

The Fair Labor Standards Act

VS

Your City

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by

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Fair Labor Standards Act

Establishes standards for:

- Minimum Wage
- Overtime
- Recordkeeping
- Child Labor

Applies to the vast majority of employees

- One of the first major labor laws – from 1938
- Attempted to reduce the amount of available labor to increase its price – leads to counterintuitive analysis

Main requirements of FLSA

overtime -- if an employee works more than forty hours in any 7-day period, the employer must pay the individual at least 1.5 times the employee's regular rate of pay for each hour worked in excess of 40, and

minimum wage -- employers must pay their employees at least the minimum wage, currently \$7.25 an hour, for each hour worked. These two concepts only apply if the employee is not exempt from coverage of the FLSA.

- FLSA is only applicable to employees
- All employees are presumed to be covered and thus entitled to be paid the minimum wage and paid overtime for all hours worked hours over 40 in the 7 day pay period.
- More than 50 types of employees who are exempt pursuant from application and/or overtime

“Hours worked” includes all hours the employee actually performs duties that are for the benefit of the city, including:

- Rest periods or “breaks” of 20 minutes or less.
- Meetings and training programs.
- Travel between work sites during the work day.
- Time spent performing duties after hours or on weekends due to emergencies (call backs).
- Any time performing duties outside of the normal shift, even if it is not “authorized.”

Time that does not have to be included as “hours worked:”

- On-call hours where the employee is free to come and go as he or she chooses, or merely leaves a telephone number where he or she can be reached.
- Meal periods of at least one-half hour where the employee is not performing any work.
- Ordinary home to work travel.

- **Rate of pay for calculating minimum overtime amount** includes all compensation for employment, including base wages, longevity pay, on-call or standby pay, educational incentive pay, and most other forms of pay. It does **not** include fringe benefits.
- The workweek can be any period of time the city chooses consisting of 7 days in a row.
- A city may give compensatory time off in lieu of paid overtime.

The FLSA also requires employers to:

- Display a minimum wage poster.
- Maintain detailed records of hours worked and wages paid
- Preserve payroll records and union agreements for at least three years.

Employee vs. Independent Contractor

FLSA uses economic realities test.

Factors which the Court has considered significant in distinguishing employees from independent contractors:

- The extent to which the services rendered are an integral part of the principal's business.
- The permanency of the relationship.
- The amount of the alleged contractor's investment in facilities and equipment.
- The nature and degree of control by the principal.
- The contractor's opportunities for profit and loss.
- The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
- The degree of independent business organization and operation

- In contrast to the FLSA, the IRS uses a 20-factor test to distinguish employees from independent contractors.
- The FLSA economic realities test for distinguishing employees from independent contractors is different than the IRS test.
- If an employer is the subject of a DOL worker classification audit, the IRS will almost certainly be alerted to any resulting worker reclassifications. Pursuant to a Memorandum (MOU) entered into between the IRS and DOL on September 19, 2011, the agencies agreed to collaborate and share information to reduce instances of worker misclassification in order to reduce the “tax gap” and improve employer compliance with federal labor laws.

Exemptions from Overtime

- **Fully Exempt Public Safety Employees**—Less than five employees in law enforcement or fire protection
- **Partly Exempt Public Safety Employees**
 - Police – equivalent of 43 hours per week
 - Fire – equivalent of 53 hours per week
- Employees who are exempt from overtime pursuant to 29 USC § 213—e.g. Executives, Administrative, Professional, Teacher, Artistic Employee – Section 213 is extensive, but most employee groups are very specialized
- Employees who are exempt from overtime pursuant to 29 USC § 214 – special certificates by DOL- e.g. students, handicapped
- Elected Officials & their staff
- Volunteers

Fully Exempt Public Safety Employees—29 U.S.C. § 213(b)(20) provides an overtime exemption for law enforcement or fire protection employees of a police or fire department that employs less than five employees in law enforcement or fire protection activities

Partly Exempt Public Safety Employees – Fire & Police in cities that employ more than five of each:

