’s regular rate of pay. If the employer chooses to pay the employee for on-call time (for example, a \$50 on-call payment per eight hour shift) that would not otherwise be considered hours worked under the regulation, that

\$50 compensation nevertheless must be included in the employee’s rate of pay calculation for overtime. 29 C.F.R. § 778.221(b). Of course, “all payment for time actually worked must also be included in the regular rate calculation.” 29 C.F.R. § 778.223.

Once the employee arrives at work after being called into service, all working time must be compensated. If this pushes the hours worked over 40 in a week or any other permitted schedule overtime must be paid.

## Show-up, Call-in or Reporting Time

“If an employee reports for duty and is required to wait 10 to 15 minutes before being told that no work is available, the waiting time is compensable. In such instances, the employee is *engaged to wait* (29 C.F.R. § 785.14) rather than *waiting to be engaged*.” 29 C.F.R. § 785.15 and 29 C.F.R. § 785.16(b).

## Stand-By Time

“Workers who must ‘stand by’ their posts ready for duty, whether during lunch periods, during machinery breakdowns or during other temporary work shutdowns, must be paid for this time.” 29 C.F.R. § 785.15. Since the employee’s time is controlled by the employer, and the employee is not able to use the time for his/her own purpose, the time is working time.

This rule applies also to employees who work away from the employer’s place of business. “For instance, a repairman is working while he/she waits for the employer’s customer to make the premises ready. The time is working time, even though the employee is allowed to leave the premises or the job site during such periods of inactivity.” 29 C.F.R. § 785.156(b).

## Breaks and Meals

Break periods, such as lunch or dinner meals or rest periods, may or may not be compensable depending



on whether the employee is relieved from duty and the amount of time allocated for the activity. The FLSA does not require that employees be given rest periods (29 C.F.R. 785.18), but if rest periods are provided, they must be counted as hours worked if they last 20 minutes or less. *Mitchell v. Grienetz*, 235 F.2d. 621 (10th Cir. 1956). Coffee and snack breaks are compensable rest periods and cannot be excluded from hours worked as meal periods. Whether rest periods that last longer than 20 minutes are compensable depends upon an employee's freedom during the breaks.

"A bona fide meal time, when the employee is completely relieved from duty, is not work time." 29 C.F.R. § 785.19(a). "Short periods, such as coffee breaks or snacks, are not considered meal time. Of course, if an employee works during the meal, the time is compensable. Whether or not an employee's meal period can be excluded from compensable working time depends on the employee 'freedom meal test'." 29 C.F.R. § 785.19(a).

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

1. The meal period generally must be at least 30 minutes, although a shorter period may qualify under special conditions. In *Blain v. General Electric Company*, 371 F. Supp. 857 (W.D. KY, 1971), the court approved an 18-minute meal period, because the employees agreed to it in return for leaving earlier in the day.
2. 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.
3. The employee must be free to leave his/her duty station. There are no requirements, however, that the employee be allowed to leave the premises or work site.

"Meal time spent out of town on business trips is not generally compensable time." 29 C.F.R. § 785.39. If, however, an employee works during his/her meal, such time is compensable.

"Any work done voluntarily during meal periods must be counted as compensable working time if the employer knows or has reason to believe the work is being performed. If the employer does not know of the work, and the employee's work during meal time is essentially de minimis, no compensation is required." *Baker v. United States*, 218 Cl. Ct. 602 (1978).

"Public agencies may exclude meal time from hours worked on tours of duty of 24 hours or less, provided that the 207(k) employee is completely relieved of duty during the meal period." 29 C.F.R. § 553.224(b). "The meal period of safety personnel who are on call more than 24 consecutive hours can be excluded from working time under certain criteria." 29 C.F.R. § 553.223(d).

Firefighters required to remain at their work station during meal time and obligated to respond to incoming calls are not completely relieved from duty, therefore, their mealtime is compensable. *Rotondo v. Georgetown, S.C.*, 869 F. Supp. 369 (D.S.C. 1994). However, in *Albee v. Village of Bartlett, Ill.*, 861 F. Supp. 680 (N.D. Ill. 1994), the courts determined that occasional interruptions in a police officer's meal break did not entitle the officer to compensation. The bottom line seems to be whether the officer's time and attention are occupied primarily by private pursuit (procurement and consumption of food) or whether the officer's time and attention are taken up primarily by official responsibilities that prevent the officer from comfortably and adequately enjoying the meal.

"If a public agency elects to pay overtime compensation to firefighters and law enforcement personnel in accordance with section 207(k) of the



act, the public agency may exclude meal time from hours worked if all the tests in §785.19 above are met.” 29 C.F.R. § 553.223(a). If a public agency elects to use the section 7(k) exemption, “the public agency may exclude meal time from hours worked on tours of 24 hours or less, provided that the employee is completely relieved from duty during the meal period.” 29 C.F.R. § 553.223(b).

With respect to firefighters employed under the section who are confined to a duty station, “meal time cannot be excluded from the compensable hours of work where the firefighter is on a tour of duty of less than or exactly 24 hours.” 29 C.F.R. § 553.223(c). On the other hand, where law enforcement personnel are required to remain on call in barracks or similar quarters, or are engaged in extended surveillance activities (e.g., stakeouts) for 24 hours or less, they are not considered to be completely relieved from duty, and any such meal period would be compensable. In the case of police officers and firefighters who are on a tour of duty of more than 24 hours, meal time may be excluded from compensable hours of work.

## Sleep Time

“Under certain conditions an employee is considered to be working even though some of his/her time is spent sleeping.” 29 C.F.R. § 785.20. The regulations provide for two general policies regarding sleeping time. The first is for employees whose tour of duty is less than 24 hours. The other is for those employees who work around the clock.

For an employee whose tour of duty is less than 24 hours, periods during which the employee is permitted to sleep are compensable working time, as long as the employee is on duty and must work when required.

For example, a telephone operator who is required to be on duty for specified hours is working even though the employee is permitted

to sleep when not busy answering calls. It makes no difference whether the employee is furnished facilities for sleeping or not. The employee’s time is controlled by the employer. The employee is required to be on duty and working, thus, the time is work time.  
29 C.F.R. § 785.21.

“When an employee’s tour of duty is longer than 24 hours, up to eight hours of sleep time can be excluded from compensable working time.” 29 C.F.R. § 785.22(a) The regulations provide that the eight hours of sleep time are excluded if:

1. an expressed or implied agreement excluding sleeping time exists;
2. adequate sleeping facilities for an uninterrupted night’s sleep are provided;
3. at least five hours of sleep are possible during the scheduled sleeping periods; and
4. interruptions to perform duties are considered hours worked.

There also are special rules for police officers and firefighters who are compensated under the § 207(k) exemption of the act. “For sleep time to be excluded for such employees, they must work a shift of more than 24 hours.” 29 C.F.R. § 553.222(c). Therefore, a tour of duty of 24 hours and 10 minutes is sufficient to constitute “more than 24 hours on duty.”

“If the sleep period is longer than eight hours, only eight hours of sleep time can be credited.” 29 C.F.R. § 785.22(a). DOL has ruled, however, that “the five hours of sleep do not have to be consecutive and that sleep time does not necessarily have to be at night. Additionally, there must be a voluntary agreement between the employer and employees excluding sleep time. Without an agreement the sleep time must be counted as hours worked.” 29 C.F.R. § 785.22(b).



If the sleep period is interrupted by a call to duty, the interruption must be counted as hours worked. “If the sleep period is interrupted so frequently that the employee cannot get a reasonable night’s sleep, then the entire period must be counted as working time.” 29 C.F.R. § 553.222(c).

## Meetings, Lectures and Training Programs

The regulations (29 C.F.R. § 785.27) identify when an employee’s time spent in training programs, lectures or meetings is compensable. The time cannot be counted as working time if all the following four criteria are met:

1. Attendance must occur outside the employee’s regular working hours;
2. Attendance must in fact be voluntary;
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.

“Attendance is not voluntary if it is required by the employer. It is also not voluntary if the employee is led to understand or believe that his/her present working conditions or the continuance of his/her employment would be adversely affected by nonattendance.” 29 C.F.R. § 785.28.

29 C.F.R. § 785.29 establishes “that training is directly related to the employee’s job if it is designed to make the employee handle his/her job more effectively, as distinguished from training the employee for another job, or to a new job or additional skills.” Where a training course is instituted for the bona fide purpose of preparing for advancement through upgrading the employee to a higher skill, and is not intended to make the employee more efficient in his present job, the training is not considered directly related to the employee’s job even though the course incidentally improves the employee’s skill in doing regular work.

“Attending an independent trade school or pursuing a correspondence course 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.” *Price v. Tampa Electric Co.*, 806 F.2nd. 1551 (1987); 29 C.F.R. § 785.30.

DOL regulations make clear, however, that “attendance at a bona fide fire or police academy or other training facility, when required by the employing agency, constitutes engagement in law enforcement or fire protection activities” as outlined in 29 C.F.R. § 553.226(c). Therefore, basic and advanced training are considered part of the employee’s law enforcement or fire protection activities. Time spent in actual training constitutes compensable hours of work.

Time spent studying or in other personal pursuits is not compensable even if the employee is confined to campus or to barracks 24 hours a day. (Wage and Hour Opinion, February 5, 1990) “Police officers and firefighters who attend a police or fire academy or other training facility are not considered to be on duty during the time they are not in class or training, as long as they are free to use such time for personal pursuits.” 29 C.F.R. § 553.226(c). Moreover, re-certification training of paramedics that is state mandated and outside the regular working hours also is non-compensable (Wage and Hour Opinion, February 5, 1990).

