

# **WHAT IS THE FAIR LABOR STANDARDS ACT AND HOW TO COMPLY WITH THE WAGE AND HOUR LAWS**

**Presented by:**

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## **BACKGROUND ON THE FAIR LABOR STANDARDS ACT**

### **A. Overview of the FLSA: The Statute and Regulations**

- The FLSA is a federal law that was enacted by the U.S. Congress in 1938.
  - The FLSA set minimum wage, overtime pay, equal pay, record keeping and child labor standards for covered employees.
  - The FLSA arose out of the depression era.
  - The three-fold purpose of the FLSA was:
    - ▶ to create a minimum wage standard to remedy exploitation of lowest wage earners;
    - ▶ promote fair competition in interstate commerce by creating a nationwide floor under which competition could not drive down wages; and
    - ▶ to generate more jobs by encouraging employers to spread the existing work among a greater number of employees by virtue of requiring overtime pay.
- The administration and enforcement of the FLSA and related statutes fall within the responsibility of the Federal Department of Labor, the Wage and Hour Division.
- The Wage and Hour Division is responsible for promulgating the applicable regulations implementing the FLSA that are found in the Code of Federal Regulations (CFR).

### **B. Enforcement Options**

1. **Government Civil DOL Actions: Section 16(c) and Section 17 (Injunctive Relief)**

- The Secretary of Labor may bring suit in any court of competent jurisdiction under Section 16(c) of the FLSA on behalf of aggrieved employees to recover unpaid minimum wages, overtime, as well as liquidated damages.
- The Secretary of Labor may not recover attorneys' fees
- Section 17 of the FLSA permits the Secretary of Labor to file an action for injunctive relief, that can also address child labor and record keeping violations.
- Section 17 injunction actions can seek recovery of back wages and liquidated damages.
- Section 17 injunctions may be retrospective, requiring the employer to pay minimum wages and overtime compensation that were not paid when due, or prospective, which prohibit the employer from violating the FLSA in the future.

## 2. **Criminal Prosecutions by Department of Justice**

- Section 16 (e) of the FLSA permits the U.S. Department of Justice to institute criminal actions against employers for willful violations of the FLSA.
- In the criminal context, a “willful” violation is one that is deliberate, voluntary and intentional.
- The statute of limitations for criminal prosecutions under the FLSA is five (5) years (compared with two (2) or three (3) statute of limitations for civil remedies).
- For first criminal conviction, violators are subject to a fine of up to \$10,000.

- For subsequent convictions under the FLSA, violators are subject to a fine of up to \$10,000 or imprisonment for up to six (6) months, or both.
- Falsification of records by an employer during a DOL investigation subjects the employer to criminal prosecution.

### 3. Individual Actions

- Section 16 (b) of the FLSA authorizes employees to sue their employers for unpaid minimum wage, unpaid overtime compensation, as well as for liquidated damages, which is an amount equal to the wages improperly withheld.
- An employee suit is precluded if the employee has received back wages due under supervision of the Secretary of Labor, or the Secretary of Labor has filed suit on behalf of the employee.
- The employee's right to sue is also precluded if the Secretary of Labor has filed an injunction action barring the employee's right to sue.
- A prevailing employee recovers reasonable attorneys' fees at the trial court level.
- The award of attorneys' fees at the appellate level is at the discretion of the appellate court.
- A prevailing employer is generally not entitled to attorneys' fees under the FLSA.
- Prevailing employees may also recover court costs, including witness fees.

### 4. "Collective" Actions

- One or more employees may bring an action on behalf of the themselves and other employees “similarly situated”
- FLSA “collective” actions operate differently than typical “class action” suits brought under Rule 23 of the Federal Rules of Civil Procedure.
- “Similarly situated” employees must “opt-in” to the lawsuit to become a plaintiff, by filing a written consent with the court to be bound by the outcome of the suit.
- Signed consents by opt-in plaintiffs filed after the original complaint do not relate back to the date of the original complaint.
- The court normally facilitates the notice to potential plaintiffs.

### **C. Sect 15(a)(3) Anti-Retaliation Prohibition**

- Section 15(a)(3) of the FLSA protects former and current employees from retaliation for engaging in statutorily-protected activity.
- Protected activity might include filing a complaint with DOL, filing of a lawsuit under FLSA, cooperating with the Wage and Hour Division investigator, as well as informal complaints made by employees to their employers concerning wage and hour issues.
- Retaliatory or discriminatory employment actions that are made unlawful under Section 15(a)(3) might include discharge, demotion, reassignment or reduction in wages or benefits, or change in hours.
- Remedies available to a prevailing plaintiff in a retaliation action, may include injunctive relief, civil damages in the form of payments of lost or back wages, reasonable attorneys’ fees, costs, prejudgment and post- judgment interest, and in cases involving willful violations, liquidated damages.

