The Fair Labor Standards Act vs Your City

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Curriculum Vitae

Miles Risley is the City Attorney of Corpus Christi, Texas. He received his law degree from the University of Texas in 1992. He graduated summa cum laude from West Texas State University in 1989.

Mr. Risley has practiced municipal law since 1994. He became City Attorney of Corpus Christi in 2014. He was City Attorney of Wichita Falls between 2009 and 2014. Prior to his service in Wichita Falls, he was the City Attorney of Victoria, Texas. Before coming to Victoria, he practiced with the law firm of Byington, Easton, and Risley, PC in Austin, Texas. He has also been an adjunct instructor at Victoria College and has served as a U.S. Army Military Intelligence Officer.

Mr. Risley has been a municipal attorney and member of the Texas City Attorneys Association (TCAA) for the past 23 years. Mr. Risley is also a Local Government Fellow of the Texas International Municipal Lawyer's Association (IMLA). In addition, Mr. Risley is a member of the Texas State Bar College and has made presentations to IMLA, the TCAA, and the National Contract Management Association. His presentations and papers have discussed land use law, municipal court, the Texas Open Meetings Act, the Texas Public Information Act, government contracting, gang injunctions, and tow truck regulation. In addition, he is currently the President of the Texas Coalition for Affordable Power, which advocates for the interests of electricity consumers and purchases electricity for more than 160 cities and other political subdivisions.

Mr. Risley has extensive experience dealing with delicate issues of the Fair Labor Standards Act. He regularly argues with federal officials, his own clients, and plaintiffs about personnel issues. He has been involved in litigation related to the Fair Labor Standards Act many times throughout his career.

The Fair Labor Standards Act vs Your City

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The Fair Labor Standards Act vs Your City

Introduction:

The U.S. Fair Labor Standards Act of 1938 ("FLSA")[1] establishes minimum wage, overtime pay, recordkeeping, and child labor standards. It applies practically to all employers and employees, including federal, state, and local governmental employers and their employees ("public sector" employees and employers). The FLSA spawns regular litigation because its provisions and the regulations that the Department of Labor has promulgated to interpret it are counter-intuitive because it is intended to interfere with the right of employers and employees to reach mutually advantageous arrangements.[2] In the archives of federal labor laws, the FLSA holds a position nearly comparable to that of the Dead Sea Scrolls - there are other items that are more ancient, but not many.[3] Its original purpose is a product of the lump of labor fallacy of unenlightened economics. It is also the product of constant tension between employers and employees.

The FLSA was passed during the Great Depression. Originally, the FLSA exempted states and their political subdivisions.[4] In 1974, Congress amended the FLSA to cover virtually all state and local government employees. The Supreme Court held this amendment to be an unconstitutional violation of 10th Amendment and Congress's commerce clause power in *National League of Cities v. Usery*.[5] 11 Less than a decade later, the Supreme Court overruled *Usery* in *Garcia v. San Antonio Metro. Transit Authority*, thus allowing FLSA to apply to state and local government employees.[6]

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[1] 29 USCS §§ 201 et seq. https://www.dol.gov/whd/regs/statutes/FairLaborStandAct.pdf

[2] The FLSA now more often serves not as an [sic] protector of the oppressed, but rather as a straightjacket forbidding employers from giving modern workers what they want. Oversight of the Fair Labor Standards Act: Hearing Before the Senate Comm. on Labor and Human Resources, 104th Cong. 46-7 (1996) [hereinafter Senate hearing 1996] (statement of William J. Kilberg, Fair Labor Standards Act Reform Coalition).

[3] Hearings on the Fair Labor Standards Act, Before the Subcomm. on Workforce Protections of the House Comm. on Economic and Educational Opportunities, 104th Cong. 30 (1995) [hereinafter House hearing 1995] (document submitted by the Labor Policy Association, "Reinventing the Fair Labor Standards Act to Support the Reengineered Workplace.").

[4] Michael Jilka, For Whom Does The Clock Tick: Public Employers' Liability For Overtime Compensation Under Federal Law, 63 J. Kan. B. Ass'n 34, 35 (1994).

[5] *National League of Cities v. Usery*, 426 U.S. 833 (1976) .

[6] *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

Fundamentals of the FLSA

The two concepts undergirding the FLSA are:

1. **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

2. **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.

The FLSA is only applicable to employees. The question of whether an individual is an employee or an independent contractor is a frequently litigated issue.

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. However, there are more than 50 types of employees who are exempt pursuant to the FLSA and its regulations.[7]

FLSA Exemptions frequently used by local governmental entities are as follows:

- Executive Employee*
- Administrative Employee*
- Education Establishments Employee*
- Administrative Professional*
- Learned Professional*
- Artistic Employee*
- Computer-Related Employee*
- Attorney, Physician or Teacher
- Highly compensated employees ($100,000+ annually) in office or non-manual work
- Fire Employee (partial exemption-alternate max hour calculation)
- Law Enforcement Employee (partial exemption-alternate max hour calculation)
- 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

*Must meet the Salary Level Test and Salary Basis Test (for private entities).

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: The employee must receive a predetermined, fixed salary that is not subject to reduction due to variations in quality or quantity of work performed (except for some very narrow specified circumstances).

[7]See US Chamber of Commerce List of FLSA Overtime Exemptions at https://secure.acce.org/clientuploads/Chamberpedia/US%20Chamber_%20Appendices%20-%20All.pdf.

"Hours worked" includes all hours the employee actually performs duties that are for the benefit of the city,[8] 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." (Although unauthorized hours must be compensated, nothing precludes an employer from taking disciplinary action for failure to follow a policy that requires prior approval before working overtime).

All of the "hours worked" must be added together to determine if the employee exceeded 40 hours in one workweek. When computing "hours worked," a city does not need to include time the employee was gone for vacation, sick leave, or holidays, even if the time off is paid time off. Although some cities have policies or union contracts requiring such hours to be included, it is not required under the FLSA.[9]

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.

