



# County Technical Assistance Service

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## Fair Labor Standards Act (FLSA)

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We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other e-Li material.

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## Fair Labor Standards Act (FLSA)

**Reference Number:** CTAS-128

The federal Fair Labor Standards Act (FLSA) sets basic minimum wage and overtime pay standards, establishes recordkeeping requirements and regulates child labor.<sup>[1]</sup> The FLSA has applied to state and local governments since 1985 when the United States Supreme Court decided the case of *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>[2]</sup> which reversed its 1976 decision in *National League of Cities v. Usery* and held that the FLSA applies to employees of state and local governments.

As a result of *Garcia*, Congress enacted amendments to the FLSA which authorized the use of compensatory time in lieu of cash compensation for overtime work by state and local government employees. In addition, the amendments provided an exemption from the overtime and minimum wage requirements of the FLSA for volunteers under specified circumstances; authorized special detail work by public safety employees without overtime costs for the county; and defined limited circumstances under which government employees can do part-time work for the county in their off-duty hours without the county incurring overtime costs for the additional hours.

The U.S. Department of Labor (DOL) promulgates rules and regulations to implement the provisions of the FLSA, which can be found in the Code of Federal Regulations (C.F.R.). The regulations contain detailed explanations of how the various provisions of the FLSA are applied, and often include examples to aid in interpreting the law. Copies of these regulations, as well as other useful publications, are available from the local DOL offices located across the state.

All local governments should periodically undertake a review of their employment practices to ensure that they are in conformity with the requirements of the FLSA and any new rules enacted by any recent amendments. Local governments should conduct job studies (reviewing job duties), write accurate job descriptions, assign properly descriptive job titles and perform periodic audits or reviews to consider exemptions applicable and continued compliance with the FLSA's provisions.

Almost as important as what the FLSA does, is what it does not do. The FLSA does not require any of the following:

1. Vacation, holiday, severance, or sick pay;
2. Employees be paid on a salary basis or hourly wage basis for non-overtime work;
3. Meal or rest periods, holidays off, or vacations;
4. Premium pay for weekend or holiday work;
5. Payroll on a weekly basis;
6. Pay raises or fringe benefits;
7. Discharge notice, reason for discharge, or immediate payment of final wages; or
8. Any limit on the number of hours of work for persons 16 years of age and over.

These and similar matters are left to the discretion of the employer. Which official within the county is legally authorized to make personnel decisions is an important consideration. Both general law and private acts should be consulted to determine the applicable law in a particular county and office.

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[1] The federal Equal Pay Act of 1963, which requires equal pay for equal work regardless of gender, was enacted as an amendment to the Fair Labor Standards Act. It is more commonly associated with discrimination laws and not with wage and hour laws, and it is administered by the federal Equal Employment Opportunity Commission.

[2] 105 U. S. 2041 (1985).

## Application of the FLSA

**Reference Number:** CTAS-130

The FLSA is applicable to all employees of counties, including full and part-time employees, unless they are specifically exempted. Under the FLSA, some workers are considered *not covered*, and thus are not subject to any of the provisions of the FLSA, and others are *covered* employees who are *exempt* from some of the provisions of the FLSA. The payment of a salary in lieu of an hourly wage does not, by itself, remove an employee from the provisions of the FLSA.

The FLSA does not apply to persons who are not “employees.” The determination of whether an employer-employee relationship exists is therefore an important one. The employment relationship requires an “employer” and

an “employee,” and the act or condition of employment. Courts have interpreted the term “employ” as defined in the FLSA broadly as “to suffer or permit to work” and have indicated that mere knowledge by an employer of work done for him or her by another is sufficient to create an employment relationship under the FLSA.

## Non-Covered Workers

**Reference Number:** CTAS-131

The following workers are not included within the definition of “employee” for purposes of the FLSA, and thus are *not covered* by the Act:

1. Independent contractors;
2. Elected officials and their personal staff, policy-making political appointees, and legal advisors;
3. Bona fide volunteers; and
4. Prisoners.

