

The Fair Labor Standards Act and Calculating the Regular Rate

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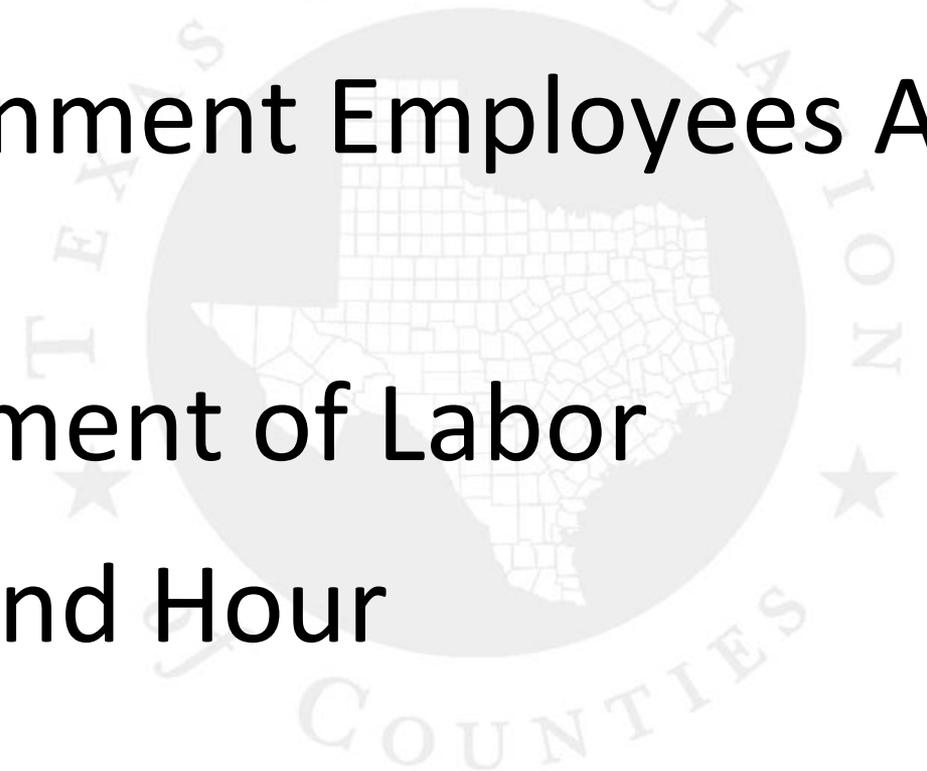
HR Consultant



Learning Objectives

- Understand the basics of FLSA
- Realize the importance of FLSA to employers and employees
- Remain in compliance with the FLSA
- Understand the importance of proper recordkeeping

Fair Labor Standards Act

- A federal law enacted in 1938
 - Government Employees Added 1974
 - Department of Labor
 - Wage and Hour
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FLSA – What's Required

- ❖ Minimum Wage - \$7.25
- ❖ Overtime Pay – 1 ½ times the Regular Rate of pay for all hours actually worked over 40 in a work week (Exempt Employee and Law Enforcement Exceptions)
- ❖ Recordkeeping – Must be complete and accurate

FLSA – What's Required

- ❖ Child Labor Restrictions – Regulates children ages 14-15 and 16-17 with stricter guidelines
- ❖ Equal Pay Act – Lilly Ledbetter Act – Amends the FLSA and requires equal pay for men and women on the basis of sex

Fair Labor Standards Act

- **The FLSA does six things:**
- **Sets minimum wage**
- **Establishes overtime pay requirements**
- **Sets recordkeeping requirements**
- **Sets equal pay for equal work**
- **Restricts child labor – restrictions for 14-15 and 16-17 year olds**
- **Provides nursing mothers breaks**

Fair Labor Standards Act

- **The FLSA does not require:**
- **Vacation, holiday, sick or severance pay**
- **Meal, breaks or rest periods**
- **Premium pay for weekends or holidays**
- **Pay raises or fringe benefits**
- **Daily overtime pay**
- **Discharge notices or immediate discharge pay**
- **Limits to number of hours worked (except for under the age of 16)**