- Whether punitive damages are available may depend on which federal appeals circuit decides the case; the U.S. Court of Appeals for the Eleventh Circuit in *Snapp v. Unlimited Concepts, Inc.*, No. 98-2936 (11<sup>th</sup> Cir. April 5, 2000), the Court of Appeals held that the FLSA does not provide for punitive damage awards to plaintiffs in FLSA Section 216(b) retaliation actions.

#### **D. Statutes of Limitations, Willful Violations and Liquidated Damages**

- The FLSA establishes a general two-year statute of limitations.
- A three-year statute of limitations applies in the case of “willful” violations.
- The statute of limitations for criminal prosecution under the FLSA is five years.
- The statute of limitations is tolled at the time an actual lawsuit is filed, not when an employee makes a complaint either informally or formally with the DOL or pursues other administrative remedies.
- A violation is considered to be “willful” if the employer knew that its conduct was in violation of the FLSA or if the employer showed reckless disregard for the requirements of the FLSA (*McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988)).
- An employer is deemed to be aware that its conduct was prohibited by the FLSA if it is advised by a Wage and Hour Division official that the conduct at issue is unlawful.
- An employer is deemed to have showed reckless disregard for the FLSA if it is proved that the employer should have inquired further into whether its conduct was in compliance with the FLSA but failed to do so.

- Liquidated damages are equal to the amount of unpaid wages recovered, i.e., double-back pay.

## **E. Civil Money Penalties**

- Pursuant to the 1989 FLSA Amendments, Section 16(e) of the FLSA provides for civil money penalties not too exceed \$1,000, for repeated or willful violations of the minimum wage and overtime provisions of the FLSA.
- The FLSA also allows the DOL to assess civil money penalties for child labor violations.
- DOL regulations provide that the wage and hour administrator considers the seriousness of the violations and the size of the employer's business, as well as other factors, when assessing the amount of penalty for any repeated or willful violation.
- Child labor violations subject an employer to a civil money penalty up to \$10,000 per employee who was subject of such a violation.

## **CLASSIFYING CORRECTLY EXEMPT vs. NON-EXEMPT EMPLOYEES AND COMPLYING WITH THE SALARY BASIS TEST FOR EXEMPT EMPLOYEES**

### **A. Introduction**

- Section 13(a)(1) of the Fair Labor Standards Act (FLSA) provides an exemption from the minimum wage and overtime requirements for employees in an executive, administrative, professional or outside sales capacity; also computer professionals.
- New DOL regulations: 29 C.F.R. Part 541.
- Effective date: August 23, 2004

### **B. Coverage**

- Enterprise coverage: at least \$500,000 annual gross revenues.

- Individual coverage (engaged in interstate commerce).

### **C. Blue Collar Workers and First Responders**

- White collar exemptions are not applicable to these groups (e.g., firemen, paramedics, etc.)

### **D. Three Separate Tests for White Collar Exemptions**

- Salary level test.
- Salary basis test.
- Duties test.

### **E. Salary Level Test**

- Recent regulations eliminate two separate salary levels previously utilized for “long” and “short” tests.
- New minimum salary level for executive, administrative and most professional exempt employees is **\$455 per week (i.e., \$23,660 per year)**.
- New regulations retain no salary level test for certain professionals (e.g., doctors, lawyers, teachers) and outside sales employees.
- Administrative and professional exempt employees may still be compensated on a fee basis in lieu of a salary basis.
- Exempt hourly paid computer professionals can still be paid at a minimum rate of **\$27.63 per hour**; however, salaried exempt computer professionals must be compensated at the new \$455 per week minimum level.

- Exempt academic administrative employees satisfy the salary level test if they are paid on a salary basis at a rate at least equivalent to the entrance salary for teachers in the same educational establishment.
  
- Highly compensated executive, administrative and professional employees (not computer or outside sales employees) may be exempt under a new DOL salary level test if they meet the following criteria:
  - Total annual compensation is at least **\$100,000** (including at least \$455 per week paid on a salary or fee basis)
  - Customarily and regularly performs one or more of the exempt duties of an executive, administrative or professional employee.
  - Highly compensated employee test applicable only to employees who perform office or non-manual work.

#### **F. Salary Basis Test**

- Employee must be paid a salary either on a weekly, bi-weekly, semi-monthly or monthly basis.
- Salary cannot be subject to deductions for quality or quantity of work performed by employee.
- Salary need not be paid for any week in which no work is performed.
- **Permissible deductions** from exempt employee's salary:
  - Absences for personal reasons other than illness or disability; one or more full days.

