

FYI[®] In-depth

For your information[®]

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Fair Labor Standards Act — Are you sure you're in compliance?

The federal Fair Labor Standards Act establishes minimum wage and overtime pay standards that govern how and how much private and public sector employers must pay their workers. The recent surge in private lawsuits and more aggressive enforcement by the DOL show just how costly and disruptive FLSA claims can be. To minimize potential liability, employers should review their employee classification, timekeeping, and payroll practices to ensure that they are paying employees covered by the FLSA for all compensable hours.

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Background

The Fair Labor Standards Act (FLSA) establishes federal minimum wage, overtime pay, recordkeeping, and youth employment standards for both private and public sector employers. With certain statutory exemptions, full-time and part-time employees are generally covered by the FLSA if they work for (1) a business or organization that is involved in interstate commerce and annually does at least \$500,000 worth of sales or business, or (2) a hospital, nursing home or other residential health care facility, school or preschool, or public agency. Churches, charitable institutions, and certain other entities that are not organized for a business purpose are not subject to this law. Additionally, because coverage flows from the employer-employee relationship, the FLSA does not apply to independent contractors or, generally, to volunteers.

Employers that violate the FLSA can face substantial liability.

Collective action and class-action lawsuits brought on behalf of a group of employees have become commonplace, and can expose employers to staggering costs for back pay, liquidated damages, and attorneys' fees. In addition, employers increasingly face civil penalties and possible criminal sanctions as the DOL's Wage and Hour Division (WHD) has stepped up its FLSA enforcement activities.

Buck Webinar

Buck Consultants is sponsoring a webinar — *The FLSA: Avoiding common pitfalls and costly mistakes* — on Tuesday, April 8 at 2:00pm EDT. Join Buck and HRTMS for an overview of core FLSA requirements and practical advice on how to comply with them. Registration information is available [here](#).

An overview of the FLSA

Employees covered by the FLSA must be paid at least the federal minimum wage (currently \$7.25 per hour) and, in most cases, overtime at time and one-half of the employee's regular rate of pay for all hours worked in excess of 40 in a workweek. While the FLSA addresses a wide range of issues, employers typically face two broad categories of wage-and-hour claims under this law — employee misclassification and unpaid wages for overtime.

To minimize potential liability for noncompliance and avoid costly litigation, employers should take appropriate steps to ensure that they are properly:

- Determining which employees are protected by the FLSA and which are not (non-exempt v. exempt employees)
- Tracking and calculating an employee's "hours worked"
- Determining an employee's "regular rate" for the purpose of calculating overtime pay

Beware of state and local wage-hour laws!

The FLSA sets out federal standards, but states and localities may have a higher minimum wage or lower maximum workweek. Employers must comply with whichever applicable laws are more stringent.

FLSA exemptions

While most employees are covered by the FLSA's minimum wage and overtime rules, employees and groups of employees that satisfy certain salary and job duties tests may qualify for one of the statutory exemptions. Exemptions are generally available for white-collar employees, computer employees, and outside sales employees, and for employees in certain industries including transportation, agriculture, and seasonal recreation. The FLSA also provides exemptions for employees who perform certain types of work (such as commissioned retail salespersons), or work under special certificates (such as full-time students, disabled employees, and apprentices). In each case, however, the burden is on the employer to establish an employee's exempt status.

Are you in compliance?

Review our [questionnaire](#) to assess your potential exposure to FLSA claims.

Note that blue-collar workers (including skilled tradesmen such as carpenters, electricians, and mechanics), manual laborers (defined as nonmanagement employees in production, maintenance, construction, and similar jobs), and first responders (police, firefighters, and paramedics) are entitled to minimum wage and overtime premium pay — regardless of how highly they are paid.

White-collar exemptions

The FLSA provides an exemption from both minimum wage and overtime pay for employees working as *bona fide* executive, administrative, or professional employees (the so-called "white-collar" exemptions). To qualify for any of these exemptions, employees must satisfy a minimum earnings requirement and meet certain tests regarding their job duties. The FLSA also provides an exemption for highly compensated white-collar employees.

Determining whether an employee qualifies for a white-collar exemption is complicated. In making this determination, the employer cannot simply rely on job titles, job descriptions, job qualifications, or employment agreements. Rather, for an exemption to apply, an employee's job generally must satisfy three separate tests: (1) salary level; (2) salary basis; and (3) job duties.