Employment Relationship

- **Must be an employer-employee relationship**
 - **Employ means “suffer or permit” to work**
 - **Mere knowledge of work performed could =
overtime – records critical!**
 - **Knowledge that work has been done may create
employment relationship**

Employment Relationship

- **Independent contractors are not covered**
Must meet specific requirements – usually acquired through bidding process (control, profit or loss, investment, permanence, skill)
- **Volunteers – if specific requirements met.**
DOL determines case by case (29 C.F.R. 553.101)
 - Paid expenses, reasonable benefits; IRS
 - Different capacity from regular job
 - Occasional or Sporadic Employment
 - No overtime calculation
 - Infrequent, irregular, or in scattered instances.

Fair Labor Standards Act: Exclusions of an “Employee”

- Public Elected Office Holders
- “Personal Staff”, Policy Makers, or Immediate Advisors of Office Holder
 - Tread carefully!
 - Dept. of Labor ok (letter) is recommended...

Hours Worked

- For law enforcement: Pre-duty or Post-Duty activities that are an integral part of the employees principal activity: reports, washing car, taking care of police dog 29 C.F.R. 553.221
- On-Call = Freedom Test 29 C.F.R. 553.221
- Travel Time (During Work Hours) (Police Officer who is given a car to drive home is not working during the time to drive home even if the radio is on so that they may respond to emergency calls, if they respond to the call, time spent responding is compensable) 29 C.F.R. 553.221
- Training, lectures, meetings 29 C.F.R. 553.226
- Meals and rest periods (20 min.) 29 C.F.R. 553.223
- Sleep time (Up to 8 hours – 5 hours must be uninterrupted)
- 29 C.F.R. 785.21-23

Overtime

- **Overtime includes all hours actually worked over 40 in the workweek**
 - Daily overtime is not required
 - Dual employment counts time from both jobs
 - Workweeks cannot be averaged
 - Paid leave is not counted as hours worked
- **Law enforcement partial overtime exemption (207[k])**
- **Law enforcement 5 person dept. exclusion (workweek)**

Overtime Compensation

- **Overtime for non-exempt employees:**
 - Paid at 1 1/2 times regular (hourly) rate
 - or
 - Compensatory time at 1 1/2 hours comp time for each overtime hour worked
- **Employees cannot give up their right to overtime pay**

Compensatory Time

- **Applies only to state and local government**
- **Must have agreement or understanding**
 - Once in place, county can pay overtime as comp time, cash or combination
- **Employee can use at any time unless absence disrupts department** 29 C.F.R. 553.25 **unduly**
- **Can require employee to use before vacation**
- **You must keep records** 29 C.F.R. 553.50

Compensatory Time

- **Can require employee to use at county's convenience (Christensen v Harris County)**
- **Employee cannot lose comp time 29 C.F.R. 553.27**
 - Used
 - Cashed out at any time
 - Paid at termination – Employees who become elected officials must be paid out
- **Maximum accruals allowed 29 C.F.R. 553.24**
 - - 240 hours all employees except law enforcement
 - - 480 hours law enforcement

Compensatory Overtime Calculation Example

- Workweek: Sun. 12:00 am-
Sat. 11:59 pm
- Employee works 50 hours in 7-days.
- $50 \text{ hours} - 40 \text{ hours} = \mathbf{10 \text{ overtime hours}}$ (10 hours x 1.5 = 15 Hours Comp Time Earned)
- Total Compensation \$400 Regular Pay – 15 Hours Comp Earned

Compensatory Overtime Calculation 207 (k)

Example

7 Day – 43 Hour

- Work Period: Sun. 12:00 am-
Sat. 11:59 pm
- Employee works 50 hours in 7-days.
- Employee earns \$400.00 per work period. (Pay covers 43 hour work period)
- 50 hours – 43 hours = **7 overtime hours**
(7 hours x 1.5 = 10.5 Hours Comp Time Earned)
- Total Compensation \$400 Regular Pay – 10.5 Hours Comp Earned

FLSA – Regular Rate

Examples of inclusions in the Regular Rate:

- ❖ Salary
- ❖ Shift Differentials
- ❖ Hazardous duty pay
- ❖ Sick leave buy back

FLSA – Regular Rate

Examples of exclusions from the Regular Rate:

- ❖ Absences such as vacation, illness bereavement, jury leave
- ❖ Payments for unused vacation leave

FLSA – Regular Rate

Examples of exclusions from the Regular Rate:

- ❖ Holiday pay (must be equivalent to regular earnings)
- ❖ Premium Pay (where time is already compensated at 1.5)

FLSA – Regular Rate

Examples of exclusions from the Regular Rate:

- ❖ Idle time beyond employer control – weather conditions
- ❖ Meal expenses
- ❖ Call-back premiums

FLSA – Regular Rate

Examples of exclusions from the Regular Rate:

- ❖ Travel expenses
- ❖ Reasonable uniform allowances
- ❖ Payments for use of comp time
- ❖ Mileage reimbursement

FLSA – Regular Rate

Regular rates and overtime pay must be calculated prior to making any deductions from pay.

Examples:

Retirement

Deferred Compensation

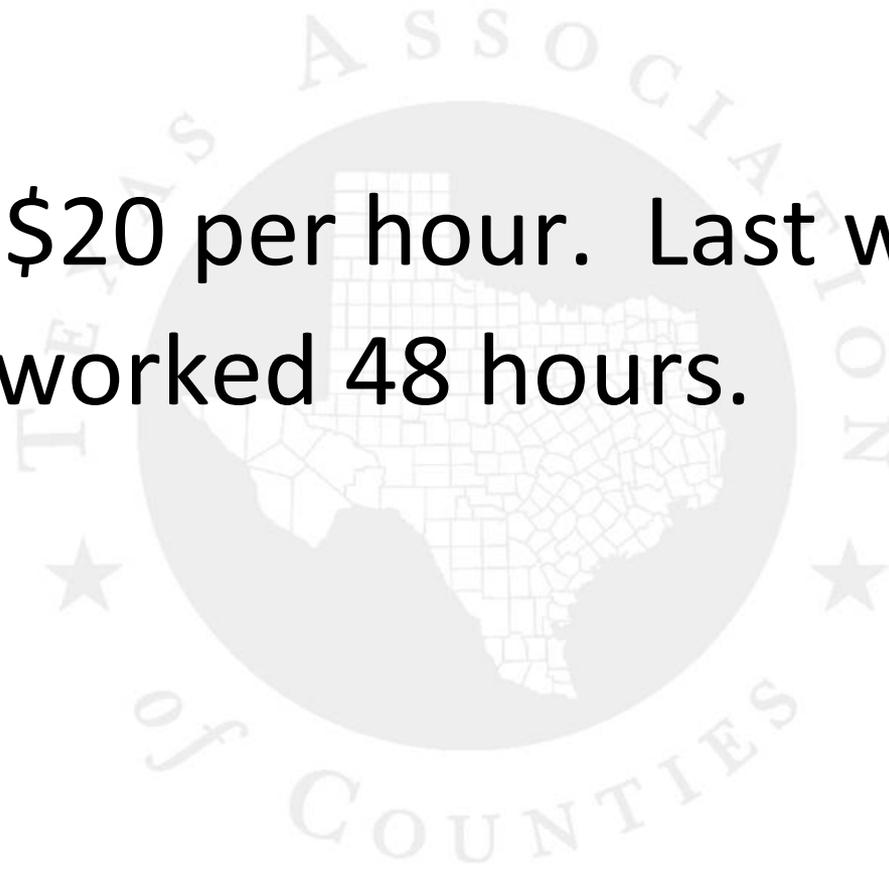
Calculating the Regular Rate

Overtime pay must be calculated at the
“Regular Rate” – not the hourly rate.

Regular Rate – The hourly rate PLUS
other forms of compensation received
by the employee.

Basic Weekly Overtime Sample

Sue Earns \$20 per hour. Last week she actually worked 48 hours.