- City can establish an extended work period for police officers and firefighters between 7 and 28 days, and the weekly hours can extend to an effective average of 43 hours for police officers and 53 hours for firefighters before they become entitled to overtime.
- Texas Local Gov't Code § 142.0015(f) provides a city of more than 10,000 may not require its police officers to work more hours during a calendar week than the number of hours in the normal work week of the majority of the employees of the city, other than police officers or fire fighters – without agreement

Fire protection personnel include firefighters, paramedics, emergency medical technicians, rescue workers, ambulance personnel, or hazardous materials workers – Heavily litigated - 20% rule no longer applies to EMS work – previously heavily litigated

Police officers (“law enforcement personnel”) are empowered by state or local ordinance to enforce laws designed to maintain peace and order, protect life and property, and to prevent and detect crimes; who have the power to arrest; and who have undergone training in law enforcement. 20% rule applies

NOT a law enforcement officer:

- building or health inspector
- animal control personnel
- sanitarian
- dispatcher
- radio operator
- repair worker clerk
- janitor

Exemptions subject to salary basis test and salary level test

- Executive Employee*
- Administrative Employee*
- Education Establishments Employee*
- Administrative Professional*
- Learned Professional*
- Artistic Employee*
- Computer-Related Employee*

Salary Level Test: The employee must be paid at least \$455 per week or \$910 biweekly or \$1971.66 monthly or \$23,660 annually. These amounts are actual payments and salary should not be pro-rated for part-time employees

Salary Basis Test: Private employee must receive a predetermined, fixed salary that is not subject to reduction due to variations in quality or quantity of work performed – Public entity may deduct for hours not worked per 29 CFR § 541.710

Exemptions not subject to salary level test and salary basis test:

- Teacher, Attorney or Physician
- Highly compensated employees (\$100,000+ annually) in office or non-manual work
- Employee of Seasonal Amusement or Recreational Establishment
- Youth under 20 years old in first 90 days of employment
- Elected Officials and Personal Staffs of Elected Officials
- Volunteers

Executive Exemption: To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than \$455* per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight

Administrative employee exemption: To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455* per week;
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Learned Professional Exemption: To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455* per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Creative Professional Exemption (artist): To qualify for the creative professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455* per week;
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Computer Employee Exemption: To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated either on a salary or fee basis (as defined in the regulations) at a rate not less than \$455* per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- The employee's primary duty must consist of:
 - The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
 - 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;
 - The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
 - A combination of the aforementioned duties, the performance of which requires the same level of skills.

Highly-Compensated Executive:

The regulations contain a special rule for “highly-compensated” workers who are paid total annual compensation of \$100,000 or more. A highly compensated employee is deemed exempt under Section 13(a)(1) if:

The employee earns total annual compensation of \$100,000 or more, which includes at least \$455* per week paid on a salary basis;

The employee’s primary duty includes performing office or non-manual work; and

The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

Dangers of using the Executive, Administrative, Management, and Highly Compensated Employee Exemptions:

- **Tradesmen, Dockworkers, and laborers** are excluded from Executive, Administrative, Management, and Highly Compensated Employee Exemptions
- **Police officers and Firefighters are very rarely administrative professionals:** Nonetheless, the DOL issued Wage & Hour Opinion No. 2005-50 in 2005 stating that Police Lieutenants, Police Captains, and Fire Battalion Law enforcement and fire personnel who spend more than 50% of their time on management tasks could be exempt from the minimum wage and overtime provisions of the Fair Labor Standards Act. 29 CFR § 541.3(b)

Teachers, Attorneys, and Physicians:

- Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment.
- An employee holding a valid license or certificate permitting the practice of law or medicine is exempt if the employee is actually engaged in such a practice

Employee of Seasonal Amusement or Recreational Establishment---be careful---read the regulations & guidance

Youth under 20 years old in first 90 days of employment - The 1996 Amendments to the FLSA allow employers to pay a youth minimum wage of not less than \$4.25 an hour to employees who are under 20 years of age during the first 90 consecutive calendar days after initial employment.