Buck comment. On March 13, 2014, President Barack Obama directed the DOL to change the overtime rules governing the white-collar exemptions. The DOL is expected to propose raising the salary threshold and changing the current job duties tests, which would significantly narrow the availability of exemptions. (See our [March 14, 2014 FYI Alert](#).) The exemptions discussed below reflect the current regulations, but employers should be aware that changes are likely in the foreseeable future.

Salary level test. To be considered exempt under the FLSA, most executive, administrative, and professional employees must earn a minimum salary of \$455 per week, which may be paid in equivalent amounts for periods longer than one week (for example, \$910 biweekly, \$985.83 semimonthly, or \$1,971.66 monthly). While the salary level test applies to most white-collar employees, it does not apply to doctors, teachers, lawyers, outside sales employees, and certain computer-related occupations.

The FLSA also provides an almost automatic exemption for certain highly compensated employees who perform office or non-manual work. To qualify for the highly compensated exemption, an employee must earn a total annual compensation of at least \$100,000 (including commissions, nondiscretionary bonuses, and other nondiscretionary compensation), and receive at least \$455 per week on either a salary or fee basis. In addition to satisfying the compensation threshold, the employee must customarily and regularly perform one or more of the duties identified in the standard exemption tests for executive, administrative, or professional employees discussed below.



Salary basis test. Executive, administrative, and professional employees must be paid on a salary basis to qualify as exempt. Being paid on a salary basis means an employee regularly receives a predetermined amount of compensation each pay period regardless of variations in the quality or quantity of work. Like the salary level test, the salary basis test does not apply to doctors, teachers, lawyers, outside sales employees, and certain computer-related occupations.

Subject to limited exceptions, an exempt employee must receive his or her full salary for any week in which he or she performs any work, regardless of the number of days or hours worked. However, employers need not pay exempt employees for workweeks in which they perform no work.

- A “workweek” is any fixed and regularly-recurring period of 168 hours, or seven consecutive 24-hour periods. It can begin on any day of the week at any hour.
- A “workday” means the period between the times an employee begins and finishes his or her principal work activity.

Buck comment. Because of the salary basis concern, most companies that find it necessary to furlough salaried exempt employees do so only in increments of full workweeks. For furloughs of less than a full workweek, businesses must pay the exempt employee's full weekly salary or lose the exemption.

Because an employer may jeopardize an employee's exempt status by making salary deductions, employers should exercise caution when docking an employee's pay. Although the FLSA permits employers some flexibility, it provides only limited exceptions to the general no-pay-docking rule. To avoid a potentially costly mistake, deductions from an exempt employee's pay must be made in full-day increments and only for one of the following reasons:

FLSA compliance is determined on a workweek basis, and each workweek stands on its own.

- Absences for personal reasons
- Absences for sickness or disability, where deductions are made under a bona fide plan, policy, or practice of providing wage replacement benefits
- Offsets of jury, witness, or military pay
- Penalties for violations of major safety rules
- Disciplinary suspensions
- Partial first week or last week of employment
- Unpaid leave taken under the federal Family and Medical Leave Act

Buck comment. Because the FLSA provides no exception for weather-related office closures, it is improper to reduce an exempt employee's weekly salary unless the employee misses the entire workweek. Employers may, however, charge exempt employees accrued vacation or available PTO to cover the closure. Although federal law requires only that nonexempt employees be paid for the hours they actually work, some states require employers to pay hourly employees for a minimum number of hours if they report to work when a facility is closed.

As long as the basic salary level test is satisfied, employers may elect to pay exempt employees overtime or adopt other more generous practices (for example, additional time off) without affecting the exemption. However, the employer will lose the exemption if, for example, it makes salary deductions when work is not available, provided the employee is ready, willing, and able to work. In such circumstances, the employee is no longer being paid on a "salary basis" and would be entitled to overtime pay.

Buck comment. A practice of making improper salary deductions can result in an employer losing the exemption not only for the affected employee during the period in which the deductions were made, but also for other employees working in the same job classification who work for the same managers responsible for the improper deductions. To minimize the risk of improper deductions, employers should ensure that they have in place a clearly communicated deduction policy, an easily accessible employee complaint procedure, and a system for prompt reimbursement of improper deductions.

Job duties test. Classifying employees as exempt or nonexempt is a complicated process. Once an employer has made sure an employee satisfies the minimum salary threshold, the next consideration is whether the employee's job duties satisfy any of the executive, administrative, or professional exemptions.