Basic Weekly Overtime Sample

Basic Hourly Rate = \$20.00

Straight Time Pay = \$20.00 x 40 = \$800.00

Total Compensation = \$800.00 + 0 = \$800.00

Regular Rate = \$800.00 / 40 = \$20.00

Overtime Pay = \$20.00 x 1.5 x 8 = \$240.00

Total Pay = \$800.00 + 240.00 = \$1040.00

Basic Weekly Overtime Sample

Bill earns \$20 per hour. Last week he actually worked 48 hours. He receives \$40.00 longevity each week. He receives a \$25.00 uniform allowance weekly.

Basic Weekly Overtime Sample

Basic Hourly Rate = \$20.00

Straight Time Pay = \$20.00 x 40 = \$800.00

Total Compensation = \$800.00 + 40 = \$840.00

Regular Rate = \$840.00 / 40 = \$21.00

Overtime Pay = \$21.00 x 1.5 x 8 = \$252.00

Total Pay = \$840.00 + 252.00 + 25.00 = \$1117.00

Basic 14-Day Overtime Sample

Joe earns \$860.00 each 14 day – 86 hour work period. His salary covers all 86 hours. Last 14 day work period Joe actually worked 90 hours. Joe gets \$43 longevity each work period.

Basic 14-Day Overtime Sample

Basic Hourly Rate = $\$860.00 / 86 = \10.00

Straight Time Pay = $\$10.00 \times 86 = \860.00

Total Compensation = $\$860.00 + 43 = \903.00

Regular Rate = $\$903.00 / 86 = \10.50

Overtime Pay = $\$10.50 \times 1.5 \times 4 = \63.00

Total Pay = $\$903.00 + \$63.00 = \$966.00$

Fair Labor Standards Act: Employee Classifications

- Non-Exempt Employees
- Exempt Employees

Reminder – Elected Officials are not employees under the

FLSA (29 C.F.R. 553.11)

Examples of Non-Exempt

Deputy Clerk,
Accounting
Clerk

Maintenance

Detention
Officer

Equipment
Operator

Court
Reporter

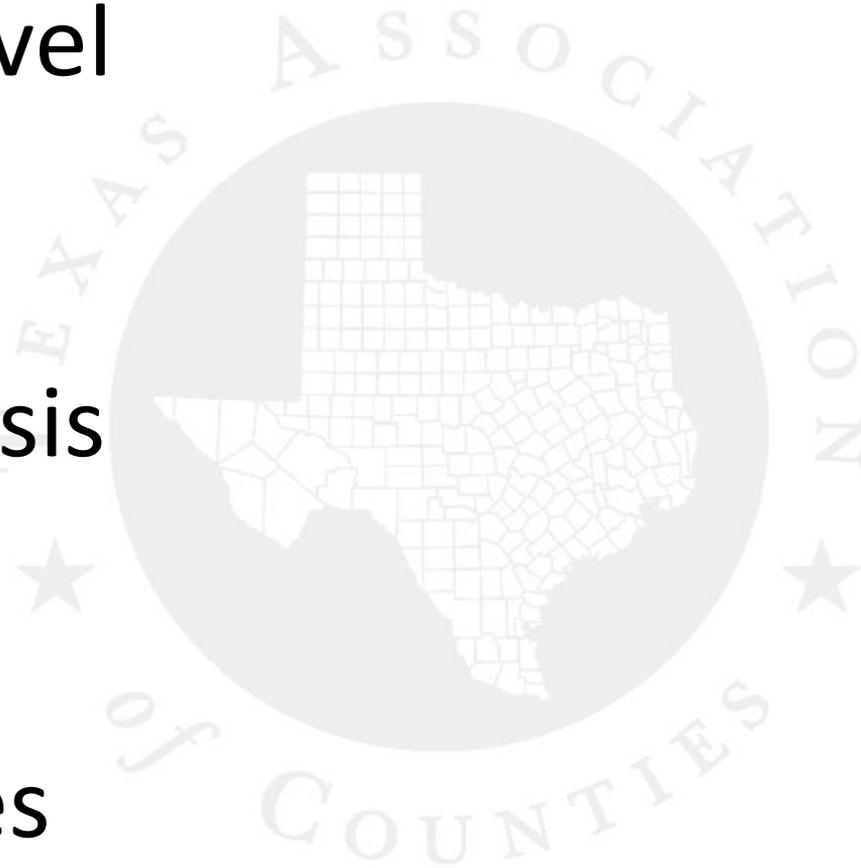
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Exempt Employees