## Travel Time

Whether travel time is compensable or not depends entirely on the kind of travel involved. The general rule of thumb is that “time spent by an employee in travel as part of the employer’s principal activity must be counted as hours worked.” 29 C.F.R. § 785.38. Under the Portal-to-Portal Act, “the employer generally is not responsible for time spent by the employee in walking, riding, or



otherwise traveling to and from the actual place of performance of the principle activities.” 29 U.S.C. § 254(a). The act was enacted to offset the effect of a series of Supreme Court decisions that expanded the compensable working time requiring payment under the FLSA.

These Supreme Court decisions culminated in the case of *Anderson v. Mt. Clemens Pottery Co.* 328 U.S. 680(1946). The court found that “the time actually required to walk the distance between the plant entrance and work stations and back was compensable.” Consequently, excluding normal commuting time, the general rule is that employees should be compensated for all travel unless it is overnight, outside the regular working hours, on a common carrier, or where no work is done.

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 material, equipment or other employees, or to receive instructions before traveling to the work site, compensable time starts at the meeting place.” 29 C.F.R. § 785.38.

An employee who drives a company car or vehicle does not have to be compensated for commute time simply because he or she is operating the employer’s vehicle, so long as it is for the employee’s convenience. *Field Operations Handbook* § 31c01(a). According to the Wage and Hour Letter, April 13, 1995, an employee does not have to be compensated if all of the following conditions are met:

1. Driving the employer’s vehicle between the employee’s home and the work site is strictly voluntary and not a condition of employment;
2. The vehicle involved is the type of vehicle that would normally be used for commuting;
3. The employee incurs no cost for driving the employer’s vehicle or parking it at home; and
4. The work sites are within the normal commuting area of the employer’s establishment.

Travel time during the workday might present some problems. When an employee travels from job site to job site during the day and then travels to the place of work, the employee must be compensated for all the travel time. If, however, the employee leaves home on the way to a work site but stops at the home office for his or her own convenience, the time traveling from the office to the site is not compensable. Had the stop been made for the employer’s convenience, the time would have been compensable.

In certain rare emergency situations, the regulations (29 C.F.R. § 785.36) provide that “an employee must be compensated for home-to-work travel time.” Generally, if after completing a day’s work, an employee is called at home and must travel a “substantial distance” to perform an emergency job, the travel time is compensable.

Out-of-town travel is a bit more complicated because DOL takes the position that out-of-town travel is not ordinary home-to-work travel. Because the travel is performed for the employer’s benefit and at the employer’s request, the employee must be compensated. Not all the travel, however, needs to be counted as hours worked. DOL specifically permits the employer to “exclude the travel time between the employee’s home and the airport, bus or railroad station.” 29 C.F.R. § 785.39.

The regulations provide that travel time is compensable work time when it occurs during the employee’s regular working hours. “DOL does not count as working time overnight travel that occurs outside of regular working hours as a passenger on an airplane, train, boat, bus, or car and where the employee is free to relax.” 29 C.F.R. § 785.39. It is advantageous to most employers; therefore, to have their nonexempt employees travel after working hours.



“If an employee is required to drive or required to ride as an assistant or helper in an automobile, the employee must be compensated for the travel time” (29 C.F.R. § 785.41) except when the employee is on a bona fide meal break or is provided sleeping facilities. If, however, “an employee is offered the option of public transportation, but chooses to drive, the employer may count as hours worked either the time spent driving or the time that would have had to be counted if public transportation was taken.” 29 C.F.R. § 785.40. If the travel is overnight and done outside work hours, the travel time is not compensable.

### Examples of Compensable Working Time

Following are examples of working time for which an employee is entitled to be compensated. (This list is not all inclusive.)

1. Time spent by budget or fiscal employees required to remain until an official audit is finished. 29 C.F.R. § 785.15.
2. Caring for tools that are a part of principal activities, such as fire hoses by firefighters and guns by police officers. 29 C.F.R. § 553.221(b).
3. Charitable work requested or controlled by the employer. 29 C.F.R. § 785.44.
4. Cleaning and oiling machinery. 29 C.F.R. § 785.24(b)(1).
5. Driving van pools when the driver is chosen by the employer and under the control of the employer. *Field Operations Handbook* § 31c02(c).
6. Emergency work/travel time. 29 C.F.R. § 785.36.
7. Fire drills or other disaster drills, whether voluntary or involuntary, either during or after regular working hours. *Field Operations Handbook* § 31b15.
8. Meal periods, if: (a) employees are not free to leave their posts; or (b) the time is too short to be useful to employees. 29 C.F.R. § 785.19.
9. Medical attention during working hours at the employer’s direction. 29 C.F.R. § 785.43.
10. On-call where liberty is restricted. 29 C.F.R. § 785.17.

11. Preparatory work that is a part of the principal activity. *Lindow v. United States*, 738 F.2d 1057 (9th Cir 1984).
12. Principal activities. 29 C.F.R. § 790.8.
13. Rest periods of 20 minutes or less. 29 C.F.R. § 785.18.
14. Show-up time of 10 to 15 minutes, if the employees are required to remain on the premises that long before being sent home. 29 C.F.R. § 778.220.
15. Stand-by time during short plant shutdowns. 29 C.F.R. § 785.15.
16. Training in regular duties to increase efficiency. 29 C.F.R. § 785.29.
17. Training programs required by the employer. 29 C.F.R. § 785.27.
18. Travel (but not performing work) from one work site to another or traveling out of town during working hours. 29 C.F.R. § 785.38, § 785.39.
19. Cleaning and laundering uniforms or other distinctive clothing required by the employer, at least to the extent it cuts into the minimum wage. *Marshall v. S.F. of Ohio, Inc.*, 25 Wage and Hour Cas. (BNA) 227 (S.D. Ohio 1981).
20. Waiting for work after reporting time or while on duty. 29 C.F.R. § 785.15.
21. Washing up or showering, if it is required due to the nature of the work. *Steiner v. Mitchell*, 350 U.S. 247 (1956).
22. Cleaning and maintaining police vehicles, if the officers are responsible for those tasks. Wage and Hour Opinion Letter, Dec. 30, 1985.

### Examples of Non-Compensable Time

Following are examples of work-related matters for which an employee need not be compensated.

1. Absences (including sick leave, annual leave, holidays, funerals and weather-related absences). 29 C.F.R. § 778.218(d).
2. Athletic contest involvement as a participant, official or scorer, even if sponsored by the employer, so long as it is voluntary and not a condition of employment. *Field Operations Handbook* § 31b05.



3. Changing clothes, if the change is for the employee's convenience. 29 U.S.C. § 203(o).
4. Charitable work done voluntarily outside the working hours. 29 C.F.R. § 785.44.
5. Clothes changing at home. *Field Operations Handbook* §31b13.
6. Holidays on which an employee does not work. 29 C.F.R. § 778.218(d).
7. Jury duty. 29 C.F.R. § 778.218(d).
8. Meal periods involving no duties and lasting one-half hour or longer. 29 C.F.R. § 785.19(a).
9. Medical attention outside or working hours, or not at the direction of the employer. 29 C.F.R. § 785.43.
10. On-call time where the employee merely leaves a telephone number and is not restricted. 29 C.F.R. § 785.17.
11. Operation of an employer's motor vehicle for the employee's own commuting convenience. *Field Operations Handbook* § 31c02.
12. Sleep time up to eight hours under a contract if the tour of duty is 24 hours or longer. 29 C.F.R. 785.22(a).
13. Shutdowns for regular, customary equipment maintenance where the employee is free to leave the premises. 29 C.F.R. § 785.15.
14. Time spent before, after or between regular working hours. 29 C.F.R. § 790.7.
15. Trade school attendance, which is unrelated to present working conditions. 29 C.F.R. § 785.30.
16. Training program voluntarily attended that are unrelated to regular duties and involve no productive work. 29 C.F.R. § 785.27.
17. Travel: (a) from home to a work site, and vice versa. 29 C.F.R. § 785.35. Or (b) on overnight trips during non-working hours, except while performing duties or other work. 29 C.F.R. § 785.39.
18. Voting time, as long as state laws do not require compensation. 29 C.F.R. § 778.218(d). Wage and Hour Opinion Letter, Nov. 9, 1944.
19. Waiting time: (a) in a paycheck line, (b) to check in or out, and (c) to start work at a designated period. 29 C.F.R. § 790.7(g).

20. Washing up or showering under normal conditions. 29 C.F.R. § 790.7(g).

## OVERTIME COMPENSATION

The FLSA (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 allows payment to include the "reasonable cost" or "fair value" of furnishing an employee with board, lodging or other facilities.

## Compensation for Hours Worked

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 (1½) times the non-exempt 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 worker is engaged. This usually means overtime for hours in excess of 40 hour per week. Of course, overtime payments need not be made to exempt or non-covered workers. Only non-exempt employees are entitled to overtime under the act.

"The FLSA's workweek for nonexempt employees is generally a fixed period of 168 hours — seven consecutive 24-hour periods" which is established by the employer for each employee. 29 C.F.R. § 778.105. It may begin on any day of the week and at 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." 29 C.F.R. § 553.224(a). For the purpose of FLSA compliance, "work period" and "workweek" are identical.

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 two 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 daily, weekly, bi-monthly, or on another basis.

While overtime must be calculated on a workweek basis, there is no requirement in the FLSA that overtime compensation must be paid weekly. According to the DOL regulations, as a general rule, “overtime earned in a particular workweek should be paid where possible on the regular payday for the period in which such workweek ends.” 29 C.F.R. § 778.106. However, when the correct amount of overtime compensation cannot be determined until later, it is permissible to wait if it is paid as soon after the regular pay period as is practical. Payment should not be delayed beyond the next payday.

