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The Fair Labor Standards Act: An Overview and Update

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The Fair Labor Standards Act

An Overview and Update

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MTAS

**MUNICIPAL TECHNICAL
ADVISORY SERVICE**

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INTRODUCTION

The Fair Labor Standards Act of 1938 (FLSA, herein referred to as “the Act”), primarily known 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 working 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, initially, include 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*, 409 U.S. 1103 (1973); *National League of Cities v. Usery* 426 U.S. 833 (1976); and *Garcia v. San Antonio Metropolitan Transit Authority* 469 U.S. 528, 83 L. Ed. 2d1016, 105 S. Ct. 1005 (1985)]. Even so, application of all the provisions of the act to governments was furthered 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 it restricts child labor. These provisions apply to all state and local government employees, except certain employees excluded from the FLSA definition of “employee,” and those employees who may qualify for exemption from the requirements of the Act. The Act establishes a definition of “hours worked” and provides the conditions when 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 persons 16 years of age or over, as long as overtime pay provisions are met;
- Time off for holidays or vacations. (If employees work on holidays, they need not be paid at time and one-half, or any other premium rate.)

The Act can be enforced by private employee lawsuits or by actions taken by the Department of Labor. If 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 in the amount of back pay. There is a two-year statute of limitation under the Act, extending to three years if a violation is willful. Attorney fees too, are generally recoverable.

APPLICATION TO STATE AND LOCAL GOVERNMENTS

This document details the specifics of the Act. It covers 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 employed in an enterprise engaged in commerce or in the production of goods for commerce” (private sector employers). State and local government employees first became subject to the minimum wage and overtime pay provisions by the Fair Labor Standards Amendments of 1966, which became effective Feb. 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 the 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, 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 the 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 Feb. 19, 1985, the Supreme Court ruled in *Garcia v. San Antonio Metropolitan Transit Authority et al.* 105 U.S. 2041, and (*Donovan v. San Antonio Metropolitan Transit Authority et al.*, (SAMTA), Nos. 82-1913 and 82-1951, that the minimum wage and overtime pay provisions of FLSA apply to the public mass transit employees of the San Antonio Metropolitan Transit Authority. In so doing, the Court overruled its 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 the 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 were not finalized until January 16, 1987.

In 1987, the final regulations were released by the Department of Labor, Wage and Hour Division (29 Congressional .Federal Register (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 as a result of 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, DOL released final regulations in August 1992 to amend the salary basis test for public employers to allow docking of exempt employees' pay for partial-day absences. The regulations [29 C.F.R. §541.5(d)] 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.”

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 FLSA 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 (7) consecutive twenty-four (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 \$5.15 per hour as of Sept, 1997. 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 workweek 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. §531.3).

Special Sub-minimum Wages

The FLSA provides 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”). The regulations allow employers to pay employees under 20 years of age an “opportunity” wage of \$4.25 per hour for the first 90 days of their employment [29 U.S.C. §206(g)]. Certificates are not issued if lower wage rates limit full-time job opportunities for others in

the workplace. 29 C.F.R. §§520.201 - 520.503 provides 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 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. Regulation 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 apprenticeable occupation and does not fall into any of the following categories: marketing; sales administration; administrative support; executive and managerial; professional and semiprofessional occupations (occupations for which entrance requirements customarily include education of college level).*

A special sub-minimum wage may also be paid to learners. A learner is a worker “who is being trained for an occupation, which is not customarily recognized as an apprenticeable trade, for which skill, dexterity and judgement must be learned and who, when initially employed produces little or nothing of value” (29 C.F.R. §520.300). 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).

Regulation 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 only be issued 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. §525.5).

The special minimum wage certificate section also applies to the employment of patient workers at sub-minimum wage. The definition of a patient worker can be found at 29 C.F.R. §525.3(e). The regulations clarify under what circumstances an employer/employee relation exists with patient workers.

The FLSA allows employers to pay employees under 20 years of age an “opportunity” wage of \$4.25 per hour for the first 90 days of their employment [29 U.S.C. §206(g)(1)]. The 90-day eligibility period is defined as “90 consecutive calendar days beginning with the first day of work for an employer.” It is not affected by the number of days during which the young employee actually performs work for the employer. Employers may not displace other employees for the purpose of hiring workers at the lower rate of pay or make partial displacements by reducing hours, wages or employment benefits. Similarly, hiring employees under 20 years of age and then discharging them at the end of the 90 day eligibility period is illegal. Unlike other sub-minimum wage rate provisions outlined by the FLSA, an employer need not obtain a special certificate to apply the lower rate to qualifying employees [29 U.S.C. §205(g)].

Overtime Pay

Overtime pay required by the FLSA is “extra pay for hours worked over 40 during a workweek.” The workweek is any seven consecutive 24 hour periods. The workweek may begin at any particular 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 (1 ½) times their regular hourly rate for hours worked in a workweek beyond 40. The time and one-half overtime premium is generally 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 workweek. 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

Eligibility for Sub-Minimum Pay

Types of Earners	Eligible Employers	Percent of Minimum Wage
<p>Students Full-time students of institutions of higher education (29 C.F.R. §519.11)</p> <p>Full-time students at any level, at least 14 years of age (29 C.F.R. §519.2)</p> <p>Part-time student-learners, at least 16 years old, working in a bona fide vocational training program (29 C.F.R. §520.506)</p>	<p>Institutions of higher education</p> <p>Retail, service or agricultural establishments</p> <p>Accredited school, college or university</p>	<p>No less than 85 percent</p> <p>No less than 85 percent</p> <p>No less than 75 percent</p>
<p>Disabled Disabled or aged workers (29 C.F.R. §524.1)</p> <p>Disabled workers in training programs, multi-handicapped workers, or severely handicapped workers (29 C.F.R. §525.1)</p> <p>Patient workers (29 C.F.R. §529.1)</p>	<p>All employers</p> <p>Generally non-profit institutions or workshops</p> <p>Hospitals or institutions</p>	<p>No less than 50 to 75 percent</p> <p>No less than 25 percent</p> <p>No less than 50 percent</p>
<p>Apprentices 29 C.F.R. §520.400</p>	<p>Most employers, with certain exceptions</p>	<p>No less than 95 percent; special rules for "piece rate" wages</p>
<p>Learners 29 C.F.R. § 520.408</p>	<p>Most employers, with certain exceptions</p>	<p>No less than 95 percent</p>

discrimination between employees on the basis of sex when the work is performed under similar working conditions and require 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 which measures earnings in terms of quantity or quality of production;*
- (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

Local governments may employ minors as a part of their regular workforce or in summer jobs for youth program. The FLSA provides that “minors who are between 14 and 16 years old are permitted to work in any nonagricultural 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. §570.31).”

