

# **The Fair Labor Standards Act**

**-\$-**

## **Its Impact on Counties**

*Presented by:*

NAME

TITLE

Texas Association of Counties

Personnel Assistance Section

1-800-456-5974

## **The Fair Labor Standards Act: Its Impact on Counties**

### **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, or 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 the definition of “employee” 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 employs 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.

### **Employment Relationship**

- ◆ For coverage to exist under the FLSA, there must be an employer-employee relationship.
- ◆ Under the FLSA, “employ” means to suffer or permit to work.
- ◆ Mere knowledge by an employer of work done for him or her may be sufficient to create an employment relationship under the FLSA.
- ◆ While the employer-employee relationship does not exist with independent contractors, the employer needs to carefully examine pertinent criteria to ensure that the relationship is that of independent contractor and not an employee.
- ◆ In the public sector, individuals may volunteer their services, as long as specific requirements are met, without being subject to the provisions of the FLSA.

### **Hours Worked**

- ◆ Within any workweek, employees covered by the FLSA must be paid for all hours worked.

### **Hours Worked (continued)**

- ◆ Hours worked includes any work which an employee performs on or away from the employer's premises and the employer knows or has reason to believe work has been performed. It also includes periods during which the employee is under the control of the employer even though no work is actually being performed.
- ◆ Situations important in determining work time include:
  - Waiting time;
    - \* On duty
    - \* Off duty
    - \* Waiting to be engaged versus engaged to wait
  - Employee sent home for lack of work;
  - Split shifts;
  - Meal periods;
  - Rest periods;
  - Duty of less than 24 hours;
  - Duty of 24 hours or more;
  - Duty of 24 hours or more - fire protection and law enforcement employees;
  - Employee's residing on employer's premises.

### **Minimum Wage**

- ◆ The minimum wage for all nonexempt employees is \$5.15 per hour.
- ◆ The lesser of the reasonable cost or fair value of food, lodging, and other facilities customarily furnished by the employer may be credited toward the minimum wage. "Reasonable cost or fair value" cannot include a profit for the employer.
- ◆ Uniforms or tools, when required by the employer, are not considered facilities for which the employer may take credit in meeting the minimum wage.
- ◆ If the employer requires employees to purchase uniforms to wear as part of the job, the cost of the uniforms cannot bring the employee's wage below the minimum wage.
- ◆ Individuals in certain types of positions may be employed at sub-minimum wage provided they meet specific criteria and an exemption certificate is issued by the Wage and Hour Division of the Department of Labor. Included in this category are:
  - Learners;
  - Student learners;
  - Apprentices;
  - Messengers;
  - Full time students; and
  - Disabled workers in sheltered workshops.

### **Overtime and Overtime Pay**

- ◆ Overtime is any time worked by a covered employee in excess of 40 hours in any workweek. (There are some limited exceptions to this which will be addressed later.)

### Overtime and Overtime Pay (continued)

- The workweek is a regular recurring period of seven consecutive 24 hour periods (168 hours).
- Each employer must establish an identified work week for its employees.
- There is no requirement that all employees be on the same workweek, but there must be a specific workweek for each employee.
- The workweek may begin on any day of the week and any hour of the day, but, once established, cannot be changed unless the change is intended to be permanent.
- ◆ In determining if overtime has been worked, time paid for hours not worked, such as leave time, do not have to be included in the calculation.
  - In calculating overtime, each workweek stands alone.
  - The employer cannot average the hours of work in two or more workweeks.
- ◆ An employee of a local government who is covered by the overtime provisions of the FLSA must be paid at 1½ times his or her regular rate for all overtime worked

**--OR--**

Receive compensatory time at the rate of 1½ hours of compensatory time for each hour of overtime worked in a workweek provided certain conditions have been met.

- Employees do not have to be paid on weekly basis, but regular and overtime pay for a particular workweek must be paid on the regular payday for the pay period in which the workweek ends.
- If, for some reason, the overtime pay cannot be calculated in time to pay on the regular payday for the workweek, the overtime must be paid as soon as is reasonably practicable, but no later than the following pay period.
- ◆ In determining an employee's regular rate for calculating the overtime rate, all remuneration paid to the employee for work performed must be included.
  - All rates must be reduced to a workweek basis for purposes of calculating regular rate.
  - Employees may be paid on an hourly or salary basis, but an employee who is paid on a salary basis is not exempt from the overtime provisions of the FLSA unless they meet all the requirements for exemption.
- ◆ Overtime must be paid to covered employees and an employee cannot waive his or her right to overtime pay.
- ◆ Employers cannot relieve themselves of the obligation to pay overtime by merely having a policy which states "all overtime must be approved in advance" or "no overtime is allowed." As stated earlier, the employer is obligated to recognize and pay for all hours which the employer knows or has reason to believe that work has been performed
- ◆ A partial overtime exemption is allowed for fire protection and law enforcement employees. (The attached chart summarizes this exemption).