- Absences for sickness or disability (including work-related/workers' comp accidents or illnesses) if in accordance with a bona fide sickness or disability plan; prior to employee's eligibility for plan and after exhaustion of plan benefits; one or more full days.
  - Offsets for pay received by employee for military duty, jury duty and service as a witness; no deduction permitted for such absences of less than a week other than offsets.
  - Partial, initial or terminal weeks of employment.
  - Family and Medical Leave Act (FMLA), intermittent and reduced leave.
  - Disciplinary penalties for infractions of safety rules of major significance.
  - Disciplinary suspensions for infractions of significant workplace conduct rules; one or more full days.
- If an employer has an actual practice of making improper deductions from an exempt employee's salary, the exemption will be destroyed for the period during which the improper deductions were made for all employees in the same job classification working for the same managers who made the improper deductions.
  - Improper deductions that are isolated or inadvertent (*i.e.*, unintentional) will not result in loss of the exemption if the employer reimburses those employees subject to the improper deductions.
  - **Safe harbor provision**
    - Requirements:

- (a) Employer promulgates policy prohibiting improper deductions, which includes a complaint mechanism.
  - (b) Employer reimburses employees for improper deductions.
  - (c) Employer makes good faith effort to comply prospectively.
- Safe harbor provision applies to any improper deduction, not only inadvertent or isolated.

## G. Duties Test

- The “**Standard**” test: Under the DOL regulations, the former “long” and “short” tests for the executive, administrative and professional exemptions have been replaced with one “standard” test for each exemption.
- Definition of “**primary duty**”: Under the new regulations, DOL has provided for the first time a definition of the term “primary duty” - - the “principal” or “most important” duty that the employee performs; the determination is to be made on a case-by-case basis with consideration given to a number of factors relating to the character of the employee’s job as a whole. The new regulations provide that the amount of time spent on exempt work is not the determinative factor in ascertaining an employee’s primary duty. Under the former rules, performing exempt work at least 50% of the time was a “good rule of thumb.”
- **Executive exemption duties test**
  - Examples: General manager; vice-president of sales; director of operations; executive chef; etc.
  - Has the **primary duty of management** of a customarily recognized department or subdivision (e.g., sales department, groupings, teams, etc.) of the enterprise.

- Customarily and regularly **directs the work of two or more employees** (*i.e.*, two full-time employees or their equivalent). [**DOL historically expected supervision of at least four or more subordinates; otherwise, the 50% rule of thumb was not satisfied**].
- Has the **authority to hire or terminate** other employees or whose **suggestions and recommendations** as to their hiring, termination, etc. are given **particular weight** (factors: whether such suggestions and recommendations are part of executive's duties; frequency with which executive provides such suggestions and recommendations; and frequency with which such suggestions and recommendations are relied upon).
- **Business owner's exemption:** Regardless of salary level, a business owner who has at least 20% equity interest and is actively engaged in the management of the business qualifies as exempt.
- Elimination of **sole charge** provision: The new DOL regulations eliminated the "sole charge" provision under the executive exemption whereby employees who are in sole charge of an independent establishment or a physically separate branch qualified as exempt, despite performing mostly non-exempt duties.
- **Concurrent duties:** Under the new DOL regulations, the concurrent performance of exempt and non-exempt duties does not preclude an employee from qualifying for the executive exemption as long as the employee meets all requirements of the executive exemption, including the primary duty of management (*e.g.*, assistant manager).
- **Administrative exemption duties test**
  - Examples: Insurance claims adjuster; director of human resources; financial services employees; team leaders of major projects; purchasing agents; school

superintendents; principals; vice-principals; department heads and academic counselors.

- **Primary duty is performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customer.**
- **Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.**

- **Professional exemption duties test**

- **Learned professionals:** Perform work requiring knowledge of an advanced type in the fields of science or learning customarily acquired by a prolonged course of specialized intellectual instruction (or acquired through a combination of work experience and intellectual instruction). [Examples: doctor, lawyer, architect, RN, executive chef, accountant, dental hygienist, funeral director, teacher; **not** paralegals]
- **Creative professionals:** Perform work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor, such as music, writing, acting and the graphic arts. [Examples: composer, "5" star restaurant chef, journalist/editorialist; **not** basic newspaper reporter, cook]
- **Computer professionals:** Primary duty consists of: (1) application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; (2) design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; (3) design, documentation, testing, creation or modification of

computer programs related to machine operating systems; or (4) combination of the aforementioned duties, the performance of which requires the same level of skills. [Examples: computer systems analyst, computer programmer, software engineer; **not** employees engaged in the manufacture or repair of computer hardware]

- **Outside sales exemption duties test**
  - Examples: Pharmaceutical representative, television advertising sales, driver/salesman, etc.
  - Primary duty is making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by a client or customer, **and** is customarily and regularly engaged away from the employer's place of business in performing such duty. **[DOL normally expects as a rule of thumb that the outside sales employee works at least 50% of the time away from the employer's place of business].**

### **UNDERSTANDING COMPENSABLE HOURS WORKED FOR NON-EXEMPT EMPLOYEES**

The FLSA does not define the term "hours worked," and does not provide much information about what hours are compensable. In most cases, employers have no problem recognizing that employees must be paid for hours spent while the employees are physically present at work during regular work hours performing the principal duties of their jobs. However, employers run into problems when employees engage in activities which are incidental to their jobs, such as traveling, preparing for work, carrying a beeper, or waiting to work.

