

# FLSA

## Fair Labor Standards Act

### What It Is and How to Apply It

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# Topics

- Introduction
- What it is and Why it is important
- FLSA Exemptions & Types
- How does FLSA relate to classification
- How to apply it
- Remedies for Employer FLSA Violations
- Resources
- Tools, Rules and Regs

# What is FLSA?

Fair Labor Standards Act – Establishes minimum wage, overtime pay, record-keeping, and child labor standards affecting full-time and part-time workers in the private sector and federal, state and local governments.

# Most employers are subject to State and Federal Regulations

- State Regs: OAR 839-020-0004(25), (29), (30); and OAR 839-020-0005
- Federal Regs: 29 CFR 541.0 – 541.315

# How long has it been around ?

- This Act originally went into effect in 1938, but did not cover public sector employees at that time.
- In 1966 Amendments extended coverage under the Act to state and local government employees for the first time. In 1985, compensatory time or “comp time” in lieu of overtime pay was added to the FLSA for state and local government employees.

# Why is FLSA important?

- It sets standards for the payment of overtime, established the eight-hour work day, a forty-hour work week, and standards for child labor. Numerous amendments, including the Equal Pay Act added additional provisions to the law.
- Inaccurate FLSA decisions can result in wage claims, penalties and financial liability against an agency. These are known as “Remedies” for employer FLSA violations.
- Exemption status must be based on the duties of a **position** -- not solely on the classification.

# Exemptions to the FLSA

- ▶ Applies to employees except those who meet the “white collar” exemptions or independent contractors or volunteers.
- ▶ “White collar” exemptions are:
  - Executive
  - Administrative
  - Professional
  - Computer–Related Occupations
  - Outside Sales (usually not applicable to government)

# Exempt vs Non-Exempt

- What is an Exempt position? Duties that meet the executive, administrative or professional definitions as defined by the Fair Labor Standards Act (FLSA), are not eligible for overtime.
- What is a Non-Exempt position? Duties that do not meet one of the exclusions covered by the Fair Labor Standards Act (FLSA) and are eligible for overtime (time and a half calculation).

Determining eligibility for overtime status is complex; it requires applying state and federal regulations. In addition, terms of a collective bargaining agreement may apply.

# Independent Contractors and Volunteers

- ▶ Carefully evaluate status of independent contractors and volunteers.
- ▶ Courts look at the “economic reality” to determine if the worker is an independent contractor.
- ▶ Employees can not volunteer to do substantially similar work to the work they are paid to do.
- ▶ Employees may incur overtime if they are paid by more than one state agency.

# Exempt Employees Must Meet the Duties Tests AND a Salary Basis Test

State and federal regulations provide 3 major categories of exemptions:

- Executive (Supervisory)
- Administrative
- Professional

Within each category an employee must meet a combination of duties tests and a salary basis test to be classified as exempt.

# Tests for FLSA Status

- ▶ Within all 3 categories, exempt status is measured by the scope of exempt duties, as well as payment on a salary basis. If even one test requirement is not met, the employee may not be classified as exempt.
- ▶ Determine the “Primary Duty” for the position. “Primary Duty” means the principal, main, major or most important duty that the employee performs.

# Executive (Supervisory) Exemption

- The employee's "Primary Duty" must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise.
- The employee must customarily and regularly direct the work of at least 2 or more employees **AND** have the authority to hire/fire, recommend, recommend advancement or promotion. The employee's recommendation must be given "particular weight".

# Executive Employees

- ▶ Generally, an executive's recommendations must pertain to the employees whom the executive customarily and regularly directs.
- ▶ “Customarily and regularly” means greater than occasional; it includes work normally done every work week.
- ▶ Example Executive exemptions: Agency director, division administrator, section manager

# Administrative Exemption

- “Primary Duty” must be performance of office or non-manual work of *substantial importance to the management or general business operations of the business of the employer or the employer’s customers.*
- The person in the position customarily and regularly makes decisions that require independent judgment and discretion with respect to matters of significance.

# Administrative, continued

- The employee must have the authority to formulate, affect, interpret, or implement management policies or operating practices; deviate from established policies or procedures; commit the employer in significant financial matters;
- May not necessarily supervise.
- Examples of work that fits this exemption: finance, accounting, budgeting, auditing, quality control, purchasing, procurement, human resources, labor relations, management planning; business research, government relations, Internet and database administration and legal and regulatory compliance.