The rate of pay for calculating minimum overtime amount includes includes all compensation for employment, including base wages, longevity pay, on-call or standby pay, educational incentive pay, and most other forms of pay.[10] It does not include fringe benefits.

The workweek can be any period of time the city chooses consisting of 7 days in a row.[11]

A city may give compensatory time off in lieu of paid overtime.[12]

The FLSA also requires employers to:

- **Display a minimum wage poster**.[13]
- **Maintain detailed records** of hours worked and wages paid[14]
- **Preserve payroll records** and union agreements for at least three years.[15]

[8] 29 C.F.R. §§ 785.10 - .45.
[9] See League of Minnesota Cities Information Memo: Fair Labor Standards Act (FLSA): An Overview 8/8/2016 *https://www.lmc.org/media/document/1/flsaoverview.pdf*.
[10] 29 U.S.C.§ 207(e).
[11] 29 C.F.R. § 778.105.
[12] 29 C.F.R. § 553.23.
[13] Poster can be downloaded at https://www.dol.gov/whd/regs/compliance/posters/wh1385State.pdf.
[14] 29 C.F.R. §§ 516.2 –.9
[15] 29 C.F.R. § 516.5.

Employee vs. Independent Contractor – Economic Realities Test

Under the common law test employees are distinguished from independent contractors on the basis of whether or not the business has the right to control the details and means by which work is performed rather than just the right to direct the ultimate result. The definition of an "employee" under the FLSA is broader than the traditional common law test.[16] For FLSA purposes, independent contractors are distinguished from employees using the "economic realities" test, which uses multiple factors, but has been summarized as follows:

> The ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service, or are in business for themselves.[17]

The U.S. Supreme Court has on a number of occasions indicated that there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA.[18] The Court has held that it is the total activity or situation which controls. Among the factors which the Court has considered significant are:

- The extent to which the services rendered are an integral part of the principal's business. If it is integrated into the business, then it is indicative of employment.
- The permanency of the relationship. A permanent relationship indicates an employment relationship.
- The amount of the alleged contractor's investment in facilities and equipment. If the contractor's investment is minor, it is indicative of an employment relationship.
- The nature and degree of control by the principal. Does the contractor control the means and methods of performing the task(s).
- The alleged contractor's opportunities for profit and loss. If the worker's managerial skill can affect his profit or loss, then that indicates an independent contractor relationship.
- The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor. The worker's business skills, not merely his technical skills, must affect his performance of the task(s).
- The degree of independent business organization and operation. Nonetheless, the U.S. Department of Labor has stated that the control factor should not be overemphasized by employers. Even if there is a lack of control, if the worker is economically dependent on the employer, the DOL will deem the worker an employee.[19]

There are certain factors which are immaterial in determining whether there is an employment relationship. Such facts as the place where work is performed, the absence of a formal employment agreement, or whether an alleged independent contractor is licensed by State/local government are not considered to have a bearing on determinations as to whether there is an employment relationship.[20] Also, the Supreme Court has held that the time or mode of pay does not control the determination of employee status.[21]

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[16] 29 USCA§203(e)&(g).

[17] *Brock v. Superior Care, Inc.*, 840 F2d 1054 (2d Cir 1988).

[18] *Wage and Hour Division (W&H) Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA)* **(Revised July 2008) https://www.dol.gov/whd/regs/compliance/whdfs13.htm**

[19] *See, e.g., W&H Opinion Letter No.* 832 (June 25, 1968); *W&H Opinion Letter No. 1029* (September 12, 1969).

[20] Id.

[21] Id.

The primary test articulated by the U.S. Supreme Court is the "economic reality" test. In *United States v. Silk*, 331 U.S. 704 (1947), a case dealing with whether an employer owed Social Security taxes on certain workers, the Supreme Court found the following factors important:

- the degree of control exercised by the alleged employer;
- the extent of the relative investments of the [alleged] employee and employer;
- the degree to which the "employee's" opportunity for profit and loss is determined by the "employer";
- the skill and initiative required in performing the job; and
- the permanency of the relationship.

(quoted from *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042 (5th Cir. 1987)).

Brock, one of the leading cases from the 5th Circuit, explaining independent contractor/employee issues, goes on to state that the "focus is whether the employees as a matter of economic reality are dependent upon the business to which they render service". The same case notes further that "it is *dependence* that indicates employee status...the final and determinative question must be whether the total of the testing establishes the personnel are so dependent upon the business with which they are connected" that they are employees.[22]

In *Herman v. Express Sixty-Minutes Delivery Services, Inc.*, the U.S. Department of Labor (DOL) sued a courier delivery service on behalf of several of its couriers. Express contracted with various businesses, including law firms, hospitals, and laboratories, to deliver packages on a 24-hour basis in and around the Dallas-Fort Worth metropolitan area.[23] To make these deliveries, Express employed 50 drivers as independent contractors. The DOL alleged that the couriers were employees, not independent contractors and accordingly, Express owed the drivers overtime compensation. After considering many factors, the 5th Circuit found that the drivers were independent contractors. Consequently, Express was not liable for any overtime compensation.

In determining independent contractor status under the FLSA, the *Herman* Court focused on whether the alleged employees, as a matter of economic reality, were economically dependent upon Express's business. To make the determination the *Herman* plaintiffs were independent contractors, the 5th Circuit considered the *Brock* factors.