In considering whether such incidental activities are compensable working time, the requirements of the Portal-to-Portal Act come into play. The

Portal-to-Portal Act prohibits employees from claiming payment for some incidental activities, such as: time spent by an employee walking, riding or traveling to and from the place where they perform their “principal work activities,” unless such activities are compensable under the terms of a contract, custom or practice.

“Principal work activities” generally refer to the duties, tasks and actions that are an essential part of a particular employee’s job. All activities closely related to these “principal work activities” and which are indispensable to the performance of the employee’s “principal work activities” are also considered “principal work activities,” even if these related activities are performed outside the regular working hours or outside the employer’s premises.

Finally, work not requested by the employer, but knowingly permitted by the employer, counts as compensable time. For example, the employer must compensate an employee who voluntarily and without authorization continues working after his shift ends or an employee who performs work away from the workplace.

**A. Preparatory/Concluding Hours Worked for Non-exempt Employees - With a Special Focus on Practical Pointers for Compliance**

The Portal-to-Portal Act also excludes from compensation time spent on activities that are preliminary or postliminary to an employee’s principal work activities or duties, unless provided for in a contract, custom or practice.

Preliminary activities are those performed prior to the workday and postliminary activities are those performed subsequent to the workday. Preliminary and postliminary activities are compensated only if they are preparatory or concluding activities that are part of the employee's work and/or done for the employer's benefit.

**1. Examples of compensable (concluding/preparatory) activities.**

- changing clothes, if required by the nature of the work;
- cleaning and oiling machinery; or
- caring for tools that are part of the employee's principal activities.

**2. Examples of non-compensable preliminary/postliminary activities.**

- voluntary athletic events, even if employer sponsored;
- changing clothes for employee's convenience; or
- jury duty.

**B. Training Time**

Training and meetings need not be counted as "hours worked" if all of the following four conditions are met:

1. Attendance at training is outside of regular working hours;
2. Attendance at the meeting or training is voluntary;
3. The training is not directly related to the employee's job (training is considered "directly related" if it makes the employee more effective in his job); and
4. The employee does not perform productive work during attendance at the meeting or training.

Even training which is actually related to the employee's job need not be compensated if it corresponds to courses offered by an independent institution of learning and is voluntarily attended by the employee outside normal working hours.

### **C. Breaks and Meal Times**

Meals are not compensable if the employee is completely relieved from work and/or from his duties while eating, and if the period is thirty minutes or longer. *Kohlheim v. Glynn County, Ga.*, 915 F.2d 1473 (11<sup>th</sup> Cir. 1990). If the employee is required or allowed to perform duties while eating, the meal is compensable time.

The Act does not require employers to grant breaks, but if the employer chooses to grant such breaks or rest periods, breaks or rest periods of short duration (5-20 minutes) are counted as hours worked and must be compensated. Anything over thirty minutes does not have to be compensated (as long as no work is performed). The FLSA does not address whether or not breaks between

twenty and thirty minutes are compensable or not, but a rule of thumb now accepted by the DOL is that anytime on break less than 30 minutes should be compensated.

**D. “On Call”/Waiting Time**

**1. “On-call”**

Whether or not time spent “on call” must be paid for by the employer depends on the employees’ freedom to act while they are “on call.” If the time is spent predominately for the employer’s benefit, the employee must be paid for that time. The key is whether the employee is “engaged (hired) to wait” or whether the employee is simply “waiting to be engaged.” The former is compensable time, but the latter is not.

To determine if the time “on call” is compensable, courts look at how much control the employer has over the employee and examine whether the employee can use the “on call” time for his personal use or benefit. An employee who cannot use the time he or she is “on call” for his or her own use because of the restrictions placed on the employee by the employer must be paid for that “on call” time. The key in many cases seems to be the number of “calls” regularly received by the employee during his/her shift. If the employee regularly receives sufficient “calls” to interfere with the use of the “on call” time for his/her own personal use, courts tend to find that the time is compensable. If the employee

receives only a few calls per “call” period, courts are more likely to find that the “on call” time is not compensable. This is true even if the employee must be able to report for duty within an hour or so, must be reachable by phone or beeper, must be clean, must consume no alcohol and must comply with other restrictions.

## **2. Waiting time**

In some circumstances, waiting time is compensable. To determine if waiting time is compensable, the specific circumstances must be analyzed:

### **a. Waiting to start duties**

Time an employee spends waiting to work when the employee arrives at work before his or her scheduled shift is generally not compensable. However, if the employee actually performs work during that time, he/she must be compensated.

### **b. Waiting while on duty**

All time that is spent by employees while on duty, between activities, must be compensable. An employee must be paid where waiting is a principal part of the employee’s job.