Minors between 14 and 16 years old may only work outside school hours. 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 only work 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)]. Regulation 29 C.F.R. §570.35(b) provides an exception to the above restrictions for minors 14

and 15 years of age. The exception is provided for those minors who are employed to perform sports concession services at professional sporting events.

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)]. The Act, however, also provides 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 IS COVERED BY THE ACT AND WHO IS NOT?

The FLSA provides coverage to a wide range of employees in the public sector. The Act, however, does not apply to all employees. Some individuals are simply not covered (non-covered employees). Others, while covered by the Act, are exempted from certain provisions of the Act (exempt employees). Non-covered employees are not bound by any provisions of the FLSA. Exempt employees, while covered by the FLSA, are exempt from the minimum wage and overtime provisions of the act. 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 not 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 Tennessee, there are still a few elected officials who also perform work, other than their elected duties for their city (elected commissioners with responsibility for a department or division). The Department of Labor has determined that no matter what activity the elected official performs, he/she is not considered an employee for FLSA purposes (DOL Wage and Hour Opinion Letter, December 3, 1986).

In 1985, a new non-covered employee category was added to 29 U.S.C. §203(e)(2)(C)(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.

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 official.” 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. Furthermore, to qualify for the exemption, a personal staff member must not be subject to the civil service laws of the employing agency.

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 Dec. 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;*
- (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.” Generally, staff includes only persons who are under the direct supervision of the elected official and who have almost daily contact with him. It would not include all members of an operational unit, since all the members could not have a personal working relationship with the elected official.

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, 367-68 (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 are also 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 are non-covered for FLSA purposes.

Another group of individuals not covered by the Act include bona fide volunteers, independent contractors, prisoners and trainees. Regulation 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 benefit, 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. The first has to do with whether two agencies of the same state or local government constitutes the same or separate public agencies. The second issue arises when considering whether the employee is volunteering for the “same type of services” which 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:

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 volunteers as a firefighter at the same public agency. (Note - A January 7, 1988 DOL Opinion letter states that a firefighter may volunteer the same services for a different public agency in another jurisdiction.)

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

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, 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 are 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.*, 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 scheduling 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 are not considered employees under the FLSA and need not be paid minimum wages or overtime. Thus prisoners can be worked long hours by a governmental entity without a 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 (N.D. Ill. 1984)].

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

“Whether trainees are employees ... depends 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

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 are still covered by FLSA record-keeping requirements.

The exemptions we are concerned with relate to executive, administrative and professional 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.

Two independent tests can be applied to determine if an employee qualifies for an executive, administrative or professional exemption. The first is known as the “long test” and specifies in some detail the duties, responsibilities and obligations of the employees. It also requires that the employee be paid on a salary basis and specifies a minimum salary for the employee to qualify for the exemption. The second test, known as the “short test,” sets forth fewer conditions related to employee duties and requires a higher minimum salary for an employee to be exempt. An employee whose duties satisfy either the long or short test will be deemed exempt from FLSA minimum wage and overtime standards.

Under DOL regulations, an exempt executive, administrative or professional employee generally must be paid on a salary basis. An employee is considered to be paid on a salary basis if he or she regularly receives each pay period a predetermined amount constituting all of or part compensation. The amount cannot be “subject to” reductions because of variations in the quality or quantity of the work performed (29 C.F.R. §541.118). The otherwise exempt employees must receive a full salary for any week in which he or she performs work, without regard to the number of days or hours worked.

In response to numerous court cases (notably *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991) and *Auer v. Robbins*, 519 U.S. 452 (1997)), DOL issued additional regulations on the salary basis test that apply only to the public sector. The regulations, found at 29 C.F.R. §541.5(d), state:

- (a) *An employee of a public agency who otherwise meets the*

requirements of §§541.1, 541.2 or 541.3 on the basis that such employee is paid according to a pay system established by statute, ordinance, or resolution, 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 workday when accrued leave is not used by an employee because:

- (1) *Permission for its use has not been sought or has been sought and denied;*
 - (2) *Accrued leave has been exhausted; or*
 - (3) *The employee chooses to use leave without pay.*
- (b) *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 accordingly reduced.*

This regulation, in effect, allows public employers to use pay systems where deductions for absences of less than a day can be made from the salary of exempt employees, so long as the pay system is established by statute, ordinance, regulation, policy or practice.

The FLSA provides exceptions to the salary requirement for certain employees, including workers in particular professions. These exceptions allow workers to qualify as exempt from minimum wage and/or overtime provisions even if they are not paid on a salary basis, as long as they meet applicable duty requirements. Employees working in the traditional professions of law, medicine and teaching do not have to be paid a salary to be exempt according to 29 C.F.R. §514.013 and 541.314. Instead these workers can be paid on an hourly basis. Nurses, therapists, dietitians, social workers, and psychologists are excluded from this exemption [29 C.F.R. §541.314(c)].

Payment on a salary basis is also not a requirement for exemption in the cases of certain employees in computer-related occupations (29 C.F.R. §541.303) who meet the applicable duty test and are paid on an hourly basis, if their hourly rate of pay exceeds \$27.63 [29 U.S.C. §213 (a)(17)].

Each of the “short tests” for the white collar exemption contains a different primary duty requirement (29 C.F.R. §§541.1,541.2,541.3). A rule of thumb is that if an employee spends at least 50 percent of his/her time involved in the appropriate primary duty, he/she will satisfy the requirement for the exemption (29 C.F.R. §541.103). The regulations (29 C.F.R. §§541.103, 541.206, 541.304) also provide the following guide to determining whether an employee satisfies the primary duty requirements:

- (1) *The relative importance of the worker’s managerial duties as compared with other types of duties;*
- (2) *The frequency with which the employee exercises discretionary powers;*
- (3) *The employee’s relative freedom from supervision; and*
- (4) *The relationship between the employee’s salary and the wages paid other employees for the same kind of work.*

Each of the white-collar exemptions contains either a primary duty requirement (short test) or a 20 percent non-exempt work limitation (long test).