Buck comment. Employees who are paid on an hourly basis, regardless of whether they earn over \$455 per week and meet the job duties test for an exemption, are not considered exempt.

Because exempt or nonexempt status depends on an employee's actual job duties, DOL regulations set forth distinct job duties tests for each exempt classification.

Executives. The executive exemption is available to employees whose primary duty is management of the enterprise or of a customarily recognized department or subdivision, and who customarily and regularly direct the work of two or more full-time employees (or the equivalent). In establishing the exemption, a key consideration is whether an employee has the authority to hire or fire other employees or whether the employee's suggestions or recommendations on hiring, firing, advancement, promotion, or status change decisions are given particular weight. Among other factors to consider are:

- Relative importance and amount of time spent performing exempt duties
- Relative freedom from direct supervision
- Relationship between the employee's salary and the wages paid to other employees for the same kind of nonexempt work

Notably, employees who perform both exempt and nonexempt work are not automatically disqualified from being exempt. Although employees who spend more than 50% of their time performing exempt work will generally satisfy the primary duty requirement, the regulations do not *require* that exempt employees spend more than 50% of time performing exempt work.

Buck comment. Whether revised FLSA regulations will place a limit on the amount of time an exempt employee can spend on non-exempt work remains to be seen.

Administrative employees. The administrative exemption is available for employees whose primary duty is performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers. For purposes of the exemption, primary duty includes the exercise of discretion and independent judgment on matters of significance. Discretion and independent judgment would not include, for example, clerical or secretarial work, recording or tabulating data, or performing mechanical, repetitive, recurrent, or routine work.

Among the factors to be considered in assessing the availability of the administrative exemption are whether the employee:

Although employees who spend more than 50% of their time performing exempt work will generally satisfy the primary duty requirement, current regulations do not *require* exempt employees to spend more than 50% of their time on exempt work.

- Has authority to formulate, affect, interpret, or implement management policies or operating practices
- Carries out major assignments in conducting business operations
- Performs work that substantially affects business operations, even if the employee's assignments are related to the operation of a particular business segment
- Provides consultation or expert advice to management
- Has authority to commit the employer in matters that have significant financial impact, or to negotiate and bind the company on significant matters

Job titles don't determine exemptions. Job functions do.

Buck comment. Human resources managers have generally been seen as meeting the administrative duties requirements needed to qualify for the exemption. Recently, however, a Florida federal judge conditionally certified a nationwide class of Lowe's Home Centers, Inc. human resources managers challenging their exempt classification, alleging they lacked discretion and decision-making authority to hire, fire, or discipline employees, and did not supervise other employees.

Professional employees. Two exemptions are available for professional employees — the learned professional exemption and the creative professional exemption. To qualify for the learned professional exemption, the employee's primary job duty must be the performance of office or non-manual work that is directly related to the management or general business operations of the employer or its customers, and includes the exercise of discretion and independent judgment in significant matters.

The employee's work must require advanced knowledge (beyond the high school level) in a field of science or learning that is customarily acquired by a prolonged course of specialized intellectual instruction. Generally, exempt professions include lawyers, teachers, accountants, pharmacists, engineers, and actuaries. Because specialized academic training is typically a prerequisite for entering the profession, the possession of an appropriate academic degree is often the best evidence that an employee meets the specialized instruction requirement.

Typically, registered nurses meet the duties requirements for the learned professional exemption. However, many registered nurses are paid by the hour rather than on a salary basis, and thus are entitled to overtime pay. Licensed practical nurses generally do not qualify for the exemption.

Buck comment. The learned professional exemption would not generally apply to occupations in which most employees acquire their skill through experience or their knowledge through an apprenticeship program. Such occupations include, for example, accounting clerks and bookkeepers, cooks, paralegals and legal assistants, and engineering technicians.

An exemption is also available for creative professionals whose primary duty is the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor, such as music or graphic arts. Exempt status for this group of employees is determined on a case-by-case basis.

Highly compensated employees. An employee with total annual compensation of at least \$100,000 is deemed exempt for FLSA purposes if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee described above. Because the high level of compensation is a strong indicator of an employee's exempt status, the FLSA does not require a detailed analysis of the employee's job duties. As a practical matter, an employee may qualify as a highly compensated executive if the employee regularly directs the work of two or more employees, even though the employee does not meet all of the other requirements for the executive exemption.