### **c. Off duty time**

Periods in which an employee is completely relieved from duty and which are long enough to enable the employee to use the time effectively for his or her

own purpose are not “hours worked” and are not compensable. Whether the time period is long enough depends on the facts of each case. An employee who is completely relieved of duties during a one hour lunch break need not be paid, even though they may be required to remain on the employer’s premises.

#### **E. Time Spent for Medical Attention**

If for some reason an employee is directed by the employer to seek medical treatment, a physical examination or drug testing, the time spent receiving medical treatment is compensable time, even if the examinations are conducted outside regular working hours. For example, if the employer has a policy requiring employees to be tested for drugs after they suffer an on-the-job injury, the employer must count the time spent by the employee getting tested as “hours worked.”

If the employer requires pre-employment drug and alcohol tests after a conditional offer of employment, the employer does not have to include the time spent in such testing as “hours worked.”

#### **F. Travel Time**

##### **1. Travel from home to work**

Generally, travel from home to work and work back home is not compensable.

##### **2. Travel during the workday**

Time spent traveling once employee arrives at work, such as time traveling from an employer's job site to the employer's other job sites, is compensable. Where an employee is required to report to a designated location to receive instructions or to pick up tools/materials before traveling to the workplace or job site, travel from the meeting place to the workplace or job site is compensable. Similarly, if an employer requires its employees to go back to the employer's premises at the end of the workday, that time is compensable.

### **3. Travel to out-of-town assignments**

When employees who normally work at one location are given one-day special assignments that require them to travel to another city, all the travel time involved counts as hours worked. The only time that may be excluded are meal times and time spent traveling from the employee's home to the point of departure.

### **4. Overnight travel**

When an employee is required to spend the night away from home, all travel during the employee's regular working hours on his normal working days, and all travel during the corresponding hours on his non-working days is counted as hours worked. The Department of Labor will not consider as "hours worked"

any time spent in travel away from home outside of the employee's regular working hours.

## **G. Sleeping Time**

Under certain circumstances, an employee is considered to be working while sleeping.

### **1. Employees who are on duty for less than 24 hours**

If an employee's shift is less than 24 hours long and the employee is permitted to sleep or engage in other activities when not busy, the regulations provide that the employee must be paid for sleeping time.

### **2. Employees who are on duty more than 24 hours**

Employees who are required to be on duty 24 hours or longer may make an agreement with the employer to exclude or modify meal periods and sleeping periods of *no more than eight hours* so that the employer does not have to pay for these. The employer must provide an adequate sleeping facility and the employee's sleep time must not be interrupted. If, however, the sleep or meal period is interrupted by a call to duty, the interruption is counted as "hours worked," not the entire period. If the period of sleep is interrupted in such a way that the employee cannot get a reasonable night's sleep, the entire period must be counted as "hours worked."

## **RULES ON PAYROLL DEDUCTIONS FOR EXEMPT AND NON-EXEMPT EMPLOYEES**

An employer may deduct from the employee's wages for the employee's share of social security, as well as other federal, state or local taxes. An employer may not deduct from wages any tax that the employer is required to pay. There are other permissible deductions. They are:

- deductions for board, lodging or other facilities may be made provided the costs of such facilities do not exceed the reasonable costs of such facilities (without a profit allowance);
- deductions pursuant to a court order;
- deductions for permissible voluntary assignments to third persons, such as: union dues, savings accounts, some insurance premiums, or contributions to churches; or
- deductions for uniforms.

With the exception of deductions for board, lodging and other facilities and employee's voluntary assignment of wages, employers may not reduce wages below the minimum wage requirement. The required minimum wage should be paid "free and clear."

## **UNDERSTANDING OVERTIME RULES FOR NON-EXEMPT EMPLOYEES**

### **A. Basics of Overtime**

The FLSA requires that all non-exempt employees receive overtime pay for any hours worked over forty in any one workweek. FLSA does not require

overtime to be paid to employees who work more than eight hours a day, or who work holidays or on weekends. The Act provides for overtime pay only when the number of hours in a workweek exceeds the statutory maximum of forty.

- A workweek for FLSA purposes is a fixed and recurring period of 168 hours comprising 7 consecutive 24-hour periods. The Act provides for longer workweeks in specific industries.
  - A workweek may begin on any hour of any day and it need not coincide with a calendar week or the pay period. However, for purposes of overtime compensation it may be easier to have the workweek coincide with a calendar week or pay period.
  - Hours worked in one workweek cannot be transferred to another workweek. Thus, if you have a two week pay period and an employee works 42 hours in the first workweek of the pay period and 38 hours in the second workweek of the pay period, you cannot credit the second week with the two extra hours worked in the first.
  - Workweeks can vary for different employees.
  - Once established, the beginning of the workweek may only be changed if the change is permanent and not made to evade paying overtime.
  - Straight time, as well as overtime, generally must be paid on the employee's regular pay day. However, if the precise amount of overtime cannot be calculated when the pay period ends, the employer is afforded a grace period but not beyond the next pay day.