In contrast to the FLSA, the IRS uses a 20-factor test to distinguish employees from independent contractors.[24] The FLSA economic realities test for distinguishing employees from independent contractors is broader than the IRS test. Nonetheless, if an employer is the subject of a DOL worker classification audit, it should be aware that 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.[25]

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[22] See http://www.twc.state.tx.us/news/efte/independent_contractor_tests.html

[23] *Herman v. Express Sixty-Minutes Delivery Services, Inc.*, 161 F.2d 299 (5th Cir. 1998),

[24] See Internal Revenue Ruling 87-41, 1987-1 C.B. 296. See also, Treas. Reg. § 31.3401(c)-(1)(b), which provides that an employer-employee relationship generally exists if the worker "is subject to the will and control of the employer not only as to what shall be done but how it shall be done." See also, *Gierek v. Commissioner*, 66 T.C.M. 1866 (1993).

[25] Memorandum of Understanding between the Internal Revenue Service and the United States Department of Labor (9/19/11).

Special People who get Overtime---Public Safety Employees and the FLSA

As a general rule, employees who perform police and firefighter work will be considered non-exempt under the FLSA, and must receive overtime or compensatory time off unless they:

- meet the requirements of the administrative or executive exemption or
- fall under the small police/fire department (less than five applicable employees) exemption[26].

The most significant difference from ordinary non-exempt employees is that a 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.[27] Section 7(k) of the FLSA provides that employees engaged in fire protection or law enforcement may be paid overtime on this extended "work period" basis.[28]

This extended "work period" may be from 7 consecutive days to 28 consecutive days in length. For work periods of at least 7 but less than 28 days, overtime pay is required when the number of hours worked exceeds the number of hours that bears the same relationship to 212 (fire) or 171 (police) as the number of days in the work period bears to 28. For example, fire protection personnel are due overtime under such a plan after 106 hours worked during a 14-day work period, while law enforcement personnel must receive overtime after 86 hours worked during a 14-day work period. Different workweeks may be established for different positions or groups of employees as long as each employee group is told what their workweek is and it is documented.[29]

In addition, police officers and firefighters may accrue up to 480 hours of compensatory time in contrast to the 240 hour limit for other employees.[30]

Texas cities with more than 10,000 employees need to be cognizant of Texas Local Gov't Code § 142.0015(f), which provides that such a high-population city 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. This section provides that if a majority of nonpublic safety employees in a city work 40 hours, a police officer would be entitled to overtime pay when the officer works more than 40 hours. However, a city may require a police officer to work more hours than permitted in the event of an emergency and, if a majority of police officers working for the city sign a written waiver of their rights, that city may adopt a work schedule requiring police officers to work more hours than permitted.[31]

Who is a firefighter: There has been a great deal of litigation regarding who is a firefighter. Fire protection personnel include firefighters, paramedics, emergency medical technicians, rescue workers, ambulance personnel, or hazardous materials workers who:

1. are trained in fire suppression;

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[26] 29 U.S.C. § 213(b)(20). Also see 29 C.F.R. § 553.200(c).

[27] See *W&H Fact Sheet 8:* ***Law Enforcement and Fire Protection Employees Under the Fair Labor Standards Act (FLSA)*** **(Revised March 2011)** https://www.dol.gov/whd/regs/compliance/whdfs8.htm

[28] 29 U.S.C. § 207(k). Also see 29 C.F.R. § 553.230(c).

[29] 29 C.F.R. § 553.224.

[30] 29 U.S.C. § 207(o)(3)(A).

[31] See Employment Law Manual for Texas Cities, Page 27, https://www.tml.org/p/EMPLOYMENT%20LAW%20MANUAL%20FOR%20TEXAS%20CITIES_2015.pdf

2. have the legal authority and responsibility to engage in fire suppression;
3. are employed by a fire department of a municipality, county, fire district, or State; and
4. are engaged in the prevention, control and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

There is no limit on the amount of nonexempt work that an employee employed in fire protection activities may perform.[32] So long as the employee meets the criteria above, he or she is an employee "employed in fire protection activities" as defined in section 203(y) of the FLSA.

Cities that utilize employees who perform dual-functions as firefighters and paramedics should be aware of a 5th Circuit opinion, which invalidated a DOL regulation (29 C.F.R. §553.212) and held that firefighters and certain dual-function paramedics can qualify for the 7(k) exemption even if they spend more than 20% of their time performing non-fire suppression activities, such as dispatching.[33] In *McGavock*, the firefighters tried to argue that, even after the passage of § 203(y), because they spent more than 20% of their workweek engaged in dispatching duties (as opposed to fire protection activities), they should not fall under the fire protection exemption. The *McGavock* court held that the Water Valley firefighters fell squarely within § 203(y)'s terms with the following statement:

> The only purpose of Congress in amending the statute that is clear to us, is that it intended all emergency medical technicians (EMTs) trained as firefighters and attached to a fire department to be considered employees engaged in fire protection activities even though they may spend one hundred percent of their time responding to medical emergencies.[34]

This interpretation is supported by the introductory clause to Section 203(y).[35] This clause states that ""employee in fire protection activities' means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker." As the dissent in *Lawrence* notes, "Congress's enumeration of various job titles, in addition to that of firefighter, undermines the majority's conclusion that the exemption applies only to employees hired exclusively, primarily, or periodically "to fight fires."'[36]

Who is a Police Officer: Police officers ("law enforcement personnel") are employees who 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. Employees engaged in law enforcement activities may perform some nonexempt work which is not performed as an incident to or in conjunction with their law enforcement activities. However, a person who spends more than 20% of the workweek or applicable work period in nonexempt activities is not considered to be an employee engaged in law enforcement activities under the FLSA.[37]

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[32] *W&H Fact Sheet 8:* ***Law Enforcement and Fire Protection Employees Under the Fair Labor Standards Act (FLSA)*** **(Revised March 2011)** https://www.dol.gov/whd/regs/compliance/whdfs8.htm

[33] *McGavock v. City of Water Valley, Mississippi*, 452 F.3d 423 (5th Cir. 2006).

[34] *McGavock v. City of Water Valley, Mississippi*, 452 F.3d 423, 427 (5th Cir. 2006). Also see *Gonzalez v. City of Deerfield Beach*, 510 F. Supp. 2d 1037, 1042 (S.D. Fla. 2007) .