Outside sales and computer employee exemptions

The FLSA contains exemptions from its minimum wage and overtime requirements for employees working in outside sales or in certain computer-related occupations. Whether these types of employees qualify for an exemption hinges on meeting the job duties tests described below.

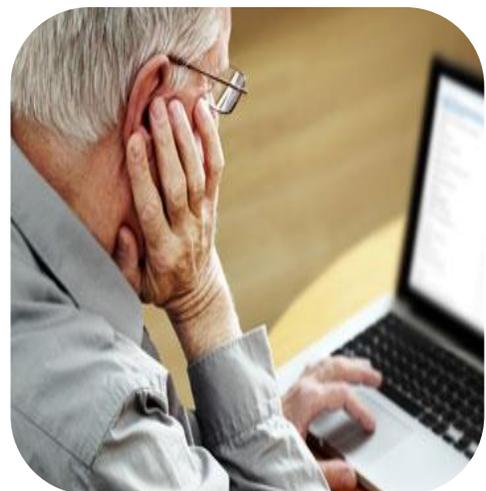
Outside sales employees. Unlike other white-collar employees, outside sales employees can qualify as exempt under the FLSA without satisfying minimum salary requirements. The regulations generally define outside sales employees as salespersons whose primary duty is making sales, or obtaining orders or contracts for services or for the use of facilities. To qualify for the exemption, employees generally must regularly sell their employer's products, services, or facilities to customers away from their employer's place(s) of business — either at the customer's place of business or at the customer's home, if selling door-to-door.

Sales made by mail, telephone, or via the Internet usually do not qualify unless they are made in conjunction with outside sales activity. As a general rule, sales made from the employer's place of business (inside sales) do not qualify. However, some employees performing inside sales work in certain retail and service establishments who are paid in whole or in part by commission may be exempt from the FLSA's overtime pay protections. Drivers who both deliver and sell products may qualify as exempt outside sales employees, but only if the employee's primary duty is to make sales.

Buck comment. In 2012, the US Supreme Court considered whether pharmaceutical sales representatives (also known as detailers) were exempt from overtime under the FLSA's outside sales exemption. After looking at the everyday tasks completed by the detailers, the court concluded they qualify for the exemption. (See our [July 20, 2012 For Your Information](#).)

As with other exemptions, an employee who does not satisfy the requirements of the outside sales exemption may still qualify as an exempt employee under one of the other white-collar exemptions if all the relevant criteria are met.

Computer employees. The computer employee exemption is open to computer systems analysts, programmers, software engineers, and other skilled computer workers. To qualify for the exemption, they have to satisfy the duties test below and a minimum salary threshold. They must be compensated on either a salary or fee basis at a rate of at least \$455 per week, or, if paid on an hourly basis, at a rate of at least \$27.73 per hour. In determining whether computer employees who are paid on a fee basis meet the salary threshold, employers must consider the time the employee worked on a



particular job and calculate whether the rate paid for the job would amount to at least \$455 per week if the employee had worked 40 hours.

The exemption is generally available to computer employees who perform duties related to systems analysis, design, development, or documentation. Employees are eligible for the exemption if they perform any of the following as their primary job duties:

- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications
- 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
- The design, documentation, testing, creation or modification of computer programs related to machine operating systems
- A combination of these duties requiring the same level of skills

The computer employee exemption does not extend to employees engaged in the manufacture or repair of computer hardware and related equipment. Similarly, engineers, drafters, and others skilled in computer-aided design software who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations do not qualify for this exemption even though their work may be highly dependent on using computers and computer software programs. They may, however, qualify for another exemption.

Buck comment. State and local laws may apply different job duties standards. California, for example, uses a different test than the FLSA for determining the computer and other “white-collar” exemptions. Employers that are unaware of the differences among local, state, and federal laws may be vulnerable to significant liability for employee misclassification and resulting unpaid wages and overtime.

Tracking and calculating “hours worked”

The FLSA requires nonexempt employees to be paid at least the federal minimum wage for all hours worked in a workweek. Unless an exemption applies, employees who work more than 40 hours in a single workweek must also receive time and one-half the employee’s regular rate of pay for all overtime hours.

The failure to properly count all hours worked may result in a minimum wage violation if the employee’s hourly rate falls below the federal minimum wage, or in an overtime violation because the employer has not fully accounted for hours worked in excess of 40 during the workweek. Thus, the first step in calculating proper wage and overtime payments is to determine how many hours an employee has worked.