## **B. Calculating the "Regular Rate"**

Overtime wages are equal to the regular rate plus one half of that rate per hour, a.k.a. time and a half. The regular rate includes all remuneration for employment paid to or on behalf of employees.

**1. Hourly employees**

In most cases the regular rate will be the hourly rate. Other forms of compensation, such as premium pay and bonuses must be figured into the calculation of the regular rate.

**2. Salaried employees (non-fluctuating workweek)**

For regular salaried employees (non-fluctuating workweek), the regular rate is determined by dividing the total remuneration by the maximum standard hours for which the employee's salary is designed to cover (generally forty hours).

**3. Salaried employees (fluctuating workweek)**

Fixed salary for fluctuating hours – paid a salary for all hours worked in that workweek. The salary covers the straight time pay for all hours, including those over 40. As a result, the regular rate of pay will vary from week to week as the hours worked vary. Regular rate is determined by dividing the salary by the number of hours worked. If there is any overtime in a week, then payment of one-half of the regular rate in addition to the salary, will satisfy the employer's overtime requirement. The salary must be large enough that the employee's hourly rate does not fall below the hourly wage requirement.

**4. Employees working at two (2) jobs or rates**

**a. Piece Workers**

The regular rate for piecework is total earnings divided by total hours. Overtime rate is equal to one and one half times the regular rate, or piece and one-half.

**b. Day Rates, Job Rates**

When an employee is paid a flat rate sum for either a day's work or completing particular jobs, the regular rate is calculated by dividing the flat sum by the number of hours worked. Again, the sum must be large enough to ensure that the employee does not work for less than minimum wage. If the employee exceeds forty hours per week, they must be paid overtime pay. Day rates are effective only when there is a fixed amount of work per day, and an employee can work extra fast, and then have time off, perhaps to work another job. Otherwise, the day rate only encourages an employee to slow down, so as to get some overtime pay. Garbage collectors are the classic example. If paid a flat rate for a normal route, they can actually run instead of walking, and finish in half the time. They get time off and the employer avoids overtime pay.

**C. Items Included in the Regular Rate**

**1. Meals/lodging/other goods and services**

Goods and Services – when payments are made in the form of goods and services that are regarded as part of wages, the regular rate will be credited with the reasonable cost to the employer of those goods and services.

## **2. Nondiscretionary bonuses**

Any bonus that creates a reasonable expectation of payment on the part of the employee or that is dependent on the quality, quantity, efficiency of production, or hours worked is a nondiscretionary bonus. It must include an overtime component so that employees who work more overtime get more bonus. Otherwise it would be possible to circumvent the law by paying low regular rates, low overtime rates and high bonuses, while requiring long hours of work.

## **3. Commissions**

Commission payments are payments for hours worked and must be included in the regular rate. All of these methods require careful recording of the hours worked each week.

- a. Based on a workweek basis - the commission is merely added to the week's earnings and then divided by the total number of hours worked. The employee is paid one half of the regular rate for each overtime hour worked in addition to the commission.
- b. Deferred commission payments - once the amount can be determined, it is apportioned back over the workweeks of the period during which it was earned. The employee receives additional overtime compensation for each week during the period in which overtime was worked. (The additional compensation may not be less

than one half of the increase in the hourly rate of pay attributable to the commission for that week multiplied by the number of hours worked in excess of the applicable maximum hours standard).

- c. Deferred commission payments (payments that are not identifiable to particular workweeks) - there are two methods for calculating regular rate:
- Allocate equal amounts of the commission to each week in the commission computation period.
  - Allocation of equal amounts to each hour worked.

#### **4. Premium pay**

- a. Hours in excess of a daily or weekly standard - this type of compensation is provided for via contract, contingent on the employee first working eight hours in a day or an excess amount each week. Under such circumstances, the extra compensation provided by the premium rates need not be included in the employee's regular rate of pay for purposes of computing overtime and may be credited toward the overtime requirement imposed by the FLSA. If the contracted for premium is less than time and one-half for similar work during normal hours, the employee must be paid the difference.
- b. If the contracted for premium is greater than the one and one-half, the excess overtime can be used to offset weekly overtime.
- c. Work on special days - the premium rate must be included in the computation of regular rate unless the rate is at least time and a half and the employee is provided adequate notice of the employer's plan to have them work on the special day.
- d. Clock Pattern Premiums - shift differentials. Generally shift differentials for working undesirable shifts must be included in the regular rate if the employee is regularly scheduled for that shift. However, if the shift differential

is pursuant to a contract or collective bargaining agreement, and the rate is equal to one and one half times the regular rate for the other shifts then the employer can exclude the differential from the regular rate premium.

- e. An employment agency that paid evening shift temporary word processors at a rate of \$16.50 per hour, \$3.50 higher than its day rate, could not exclude the premium rates from the regular rate and credit those amounts towards overtime. The evening shift rate must be factored into the regular day rate because the evening rate is less than one and one-half times the regular rate.