### **Special Overtime Provisions**

- ◆ With their agreement, employees of hospitals and residential care establishments may receive overtime in excess of 80 hours in fixed 14 day period or for work in excess of 8 hours in a day for that period, whichever would be the greater benefit to the employee.
- ◆ Certain seasonal employees may be exempt from the overtime provisions of the FLSA provided that specific criteria are met.

### **Exemptions**

- ◆ Employees who meet the criteria for executive, administrative, and professional employees are exempt from the minimum wage and overtime provisions of the FLSA. (The attached chart shows the criteria for these exemptions.)
- ◆ Employers need to be careful in designating a position as exempt since a wrong designation can cost back overtime wages and possibly an equal amount in liquidated damages plus possible attorney's fees.
- ◆ The actual job duties and responsibilities determine if a job is exempt and not job titles or job descriptions.
- ◆ Factors such as high salary, an advanced college degree, or special knowledge or skills do not, in themselves, automatically make a job exempt.
- ◆ Before an employee can be considered for an exemption, he or she must be "truly salaried" which limits salary deductions and charges to earned leave for absences from work.

### **Special Provisions - State and Local Governments**

- ◆ On November 13, 1985, a group of amendments to the FLSA was signed into law which affect the application of the FLSA to state and local governments.
  - The significant areas of these amendments deal with compensatory time, , occasional or sporadic employment, special duty work, substitution, and volunteers.
  - These amendments apply only to state and local governments and do not affect the application of the FLSA to private sector employers.
- ◆ Compensatory time
  - Compensatory time (or comp time) may be given in lieu of cash overtime payment at a rate of 1½ times the amount of overtime worked. However, there must be a collective bargaining agreement or an agreement or understanding between the employer and employee, prior to the overtime being worked, that overtime will be paid in the form of comp time.
    - \* While it is not required, it is advisable to have this agreement in writing.
    - \* Once this agreement is made, the employer can pay for overtime in the form of cash overtime, comp time, or a combination of both.
  - Most employees can accrue up to a maximum of 240 hours comp time while employees in public safety and certain emergency response positions may accrue up to 480 hours.

### **Special Provisions - State and Local Governments** (continued)

- \* Once the maximum accrual has been reached, any additional overtime worked must be paid at 1½ times the employees regular rate until sufficient time has been used to bring the comp time balance below the maximum.
- Employees must be allowed to use their accrued compensatory time within a reasonable time after is requested provided their absence does not unduly disrupt the employer's operations.
  - \* The stance of the Department of Labor is that the term “unduly disrupt” goes far beyond merely inconveniencing the employer.
  - \* In a decision by the United States Supreme Court (*Christensen v. Harris County*) it was determined that an employer has the right to require employees to use their earned comp time.
  - \* Since comp time is actually a form of delayed overtime payment, an employer cannot make an employee forfeit comp time that is not used within a particular time period.
  - \* An employer can “buy back” all or part of an employee's unused comp time by paying for it at the employee's current regular rate.
  - \* Employees who terminate, for any reason, must be paid for all unused comp time at either the employee's current regular rate or the average regular rate for the past three years, whichever is greater.
- ◆ Occasional or sporadic employment
  - Employees may, solely at their option, perform occasional or sporadic work for the county without the extra hours counting toward overtime calculations provided the additional work is in a different capacity from their regular jobs.
  - The term “occasional or sporadic” is defined as infrequent, irregular, or occurring in scattered instances.
- ◆ Special duty work
  - Fire protection and law enforcement personnel may work for a separate employer in their normal activity without the time being counted toward the hours used to determine overtime.
  - This decision to work special duty work must be made solely by the employee without coercion by the employer.
- ◆ Substitution
  - Employees may, solely at their option, substitute for fellow employees in jobs in the same capacity without the hours being subject to calculation for overtime provided the employer knows of and approves of the substitution.
  - When one employee substitutes for another under this provision of the FLSA, each employee will be credited as if he or she had worked his or her normal work schedule for that shift.
- ◆ Volunteers
  - Citizens who are not employees of the county may do volunteer work for the county in any capacity as long as the individual has no expectation of or

### **Special Provisions for State and Local Governments** (continued)

receives no remuneration for his or her services. Paid expenses, reasonable benefits, or nominal fees will not negate a person's volunteer status.

- Employees of the county may volunteer their services to the county provided the decision to do volunteer work is the decision of the employee without any coercion from the county, and the volunteer work is in a different capacity from the duties the employee provides for the county in his or her regular job.

### **Recordkeeping**

- ◆ The FLSA requires an employer to keep specific records which include:
  - 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 the 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.
- ◆ Most of the required records are probably kept already as a matter of good business practice and to comply with other laws.

