

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

### 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)).

The FLSA's 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).
- **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.

#### A. Exempt or Non-exempt?

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

- They are *salaried*, which means that they receive the same wages from pay period to pay period and that there are no changes to that amount 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").

## The Duties Tests

### Executive Employee Duties Test:

The employee

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

### Administrative Employee Duties Test:

The employee

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

### The Learned Professional Employee Duties Test:

The employee

- must perform work requiring advanced knowledge
  - must be intellectual in character
  - must require 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 Computer Employee Test:

The employee's 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); or
- 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.

**B. 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.”

**a) 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.

**b) On-call Time:**

Whether or not the time an employee spends on-call is compensable depends on whether the time is being spent primarily for the benefit of the employer or whether the employee, while waiting for a call, can use the time for his or her own benefit. Employers may impose some restrictions on employees who are on-call – such as requiring them to abstain from alcohol consumption – without the time becoming compensable.

1. Factors considered by the courts in determining whether on-call time is compensable:

- i. required response time;
- ii. use of a pager to ease restrictions;
- iii. ability to trade on-call shifts;
- iv. excessive geographical limitations;
- v. employee’s ability to engage in personal activities; and
- vi. frequency of calls.

2. Examples of On-Call Time That Is Not Compensable

- i. Water and sewer department employees who could wear pagers, could not consume alcoholic beverages and were called back to duty an average of less than once per day;
- ii. Police detectives called less than twice per week, who could be reached by pager, and who had to remain sober and report to duty within 20 minutes of responding to a pager.

**c) 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.

**d) Travel Time**

- a. From home to work
  - i. Normal travel from home to work is not compensable time.
  - ii. Travel from home after the end of the work day to respond to an off-the-worksites emergency would be compensable time.
  - iii. If an employee is on-call and is called back to work, the time spent traveling to and from work is compensable.
- b. Away from home community
  - i. Travel away from home is compensable when it occurs during the employee's workday. The employee is simply substituting travel for other duties.
  - ii. Travel away from home is compensable when it occurs during what would be working hours, but on nonworking days.
    - A. If an employee regularly works from 9 a.m. to 5 p.m. from Monday through Friday, travel time on from 9 a.m. to 5 p.m. on Saturday and Sunday is also compensable time.
  - iii. Time traveling away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile is not compensable.

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

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

## **D. Deductions from the Wages of Exempt Employees**

### **1. Disciplinary Suspensions without Pay**

1. **Nonexempt employees:** Allowed for any disciplinary reason permitted by personnel policy.  
*For example:* suspension without pay for working overtime without authorization
2. **Exempt employees:** Not allowed for periods of less than one full workday or for one full workday and part of another, with one exception:
  - Suspension without pay is permitted for the violation of safety rule of major significance, that is, 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.

### **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.

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

Docking of pay of exempt employees for absences in excess of accrued leave is permitted if:

- there is policy of accruing sick/vacation time; and
- that policy requires docking when employee has not used accrued leave when
  - 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.

#### **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.

### **E. Deductions from Pay Affecting *Both Exempt and Nonexempt Employees***

#### **1. Deductions for the Overpayment of Wages**

When the employer has accidentally paid an employee more than it owes the employee in wages, it may deduct the amount of overpayment from the employee’s wages either in a lump sum or over time.

- a. This will not destroy the exemption of an exempt employee.
- b. Deductions taken for overpayment of wages may bring an employee’s wages below minimum wage without violating the FLSA.

#### **2. Deductions for Advances of Vacation and Sick Leave**

Neither FLSA regulations nor any cases before the federal Fourth Circuit Court of Appeals or a North Carolina federal district court address deductions to repay advanced paid vacation or sick leave. Nevertheless, certain principles may be inferred from existing rules and cases.

- a. First, nothing prohibits an employer from deducting from current wages an earlier advance of wages. Vacation and sick leave are an alternate form of compensation that have a cash value and as such, an advance of leave is equivalent to an advance of wages. The U.S. Department of Labor Field Operations Manual considers advances of paid accrued leave to be an advance of salary.
- b. As with an advance of salary, the deduction for repayment of an advance of vacation or sick leave *may* reduce below minimum wage the amount of money the employee receives after the deduction is made.
- c. The practice of deducting from final wages any advance of vacation or sick leave must be incorporated into your personnel policy before you may make such deductions.

### 3. Deductions for the Destruction or Loss of Employer Property or Money

#### Exempt Employees:

- a. To deduct the cost of lost or damaged property or missing funds from the wages of an exempt employee will destroy the exemption.
- b. The deduction would also violate the FLSA's requirement that wages be paid unconditionally and "free and clear," with no deductions being made for the benefit of the employer.

#### Nonexempt Employees:

- a. The FLSA requires that wages be paid unconditionally and "free and clear" and that none of the wages go back to the employer. Thus, as a general matter, deductions from an employee's paycheck that benefit the employer are unlawful.
- b. Voluntary deductions to pay back the employer for lost or damaged uniforms, property or equipment are permitted if they meet the following requirements are met.

#### *Workweeks without Overtime*

- i. The deduction cannot reduce below the rate of the minimum wage the amount of money the employee receives in compensation.

#### *Overtime Workweeks*

- i. The deductions may only be made if there is an agreement between the employer and the employee that deductions will be made for specific items.
  - A. The agreement must be reached before the employee performs the work that becomes subject to the deductions.
  - B. The agreement must be specific concerning the particular items for which the deductions will be made, and the employee must know how the amount of the deductions that are covered by the agreement will be determined.
  - C. The employee must affirmatively agree or assent to the employer's deduction policy. The burden of proof that the employee agreed to the deduction is on the employer.
  - D. Deductions from wages where no prior agreement exists as to particular items are never permitted in an overtime work week.
- ii. The total amount that an employer may deduct from an employee subject to overtime pay in an overtime workweek cannot reduce below the minimum wage the amount of money the employee receives in compensation for straight-time hours.
- iii. Where no express or implied agreement exists as to deductions for particular items, or if the employer reduces an employee's wages for a reason not addressed in the contractual arrangement or for no legitimate reason, the deductions are considered unlawful and are not allowed during overtime workweeks.

#### **4. Deductions for the Cost of Training**

Numerous local governments have adopted policies requiring employees to repay a portion of training costs if they voluntarily leave the local government's employment before completing a specified number of years of service. As with deductions from pay for damage to or loss of the employer's equipment, **this practice appears to be permissible so long as employees are advised of the policy at the outset of employment and the deduction does not bring the employee's regular rate of pay below minimum wage.**

- a. Neither the FLSA regulations nor any federal Fourth Circuit Court of Appeals or North Carolina federal district court cases address deductions for the cost of training.
- b. Cases from other circuits, however, provide a rationale for allowing such a practice.

#### **F. 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.