TEXAS YOUNG LAWYERS ASSOCIATION

EMPLOYER'S GUIDE TO WAGES, OVERTIME AND EXEMPTIONS

UNDER THE FAIR LABOR STANDARDS ACT

Employer's Guide to Wages, Overtime, and Exemptions under the Fair Labor Standards Act

The Texas Young Lawyers Association

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What is the Fair Labor Standards Act?

The Fair Labor Standards Act ("FLSA") is perhaps the most comprehensive and complicated statute regulating employment relationships, and applying it to any particular set of facts and circumstances can be difficult. The FLSA is a federal law enacted on June 15, 1938 to provide for minimum wage standards and to regulate work hours, overtime pay, and set child labor standards for most workplaces in the United States. Nearly 80 years later, the FLSA remains the central source for U.S. wage and hour laws and continues to fulfill its purpose to provide workers with minimum protections to ensure each employee covered by the FLSA gets fair pay for work performed.

What is the role of the Wage and Hour Division of the Department of Labor?

The Wage and Hour Division ("WHD") of the U.S. Department of Labor ("DOL") is charged with interpreting and enforcing the FLSA's federal minimum wage, overtime pay, record keeping and child labor requirements. 29 U.S.C. § 204; 29 C.F.R. § 500.0. The WHD has broad investigative powers and can inspect employers' premises and records and question employees. 29 U.S.C. § 211(a). Additionally, the WHD can impose penalties on employers and the employers' ability to seek judicial review of penalties is limited.

"Employers," "Employees," and the FLSA

Who is an "Employer" for purposes of the FLSA?

"Employer" is broadly defined to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). It can include "supervisors," i.e., those with "managerial responsibilities" or "substantial control over terms and conditions of the employee's work," but is not so limited.Generally, the FLSA applies to all employers and employees who are not specifically exempted by the FLSA and are (1) engaged in interstate commerce; (2) employed by an "enterprise" engaged in such activities; or (3) employed as a private household domestic servant.

Individuals can be considered "employers" for purposes of individual liability under the FLSA, and in making the determination, courts consider various factors, such as whether the individual: (1) possessed power to hire and fire employees;

(2) supervised or controlled employee work schedules or conditions of employment; (3) determined the rate or method of payment; and (4) maintained employee records.

Are independent contractors "employees" for purposes of the FLSA?

The FLSA defines "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e)(1).

Simply classifying an individual an "independent contractor" does not make him so, and this is a common mistake by employers that can result in liability with the WHD, the IRS, and through private lawsuits. Thus, courts frequently consider this question and, depending on the facts and circumstances of each case, must determine whether an individual is covered under the FLSA.

Generally, courts consider the following five factors in determining whether an individual is an "employee" under the FLSA:

(1) The degree of control exercised by the alleged employer;
(2) The extent of relative investment of the worker and the alleged employer with respect to the facilities and/or materials used to perform the work;
(3) The degree to which the worker's opportunity for profit and loss is determined by the alleged employer;
(4) The skill and initiative required in performing the job; and
(5) The permanency of the relationship.

This test is not rigidly applied, and no one factor weighs more than the other. Additionally, it is not necessary that evidence exist with respect to each factor to determine the existence of an employment relationship.

What types of employment relationships are not covered under the FLSA?

Typically, independent contractors, volunteers, interns, or trainees engaged similarly to an educational environment, and prisoners, and certain domestic, fishing, and agricultural workers who are expressly exempted under the Act are not covered by the FLSA.

What does it mean to "work" or "employ" someone under the FLSA?

The FLSA also broadly defines "employ" as "to suffer or permit to work." 29 U.S.C. §§ 203(e)(1), (g). If an employee is "suffered or permitted" to work, he or she must be compensated under the FLSA for the time spent providing services for an employer. Thus, work, even if not requested, but permitted to be performed, is work time that must be paid by the employer, provided that the employer is aware that the work is being performed. 29 CFR § 785.11.

What does it mean to be "engaged in commerce" under the FLSA?

To be "engaged in commerce" under the FLSA means to perform any activity involving or relating to interstate movement of people, goods, and services. 29 C.F.R. § 776.8. A wise rule of thumb: If it affects commerce, the FLSA applies. 29 USC § 202. While there is no *de minimus* requirement, "[a]ny regular contact with commerce, no matter how small, will result in coverage." Thus, most economic activity, no matter how remote or trivial, "affects commerce," for purposes of the FLSA.

