

FAIR LABOR STANDARDS ACT

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Note: This article provides general information concerning the topics covered. It is not an exhaustive treatment of the statutory or case law authority on the subject. For a thorough legal analysis of particular factual circumstances, experienced legal counsel should be consulted.

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FAIR LABOR STANDARDS ACT

I. INTRODUCTION

The federal Fair Labor Standards Act (FLSA) enacted in 1938 is found at 29 U.S.C. § 201, *et seq.* FLSA sets minimum wage, overtime pay, equal pay, recordkeeping, and child labor standards for employers who are covered by the act and are not exempt from specific provisions. Generally speaking, the FLSA applies to all federal, state and local governments, including counties.

II. COVERAGE OF FLSA

A. Non-Covered Employees. Some employees are simply not covered by FLSA, which means that none of the provisions of FLSA apply to those employees. The following are employees who are not covered by any provisions of FLSA.

1. Elected Officials. Elected officials are not employees under FLSA, and thus, are not covered by any of the provisions of FLSA.
2. Personal Staff of Elected Officials. Personal staff members specifically selected or appointed by an elected official are not employees under FLSA, and thus, are not covered by any of the provisions of FLSA. In order to be considered a personal staff member, the person must be directly supervised by the elected official, have regular contact with the elected official, serve entirely at the discretion of the elected official, and must not be covered by the agency's civil service system.
3. Policy-Making Appointees. A person appointed by an elected official to a policy-making position, who is not covered by the agency's civil service system, is not covered by the provisions of FLSA.
4. Legal Advisors. Immediate legal advisors to an elected official, who are not covered by the agency's civil service system, are not covered by the provisions of FLSA.
5. Legislative Employees. Persons not covered by the agency's civil service system who work in the legislative branch of a state or one of its political subdivisions are not covered by the provisions of FLSA.

6. **Volunteers.** A person who volunteers to perform services for a political subdivision of a state and receives no compensation (or only receives expenses or a nominal fee) is not an employee covered by FLSA as long as the services are not the same type of services performed by the person as an employee of the political subdivision.

7. **Independent Contractors.** FLSA only applies where an employer-employee relationship exists. Independent contractors are not in an employer-employee relationship and, therefore, are not entitled to FLSA protection. The Department of Labor and the courts all apply the “economic reality test” and consider the following factors when determining whether an individual is an employee or independent contractor: the degree of control exercised over the work by the alleged employer; the independent contractor’s opportunity for profit and loss; the independent contractor’s investment in facilities and equipment; the permanency of the relationship; and the degree of skill required to perform the work.

8. **Prisoners.** The use of inmate labor does not violate FLSA, if the prisoner works for or is required to work by the governmental agency incarcerating them. If the prisoners are contracted out, however, FLSA protections may apply.

9. **Trainees.** True trainees are not covered by FLSA. Trainees, however, must be distinguished from employees who are receiving training. The following six criteria must apply for the person to be considered a trainee: (1) the training is similar to that given at a vocational school; (2) the training is for the benefit of the trainee; (3) the trainees do not displace regular employees, and work under close supervision; (4) the employer receives no immediate advantage and may actually be impeded by the training; (5) the trainees are not guaranteed a job upon completion of the training period; and (6) the trainees understand that they are not entitled to wages for the time spent in training.

B. Exempt Employees. Employees considered exempt under FLSA are subject to the equal pay and recordkeeping requirements, but are not subject to the minimum wage and overtime requirements. Not all employees who are paid a salary as opposed to an hourly rate are considered exempt. In order to be exempt, the employee must meet the following three criteria: (1) receive at least the minimum salary required under FLSA; (2) qualify under the salary basis test; and (3) occupy a qualified white-collar position.

1. Minimum salary requirements. The new regulations guarantee non-exempt status for those employees who make \$455 or less per week, or \$23,660 or less per year. This represents a significant jump from the previous threshold levels of \$155 per week or \$8,060 per year.