## Independent Contractors

**Reference Number:** CTAS-132

Independent contractors are not covered by the FLSA. There is no simple method for determining whether a worker is an employee or an independent contractor. A determination of the relationship cannot be based on isolated factors or upon a single characteristic or on technical concepts. It depends on all of the circumstances of the whole activity. All the facts relevant to the relationship between the worker and the employer must be considered. In general, workers who are economically dependent on the business of the employer, regardless of their skill level, are employees. Independent contractors are workers with economic independence who are in business for themselves. Among the factors that are considered significant, although no single one is regarded as controlling, are:

1. The extent to which the services in question are an integral part of the employer’s business.
2. Whether the worker’s managerial skills affect his or her opportunity for profit and loss.
3. The relative investments in facilities and equipment by the worker and the employer.
4. The worker’s skill and initiative.
5. The permanency of the worker’s relationship with the employer.
6. The nature and degree of control by the employer.

Each of the above-listed factors should be carefully analyzed, as well as any other relevant factors, to determine whether a person is an independent contractor based on the totality of the circumstances.

There are some factors that the Department of Labor deems immaterial to the determination of whether an employment relationship exists. The fact that the worker signs an agreement stating that he or she is an independent contractor is not controlling. The fact that the worker has incorporated a business or is licensed by a governmental agency is also not determinative. These include the place where the work is performed, the absence of a formal employment agreement, and whether the alleged contractor is licensed by state/local government. Finally, the time or method of payment does not control the determination. For more information, see [FLSA Fact Sheet #13, Am I an Employee? Employment Relationship under the Fair Labor Standards Act](#).

## Elected Officials and Their Personal Staff

**Reference Number:** CTAS-133

Elected county officials are not covered by the FLSA. Also not covered are political appointees to policymaking positions, legal advisors, and the personal staff of elected officials, as long as these persons are not under civil service protection. The exclusions for an elected official’s personal staff and political appointees are very narrowly applied, and great care should be exercised in relying on those exclusions.

To determine whether someone meets one of these exclusions, the definition of “employee” under the FLSA must be examined, together with the administrative interpretations of that definition. The definition of “employee” does not include an individual who:

1. Holds a public elective office of that state, political subdivision, or agency;
2. Is selected by the holder of such an office to be a member of the official’s personal staff;
3. Is appointed by the office holder to serve on a policymaking level;

4. Is an immediate adviser to such an office holder with respect to the constitutional or legal powers of the office; or
5. Is an employee of the legislative branch of that state, political subdivision, or agency; as long as such individuals are not subject to civil service laws of the state, political subdivision, or interstate governmental agency which employs them.<sup>[1]</sup>

The exclusion for personal staff of an elected official is construed very narrowly by the DOL. As explained by the DOL in a Wage and Hour Opinion Letter dated November 27, 1998 (1998 WL 1147737), the exception applies only to individuals who are in a "highly intimate and sensitive position of responsibility" on the staff of the elected official. It generally includes only persons who are hired by and under the direct supervision of the elected official and who have regular direct contact with the official. See Wage and Hour Opinion Letter, September 12, 1997 (1997 WL 971910).

When a publicly elected official appoints an individual to serve on a policymaking board or commission, such an appointed individual is not covered by the FLSA. The most obvious examples of these policymaking appointees are appointed members of planning and zoning commissions, recreation boards, or other boards and commissions that have specific policymaking or advisory responsibilities.

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[1] 29 U.S.C. § 203(e)(2)(C).

## Volunteers

**Reference Number:** CTAS-134

Individuals performing volunteer services for units of state and local governments are not considered "employees" under the FLSA, and are therefore not covered by the act. The regulations governing volunteers are found in 29 C.F.R. §§ 553.100 - 553.106. A volunteer is an individual who performs a service for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation. These services must be offered freely and without pressure or coercion, direct or implied, from the employer. Individuals performing volunteer services for counties will not be regarded as employees for purposes of the FLSA. However, an employee cannot volunteer to perform services for his or her own employer that are similar to the services the employee is paid to do. For example, a full-time paid firefighter could not agree to identify a portion of the workweek as "volunteer time." An employee cannot be both a paid employee and a non-paid volunteer while performing the same type of work for the same employer.