[35] *Rescue Me? Should the Courts Come to the Aid of Quasi-Firefighters: An Analysis of the Circuit Split Regarding How Broadly the Courts Should Read § 203(y) of the Fair Labor Standards Act*, 12 U. Pa. J. Bus. L. 899, Spring, 2010

[36] Lawrence v. City of Phila., 527 F.3d 299, 310 (3d Cir. 2008), 527 F.3d at 324.

[37] *W&H Fact Sheet 8:* ***Law Enforcement and Fire Protection Employees Under the Fair Labor Standards Act (FLSA)*** **(Revised March 2011)** https://www.dol.gov/whd/regs/compliance/whdfs8.htm

A building or health inspector, an animal control personnel, and sanitarians, among others, would normally not meet the definition of an employee engaged in law enforcement activities.[38] Additionally, employees who may be members of a fire or police department and who perform support activities, such as dispatchers, radio operators, repair workers, clerks, or janitors do not qualify as law enforcement officers for the 7(k) exemption.[39]

Small Employer Exemption to Overtime for Fire and Police:

The FLSA 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.[40] The exemptions are counted separately. A city could have less than five employees in law enforcement and claim the exemption even if the city had five or more employees in fire suppression.[41]

An employee who is assigned to the fire department or police department and who performs support services, such as a dispatcher, alarm operator, clerk, or mechanic, does not count towards the five-employee threshold.[42] However, a higher paid exempt officer who engages in fire protection or law enforcement activities, such as a fire or police chief, is counted for purposes of determining whether the complete overtime exemption applies.[43] Volunteers are not considered employees; therefore, they do not count towards the minimum employee threshold.[44]

[38]29 C.F.R.§ 553.211(e).
[39]29 C.F.R.§ 553.211(g)
[40]29 U.S.C. § 213(b)(20); 29 C.F.R. § 553.20.
[41]See Employment Law Manual for Texas Cities, Page 24, https://www.tml.org/p/EMPLOYMENT%20LAW%20MANUAL%20FOR%20TEXAS%20CITIES_2015.pdf
[42]Id.
[43]Id.
[44]Employment Law Manual for Texas Cities, Page 26, https://www.tml.org/p/EMPLOYMENT%20LAW%20MANUAL%20FOR%20TEXAS%20CITIES_2015.pdf.

Special People who get No Overtime—Exemptions from the FLSA for Managers, Professionals, Teachers, Techies, and Artists

The following categories of employees are exempt from the FLSA's overtime and minimum wage requirements:

Executive Employee[45]*
Administrative Employee[46]*
Education Establishments Employee[47]*
Learned Professional[48]*
Artistic Employee (Creative Professional)*
Computer-Related Employee*
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, administrative, educational, professional, artistic, and computer-related employees must meet both the salary basis and salary level tests, which are as follows:

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 (only for private sector employees): Private employee must receive a predetermined, fixed salary that is not subject to reduction due to variations in quality or quantity of work performed – Substantially changed for public employees to allow deductions from fixed salary for work not performed due to leave without pay for absences for personal reasons or because of illness or injury pursuant that otherwise meets the requirements of 29 USC § 541.710[49]

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[45] 29 U.S.C. § 213 Exemptions (a) Minimum wage and maximum hour requirements. The provisions of sections 6 (except section 6(d) in the case of paragraph (1) of this subsection) and 7 [29 U.S.C.A. §§ 206, 207] shall not apply with respect to - any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act except than [that] an employee of a retail or service establishment shall not be excluded . . .

[46] Id.

[47] Id.

[48] Id.

[49] 29 USC § 541.710. Employees of Public Agencies:

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

(1) Permission for its use has not been sought or has been sought and denied;

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 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 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 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 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:

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(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.

• The employee must be compensated either on a salary or fee basis 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:

1. The employee earns total annual compensation of $100,000 or more, which includes at least $455* per week paid on a salary basis;
2. The employee's primary duty includes performing office or non-manual work; and
3. The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

An employee may qualify as an exempt highly-compensated executive if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements in the standard test for exemption as an executive.

The required total annual compensation of $100,000 or more may consist of commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period, but does not include credit for board or lodging, payments for medical or life insurance, or contributions to retirement plans or other fringe benefits.[50]

Please note, the Department of Labor is undertaking rulemaking to revise the regulations located at 29 C.F.R. part 541, which govern the exemption of executive administrative, and professional employees from the Fair Labor Standards Act's minimum wage and overtime pay requirements. Until the Department issues its final rule, it will enforce the part 541 regulations in effect on November 30, 2016, including the $455 per week standard salary level. These regulations are available at: https://www.dol.gov/whd/overtime/regulations.pdf.[51]

[50] *W&H Fact Sheet #17H: Highly-Compensated Workers and the Part 541-Exemptions Under the Fair Labor Standards Act* (FLSA) https://www.dol.gov/whd/overtime/fs17h_highly_comp.pdf
[51] Id.

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: Non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the Fair Labor Standards Act, and are not exempt under the regulations in this part no matter how highly paid they might be.[52]

Police officers and Firefighters are very rarely administrative professionals: The regulations issued pursuant to the FLSA create the impression that virtually no police or firefighters are subject to the administrative or professional exemptions under the FLSA.[53] 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. This DOL opinion has been relied upon to provide

[52] 29 CFR § 541.3 Scope of the section 13(a)(1) exemptions.(a) The section 13(a)(1) exemptions and the regulations in this part do not apply to manual laborers or other "blue collar" workers who perform work involving repetitive operations with their hands, physical skill and energy. Such nonexempt "blue collar" employees gain the skills and knowledge required for performance of their routine manual and physical work through apprenticeships and on-the-job training, not through the prolonged course of specialized intellectual instruction required for exempt learned professional employeessuch as medical doctors, architects and archeologists. Thus, for example, non-management production-line employees and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the Fair Labor Standards Act, and are not exempt under the regulations in this part no matter how highly paid they might be.