2. The Salary Basis Test. An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period, on a weekly or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the rules and exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This requirement is subject to the general rule that an employee need not be paid for any workweek in which he performs no work. 29 C.F.R. § 541.118.

a. An employee will not be considered to be paid "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business.

b. Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

c. Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability.

d. Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

e. Penalties imposed in good faith for infractions of safety rules of major significance, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines, will not affect the employee's salaried status. Employers may also deduct pay as a penalty for disciplinary suspensions of one or more days for rule infractions, as long as the employer has a written policy in place providing for these deductions.

f. Failure to pay the full salary in the initial or terminal week of employment is not considered inconsistent with the salary basis of payment. In such weeks, the payment of a proportionate part of the employee's salary for the time actually worked will meet the requirement.

g. The fact that the employee receives bonuses or incentive pay does not destroy his exempt status as long as he receives a guaranteed minimum salary of more than \$455 per week.

h. Public agencies may deduct for partial day absences without destroying the exempt status of an employee if the agency has established by practice or policy pursuant to the principles of public accountability a system whereby the employee accrues personal leave and sick leave and pay is reduced for absences if leave has not been requested (or was requested but denied), the leave has been exhausted, or the employee chooses leave without pay.

i. Public agencies may deduct for absences due to a budget-required furlough.

Improper deductions may result in negative consequences for employers, including loss of the exemption for the affected employee and other similarly-situated employees. The new regulations outline certain factors to be considered when determining whether or not an employer will lose the exemption. These factors include the number of improper deductions, the time period during which the deductions were taken, the number and geographic location of the affected employees, the number and location of managers involved in making the deduction decisions, and the existence of a policy pertaining to the alleged improper deduction. If the facts show that the employer had an actual practice indicating that it did not intend to pay the employees on a salary basis, the exemption will be lost for the time period the improper deductions were taken for all employees in that job classification working for the offending manager.

The new regulations include a safe harbor provision, however, so that isolated or inadvertent improper deductions do not have to result in exemption loss. Under this provision, if the employer has a clearly communicated policy prohibiting improper deductions, a complaint mechanism for employees to address improper deductions that includes a reimbursement process, and shows a good faith commitment to comply with the regulations, an employer may avoid loss of the exemption by properly reimbursing the employee who suffered the improper deduction. A willful violation of the regulations or a failure to reimburse the employee, however, may still result in a loss of the exemption.

3. Exempt White-Collar Positions. The exemptions, as they are defined in the regulations, do not include blue collar workers. Specifically, those workers who perform repetitive operations with their hands, physical skill, and energy by applying skills gained through apprenticeships and on the job training, will not qualify for any FLSA exemption. Similarly, first responders, such as police officers, firefighters, emergency medical personnel, and rescue personnel will not fit any of the FLSA exemptions. Certain technologists and technicians will also not fit any of the exemption categories. The exemptions apply primarily to white-collar workers, such as executive employees, administrative employees, and professional employees.

a. Executive Employees. Executive employees are exempt from overtime and minimum wage requirements if they meet the minimum salary requirements and salary basis test set out above and: (1) they have a primary duty that is management of the enterprise or a subdivision thereof; (2) they customarily and regularly direct the work of two or more employees besides themselves; and (3) they have the authority to hire or fire other employees, or their recommendations concerning hiring, firing or promotion are given particular weight.

b. Administrative Employees. Administrative employees are exempt from overtime and minimum wage requirements if they meet the minimum salary requirements and salary basis test set out above and: (1) they have a primary duty that includes the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer's customers; and (2) they have a primary duty that includes the exercise of discretion and independent judgment with respect to matters of significance.

c. Professional Employees. Professional employees are exempt from overtime and minimum wage requirements if they meet the minimum salary requirements and salary basis test set out above and: (1) they have a primary duty that is the performance of work requiring knowledge of an advanced type in a field of science or learning, customarily acquired by a prolonged course of intellectual instruction (learned professional); or (2) they have a primary duty that is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor (creative professional).

d. Computer Employees. Computer employees are exempt from overtime and minimum wage requirements if they meet the minimum salary requirements and salary basis test set out above (or are paid a minimum of \$27.63 per hour) and they have a primary duty that consists of: (1) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; (2) the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on or related to user or system design specifications; (3) the design, documentation, testing creation or modification of computer programs related to machine operating systems; or (4) a combination of the aforementioned duties, the performance of which requires the same level of skills.