Executive Employee Exemption

An employee who meets either the long test or the short test for executives is exempt. For the long test, an executive employee must meet all the requirements to be exempt from the FLSA minimum wage and overtime provisions. The **long test** is as follows (29 C.F.R. § 541.1 and 29 C.F.R. §541.101):

- (1) *Duties:* Primary management of the agency, department or subdivision.
- (2) *Supervision:* Customarily and regularly directs two or more other employees.
- (3) *Authority:* Possesses the power to hire or fire employees or make suggestions that are given substantial weight in such decisions, including promotions.
- (4) *Discretion:* Customarily and regularly exercises discretionary power.
- (5) *Work Responsibility:* Does not devote more than 20 percent of his/her hours in a workweek to the performance of activities not closely related to items (1) through (4).
- (6) *Compensation:* Is paid not less than \$155 per week exclusive of board, lodging or other facilities. On a yearly basis, \$155 per week equals about \$8,060 annually.

An executive employee must meet all the requirements of the **short test** to be exempt from the minimum wage and overtime provisions of the Act.

They include:

- (1) *Compensation:* Is paid not less than \$250 per week exclusive of board, lodging or other facilities. On a yearly basis, \$250 per week equals about \$13,000 annually.
- (2) *Duties:* Primary management of the agency, department, or subdivision.
- (3) *Supervision:* Customarily and regularly directs two or more other employees. (The DOL *Field Operations Handbook* interprets 29 C.F.R. §541.105(a) as requiring, in most circumstances, an employee to supervise the equivalent of 80 hours of a subordinate's work.)

Examples of executive employees who are generally exempt from the FLSA include:

- Executive director of government agencies
- Department chiefs
- City managers
- Chief clerks of a court
- Police and fire chiefs
- District and battalion fire chief [*Smith v. City of Jackson, MS*, 954 F.2d 296 (5th Cir. 1992)]
- Fire shift commanders [*Hartman v. Arlington County*, 903 F.2d 290 (4th Cir. 1990)]

In using both the short and long test to determine whether an employee is exempt as an executive, the amount of time spent on managerial duties, the amount of discretion the employee has, and the number of employees he/she supervises or directs are critical. In addition, the type of job skills used is also important; the executive exempt employee exercises managerial duties that are critical to the successful operation of the organization.

Administrative Employee Exemption

An employee who meets either the long test or the short test for administrators provided in 29 C.F.R. §§541.2 and 541.201 is exempt. An administrative employee must meet all of the following long test requirements to be exempt from the FLSA minimum wage and overtime provisions:

- (1) *Duties:* Primarily consist of either -
 - (a) *non-manual or office work directly related to management policies or general business operations; or*
 - (b) *performance of administrative functions in an educational establishment in work related to academic instruction or training.*
- (2) *Discretion:* Customarily and regularly exercises discretion and independent judgement.
- (3) *Supervision:*
 - (a) *regularly and directly assists a person employed in an executive or administrative capacity; or*
 - (b) *performs work requiring special training, experience or knowledge under only general supervision; or*
 - (c) *executes special assignments and tasks under only general supervision.*
- (4) *Work Responsibility:* Does not devote more than 20 percent of work time to activities not directly or closely related to performance of administrative work.
- (5) *Compensation:* Is paid not less than \$155 per week exclusive of board, lodging or other facilities. (On a yearly basis, \$155 per week equals about \$8,060 per year.)

An administrative employee must meet all the short test requirements to be exempt. They include:

- (1) *Compensation:* Is paid at least \$250 per week exclusive of board, lodging or other facilities. (On a yearly basis, \$250 per week equals about \$13,000 per year.)
- (2) *Duties:* Primarily performs office or non-manual work directly related to management policies or general business operations, or the performance of functions in the administration of an educational establishment, or a department or subdivision in work directly related to the academic instruction or training.
- (3) *Responsibilities:* Primary duty includes work requiring the exercise of discretion and independent judgement.

Of the three FLSA exemptions, the administrative exemption is perhaps the most vague and subject to differing interpretations. The following types of employees are generally categorized as administrative employees who are exempt from the FLSA:

- Executive and administrative assistants [29 C.F.R. §541.201(a)(1)];
- Staff employees such as tax experts, statisticians, personnel directors [29 C.F.R. §541.201(a)(2)];
- Certain buyers and contract administrators [29 C.F.R. §541.207(d)(2)];
- Data processing senior system analysts and sometimes computer programmers [29 C.F.R. §541.207(c)(7)];
- Office managers who do not supervise two or more employees, yet exercise discretion and judgement [29 C.F.R. §541.208(f)];
- Purchasing agents, buyers, personnel directors and labor relations directors who work in one-person departments [29 C.F.R. §541.201(a)(2)(ii)].

Because the administrative field contains jobs with extremely diverse functions and a wide variety of titles, job title alone is of little assistance in determining whether an employee is exempt. The exemption depends on the duties of the employee and other qualifications, not on how the employer classifies the employee.

Professional Employee Exemption

An employee who meets either the long test or the short test for professionals in 29 C.F.R. §§541.3 and 541.301 is exempt. A professional employee must meet all of the following requirements to be exempt from the Fair Labor Standards Act minimum wage and overtime provisions:

- (1) *Duties:* Primarily work requiring
 - (a) *advanced learning acquired by a prolonged course of specialized intellectual instruction, as distinguished from general academic education, apprenticeship or routine training; or*
 - (b) *original or creative work depending primarily on invention, imagination or talent; or*
 - (c) *teaching, tutoring, instructing or lecturing for a school system or educational institution.*
- (2) *Discretion:* Work requiring the consistent exercise of discretion and judgment.
- (3) *Work product:* Predominantly intellectual and varied in character and cannot be standardized in relation to a given period of time.
- (4) *Work responsibility:* Must devote not more than 20 percent of his/her hours to activities not essential, (not part of or necessarily incident to the work).

- (5) *Compensation:* Is not paid less than \$170 per week exclusive of board, lodging or other facilities. (On a yearly basis, \$170 per week equals about \$8,840 per year.)

A professional must meet all of the requirements of the short test to be exempt from the minimum wage and overtime provisions. The short test includes:

- (1) *Compensation:* Is paid not less than \$250 per week exclusive of board, lodging or facilities. (On an yearly basis, \$250 per week equals about \$13,000 per year.)
- (2) *Duties:* Primarily consist of performing work requiring advanced learning or work as a teacher.
- (3) *Discretion:* Must include work which requires the consistent exercise of discretion and judgment or consist of work requiring invention, imagination or talent in a recognized field of artistic endeavor.