**Elected Officials and Personal Staffs of Elected Officials:
29 U.S.C. § 203(e)(2)(C) excludes from the definition of
“employee” under the FLSA an individual who is not subject to
the civil service laws of the state, political subdivision, or
agency which employs him, and who:**

- holds a public elective office of that state, political subdivision, or agency,
- is selected by the holder of such an office to be a member of his personal staff,
- is appointed by such an officeholder to serve on a policy making level,
- is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office, or
- is an employee in the legislative branch or legislative body of that state, political subdivision, or agency and is not employed by the legislative library of such state, political subdivision, or agency.

Volunteers:

- True volunteers for public agencies are exempt from the FLSA. However, volunteers cannot be persons who are also employees of the public agency public agency that provides services that would also be supplied by that same public agency
- 29 CFR § 553.105 provides, in relevant part: “Mutual aid agreements. An agreement between two or more States, political subdivisions, or interstate governmental agencies for mutual aid does not change the otherwise volunteer character of services performed by employees of such agencies pursuant to said agreement.

Strict Construction against Exemption:

- Congress chose to exempt a multiplicity of employment categories from the broad sweep of the FLSA, including those persons employed in a bona fide administrative capacity (29 U.S.C.A. § 213(a)(1)).
- Exemptions from the FLSA should be strictly construed against the employer.

On-Call Time:

- Whether nonexempt employees must be paid for their on-call time depends on whether they are “waiting to be engaged” or are “engaged to wait”
- If an employee who is on call is able to use his or her time freely and is not performing a specific assigned task, that employee is waiting to be engaged.
- The employee can be available by telephone if needed; however, since he or she is waiting (off duty), the employee is not compensated for that time.
- If an on-call employee must carry a paging device such as a beeper or cellular phone, and the employee is relieved of his or her duties, the time is unpaid
- Generally, if the on-call requires people to stay in a close geographic proximity, then it’s compensable –
- 5 minutes = compensable 1 hour = not compensable

Multi-factor Test When Determining Whether Or Not On-call Workers Must Be Compensated:

- Strict geographic limitations. Generally, if the on-call requires people to stay in a close geographic proximity, then it's compensable. There's no one answer regarding how close employers can ask employees to stay to the work site. But requiring them to stay within a 5-minute drive would almost always require they be paid for that time.
- Restrictions on movement. When an employee is required to stay in the same place – whether it's a work site or at home – most rulings have come down in favor of paying the employee.
- Quick-response requirements. Then there's the consideration of how much time a company gives an employee to respond to a call from work. Again, there's no one hard-and-fast rule. But courts have generally decided that requiring employees to call back within 30 minutes is not overly restrictive
- Uniform requirements. If employees have to wear uniforms, that's a sign that personal use of their on-call time is greatly restricted and they should be paid
- Frequency of calls. The more calls employees get, the more likely it is they're considered "on duty" and need to be paid.

Compensatory Time for State and Local Employees

Compensatory time may only be given to employees if the employees agree before performing the work to accept compensatory time off in lieu of overtime through individual agreements or through a collective bargaining agreement.

Department of Labor Investigations:

- 29 U.S.C. §211(a) grants the Wage and Hour Administrator broad powers to conduct investigations into potential FLSA violation
- investigation will include a review of the employer's records and probably include employee interviews
- employee interviews are conducted in private and are confidential
- Wage and Hour investigators do not need judicial approval prior to issuing a valid subpoena
- There are no "requirements in terms of any showing of 'probable cause'" in regards to issuance of a subpoena requesting documents
- Where an inspector "[seeks] to conduct a search of nonpublic working areas ... an administrative warrant [is] required before such a search [can] be conducted without the consent of the owner of the premises

Department of Labor Investigations (continued):

- Responsibility under FLSA for making, keeping & preserving accurate records of employees work hours rest solely on employer.
- For employees subject to the minimum wage or overtime provisions of the FLSA, employers must maintain that employee's:
 - name
 - home address
 - date of birth
 - sex
 - occupation
 - day of beginning of work-week
 - rate of pay and/or basis of pay
 - hours worked each workday & workweek
 - total daily earnings or wages
 - total overtime pay
 - total additions or deductions from wages each pay period
 - total wages paid each pay period
 - date of payment and pay period of each payment