



# The Fair Labor Standards Act: Wage-Hour Rules and Common Pitfalls

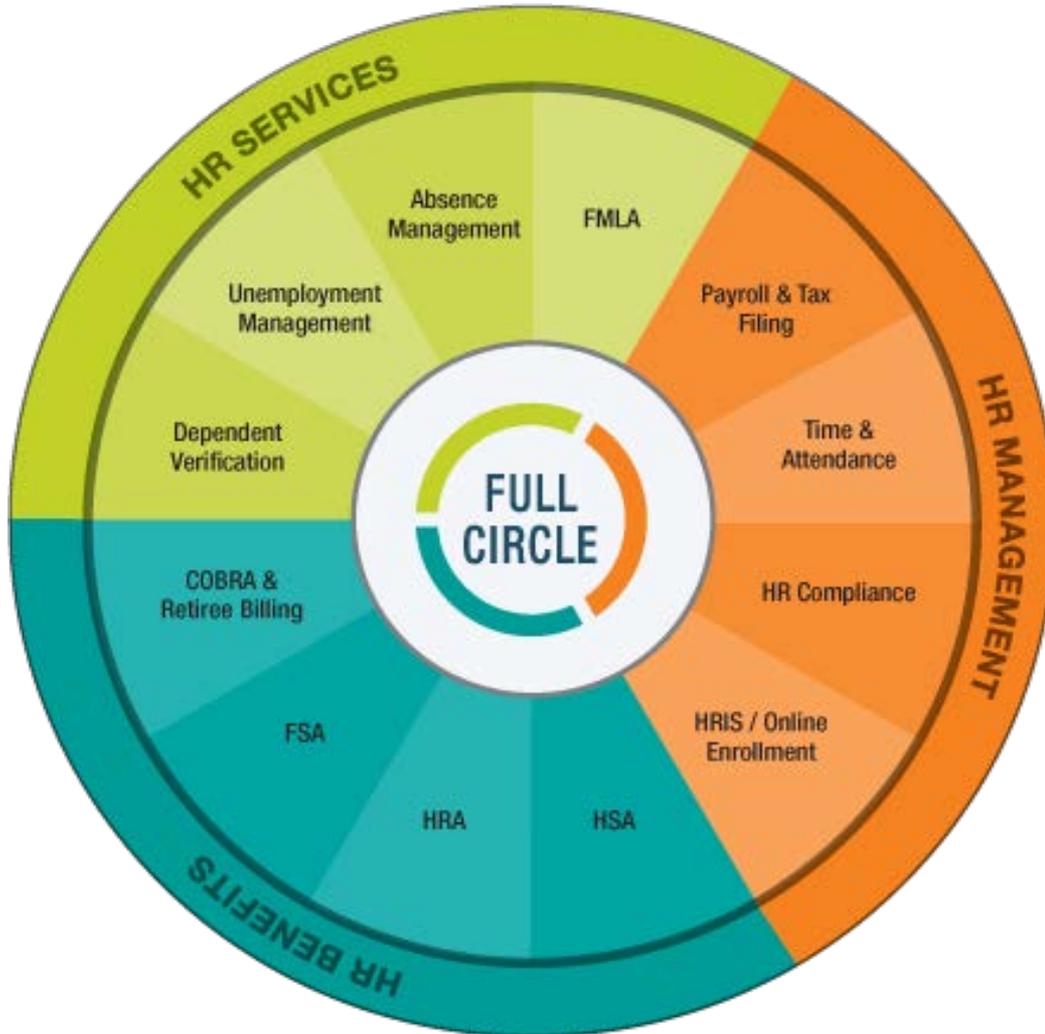
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# Introduction



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# Introduction



- Basics
- Exemptions
- Overtime
- Hours worked



Image from  
<https://codebangers.com/product/all-in-one-time-clock/>



This presentation does not cover state-specific laws:

- Wage-hour
- Wage payment

# FLSA Basics – Employer Coverage



## Applies to most employers

- Enterprises that have an annual dollar volume of sales or business of \$500,000+; and
- Hospitals, businesses providing medical/nursing care for residents, schools and preschools, and government agencies

# FLSA Basics – Individual Coverage



- Alternatively, applies to most individual employees
  - Engaged in interstate commerce or production of goods for interstate commerce, or in any closely-related process or occupation directly essential to such production
    - Work in communications or transportation
    - Regularly use mail, telephones, or telegraph for interstate communication, or keep records of interstate transactions
    - Produce, handle, ship, or receive goods moving in interstate commerce
    - Regularly cross state lines in course of employment
    - Work for independent employers who contract to do clerical, custodial, maintenance, or other work for firms engaged in interstate commerce or production of goods for interstate commerce
  - Domestic service workers