For purposes of the FLSA, an employee is “working” whenever he or she performs work for the employer — including work that the employer does not request, but nevertheless allows the employee to perform for the employer’s benefit. In some situations, it is clear that an employee is on the clock — for example, a manufacturing employee working on a production line, a retail employee helping an in-store customer, or waitstaff serving diners

in a restaurant. In other circumstances, it is less clear whether an employee is working and eligible for overtime pay.

Tracking small increments of time

The FLSA requires employers to keep records of wages, hours, and other items on each nonexempt worker. Employers may use any timekeeping method they choose (such as a time clock) as long as the timekeeping plan is complete and accurate. For employees who work on a fixed schedule, for example, the employer may keep a record showing the schedule of daily and weekly hours and merely indicate that the worker followed the schedule. However, when a worker deviates from the schedule, the employer must record the number of hours the worker actually worked.

Many employers track their employees' hours in 15-minute increments, and the DOL allows an employer to round employee time to the nearest quarter hour subject to certain rounding rules. To avoid violating the FLSA's minimum wage and overtime pay requirements, employers that track employee time in this manner may round down — and thus not count toward hours worked — employee time between 1–7 minutes. However, they must round up — and count as a quarter hour of work time — employee time between 8–14 minutes.

In many workplaces, there are infrequent and insignificant periods of time beyond regularly-scheduled working hours — usually lasting only a few seconds or a few minutes — that an employer cannot precisely record for payroll purposes. The DOL acknowledges that employers may disregard those periods in recording working time under the FLSA. Although courts have held that such periods of time are *de minimis*, an employer should take care to count this time as part of hours worked if it can be practically ascertained. Particularly where short periods of time repeat with any sort of regularity, a court may view the time in the aggregate as compensable hours worked.

Waiting and on-call time

Whether waiting time is compensable depends on the surrounding circumstances. Generally speaking, if the employee is engaged to wait, the employee is considered to be on duty and the time is counted as work time. If, on the other hand, the employee is waiting to be engaged, the employee is considered to be off duty and the time is not compensable.

Off-duty waiting time or layover time typically does not count as hours worked, but only if the following conditions are met: (1) the employee is completely relieved from duty; (2) the time is long enough to let the employee use it effectively for his or her own purposes; (3) the employee is allowed to leave the job site; and (4) the employee is told what time he or she has to return.



Maintaining accurate time records is critical

Failure to keep records of hours worked by non-exempt employees leaves employers vulnerable to wage and overtime claims and DOL investigations.

Engaged to wait? Apple and Amazon employees think so

Apple Inc. and Amazon.com currently face class action claims for unpaid time employees spend in daily security screenings. The US Supreme Court recently agreed to consider whether such time is compensable. (See our [March 7, 2014 For Your Information.](#))

Example. A receptionist who reads a book while waiting for customers or telephone calls is working, and the time spent reading must be counted toward hours worked (engaged to wait). In contrast, a truck driver is sent from Washington, DC at 6:00 a.m. to New York City, arriving at 12:00 noon. If the driver is completely off duty until 6:00 p.m. when he starts the return trip, the idle time is not “hours worked” (waiting to be engaged).

Whether time spent on-call qualifies as hours worked under the FLSA largely hinges on whether the employee is able to use the time freely, and requires a case-by-case analysis. When an employee is on-call, any time spent responding to calls is hours worked. In most cases, an employee who is required to remain on-call while off the employer’s premises and is simply required to carry a cell phone or pager, or leave work where he or she can be reached, is not working unless there are additional constraints on the employee’s freedom.

If the employee can use the on-call time effectively to engage in personal activities, such as going to the movies or a ball game, it generally will not be deemed work time. However, if work calls received during on-call time are frequent enough to interrupt the employee’s activities, the time may be compensable. An employee who is required to remain on the employer’s premises or at a location controlled by the employer so that he or she cannot use the time effectively for his or her own purposes is working while on-call (e.g., a hospital employee who must stay at the hospital in an on-call room).

Commuting and travel time

In ordinary situations, normal travel time from home to work is not working time, and commuting time is not compensable whether the employee works at the same site every day, works at different job sites on different days, or uses an employer-provided vehicle to commute. However, time spent by an employee traveling from work site to work site as part of the regular day’s work must be counted as hours worked and paid at the employee’s normal rate of pay. Similarly, if the employee is required to attend a meeting during the day at another site, the travel time is considered hours worked.