[53] 29 CFR § 541.3(b)

(1) The section 13(a)(1) exemptions and the regulations in this part also do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

(2) Such employees do not qualify as exempt executive employees because their primary duty is not management of the enterprise in which the employee is employed or a customarily recognized department or subdivision thereof as required under § 541.100. Thus, for example, a police officer or fire fighter whose primary duty is to investigate crimes or fight fires is not exempt under section 13(a)(1) of the Act merely because the police officer or fire fighter also directs the work of other employees in the conduct of an investigation or fighting a fire.

(3) Such employees do not qualify as exempt administrative employees because their primary duty is not the performance of work directly related to the management or general business operations of the employer or the employer's customers as required under § 541.200.

(4) Such employees do not qualify as exempt professionals because their primary duty is not the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as required under § 541.300. Although some police officers, fire fighters, paramedics, emergency medical technicians and similar employees have college degrees, a specialized academic degree is not a standard prerequisite for employment in such occupations.

that captains are exempt from the FLSA in many cases.[54] Lieutenants have a mixed record of being determined to be FLSA exempt under the administrative exemption.[55] Correctional officers who primarily work the "front line," detaining and supervising suspected and convicted criminals, are not exempt, regardless of their rank, pay level, and supervision of other officers.[56]

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. Exempt teachers include, but are not limited to, regular academic teachers; kindergarten or nursery school teachers; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrument music teachers. The salary and salary basis requirements do not apply to bona fide teachers. Having a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge includes, by its very nature, exercising discretion and judgment.[57]

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. An employee who holds the requisite academic degree for the general practice of medicine is also exempt if he or she is engaged in an internship or resident program for the profession. The salary and salary basis requirements do not apply to bona fide practitioners of law or medicine.[58]

Employee of Seasonal Amusement or Recreational Establishment

Section 13(a)(3) provides an exemption from the minimum wage and overtime provisions of the FLSA for "any employee employed by an establishment which is an amusement or recreational establishment, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33-1/3 per centum of its average receipts for the other six months of such year."[59]

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[54] *See Simmons v. City of Fort* Worth, 805 F.Supp. 419, 421 (N.D. Tex. 1992); [*15] *Masters v. City of Huntington*, 800 F.Supp. 363, 365 (S.D. W.Va. 1992); *Keller v. City of Columbus, Indiana*, 778 F.Supp. 1480, 1482 (S.D. Ind. 1991); *Benavides v. City of Austin*, No. A-11-CV-438-LY, 2013 U.S. Dist. LEXIS 87648, 2013 WL 3197636, *7-8 (W.D. Tex. 2013). *Martinez v. Refinery Terminal Fire Co.*, No. 2:11-CV-295, 2014 U.S. Dist. LEXIS 18244, at *14-15 (S.D. Tex. Feb. 13, 2014).

[55] The regulations also make clear that "a police officer . . . whose primary duty is to investigate crimes . . . is not exempt under 13(a)(1) of the Act merely because the police officer [*15] . . . also directs the work of other employees [while performing such work]." 29 C.F.R. § 541.3(b); *see also Maestas v. Day & Zimmerman, LLC*, 664 F.3d 822, 829-30 (10th Cir. 2012) (private security "field lieutenant" not necessarily exempt); *Mullins v. City of New York*, 653 F.3d 104, 118-19 (2nd Cir. 2011) (police sergeants not exempt). *Jones v. Williams*, No. CCB-11-793, 2012 U.S. Dist. LEXIS 137254, at *14-15 (D. Md. Sep. 25, 2012) (police lieutenant not exempt).

[56] *Crawford v. Lexington-Fayette Urban Cty. Gov't*, No. 06-299-JBC, 2008 U.S. Dist. LEXIS 50875, at *29 (E.D. Ky. June 25, 2008).

[57] Fact Sheet #17H: Highly-Compensated Workers and the Part 541-Exemptions Under the Fair Labor Standards Act (FLSA) https://www.dol.gov/whd/overtime/fs17h_highly_comp.pdfhttps://www.dol.gov/whd/overtime/fs17d_professional.pdf

[58] Id.

[59] 29 U.S.C. § 213(a)(3)

Whether an amusement or recreational establishment "operates" during a particular month is a question of fact, and depends on whether it operates as an amusement or recreational establishment. If an establishment engages only in such activities as maintenance operations or ordering supplies during the "off season" it is not considered to be operating for purposes of the exemption. (c) 33-1/3 % Test. Because the language of the statute refers to receipts for any six months (not necessarily consecutive months), the monthly average based on total receipts for the six individual months in which the receipts were smallest should be tested against the monthly average for six individual months when the receipts were largest to determine whether this test is met.

This is a very difficult exemption for a municipality to obtain because it requires that a municipality or, more likely, a corporation owned by the municipality, must operate a separate establishment that is a seasonal amusement or recreational establishment.

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. The law contains certain protections for employees that prohibit employers from displacing any employee in order to hire someone at the youth minimum wage.

This can be a dangerous provision to utilize. First, the municipality must have a reliable system for ensuring the pay is increased when youth become 20 years old or reach the 90 day mark in employment. Secondly, other employees can allege displacement. Employers may not take any action to displace any employee (including partial displacements such as a reduction in hours, wages, or employment benefits) for the purpose of employing someone at the youth wage. Violation of this anti-displacement provision is considered to be a violation of the FLSA's Section 15(a)(3) anti-discrimination provision.[60]

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:

1. holds a public elective office of that state, political subdivision, or agency,
2. is selected by the holder of such an office to be a member of his personal staff,
3. is appointed by such an officeholder to serve on a policy making level,
4. is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office, or
5. 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.[61]

Volunteers:

[60] *W&H Fact Sheet #32: Youth Minimum Wage - Fair Labor Standards Act.* https://www.dol.gov/whd/regs/compliance/whdfs32.pdf
[61] 29 U.S.C. § 203(e)(2)(C)(i).