The following types of employees are generally categorized as professional employees who are exempt from the FLSA:

- The so-called learned professions, such as medicine, law and dentistry [29 C.F.R. §541.302(e)(1)];
- Artistic professions and architects or degreed planners [29 C.F.R. §541.303, 541.302(e)(1)];
- Teachers and professors [29 C.F.R. §541.302(g)(2)];
- Professional medical technologist (29 C.F.R. §541.306);
- Registered nurses [29 C.F.R. §541.302(e)(1)];
- Accountants, depending on training and job duties, but not necessarily junior accountants or accounting clerks [29 C.F.R. §541.302(f)];
- Engineers and scientists [29 C.F.R. §541.302(e)(1)].

Certain computer employees may now be exempt as professional employees. Under regulations 29 C.F.R. §541.303(b), to be considered an exempt professional, an employee's primary duty must consist of one or more of the following:

- (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 modification 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 operation systems; or*
- (4) *A combination of the aforementioned duties, the performance of which requires the same level of skills.*

The professional exemption only applies to those highly skilled employees who have achieved a level of proficiency in the theoretical and practical application of a body of highly-specialized knowledge in computer systems analysis, programming, and software engineering; it does not include: (1) trainees or employees in entry level positions learning to become proficient in such areas; nor (2) employees in these computer-related occupations who have not attained a level of skill and expertise that allows them to work independently and generally without close supervision [29 C.F.R. §541.303(c)]. The regulations also state that the level of expertise and skill required to qualify for the exemption is generally attained through a combination of education and experience in the field. While some employees commonly have a bachelor's or higher degree, no degree is required for this exemption.

To meet the long test requirements for a professional employee, the work engaged in must be predominately intellectual and varied in character, as opposed to routine mental, mechanical, or physical work (29 C.F.R. §541.306).

Recreational Employee Exemption

The FLSA contains specific exemptions from minimum wage and overtime provisions for amusement or recreational employees. Regulation 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 33¹/₃ 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 recreational establishment. Since some governments operate stadiums, convention centers, amusement parks and facilities, and recreational establishments like nature centers, ice skating rinks, state fair grounds, tennis courts, golf courses, parks, gymnasiums, outdoor and indoor swimming pools, zoos and museums, this exemption from the act can be significant.

This following chart provides an overview of the special categories of employees affected by the Fair Labor Standards Act. The first column lists those individuals 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 cites all employees who are covered by the overtime and record keeping provisions of the Act. Finally, the special category of employees is listed in column three.

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		School Personnel
Legal Advisors	Seasonal		Hospital and Nursing Home Employees
Bona Fide Volunteers	Recreational		Other
Independent Contractors	Other		
Prisoners			
Certain Trainers			

Quiz: Who is covered by the FLSA

Determine whether the individuals described below are non-exempt, not covered, or exempt from the

- | | |
|---|--|
| <p>(1) A collector of delinquent accounts who supervises no work of any employee, and who does not directly assist an executive but performs specialized or technical work on executive special assignments.</p> <p>(2) The foreman of a shop who spends part of his Saturdays and Sundays working on machines in a maintenance capacity.</p> <p>(3) A salaried fire captain who had a part-day absence docking policy whose primary duty is management.</p> <p>(4) Housing inspector who spends most of her time performing clerical tasks, maintaining records and answering the phone.</p> <p>(5) Purchasing agents, buyers, and personnel directors who work in one-person departments.</p> | <p>(6) Patrol sergeant, investigative sergeant and administrative/specialist sergeant.</p> <p>(7) Executive and administrative assistants.</p> <p>(8) Probation officer.</p> <p>(9) Teachers and professors.</p> <p>(10) Chief nurse in charge of all first aid.</p> <p>(11) Engineering employees who worked all or part of their time on designs, and who were paid by the hour.</p> <p>(12) Reporters employed by a newspaper publishing company.</p> |
|---|--|

Answers to Quiz:

1. Non-Exempt; 2. Exempt; 3. Exempt; 4. Non-Exempt; 5. Exempt; 6. Non-Exempt; 7. Exempt; 8. Non-Exempt; 9. Exempt; 10. Exempt; 11. Non-Exempt; 12. Non-Exempt

HOURS WORKED AND COMPENSATION

All employees not exempted or excluded from the act 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 (20 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.

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 the:

- 1) *employee is completely relieved from duty and allowed to leave the job; or*
- 2) *employee is relieved until a definite, specific time; and*
- 3) *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, are all working during their periods of inactivity. The rule also applies to an employee who works away from the employer’s premises. Employees who wait before starting their duties because they arrived at the work place 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 [*Irwin v. Clark*, 400 F.2nd 992 (9th Cir. 1968)].

DOL has defined “off duty” as a:

... periods 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. [DOL W.H. Publication 1459 (May 1985)].

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 in 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. 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 shows up 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” rather than “waiting to be engaged” (29 C.F.R. §785.14).

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 also applies 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. § 785.15).

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 are 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. Turner*, 286 F.2nd. 105 (5th Cir. 1960), *Mitchell v. Grienetz*, 235 F.2nd. 621 (10th Cir. 1956); and *Aeromotive Metal Products, Inc. v. Wirtz*, 312 F.2nd 728 (9th Cir 1963)]. 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 breaks.

A bona fide meal time, when the employee is completely relieved from duty, is not work time (29 C.F.R. §785.19). 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).

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 eighteen (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 volunteer work done 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)].

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 (*Rotondo v. Georgetown, S.C.*, 2 Wage and Hour Cas. 2d. (BNA) 946 (D.S.C. 1994). However, in *Albee v. Bartlett* (Ill. 2 Wage and Hour Cas. 2d. (BNA) 421 (N.D. Ill. 1994), the courts determined that occasional interruptions in a police officer's meal break did not entitle the officer to compensation.

If a public agency elects to pay overtime compensation to firefighters and law enforcement personnel in accordance with section 7(a)(1) of the Act, the public agency may exclude meal time from hours worked if all the tests in §785.19 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, in the case of law enforcement personnel, 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 section 29 U.S.C. §207(k), who are confined to a duty station, meal time cannot be excluded from the compensable hours of work where (1) the firefighter is on a tour of duty of less than 24 hours, and (2) where the firefighter is on a tour of duty of 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), 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; and*
- (2) *Adequate sleeping facilities for an uninterrupted night's sleep are provided; and*
- (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 are also 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 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, 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 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 lead 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 skill in doing his/her 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 outlined in 29 U.S.C. §207(k). Therefore, basic and advanced training is 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. 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 which expanded the compensable working time requiring payment under the FLSA. These decisions culminated in the case of *Anderson v. Mt. Clemens Pottery Co.* (328 U.S. 680(1946).

In the Anderson case employees said that they were entitled to pay from the time they punched in on the time clock at the entrance to the plant until the time they punched out at the end of the day. The Supreme Court denied this claim, in part, for the reason that not all of the time that elapsed from the moment an employee punched in was necessary to

perform his/her work. The court, however, 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/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. §785.35).