- Are exempt from overtime provisions.
- Are truly “salaried”.
- Based on the job duties & responsibilities, not the job title.
- \$\$\$ wrong classification—possible overtime back-pay, liquidated damages, attorneys’ fees.

Three Tests for Exemption

- Salary Level
- Salary Basis
- Job Duties



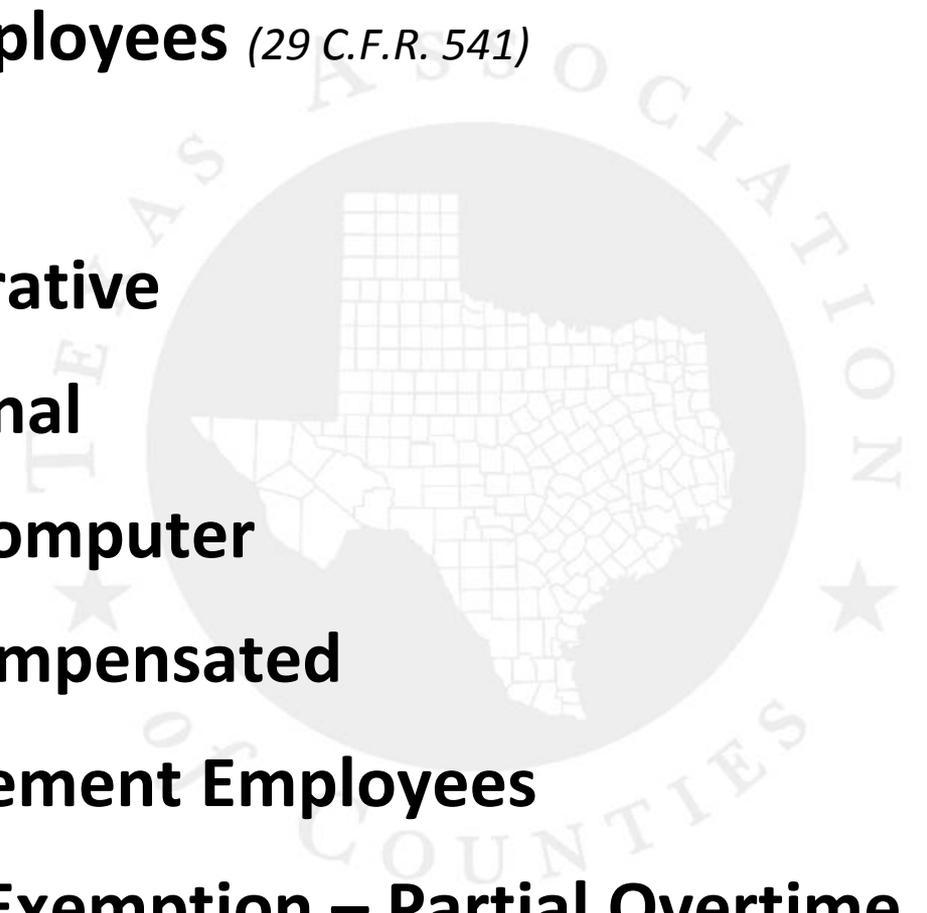
Exemption Basics

- 29 C.F.R. 541
- **Must be paid at least \$455 per week (\$23,660/yr) – Salary is a pre-determined amount each pay period**
- **Primary duty must be office or non manual work related to management**
- **Exercises discretion and independent judgment**

Exemption Basics

- 29 C.F.R. 541
- **Has hiring/firing authority or heavy weight in hiring/firing decisions**
- **Compensation can not be reduced because of quantity or quality of work being performed**
- **If employee is ready to work may not make any deductions**

Exclusions and Exemptions

- **Exempt Employees** *(29 C.F.R. 541)*
 - Executive
 - Administrative
 - Professional
 - Certain Computer
 - Highly Compensated
 - **Law Enforcement Employees**
 - **- 207 (k) Exemption – Partial Overtime Exemption** *(29 C.F.R. 553.201)*
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- A large, faint watermark logo for the Texas Association of Counties is centered in the background. It features a circular emblem with a map of Texas in the center, surrounded by the text "TEXAS ASSOCIATION OF COUNTIES" and two stars.