# Administrative, continued

- What does it mean “*directly related to management policies or general business operations*”? These people:
  - plan
  - advise management
  - negotiate
  - represent the agency
- What is “customarily and regularly”?
  - frequency of decisions -- should be ongoing and fairly often and not just because someone is experienced at a particular “learned” task

# Professional Exemption

There are two types of exempt Professional Employees: LEARNED PROFESSIONALS and Creative Professionals.

# LEARNED PROFESSIONAL

- ▶ THE EMPLOYEE MUST BE COMPENSATED ON A SALARY OR FEE BASIS (AS DEFINED IN THE REGULATIONS) AT A RATE NOT LESS THAN \$455 PER WEEK;
- ▶ THE EMPLOYEE'S PRIMARY DUTY MUST BE THE PERFORMANCE OF WORK REQUIRING ADVANCED KNOWLEDGE, DEFINED AS WORK WHICH IS PREDOMINANTLY INTELLECTUAL IN CHARACTER AND WHICH INCLUDES WORK REQUIRING THE CONSISTENT EXERCISE OF DISCRETION AND JUDGMENT;

# LEARNED PROFESSIONAL ...

THE POSITION MUST:

REQUIRE KNOWLEDGE OF AN “ADVANCED” TYPE IN A FIELD OF SCIENCE OR LEARNING WHICH IS ACQUIRED BY A PROLONGED COURSE OF SPECIALIZED INTELLECTUAL INSTRUCTION (E.G., DEGREE IN MEDICINE, TEACHING, ACCOUNTANCY, ENGINEERING, ETC.)

A GENERAL ACADEMIC DEGREE, APPRENTICESHIP OR ROUTINE PROCESS WILL NOT QUALIFY FOR THIS EXEMPTION.

# LEARNED PROFESSIONAL ....

SOME EXAMPLES OF “LEARNED” PROFESSIONS  
ARE:

DOCTORS

NURSES

ACCOUNTANTS

ACTUARIES

■ ENGINEERS

ARCHITECTS

■ TEACHERS

■ PHARMACISTS

# Professional.....

The State doesn't have many employees that work in positions considered in the "artistic profession," so research this exemption carefully before making the determination.

Outside Sales Exemption – Primary Duty is making outside sales – Generally not used in state government.

Highly Compensated Employees – performing office or non-manual work and paid total annual compensation of \$ 100,000 or more are exempt from FLSA if they customarily and regularly perform

# CREATIVE PROFESSIONAL

- ▶ To qualify for the creative professional employee exemption, all of the following tests must be met:
- ▶ The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;

# CREATIVE PROFESSIONAL CONTINUED

- ▶ The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.
- ▶ This requirements are generally met by actors, composers, musicians, certain painters, essayists, cartoonists, writers, novelists, and others. These exemptions must be determined on a case-by-case basis.

# Professional Exemption Test for Computer Professional

- ▶
- ▶ The employee must be compensated either on a salary of \$455 per week or, on an hourly basis, not less than \$27.63 an hour ;
- ▶ The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field;

# Computer Professional.....

- ▶ The employee's primary duty must consist of: 1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
- ▶ 2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

# Computer Professional Continued...

- ▶ 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.”

# What about positions that are exempt, but still get OT?

- “Exempt” Executive and Management Service and Unrepresented employees are not eligible for compensation for any hours over 40.
- “Exempt” employees who are represented by a union, may be eligible for additional pay (“hour for hour” or compensatory time for hours worked over 40).
- Check the collective bargaining agreement(s) for your specific agency to be sure.

# Remedies for Employer FLSA Violations – Examples

- ▶ Recovery of Back Pay and Overtime (employee)
- ▶ Liquidated Damages (employee)
- ▶ Prejudgment Interest (employee)
- ▶ Attorney's Fees and Costs (employee)
- ▶ Court Cost and Witness Fees (employee)
- ▶ Lawsuit on Employee's Behalf (US DOL)
- ▶ Criminal Penalties (US DOL)
- ▶ Civil Money Penalties (US DOL)

# Statute of Limitations

- FLSA establishes a general 2-year statute of limitations: suit must be filed within 2 years after a violation occurs
- Willful violation of the act increases the statute of limitations to 3 years: “willful” means employer knew or showed reckless disregard as to whether conduct was prohibited by FLSA.

# Tools, Rules and Regs

- BOLI – Technical Assistance Unit – 971-673-1384
- BOLI Employer Handbook – Employee Classification & Wage and Hour Exemptions; Wage & Hour Laws – 2012 Editions

Public Employer's Guide to FLSA Employee Classification by Thompson Publishing Group

- 29 CFR 541.0 – 541.710 (Federal Regulations)
- OAR 839-020-0004(25), (29),(30)
- OAR 839-020-0005

# What if you have more questions after today ?

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