

## THE FAIR LABOR STANDARDS ACT (FLSA) 29 U.S.C. §§ 201-219

A. **Overview.** The Fair Labor Standards Act (FLSA) is a federal law that sets minimum wage, overtime pay, equal pay, record keeping, and child labor standards for employers. It is administered by the Wage and Hour Division of the U.S. Department of Labor ([www.dol.gov/esa/whd](http://www.dol.gov/esa/whd)).

- Minimum wage and overtime requirements apply to all *non-exempt* state and local government employees.
  - ✓ **Overtime:** Employers must pay overtime or one-and-one-half the employee's regular rate of pay for each hour worked over forty (40).
  - ✓ **Local Government Exceptions:**
    - Law enforcement: O/T only for hours over 171 in a 28-day cycle
    - Firefighters: O/T only for hours over 212 in a 28-day cycle
  - **Note:** Governments with fewer than five (5) law enforcement officers or fewer than 5 firefighters are exempt from paying overtime to law enforcement officers or firefighter, as the case may be.
- ✓ **Comp time:** Local governments may give their employees compensatory time-off at the rate of one-and-one-half hours for every hour worked over 40 in lieu of cash overtime up to a total of two-hundred forty (240) hours.
  - Public safety may receive comp time up to a total of four-hundred eighty (480) hours.

### B. **Exempt or Non-exempt?**

Everyone is non-exempt unless they can be shown to fit into one of three exceptions:

- ✓ They are salaried,
  - “salaried” means no change from pay period to pay period based on variations in quality or quantity of work (the “salary basis test”);
- and**
- ✓ They earn at least \$455 per week (the “salary threshold test”),
- and**
- ✓ they are executive, administrative or professional employees within the meaning of those terms as set forth in United States Department of Labor regulations (the “duties tests”).

#### Executive Employees:

- Regularly direct the work of at least two employees, and
- Have a primary duty of management, and
- Have hiring, firing or promotion authority, or recommendations about hiring, firing and promotions are given particular weight.

#### Administrative Employees:

- Have a primary duty of office or nonmanual work directly related to management or general business operations of the employer, and
- Perform work requiring the exercise of discretion and independent judgment on matters of significance.

#### Academic Administrative Employees:

- Have a primary duty of performing administrative functions directly related to academic instruction;  
The administrative work must be more than just “office or non-manual work.”
- No discretion and independent judgment requirement.

#### Learned Professional Employees:

- Must perform work requiring advanced knowledge
  - Intellectual in character
  - Requires consistent exercise of discretion and independent judgment
- Advanced knowledge must be in a field of science or learning
  - For example, law, medicine, teaching, accounting, actuarial science, engineering, architecture, pharmacy and physical, chemical and biological sciences.
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

#### Professional Exemption for Teachers

- Primary duty of “teaching, tutoring, instructing or lecturing in the activity of imparting knowledge.”
- Employed in public school, community college, 4-yr. college or university.
- Salary basis and salary threshold tests do not apply.
- Discretion and judgment requirement does not apply.

#### Professional Computer Employee

Work must focus on:

- the application of systems analysis, techniques and procedures to determine hardware, software or system functional specifications (this may include consulting with users);
- the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, either based on and related to user or system design specifications, or related to machine operating systems; or
- a combination of the two

**Note: The FLSA does not cover the following persons who may perform work for a state or local government:**

- elected officials and their personal staff
- policymaking appointees
- volunteers
- independent contractors
- certain trainees

**C. Hours Worked: For FLSA purposes, “hours worked” are:**

1. All time during which an employee is required to be on the employer’s premises or at some other assigned workplace; and
2. All time during which the employee is “suffered or permitted to work.”

**See 29 U.S.C. 203(g); 29 CFR §§ 785. 7, 785. 11.**

**1. Bona Fide Meal Periods:**

- Must be at least thirty minutes in length
- Employee must be completely relieved of duties.
- Employee does not have to be allowed to leave the premises.

**See 29 CFR § 785.19.**

***Bona Fide Meal Periods for 207(k) Personnel:***

- Law Enforcement Tour of 24 hrs or less:  
⇒ Meal periods of 30 min. may be excluded unless officers are on-call during that time.
- Firefighter Shift of 24 hrs or less:  
⇒ Meal periods may NOT be excluded.
- Law Enforcement & Firefighters on Duty More than 24 hrs:  
⇒ Meal periods may be excluded if they are 30 min. and employee is relieved of duties (not on-call).

**See 29 CFR § 553.223.**

**3. Sleep-Time:**

- Shift must be minimum of 24 hours (24.5) before sleep time can be excluded.
- No more than 8 hours can be excluded.
- Express or implied agreement required.
- Employer must provide adequate sleeping facilities.
- Employee must be able to get at least 5 hours of uninterrupted sleep.

**See 29 CFR §§ 785.22, 553.222 [207(k) personnel].**

**4. Training Time:** Employees do not have to be compensated for training time if:

- attendance is outside the employee's regular working hours;
- attendance is voluntary;
- the course is not directly related to the employee's job; and
- the employee does not perform any productive work during time in attendance at the course.

See 29 CFR § 785.27.

**D. Regular Rate of Pay Includes:**

- Hourly rate / salary
- Retroactive salary increases
- On-call pay
- Nondiscretionary bonuses
- Shift differentials
- Longevity pay

**E. Deductions from Wages**

**1. Disciplinary Suspensions without Pay**

- Nonexempt employees: Allowed for any disciplinary reason permitted by personnel policy.  
*For example:* suspension without pay for working overtime without authorization
- Exempt employees: Generally allowable only for full-week periods  
**EXCEPTION:** Violation of safety rule of major significance  
*Definition of "safety rule of major significance:"*  
A rule intended to prevent serious danger to the workplace or other employees.