For county employees who want to volunteer their time, two determinations must be made: (1) whether the services are performed for the same employer, and (2) whether the services are the same or similar to those the employee is paid by the county to do. Whether two units of a county are considered the same employer (same public agency) depends on the facts and circumstances, determined on a case-by-case basis. One factor the DOL considers is whether the agencies or departments are treated separately for statistical purposes in the Census of Governments, issued by the Bureau of the Census, U. S. Department of Commerce. The DOL normally takes an expansive view of the county as an employer, and if the agency for which a county employee wishes to volunteer is even remotely related to the county government, it might be wise to seek an opinion from the Wage and Hour Division on the issue.<sup>[1]</sup>

If the volunteer services are being performed for the same public employer, the services cannot be the same or similar services that the employee is paid to perform. The *same or similar services* means similar or identical services, based on all of the facts and circumstances. The DOL will consider such things as the three-digit categories of occupations in the *Dictionary of Occupational Titles*, as well as whether the volunteer duties are closely related to either the actual duties performed or the responsibilities assigned to the employee.

The DOL has issued several opinion letters on these issues. In an opinion dated October 5, 1987, the DOL stated that fire truck drivers in the same district could not work additional time for the same district without the hours worked being counted and compensated in accordance with the FLSA. In a ruling dated January 2, 1988, the DOL stated that a firefighter could volunteer the same services for a different public agency in another jurisdiction. In Opinion FLSA2008-11NA dated September 22, 2008, the DOL found that detention officers cannot volunteer for the same public agency as sheriff deputies.

The DOL also has issued opinions confirming that public employees can perform volunteer work for the same employer, as long as the volunteer work is substantially different from their paid position. For example, in a letter

dated May 7, 1986, the Wage and Hour Division stated that a full-time paid high school custodian could volunteer services to the high school as an assistant basketball coach. See also *Purdham v. Fairfax County School Board*, 637 F.3d 421 (4th Cir. 2011) (the court held that where a public employee engages in services different from those he or she is normally employed to perform, and receives no compensation or only a nominal fee, such work is exempt from the FLSA and the public employee is deemed a volunteer). Because all of these issues are decided on the facts and circumstances of the particular case, any county wishing to rely on such opinions would be well advised to request an opinion letter based on its own facts and circumstances.

Volunteers can be reimbursed for *expenses, reasonable benefits, and nominal fees* without losing their volunteer status. The DOL's regulations do not include any dollar limitation on the amount of money that can be paid to volunteers. The regulations state that a fee will not be considered nominal if it is tied to "productivity." The regulations make clear, however, that fees may be paid on a per-call or similar basis (e.g., a point system). The determination of whether an individual should lose volunteer status and be considered an employee for purposes of the FLSA will be made by DOL on the basis of an examination of the total amount of payments made, including fees, benefits, and expenses, "in the context of the economic realities of the total situation." Examples of allowable payments include uniform allowances, reasonable cleaning expense reimbursement, and compensation for wear and tear on personal clothing. These must be limited to actual reimbursement amounts and cannot be artificially high. Reasonable payments are permitted for tuition, books, supplies, transportation, and meal costs involved in training a volunteer to teach them to perform efficiently the services they will provide as a volunteer.

Some reasonable benefits also may be provided, such as liability, health, life, disability, worker's compensation, a nominal monthly or annual stipend or a "per call" stipend so long as these are nominal in the context of the economic realities of the particular situation. The regulations define allowable "reasonable benefits" to include a wide range of benefits such as pensions and length of service awards, and eliminate the requirements that benefits be "service-related" and be provided to county employees who perform the same type of services as the volunteers in order to qualify as allowable reasonable benefits.