True volunteers for public agencies are exempt from the FLSA. However, volunteers cannot be persons who are also employees of the public agency.[62] Also, volunteers cannot provide be employed by another public agency that provides services that would also be supplied by that same public agency.[63] A common example of the application of that type of prohibition would be a volunteer fireman who provides services in conjunction with services provided by a paid fire department that covers the same area.[64]

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)). It is generally recognized that this and other exemptions from the FLSA should be strictly construed against the employer, and should be limited to those situations that plainly and unmistakably come within the terms and spirit of the exemptions; and thus, that because the FLSA is remedial in nature, with a humanitarian purpose, it should be construed liberally in favor of the employee, and not in a narrow, grudging manner, with any doubt as to construction of the FLSA being resolved in favor of coverage of the employees under the statutes.[65]

[62] 29 CFR § 553.101 "Volunteer" defined.
(a) An individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered, is considered to be a volunteer during such hours. Individuals performing hours of service for such a public agency will be considered volunteers for the time so spent and not subject to sections 6, 7, and 11 of the FLSA when such hours of service are performed in accord with sections 3(e)(4) (A) and (B) of the FLSA and the guidelines in this subpart.
(b) Congress did not intend to discourage or impede volunteer activities undertaken for civic, charitable, or humanitarian purposes, but expressed its wish to prevent any manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon individuals to "volunteer" their services.
(c) Individuals shall be considered volunteers only where their services are offered freely and without pressure or coercion, direct or implied, from an employer.
(d) An individual shall not be considered a volunteer if the individual is otherwise employed by the samepublic agency to perform the same type of services as those for which the individual proposes to volunteer.

[63] 29 CFR § 553.102 Employment by the same public agency.
(a) Section 3(e)(4)(A)(ii) of the FLSA does not permit an individual to perform hours of volunteer service for a public agency when such hours involve the same type of services which the individual is employed to perform for the same public agency.
(b) Whether two agencies of the same State or local government constitute the same public agency can only be determined on a case-by-case basis. One factor that would support a conclusion that two agencies are separate is whether they are treated separately for statistical purposes in the Census of Governments issued by the Bureau of the Census, U.S. Department of Commerce.

[64] Please note the limited exception to that prohibition with respect to mutual aid agreements pursuant to 29 CFR § 553.105, which 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. . . "

[65] Am. Jur. 2d, Labor and Labor Relations § 2212.

On-Call Time—Yes, I do want to be paid for sitting on the couch

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" as defined by the U.S. Department of Labor (DOL) Wage and Hour Division.[66] For example, a secretary who reads a book while waiting for dictation or a fireman who plays checkers while waiting for an alarm is working during such periods of inactivity. These employees have been "engaged to wait."[67]

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 unless the employer has an on-call policy that specifically requires pay during such times. Federal court decisions have held that on-call employees are not overly constrained by a paging device.[68] Therefore, the unpaid, waiting-to-be-engaged status could apply to those employees who are not required to wait near or at the worksite.

Federal courts apply a multi-factor test when determining whether or not on-call workers must be compensated[69]:

- 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.

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[66] 29 CFR § 785.16 Off duty.
(a)*General.* Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked. He is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived. Whether the time is long enough to enable him to use the time effectively for his own purposes depends upon all of the facts and circumstances of the case.
(b)*Truck drivers; specific examples.* A truck driver who has to wait at or near the job site for goods to be loaded is working during the loading period. If the driver reaches his destination and while awaiting the return trip is required to take care of his employer's property, he is also working while waiting. In both cases the employee is engaged to wait. Waiting is an integral part of the job. On the other hand, for example, if the truck driver is sent from Washington, DC to New York City, leaving at 6 a.m. and arriving at 12 noon, and is completely and specifically relieved from all duty until 6 p.m. when he again goes on duty for the return trip the idle time is not working time. He is waiting to be engaged. (*Skidmore* v. *Swift,* 323 U.S. 134, 137 (1944); *Walling* v. *Dunbar Transfer & Storage,* 3 W.H. Cases 284; 7 Labor Cases para. 61,565 (W.D. Tenn. 1943); *Gifford* v. *Chapman,* 6 W.H. Cases 806; 12 Labor Cases para. 63,661 (W.D. Okla., 1947); *Thompson* v. *Daugherty,* 40 Supp. 279 (D. Md. 1941))

[67] Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA). https://www.dol.gov/whd/regs/compliance/whdfs22.pdf

[68] See https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/cms_020208.aspx

[69] See http://www.hrmorning.com/flsa-2/

- 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. Anything less than that might be.

- 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 for that time.

- Frequency of calls. The more calls employees get, the more likely it is they're considered "on duty" and need to be paid. For example, the DOL has stated that EMTs who get more calls in the winter, when there are more weather-related accidents, may be owed wages for their on-call time during those months. But that is not always the case during times of the year when emergency calls are less frequent. Prohibiting employees from switching shifts. The more freedom employees have, the more likely it is they are not required to be paid.