A deduction made as a form of suspension without pay for violation of a major safety rule may be made in any amount and need not be tied to the employee's wage rate.

See 29 CFR §§ 541.602(b)(4) and 541.602(c).

**2. Deduction for Full-Day Disciplinary Suspensions for Exempt Employees**

Permitted under the following circumstances:

- May only be imposed for "infractions of workplace conduct rules"
- Employer must have a written policy to that effect
- Policy must be uniformly applied

- Deduction for the pro-rata amount of weekly salary
- DOL example of types of infractions for which this exception may be used:
  - ▶ Violation of sexual harassment policy
  - ▶ Violation of workplace violence rules

**Note:** tardiness, insubordination, performance failures do not fall within this exception.

See 29 CFR § 541.602(b)(5).

### **3. Deductions for Absences in Excess of Accrued Sick or Vacation Leave**

Docking of pay of exempt employees is permitted if

- there is policy of accruing sick/vacation time; and
- that policy requires docking when employee has not used accrued leave because
  - the employee has not sought permission to use accrued time or permission has been denied; or
  - the employee has used up all accrued time; or
  - the employee requests leave without pay; or
  - the employer institutes partial-week furloughs.

See 29 CFR § 541.710.

### **4. Deductions for Partial First or Last Week of Work**

An employer may pay a proportionate part of an employee's full salary for the time actually worked in the first and last week of employment. See 29 CFR § 541.602(b)(6).

### **5. Deduction for Destruction or Loss of Employer Property**

Employees subject to the FLSA must be paid wages unconditionally and “free and clear.” Voluntary deductions are permitted and deductions for equipment furnished by employer allowed under certain circumstances. If you are going to want to deduct the cost of property that is destroyed through the employee’s negligence or deliberate action or that the employee fails to return, make this practice a part of the personnel policy and make sure that it is communicated to employees.

See 29 CFR §§ 531.35, 531.36 and 531.37.

**F. Fluctuating Workweek:** Use for employees whose hours vary from week to week.

- Employee paid fixed salary to cover whatever hours job demands in a given week — up to 40.
- Overtime hours paid at ½ the regular rate.
- Note that regular rate will vary from week to week because fixed salary will be divided by a different number of hours worked each week.

**G. The 207(k) Exemption for Law Enforcement and Firefighters:**

Allows work periods between 7 and 28 days:

	<u>Law Enforcement</u>	<u>Fire Protection</u>
28 days	171 hrs.	212 hrs.
14 days	86 hrs.	106 hrs.
7 days	43 hrs.	53 hrs.

***Establishing the 207(k) Exemption:***

- Requires notation in payroll records showing length of period and starting date / time.
- Notation should state schedule adopted “pursuant to section 207(k) of the FLSA and 29 CFR Part 553.
- Does not require DOL approval or employee agreement.
- Does not have to coincide with payroll periods.

***Who Qualifies as a Law Enforcement Officer for 207(k) Purposes?***

- ▶ Uniformed or plainclothes members of a body of officers
- ▶ Who have the statutory power to enforce the law and
- ▶ Who have the power to arrest, and
- ▶ Who have participated in a special course of law enforcement training

See 29 CFR § 553.211.

*Note that an unsworn jailer counts as a law enforcement officer for 207(k) purposes, but other civilian employees of the police or sheriff’s department do not.*

***Who Qualifies as a Firefighter for 207(k) Purposes? Any employee who:***

- ▶ Is trained in fire suppression;
- ▶ Has the legal authority and responsibility to engage in fire suppression;
- ▶ Is employed by a fire department, and
- ▶ Is engaged in either
  - preventing, controlling and extinguishing fires, or
  - responding to emergency situations where life, property or the environment is at risk.

See 29 USC § 203(y).

**H. Recordkeeping. Employers must keep the following records for employees covered by the minimum wage and overtime provisions of the FLSA:**

1. Name in full, as used for social security recordkeeping purposes and, on the same record, the employee's identifying number or symbol, if such a number or symbol is used in place of the name on any payroll records.
2. Home address and zip code
3. Date of birth
4. Gender and occupation
5. Time of day and day of week on which the employee's workweek begins. For police officers and firefighters using something other than a 7-day workweek, the starting time and length of each employee's work period is required.
6. Regular hourly rate of pay
7. Hours worked each day and total hours worked each workweek
8. Total daily or weekly straight-time earnings or wages due for hours worked during the work day or workweek
9. Total premium pay for overtime hours
10. Total additions to, or deductions from, wages paid each pay period
11. Total wages paid each pay period
12. Dates of payment and pay period covered by payment.

**With the exceptions of nos. 6-10 above, employers must keep the same information for exempt employees.**

**I. Enforcement Procedures and Penalties for Violations of the FLSA:**

- Investigation by US DOL: If DOL finds that an employer has violated the FLSA, it may bring a lawsuit on the employee's behalf and seek either back wages and liquidated damages (defined by statute as the amount of back wages; hence the recovery is of double back pay), or back wages and an injunction prohibiting the employer from further violating the statute.
- DOL can also seek civil money penalties of \$1,100 per repeated violation.

- The employee may bring a private suit to recover double back pay and attorneys' fees.
- In egregious cases, the US Department of Justice may initiate a criminal prosecution for willful violation of the FLSA. The penalty for a first offense is a fine of no more than \$10,000; second offenses are punishable by fines of no more than \$10,000 **and/or** up to six months imprisonment.