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). 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. Again, 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). 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 an employee, however, leaves home on his/her way to a work-site, but stops at the home office for his/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 an employee, after completing a day's work, 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 non-exempt 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

The following are examples of working time for which an employee is entitled to be compensated:

- Time spent by budget or fiscal employees required to remain until an official audit is finished (29 C.F.R. §785.15).
- Caring for tools that are a part of principal activities, such as fire hoses by firefighters and guns by police officers [*Cooley v. United States*, 26 Wage & Hour Cas. (BNA) 50 (Fed.Cir. 1983)].
- Charitable work requested or controlled by the employer (29 C.F.R. §785.44).
- Cleaning and oiling machinery [29 C.F.R. §785.24(b)(1)].
- Driving van pools when the driver is chosen by the employer and under the control of the employer (*Field Operations Handbook* §31b02).
- Emergency work/travel time (29 C.F.R. §785.36).
- Fire drills or other disaster drills, whether voluntary or involuntary, either during or after regular working hours (*Field Operations Handbook* §31b15).
- Meal periods, if: (a) employees are not free to leave their posts; or (b) the time is too short to be useful to employees (20 C.F.R. §785.19).
- Medical attention during working hours at

the employer's direction (29 C.F.R. §785.43).

- On-call where liberty is restricted (29 C.F.R. §785.17).
- Preparatory work that is a part of the principal activity (*Lindow v. United States*, 738 F.2d 1057 (9th Cir 1984).
- Principal activities (29 C.F.R. §790.8).
- Rest periods of 20 minutes or less (29 C.F.R. §785.18).
- 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).
- Stand-by time during short plant shutdowns (29 C.F.R. §785.15).
- Training in regular duties to increase efficiency (29 C.F.R. §785.29).
- Training programs required by the employer (29 C.F.R. §785.27).
- 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).
- 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).
- Waiting for work after reporting time or while on duty (29 C.F.R. §785.15).
- Washing up or showering, if it is required due to the nature of the work (*Steiner v. Mitchell*, 350 U.S. 247 (1956)).
- 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

The following are examples of work-related matters for which an employee need not be compensated:

- Absences (including sick leave, annual leave, holidays, funerals and weather-

- related absences) [29 C.F.R. §778.218(d)].
- 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).
- Changing clothes, if the change is for the employee's convenience [29 U.S.C. §203(o)].
- Charitable work done voluntarily outside the working hours (29 C.F.R. §785.44).
- Clothes changing at home (*Field Operations Handbook* §31b13).
- Holidays on which an employee does not work [29 C.F.R. §778.218(d)].
- Jury duty [29 C.F.R. §778.218(d)].
- Meal periods involving no duties and lasting one-half hour or longer (29 C.F.R. §785.19).
- Medical attention outside of working hours, or not at the direction of the employer (29 C.F.R. §785.43).
- On-call time where the employee merely leaves a telephone number and is not restricted (29 C.F.R. §785.17).
- Operation of an employer's motor vehicle for the employee's own commuting convenience (*Field Operations Handbook* §31c02).
- 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).
- Shutdowns for regular, customary equipment maintenance where the employee is free to leave the premises (29 C.F.R. §785.15).
- Time spent before, after or between regular working hours (29 C.F.R. §790.7).
- Trade school attendance, which is unrelated to present working conditions (29 C.F.R. §785.30).
- Training programs voluntarily attended that are unrelated to regular duties and involve no productive work (29 C.F.R. §785.27).
- Travel: (a) from home to a work site, and vice versa (29 C.F.R. §785.35; (b) on overnight trips during non-working hours, except while performing duties or other work (29 C.F.R. §785.39).
- 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).
- 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)].
- Washing up or showering under normal conditions [29 C.F.R. §790.7(g)].

Quiz:

Whose Time is Compensable for Overtime?

- (1) Sarah is a senior clerk in the fire department. Her husband drops her off at work every day at 7:00 a.m. He has to be at work by 7:30 a.m. Sarah's shift begins at 8:00 a.m. When Sarah arrives, she generally starts preparing for the day by filling the copiers and printers with paper, checking overnight e-mail messages and routing them to the appropriate person, etc. Is Sarah's time before 8:00 a.m. compensable?
- (2) Jack was just about to get off work at 4:30 p.m., when it began snowing. Jack works in the public works department. His manager just informed him that he may have to drive the salt trucks if the weather doesn't get any better. After about an hour, the snow stops and Jack is sent home. Is Jack's time after 4:30 p.m. compensable?
- (3) Linda is a clerk at the circulations desk of a small branch library. Because there are only two employees in the building at any given time, Linda usually takes her lunch at her desk and answers the phone. Is the time Linda spends at lunch compensable?
- (4) Employees are afforded two 15-minute breaks each day. Is the time compensable?
- (5) Jason was recently hired by the city as a police officer. He has spent the last week at the Police Officers Training Academy. During the week, classes were held from 7:00 a.m. to 6:00 p.m. with an hour lunch break. Twice during the week, the officers were required to attend night surveillance training that lasted from 9:00 p.m. to 10:00 p.m. Is any of Jason's training time compensable?
- (6) Fred is a meter reader for the town. He recently asked to attend a class in "New Technology in Meter Reading" and was granted permission to do so. The class is scheduled on Saturday morning in Washington, D.C. Fred leaves work on Friday afternoon and drives to Washington for the class. Is Fred's driving time compensable?
- (7) The city pays employees an extra \$100 per week for on-call duties. The employee is given a pager and a cellular phone and told to report for duty when called. On the first night, Gary is called at 2:00 a.m. to respond to the downing of an electrical pole. Gary works until 6:00 a.m. working the call. He reports to work the next morning two hours late. He is not called out any more during the week. Is Gary due any overtime compensation?
- (8) Ray is a member of the city's fire department. The city council voted at the last meeting to start deducting sleep time from employees' pay. Firefighters work 23 hours and 45 minutes per shift. Is the sleep time compensable?

Answers to Quiz:

- (1) Yes; (2) Yes; (3) Yes; (4) Yes; (5) Yes; (6) No;
(7) Yes - 4 hours at time and a half minus the 2 hours for being late; (8) Yes.