In an opinion letter dated November 9, 1986, the DOL addressed the "reasonable benefits" issue in the context of volunteer firefighters. In this particular instance, the locality proposed to reward its firefighters with the following benefits:

1. Minimum water and sewer allotments—valued at \$9.00 and \$5.50 per month, respectively;
2. Membership in the government's swimming pool—valued at \$20 per month for a single person and \$30 per month for a family, for the pool season of three months; and
3. A contribution to a retirement investment fund—valued at \$250 per year, with an increase of \$25 per year up to \$500.

In this case, the DOL ruled that the benefits offered were nominal in value and therefore would not affect the volunteer status of the firefighters.

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[1] One issue that has been fairly controversial is whether a county employee such as an EMT or paramedic can volunteer the same services to a volunteer rescue squad or volunteer fire department within the county. The DOL appears to have relaxed its views somewhat in this area in light of a case in another jurisdiction, *Benshoff v. Virginia Beach*, 180 F.3d 136 (4<sup>th</sup> Cir. 1999). If the employee volunteers freely and without coercion, and if the volunteer organization is independently chartered with separate by-laws and policies and it is sufficiently separate from the county, the employee may volunteer even though the county provides some funding to the volunteer organization. See Wage and Hour Opinion Letters dated May 22, 2002 (2002 WL 32487830), June 5, 2002, and November 27, 2001.

## Prisoners

**Reference Number:** CTAS-135

Prisoners who are required to work by or for the government are not considered employees under the FLSA and need not be paid minimum wages or overtime. Use of inmate labor does not violate the FLSA if the prisoner works for or is required to work by the government having custody of the prisoner. However, if the inmates are contracted out to a private contractor, this can create an employment relationship requiring the payment of wages in accordance with the FLSA if the private contractor exercises sufficient control over the prisoner to give rise to an employer-employee relationship. Even where minimum wage is required, deductions for restitution or other matters set by law or court order may reduce the wages below minimum wage so long as the employer does not gain from the deduction.

## Exempt Employees

**Reference Number:** CTAS-136

In addition to the workers who are not covered by the FLSA, there are some employees who are exempt from the minimum wage and overtime provisions of the Act. These employees are not required to be paid overtime when they work in excess of 40 hours in a workweek. These employees are, however, subject to some of the record-keeping provisions of the FLSA. Although payment of a salary is an essential element of many exemptions, *the fact that an employee is paid a salary does not by itself make an employee exempt.*

## Executive, Administrative and Professional Exemptions

**Reference Number:** CTAS-137

These exemptions are sometimes called the “white collar” or “Section 541” exemptions, and are governed by the federal regulations found at 29 C.F.R. part 541. These regulations contain detailed requirements for the application of the exemptions. Employers should thoroughly review all of their wage and hour practices and make adjustments to ensure compliance with the rules.

The employer has the burden of proving that a particular exemption applies to a particular employee and, therefore, the employer takes the exemption at his or her peril. Also, even though executive, administrative, and professional employees are specifically excluded from the provisions of the FLSA with regard to minimum wage and overtime, these employees are not exempt from the equal pay provisions and some of the recordkeeping provisions.

In order to qualify for one of these exemptions, an employee must meet certain tests regarding minimum compensation, job duties and responsibilities, and the employee must be paid on a “salary basis.” Under the old regulations, each of the white collar exemptions had a “Short Test” and a “Long Test” but these tests have been combined into a single test for each exemption. All of the white-collar exemptions require employees to be paid on a “salary basis” and their “primary duty” must be the performance of exempt work that varies by exemption. An employee who satisfies the test for a white-collar exemption is exempt from the minimum wage and overtime requirements of the FLSA.

## The Salary Basis Requirement

**Reference Number:** CTAS-138

The “salary basis” test is a threshold requirement for the executive, administrative, and professional exemptions.<sup>[1]</sup> To meet this requirement, an employee must receive each pay period on a weekly or less frequent basis a predetermined amount that is not subject to reduction for the quality or quantity of work performed. The regulations were revised effective January 1, 2020. Under current regulations, the amount of the guaranteed salary cannot be less than \$684 per week (which translates into \$35,568 per year). The employee must receive the full salary for any week in which any work is performed, without regard to the number of days or hours worked, but exempt employees are not required to be paid for any week in which no work was performed.<sup>[2]</sup>