What does it mean to be an "enterprise" under the FLSA?

Under the FLSA, an "enterprise" means any group of related activities performed through a unified operation or other common control for common business purpose that has total gross volume of business of $500,000 or more and has two or more employees (i) engaged in commerce or production of goods for commerce or (ii) engaged in handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person. 29 U.S.C. §§ 203(b), (r); 29 C.F.R. §§ 776, 779.21, 779.200.

Both businesses and individuals can be considered engaged in an "enterprise" and therefore subject to the requirements of the FLSA. An individual owner or employee of a business may be held personally liable for a business's violation of the FLSA if the employee satisfies the FLSA's broad definition for an individual "employer."

Minimum Wage and Overtime

What is the minimum wage required by the FLSA?

The FLSA sets the minimum wage, or the minimum amount per hour that an employer is required by law to pay each of its employees unless the employee is exempt. 29 USC § 206(a). As of January 1, 2018, the federal minimum wage is $7.25/hour. It applies to all fifty states and the District of Columbia.

States also have minimum wage laws, and where an employee is subject to both the state and federal minimum wage laws, the employee is entitled to whichever minimum wage rate is higher. A state minimum wage rate, if enacted, must be higher than the current federal rate. 29 USC § 218(a). As of January 1, 2018, the minimum wage in Texas is also $7.25/hour.

Does the FLSA require employers to give employees vacation or sick pay?

No. The FLSA does not require holiday, vacation, or sick pay.

Are all employees entitled to overtime pay under the FLSA?

The FLSA requires that an employer pay a nonexempt employee who works more than 40 hours in a week one and one-half times the employee's regular rate of pay. In general, the regular rate of pay is the employee's average earnings per hour based on the employment contract. 29 U.S.C. § 207(a)(1). The "regular rate" refers to the hourly rate actually paid to an employee for a normal, non-overtime workweek for which he is employed.

Importantly, the overtime requirement does *not* apply only to hourly employees. This is a common misconception among employers that often leads to liability under the FLSA. If an employee is not specifically exempted from the overtime provisions of the FLSA, the employer *must* pay overtime, regardless of whether the employee is paid on a salary, piece rate, commission, fee, or daily rate basis.

How is overtime pay calculated under the FLSA?

Overtime is based on hours worked, not just hours paid (e.g., sick days, holidays, and vacation days). 29 U.S.C. § 207(e)(2). For adults, there is no limit on overtime

hours that employees may work, and overtime may be mandatory. 29 CFR § 778.102. Employers should have clear policies and readily enforce policies that prohibit nonexempt employees from working prior to and extending past their scheduled time.

When computing whether overtime is owed to an employee, a seven-day workweek is used. Each workweek is a separate unit for overtime purposes. Therefore, the hours cannot be averaged over two or more weeks. For example, if a nonexempt employee works 60 hours the first week of June and less than 4 hours the second week of June, the employer must pay that employee one and one-half times the employee's regular rate of pay for 20 hours during that first week of June. The employer does not owe the employee any overtime pay for the second week of June. 29 CFR § 778.104.

The following are excluded from compensation:

- Stock options; and
- Reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interest and properly reimbursable by the employer. 29 U.S.C. §§ 207(e)(2), (8).

Must employees be compensated for all hours worked?

The FLSA requires employers to pay their employees for all hours the employees work. However, "work" is not defined under the FLSA. Rather, "work" is defined by the U.S. Supreme Court as activity involving "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." The Court later clarified that "exertion" is not necessary for an activity to count as "work" and that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen."

According to the DOL, "workday," in general, means the period between the time on any particular day when such employee commences her "principal activity" and the time on that day at which she ceases such principal activity or activities. The workday may therefore be longer than the employee's scheduled shift, hours, tour of duty, or production line time. The scope of what constitutes compensable "work" continues to be a disputed issue. However, case law has since developed two primary limitations to the U.S. Supreme Court's 1944 definition of "work."

Di Minimis doctrine and Portal-to-Portal Act

Insignificant periods of time beyond scheduled working hours, which cannot as a practical matter be precisely recorded for payroll purposes, may be considered *di minimis*, and not compensable work.

The Portal-to-Portal Act limits employer liability for "effortless" preliminary or postliminary activities. 29 U.S.C. § 254(a). Congress passed this Act to limit the liability of employers for certain activities, such as (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. 29 U.S.C. § 254(a).