## **D. Items Excluded from the Regular Rate**

### **1. Discretionary bonuses**

Bonuses which are to be paid are determined at the sole discretion of the employer at or near the end of a period and are not pursuant to any agreement or incentive program.

### **2. Stock options gain**

Generally, any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program is excluded from the calculation of the regular rate. Worker Economic Opportunity Act, 20 U.S.C. §207(e)(8). Under the current state of the law, stock options are an additional benefit comparable to health insurance and are not considered part of an employee's base salary. Accordingly, employers may grant non-exempt employees stock options without having to pay additional overtime for the value of those options.

### **3. Benefit plans contributions**

Benefit Plan contributions will be excluded from the regular rate if made pursuant to a bona fide plan, with a written agreement maintained in good faith and benefits paid on a periodic basis. There are other requirements, the discussion of which is beyond the scope of this seminar.

### **E. Compensatory Time Rules**

Compensatory time is defined as time off in lieu of overtime, to be taken at a future date. A private sector employer may not credit a non-exempt employee with compensatory time rather than paying time and one-half for overtime earned. The DOL has determined that exempt employees may agree to a compensatory time plan provided it does not affect the salary basis of compensation, some courts have found such arrangements may invalidate salary basis. This is true even if the employee is given time off for overtime at one and one half times the hours of overtime worked which is required in circumstances where compensatory time is permitted.

Time-off plans (these are distinguishable from compensatory time plans) are permissible in certain circumstances for private sector employers. When an employee is paid on a salary basis, an employer may lay off the employee a sufficient number of hours in a pay period so that the desired wage or salary for the pay period covers the total amount of compensation, due the employee for

each workweek taken separately. Such a plan will not work for an employee with a weekly pay period.

Accordingly, if an employee worked two hours of overtime in the first workweek of a two week pay period, then the employer would have to lay off the employee three (3) hours ( $2 \text{ hours} \times 1\frac{1}{2} = 3 \text{ hours}$ ) in the next work week so that the employee's salary would cover all compensation due for the hours worked, including overtime.

An employer must accurately predict the hours to be worked each workweek to make a time-off plan work. If you cannot give the employee enough time-off in a subsequent week, you must compensate him/her for his/her overtime hours.

### **OVERTIME RULES FOR EXEMPT EMPLOYEES**

Exempt employees are not entitled to receive overtime. However, as long as the employee's salary is maintained, there is nothing wrong with paying extra money or giving compensatory time off when overtime is worked. Time records may also be maintained, though not required by law. Maintaining time records for exempt employees will not destroy an otherwise lawful exemption.

### **FLSA RECORD KEEPING REQUIREMENTS**

#### **A. Fair Labor Standards Act (FLSA)**

Generally, the following information must be kept by employers for all employees covered by the FLSA. However, as detailed later, certain exceptions

apply to some types of employees, e.g., executives, as well as to some different industries.

1. Name-in-Full: Full name of the employee as used for Social Security purposes. If employer uses a number or symbol on time cards or other records, this number or symbol must also appear on the record.
2. Home Address (address where the employee is currently residing).
3. Date of Birth.
4. Sex and Occupation.
5. Work Week (this is not necessarily Monday to Friday, but the beginning and ending of 168 hours over a seven-day period).
6. Regular Hourly Rate.
7. Hours Worked.
  - The total hours worked each workday and total hours worked each workweek must be recorded.
  - If the employee works a fixed schedule each week, then the employer can simply keep records on the workweek the employee normally works. In weeks that the employee adheres to the schedule, then the employer can check off or indicate that the normal week was worked. However, if the employee works a different schedule, then the exact hours worked each day and week must be recorded.
8. Straight-Time Earnings: The total straight-time earnings or wages due for hours worked during the workweek, exclusive of overtime compensation. Straight-time earnings including hourly wages, piece rates, commissions, etc.

9. Overtime Earnings: The total overtime earnings for the week, exclusive of straight-time earnings. (This is not the overtime premium which is equivalent to the ½ wage over the regular rate).
10. Additions and Deductions: Total additions and deductions from wages paid each pay period. Further, for each individual employee, the dates, amounts, and nature of the items added or deducted from the pay check.
11. Total Wages: Total wages paid each period.
12. Date and Pay Periods: The date of payment and the pay period (1 week, 2 weeks or 1 month) covered by payment.
13. Retroactive Payment of Wages: If an employer is making back wage payments to an employer under government supervision, it must record and preserve the amount of the payment, the period covered by the payment, and the date of the payment. Additionally, the employer must complete a report on a form provided by the Wage and Hour Division.

## **B. Major Exemptions**

In most organizations there are certain employees that are exempt from many of the record keeping requirements of the FLSA. While some record keeping requirements are waived, employers should be aware of other requirements created by the exemption. Namely, employers are responsible for justifying or substantiating any claimed exemptions, thus adequate records in this regard are required.

