

# **The Fair Labor Standards Act:**

**Exemptions, Exclusions, Time Worked and  
Recordkeeping**

*Presented by;*

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## **The Fair Labor Standards Act:** **Exclusions, Exemptions, Hours Worked and Recordkeeping**

### **Coverage**

- ◆ The Fair Labor Standards Act (FLSA):
  - Sets minimum wage levels;
  - Establishes requirements for overtime pay;
  - Establishes requirements for recordkeeping;
  - Sets equal pay for equal work; and
  - Restricts child labor.
- ◆ The FLSA does not require:
  - Vacation, holiday, sick, or severance pay;
  - Meals or rest periods, holidays off, or vacation;
  - Premium pay for weekend or holiday work;
  - Pay raises or fringe benefits;
  - Discharge notices, reasons for discharge, immediate payment of final wages; or
  - Any limit on the number of hours worked by persons 16 years of age or older.

### **Exclusions**

- ◆ Specifically excluded from coverage under the FLSA are employees of public agencies who are not subject to the civil service laws of the state, political subdivision, or agency which employ them and who are:
  - Holders of public elective office;
  - Members of the office holder's personal staff;
  - Appointed by elected officials to policy making positions; or
  - Who serve as immediate advisors to elected officials with respect to the constitutional or legal powers of the officeholder.
- ◆ The "personal staff" exclusion tends to create the most problems.
  - Criteria for this exclusion tend to be narrowly viewed by the Department of Labor (DOL).
  - Some criteria that have been applied by the DOL and various courts include the fact that the employee:
    - \* Is hired at the sole discretion of the elected official;
    - \* Serves at the pleasure of the official and does what is delegated by the official;
    - \* Works exclusively for the elected official;
    - \* Has a high degree of accountability to the elected official; and
    - \* Is in a highly intimate and sensitive position of responsibility on the elected official's staff.
  - Due to the varying interpretations of the "personal staff" exclusion, it is advisable to obtain an opinion letter from the Department of Labor prior to declaring any position as "personal staff" if there is doubt as to whether the position qualifies for that status.
  - Employees who qualify as "excluded" under the FLSA are not subject to any provisions of the Act.

## Exemptions

- ◆ The three categories of exemptions under the FLSA that normally apply to counties include executive, administrative, and professional.
- ◆ Exempt employees are not subject to the minimum wage or overtime provisions of the FLSA.
- ◆ Before an employee can qualify as an exempt employee, he or she must be truly salaried.
  - The employee receives a predetermined amount each pay period constituting all or part of the employee's compensation.
  - This amount cannot be subject to reduction because of variations in the quality or quantity of work performed.
- ◆ The employee must receive a full salary in any week in which work is performed unless:
  - The employee is absent from work for a day or more for personal reasons other than sickness or accident;
  - The employee is absent for a day or more occasioned by sickness or disability and deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability;
  - The employer imposes penalties in good faith for major safety violations; or
  - The employee is absent for the entire workweek or performs no work.
- ◆ The "short test" to qualify for an exemption in each category include the following criteria:
  - Executive:
    - \* Paid a salary of at least \$250 per week;
    - \* Regularly directs the work of at least two or more employees; and
    - \* Primary duty is management of the enterprise or a recognized department or subdivision thereof.
  - Administrative:
    - \* Paid a salary of at least \$250 per week;
    - \* Primary duty consists of either:
      - Responsible office or non-manual work directly related to the management policies or general business operations of the employer or the employer's customers; or
      - Responsible work that is directly related to academic instruction or training carried on in the administration of a school system or educational establishment; and
    - \* Such primary duty includes work requiring exercise of discretion and independent judgement.
  - Professional:
    - \* Paid a salary of at least \$250 per week
    - \* Primary duty consists of work requiring knowledge of an advanced type in a field of science or learning, or work as a teacher in an activity of imparting knowledge which requires consistent exercise of discretion and judgement; or
    - \* Primary duty is artistic work that requires invention, imagination, or talent in a recognized field of artistic endeavor.

### Exemptions (continued)

- ◆ In determining if a position is exempt, the DOL will look at what the employee actually does.
- ◆ An advanced degree, high salary, or inflated job title or job description does not automatically make a position exempt.
- ◆ If a position is misclassified as exempt, it may result in the employer having to pay back wages, back overtime, and possible liquidated damages, court costs, and attorney's fees.
- ◆ A conservative approach is recommended to determining which positions are exempt because the DOL narrowly defines the requirements for exemption.

### Time Worked

- ◆ Time worked includes any work the employee performs on or away from the employer's premises and the employee knows or has reason to believe work has been performed.
  - Even if the employer does not require an employee to work, such as an employee working after hours, this time must be counted as time worked as long as the employer knows or has reason to believe that it is being performed.
  - The employer cannot receive the benefits of such activity without compensating for it.
- ◆ Time worked also includes periods during which the employee is under the employer's control even though no work is being performed.
- ◆ Areas in which questions often arise involving time worked include:
  - Waiting time
    - \* If the employee is told to wait until work becomes available, such as waiting for a machine to be repaired, the time would be time worked.
    - \* If the employee is waiting, at his or her own decision, in hope that some work may become available, then the time is not time worked.
  - Meal and rest periods
    - \* Generally, meal periods are not considered time worked if the employee has at least 30 minutes free from any actual work or work related interruptions.
    - \* Rest periods, or "coffee breaks", of 20 minutes or less, though not required by law, must be counted as time worked.
  - On-call time
    - \* Whether on-call time is time worked normally depends on how restricted the employee is in being able to pursue his or her own interests.
    - \* If the employee is able to move about the community with the freedom to engage in various personal activities and pursuits, then the time is probably not time worked. Being required to leave a phone number where he or she may be reached or being required to carry a pager does not affect this status.
    - \* If the employee must stay at home near the phone or if the reporting time is so brief to significantly restrict the freedom of the employee to pursue his or her own interests, then the on-call time is time worked.