There are, however, certain instances when travel from home to work may be compensable. If, for example, the employee has to travel beyond the normal commute for work, the additional time spent would normally be compensable. If an employee who is home after completing his or her day’s work is called out to handle an emergency job, travel time is likely to be working time. When an employee who regularly works at a fixed location in one city is given a special one-day assignment in another city, the travel generally would qualify as an integral part of the employee’s principal work activity and count as hours worked. However, in this situation, the employee’s normal home-to-work travel time may be deducted from otherwise compensable travel time.

Travel that keeps an employee away from home overnight usually counts as work time, and must be compensated when it occurs during the employee’s regular workday (e.g., 9 a.m. to 5 p.m.). However, travel time

that occurs outside the employee's regular hours generally need not be compensated unless the employee is performing assigned work such as driving other employees or preparing for a presentation.

Donning and doffing

The FLSA generally requires employers to pay employees for time spent putting on (donning) and taking off (doffing) "clothes" required by the law or the employer. However, the law also allows parties to collectively bargain over whether time spent changing clothes at the beginning or end of each workday must be compensated.

Whether donning and doffing safety equipment (such as flame-retardant pants, hard hats, work gloves, or metatarsal boots) qualifies as "changing clothes" under the FLSA has been a hotly-debated topic. In [Sandifer v. US Steel](#), the Supreme Court considered whether time spent changing into and out of various pieces of protective gear would be compensable in view of a contrary provision in a collective bargaining agreement. Concluding that the FLSA's statutory compensation exception only encompasses items that are an integral and indispensable part of performing the job, the Court held that nine of the 12 items at issue constituted clothes, while three others (earplugs, glasses, and respirators) did not. Notably, the court left it to lower courts to decide in future cases whether other items are "clothes" for FLSA purposes. The court also left it to lower courts to decide compensability issues based on whether the majority of pre-shift and post-shift time is spent changing clothes.



Breaks and meal periods

Although the FLSA does not require employers to give employees meal or rest breaks, employers that do offer short breaks (usually five to 20 minutes) generally must compensate their employees for this time. The FLSA expressly requires employers to provide unpaid break time and space for nonexempt nursing mothers. If an employer already provides paid breaks, an employee who uses that break time to express milk must be compensated in the same way that other employees are compensated for break time.

Buck comment. The Affordable Care Act amended the FLSA to require employers to provide reasonable break time for a nonexempt employee to express breast milk for her nursing child for one year after the child's birth, and to provide an appropriate place (other than a bathroom) that can be used for that purpose. While the FLSA does not require employers to provide lactation breaks for exempt employees, they may be required to do so under applicable state laws.

A *bona fide* meal period (typically 30 minutes or more) is generally not time for which an employee must be compensated, provided the employee is completely relieved from duty during the period. When an employee remains at his or her desk while eating lunch but regularly answers the telephone, the time must be counted and paid as compensable hours. Employers that have a policy of automatically deducting time for normally scheduled

meal periods should ensure that they have a reasonable process in place for employees to report any working time that occurs during those periods, and that they communicate this process to their nonexempt employees.

Buck comment. Unlike the FLSA, some states require employers to offer breaks and/or meal periods. In other states, whether to provide breaks or meal periods is generally a matter of agreement between the employer and the employee (or the employee's representative).

Sleeping

If an employee is on duty for less than 24 hours, sleep time must be included as “hours worked.” However, if an employee is on duty for more than 24 hours, regularly scheduled sleeping periods of more than 8 hours can be excluded. In either case, a reduction in hours worked for time spent sleeping is only permitted if the sleep period is at least five hours long.



Lectures, meetings, trainings

Employers must pay employees to attend lectures, meetings, training programs, and other similar activities if any of the following four conditions are met:

- Attendance is during the employee's normal working hours
- Attendance is not voluntary (if the employee reasonably believes that his or her working conditions or continued employment will be adversely affected by failure to attend)
- The course, lecture, or meeting is directly job-related
- The employee concurrently performs other work

Training is generally not considered working time for FLSA purposes if it is designed to teach the employee a different job. Similarly, time spent by an employee, on his or her own initiative, to attend a school or outside program (even when eligible for tuition reimbursement) is not considered working time.

Vacation time, sick leave, and holidays

The FLSA does not require payment for time not worked, such as vacations, sick leave, or holidays (federal or otherwise). Rather, these benefits are matters of agreement between an employer and an employee (or the employee's representative).