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 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 non-exempt worker is engaged. This usually means overtime for those 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 non-exempt employees is generally a fixed period of 168 hours-- seven consecutive 24-hour periods (29 C.F.R. §778.105)--which is established by the employer for each employee. It may begin on any day of the week and on any hour of the day; it need not coincide with the calendar week. The FLSA also provides for the declaration of a longer work period for law enforcement and fire protection personnel [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 on a daily, weekly, bi-monthly, or other basis. While overtime must be calculated on a workweek basis, there is no requirement in the FLSA that the 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 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)(3)] 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 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 this provision. 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. Regulation 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 the calculation of 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).

The following are examples of compensation paid to non-exempt employees that are included in determining the regular rate of pay:

- On-call pay (29 C.F.R. §778.223);
- 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);
- Contest prizes (29 C.F.R. §778.330);
- 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)]);
- Salaries;
- Salary increases, including retroactive increases;
- Shift differentials, hazardous-duty pay and longevity pay [*Featsent v. City of Youngstown*, 859 F. Supp. 1134 (N.D. 1993)]; and
- 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 also known 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.

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

- Absence pay for infrequent or unpredictable absences, such as vacation, illness, bereavement, disaster relief payments or jury leave (29 C.F.R. §778.218);
- Discretionary bonuses (29 C.F.R. §778.211);
- Holiday pay, if it is equivalent to regular earnings (29 C.F.R. §§778.230, 778.218);
- Premium-pay, such as time compensated at time and one-half (29 C.F.R. §778.201);
- 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)];
- Severance pay (29 C.F.R. §778.224);
- 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, 778.213);
- Call back premium pay (29 C.F.R. §778.221);
- Travel expenses, if business trips are taken by the employee [29 U.S.C. §207(e)(2)];
- 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);
- Weekly overtime pay, in any amount (29 C.F.R. §778.201);

- Health and Welfare fund benefits received by the employee (29 C.F.R. §207.215);
- Death benefits (29 C.F.R. §778.218);
- 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);
- Reasonable uniform allowances [29 C.F.R. §217(b)(2)];
- Payment made to an employee for periods of absence due to the use of accrued compensatory time [29 C.F.R. §553.26(c)];
- Tuition reimbursement (Wage and Hour Opinion Letter, Sept. 17, 1993); and
- Automobile reimbursement (Wage and Hour Opinion Letter, Dec. 12, 1988).

Chapter 32 of the DOL *Field Operations Handbook* identifies other remuneration which 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. In other words, employee deductions and contributions are permissible, but overtime is calculated on the regular rate before the deductions are made (29 C.F.R. §778.304). 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 which the law requires to be born by the employer.

If the wearing of a uniform is required by law or by the employer, the cost of the uniform is considered to be a business expense of the employer. If the employer requires the employee to bear the cost, it may not reduce the employee's wage below the minimum wage or cut into overtime compensation required by the Act [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. So long as the employer is continuing to pay in excess of the minimum wage, the employer may prorate deductions for uniforms over a period of paydays.

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

- Voluntary assignment by the employee;
- Charitable contributions by the employee;
- Garnishments;
- Health and welfare plan contributions by the employee;
- Insurance premiums paid for the employee's convenience;
- Pension plan contributions by the employee;
- Repayment of salary advances;
- Savings plan contributions by the employee;
- Withholding of taxes for or on behalf of the employee, including state and federal income tax, social security and unemployment compensation;
- Union dues and fees; and
- U.S. savings bond purchases.

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 hourly employees; hourly rate and bonus employees; salaried employees working a fixed workweek of 40 hours; salaried employees paid for all hours worked, but working in excess of a 40 hours workweek; salaried employees working a

fixed workweek under 40 hours; Fixed weekly salary for a fixed workweek over 40 hours; semi-monthly salary pay; monthly salary pay; irregular hours; piecework; day rate and job rates; employee working at two or more rates; payments other than cash; and overtime based upon authorized basic rates.

Hourly Employees

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

Hourly Rate and Bonus

Example:

If an employee worked 46 hours in a workweek and received 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 would be computed as follows: (46hours X \$7 = \$322.00 + 19.20 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 (46 hours X \$7.42) + (6 hours X \$3.71) or \$363.58.

Salaried Employees 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 for which the salary is intended to cover.

Computation of Regular Rate and Overtime Compensation

Type of Employee	Regular Rate Equals	Overtime Compensation
Hourly: no guaranteed overtime	Hourly rate ÷ other forms of compensation (including bonuses and premiums)	1.5 x regular rate for hours worked past 40 hours
Hourly: 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 b) 1.5 x additional overtime above hours guaranteed
Salaried: fixed workweek of 40 hours	Salary and other forms of compensation ÷ 40 (hours/week)	1.5 x regular rate for hours worked past 40 per week
Salaried: representing payment for all hours worked in more than 40 hour work week	Salary and other forms of compensation ÷ number of hours worked in week (this number will vary with each week)	.5 x regular rate for hours more than 40 per week
Salaried: fixed workweek of 40 hours	Weekly salary and other forms of compensation ÷ number of hours worked in a week (this number will vary with each week)	Straight time at regular rate for hours up to 40 per week
Salaried: 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	.5 x regular rate for hours up to 48 or other contracted maximum 1.5 regular rate for hours above contracted maximum
Salaried: paid semi-monthly for all hours worked	[(Salary and other forms of compensation x 24) ÷ 52] ÷ number of hours worked	.5 regular rate for hours worked past 40 per week
Salaried: paid monthly for all hours worked	[(Salary and other forms of compensation x 12) ÷ 52] ÷ number of hours worked.	.5 x regular rate for hours worked past 40 per week
Salaried: paid semi-monthly for all hours worked	[(Salary and other forms of compensation x 24) ÷ 52] ÷ number of hours worked	1.5 regular rate for hours worked past 40 per week
Salaried: paid monthly for all irregular hours worked	[(Salary and other forms of compensation x 12) ÷ 52] ÷ number of hours worked.	.5 x regular rate for hours worked past 40 per week

Example:

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

Salaried Employee Paid for all Hours Worked, but Working in More than 40 Hour 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. Such an employee's regular rate is determined by dividing the weekly salary and other forms of compensation by the number of hours worked.

Example:

If the employee works 50 hours for a weekly salary of \$500, the regular rate is \$10 an hour. Overtime for such a salaried employee is based on half-time and would be \$5 an hour for 10 hours, that 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 Under 40 Hours

The regular rate for an employee working a fixed workweek of less than 40 hours may 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 wages and other forms of compensation by the number of hours in the workweek.

Example:

Joe works a 35-hour workweek for a salary of \$300. Under the act, Joe's maximum straight-time workweek is 40 hours. Joe's regular rate is \$8.57 per hour (\$300 divided by 35 hours). If Joe works overtime, he is entitled to \$8.57 per hour for hours 36 - 40 and \$12.86 ($\$8.57 \times 1\frac{1}{2}$) for each additional hour.