Overtime for Law Enforcement – 207 (k) Exemption

Under FLSA Regulation

29 C.F.R. 553.211(c)

Deputy Sheriffs

Deputy Constables

29 C.F.R. 553.211(f)

Security Personnel in Correctional Institutions – responsible for controlling and maintaining custody of inmates and safeguarding them from other inmates or supervising such functions, working inside of jails or other such institutions.

Best Advice For Record Keeping

- **To keep out of trouble**

- Keep a complete and accurate record of all hours worked

- Pay all non-overtime hours at straight time

- Pay all overtime hours at

- ✓ 1 1/2 times employee's regular rate; or

- ✓ 1 1/2 comp time rate

Record Keeping

- **Information that is normally part of personnel files**

Name, address, date of birth (if under 19), rate of pay, payroll records, etc.

- **Supervisor's primary responsibility**

Keep accurate record of all time worked

Record Keeping

- *29 C.F.R 516*
- **Time and day of week when employee's workweek begins**
- **Actual hours worked each day**
- **Total hours worked each week**
- **Basis on which employees wages are paid (hourly or salary)**
- **Total daily or weekly straight time earnings**
- **Regular hourly rate of pay**

Record Keeping

- 29 C.F.R. 516

- **All additions to or deductions from the employees wages**
- **Total wages each pay period**
- **Date of payment and the pay period the payment covers**

Record Keeping

- *29 C.F.R. 516*
- **What about timekeeping?**
- **Employers may use any method they choose, but it MUST be accurate and complete for each non-exempt employee.**
- **Records MUST be kept for 3 years.**
- **Records must be kept for DOL inspection**
- **Absence of records = PROBLEM**

Record Keeping – New Development

- Chao v. Self Pride Inc.
- 4th Circuit Court of Appeals – 5-17-07
- Company changed employees timesheets without getting initials of employees after the changes were made.
- Ruling – “...arbitrary and inconsistent treatment of employee timesheets...” This created a legal liability for supervisor who changed the timesheets.
- Court fined him \$155,239.72 ***PERSONAL FINE***
- Court fined company additional \$527,903.63

Time Sheets

- Complete and accurate record required
- Governmental Record
- **Falsification: Texas Penal Code 37.10**
- Absence of Records = **PROBLEMS**
- Need signed timesheets – Need both employee and supervisor signature
- Do not make changes on timesheet without employees initialing changes

Enforcement

- **Enforced by Department of Labor (DOL), Wage and Hour Division** *29 C.F.R. 515.8*
- **DOL investigates & gathers data-- (wages, hours, employment practices)**
 - **Enters premises, inspects records, interviews employees**
- **Determines if violation occurred and can have civil and criminal penalties**
- **Suit can occur through complaint or employee can obtain their own attorney**
- **Retaliation Prohibited**

Ideas

- **Review job duties and job descriptions**
- **Apply the standard test for exempt employees. Conduct a self-audit and make corrections immediately.**
- **Review timesheets.**
- **Review record keeping methods.**
- **Make certain budget details the number of hours that the salary covers and budget non-exempt employees in hourly amounts.**
- **Train supervisors on FLSA issues**

For More Information

- Other resources on the Part 541 exemptions are available at www.dol.gov/fairpay
 - Regulations
 - Preamble
 - Fact Sheets
 - Field Operations Handbook
 - Frequently Asked Questions
- To ask a specific question or register a comment:
 - Email: fairpay@dol.gov
 - Telephone, toll-free: 1-866-4US-WAGE

And Finally



The Fair Labor Standards Act

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