

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). The FLSA's minimum wage and overtime requirements apply to all *non-exempt* state and local government employees.

DETERMINING WHETHER A POSITION IS EXEMPT OR NON-EXEMPT

A. Everyone is non-exempt unless they can be shown to satisfy all three of the following:

- 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, 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”).

B. The Executive Duties Test:

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

C. The Administrative Duties Test:

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

Academic Administrative Duties Test:

- a. 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.”
- b. No discretion and independent judgment requirement.

D. The Learned Professional Duties Test:

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

Professional Exemption for Teachers

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

Professional Exemption for Computer Employees. Work must focus on:

- a. the application of systems analysis, techniques and procedures to determine hardware, software or system functional specifications (this may include consulting with users);
- b. 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
- c. a combination of the two.

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

1. elected officials and their personal staff
2. policymaking appointees
3. volunteers
4. independent contractors
5. certain trainees

HOURS WORKED 29 U.S.C. 203(g); 29 CFR §§ 785.7, 785.11

For FLSA purposes, “hours worked” are:

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

A. Bona Fide Meal Periods 29 CFR § 785.19

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

Bona Fide Meal Periods for 207(k) Personnel 29 CFR § 553.223

a. Law Enforcement Tour of 24 hrs or less:

Meal periods of 30 min. may be excluded unless officers are on-call during that time.

b. Firefighter Shift of 24 hrs or less:

Meal periods may NOT be excluded.

c. 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 (that is, the employee is not on-call).

B. Sleep Time 29 CFR §§ 785.22. See 29 CFR 553.222 for 207(k) personnel

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

C. Travel Time

- 1. From home to work**
 - a. Normal travel from home to work is not compensable time. See 29 CFR § 785.35.
 - b. Travel from home after the end of the work day to respond to an off-the-worksit emergency would be compensable time. See 29 CFR § 785.36.
 - c. If an employee is on-call and is called back to work, the time spent traveling to and from work is compensable.
- 2. Away from Home Community**
 - a. Travel away from home is compensable when it occurs during the employee's workday. The employee is simply substituting travel for other duties.
 - b. Travel away from home is compensable when it occurs during what would be working hours, but on nonworking days.
 - iii. 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.
 - c. Time traveling away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile is not compensable. See 29 CFR § 785.39; see also § 785.37.

OVERTIME

- A. Employers must pay overtime or one-and-one-half the employee's *regular rate of pay* for each hour worked over forty (40) in any given workweek by a nonexempt employee.**

B. 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 240 hours.

1. Public safety may receive comp time up to a total of four-hundred eighty (480) hours.

C. Exceptions:

1. The Fewer than Five Rule

Governments with fewer than five (5) law enforcement officers or fewer than five firefighters in any given week are exempt from paying overtime to law enforcement officers or firefighter, as the case may be.

2. The 207(k) Exemption for Law Enforcement and Firefighters

- a. The 207(k) exemption allows work periods between 7 and 28 days. Under the 207(k) exemption, overtime is owed to nonexempt law enforcement officers only for hours over 171 in a 28-day cycle or in proportion to 171 for work periods of fewer than 28 days. Overtime is owed to nonexempt firefighters only for hours over 212 in a 28-day cycle.

	<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.

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

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

c. **Who Qualifies as a Law Enforcement Officer for 207(k) Purposes? 29 CFR § 553.211**

- 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.
- 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.

e. **Who Qualifies as a Firefighter for 207(k) Purposes? 29 U.S.C. § 203(y)**

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.

3. The Fluctuating Workweek

This method of calculating overtime may be used for employees whose hours vary from week to week – sometimes more than 40, sometimes fewer than 40.

- a.** The employee is paid a fixed salary to cover whatever hours job demands in a given week — up to 40.
- b.** Overtime hours paid at $\frac{1}{2}$ the regular rate.
- c.** The regular rate will vary from week to week because fixed salary will be divided by a different number of hours worked each week.

D. Calculating the Regular Rate of Pay

The regular hourly rate of pay of an employee is determined by **dividing his total compensation for employment in any workweek by the total number of hours actually worked** by him in that workweek for which such compensation was paid.

1. The FLSA requires that **all** compensation for employment be included in calculating the regular rate. This means that the following kinds of compensation must be included when calculating the rate on which overtime is based:
 - a. hourly rate (or salary divided by number of hours worked)
 - b. Any retroactive salary increases
 - c. On-call pay, whether for time actually worked or per shift for simply being available
 - e. Nondiscretionary bonuses
 - f. Shift differential
 - g. Longevity pay
2. There are very few exceptions to this requirement. They include:
 - a. **discretionary bonuses**, that is, those which may be given or not in the sole judgment of the employer (see 29 CFR § 778.211);
 - b. gifts and payments marking special occasions such as a 10-year service anniversary or a holiday payment, so long as the amounts of the payment is not dependent on hours worked, production, or efficiency.
 - c. contributions by the *employer* to welfare benefit plans, such as health insurance or pension plans such as LGERS or the NC 401(k) Plan;
 - d. made for occasional periods when no work is performed due to vacation, holiday, illness, or failure of the employer to provide sufficient work – *this means that a payout of accrued unused sick, vacation or comp time is not included in the regular rate*;
 - e. overtime compensation itself – *this means that a comp time cash payout is not included in the regular rate*;
 - f. holiday pay or premium pay for work on the weekends is excludable from the calculation of the regular rate, but only if the holiday or premium pay rate is at least one-and-one-half the regular hourly rate;

DEDUCTIONS FROM WAGES

A. Disciplinary Suspensions without Pay

1. **Nonexempt employees:** Allowed for any disciplinary reason permitted by personnel policy. An example is a suspension without pay for working overtime without authorization
2. **Exempt employees:** Generally allowable only for full-week periods
 - i. **Exception:** 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. 29 CFR §§ 541.602(b)(4) and 541.602(c).

B. Deduction for Full-Day Disciplinary Suspensions for Exempt Employees 29 CFR § 541.602(b)(5)

Permitted under the following circumstances:

1. The deduction may only be made for “infractions of workplace conduct rules;”
2. The employer must have a written policy to that effect;
3. The policy must be uniformly applied;
4. The deduction for the pro-rata amount of weekly salary;
5. DOL example of types of infractions for which this exception may be used:
 - i. violation of sexual harassment policy
 - ii. violation of workplace violence rules
 - iii. tardiness, insubordination, performance failures **do not** fall within this exception.

C. Deductions for Absences in Excess of Accrued Sick or Vacation Leave 29 CFR § 541.710

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

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

D. 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).

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. 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.

ENFORCEMENT PROCEDURES AND PENALTIES FOR VIOLATIONS OF THE FLSA

- A. If the U.S. Department of Labor 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.
- B. DOL can also seek civil money penalties of \$2,014 per repeated violation per employee.
- C. The employee may bring a private suit to recover double back pay and attorneys' fees.
- D. 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.