### **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 premises and records; and question employees to determine whether any person has violated any provision of the FLSA. 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 failing to pay proper minimum wage and overtime pay.

### **Enforcement** (continued)

- 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 a suit on their behalf for relief or reinstatement to their jobs 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 violations, in which case a 3-year statute of limitations applies.

***NOTE:** This paper is provided for informational purposes only. Nothing in this paper is intended to be, nor should it be construed as, legal advice or guidance. Where legal assistance is needed, the services of a qualified attorney should be sought*

**Executive, Administrative, and Professional Exemptions**  
**Under the Fair Labor Standards Act**

An exemption from both the minimum wage and overtime pay requirements is provided in section 13(a)(10) of the Fair Labor Standards Act (FLSA) for any employee employed in a bona fide executive, administrative, or professional capacity, as these terms are defined and delimited in regulations of the Secretary of Labor. An employee will qualify for an exemption if he or she meets all the pertinent tests relating to duties, responsibilities, and salary as stipulated in the applicable section of 29 CFR, Part 541.

---

**Executive Employees**

The term employee employed in a bona fide executive \* \* \* capacity in section 13(a)(1) of the Act shall mean any employee:

- (a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and
- (b) Who customarily and regularly directs the work of two or more other employees therein; and
- (c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and
- (d) Who customarily and regularly exercises discretionary powers; and
- (e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: Provided, That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which he is employed; and
- (f) Who is compensated for his services on a salary basis at a rate of not less than \$155 per week (or \$130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities:

Provided, That an employee who is compensated on a salary basis at a rate of not less than \$250 per week (or \$200 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

### Administrative Employees

The term employee employed in a bona fide \* \* \* administrative \* \* \* capacity in section 13(a)(1) of the Act shall mean any employee:

- (a) Whose primary duty consists of either:
  - (1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, or
  - (2) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and
- (b) Who customarily and regularly exercises discretion and independent judgment; and
- (c) (1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or
- (2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or
- (3) Who executes under only general supervision special assignments and tasks; and
- (d) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and
- (e) (1) Who is compensated for his services on a salary or fee basis at a rate of not less than \$155 per week (\$130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, or
- (2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) of this section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which employed:

Provided, That an employee who is compensated on a salary or fee basis at a rate of not less than \$250 per week (\$200 per week if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section.

## Professional Employees

The term employee employed in a bona fide \* \* \* professional capacity in section 13(a)(1) of the Act shall mean any employee:

- (a) Whose primary duty consists of the performance of:
  - (1) Work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or
  - (2) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee, or
  - (3) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the school system or educational establishment or institution by which he is employed, or
  - (4) Work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and who is employed and engaged in these activities as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field, as provided in Sec. 541.303; and
- (b) Whose work requires the consistent exercise of discretion and judgment in its performance; and
- (c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and
- (d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; and
- (e) Who is compensated for services on a salary or fee basis at a rate of not less than \$170 per week (\$150 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: Provided, That this paragraph shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof, nor in the case of an employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of medicine or any of its branches, nor in the case of an employee employed and engaged as a teacher as provided in paragraph (a)(3) of this section:

**Professional Employees (continued)**

Provided further, That an employee who is compensated on a salary or fee basis at a rate of not less than \$250 per week (or \$200 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance either of work described in paragraph (a) (1), (3), or (4) of this section, which includes work requiring the consistent exercise of discretion and judgment, or of work requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section: Provided further, That the salary or fee requirements of this paragraph shall not apply to an employee engaged in computer-related work within the scope of paragraph (a)(4) of this section and who is compensated on an hourly basis at a rate in excess of 6 1/2\ times the minimum wage provided by section 6 of the Act.

**Special Overtime Pay Provision:**  
**Fire Protection and Law Enforcement Employees**

Section 207(k) of the Fair Labor Standards Act provides a partial overtime exemption for public agency employees employed in law enforcement and fire protection activities. Under this provision, a state or local government can establish a work period of from 7 to 28 consecutive days, in lieu of the workweek, for paying overtime. There is no requirement that there be any particular relationship between this work period and the work schedule adopted by the agency for its other employees. The maximum number of hours that a law enforcement or fire protection employee must work under this program before overtime is paid depends on the number of days selected for the work period. The following table sets forth the maximum work hour standards for work periods that range between 7 and 28 days before a state or local government agency is required to pay overtime to law enforcement and fire protection employees

Work Period: Days	Maximum Hour Standards	
	Law Enforcement	Fire Protection
7	43	53
8	49	61
9	55	68
10	61	76
11	67	83
12	73	91
13	79	98
14	86	106
15	92	114
16	98	121
17	104	129
18	110	136
19	116	144
20	122	151
21	128	159
22	134	167
23	141	174
24	147	182
25	153	189
26	159	197
27	165	204
28	171	212