The other method of calculating the regular rate for workweeks under 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 would also be based upon a 40 hour workweek and not the lesser workweek actually labored.

Fixed Weekly Salary For a Fixed Workweek Over 40 Hours

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

Example:

Susan is paid \$480 for a 48-hour week. The applicable statutory straight-time workweek is 40 hours. Susan's rate is \$10 per hour ($\480 divided by 48 hours = \$10). Her weekly wage is \$520, calculated as follows: $\$480 + [(\frac{1}{2} \times \$10) \times (48-40)]$. For hours worked over 48 hours, Susan 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.

Semi-Monthly Salary Pay

The regular rate for an employee paid a semi-monthly salary is computed by breaking down 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 Susan earns \$600 semi-monthly and works 40 hours per week, her 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 Joe earns \$1,500 a month and has a statutory straight-line workweek of 40 hours, Joe's regular rate would equal \$8.65 ($[\$1500 \times 12]/52 = \346.15 per week; $\$346.15/40 = \8.65 hourly rate). If Joe worked 44 hours in a workweek, he would be entitled to overtime pay for four hours at time and a half ($\$8.65/2 = \4.33 ; $4.33 + 8.65 = \$12.98$ overtime rate) ($4 \times \$12.98$) or \$51.92. Joe's salary for the month would equal \$1,551.92. Joe might also 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 setoff from other weeks where less than 40 hours were worked, unless the employer is proceeding under the 207(k) exemption or the 207(j) provision for hospital or nursing home establishments.

Example:

Joe is paid a month salary that in February translates into a weekly salary of \$500. However, Joe works irregular hours. In week one, Joe works 40 hours. No overtime is due and he is paid \$500. In week two, Joe works 50 hours. Joe'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$). Joe's total compensation for week two equals

\$550. In week three, Joe works 40 hours and is entitled to no overtime. In week four, Joe works 48 hours, resulting in a regular rate of \$10.41 per hour ($\500 divided by 48). Joe is entitled to a half-time overtime premium of \$41.64 ($\$10.41 \times \frac{1}{2} \times 8$). Joe's total compensation for week 4 is \$541.64. Joe's salary plus overtime premiums for the month totals \$2,091.64.

Employee Working at Two or More Rates

Where an employee in a single workweek works at 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, that is, the earnings from all such rates are added together and this total is then divided by the total number of hours worked at all jobs (29 C.F.R. §778.115).

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 an employee 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 at such jobs must be combined to determine what overtime over 40 hours is due. Then the regular rate should be fixed by one of the above procedures. In addition, 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 in 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 is normally no special FLSA problem. Each employer must separately consider and must 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 governmental organizations, units, or departments, 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 may still 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;*
- (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, then 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 an 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, and 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 non-exempt 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). 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 that the policy be distributed to employees);*
- (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).

Example:

A salaried employee works 50 hours in a week at a \$500 salary. His/her regular rate of pay would be \$10 an hour. Under half-time, he/she would be entitled to one-half the \$10 regular rate for all overtime hours worked. Thus he/she 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 come to \$187.50. Thus, half-time is considerably more advantageous to the employer. The advantage of half-time for the employer becomes greater with more hours 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.

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 predetermined amount of overtime. It offers the employee the security of a set weekly income, with the employer able to anticipate and control labor cost and bookkeeping calculations.

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

- (1) *There must be a specific agreement 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. §207(f)]. This has been interpreted to mean that the employee’s work must fluctuate such that he/she sometimes works over 40 hours a week and other times under 40 hours during the week;*

- (3) *The weekly overtime payment must be guaranteed [Martin v. Saunders Construction, 2 Wage and Hour Cas. (BNA) 427 (D.Ma. 1992)]. In other words, if the Belo Plan calls for 60 hours of work and the employee works 40 hours, he/she still gets full payment;*
- (4) *The guaranteed number of weekly hours worked cannot exceed 60 per week. 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 agreed 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, the employee would every week be paid his/her regular rate (\$7 x 40 hours) of \$280 plus an overtime rate (\$10.50 x 20 hours) of \$210. 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 in excess of 60 hours per week, an additional overtime premium would be payable at the \$10.50 per hour rate.*

CALCULATING HALF-TIME

(1) Regular Rate	= Weekly Salary	(÷) Number of Hours Worked
(2) Half-Time Premium	= Regular Rate	(X) ½
(3) Extra “Half-Time” Pay	= Half-time Premium	(X) Number of Hours Worked Over 40

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. §207(o)] 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, 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(a)]. 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)].

The compensatory time that an employee earns constitutes a legal liability for the employer. 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 [29 U.S.C. §207(o)(3)(A)].

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 U.S.C. §207(o)(5)]. 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. Our 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 [29 C.F.R. §553.27(b)], 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. 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 (3) 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. §553.19).

Time-off plans are only allowed under the following conditions:

- (1) *The employee must get time off at time and one-half for all hours 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 do so) 15 hours and, accordingly, only work 25 hours the second week without any overtime premium due. If the 50 hours occurs during the second week, the overtime premium will be due.

Quiz: Calculate the Overtime Compensation

- (1) Susan earns \$600 semi-monthly as a records clerk in the police department. She works 40 hours per week. What is her regular rate of pay?
- (2) Joe earns \$1,500 a month in the public works department as a crew leader. His workweek is generally 40 hours per week. If Joe worked 44 hours in a week, how

much would he be entitled to for overtime worked? What would Joe's salary for the month equal?

- (3) Frank is paid \$6 an hour for 40 hours of work and is paid \$25 for being on call over the weekend. If he is called back for four hours of work over the weekend, what would his regular rate equal?
- (4) Jill's is paid \$6 an hour, and works 46 hours this week. What is her weekly salary?
- (5) Jan works as a meter reader for the city. She is hired at a salary of \$200 a week and is told that this salary is compensation for a regular workweek of 35 hours. What is her regular hourly rate of pay? If she works 5 hours overtime, what should her pay be for this week? If she works 7 hours overtime, what should her pay be for this week?
- (6) Don is entitled to overtime pay after 40 hours a week. His workweek begins on Monday, and he is paid \$6 an hour. Don reports to work according to the schedule and is sent home after being given only 2 hours of work. He then works 8 hours each day on Tuesday through Saturday totaling 42 hours for the week. The personnel policy provides that an employee reporting for scheduled work on any day will receive a minimum of 4 hours work or pay. What is the employees weekly compensation?