### **Occasional and Sporadic Employment**

When state or local government employees, at their option, work occasionally or sporadically on a part-time basis for the same agency in a capacity different from their regular employment, the hours worked in the different job do not have to be combined with the regular hours for the purpose of determining overtime liability.” 29 U.S.C. § 207(p)(2). DOL defines “occasional or sporadic as infrequent, irregular or occurring in scattered instances.” 29 C.F.R. 553.30(b)(1). DOL has determined (29 C.F.R. § 553.30(c)(1)) that hours worked “will be excluded only where the occasional or sporadic assignment is not within the same general occupational category as the employee’s regular work.” Moreover, “the decision to work in a different capacity must be made freely by the employee and without concern, implicit or explicit, by the employer.” 29 C.F.R. § 553.30(b)(2). The employee must be free to refuse to perform the work without fear of sanctions and without being required to explain or justify the decision.

The fact that the activity is recurring, such as at a county fair where a county employee takes tickets or provides security, does not necessarily mean that the activity will not meet the “occasional or sporadic” test. Employment in such activities may be considered occasional or sporadic for regular employees of state and local governments even though the need can be anticipated seasonally.

It is important to note that “regular part-time jobs, where the employee works scheduled hours, will not qualify under the occasional and sporadic provisions. Moreover, performance of work similar to work regularly performed, even after regular working hours, will not qualify. In such cases, the hours worked in both jobs must be aggregated and overtime calculated.” 29 C.F.R. § 553.30(b)(3).

### **Substitutions**

The FLSA provides that any individual employed in any capacity by a public agency may agree to substitute, during scheduled work hours, for another employee. Rule 29 U.S.C. § 207(p)(3) provides that employees may work substitution schedules where the substitution is:

1. voluntarily undertaken and agreed to solely by the employees, and
2. approved by the employer.

The traded time is not considered by the public agency in calculating the hours for which the employee is entitled to overtime compensation. In effect, even though a substitution is made, “each employee will be considered to have worked his/her normal schedule.” 29 U.S.C. § 207(p)(3). In addition, “the employer of the employee who performs such substitution work is not required to keep a record of the hours of substituted work.” 29 U.S.C. § 211(c); 29 C.F.R. § 553.31(c).



## Regular Rate of Pay

The FLSA defines “regular rate of pay” as the total of all payments made by the employer to, or on behalf of, an employee. The regular rate of pay may be more than the minimum wage, but it cannot be less.” 29 C.F.R. § 778.108. Following are examples of compensation paid to non-exempt employees that are included in determining the regular rate of pay:

1. On-call pay. 29 C.F.R. § 778.223.
2. Bonuses promised for accuracy of work, good attendance, continuation of the employment relationship, incentive, production and quality of work. 29 C.F.R. § 778.208.
3. Contest prizes. 29 C.F.R. § 778.330.
4. 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 (for example, supper money while working late or meal expenses while out of town on business. 29 C.F.R. § 778.217(b).
5. Salaries.
6. Salary increases, including retroactive increases.
7. Shift differentials, hazardous-duty pay and longevity pay. *Featsent v. City of Youngstown*, 859 F. Supp. 1134 (N.D. 1993).
8. Traveling expenses of employees going to and from work, if they are paid by the employer (29 C.F.R. § 778.217(d)), unless the expenses are incurred on the employer’s behalf or for the employer’s benefit (for example, travel expenses due to temporary movement of the work location or expenses for traveling “over the road”). 29 C.F.R. § 217(b).

Additionally, compensation to employees may take the form of employer contributions to employee flexible benefit plans, which are known also as “cafeteria” plans. Cafeteria plans are governed by Section 125 of the Internal Revenue Code. The question of whether cafeteria plan benefits must be included in an employee’s regular rate was addressed in the case of *Madison v. Resources for Human*

*Development Inc.*, Civil Action No. 97-7402 (E.D. Pa. Jan. 8, 1999). In the case, the court ruled that “certain employer contributions to the workers’ cafeteria plans should have been included in the employee’s regular rates.” Principally, this was because the employees were given the choice to receive the employer’s contributions, in whole or in part, in cash. Under FLSA rules (29 C.F.R. § 778.215(a)(5)), “such cash components to benefit plans, including cafeteria plans, are permitted only in limited circumstances,” none of which existed in Madison.

Following are examples of payments that need not be included in the regular rate of pay:

1. Absence pay for infrequent or unpredictable absences, such as vacation, illness, bereavement, disaster relief payments or jury leave. 29 C.F.R. § 778.218.
2. Discretionary bonuses. 29 C.F.R. § 778.211.
3. Holiday pay, if it is equivalent to regular earnings. 29 C.F.R. §§ 778.203(d), 778.218.
4. Premium pay, such as time compensated at time and one-half. 29 C.F.R. § 778.201(a).
5. Idle time beyond the control of the employer due to machinery breakdown, supplies failing to arrive and weather conditions making it impossible to work. 29 C.F.R. § 778.218(c).
6. Severance pay. 29 C.F.R. § 778.224.
7. Pension, profit-sharing, thrift and savings plan payments qualifying under the U.S. Department of Labor’s administrative regulations. 29 U.S.C. § 207(e)(3)(b); 29 C.F.R. §§ 549.0(a)&(b), 778.213.
8. Call back premium pay. 29 C.F.R. § 778.221.
9. Travel expenses, if business trips are taken by the employee. 29 U.S.C. § 207(e)(2).
10. Show-up or reporting pay (paying a minimum amount for coming to work) to the extent pay exceeded hours worked. 29 C.F.R. § 778.220.
11. Weekly overtime pay, in any amount. 29 C.F.R. § 778.201.



12. Health and welfare fund benefits received by the employee. 29 C.F.R. § 778.215.
13. Death benefits. 29 C.F.R. § 778.218.
14. Employer-paid disability benefits, hospitalization, medical care, retirement benefits, workers' compensation, or other employer-paid health and welfare contributions, including all insurance premiums. 29 C.F.R. § 778.214.
15. Reasonable uniform allowances. 29 C.F.R. § 217(b)(2).
16. Payment made to an employee for periods of absence due to the use of accrued compensatory time. 29 C.F.R. § 553.26(c).
17. Tuition reimbursement. Wage and Hour Opinion Letter, Sept. 17, 1993.
18. Automobile reimbursement. Wage and Hour Opinion Letter, Dec. 12, 1988.

Chapter 32 of the DOL Field Operations Handbook identifies other forms of pay that may be excluded from the computation of the regular rate of pay, including sums paid as gifts, payments for suggestions, new business contest awards, fringe benefits paid in cash, report and call-back pay, reimbursement of employee expenses, and the employer's share of board and lodging cost.

## Wage Deductions

In most cases "the FLSA does not prohibit deductions from wage payments; however, the regular rates and overtime pay must be figured before deductions are made." 29 C.F.R. § 778.304. In other words, employee deductions and contributions are permissible, but overtime is calculated on the regular rate before deductions are made. 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 deduction can be made for any tax that the law requires be borne by the employer.

If wearing 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, then the employer may not reduce the employee's wage below the minimum wage or cut into overtime compensation required by the act." W.H. Publication 1428 (Rev. March 1984). 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. As 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.

Following are examples of wage deductions that are to be included in the regular rate.

1. Voluntary assignment by the employee.
2. Charitable contributions by the employee.
3. Garnishments.
4. Health and welfare plan contributions by the employee.
5. Insurance premiums paid for the employee's convenience.
6. Pension plan contributions by the employee.
7. Re-payment of salary advances.
8. Savings plan contributions by the employee.
9. Withholding of taxes for or on behalf of the employee, including state and federal income tax, Social Security and unemployment compensation.
10. Union dues and fees.
11. U.S. savings bond purchases. C.F.R. § 778.304.

## Computing Regular Rate of Pay

There are various methods of computing an employee's regular rate of pay. The regulations provide guidance on computing regular rates of pay for (1) hourly employees, (2) hourly rate and bonus employees, (3) salaried employees working a fixed workweek of 40 hours, (4) salaried employees paid



for all hours worked but working more than 40 hours in a workweek, (5) salaried employees working a fixed workweek of less than 40 hours, (6) a fixed weekly salary for a fixed workweek of more than 40 hours, (7) semimonthly salary pay, (8) monthly salary pay, (9) irregular hours, (10) piecework, (11) day rate and job rates, (12) an employee working at two or more rates, (13) payments other than cash, and (14) overtime based on authorized basic rates.

### **Hourly Employee**

The regular rate for an hourly employee is the hourly rate plus any other form of compensation received by the employee, such as non-discretionary bonuses, shift premiums, etc. For all hours over 40 worked in a week, the employee must be paid at least one and a half (1½) times the regular rate.

Example:

An employee is paid \$8 per hour. The employee would be paid \$12 for each hour worked during the workweek over 40: ( $\$8 \times 1.5 = \$12$ ).

### **Hourly Rate and Bonus**

Example:

An employee works 46 hours in a workweek and receives a bonus of \$19.20 in addition to earnings at an hourly rate of \$7 per hour. The regular rate would be \$7.42 per hour. This is computed as  $46 \text{ hours} \times \$7 = \$322 + 19.20 \text{ bonus} = \$341.20$ . This total divided by 46 hours yields a regular rate of \$7.42. The employee would be entitled to receive a total wage of \$363.58:  $(46 \text{ hours} \times \$7.42) + (6 \text{ hours} \times \$3.71) = \$363.58$ .

