

# **FLSA Essentials: Practically Applying the Most Recent Legal Perspectives**

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# Fair Labor Standards Act

- Known as the “FLSA”
- Codified at 29 U.S.C. § 201, *et seq.*
- Governs minimum wage and overtime
- New rules take effect December 1, 2016

# FLSA: The Basics

- Sets federal minimum wage  
(currently \$7.25/hour) – no Alabama minimum wage
- Nonexempt employees must be paid a premium for each hour worked over 40 in a 7-day workweek
- Regulates child labor
- Guarantees equal pay regardless of gender
- Imposes recordkeeping requirements

# What is overtime?



# What is overtime?

- Overtime is the amount of hours exceeding 40 in a work week
- Under the FLSA, nonexempt employees are entitled to 1.5 (time and a half) of their regular hourly pay
- Example: Oprah makes \$10/hour so her overtime rate is \$15/hour.

# Exemptions

- Types of exemptions:
  - Executive
  - Administrative
  - Learned professional
  - Creative professional
  - Computer professional
  - Outside sales

# Exemptions

- Why are exempt employees important?
  - Maintain consistent personnel costs
  - Lower hourly rates

# Salary Exemption Test

1. Must be paid on a salary basis
2. Perform exempt duties





# Salary

- Salary = employee regularly receives a predetermined amount each pay period
- Employee is entitled to entire salary regardless of hours worked (with exceptions)
- Cannot be paid by the hour

# Must receive full salary unless:

- Employee is absent from work one or more full days for personal reasons
- Employee is absent from work one or more full days for sickness or disability if deduction is made in accordance with plan, policy, or practice
- Employer imposes good faith penalties for safety infractions or misconduct
- FMLA leave
- Employee is absent for the entire work week

# Recording Time

- Should exempt employees record their hours?
  - No requirement under FLSA
  - BUT time records may be beneficial if an employee is reclassified
  - Can also use time records to assess productivity and need for additional employees

# Cannot deduct for:

- Jury duty
- Attendance as a witness in court
- Temporary military leave
- Absences caused by employer

# Executive Exemption

- **Management** – must have a primary duty of managing the organization or a customarily recognized department or subdivision.
- **Supervision** – must customarily and regularly direct the work of two or more employees.
- **Authority** – must have the authority to hire/fire employees.

# Examples

- Plant manager
- Shop foreperson
- Assistant manager with sufficient hiring authority
- Executive chef

# Administrative Exemption

- **Duties** – must have a primary duty that includes the performance of office or nonmanual work directly related to the organization’s management or business operations.
- **Discretion** – must exercise discretion and independent judgment with respect to matters of importance.

# Examples

- Insurance claims adjusters
- Financial advisors
- Team leaders
- Executive/administrative assistants
- Human resources managers



# Examples of Nonexempt Employees

- Inspectors
- Test proctors/graders
- Personnel clerks
- Bookkeepers
- Paralegals
- Probation officers
- Payroll clerk

# Learned Professional Exemption

- **Knowledge** – work requires knowledge of an advanced type.
- **Field of science or learning**
- **Course of study** – knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.
- **Discretion and independent judgment**

# Field of Science or Learning

- Law
- Medicine
- Theology
- Accounting
- Physical, chemical, or biological sciences
- Actuarial computation
- Engineering
- Architecture
- Teaching
- Pharmacy

# Examples

- Doctors
- Registered nurses (RNs), but not LPNs or nurse aides
- Paramedics
- Teachers
- Accountants, but not clerks
- Pilots

# Creative Professional Exemption

- Does the employee's primary duty require invention, imagination, originality, or talent in a recognized field of creative or artistic endeavor?

# Examples

- Graphic designers
- Filmmakers
- Artists

# Computer Exemption

- Primary duty must consist of:
  - Application of systems analysis techniques and procedures;
  - Design, development, documentation, analysis, creation, testing, or modification of computer systems or programs;
  - Design, documentation, creation, testing, or modification of computer programs related to machine operating systems; or
  - Combination of the above.

# Outside Sales Exemption

- Primary duty is making sales or obtaining orders or contracts for services or use of facilities.
- Employee is customarily and regularly engaged away from the employer's place of business.
- ❖ May be compensated by commission only without a salary



# What are “hours worked”?

- Employees must be paid for all hours spent performing the principal duties assigned by their employer.
  
- But what about pre- or post-shift activities?

# Compensable Preliminary and Postliminary Time

- Activities compensated by contract, custom, or practice
- Job-related activities required as part of an employee's work



# Examples

- Remaining until audit or inspection is complete
- Changing clothes at work, if required by the nature of job duties
- Cleaning and maintaining police vehicles
- Driving employer-owned vehicles between secure parking locations and work sites
- Fire drills
- Rest periods of 20 minutes or less

# When is this time NOT compensable?

- Not an integral part of the employee's principal job duties

# Examples

- Absences
- Voluntary athletic contest
- Changing clothes at home
- Voluntary charitable work outside working hours
- Meals periods lasting longer than 30 minutes
- General commuting
- Waiting to don protective gear before shift

# Training and Meeting Time

# Training and Meeting Time

- Generally, employees must get paid for attending training, meetings, or similar activities UNLESS:
  1. Outside regular working hours;
  2. Attendance is voluntary;
  3. Not directly related to the employee's job; and
  4. Employee does not perform productive work while attending the training or meeting.

# Internships

- Training for **current employees** is different than **trainees or interns**
- Interns or potential new hires may be exempt if they meet a six-part test



# Unauthorized Overtime—

**Do I have to pay it?**

# YES!

Employers must pay all overtime earned by employees whether or not it was pre-approved.



# Unauthorized Overtime

- Cannot avoid paying earned overtime by requiring employees to seek authorization
- BUT can discipline and even terminate employees for working unauthorized overtime

# Independent Contractors



# Independent Contractors

- Independent contractors are NOT employees
- Not subject to FLSA obligations
- Paid via IRS Form 1099

# Independent Contractor Test

- Different tests apply under different contexts
- FLSA test is called the Economic Realities Test
- Five factors:
  1. Degree of control
  2. Relative investment in facilities
  3. Worker's opportunity for profit and loss
  4. Permanency of parties' relationship
  5. Skill required

# Independent Contractor Test

- Degree of control
  - Most important factor
  - Examples of control:
    - Establishing cost of work to be performed
    - Hiring and firing workers to assist in project
    - Delegating tasks
    - Responsibility for licenses, taxes, and other administrative tasks
    - Advertising
    - Work schedules
    - Working without close supervision or frequent status reports

# Safe Harbor Policies

- Employers who make impermissible deductions may lose the exemption for that employee AND others in the same job classification
- But employers may include a safe harbor policy in handbook to avoid losing the exemption



# Safe Harbor Policy

- States which deductions are allowed
- Which deductions are NOT allowed
- Provides a mechanism for employees to dispute deductions
- Prohibits retaliation for making complaints regarding deductions



# Other Ways to Avoid/Fix FLSA Errors

- Conduct annual self-audits
  - Review job descriptions
  - Review payment methods
- Consult with attorney and/or accountant
  - Request formal opinion letter
- Pay any unpaid overtime as quickly as possible

# Questions?