Answers to Quiz:

1) \$6.92 per hour;

2) \$51.92 for 4 hours, \$1,551.92;

3) $(240 + 25 + 24(4\text{hr times } \$6)) / 44 = \$6.57$ (regular rate),
 $\frac{1}{2} (\$6.57) = \$3.28 * 4 = \$13.12$ overtime due making total pay due \$302.12;

4) $(40)(6) = 240 + (6\text{hr})(\$9) = 54 = \$294.00$;

5) $(\$200/35) = \5.71 ; she should receive \$5.71 for each of the first 40 hours = \$228.40; she should receive \$5.71 for each of the first 40 hours and \$8.65 (time and a half) for each hour after 40);

6) $(40)(6) = \$240 + \$18(2\text{hrs worked at time and a half}) + 12(2\text{ hours additional per policy})$ for a total \$270.

OVERTIME FOR POLICE AND FIREFIGHTERS 207(k) EXEMPTION

The FLSA 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) 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 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. §553.1(d)].

Definition of Employees Covered by Section 207(k)

All personnel employed in a police, fire, or other public safety agency 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 (29 C.F.R. §553.210) state that an employee must:

- (1) *Be employed by an organized fire department or fire protection district;*
- (2) *Have been trained to the extent required by state statute or local ordinance;*
- (3) *Have the legal authority and responsibility to engage in the prevention, control, or extinguishment of a fire of any type; and*
- (4) *Perform activities that are required for, and directly concerned with, the prevention, control or extinguishment of fires.*

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)]:

- (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 (29 C.F.R. §553.210). The exemption also covers employees who have had no training.

Additionally, many jurisdictions have emergency medical service (EMS) personnel who function under the umbrella of their police or fire departments. Whether such EMS workers qualify for the partial exemption as law enforcement or fire protection employees was decided in December 1999 when the FLSA was amended by P. L. 106-151. The amendment redefined fire protection employee to include employees who “engage in response to emergency situations where life, property or the environment are at risk.”

The exemption does not cover agency personnel who do not fight fires on a regular basis. The exemption, however, may include such employees during emergency situations when they are called on to spend substantially all (80 percent or more) of their time during the applicable work period performing fire protection activities. Employees who spend more than 20 percent of their time engaged in activities not incidental to or in conjunction with fire protection activities cannot qualify as exempt under §207(k). Incidental work, however, covers a wide array of activities including housekeeping; equipment maintenance; lecturing; responding to emergencies not related to firefighting, such as EMS and HAZMat; attending community fire drills and inspecting homes and schools for fire hazards. Such incidental work should not be counted toward the 20 percent limitation on non-exempt work [29 C.F.R. §553.212(a)].

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 stenographer [29 C.F.R. §553.210(c)].

To be covered by the 207(k) exemption for law enforcement officers, 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):

- (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. §553.215).

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.

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(a)]. The work period chosen need not coincide with the pay period for 207(k) employees.

DOL regulation 29 C.F.R. §553.230 established the following table to set forth the maximum hours for each work period after which the law enforcement and fire protection employees are entitled to time and a half the regular rate.

Maximum Hours Worked (Rounded) Before Overtime		
Consecutive Days Work Period	Hours of Fire Protection	Hours of 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 nonexempt law enforcement and fire protection personnel based on a 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 non-exempt employees. When calculating overtime for 207(k) employees, the employer, however, 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 same rules regulating the definitions of hours worked also apply. If employees are required to show up early for work, 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 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. Volunteer firefighters who are paid by the call or by the hour when called to duty are often referred to by fire departments as “on-call firefighters.” On-call firefighters do not fall under this FLSA heading 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 non-exempt 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. The failure to keep accurate records, however, 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 for records to be maintained. Records may be maintained on paper, microfilm, or an automatic data processing system, provided viewing equipment is accessible and reproduction identifiable [29 C.F.R. §516.1(a)]. Additionally, employers may use “any timekeeping method they choose” for keeping track of employee’s 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) 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 workday 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;*
- (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 hour 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 employees are required where exempt employees are concerned [29 C.F.R. §516(b)]. 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 employees 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 one-half hours for each overtime hour worked [29 C.F.R. §553.50(a)].*
- 2) *The number of hours of compensatory time used each workweek, or other applicable period, by the employee [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)].*
- 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 employee has violated the provisions of the FLSA. The Department of Labor (DOL) “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 him/herself and show the employer official credentials.*
- (2) *Confer with the employer or a designated representative, making any necessary explanations about the records that need to be seen and the approach to be taken. The compliance officer will also ask the employer’s permission to conduct private interviews with some employees.*
- (3) *Ask the employer to make space available for his/her 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 to 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 [29 U.S.C. §216(b)] and the recovery of back wages and liquidated damages (an amount equal to the wages improperly withheld). 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) *He/she 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/her own name and recover liquidated damages [29 U.S.C. §216(c)].*

When an employee sues in a back pay suit on his/her own behalf and wins, the court must 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 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 Department of Labor to assess civil monetary penalties on employers who willfully violate the act's minimum wage and overtime provisions. Civil money penalties up to \$1,000 per violation may be assessed by the DOL for repeated or willful violations (29 U.S.C. §206 and §207). The statute of limitation for civil money penalties is five 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. These defenses include an absolute good faith defense, a defense to liquidated damages, and the statute of limitations 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 its actions were taken in good faith. Essentially, the absolute good faith defense in the Portal-to-Portal Act (29 U.S.C. §259) 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). For an employer faced with an FLSA lawsuit, the absolute good faith defense means that it will not be liable for employee back pay, liquidated damages, pre- or post-judgment interest, cost, etc. Instead, the only relief available is that the employer can be enjoined from committing future violations of the FLSA, but cannot be punished for past acts.

Employees 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. 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 that violate the section may face fines of up to \$10,000 for the first offense and for subsequent violations of up to \$10,000 plus imprisonment for up to six months. Additionally, an employee who suffers discriminatory treatment may seek an injunction ordering the employer to reinstate him/her.

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 limitations.

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 a FLSA claim, the DOL may ask the employer to sign an agreement: (1) a stipulation of 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. The settlement procedures for FLSA are very formalized, and employers should confer with the city attorney prior to attempting any private settlements.

Damages awarded to employees as wages are generally taxable. Liquidated damages awarded to employees, however, are not considered wages for employment under 29 U.S.C. §216(b), even though they may still be taxable. The IRS 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).

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- U. S. Department of Labor, Employment Standards Administration Wage and Hour Division,**
Police and Fire Fighters 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,**
Record Keeping 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?

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