1. White Collar Exemption (Bona fide executives, administrative professional employees, outside sales employees): Under this exemption, employers must keep records on the items specified above in the general FLSA section, except for Regular Rates, Hours Worked, Straight-Time Earnings, Overtime Earnings, and Additions and Deductions. The following additional records are also required:

- Wage Basis: The basis for payment of wages, e.g., \$500/week; \$1,000/week plus 5% commissions, etc.
- Total Pay: Total Compensation received from wages and fringe benefits.
- Tipped Employees require additional record keeping.
- Symbol: A symbol or letter must be placed on the employee's pay record designating that the employer is counting tips towards the payment of minimum wage.
- Tip Report: The employee must report the amount of the tips he or she receives either weekly or monthly. This is for IRS purposes. (IRS Form 4070).
- Non-Tipped Hours Worked: The hours worked each week that the employee did not receive tips and the corresponding total daily or weekly straight-time payment made by the employer for these hours.
- Tipped Hours Worked: The hours worked each workday that the employee receives tips and correspondingly total daily or weekly straight-time payment made by the employer for these hours.
- Minimum Wage Credit: Amount of tips credited towards the minimum wage. As stated above, this amount cannot exceed forty (40) percent of the statutory minimum wage.

### **C. Belo Contracts**

Generally, these contracts are usually made pursuant to collective bargaining agreements that require workers to work irregular hours. Employers subject to these agreements must keep all of the standard FLSA records except

Straight-Time Earnings, and Overtime Earnings. Additionally, employers must also maintain total weekly guaranteed earnings; total weekly compensation in excess of weekly guarantees; and a copy of the Belo Contract. Do not attempt to use a Belo Contract. They are disfavored by the Wage and Hour Division.

#### **D. Preservation of Records**

##### **1. Records kept for three years**

- a. Payroll Records: All payroll records or other records containing the employee information and data required under the FLSA.
- b. Sales and Purchase Records: The total dollar volume of sales or business and the total volume of goods purchased or received by the employer in the manner maintained by the employer in the ordinary course of business.
- c. Certificates and Notices: Certificates and notices listed or named in any applicable section of the FLSA or supporting regulations, e.g., proof of age certificates.
- d. Assorted Collective Bargaining Agreements: Collective bargaining agreements that provide board, lodging or other facilities to employees as a portion of wages. Additionally, collective bargaining agreements that concern the distribution of petroleum products.
- e. Other Agreements: All agreements evidencing overtime pay for piece rate work, hourly or other basic rates. Additionally, certain wage agreements for live-in employees of hospitals or other facilities engaged in the care of the sick, aged or mentally ill. Any agreement, trust or plan that excludes certain items from compensation.

##### **2. Records to be kept for two years**

- a. Supplemental Records: Source documents used to compile other payroll records. These records mainly consist of the following:
- b. Basic Employment and Earnings Records: Any source document that substantiates the payroll information, such as time cards or time sheets.
- c. All tables or schedules that show the piece rate Wage Rate Tables or other rates used in computing straight-time earnings, wages, salary, or overtime compensation. These records are kept for two years from the date of their last effective date.
- d. Order, Shipping, and Billing Records: All customer orders, invoices received, incoming and outgoing shipping and delivery records, bills of lading, and all billings to customers (not including register tapes and sales receipts, etc.) kept in the ordinary course of business.
- e. Additions to or Deductions from Wages: These records include all of the adjustments made to an employee's wages, e.g., employee purchase orders and wage assignments.

### **3. Storage of records**

Records must be kept safe and accessible at the place or places of employment. However, records may be kept at a central storage facility as long as they are made available for inspection within 72 hours of a request from an authorized representative of the Wage and Hour Division.

### **4. Form of records**

No particular form of records is required. Records may be kept on microfilm or computer as long as adequate viewing equipment is available and reproductions are clear and identifiable by date or pay period.

## **5. Petition for exemptions**

Employers may petition the Wage and Hour Division to be excused from certain record keeping duties due to peculiar conditions. Employers must submit a written petition detailing their need for the exception. Typically, it is a good practice to provide a copy of the proposed record the employer is seeking to keep.

## **6. Penalties**

Willful falsifications can result in both civil and criminal penalties. However, a simple failure to keep records as required under the FLSA only results in civil penalties. The greater risk to an employer who lacks accurate records of hours worked is that it will have a difficult time refuting the claims of employees who allege that they worked more hours than they did.

## **7. Posting of notices**

Every employer is subject to the minimum wage requirements of the FLSA and must post, in a conspicuous place, a notice explaining the Act. This notice may be obtained from the Wage and Hour Division. If an employer is not subject to the minimum wage requirements of the Act, it may modify the notice to reflect its particular situation. The following notices and their corresponding form number are available from the Wage and Hour Division:

- General Notice - English (WH1088)
- General Notice - Spanish (WH108Sp)
- State and Local Gov't (WH1385)
- Patient Workers (WH1417)

- Sheltered Workshops (WH1284)