# FLSA Basics – Independent Contractors



- 6/7/17: DOL withdrew its 2015 guidance on independent contractors
  - 2015 guidance stated, “most workers are employees under the FLSA's broad definitions”



Image from  
<http://massrealestatelawblog.com/2015/06/03/agents-can-remain-independent-contractors-sjc-rules-but-questions-remain/>

# FLSA Basics – Interns



- 1/5/18: DOL moved to “primary beneficiary” test to determine whether interns are employees under FLSA
- Based on economic reality, who is the primary beneficiary of the internship, considering:
  - No expectation of compensation
  - Training similar to that given in educational environment
  - Tied to intern’s formal education program by integrated coursework or receipt of academic credit
  - Accommodates intern’s academic commitments/calendar
  - Duration is limited to period of beneficial learning
  - Intern’s work complements, rather than displaces, the work of paid employees
  - No entitlement to paid job later
- No single factor is determinative



- Employers must pay nonexempt employees minimum wage and overtime
  - Minimum wage: All nonexempt employees must be paid at least the minimum wage for each hour worked
    - Federal: \$7.25
    - State and local laws often have higher minimum wage
  - Overtime: All nonexempt employees must be paid 1.5x their regular rate of pay for hours worked over 40 in a workweek
  - Recordkeeping
- But many employees are exempt

# FLSA Exemptions



- Generally two tests determine whether an employee is exempt
  - Primary duty
  - Salary



# Salary Test



- Salary threshold has been \$23,660, or \$455/week, since 2004
- 5/18/16: DOL announced salary threshold increase
  - \$47,476, or \$913/week, effective 12/1/16
  - Automatic updates to occur every 3 years, starting 1/1/20
- 11/22/16: E.D. Tex. enjoined DOL's new rule
- 7/26/17: DOL requested information re: salary test
- 8/31/17: E.D. Tex. granted summary judgment
- 10/30/17: DOL appeals to affirm authority to set salary threshold

# Salary Test



- Employee regularly receives each pay period a predetermined amount constituting all or partial compensation
  - Weekly or less frequent basis
  - Not subject to reduction because of variations in the quality or quantity of the work performed



Image from  
<http://www.njit.edu/humanresources/services/current-employees/payroll/>

# Salary Test



**Q:** Paul is PT, and works 20 hours/week. Would paying him \$11,830 (half of \$23,660) satisfy the salary test?

**A:** No, salary threshold cannot be prorated.

**Q:** Paul works FT for only 6 months of the year. Would paying him \$11,830 (half of \$23,660) satisfy the salary test?

**A:** Yes, salary test applied on a weekly basis.

# Salary Test – Deductions



- Permissible deductions
  - Absences for one or more full days
    - Personal reasons
    - Sickness/disability with wage replacement benefits
  - Offsets for jury fees, witness fees or military pay
  - Penalties imposed in good faith for infractions of safety rules of major significance
  - Unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace rules
  - In proportion to a partial first and last week of employment
  - In proportion to partial weeks worked due to FMLA leave

# Salary Test – Deductions



**Q:** Arnold typically works a 40 hour workweek but missed a half day for a parent-teacher conference – permissible deduction?

**A:** No, only full day absences may be deducted.

**Q:** Arnold's office closes for a full day due to inclement weather – permissible deduction?

**A:** No, not a personal reason.

**Q:** Arnold took four hours of FMLA leave – permissible deduction?

**A:** Yes, can reduce his weekly salary by 10%.

# Salary Test – Improper Deductions



- An actual practice of making improper deductions from salary will result in the loss of the exemption:
  - During the time period in which improper deductions were made
  - For employees in the same job classifications
  - Working for the same managers responsible for the actual improper deductions
- But isolated/inadvertent improper deductions will not result in the loss of exempt status if the employer reimburses the employee

# Salary Test – Safe Harbor



- The exemption will not be lost if the employer:
  - Has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism;
  - Reimburses employees for any improper deductions; and
  - Makes a good faith commitment to comply in the future

# Primary Duty



- Principal, main, major or most important duty that the employee performs
- Factors to consider:
  - Relative importance of exempt duties compared to other types of duties;
  - Amount of time spent performing exempt work;
  - Employee's relative freedom from direct supervision; and
  - Relationship between employee's salary and wages paid to other employees for nonexempt work performed by employee

# Administrative



- Salary threshold applies
  - Exception: Academic administrators
- Primary duty is:
  - Performance of office or non-manual work directly related to management or general business operations of employer or employer's customers; and
  - Includes exercise of discretion and independent judgment with respect to matters of significance

# Administrative



**Q:** Ethan is the executive assistant to the company president – exempt?

**A:** If clerical tasks constitute Ethan’s primary duty: no.

**A:** If the president delegated to Ethan authority regarding matters of significance without specific instructions or prescribed procedures: yes.