Pre-Shift and Post-Shift Duties

The next limitation to the definition of "work" deals with preliminary and postliminary activities. The Supreme Court has held that activities that take place before or after an employee commences her regular workday are compensable, "if those activities are an integral and indispensable part of the principal activities." *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956) (finding plant worker's time spent in changing in and out of work clothes at battery plant was "integral and indispensable" part of employee's work and therefore compensable); 29 C.F.R. § 790.7(a).

Employers are required to pay wages to employees who perform pre-shift and post-shift duties, for travel to and from work sites, for cleaning and maintenance duties, and for work performed at home *when* the activities are an **integral and indispensable** part of the employee's principal activities. The Fifth Circuit has construed the term "principal activity" to include activities "performed as part of the regular work of the employees in the ordinary course of business . . . [the] work is necessary to the business and is performed by the employees, primarily for the benefit of the employer."

Do covered employees have to be compensated for rest and meal periods?

Generally, rest periods of 20 minutes or less are customarily paid for as working time. These short periods must be counted as hours worked according to the DOL.

Bona fide meal periods of 30 minutes or more generally need not be compensated as work time. However, the employee must be completely relieved from duty for the purpose of eating regular meals. The employee is not relieved if he/she is required to perform any duties, whether active or inactive, while eating. If the employee performs work duties while eating, he or she must be compensated.

Break times for nursing mothers

The Patient Protection and Affordable Care Act (ACA) provides protections for nursing mothers in the workplace. The ACA amended Section 7 of the FLSA to require that certain specified employees receive breaks for the purpose of pumping breast milk at work.

Employers are required to provide "reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk." Factors employers should consider in determining the "reasonable time" needed for an employee to express breast milk include the time it takes to walk to and from the lactation space and the wait, if any, to use the space; whether the employee has to retrieve her pump and other supplies from another location; and whether there is a sink and running water nearby for the employee to use to wash her hands before pumping and to clean the pump attachments when she is finished expressing milk. A space temporarily created or converted into a space for expressing milk or made available when needed by the nursing mother is sufficient provided that the space is shielded from view, and free from any intrusion from co-workers and the public.

Only employees who are not exempt from Section 7, which includes the FLSA's overtime pay requirements, are entitled to breaks for the purpose of expressing milk. While employers are not required under the FLSA to provide breaks to nursing mothers who are exempt from the requirements of Section 7, they may be obligated to provide such breaks under State laws.

Employers are not required to compensate nursing mothers for breaks taken for the purpose of expressing milk under the FLSA (although they made be required to do so under an applicable state law). However, where employers already provide compensated rest periods, an employee who uses her break time to express breast milk must be compensated in the same way that other employees are compensated for break time. Additionally, the employee must be completely relieved from duty or else the time must be compensated.

Employers with fewer than 50 employees are not subject to the FLSA break time requirement if compliance with the provision would impose an undue hardship. Whether compliance would be an undue hardship is determined by a number of factors including the difficulty or expense of compliance for a specific employer in comparison to the size, financial resources, nature, and structure of the employers' business.

Is work performed from home, remotely, or while traveling compensable under the FLSA?

Working from home

Employees must be paid for actions taken on behalf of their employers regardless of the location. Work-related activities at home that are engaged in by the employee at home could be considered compensable time, e.g., checking phone messages or emails before arriving to work, time spent reading or completing paper work, time spent loading or stocking equipment. For work-related activities at home to be considered compensable work time, the following factors must be satisfied:

- Activities must be primarily for the benefit of the employer per 29 CFR § 785.11 (not for personal benefit).
- Activities must be principal activities or integral and indispensable to principal activities; *IBP*, 546 U.S. at 37.
- Employer must know or should have known that employee was engaging in such activities, per 29 CFR § 785.12.

Regular home-to-work travel

An employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel, which is a normal incident of employment according to the FLSA. This is true whether he works at a fixed location or at different job sites. Normal travel from home to work is not work time and is not compensable time under the FLSA. Consequently, an employee's travel time from the employee's home to his or her regular place of business does not count as hours worked.

However, where the employee's workday begins and ends at home such as where the employee drives co-workers to work in a company-owned vehicle at the employer's request or where the employee has to run errands on behalf of the employer on the way to work, such time might be compensable if it is an integral and indispensable part of the employee's principal duties.