The exemption specifically does not apply to computer operators or those engaged in the manufacture, repair or maintenance of computer hardware and related equipment. It also does not apply to employees who may have to rely upon computers in their work, such as draftsmen, engineers or computer aided designers, if they are not engaged in computer systems analysis or programming as an occupation.

e. Highly Compensated Employees. This new category allows an employer to exempt from overtime and minimum wage requirements employees whose annual compensation is at least \$100,000 and also meets the minimum salary requirements and salary basis test set out above, and regularly and customarily performs one or more exempt duties as described above for an executive, administrative, or professional employee. (The highly compensated employee test may not be applied as an alternative to the computer employee test.)

III. REQUIREMENTS UNDER FLSA

A. Minimum Wage. Covered non-exempt employees must receive a minimum of \$5.15 per hour for every hour worked regardless of any agreement with the employer.

B. Hours Worked/Compensable Time. All non-exempt employees must be paid at least the minimum wage for all hours worked. In determining what is considered “hours worked,” and thus, is compensable time for determining the employee’s entitlement to pay, including overtime, the following rules and principles must be considered:

1. Issues Under the Portal-To-Portal Act.

a. General. The Portal-to-Portal Act is an amendment to FLSA which excludes certain preliminary and post-work activities which occur before or after an employee’s principal work from the FLSA’s minimum wage and overtime pay requirements. 29 U.S.C. § 251-262. The Portal-to-Portal Act provides that the compensable work day consists of all the time between the points at which employees begin and end their principal activities. 29 C.F.R. § 790.4. Whether an employer must pay an employee for time an employee spends on activities before or after a shift (e.g., to change into a uniform) depends on whether the activity is conducted for the employee’s convenience or is an integral part of the employee’s principal activity or which are closely related to the principal activity. 29 C.F.R. § 785.24.

b. Recent Cases. A number of cases addressing the issue of whether preparation time is compensable have dealt with police canine handlers. For example, in *Karr v. City of Beaumont, Texas*, 950 F.Supp. 1317 (E.D. Tex. 1997), the court held that police officers’ care and transportation of dogs and related maintenance of police vehicles were principal activities for which compensation was due. Similarly, in *Hellmer’s v. Town of Vestal, N.Y.*, 969 F.Supp. 837 (N.D. N.Y. 1997), a district court held that a police officer’s time spent grooming, bathing, exercising, cleaning and training his police dog was required by his employer and pursued necessarily and primarily for his employer’s benefit, and thus, was compensable time under FLSA.

c. Special Assignments and Commute Time. Generally, under the Portal-to-Portal Act, employers need not compensate employees for time spent commuting to and from work. There is, however, a special assignment exception to this provision which applies where an employee is given a special one day assignment in another city. In such cases, an employee must be compensated for the time spent in traveling to and from the special assignment. An employer may, however, deduct the time the employee would have spent traveling from his home to his normal place of work. 29 C.F.R. § 785.37. The special assignment exception will not apply, however, if the special assignment benefits the employee's interest as well as that of his employer. For example, if an employee were required to attend out-of-town training to meet applicable certification requirements, he would not be entitled to compensation for his travel time because the employee benefited from the activity.

2. Work Not "Required," But Allowed. Many times an employer will have an employee who is a little slower or more methodical than his or her fellow workers. This employee will occasionally stay late or come in over the weekend to catch up, even though not required to do so. FLSA does not distinguish between work which is required and work which is simply allowed. The statute speaks in terms of work which is "suffered or permitted." If the employer allows them to work, then it is compensable time used in the calculation of total hours worked during the work week.

The "suffered or permitted" principle applies to all work which is allowed, no matter the reason, provided the employer is aware that the work is being performed. 29 C.F.R. § 785.11; *Holzappel v. Town of Newburgh*, 145 F.3d 516, 524 (2d Cir. 1998). While the employer may cringe at the thought of punishing employees for working, quite often that is exactly what must be done. Either the time must be counted and compensated as hours worked or the employer must enforce a no-working before scheduled starting time policy, up to and including disciplining and even terminating employees who violate such a policy.