### **Salaried Employee Working a Fixed Workweek of 40 Hours**

If an employee is employed solely on a weekly salary basis, the regular rate is determined by dividing the salary by the number of hours that the salary is intended to cover.

Example:

If an employee is paid a salary of \$400 a week to work 40 hours, the regular rate of pay is \$10 an hour. If the employee works 48 hours in one week, the employee is entitled to an overtime premium of \$15 per hour, which amounts to \$120 (8 hours  $\times$  \$15 = \$120).

### **Salaried Employee Paid for All Hours Worked but Working More Than 40 Hours a Week**

If an employee receives a salary for all hours worked, then the regular rate varies according to the number of hours worked in a week. The employee's regular rate is determined by dividing the weekly salary and other forms of compensation by the number of hours worked.

Example:

If an employee works 50 hours for a weekly salary of \$500, the regular rate is \$10 an hour. Overtime for this employee is based on half-time and would be \$5 an hour for 10 hours, which is \$50. The regular rate of an employee who is paid a salary for all hours worked varies each week depending on the hours actually worked.

### **Salaried Employee Working a Fixed Workweek of Less Than 40 Hours**

The regular rate for an employee working a fixed workweek of less than 40 hours can be determined in one of two ways depending on the understanding between the employer and the employee. The conventional method is to divide the fixed weekly wage and other forms of compensation by the number of hours in the workweek.

Example:

An employee works a 35-hour workweek for a salary of \$300. Under the act, the employee's maximum straight-time workweek is 40 hours. The employee's regular rate is \$8.57 per hour (\$300 divided by 35 hours). If the employee works overtime, he is entitled to \$8.57 per hour



for hours 36 through 40 and \$12.86  
(\$8.57 X 1½) for each additional hour over 40.

The other method of calculating the regular rate for workweeks of less than 40 hours depends on an agreement between the employer and the employee that the salary paid an employee represents compensation for all hours worked up to 40 per week. Then, the employee can work any amount of time up to 40 hours per week without additional compensation. The rate of pay also would be based upon a 40-hour workweek and not the lesser workweek actually labored.

### ***Fixed Weekly Salary For a Fixed Workweek of More Than 40 Hours***

The regular rate for an employee working a fixed workweek of more than 40 hours is half-time for hours regularly worked over 40 and time and one half for additional hours.

Example:

An employee is paid \$480 for a 48-hour week. The applicable statutory straight-time workweek is 40 hours. The employee's rate is \$10 per hour (\$480 divided by 48 hours = \$10). The weekly wage is \$520, calculated as: \$480 + [(½ X \$10) X (48-40)]. For hours worked over 48, the employee must be paid time and a half, or \$15 per hour, and is not eligible for half-time pay since the salary did not represent payment for hours worked in excess of 48 per week.

### ***Semimonthly Salary Pay***

The regular rate for an employee paid a semi-monthly salary is computed by breaking the salary into weekly portions. Thus, the salary is multiplied by 24 (the number of semi-monthly periods in the year) and divided by 52 (the number of weeks in a year). To find the regular rate, divide the weekly salary by the number of hours in a workweek.

Example:

If an employee earns \$600 semi-monthly and works 40 hours per week, the employee's regular rate is \$6.92:  $(\$600 \times 24)/52 = \$276.92$  weekly rate;  $\$276.92/40 = \$6.92$  hourly rate.

### ***Monthly Salary Pay***

To compute the regular rate for an employee who is paid monthly, the employee's salary must be multiplied by 12 (the number of months in the year) and divided by 52 (the number of weeks in the year). This figure must then be divided by the number of hours in a workweek.

Example:

If an employee earns \$1,500 a month and has a statutory straight-time workweek of 40 hours, the employee's regular rate would be \$8.65:  $(\$1,500 \times 12)/52 = \$346.15$  per week;  $\$346.15/40 = \$8.65$  hourly rate. If the employee worked 44 hours in a workweek, the employee would be entitled to overtime pay for four hours at time and a half:  $(\$8.65/2 = \$4.33; 4.33 + 8.65 = \$12.98$  overtime rate),  $4 \times \$12.98 = \$51.92$ . The employee's salary for the month would be \$1,551.92. The employee also might be eligible for half-time treatment if his salary represented all hours worked.

### ***Irregular Hours***

The regular rate for an employee who works irregular hours but is paid a salary on a fixed monthly basis is computed by converting the wages into weekly figures. The regular rate is computed for each week by dividing the weekly wage by the hours actually worked in a week. Overtime must be paid each week without offsetting it from other weeks in which fewer than 40 hours were worked unless the employer is proceeding under the 207(k) exemption for public safety officers or the 207(j) provision for hospitals and nursing homes.



Example:

An employee is paid a monthly salary that in February translates to a weekly salary of \$500. However, the employee works irregular hours. In week one, the employee works 40 hours. No overtime is due and the employee is paid \$500. In week two, the employee works 50 hours. The employee's regular rate for week two is \$10 (\$500 divided by 50), and he is entitled to a \$50 half-time overtime premium ( $\$10 \times \frac{1}{2} \times 10$ ). The employee's total compensation for week two equals \$550. In week three, the employee works 40 hours and is entitled to no overtime. In week four, the employee works 48 hours, resulting in a regular rate of \$10.41 per hour (\$500 divided by 48). The employee is entitled to a half-time overtime premium of \$41.64 ( $\$10.41 \times \frac{1}{2} \times 8$ ). The employee's total compensation for week four is \$541.64. The employee's salary plus overtime premiums for the month total \$2,091.64.

***Employee Working at Two or More Rates***

When, in a single workweek, an employee performs two or more different types of work for which different straight-time rates have been established, the employee's regular rate for that week can be calculated as the weighted average of such rates. The weighted average is the earnings from all such rates added together, and the total is divided by the total number of hours worked at all jobs.

29 C.F.R. § 778.115.



## Computation of Regular Rate and Overtime Compensation

| TYPE OF EMPLOYEE                                                                 | REGULAR RATE EQUALS                                                                                                       | OVERTIME COMPENSATION                                                                                                      |
|----------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------|
| <b>Hourly:</b> No guaranteed overtime                                            | Hourly rate + other forms of compensation (including bonuses and premiums)                                                | 1.5 X regular rate for hours worked over 40 per week                                                                       |
| <b>Hourly:</b> Guaranteed overtime up to X 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) 1.5 X overtime hours guaranteed which may not exceed X hours; or<br>b) 1.5 X additional overtime above hours guaranteed |
| <b>Salaried:</b> 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                                                                       |
| <b>Salaried:</b> Representing payment for all hours over 40 worked in a workweek | Salary and other forms of compensation ÷ number of hours worked in week (this number will vary with each week)            | 0.5 X regular rate for hours over 40 per week                                                                              |
| <b>Salaried:</b> 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 per week                                                                  |
| <b>Salaried:</b> Fixed weekly salary for workweek of 48 hours                    | Salary and other forms of compensation ÷ 48 (hours/weeks) or other number of hours employee is contracted to work         | 0.5 X regular rate for hours up to 48 or other contracted maximum<br>1.5 X regular rate for hours above contracted maximum |
| <b>Salaried:</b> Paid semi-monthly for all hours worked                          | $[(\text{Salary and other forms of compensation} \times 24) \div 52] \div \text{number of hours worked}$                  | 0.5 X regular rate for hours worked past 40 per week                                                                       |
| <b>Salaried:</b> Paid monthly for all hours worked                               | $[(\text{Salary and other forms of compensation} \times 12) \div 52] \div \text{number of hours worked}$                  | 0.5 X regular rate for hours worked past 40 per week                                                                       |
| <b>Salaried:</b> Paid semi-monthly for 40 hours of work per week                 | $[(\text{Salary and other forms of compensation} \times 24) \div 52] \div 40 \text{ (hours/week)}$                        | 1.5 X regular rate for hours worked past 40 per week                                                                       |
| <b>Salaried:</b> Paid monthly for all irregular hours worked                     | $[(\text{Salary and other forms of compensation} \times 12) \div 52] \div \text{number of hours worked}$                  | 0.5 X regular rate for hours worked past 40 per week                                                                       |



## Multiple Jobs/Dual Employment

“An employee paid on a hourly basis who performs two or more different kinds of work (multiple jobs) 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 employees may agree with his/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 for the same employer (dual employment), the hours worked must be combined together to determine what overtime over 40 hours is due. The regular rate should be fixed by one of the procedures above. As a general rule, any employee who works for two different departments of the same city or county government is a dual employee entitled to payment for which all compensable time has been totaled to determine the overtime rate. This means that employers must check their records carefully, and they must properly compensate such moonlighting or dual employees.

## Joint Employment

When an employee works for two or more separate employers, there normally is no special FLSA problem. Each employer must separately consider and pay overtime for hours the individual worked for that particular employer in excess of 40 hours per week. However, in the case of governments that often work in conjunction with other government organizations, units or department, DOL has stated that “... various departments and agencies of the federal or state government, or of the political subdivisions of a state government, are to be treated as separate employers.” Wage and Hour Opinion Letter dated Aug. 23, 1974.

Even when the employee works for an entirely separate employer, there still may be questions of whether the two employers are so entangled

as to create what is called a “joint employment” relation whereby, for the purpose of the FLSA, they are treated as one entity. “The test for joint employment includes (1) sharing employees’ services so as to interchange employees; (2) an employer acting in the direct interest of another employer; (3) and employers who are not so completely disassociated that they are deemed to be under common control and share employees.” 29 C.F.R. § 791(b).