Travel for one-day assignments

Travel time spent in the commute to a one-day (non-overnight) special assignment in another city, away from the normal fixed location of work, may be considered working time. The employer should include the commuting time less that amount of time the employee normally spends commuting from home to the regular fixed location of work. An employee must generally be paid for time traveling to work on special one-day assignments to a city other than where the employee regularly works.

Overnight travel

Travel time that takes an employee away from home overnight is called travel away from home. Travel time occurring during the employee's regular work hours, whether on regular workdays or corresponding non-workdays is compensable. Travel time occurring outside those regular working hours is not compensable unless the employee is required to perform work while traveling. The DOL's current enforcement position is to ignore travel time occurring outside the normal working hours as a passenger on a plane, train, automobile, boat or bus as working time unless the employee is required to work while engaged in such travel.

Daily travel

Time spent by an employee in travel as part of her principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.

On-call time

An employee who is required to remain on call or is "engaged to be waiting" is working while "on call." An employee who is allowed to leave a message where she can be reached or is "waiting to be engaged," is not working (in most cases) while on call. Additional constraints on the employee's freedom could require this time to be compensated.

Does the FLSA protect employees who complain about their wages or overtime?

Like most federal employment laws, the FLSA prohibits retaliation against employees who engage in "protected activity" for purposes of the FLSA. "Protected activity" typically includes opposing alleged violations of the FLSA or participating in investigations, agency charges, or lawsuits. The anti-retaliation provision of the FLSA expressly prohibits employers from discharging or in any other manner discriminating against any employee for engaging in protected activity. 29 U.S.C. § 215(a)(3).

Protected activity includes oral and written complaints. However, a complaint, whether oral or written, must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection. *Id.* An employee's "grumblings" or "vague expressions of discontent" may not be actionable as complaints.

Do employers have to give employees notice of their rights under the FLSA?

Employers must display an official poster outlining the provisions of the FLSA, available at no cost from local offices of the WHD and toll-free, by calling 1-866-4USWage (1-866-487-9243). This poster is also available electronically for downloading and printing at http://www.dol.gov/osbp/sbrefa/poster/main.htm.

What kinds of records must employers keep concerning employee pay and hours worked?

In addition to its minimum wage and overtime requirements, the FLSA requires employers to preserve records relating to hours worked and compensation for all current and former nonexempt employees up to three years. 28 C.F.R. §§ 516.2, 516.6. Basic records required to be kept include:

(1) Employee name and social security number;
(2) Address, including zip code;
(3) Birth date (if younger than age 19);
(4) Sex and occupation;
(5) Time and day of week when employee's workweek begins;
(6) Hours worked each day;
(7) Travel hours worked each workweek;
(8) Basis on which employee's wages are paid;
(9) Regular pay rate;
(10) Total daily or weekly straight-time earnings;
(11) Total overtime earnings for the workweek;
(12) All additions to or deductions from the employee's wages;
(13) Total wages paid each pay period; and
(14) Date of payment and the pay period covered by the payment. 29 C.F.R. § 516.5.

Records on which wage computations are based should be retained for two years, i.e., time cards and piece work tickets, wage rate tables, work and time schedules, and records of additions to or deductions from wages. These records must be open for inspection by the Division's representatives, who may ask the employer to make extensions, computations, or transcriptions. The records may be kept at the place of employment or in a central records office.

Exemptions From Minimum Wage And Overtime Requirements

Who is exempt from the FLSA's minimum wage requirements?

Various minimum wage exceptions apply under specific circumstances for the following categories of workers:

(1) Workers with disabilities (with DOL approval);
(2) Full-time students employed in retail and service, institutes of higher learning, or agricultural (with DOL approval);
(3) Youth under the age of twenty in their first ninety days of employment;
(4) Certain agricultural employees (discussed below); and
(5) Tipped employees.

Tipped employees are those who customarily and regularly receive more than $30.00 per month in tips. The FLSA allows tipped employees to be paid less than the minimum wage, so long as their tips bring them up to the minimum wage and certain other conditions are met. Those conditions include:

- Employee must be paid no less than $2.13/ hour;
- If tips plus $2.13/ hour does not equal minimum wage, employer must pay the difference;
- Employer must communicate that it is crediting tips against the minimum wage to the employee; and
- Employees may not be asked to share a portion of their tips with employees who are not eligible for tip credit.