- Salary threshold applies
- Primary duty is:
  - Management of enterprise or customarily recognized department or subdivision;
  - Customarily and regularly directs the work of two or more other employees; and
  - Authority to hire or fire other employees or whose recommendations as to hiring, firing, advancement, promotion or any other change of status are given particular weight



**Q:** As assistant manager, Sally handles customer service issues and supervises the other store clerks when the store manager is not onsite – exempt?

**A:** It depends:

How often is manager on site?

Management responsibilities?

2+ FTE clerks/supervisor?

Hiring/firing authority/recommendations?

# Professional (Learned)



- **Salary threshold applies**
  - Exceptions: Doctors, lawyers, teachers
- **Primary duty is:**
  - Performance of work requiring advanced knowledge;
  - Advanced knowledge must be in field of science or learning; and
  - Advanced knowledge must be customarily acquired by prolonged course of specialized intellectual instruction

# Professional (Learned)



**Q:** Andrea has an accounting degree and is an accounts receivable clerk in the accounting department – exempt?

**A:** If she normally performs routine work: no.



# Computer



- Salary threshold applies
  - Alternative: At least \$27.63/hour
- Primary duty is:
  - Application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
  - Design, development, documentation, analysis, creation, testing or modification of computer systems or programs, based on user or system design specifications; and/or
  - Design, documentation, testing, creation or modification of computer programs related to machine operating systems.



**Q:** Hannah is an IT help desk specialist who:

- Troubleshoots complex problems with apps, networking, and hardware;
- Installs, configures, and tests computers and apps based on user requirements; and
- Analyzes and selects new technology resources

– Exempt?

**A:** No.

# Outside Sales



- Salary threshold does NOT apply
- Primary duty is making sales or obtaining orders or contracts for services or for use of facilities; and
- Customarily and regularly engaged away from employer's place of business in performing primary duty



**Q:** Tina tele-markets and solicits orders for a new financial product from home – exempt?

**A:** No.



Image from  
<https://www.theodysseyonline.com/five-things-have-learned-telemarketer>

# Outside Sales



**Q:** Brian is a brand representative for a new craft beer, and hosts sampling events at bars and beer fests all over the state – exempt?

**A:** If these promotional activities are directed toward increasing Brian’s own sales: yes.

**A:** If these promotional activities are intended to promote the brand and increase sales in general: no.

# Documentation



- Job descriptions
- Performance evaluations
- Offer letters/employment agreements
  - Caution: FLSA rights cannot be waived

# Overtime



- How is overtime calculated?
  - Workweek or pay period?
  - Multiple hourly rates?
  - Commissions and bonuses?
  - Can comp time be used as an alternative to overtime?



Image from  
<https://www.amazon.com/Casio-DJ-120D-Business-Calculator/dp/B007Q83LVE>

# Overtime - Workweek



**Overtime:** All nonexempt employees must be paid 1.5x their regular rate of pay for hours worked over 40 in a workweek

**Q:** What if an employee works 30 hours one week and 50 hours the next, averaging 40 hours per week for the biweekly pay period?

**A:** Employee is owed 10 hours of overtime for the second week

# Overtime – Regular Rate



Regular rate: Total pay divided by hours worked

**Q:** What if an employee holds two jobs with different hourly rates?

**A:** The employee's regular rate is the weighted average of such rates

# Overtime – Regular Rate



Calculation of regular rate and overtime for employee with two jobs with different hourly rates

- 30 hours at \$10/hour = \$300
- 20 hours at \$20/hour = \$400
- Regular rate:  $\$700 / 50 \text{ hours} = \$14/\text{hour}$
- Additional overtime pay:  $\$7/\text{hour} \times 10 \text{ hours} = \$70$

# Overtime – Regular Rate



## FLSA's definition of total pay:

### – Includes:

- Commissions
- Nondiscretionary bonuses

### – Excludes:

- Discretionary bonuses
- Payments for paid holidays, vacation, sick days



# Overtime – Regular Rate



**Q:** Employer offers a \$520 attendance bonus for the year. Include in total pay?

**A:** Yes, \$10 must be allocated back to each week's pay, which may trigger additional OT payments.

**Q:** An employee is eligible for a bonus at year-end if she meets certain performance targets, but the bonus amount is at the sole discretion of the employer. Include in total pay?