In an October 10, 1985, opinion letter, DOL identified the following factors that would support a determination that two or more agencies are separate employers:

1. The agencies are treated as separate employers from other agencies for payroll purposes;
2. The agencies deal with other agencies at arm’s length concerning the employment of any individual;
3. The agencies have separate budgets or funding authorities;
4. The agencies participate in separate employee retirement systems;
5. The agencies are independent entities with full authority to perform all of the acts necessary to their function under state statute; and
6. The agencies can sue and be sued in their own names.

If the agencies are found to be separate employers, there still may be a “joint employment relationship” between them. If the agencies are considered joint employers, they are still treated as one under the act. The October 1985 opinion letter identified the following factors as important in determining if a joint employment relationship exists:

1. When employed by one agency, is the employment by another agency completely voluntary on the part of the employee, or is the employee led to believe in any way that he/she should accept additional work at the other agency?



2. When employed by one agency, is the employee assured, promised or led to believe that he/she will receive additional work from another agency?
3. Are employees of one agency given a special preference for additional work at another agency?
4. Does the work for one agency represent only part-time or irregular work?
5. What are the percentages of time in all workweeks in which the employee works for one agency as compared to the employee's work for another agency or agencies?
6. What effect does the employee's work in one job have on his/her other job or jobs? For example, has any employee ever been fired from or been disciplined by one agency because the employee failed to perform a job for another agency?

A special joint employment provision for law enforcement, fire protection and security correctional employees was added to the FLSA. 29 U.S.C. § 207(p)(1). This provision "allows public safety employees on a voluntary basis, to be employed by special detail to a separate and independent employer in fire protection, law enforcement or related activities without combining together the employees' hours of work for the two or more employers." 29 C.F.R. § 553.227. Even if the governing body requires the second employer to hire its public safety employees for particular work or is in any other way involved (for example, approved the job, collects compensation from the second employer, then directly pays the employee), the hours of the public safety employee still are not totaled. 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.

### Half-time Plan for Salaried Employees

"The FLSA permits employers to pay nonexempt employees a fixed salary for a fluctuating workweek

and to compensate them for their overtime hours on a 'half-time' basis." 29 C.F.R. § 778.114(a). Under this method, an employee is paid a fixed salary covering whatever number of hours the job demands in a given week. With straight time already compensated in the salary, only one-half the basic rate (half time) must be paid for overtime. The amount of the half-time payment will vary depending on the number of hours worked in excess of 40 hours in the workweek.

An employer may use the half-time method of calculating overtime only if:

1. The employee understands that his/her salary is meant to cover all hours worked;
2. The parties have a clear understanding that the salary (apart from the half-time payments) will not fluctuate even though the job demands that the employee work more or less than 40 hours in a given week (to avoid confusion, it is recommended that the understanding be in writing or a policy is distributed to employees); and
3. The salary is large enough to assure that the average hourly wage never falls below the FLSA minimum wage.

"To calculate half-time, one must first determine the regular rate of pay by dividing the weekly salary by the number of hours actually worked 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(a).

Example:

A salaried employee works 50 hours in a week at a salary of \$500. The employees' regular rate of pay would be \$10 an hour. Under half-time, the employee would be entitled to one-half the \$10 regular rate for all overtime hours worked.



Thus the employee would be entitled to \$5 an hour multiplied by the 10 hours of overtime worked, or \$50 in extra overtime pay.

In this example, the half-time overtime premium is \$50, while the regular time-and-a-half overtime premium would be \$187.50. Thus, half-time pay is considerably more advantageous to the employer. The advantage of half time for the employer becomes greater the more hours that are worked because the hourly premium pay goes down. The disadvantages of using half time include problems of employee morale, difficulty in retaining good personnel, and administrative problems in calculating pay.

#### **CALCULATING HALF-TIME**

(1) Regular Rate=  
Weekly Salary (÷) Number of Hours Worked

(2) Half-Time Premium= Regular Rate (X)  $\frac{1}{2}$

(3) Extra "Half-Time" Pay=  
Half-time Premium (X)  
Number of Hours Worked Over 40

### **Belo Plans**

Belo Plans are another wage option under the FLSA that can benefit some employers. A Belo Plan is a form of guaranteed compensation that includes a pre-determined amount of overtime. It offers the employee the security of a set weekly income, with the employer able to anticipate and control labor costs and bookkeeping calculations.

There are a number of requirements for an enforceable Belo Plan:

1. There must be a specific agreement/contract between the employer and the employee, although such an agreement need not be in writing. 29 C.F.R. § 778.407.
2. The employee's duties must necessitate irregular hours of work. 29 U.S.C. § 407. This has been

interpreted to mean that the employee's work must fluctuate such that the employee sometimes works more than 40 hours a week and other times fewer than 40 hours during the week.

3. The weekly overtime payment must be guaranteed. 29 C.F.R. § 778.413. In other words, if the Belo Plan calls for 60 hours of work and the employee works 40 hours, the employee still gets full payment;
4. The guaranteed number of weekly hours worked cannot exceed 60. All hours worked beyond 60 per week must be compensated at an additional time and a half.

The type of employees who might qualify for a Belo Plan include "outside buyers, on-call servicemen, insurance adjustors, newspaper reporters and photographers, firefighters, trouble-shooters and the like. 29 C.F.R. § 778.405.

Example:

If the parties agree upon a regular rate of \$7 an hour and enter into a contract that provides a weekly guarantee of pay for 60 hours per week, every week the employee would be paid the regular rate of \$280 (\$7 x 40 hours) plus an overtime rate of \$210 (\$10.50 x 20 hours). Thus, every week, for all work performed up to and including 60 hours a week, the employee would be paid \$490. In the event the employee worked more than 60 hours per week, an additional overtime premium would be payable at the \$10.50 per hour rate.

### **Compensatory Time**

Compensatory time (comp time) is time off in lieu of monetary overtime compensation at a rate of not less than one and one-half hours of compensatory time for each hour of overtime worked. The law (29 U.S.C. § 553.20) "authorizes a public agency to provide compensatory time in lieu of overtime



payments so long as there is an employment agreement or understanding to use comp time. If it was the employer's practice prior to April 15, 1986, to pay existing employees compensatory time, then that practice shall suffice as an understanding permitting the use of compensatory time."

"The agreement or understanding to use compensatory time for employees who do not have representation must be arrived at before the performance of the work." 29 C.F.R. § 553.23(c)(1). "The agreement does not have to be in writing, but a record of its existence must be kept. The agreement doesn't have to be the same for all employees and the employer does not need to make compensatory time available to all employees." 29 C.F.R. § 553.23(c)(1).

"The compensatory time that an employee earns constitutes a legal liability for the employer." 29 C.F.R. § 553.22(a). Employees may accrue up to 240 hours of compensatory time (160 hours actual overtime worked). Employees who work in public safety activities, emergency response activities and seasonal activities may accumulate up to 480 hours of comp time (320 hours actual overtime worked).

"An employee who has accrued compensatory time and requests use of the time must be permitted to use the time off within a 'reasonable period' after making the request if it does not 'unduly disrupt' the operations of the agency." 29 C.F.R. § 553.25(a). At the same time, the DOL emphasizes that "an employee has a right to use the compensatory time earned and must not be coerced to accept more compensatory time than an employer can realistically, and in good faith, expect to be able to grant." 29 C.F.R. § 553.25(b).

While the FLSA contains a provision (29 U.S.C. § 207(o)(5)) addressing an employer's general obligation to honor an employee's request

to use compensatory time, the statute is not clear on whether an employer can exercise control over a worker's accrued comp time by requiring the employee to use it at certain times. The 9th Circuit Court of Appeals, in *Collins v. Lobdell*, 188 F.3d (1999), affirmed "an employer's right to compel use of such time." Then in May 2000, the U.S. Supreme Court resolved the issue, holding that "nothing in the FLSA or its implementing regulations prohibit a public employer from compelling the use of compensatory time." *Christensen v. Harris County*, 120 S. Ct. 1655 (May 1, 2000).

Another important issue surrounding compensatory time has to do with payment for unused compensatory time in the event an employee leaves the public agency. According to DOL regulation "payments for accrued compensatory time earned after April 14, 1986, may be made at any time and must be paid at the regular rate earned by the employee at the time the employee receives payment." 29 C.F.R. § 553.27(b). Upon termination of employment, an employee must be paid for unused compensatory time figured at:

1. The average regular rate received by such employee during the last three years of employment; or
2. The final regular rate received by such employee, **whichever is higher.**

### Time-off Plans

DOL allows the use of "time-off plans." A "time-off plan" is very similar to compensatory time but involves leave taken during the same pay period. "State and local governments may use the time-off plan in addition to compensatory time; however, for a public agency that uses the 207(k) exemption for police and fire, time off may be granted in the pay period for which the work is done up to the maximum hours specified in the regulations." 29 C.F.R. § 553.231(a).



Time-off plans are allowed only under the following conditions (427 U.S. 909 (1976); also Wage and Hour Opinion Letter, Dec. 27, 1968):

1. The employee must get time off at time and one-half for all hours worked over 40 in a week; and
2. The employee must take the compensatory time off during the same pay period in which it was accrued.

Example:

An employee who works 50 hours the first week of a two-week pay period can take off (or be ordered to take off) 15 hours and, accordingly, work only 25 hours the second week without any overtime premium due. If the 50 hours occur during the second week, the overtime premium will be due.