Who is exempt from the FLSA's overtime requirements?

There are certain occupations that are expressly exempt under the FLSA such as seamen, motor carriers, emergency response personnel, car salespersons, railway laborers, and certain workers at retail or service establishments.

Additionally, employees who occupy "bona fide executive, administrative, or professional" positions, including certain computer employees are exempted from the FLSA's provisions. 29 U.S.C. §§ 213(a)(1), (17).

Exempt status is a function of the work performed, and, generally, not the amount paid. In other words, it is the work actually performed, rather than the employee's title or compensation that determines exempt status. The executive, administrative, and professional exemptions are discussed below.

Executive Exemption

To qualify for the executive employee exemption, the employer must show each of the following factors are met:

(1) The employee must be compensated on a salary basis (as defined by the FLSA) at a rate of not less than $455 per week, exclusive of board, lodging or other facilities;
(2) The employee's primary duty must be management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
(3) The employee must customarily and regularly direct the work of two or more other employees; and
(4) The employee must have the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight.

The phrase "salary basis" is defined as "if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.602. An exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. Exempt employees need not be paid for any workweek in which they perform no work. An employee is not paid on a "salary basis" if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available." 29 C.F.R. § 541.602(a).

With respect to the second factor, the employee's "primary duty" must be "the performance of exempt work." 29 C.F.R. § 541.700(a). "Primary duty" means the principal, main, major, or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, (1) the relative importance of the exempt duties as compared with other types of duties; (2) the amount of time spent performing exempt work; (3) the employee's relative freedom from direct supervision; and (4) the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

With respect to the third factor, the phrase "customarily and regularly" means a frequency that must be greater than occasional but which, of course, may be less than constant. 29 C.F.R. § 541.701 Tasks or work performed "customarily and regularly" include work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.

Finally, regarding the fourth factor, the phrase "a customarily recognized department or subdivision" is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function. 29 C.F.R. § 541.103(a). A customarily recognized department or subdivision must have a permanent status and a continuing function.

Business owners qualify for the bona fide executive exemption if they own at least a bona fide 20% equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization, and he or she is actively engaged in its management. 29 C.F.R. § 541.101.

Administrative Exemption

There are two tests for determining whether an employee qualifies for the administrative exemption to the FLSA's minimum wage and overtime requirements under the administrative employee exemption in Section 13(a)(1). One test applies only to those employed in educational establishments,

including elementary or secondary school systems, and institutions of higher learning, among others, which are not discussed in this guide.

The other test generally applies to every other industry. In general, an employer must show that the employee meets the following criteria to qualify for the administrative employee exemption:

(1) Compensated on a salary or fee basis at a rate of not less than $455 per week, exclusive of board, lodging or other facilities;
(2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. 29 U.S.C. § 541.200.

For purposes of the first two factors, this test shares the same definitions of "salary basis" and "primary duty." "Fee basis" means that the employee is paid an agreed sum for a single job regardless of the time required for its completion. 29 C.F.R. § 541.605(a).

With respect to the second factor, work "directly related to management or general business operations" means the work performed by the employee that is directly "related to the management or general business operations of the employer or the employer's customers." 29 C.F.R. § 541.201(a). To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business. Examples include work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; legal and regulatory compliance; and similar activities. Similarly, employees acting as advisers or consultants to the employer's clients or customers (e.g., tax experts, computer engineers, or financial consultants) may be exempt since the employee's primary duty is "the performance of work directly related to the management or general business operations of the employer's customers." 29 C.F.R. § 541.201(a).

With respect to the third factor, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of

conduct, and acting or making a decision after the various possibilities have been considered. The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level. Thus, the term "discretion and independent judgment" does not require that the decisions made by an employee are final and given unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of mere recommendations for action rather than the taking of action. For example, policies made by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies. The management consultant who has studied the operations of a business and proposed change in organization may have the plan reviewed or revised by superiors before it is submitted to the client. 29 C.F.R. § 541.202(c).

The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. *See also* 29 C.F.R. § 541.704 (regarding use of manuals). The exercise of discretion and independent judgment also does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent, or routine work. An employee also does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will suffer financial loss if the employee fails to perform the job properly. For example, a messenger who is entrusted with carrying large sums of money does not exercise discretion and independent judgment with respect to "matters of significance" even though serious consequences may flow from the employee's neglect. Similarly, an employee who operates expensive equipment does not exercise discretion and independent judgment with respect to matters of significance even though improper operation may cause serious financial loss to the employer. 29 C.F.R. § 541.202(f).