Buck comment. Employers that provide nonexempt employees with smartphones face potential off-the-clock claims for work employees perform away from the office, on vacations, and on holidays (including checking or sending work-related emails and text messages). An employer that permits its nonexempt employees to perform such work generally must compensate them for this time — even if the employer has not requested it. To avoid potential liability, employers should have clearly-communicated policies in place on smartphone and home computer use during scheduled time off, as well as after hours.

Telecommuting

The FLSA's restrictions on minimum wage and overtime apply to nonexempt employees, regardless of *where* or *when* they work. Like employees in the office, teleworkers must be compensated for all hours they work or are required to be available for work.

A significant FLSA-related risk of telecommuting is that nonexempt employees may work off the clock (perform work without recording their time) or work unauthorized overtime. In either case, an employer generally must compensate the employee for such time, if the employer knew or should have known that the employee was working. In the telecommuting context, the situation often arises when an employee is responding to e-mails, text messages, or telephone calls from his or her supervisor.

As a practical matter, supervisors may experience some difficulty in monitoring the time remote employees work. To avoid FLSA violations, employers should require nonexempt employees to maintain and report hours of work, wherever performed, during each workweek (including overtime). Employers should also make sure that these employees take any required meal and rest breaks while working remotely.

Buck comment. If nonexempt employees work from home, it is essential that they have set working hours, access to an accurate time keeping system, and understand employer expectations concerning work outside the normal workday.

Calculating overtime pay

The FLSA does not require time and one-half, double time, or any other type of extra pay for weekend or night work. These are matters of agreement between an employer and employee (or the employee's representative). In most cases, however, the FLSA requires that nonexempt workers be paid no less than time and one-half the employee's regular rate for all hours worked in excess of 40 per week.

To properly determine overtime pay, an employer must first understand and correctly calculate an employee's regular rate of pay. While this sounds straightforward, the regular rate includes many types of compensation in addition to an employee's hourly rate. Specifically, an employee's regular rate includes:

- Non-discretionary (or promotional) bonuses that are announced in advance to encourage employees to work more steadily, rapidly, or efficiently
- Cost-of-living adjustments
- Shift differentials where the employee works at two or more different rates for different types of work in a single workweek
- The reasonable cost to the employer or fair market value of non-cash payments in the form of goods or facilities
- Commissions (although certain retail and service employees paid on a commission basis in whole or in part are exempt from overtime regulations)



In calculating an employee's regular rate, an employer does not have to include expense reimbursements, premium payments for overtime, weekend, or holiday work, discretionary bonuses and gifts, or payment for occasional periods when no work is performed because of vacation, holidays, or illness. However, the regular rate of pay cannot be less than the minimum wage.

With certain exceptions, each workweek stands alone for purposes of calculating an employee's regular rate and overtime pay, and an employer cannot average hours over a period of two or more weeks. Weekly earnings may be determined on a piece-rate, salary, commission, or other basis. In all cases, an employer must calculate overtime pay due on the basis of the average hourly rate derived from such earnings. The hourly rate is determined by dividing the total pay for employment (less any statutory exclusions) in any workweek by the total number of hours worked.

Buck comment. In the case of shift differentials, the employer must add together earnings from all rates in a workweek and then divide by the total number of hours worked. In certain circumstances involving multiple shifts, the computation of overtime pay is based on one and one-half times the hourly rate in effect when the overtime work is performed.

Calculating an employee's regular rate over a time period greater than one week is common in certain sectors or industries, largely reflecting the particular realities of those workplaces. Certain public sector employers and hospital employers are exceptions to the general principle that every workweek stands alone.

- Public sector employers of firefighters and law enforcement personnel may use periods of time ranging between seven and 28 days and calculate overtime based on a chart furnished by the DOL
- Hospital employers may compute overtime by way of the "8/80 rule," whereby employees are paid one and one-half times the regular rate of pay for all hours worked over eight hours in a day or over 80 hours in a 14-day period, whichever is greater



Buck comment. Some states have enacted overtime laws, and differences between federal and state laws can provide compliance challenges — particularly for multi-state employers. Where an employee is subject to both state and federal overtime laws, the employee is entitled to overtime according to the standard that will provide the higher rate of pay.

Lawsuits and enforcement activity

In FY 2013, the WHD recovered nearly \$250 million in back wages from employers. Aggressive enforcement efforts are expected to continue throughout 2014. Industries — such as construction, janitorial, hospitality, food services, and home health care — that increasingly rely on independent contracting, franchising, staffing agencies, and subcontracting for workers (so-called “fissured” industries) are expected to receive particular scrutiny as part of a DOL enforcement initiative.