### **OVERTIME FOR POLICE AND FIREFIGHTERS — 207(k) EXEMPTION**

As previously discussed, the executive, administrative and professional exemptions from overtime pay do not apply to police officers, detectives, investigators, inspectors, park rangers, firefighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers, and similar employees regardless of rank or pay level who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of laws; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspects and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work. Therefore, unless exempt as bona fide executive or administrative employees, public safety employees are eligible for overtime compensation just as regular non-exempt employees are. The primary duty

test prevails in deciding whether the employee is exempt. This is especially the case for employees who have the discretion to perform regular police duties in addition to their executive or administrative duties.

The FLSA, however, still provides “an exemption for employees engaged in law enforcement or fire protection activities.” 29 U.S.C. § 213(b)(20). If the agency employs fewer than five employees during the workweek (29 C.F.R. § 553.200), then the full exemption applies. Public agencies not qualifying for the complete exemption may be eligible for a partial exemption as provided in 29 U.S.C. § 207(k). This exemption is commonly known as the “7(k)” or “207(k)” exemption.

### **Public 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 five (5) employees during the workweek.” 29 U.S.C. § 213(b)(20); 29 C.F.R. § 553.200. It does not, however, exempt the public agency from the minimum wage requirements of the law.

“In determining the number of employees in law enforcement and fire protection, each group is considered separately. For example, if an agency has fewer than five fire protection employees but five or more employees in law enforcement activities, it may claim an exemption for the fire protection employees but not for the law enforcement employees. There is no distinction made between full-time and part-time employees and no distinction between employees on duty and those on leave. Volunteers are not, however, counted.” 29 C.F.R. § 553.200(b).



## Definition of Employees Covered by Section 207(k)

All personnel employed in police, fire or other public safety agencies do not qualify for the 207(k) exemption. Only certain law enforcement and fire protection employees are covered. Non-covered law enforcement and fire protection personnel are covered by the normal 40-hour overtime standard of the act.

To be covered by the 207(k) exemption for fire protection employees, the regulations state that an employee in fire protection activities means “an employee, including firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel or hazardous material worker, who (29 U.S.C. § 203(y)); (29 C.F.R. § 553.210(a)):

1. Is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or state; and
2. Is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.”

These employees are covered “regardless of whether they are part-time or full-time employees or are temporary or casual workers employed for a particular fire or a particular time period. The exemption also covers employees who have had no training.” 29 C.F.R. § 553.210(a).

This new definition means that if your city employs firefighters who also run EMS or rescue calls or are on hazardous materials teams, who meet both the tests established by the amendment, then the 20 percent rule no longer applies to any of the functions specifically mentioned in the definition. It is very important that all fire department employees who are eligible to take advantage of the partial exemption from the overtime provisions of the FLSA

meet both the tests. No longer will the number of EMS runs or hours spent on rescue missions threaten to jeopardize the 207(k) status of a firefighter.

This new definition has cleared up the conflicting court opinions and the different tests that have been applied to different situations. According to the U.S. Department of Labor, EMS workers who do not meet the tests established by this new law are not subject to the 207(k) exemption and are therefore considered 40-hour employees. Just because an employee works for a local government and engages in fire protection, the employee still is not exempt from the overtime provisions. If EMS workers work for the police department, public works or other such units of the city they cannot qualify for the 207(k) partial overtime exemption. It is important to remember that this revision of the law applies to fire departments.

Another area of concern has been the status of volunteer firefighters. According to an August 7, 2006, DOL Wage and Hour opinion letter to the International Association of Fire Chiefs, any fee paid to a volunteer firefighter is considered nominal as long as the fee does not exceed 20 percent of what that public agency would otherwise pay to hire a full-time firefighter.

The implementing regulations at 29 C.F.R § 553.106 provide that “a volunteer may be paid only expenses, reasonable benefits or a nominal fee, or any combination thereof, without losing volunteer status. This does not allow a firefighter already on the payroll as a full-time firefighter to respond on his off-duty time as a volunteer. Examples of permissible expenses or benefit payments are described as payment for expenses, such as dry cleaning; an allowance for a requirement, such as a uniform; reimbursement for an out-of-pocket expense, such as transportation;



a payment to provide materials, such as supplies; or a payment for benefits, such as participation in group insurance plans.

While the statute and implementing regulations do not define what constitutes a “nominal fee,” the regulations provide guidance for determining whether a fee is nominal and permissible. If a fee is not nominal, the individual does not qualify as a volunteer and is considered an employee who is covered by the FLSA minimum wage and overtime provisions. FLSA Regulation 29 C.F.R. § 553.106(e) provides that “the factors to consider in making the determination include but are not limited to:

1. The distance traveled and the time or effort required of a volunteer;
2. The availability — limited or unlimited — of a volunteer to provide services; and
3. The basis — as needed or throughout the year — on which a volunteer agrees to perform services.”

“Also not qualifying for the 207(k) exemption are civilian employees of fire departments, fire districts or forest services, such as dispatchers, alarm operators, mechanics, camp cooks or stenographers.” 29 C.F.R. § 553.210(c).

To be covered by the 207(k) exemption for law enforcement officer, “an employee, regardless of rank or status as trainee, probationary or permanent, must meet all the criteria established by statute.” 29 C.F.R. § 553.211(a):

1. Be a uniformed or plainclothes member of a body of officers and subordinates;
2. Be empowered by status or local ordinance to enforce laws designed to maintain public peace and order, protect life and property from accident or willful injury, and prevent and detect crimes;
3. Have the power to arrest; and

4. 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.

“Employees who meet the test are considered ‘engaged in law enforcement activities’ regardless of their rank or their status as trainee, probationary, or permanent employees. Law enforcement employees also meet the test regardless of their being assigned to incidental duties, such as equipment maintenance and lecturing.” 29 C.F.R. § 553.211(b).

“Not eligible for the 207(k) exemption are civilian police department employees who engage in support activities such as dispatchers, radio operators, apparatus and equipment maintenance and repair workers, janitors, clerks and stenographers” (Wage and Hour Opinion, August 21, 1987). “The exemption also does not cover employees in correctional institutions who engage in building repair and maintenance, culinary services, teaching, or psychological, medical and paramedical services.” 29 C.F.R. § 553.211(g).

Some public agencies employ public safety officers who serve as both law enforcement and fire protection personnel. The dual assignment will not defeat the 207(k) or 213(b)(20) exemption provided that the activities performed meet the definition of fire protection or law enforcement. The combined duties should make up at least 80 percent of the employee’s duties. FLSA regulation 29 C.F.R. § 553.213(b) provides that “for employees performing both fire protection and law enforcement activities, the applicable standard is the one that applies to the activity in which the employee spends the majority of work time during the work period.”



## Calculating Overtime Compensation for Public Safety Employees

The FLSA requires state and local governments using the 207(k) exemption to declare the work period for employees engaged in law enforcement and fire protection. The act 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." 29 C.F.R. § 553.224(b). The work period chosen,

however, need not coincide with the pay period for 207(k) employees.

DOL regulation 29 C.F.R. § 553.230(c) established the following table to set forth the maximum hours for each work period after which law enforcement and fire protection employees are entitled to time-and-a-half overtime pay:

### Maximum Hours Worked (Rounded) Before Overtime

| CONSECUTIVE DAYS<br>WORK PERIOD | HOURS OF FIRE<br>PROTECTION | HOURS OF LAW<br>ENFORCEMENT |
|---------------------------------|-----------------------------|-----------------------------|
| 28                              | 212                         | 171                         |
| 27                              | 204                         | 165                         |
| 26                              | 197                         | 159                         |
| 25                              | 189                         | 153                         |
| 24                              | 182                         | 147                         |
| 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                          |



Section 207(k) allows “city and state employers to calculate the pay for non-exempt law enforcement and fire protection personnel based on a maximum 28-day period. **It is improper to pay section 207(k) employees for an ‘average’ number of hours worked.** For employees engaged in fire protection or law enforcement with a work period between seven and 28 consecutive days, overtime for the excess hours is based on all hours over the number declared as the work period. A notation in the payroll records, however, must be made that shows the work period for each employee.” 29 C.F.R. § 553.50.

The rules for computing a Section 207(k) employee’s regular rate are the same as those applied to all other nonexempt employees. When calculating overtime for 207(k) employees, the employer should not use the 40-hour workweek standard. Instead, the employer should look to the employee’s work period. Overtime pay is then calculated for hours worked in excess of the 207(k) maximum.

The rules regulating the definitions of hours worked also apply. If employees are required to arrive at work early, the time is compensable. All time spent by law enforcement personnel in training sessions is counted as hours of work, but they are not compensated for overtime unless the total hours worked exceeds the maximum number of hours in the declared work period.

When off-duty police and firefighters are called back to work, they must be paid at least their regular hourly rate or at time and a half if they fall into an overtime situation. Any on-call premium that is paid must be taken into consideration in determining the employee’s overtime rate. A recent Kentucky case emphasized this point. The court of appeals held that any on-call premium provided as an incentive payment is akin to additional compensation (rather than in the nature of a bonus), and as such, the employee would be entitled to overtime calculated

at time and a half on the incentive pay based on an hourly rate for the pay period. *Kentucky Court of Appeals in City of Frankfort v. James Davenport, et al*, No. 2005-CA-0000036-MR.

Volunteer firefighters who are paid by the call or by the hour when called to duty often are referred to by fire departments as “on-call firefighters.” On-call volunteer firefighters do not fall under this FLSA 207(k) exemption unless they are required to stay at the fire station or within a certain distance of the fire station.