The term "matters of significance" refers to the level of importance or consequence of the work performed. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to, whether the employee:

- Has authority to formulate, affect, interpret, or implement management policies or operating practices;
- Carries out major assignments in conducting the operations of the business;
- Performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business;
- Has authority to commit the employer in matters that have significant financial impact;
- Has authority to waive or deviate from established policies and procedures without prior approval;
- Has authority to negotiate and bind the company on significant matters;
- Provides consultation or expert advice to management;
- Is involved in planning long- or short-term business objectives;
- Investigates and resolves matters of significance on behalf of management; and
- Represents the company in handling complaints, arbitrating disputes or resolving grievances.

Professional Exemptions

There are three categories of professionals who qualify for the Professional Exemption: Learned Professionals, Creative Professionals, and Teaching Professionals. The general rule for professional employees under 29 C.F.R. § 541.300 requires that the employer demonstrate that the employee:

(1) is compensated on a salary or fee basis at a rate of not less than $455 per week; and
(2) his or her primary duty is the performance of work:
    (i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or
    (ii) requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

For purposes of this test, "salary basis," "fee basis" and "primary duty" share the definitions set forth above.

Learned Professionals

To qualify for the learned professional exemption, the employer must show that the employee's primary duty is the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. 29 C.F.R. § 541.301(a). This primary duty test includes the following three requirements.

First, the employee must perform work requiring advanced knowledge: namely, work that is predominantly intellectual in character, and requires the consistent exercise of discretion and judgment (as distinguished from performance of routine mental, manual, mechanical or physical work). An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances.

Second, the advanced knowledge must be in a field of science or learning. It includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status.

Third, the advanced knowledge must be customarily acquired through a prolonged course of specialized intellectual instruction. Advanced knowledge cannot be attained at the high school level alone. This requirement restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best evidence that an employee meets this requirement is possession of the appropriate academic degree. However, "customarily"means that the exemption is also available to employees who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but attained the advanced knowledge through a combination of work experience and intellectual instruction.

An employee holding a valid license to practice law or medicine is exempt if the employee is actually engaged in such a practice. Similarly, an employee who holds the requisite academic degree for the general practice of medicine

is also exempt if he or she is engaged in an internship or resident program for the profession. The salary and salary basis requirements do not apply to bona fide practitioners of law or medicine and teaching professionals.

Creative Professionals

To qualify for the creative professional exemption, the employer must show that the employee's primary duty is the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor (e.g., music, writing, acting, and the graphic arts).

The requirement of "invention, imagination, originality or talent" distinguishes the creative professions from work that primarily depends on intelligence, diligence, and accuracy. Exemption as a creative professional depends on the extent of the invention, imagination, originality, or talent exercised by the employee. Determination of exempt creative professional status, therefore, must be made on a case-by-case basis. This requirement is generally met by actors, musicians, composers, conductors, painters, cartoonists, essayists, novelists, writers, and, under limited circumstances, journalists.

Teaching Professionals

Certain teachers are exempted from the minimum wage and overtime requirements of the FLSA under the professional exemption. An important distinction between teaching professionals and other professionals under the exemption is that there is no salary requirement. Therefore, unlike other professionals, a teacher does not have to earn $455 per week to be exempt.

To qualify for this exemption, the employer must show that the employee's primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and who is employed and engaged in this activity as a teacher in an "educational establishment" as defined in § 541.204(b). 29 C.F.R. § 541.303(a).

Exempt teachers include, but are not limited to: regular academic teachers; teachers of kindergarten or nursery school pupils; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations;

teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers, and vocal or instrumental music instructors. Those faculty members who are engaged as teachers but also spend a considerable amount of their time in extracurricular activities such as coaching athletic teams or acting as moderators or advisors in such areas as drama, speech, debate or journalism are engaged in teaching. 29 C.F.R. § 541.303(d).

An elementary or secondary teacher's certificate qualifyies for the exemption for teaching professionals, regardless of the terminology (e.g., permanent, conditional, standard, provisional, temporary, emergency, or unlimited) used by the State to refer to different kinds of certificates. However, a teacher who is not certified may still be considered for exemption, provided that he or she is employed as a teacher by an employing school or school system.