A recent wave of class action and other lawsuits has left many prominent employers facing sizeable wage and overtime claims. In the past year alone, lawsuits were brought on behalf of unpaid and underpaid interns against large employers in the music, television, publishing, fashion, and sports industries including NBC Universal, Conde Nast, the Hearst Corporation, Fox Searchlight Pictures, Warner Music Group, Atlantic Recording, Sony, Universal Music Group, and Donna Karan.

Buck comment. A federal district court in New York recently granted preliminary approval for the largest unpaid intern FLSA settlement to date. Elite Model Management has agreed to pay up to \$450,000 to resolve a \$50 million class action [suit](#) filed against it in 2013 for alleged violations of the minimum wage and overtime requirements of the FLSA and New York labor law.

Additionally, as noted above, both Amazon.com and Apple, Inc. currently face lawsuits over their failure to pay employees for time spent waiting for mandatory daily security screenings. The Supreme Court recently agreed to weigh in on the compensability issue, and will decide whether a company that provides workers for Amazon.com warehouses must pay them for time spent clearing security checks before or after their regular work shifts.

Employers as diverse as Starbucks and Major League Baseball are defending against minimum wage class action claims. As discussed above, Lowe’s Home Centers is one of a number of well-known employers currently facing misclassification claims, and General Electric is facing claims by service technicians in six states for failing to pay for pre- and post-shift work, again raising the pivotal issue of when the workday begins. As the DOL continues its outreach efforts and employees pay closer attention to their paychecks, even sophisticated employers can expect continued wage-and-hour challenges.

In closing

FLSA lawsuits can be time-consuming, disruptive, injurious to a business’s reputation, and expensive to defend. With collective actions and class actions on the rise, employers are increasingly exposed to substantial financial risk for employee misclassifications and underpayments. Given the surge of wage-hour suits at both the state and federal levels, employers should regularly review and update their workers’ classifications and pay practices. Review the compliance [questionnaire](#) below to help you assess whether your business is potentially vulnerable to FLSA claims.

FLSA lawsuits rose sharply in 2012-2013

According to data from the Federal Judicial Center, a total of 7,764 FLSA cases were filed between April 2012 and March 2013, up 10% from the prior 12-month period.

FLSA Questionnaire

Answer the following questions to help determine if you are in compliance with the Fair Labor Standards Act:

1. Are you properly classifying your employees as exempt vs. nonexempt?

- Classifying an employee is not as simple as looking at the employee's job title. You must review each employee's salary and duties.
- Exempt employees must fit into one of the following categories: executive, administrative, or professional employees; highly compensated white-collar employees; and outside sales or computer personnel.
- In addition, exempt employees must generally be paid a minimum salary of \$455 per week.

2. Are you paying your nonexempt employees for all hours worked?

- Make sure that you are counting/combining all hours — whether worked at one or more than one location.
- Do you have a system for auditing time records? Do your employees record training time? Travel time? Time spent working at home? On-duty waiting time? Time spent after hours reading and responding to emails?
- Do your employees work before or after regularly scheduled shifts or hours? Do your employees work during their meal or break periods? Have you clearly communicated to employees whether or not you want and/or expect them to read and respond to emails after hours or on vacation?

3. Are you paying your nonexempt employees the correct amount of overtime?

- Overtime is calculated based on an employee's "regular rate" of pay, which includes nondiscretionary bonuses or compensation, cost-of-living adjustments, shift differentials, non-cash payments, and some commissions.
- Also, in general, overtime may not be calculated based on hours worked over more than one week.

4. Are you keeping complete and accurate records of wages, hours, ages, names, social security numbers, pay rates, specific hours worked, overtime versus straight-time earnings, pay dates, week beginning and ending dates, and additions to or deductions from wages?

- These records are required by the FLSA and must be available for inspection by the DOL's Wage and Hour Division.
- Failure to keep these records can lead to penalties either for the failure itself, or because you cannot prove compliance with minimum wage and overtime requirements without them.

5. Are you in compliance with all state and local wage-hour requirements?

- The FLSA does not supersede any state or local laws that are more favorable to employees.
- Rather, state or local law may require you to pay a higher minimum wage or comply with more stringent exemption requirements.

If you answered "No" to any of these questions, you may be violating the FLSA.

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