No single factor is dispositive, and the courts apply differing levels of weight to each factor.[70] This list is illustrative, not exhaustive, and no one factor is dispositive. As noted above, the number of calls received while on call is a relevant factor in determining whether the on-call period is compensable under the FLSA. In *Bright*, for example, a hospital required its on-call biomedical equipment repair technician to be reachable by beeper, remain sober, and arrive at the hospital within approximately 20 minutes after being called. The technician received calls while on call an average of 4-5 times per week. The 5th Circuit concluded that the employee was able to use the on-call time "effectively for his own personal purposes" and, as such, the time spent on call was not compensable.[71] On the other hand, in *Renfro* the 11th Circuit concluded that on call time was compensable for firefighters who were required to wear pagers and respond to callbacks within 20 minutes, and received an average of three to five calls, and as many as 13 calls, in a 24-hour on-call period.[72]

[70] See *Reimer v. Champion Healthcare Corp*., 258 F.3d 720 (8th Cir. 2001); *Pabst v. Okla. Gas & Elec. Co.*, 228 F.3d 1128 (10th Cir. 2000); *Ingram v. County of Bucks*, 144 F.3d 265, 268 (3d Cir. 1998); *Owens v. Local No. 169, Ass'n of W. Pulp & Paper Workers*, 971 F.2d 347, 351 (9th Cir. 1992); *Renfro v. City of Emporia*, 948 F.2d 1529 (10th Cir. 1991); *Cross v. Ark. Forestry Comm'n,* 938 F.2d 912, 916 (8th Cir. 1991); *Bright v. Houston Nw. Med. Ctr. Survivor, Inc.*, 934 F.2d 671 (5th Cir. 1991).

[71] *Bright v. Houston Nw. Med. Ctr. Survivor, Inc., 934 F.2d 671, 677-78 (5th Cir. 1991)*.

[72] *Renfro v. City of Emporia*, 948 F.2d 1529 (10th Cir. 1991)

Compensatory Time for State and Local Employees

In 1985, Congress amended the FLSA to relieve states of part of the burden of compliance with the FLSA overtime provisions, while still protecting public employees who work overtime. City employees can be paid in compensatory time (paid time off) instead of overtime. The 1985 amendments require that state and local governments award compensatory time at a rate not lower than one and one-half hour for every overtime hour an employee works. Compensatory time is paid time off, and a nonexempt employee must earn at least one-and-one-half hours of compensatory time for every hour of work over 40 hours in a 7-day work period.

Compensatory time may only be given to employees if the employees agree before beginning work to accept compensatory time off in lieu of overtime through individual agreements or through a collective bargaining agreement.[73] Such an agreement may take one of two forms. Section 207(o)(2)(A)(i) of the FLSA provides that states and municipalities may make compensatory time agreements pursuant to "applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees."[37] Section 207(o)(2)(A)(ii) provides that, in cases of employees not covered by subclause (i), state and local governments may grant their employees compensatory time pursuant to "an agreement or understanding arrived at between the employer and employee before the performance of the work."[74]

Administering compensatory time is dangerous. The penalties section of the FLSA, 29 U.S.C. § 216, provides in pertinent part: "Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their . . . unpaid overtime compensation, . . . and in an additional equal amount as liquidated damages." Id. § 216(b). Thus, failure to abide by compensatory time provisions subjects a state or local government to liability for double the overtime compensation owed and invalidates the public employer's compensatory time plan.

[73] 29 U.S.C. § 207(o); 29 C.F.R. § 553.23.
[74] 29 U.S.C. § 207(o)(2)(A)(ii).

Dealing with the U.S. Department of Labor—We are from the government and are here to help you

The FLSA grants the Wage and Hour Administrator of the U.S. Department of Labor broad powers to conduct investigations into potential FLSA violations.[75] An investigation is usually initiated when the Wage and Hour Administrator contacts an employer. However, the Wage and Hour Administrator does not require an investigator to announce the initiation of an audit prior to arrival at the inspection site. The investigator typically will not disclose the reason for the investigation because most investigations are in response to employee complaint, and the Wage and Hour Administrator is attempting to maintain the confidentiality of the complaint.

The investigation will include a review of the employer's records and probably include employee interviews. These employee interviews are conducted in private and are confidential. Investigators are guided in their work by the "Field Operations Handbook," which can be reviewed online.[76]

Wage and Hour investigators do not need judicial approval prior to issuing a valid subpoena.[77] Wage and Hour Investigators have the power to subpoena the production of documents to determine both the application of FLSA to the employer and to investigate if violations occurred prior to having proof of such violations.[78] There are also no "requirements in terms of any showing of 'probable cause'" in regards to issuance of a subpoena.[79]. The Administrator's powers in this regard are comparable to those of a grand jury and are not "limited by forecasts of the probable result of the investigation."[80]

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."[81] As the Fifth Circuit has noted, "there is an important difference between an entry onto premises to conduct a broad inspection of documents and a subpoena requiring the production of certain specified documents off premises. A subpoena involves no entry and allows a company itself to search through its files, and find those documents that are specified by the subpoena as relevant."[82] On the other hand, an "extensive, non-consensual entry onto [an employer's] protected premises" requires a warrant.

The 4th Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome."[83] If an inspector arrives unannounced at a workplace with a subpoena for a number of documents, or requests to interview employees immediately at the worksite, an employer is empowered to request a scheduled, convenient

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[75] 29 U.S.C. §211(a).

[76] http://www.dol.gov/whd/FOH/.

[77] "Congress has authorized the Administrator, rather than the District Courts in the first instance, to determine the question of coverage in the preliminary investigation ... in doing so to exercise his subpoena power ... and, in case of refusal to obey his subpoena ... to have the aid of the District Court in enforcing it. *Oklahoma Press Publications Co. v. Walling*, 327 U.S. 186, 508 (U.S. 1946).

[78] *Oklahoma Press Publications Co. v. Walling*, 327 U.S. 186, 505 (U.S. 1946).

[79] *Oklahoma Press Publications Co. v. Walling*, 327 U.S. 186, 509 (U.S. 1946).

[80] Id.

[81] *Donovan v. Lone Steer*, 464 U.S. 408,414(1984).

[82] *United States v. New Orleans Public Serv., Inc.*, 734 F.2d 226, 228 (5th Cir. 1984).