## RECORD KEEPING REQUIREMENTS

“Employers who are subject to the FLSA must keep records for both exempt and nonexempt employees.” 29 U.S.C. § 211(c) and 29 C.F.R. Part 516. There are no civil penalties for employers who fail to keep accurate work records. However, the failure to keep accurate records can expose the employer to FLSA lawsuits brought by employees seeking back wages or overtime. An employee may sue an employer in federal or state court for violating the act.

The regulations do not prescribe a particular order or format in which records should be maintained. “Records may be maintained on paper, microfilm, or an automatic data processing system, provided viewing equipment is accessible and reproductions are identifiable.” 29 C.F.R. § 516.1(a). Additionally, employers may use “any timekeeping method they choose” for keeping track of employees’ hours worked as long as the method is “complete and accurate.”

## Non-exempt Employees

“Employers covered by the act must keep records for a certain amount of time on wages, hours, sex, and other terms and practices of employment.” 29 U.S.C. § 211(c). Items to be maintained for non-exempt employees (29 C.F.R. § 516.2(a)) include:

1. Name in full and employee’s identifying symbol or number;



2. Home address, including ZIP code;
3. Date of birth if under age 19;
4. Sex and occupation;
5. Time of day and day of week on which the employee's workweek begins; for 207(k) employees, the starting time and length of each employee's work period;
6. Regular hourly rate of pay for any workweek in which overtime compensation is due, the basis for the regular rate, and any exclusions therefrom, must also be explained;
7. Hours worked each workday and total hours worked each workweek;
8. Total daily or weekly straight-time earnings or wages due for hours worked during the work day or workweek;
9. Total premium pay for overtime hours; total additions to or deductions from wages paid each pay period; total wages paid each pay period;
10. Date of payment and the pay period covered by the payment; and
11. Employers with comp time arrangements must maintain and preserve records of the number of hours of comp time earned each workweek (the hours must be calculated at a rate of one and a half hours for each overtime hour worked; the number of hours of compensatory time used each workweek; the number of hours of comp time paid in cash (the total amount paid and the date of payment should be included); for 207(k) employees the employer must also make a notation on payroll records indicating the work period for each employee. The notation should show the length of the work period and its starting time.

## Exempt Employees

"Special records of employers are required where exempt employees are concerned." 29 C.F.R. § 516.3. "Almost identical records must be maintained for bona fide exempt executive, administrative, or professional employees." 29 C.F.R. § 516.3. In addition, the

employer must keep records reflecting the basis on which exempt employees are paid. These records must be sufficiently detailed to allow the calculation for each pay period of the employee's total compensation.

## Compensatory Time Records

In addition to the general record-keeping requirements, special procedures must be followed for government employees subject to the compensatory time provisions of the act. Employers with comp time arrangements must maintain and preserve records of:

1. The number of hours of compensatory time earned each workweek, or other applicable work period. The hours must be calculated at a rate of one and a half hours for each overtime hour worked. 29 C.F.R. § 553.50(a);
2. The number of hours of compensatory time used by the employee each workweek or other applicable period. 29 C.F.R. § 553.50(b);
3. The number of hours of compensatory time paid in cash, the total amount paid and the date of payment. 29 C.F.R. § 553.50(c); and
4. Any collective bargaining agreement or written understanding or agreement about earning and using compensatory time off. 29 C.F.R. § 553.50(d).

## Record Retention

The act requires employers "to preserve, for at least three years, payroll records, certificates, collective bargaining agreements and individual contracts; and sales and purchase records." 29 C.F.R. § 516.5. The act also requires employers "to preserve, for at least two years, basic employment and earnings records, wage rate tables, order, shipping and billing records, and records of additions to or deductions from wages paid." 29 C.F.R. § 516.6.

The regulations require each employer "to keep the required records in a safe and accessible location at the place or places of employment."



29 C.F.R. § 516.7(a). Additionally, “every employer employing workers subject to the FLSA must post, and keep posted, a notice explaining the requirements of the FLSA.” 29 C.F.R. § 516.4. The notice must be posted in a conspicuous place in every establishment where such employees work.

## **ENFORCEMENT, REMEDIES, PENALTIES AND SETTLEMENTS**

### **Enforcement**

The FLSA authorizes the Secretary of Labor to initiate investigations to determine whether an employer has violated the provisions of the FLSA. The Department of Labor “may investigate and gather data concerning wages, hours, payment of back wages and other employment practices. They may enter and inspect an employer’s premises and records. They may also ask any question of employees to determine whether any person has violated any provisions of the act.”

29 U.S.C. § 211(a).

DOL has identified the following investigative procedures (WH Publication 1340 (Rev. Aug. 1979)) for a compliance officer to use when conducting an investigation.

The compliance officer will:

1. Identify himself and show the employer official credentials.
2. Confer with the employer or a designated representative, making any necessary explanation about the records that need to be seen and the approach to be taken. The compliance officer also will ask the employer’s permission to conduct private interviews with some employees.
3. Ask the employer to make space available for his use and to designate some staff member who can help with questions about the employer’s records and payroll system.
4. Ask to see certain records to determine what laws apply and what, if any, exemptions are available.

5. Review payroll and time records, often on a spot-check basis, and make notes or transcriptions essential to the investigation. Information from the employer’s records will not be revealed to any unauthorized person.
6. Interview certain employees privately to confirm payroll or time records, identify workers’ duties in sufficient detail to decide if any exemptions apply, and determine if minors are illegally employed.

When all the fact-finding steps have been completed, the compliance officer will ask to meet with the employer or representative about the investigative findings. If no violations are discovered, the employer is told. If violations were found, the employer is told what they are and how to correct them.

### **Remedies**

“Employees claiming FLSA violations can sue their employer for their unpaid minimum wages or their unpaid overtime compensation and the recovery of back wages and liquidated damages (an amount equal to the wages improperly withheld).” 29 U.S.C. § 216(b). “Class action suits, however, may not be brought under the FLSA, but actions on behalf of all similarly situated employees may be brought against an employer if each party gives consent in writing to become a party and such consent is filed in the court in which the action is brought.” 29 U.S.C. § 216(b).

An employee may not file a suit if:

1. The employee has received back pay for wages due under the FLSA under supervision of the Secretary of Labor,
  2. The Secretary of Labor has filed suit to recover the unpaid wages or liquidated damages; or
  3. The Secretary of Labor 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).



When an employee brings a back-pay suit on his own behalf and wins, the court may require the employer to pay the employee's reasonable attorney fees.

The employee may, if successful, also recover court costs, including the employees' witness fees and other miscellaneous cost of the litigation.

"The Secretary of Labor can also bring a lawsuit against an employer on an 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, the employer cannot be liable for liquidated damages; however, if the employee sues directly, the employee can recover attorney's fees while the Secretary of Labor cannot.

"The employee or the Secretary of Labor must file suit within two (2) years after a violation occurs, or three (3) years if the employer has willfully broken the law." 29 U.S.C. § 255. Willful violations occur if the employer knew that its conduct was prohibited by the act or showed reckless disregard for the requirement of the act. "Persons who willfully violate the act are subject to a fine of up to \$10,000, or imprisonment for up to six months, or both." 29 U.S.C. § 216(a). The penalty of imprisonment applies only after two violations are filed by the U.S. Department of Justice. The statute of limitation for criminal prosecution is five years.

## Penalties

The FLSA allows the U. S. Department of Labor to assess civil monetary penalties on employers who willfully violate the act's minimum wage and overtime provisions not to exceed \$1,100 for each violation. 29 U.S.C. § 216(e)(2). "Civil monetary penalties of not more than \$10,000 or imprisonment for not more than six months, or both may be assessed for violating section 206 or 207 (minimum wage and overtime provisions)." 29 U.S.C. § 216(a). The statute of limitation for civil

money penalties is five (5) years." *Field Operations Handbook* § 52 f14(a)(4).

The FLSA provides that any employer who violates the child labor provisions of the act is subject to civil monetary penalties of \$10,000. Child labor violations (29 C.F.R. § 579.3(a) and 29 C.F.R. § 579.5) include:

1. The failure by an employer to maintain and preserve records concerning the date of the minor's birth and proof of the minor's age; and
2. The failure by an employer to take action to assure compliance with all requirements concerning conditions for lawful employment of such minors.

Employers have several defenses that may be used in answering FLSA lawsuits. They include an absolute good faith defense, a defense to liquidated damages and the statute of limitation defense. DOL opinion letters also provide much of the guidance for employers with questions about DOL policies and may be an important defense in a lawsuit brought by employees alleging violations of the FLSA.

The Portal-to-Portal Act provides that "an employer will not be liable for back wages if it can establish that its actions were taken in good faith." Essentially, the absolute good faith defense in the Portal-to-Portal Act (29 U.S.C. § 259(a)) states that:

... no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wage or overtime compensation under the Fair Labor Standards Act of 1938 ... *if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement*



*policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the act or proceeding ...*

To use the defense, the employer must establish that it acted in good faith. “Good faith is defined by the regulations as ‘honesty of intention ... no knowledge of circumstances which ought to put him on inquiry.’” 29 C.F.R. § 790.15(a). For an employer faced with an FLSA lawsuit, the absolute good faith defense means that the employer will not be liable for employee back pay, liquidated damages, pre- or post-judgment interest, costs, etc. Instead, the only relief available is that the employer can be enjoined from committing future violations for the FLSA but cannot be punished for past acts.

Employers wishing to request an opinion letter from DOL should submit a request in writing to:

Wage and Hour Administration  
Wage and Hour Division  
U.S. Department of Labor  
200 Constitution Ave. N.W.  
Washington, D.C. 20210

The request should state all the facts necessary to answer the question posed. The request should name a person for DOL to contact by telephone if any clarification of issues is necessary.