3. Lunch Breaks or Rest Breaks. FLSA does not require employers to provide lunch or rest breaks. If a break is provided, however, a determination must be made as to whether or not the break counts as compensable time. The break is generally considered compensable unless the following three conditions are met: (1) the break is at least 30 minutes long; (2) the employee is completely relieved of all duties during the break; and (3) the employee is free to leave his duty station. If the break does not meet all three conditions, then it must be included in the calculation of hours worked.

4. **Out of Town Travel.** Whether time spent traveling is compensable depends on when the travel occurs and the mode of travel. If the travel occurs during regular working hours, it is generally considered compensable. If it occurs after normal working hours, it is generally compensable if the employee is required to drive himself, but non-compensable if the employee uses public transportation (e.g., plane or train) where he can relax. If the employee works while on the train or plane, however, the time is compensable.

C. Overtime Pay. Employers are required to pay their covered non-exempt employees not less than one and one half (1 ½) times their regular rate of pay for all hours worked over forty (40) in a work week. 29 U.S.C. § 207(a)(1). The following rules or principles apply to determining entitlement to overtime:

1. **Work Week.** A work week consists of any seven consecutive day period. It does not necessarily correspond to the employer's pay period. 29 C.F.R. § 778.105 (1998).

2. **Daily Overtime.** Daily overtime is not required under FLSA. If an employee works eight (8) hours Monday, ten (10) hours Tuesday, five (5) hours Wednesday, twelve (12) hours Thursday, and five (5) hours Friday, he is not entitled to any overtime since the total in the seven day period does not exceed forty (40) hours.

3. **Holidays and Weekends.** FLSA does not distinguish between week days, holidays, after hours, and weekends. An employee is not entitled to any overtime or extra compensation due to the fact that he worked on a weekend, holiday, or after normal business hours.

4. **Compensatory Time.** Public employers may provide compensatory time off to employees in lieu of overtime. Compensatory time is calculated the same way as overtime is calculated. Employees may only accrue up to 240 hours of compensatory time, unless they work in a public safety, emergency response, or seasonal activity, in which case they can accrue up to 480 hours of compensatory time. Once the cap has been reached, any additional overtime must be paid in the form of cash wages.

5. **207k Provision.** Because of what is commonly referred to as the 207k provision, public employers may expand the work period for employees engaged in fire protection and law enforcement beyond the seven consecutive day work week to up to a 28 day work period. If the 207k provision is adopted by the employer, the employer must refer to a DOL table to determine the maximum hours that may be worked before overtime must be paid. For example, if the employer institutes a 7 day 207k work period, an employee engaged in fire protection is not entitled to overtime until he exceeds 53 hours within that 7 day period, and an

employee engaged in law enforcement is not entitled to overtime until he exceeds 43 hours within that 7 day period. If the employer institutes a 28 day 207k work period, an employee engaged in fire protection is not entitled to overtime until he exceeds 212 hours within that 28 day period, and an employee engaged in law enforcement is not entitled to overtime until he exceeds 171 hours within that 28 day period. The 207k provision does not allow for a work period of less than 7 days nor more than 28 days. 29 U.S.C. § 207k.

D. Equal Pay. The Equal Pay Act is an amendment to FLSA and covers the same employees as FLSA, including employees exempt from the overtime and minimum wage requirements. The Equal Pay Act prohibits employers from paying male and female employees different rates of pay for jobs which require equal skill, effort, and responsibility. 29 U.S.C. § 206(d).

In a suit under the Equal Pay Act, if an employee can show he or she performed equal work for less pay, it becomes the employer's burden to show that the disparity in pay is the result of differences in seniority, merit, quantity or quality of production or some factor (other than sex). *EEOC v. Hernando Bank, Inc.*, 724 F.2d 1188 (5th Cir. 1984). Courts interpret the phrase "any factor other than sex" to allow disparities in pay warranted by differences in job content, differences in working conditions, or differences in performance of specific units or departments of a company. *Wright v. Rayonier, Inc.*, 972 F.Supp. 1474 (S.D. Ga. 1997). In *Wright*, the district court found that the employer met its burden of showing that the plaintiff was paid differently based on differences in experience and longevity. The person whom the plaintiff alleged was paid more had thirty-seven years of experience, as compared to the plaintiff's fifteen years of experience, and had supervisory experience, whereas the plaintiff did not. The court found that the differences in longevity and supervisory experience justified a pay differential of \$1,285.00. Some courts have required employers who rely on a seniority or merit system as an explanation of pay differentials to identify standards which are systematically applied and observed, and have denied summary judgment where the employer merely relies on its own statement that seniority and merit was the basis for its decisions as to rates of pay.