[83] *Donovan v. Lone Steer*, 464 U.S. 408 at 415 (quoting *See v. City of Seattle*, 387 U.S. 541, 544 (1967)).

time and place for the investigation and to challenge the subpoena as unreasonable if an investigator insists. Initial communications with the investigator should be made diplomatically. In many cases it may be to the employer's advantage to consent and cooperate as opposed to set an adversarial tone to the proceedings. The subpoena will almost always be eventually issued.[84] To enforce an administrative subpoena in a federal district court, a governmental agency must show that: (1) the investigation will be conducted pursuant to a legitimate purpose; (2) the inquiry may be relevant to the purpose; (3) that the information sought is not already within the agency's possession; and (4) that internal administrative procedures have been followed.[85]

Employers have a right to be represented by an attorney and other representatives during investigations. The team of representatives should include personnel who can demonstrate enough knowledge of the records to demonstrate good faith compliance with the FLSA. Responsibility under the Fair Labor Standards Act for making, keeping and preserving accurate records of employees' work hours rest solely on the employer.[86]

For employees subject to the minimum wage or minimum wage and overtime provisions pursuant to section 6 or sections 6 and 7(a) of the Act, employers must maintain "payroll or other records" with respect to each employee[87] containing:

- Name in full, as used for Social Security recordkeeping purposes, and on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records;
- Home address, including zip code;
- Date of birth, if under 19;
- Sex and occupation in which employed (sex may be indicated by use of Mr., Ms., Miss., or Mrs.);
- Time of day & day of week on which the employee's workweek begins (or for employees employed under section 7(k) of the Act the starting time and length of each employee's work period);
- Regular hourly rate of pay for any workweek in which overtime compensation is due under section 7(a) of the Act; explanation of basis of pay by indicating the monetary amount paid on a per hour, per day, per week, per piece, commission on sales, or other basis; amount and nature of each payment which, pursuant to section 7(e) of the Act, is excluded from the "regular rate" (these records may be in the form of vouchers or other payment data);
- Hours worked each workday and total hours worked each workweek ("workday" is any fixed period of 24 consecutive hours and "workweek" is any fixed and regularly recurring period of 7 consecutive days). If an employee works a regular, fixed schedule, the employer may show the hours typically worked with an indication that such employee worked regular hours in any given week. If the employee works more or less than the regular schedule in a week, this must be indicated;
- Total daily or weekly straight time earnings or wages;

[84]The requirements for judicial enforcement of an administrative subpoena are minimal." *Burlington N. R.R. Co. v. Office of Inspector General, R.R. Ret. Bd*, 983 F.2d 631, 637 (5th Cir. 1993).

[85] See *U.S. v. Transocean Deepwater Drilling, Inc.*, 936 F. Supp. 2d 818, 821 (S.D.Tex. 2013).

[86] *Brock v. Bowen Manufactured Housing, Inc.*, 681 F. Supp. 1224, 1227 (W.D. Tex. 1987).

[87] 29 C.F.R. §516.2(a)

- Total premium pay for overtime hours (this excludes the straight-time earnings for overtime hours);
- Total additions to or deductions from wages paid each pay period including employee purchase orders or wage assignments. Also, in individual employee records, the dates, amounts, and nature of the items which make up the total additions and deductions;
- Total wages paid each pay period;
- Date of payment and the pay period covered by payment.

Records must be kept for two years or three years:

Two Year Records:

- Basic employment and earnings records,
- wage rate tables, order, shipping and billing records (from the last date of entry);
- records of additions to or deductions from wages paid (including all records used for determining the original, operating and maintenance cost, and depreciation and interest charges, if such costs and charges are involved in the additions to or deductions from wages paid).

Three Year Records:

- Payroll records (from the last date of entry);
- collective bargaining agreements relied upon for the exclusion of certain costs under Section 3(m) of the Act;
- collective bargaining agreements, under section 7(b)(1) or 7(b)(2) of the Act and any amendments or additions thereto;
- plans, trusts, employment contracts, and collective bargaining agreements under §7(e) of the Act; individual contracts or collective bargaining agreements under §7(f) of the Act (if not in writing then a written memorandum summarizing their terms); written agreements or memoranda summarizing the terms of oral agreements or understandings under §7(g) or 7(j) of the Act; and
- certificates and notices listed or named in any applicable section of this part;
- records of (a) total dollar volume of sales or business and (b) total dollar volume of goods purchased or received during such periods in such form as the employer maintains records in the ordinary course of business.

When an employer-defendant fails to maintain complete and accurate timekeeping records, "[t]he solution ... is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work."[88] Instead, the employee-plaintiff has sustained his burden if he proves that he has in fact performed uncompensated work "and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference."[89]

[88] *Von Friewalde v. Boeing Aerospace Ops., Inc., 339 Fed. App'x.* 448, 455 (5th Cir. 2009) (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)).

[89] *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)); see also *Rosales v. Lore*, 149 Fed. App'x 245, 246 (5th Cir. 2005).

An employee-plaintiff still bears the burden of proving, with definite and certain evidence, that she performed work for which she was not properly compensated."[90] However, an employer who has not kept the required records will not be permitted to complain that there is no evidence of the precise amount of an employee's time worked or amounts paid.[91]

[90] *Reeves v. Int'l Telephone & Telegraph Corp*., 616 F.2d 1342, 1352 (5th Cir. 1980).

[91] See *Mitchell v. Mitchell Truck Line, Inc.,* 286 F.2d 721, 725-26 (5th Cir. 1961) (explaining that an employer "cannot really complain that matters are left in great uncertainty" due to its own failure to keep accurate time and wage records). In *Reeves v. Int'l Telephone & Telegraph Corp.,* the 5th Circuit upheld an award of unpaid wages that was based on the plaintiffs estimate of the average number of hours he worked each week, which "corresponded to the rough computations of his subconscious mind" where the employer did not keep adequate records. *616 F.2d 1342, 1352 (5th Cir. 1980).*