**A:** Yes, the amount is discretionary, but the fact of the payment is not.

# Comp Time



- Employees of state or local government agencies may receive compensatory time off instead of overtime pay
  - Comp time hours earned: 1.5x each overtime hour worked
- 5/2/17: House passed Working Families Flexibility Act
  - Not yet law, but would permit comp time for private sector employees

# Work Schedule Adjustments



- Supervisors may adjust working schedules to avoid overtime
- FLSA does not require prior notice or employee consent
  - But your policies might

**KNOW THE RULES!**



# Hours Worked



## What hours count as hours worked?

- Waiting time?
- Off-duty work?
- Breaks and meal periods?
- On-call time?
- Training?
- Travel?



# Hours Worked



- “[H]ours worked which the employee is required to give his employer.”
- “[A]ll the time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed work place.”

# Waiting Time



- Waiting time constitutes hours worked if:
  - Employee remains on-duty, or
  - Short and/or unpredictable
- Waiting time does not constitute hours worked if:
  - Employee is completely relieved of duty,
  - Long enough for employee to use the time effectively for his/her own purposes, and
  - Employee is given advance notice that he/she may leave and does not have to be back until a specified time

# Waiting Time



**Q:** Alan, a customer service rep, checks Facebook while waiting for telephone calls. Hours worked?

**A:** Yes

# Waiting Time



**Q:** All of Admin Annie's work is stored on the company's server, which crashes just after Annie arrives for work at 9 am. IT expects to have it back up within the hour, so Annie kills time at her desk by calling a friend. Is her waiting time working time?

**A:** Yes

**Q:** The entire IT department is out with the flu, and a third party repairman won't arrive before noon, so Annie's supervisor gives her the morning off. Is her waiting time working time?

**A:** No

# Off-Duty Work



- Hours worked beyond an employee's assigned shift are still hours worked
- Supervisors must make every effort to enforce any prohibition of such additional hours



Image from <https://www.payrollpartners.com/calculating-employee-overtime-correctly/>

# Hours Worked



**Q:** Overeager Oliver works overtime without first obtaining his supervisor's approval, as required by company policy. Hours worked?

**A:** Yes.



# Hours Worked



**Q:** Conscientious Connor has access to his work emails on his phone, and always responds immediately to any emails that his (exempt) supervisor sends while working at night or on the weekend. Hours worked?

**A:** Yes.



Image from <https://contently.net/2015/10/13/play/work-home-according-stock-photography/>

# Breaks and Meal Periods



- FLSA does not require breaks or meal periods
- Rest periods of 5 to 20 minutes constitute hours worked
- Meal periods of 30 minutes or more do not constitute hours worked if employee is completely relieved of duty

# Breaks and Meal Periods



**Q:** Admin Annie gets a one-hour unpaid lunch every day, but often returns to her desk early to read ESPN.com online. Is her lunch period working time?

**A:** No, unless she is interrupted to do work during that time.



Image from <http://aimhirecc.com/career-exploration/lunch-pack-or-pay.aspx>

# On-Call Time



- On-call time constitutes hours worked if the employee is required to remain on or very near premises
- On-call time does not constitute hours worked if the employee is able to engage in personal activities, even if:
  - Employee must be accessible by phone, and
  - Employer imposes reasonable restrictions on travel and/or alcohol use

# On-Call Time



- Time spent responding to calls constitutes hours worked
- All on-call time constitutes hours worked if the employee is so frequently interrupted with work calls that he/she cannot use the on-call time for his/her own purposes

# On-Call Time



**Q:** IT Ida is on-call this Saturday, and must be available by phone between 9 and 5 and respond to any technological emergencies within an hour. IT Ida receives one call, logs in remotely, and spends one hour resolving the issue. Is her on-call time working time?

**A:** Just one hour

**Q:** She receives one 20-30 minute call every hour during her 8-hour shift – how many hours worked?

**A:** Probably all 8 hours

# On-Call Time



**Q:** IT Ida receives one call at 10 am that requires her to make the half-hour drive to work, where she spends 3 hours fixing the server. She arrives back home at 2, but then gets another call at 3. She logs in remotely and spends 1 hour fixing the problem. Is her on-call time working time?