Finally, an employer cannot retaliate against an employee for “whistle blowing”; that is, it cannot discharge an employee for filing a complaint or participating in an FLSA proceeding. The act “forbids any person, including employers, from discharging, retaliating against, demoting, harassing, or in any other manner discriminating against employees for engaging in such a protected activity.” 29 U.S.C. § 215(a)(3). Employers or others who violate the section may face fines of not more than \$10,000 or imprisonment for not more than six

months or both. 29 U.S.C. § 216(a). Additionally, an employee who suffers discriminatory treatment may seek an injunction ordering the employer to reinstate him.

## Settlements

Settling FLSA cases can pose numerous traps for employers. Private settlements between employers and employees are not necessarily final. The statute provides that the Secretary of Labor “is authorized to supervise the payment of unpaid minimum wage or unpaid overtime compensation owing to any employee, and the agreement to accept such payment acts as a waiver by the employee of further rights upon payment in full.” 29 C.F.R. § 216(c).

Additionally, a settlement can be submitted to a court for stipulated judgment in a lawsuit. In certain cases, the courts have rejected non-DOL supervised settlements. *Lynn’s Food Stores Inc. v. United States*, 679 F.2d 1350, 1352-54 (11th Cir. 1982). This fact makes it essential to obtain DOL supervision and blessing for any settlement of FLSA claims. Even where a settlement is rejected, the employer still may use the payments already made as a credit against potential FLSA liability.

If an employer is unable, because of financial reasons, to make a full, lump-sum settlement payment for back wages, it is possible to arrange installment payments provided the employer’s agreement to pay in installments is “both reasonable and firm.” U.S. Department of Labor *Field Operations Handbook* § 53C15. Such installments should be made based on an agreed-upon schedule, and DOL may require the employer to waive the running of any statute of limitation.

“In the event an employee refuses to accept back wages payments or cannot be located, ‘any sums’ not paid to an employee (because of the



aforementioned inabilities) within three years shall be payable into the Treasury of the United States as miscellaneous receipts.” 29 U.S.C. § 216(c).

Upon settlement of an FLSA claim, the DOL may ask the employer to sign (1) an agreement that stipulates present and future compliance with the FLSA, (2) an agreement to deliver certified or cashier’s checks for back wages, and (3) a waiver of the statute of limitation. Settlement procedures for the FLSA are quite formal, and employers should confer with the city’s attorney prior to attempting any private settlements.

Damages awarded to employees as wages generally are taxable. Liquidated damages awarded to employees, however, are not considered wages for employment under 29 U.S.C. § 216(b), even though they still may be taxable. *Keen v. Mid-Continent Petroleum Corp.*, 63 F. sup. 120 (D. Iowa 1945). The Internal Revenue Service has ruled that “such amounts are income to the employee and thus must be included in their federal income tax returns. Rul. 72-268, 1972-1 CF 313.

## CONCLUSION

The best defense to liability under the FLSA is avoidance. Though not currently among the most litigated federal statutes governing workplace compensation, cities continue to be liable for minimum wage and overtime pay to employees who work beyond the prescribed limits. The act is like a deserted mine field waiting for the uninformed and complacent. The liabilities can be significant to any organization and affect each and every employee in some fashion. Supervisors should be advised to ensure that employees do not work over the limits. Accurate records of hours worked should be maintained.

Before dismissing the act as annoying, remember that its primary objective was to “... eliminate labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers ... without substantially curtailing employment or earning power.” In other words, hire more people and minimize your FLSA exposure.



---

## FLSA RESOURCES

29 U.S.C., Chapter 8, **Fair Labor Standards Act of 1938.**

29 U.S.C., Chapter 9, **Portal-to-Portal Act of 1947.**

29 C.F.R. Part 516, **Fair Labor Standards Act Regulations, Records to be Kept by Employers.**

29 C.F.R. Part 519, **Fair Labor Standards Act Regulations, Employment of Full-Time Students at Sub-minimum Wages.**

29 C.F.R. Part 520, **Fair Labor Standards Act Regulations, Employment under Special Certificates of Messengers, Learners, and Apprentices.**

29 C.F.R. Part 525, **Fair Labor Standards Act Regulations, Employment of Workers with Disabilities under Special Certificates.**

29 C.F.R. Part 531, **Fair Labor Standards Act Regulations, Wage Payments under the Fair Labor Standards Act of 1938.**

29 C.F.R. Part 541, **Fair Labor Standards Act Regulations, Defining and Delimiting the Terms "Any Employee Employed in a Bona Fide Executive, Administrative, or Professional Capacity or in the Capacity of Outside Salesman."**

29 C.F.R. Part 548, **Fair Labor Standards Act Regulations, Authorization of Established Basic Rates for Computing Overtime Pay.**

29 C.F.R. Part 553, **Fair Labor Standards Act Regulations, Application of the Fair Labor Standards Act to Employees of State and Local Government.**

29 C.F.R. Part 570, **Fair Labor Standards Act Regulations, Child Labor Regulations, Orders and Statement of Interpretation.**

29 C.F.R. Part 578, **Fair Labor Standards Act Regulations, Minimum Wage and Overtime Violations — Civil Money Penalties.**

29 C.F.R. Part 579, **Fair Labor Standards Act Regulations, Child Labor Violations — Civil Money Penalties.**

29 C.F.R. Part 580, **Fair Labor Standards Act Regulations, Civil Money Penalties — Procedures for Assessing and Contesting Penalties.**

29 C.F.R. Part 778, **Fair Labor Standards Act Regulations, Overtime Compensations.**

29 C.F.R. Part 785, **Fair Labor Standards Act Regulations, Hours Worked.**



- 29 C.F.R. Part 790, **Fair Labor Standards Act Regulations**, *General Statement as to the Effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938*.
- 29 C.F.R. Part 791, **Fair Labor Standards Act Regulations**, *Joint Employment Relationships under the Fair Labor Standards Act of 1938*.
- Aitchison, William Bruce, *The Fair Labor Standards Act — A User's Manual* (1991).
- Ginsburg, Gilbert J. Esq. et al., *Fair Labor Standards Handbook for State, Local Governments and Schools*, Thompson Publishing Group (1998).
- Pols, Cynthia M., et. al., *FLSA: What It Means, What to Do*, International City Management Association and the National League of Cities (1991).
- Athey, Julie, *Defusing the Overtime Bomb: How to Comply with the FLSA*, M. Lee Smith Publishers LLC (1999).
- U. S. Department of Labor, Employment Standards Administration Wage and Hour Division, *Handy Reference Guide to the Fair Labor Standards Act* (White House Publication 1285).
- U. S. Department of Labor, Employment Standards Administration Wage and Hour Division, *State and Local Governments under the Fair Labor Standards Act* (Fact Sheet No. 007).
- U. S. Department of Labor, Employment Standards Administration Wage and Hour Division, *Police and Firefighters under the Fair Labor Standards Act* (Fact Sheet No. 008).
- U. S. Department of Labor, Employment Standards Administration Wage and Hour Division, *Deductions from Wages for Uniforms and Other Facilities under the Fair Labor Standards Act* (Fact Sheet No. 016).
- U. S. Department of Labor, Employment Standards Administration Wage and Hour Division, *Exemption for Executive, Administrative, Professional, and Outside Sales Employees under the Fair Labor Standards Act* (Fact Sheet No. 017).
- U. S. Department of Labor, Employment Standards Administration Wage and Hour Division, *Section 13(a)(3) Exemption for Seasonal and Recreational Establishments Under the Fair Labor Standards Act* (Fact Sheet No. 018).
- U. S. Department of Labor, Employment Standards Administration Wage and Hour Division, *Recordkeeping Requirements Under the Fair Labor Standards Act* (Fact Sheet No. 021).
- U. S. Department of Labor, Employment Standards Administration Wage and Hour Division, *Hours Worked Under the Fair Labor Standards Act* (Fact Sheet No. 022).



U. S. Department of Labor, Employment Standards Administration Wage and Hour Division,  
*Overtime Pay Requirements of the Fair Labor Standards Act* (Fact Sheet No. 023).

U. S. Department of Labor, Employment Standards Administration Wage and Hour Division,  
*1996 Amendments to the Fair Labor Standards Act* (Fact Sheet No. 029).

U. S. Department of Labor, Employment Standards Administration Wage and Hour Division — FLSA Advisor,  
*What Does the Fair Labor Standards Act Require?*

U. S. Department of Labor, Employment Standards Administration Wage and Hour Division — FLSA Advisor,  
*What Does the Fair Labor Standards Act NOT Require?* [www.dol.gov](http://www.dol.gov)



# THE UNIVERSITY of TENNESSEE

---

## MUNICIPAL TECHNICAL ADVISORY SERVICE

The University of Tennessee does not discriminate on the basis of race, sex, color, religion, national origin, age, disability or veteran status in provision of educational programs and services or employment opportunities and benefits. This policy extends to both employment by and admission to the university.

The university does not discriminate on the basis of race, sex or disability in its education programs and activities pursuant to the requirements of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act (ADA) of 1990.

Inquiries and charges of violation concerning Title VI, Title IX, Section 504, ADA or the Age Discrimination in Employment Act (ADEA) or any of the other above referenced policies should be directed to the Office of Equity and Diversity (OED), 1840 Melrose Avenue, Knoxville, TN 37996-3560, telephone (865) 974-2498 (V/TTY available) or 974-2440. Requests for accommodation of a disability should be directed to the ADA Coordinator at the UTK Office of Human Resources, 600 Henley Street, Knoxville, TN 37996-4125.

MTAS1538 • E14-1050-000-030-11