Highly Compensated Professionals Exemption

Highly compensated employees performing office or non-manual work and paid total annual compensation of $100,000 or more (which must include at least $455 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative, or professional employee identified in the standard tests for exemption. 29 C.F.R. § 541.601.

Computer-Related Industry Exemption

The FLSA also provides an exemption from both the minimum wage and overtime requirements for computer systems analysts, computer programmers, software engineers, and other similarly skilled workers in the computer field who meet certain tests regarding their job duties and who are paid at least $455 per week on a salary basis or paid on an hourly basis, at a rate not less than $27.63 an hour. 29 U.S.C. § 541.400. In addition, the computer employee exemption applies only to those whose primary duty consists of one or more of the following:

(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 and 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 computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment. And employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, analysts, drafters, and others skilled in computer-aided design software), but who are not primarily engaged in computer systems programming, design or other similarly skilled computer-related occupations identified in the primary duties test described above, are also not exempt under the Computer Employee Exemption.

Outside Sales Exemption

To qualify for the outside sales exemption from the FLSA's minimum wage and overtime requirements, an employer must show that:

(1) the employee's 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 the client or customer; and
(2) the employee is customarily and regularly engaged away from the employer's place of business. 29 C.F.R. § 541.500(a).

With respect to the first factor, the employee's "primary duty" must be incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections. Other work that furthers the employee's sales efforts will also be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences.

"Sales" for purposes of this exemption include the transfer of title to tangible property—and in certain cases, of tangible and valuable evidences of intangible property—and includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition. 29 C.F.R. § 541.501(b). Exempt outside sales work also includes "obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer." *Id.* at § 541.501(c). Obtaining orders for "the use of facilities" includes selling time on radio or television, solicitation of advertising for newspapers and other periodicals, and solicitation of freight for railroads and other transportation agencies.

"Services" extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order. *Id.* at § 541.501(d).

The outside sales employee is an employee who makes sales at the customer's place of business or, if selling door-to-door, at the customer's home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Thus, any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property. *Id.* at § 541.502.

Where can I find additional information about exemptions to the FLSA's minimum wage and overtime requirements?

The Wage and Hour Division offers a helpful compliance assistance tool on its website. The website also contains "Fact Sheets" on each of the exemptions explained above. Additionally, the Wage and Hour Diivsion maintains a toll-free information and helpline available at 1-866-487- 9243. Additionally, the FLSA's "safe harbor" provision permits employers to preserve exemptions notwithstanding improper deductions by maintaining a policy that (1) clearly prohibits improper deductions and includes a complaint mechanism, (2) reimburses employees for any improper deductions, and (3) makes a good faith commitment to comply with the FLSA in the future. If an employer successfully satisfies the requirements of the safeharbor provision, the employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing the improper deductions after receiving employee complaints. 29 C.F.R. § 541.603(d).

Damages and Penalties

What can an employee recover for an employer's violation of the FLSA's minimum wage and overtime requirements?

Damages for violations of the FLSA include unpaid wages and overtime pay, plus an "additional equal amount as liquidated damages." 29 U.S.C. § 216(b). Liquidated damages compensate the employee for the delay in receiving their wages. 29 C.F.R. § 790.22(a). The only way an employer can avoid liquidated damages, which double the amount of back wages owed, is persuades the court that its failure to comply with the FLSA was both in good faith and predicated upon reasonable grounds, such as in reliance on an attorney's advice.

Additionally, attorneys' fees are recoverable for a covered employee who succeeds against an employer in an action for violations of the FLSA. 29 U.S.C. § 216(b). Note, there is no "rule of proportionality" with awarding attorneys' fees. Therefore, attorneys' fees sometimes exceed the amount of back wages and overtime owed.

Civil penalties up to $1,000 per violation may be assessed for repeated or willful violations of the FLSA. 29 U.S.C. § 216(e).

Finally, while individual claims for unpaid wages and overtime may be relatively small, damages and resulting attorneys' fees from multi-plaintiff actions can be costly to employers. Employees who are "similarly situated" may join in collective actions against employers to recoup backwages and overtime owed. Employess are generally "similarly situated" for purposes of FLSA collective wage suits if they perform similar duties and are subject to a common pay policy, plan or design.

For more information on employer obligations under the FLSA, visit
https://www.dol.gov/whd/fact-sheets-index.htm

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