E. Recordkeeping Requirements. FLSA requires employers to keep certain records concerning all covered employees including employees exempt from the overtime and minimum wage requirements.

1. Non-exempt employees. Employees must keep the following records on non-exempt employees:
 - a. Full name and ID #;
 - b. Home address including zip code;
 - c. Date of birth if under 19;
 - d. Sex and occupation;

- e. Time of day and day of week that work period begins;
- f. Regular hourly rate with explanation for any week in which overtime is due.
- g. Hours worked each workday and each work week;
- h. Total daily or weekly straight-time earnings;
- i. Total premium pay for overtime hours;
- j. Total additions to, or deductions from, wages paid each pay period;
- k. Total wages paid each pay period; and
- l. Date of payment and the pay period covered by payment.

2. Exempt employees. The same records must be kept on exempt employees as non-exempt employees. In addition, the employer must keep records reflecting the basis on which exempt employees are paid. These records must contain sufficient detail to permit calculation, for each pay period, of the employee's total compensation for employment, including fringe benefits.

3. Preservation and form of records. FLSA requires employers to maintain the following records for at least three years: payroll records; certificates, collective bargaining agreements and individual contracts; and sales and purchase records. The following records must be kept for at least two years: basic employment and earnings records; wage rate table; order, shipping, and billing records; and records of additions to or deductions from wages paid. The records must be kept in a safe and accessible location, but may be in the form of paper, microfilm, or in a computer format accessible through an automated data processing system.

4. Posting Requirements. Every employer who employs workers subject to the minimum wage provisions under FLSA must post, and keep posted, a notice explaining the requirements of FLSA. The notice must be posted in a conspicuous place in every establishment where such employees work. Copies of the notices may be obtained from DOL headquarters in Washington, D.C., any regional office, or the department's website at www.dol.gov.

F. Prohibition Against Retaliation. Under FLSA, an employer may not discharge or otherwise discriminate against an employee for filing a complaint, instituting a proceeding or causing a proceeding to be instituted, testifying in a proceeding, or serving on an industry committee. 29 U.S.C. § 215(a)(3).

G. Damages

1. General. The damage provisions of FLSA are found at 29 U.S.C. § 216(p). An employee who prevails on a claim for unpaid minimum wages is entitled to the amount of the unpaid wages and an additional equal amount as liquidated damages plus attorney's fees and costs. Similarly, an employee who is successful in a claim for unpaid overtime is entitled to the unpaid overtime plus an additional equal amount as liquidated damages plus attorney's fees and costs.

2. Willful Violations. If an employer is found to have willfully violated FLSA, the employer may be subject to civil and/or criminal penalties not to exceed \$10,000.00 and/or six months in prison.

3. Reliance Defense. An employer can defend against FLSA liability by demonstrating that its conduct was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation of the administrator of the U.S. Department of Labor. Reliance on government interpretations is an affirmative defense which the employer bears the burden of pleading and proving. 29 U.S.C. § 259. Significantly, oral representations and/or interpretations from sources other than the administrator of the Wage and Hour Division do not qualify as a basis for establishing the defense. See *Herman v. Palo Group Foster Home, Inc.*, 976 F.Supp. 696, 704 (W.D. Mich. 1997).

4. Good Faith Defense. Where an employer is found to have committed a statutory violation of either the minimum wage or overtime provisions, it can avoid liability for liquidated damages if it can establish that its exempt classification of an employee was in good faith and reasonable. 29 U.S.C. § 260; *Bernard v. IBP, Inc.*, 154 F.3d 259 (5th Cir. 1998). The good faith and reasonable grounds defense contains both subjective and objective components. In order to satisfy these subjective good faith components, the employer must show that it had an honest intention of learning what FLSA required and acting accordingly. The objective component is determined by applying the proper interpretation of FLSA and judging the reasonableness of the employer's belief. *Nash v. Resources, Inc.*, 982 F.Supp. 1427 (D. Or. 1997).