## Time Worked (continued)

- Lectures, meetings and training programs
  - \* Attendance at lectures, meetings, training programs and similar activities need not be counted as time worked if the following four criteria are met:
    - Attendance is outside the employer's regular working hours;
    - Attendance is in fact voluntary;
    - The course, lecture, or meeting is not directly related to the employee's job; and
    - The employee does not perform any productive work during such attendance.
  - \* Attendance is not voluntary if the employee is led to believe that his or her present working conditions or continuance of employment would be adversely affected by nonattendance.
  - \* If an employee attends training on his or her own initiative after hours, the time is not time worked even if the courses are related to the employee's job.
  - \* If an employer, as a benefit for its employees, establishes a program of instruction which corresponds to courses offered by independent bona fide institutions of learning, the time would not be hours worked even if the training was job related and the employer paid for it, provided:
    - That attendance was indeed voluntary; and
    - Attendance was outside working hours.
- Travel Time
  - \* Home to work:
    - Normal travel between home and work is not considered work time.
    - However, if an employee carries out any assignment (such as picking up materials, equipment, etc.) on the way to the work site, then the rest of the travel time to the work site is time worked.
    - If the employee is required to report to a specific location prior to traveling to the work site, then the time from the initial reporting is time worked.
  - \* If an employee who has gone home for the day is called out to perform an emergency job for his or her employer and must travel a substantial distance to do so, then the all time spent in travel is working time.
  - \* Special one day assignment in another city:
    - All time would be counted as time worked except for:
      - Reasonable meal periods; and
      - The time the employee would have normally taken to travel to his or her regular job site.
  - \* Travel time that is all in the day's work:
    - Travel that is part of an employee's principal work activity, such as traveling between job sites, must be counted as time worked.
    - If an employee finishes his or her work for the day and must return to the employer's premises before going home, the time spent in travel back to the employer's premises is time worked.

### **Time Worked (continued)**

- \* Travel away from home community - overnight stay:
  - Any time spent in travel that cuts across the employee's normal workday is considered work time even if the time is not on a day normally worked by the employee.
  - Regular meal periods need not be counted as time worked.
- \* Work performed while traveling:
  - Obviously, any time spent in performing work for the employer while the employee is traveling must be counted as time worked.
  - An employee who drives a truck, automobile, bus, boat, or airplane, or is required to ride therein as an assistant or helper, is considered to be working except for bona fide meal periods.
- Medical attention:
  - \* Time spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days that he or she is working is considered time worked.

### **Recordkeeping**

- ◆ The FLSA requires that the following records be kept:
  - Name of the employee in full;
  - Home address of the employee including zip code;
  - Date of birth if under 19;
  - Sex and occupation;
  - Time of day and day of week in which employee's workweek begins;
  - Regular hourly rate of pay in any workweek in which overtime premium is due and the basis of payment (such as \$6.00 per hour, \$48.00 per day, or \$240.00 per week).
  - Daily and weekly hours of work;
  - Total daily or weekly straight time earnings;
  - Total overtime compensation for the workweek;
  - Total wages paid each pay period; and
  - Date of payment and the pay period covered by the payment.
- ◆ The FLSA does not specify how records must be kept, but required records must be kept for a minimum of three years. Some supplemental records, such as time cards, must be kept for two years.

### **Time Sheets**

- ◆ One of the recordkeeping requirements of the FLSA is that a record be maintained of all hours worked on a daily and weekly basis for each covered employee.
  - To be in compliance with the FLSA, these records must be a complete and accurate record of all time worked by an employee.
  - In the absence of time records, or if the records can be shown to be inaccurate, the word or records of the employee are normally viewed as correct by the DOL.

### **Time Sheets (continued)**

- ◆ An inaccurate time record can produce one of two results:
  - The employee does not receive payment of earnings and/or overtime required by the FLSA; or
  - The employee receives payment for time not worked or for benefits for which he or she is not entitled.
- ◆ In county employment, an employee's time record becomes a governmental record which creates potential liabilities not found in the private sector.
  - A time record is essentially a bill submitted for payment for time worked and payment of any benefits approved by the commissioner's court.
  - In Texas, falsifying or knowingly submitting an incorrect time record could be a violation of the Texas Penal Code, Section 37.10 (Tampering With Governmental Record).
  - Depending on the nature of the violation, such an action could be viewed as either a Class A misdemeanor or a state jail felony.

### **Enforcement**

- ◆ The FLSA authorizes representatives of the Department of Labor to investigate and gather data concerning wages, hours, and other employment practices; enter and inspect an employer's records; and question employees to determine whether any person has violated any provision of the FLSA. Whenever possible, the Department of Labor attempts to resolve issues of compliance and payment of back wages at the administrative level.
- ◆ The FLSA also provides for the following enforcement procedures:
  - The Secretary of Labor may file a suit on behalf of the employees for back wages and an equal amount in damages.
  - Employees may file suit to recover back wages and an equal amount in damages plus attorney's fees and court costs.
  - The Secretary of Labor may obtain a court injunction to restrain any person from violating the law, including unlawfully withholding proper minimum wage and overtime pay.
  - Employers who have willfully violated the law may face criminal penalties including fines and imprisonment.
  - Employees who have filed complaints or provided information during any investigation may not be discriminated against or discharged for having done so. If they are, they may file suit or the Secretary of Labor may file suit in their behalf for relief or reinstatement to their job and payment of wages lost and monetary damages.
- ◆ A 2-year statute of limitations applies to the recovery of back wages except in the case of willful violation, in which case a 3-year statute of limitations applies.

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