**A:** At least 6 hours, probably all 8.



Training time constitutes hours worked unless:

- Attendance is outside of the employee's regular working hours;
- Attendance is voluntary;
- Training is not directly related to the employee's job; and
- Employee does not perform any productive work during training

# Training



**Q:** After her shift ends, IT Ida attends an optional CPR training session offered by her employer for all employees. Is her training time working time?

**A:** No.

**Q:** IT Ida's supervisor grants her request to go to an out-of-town weekend conference regarding the latest software developments and users' FAQ. Is her training time working time?

**A:** Yes.



Training time does not constitute hours worked if:

- Provided by independent school, college or independent trade school
- Outside of working hours, and
- Attendance is voluntary
- Even if program is:
  - Directly related to the employee's job, or
  - Paid for by the employer



## Training time does not constitute hours worked if:

- Employer establishes program of instruction which corresponds to courses offered by independent bona fide institutions of learning,
- Outside of working hours,
- For the employee's benefit, and
- Attendance is voluntary,
- Even if program is:
  - Directly related to the employee's job, or
  - Paid for by the employer



**Q:** Eleanor is a bookkeeping clerk whose employer is paying for her to take business school courses at night – hours worked?

**A:** No, unless her employer required her to take those classes



# Travel (In Town)



- Employee's typical commute between home and work does not constitute hours worked
- Travel time during the workday constitutes hours worked

**Q:** Helpful Henry offers to pick up office supplies on his way in to work – hours worked?

**A:** Travel time from home to store does not constitute hours worked, but workday starts when Henry begins shopping for supplies

# Travel (Out of Town)



- Travel time to one-day assignments in other cities generally constitutes hours worked
- For overnight stays:
  - Travel time that occurs during regular working hours (even on non-working days) constitutes hours worked
  - Travel time outside of regular working hours as a:
    - Driver constitutes hours worked
    - Passenger does not constitute hours worked

# Travel (Out of Town)



**Q:** An HR rep based in Seattle drives to Portland Monday morning for a day of candidate screening – hours worked?

**A:** Yes

**Q:** An HR rep drives from Detroit to Chicago after her shift on Monday for a job fair on Tuesday – hours worked?

**A:** Yes

# Travel (Out of Town)



**Q:** Networking Nate, who normally works from 9 to 5, takes an early morning train from NYC to Philly and then hails a cab to arrive at a two-day conference at 9 am. Is his travel time working time?

**A:** No.

**Q:** The train is delayed and Nate does not arrive until 10 am – hours worked?

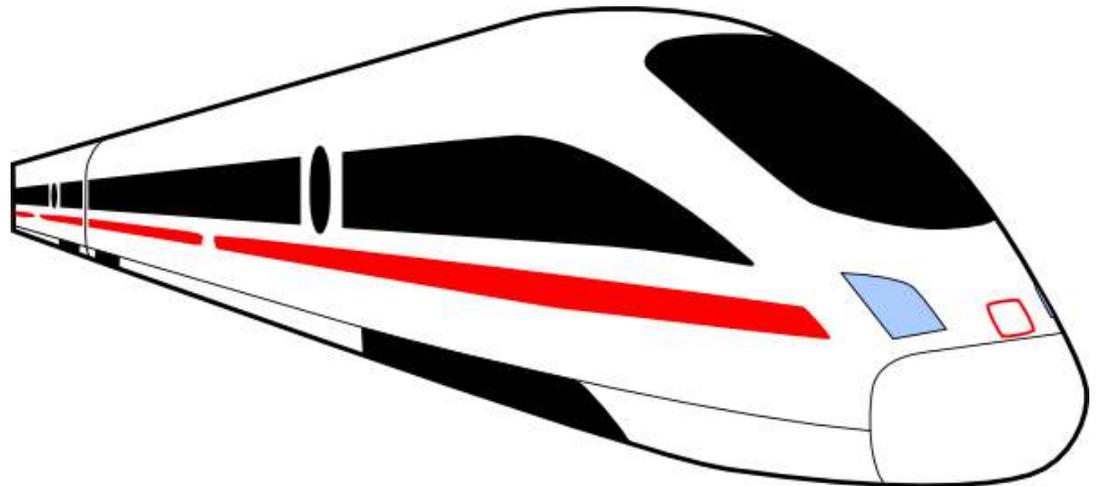
**A:** The travel time between 9 and 10 am constitutes hours worked.

# Travel (Out of Town)



**Q:** The next day, the return train leaves Philly at 6 pm. It is scheduled to arrive back in NYC at 7:30 pm, but due to a delay it does not arrive until 9 pm – hours worked?

**A:** No.





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# Questions?

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# Contact Us



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