The \$684 minimum weekly salary may be translated into an equivalent amount for periods longer than one week (for example, the \$684-per-week requirement will be met if the employee is compensated biweekly on a salary basis of not less than \$1,368, semimonthly on a salary basis of not less than \$1,482, or monthly on a salary basis of not less than \$2,964). However, the shortest period of payment that will meet this compensation requirement is one week.<sup>[3]</sup>

Also, the \$684 minimum weekly salary is not dependent on the number of hours worked in the workweek. Part-time employees are subject to the \$684 minimum weekly salary in the same way full-time employees are. It cannot be pro-rated to account for the reduced number of hours worked by part-time employees. See Wage-Hour Opinion Letter FLSA2008-1NA (2008 WL 1847289), Feb. 14, 2008.

The regulations contain exceptions that allow deductions from an exempt employee’s pay for the following limited reasons: (1) deductions for absences of one or more full days for personal reasons other than sickness or disability (for example, if an employee is absent for one and one-half days for personal reasons, an employer could only deduct one day; however, the regulations contain a special provision that allows public employers to make deductions for absences of less than one day); (2) deductions for absences of one or more full days for sickness or disability if the employer has a paid sick/disability leave plan in place and the employee has used up his or her paid sick or disability leave (a special provision allows public employers to make deductions for absences of



less than one day); (3) deductions to offset any amounts the employee may receive as jury fees, witness fees, or military pay while an employee is on leave for one of these reasons (the employer cannot make deductions for the actual absences for jury duty, witness duty, or temporary military leave; only the pay may be offset); (4) deductions made in good faith for violations of safety rules of major significance (such as rules prohibiting smoking in explosive plants, oil refineries or coal mines); (5) employers may make deductions for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules that are part of written policies applicable to all employees (for example, suspension for violating a written policy prohibiting sexual harassment or workplace violence); (6) the employer is not required to pay full compensation for the first or last week of employment but instead may pay a proportionate part of the employee's salary for the time actually worked during those weeks; and (7) an employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act (FMLA), but instead may pay a proportionate share of the salary for the time actually worked. When calculating the amount of the deductions, the employer may use the hourly or daily equivalent of the employee's full weekly salary or any other amount proportional to the time actually missed. A deduction for major safety violations may be made in any amount.<sup>[4]</sup>

Because the strict salary basis test presented problems for employers in the public sector with regard to deductions for less than one day's absence due to the generally accepted principle that public sector employees should not be paid for time not worked or covered by leave, the DOL issued regulations addressing this issue. The regulations<sup>[5]</sup> state:

a. An employee of a public agency who otherwise meets the salary basis requirements of § 541.602 shall not be disqualified from exemption under § 541.100, 541.200, 541.300, or 541.400 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because:

1. permission for use has not been sought or has been sought and denied;
2. accrued leave has been exhausted; or
3. the employee chooses to use leave without pay.

b. Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

Under these regulations, a public employee who otherwise meets the requirements for an executive, administrative, or professional exemption does not lose the exemption if the employee is paid according to a pay system under which the employee accrues personal leave and sick leave and, absent the use of such accrued leave, the pay system requires the employee's pay to be reduced for absences for personal reasons or because of illness or injury of *less than one work day*.<sup>[6]</sup> These regulations also allow a public employer to place an exempt employee on furlough for budget-required reasons without disqualifying the employee from being paid on a salary basis, except in the workweek in which the furlough occurred and the employee's pay was reduced.

With regard to disciplinary deductions, DOL recognizes the increasing liability of employers for their employees' conduct, particularly with respect to sexual harassment, workplace violence, drug and alcohol violations, and violations of state or federal laws, and the corresponding need for employers to be able to impose disciplinary suspensions of less than one week without pay for violations of workplace conduct rules. The regulations allow these deductions as long as there is a written policy in place that applies to all employees. The employer can suspend an exempt employee for one or more full days for disciplinary reasons under the written policy without losing the exemption.<sup>[7]</sup>

Current regulations provide that employers will not lose the exemption if an employee's pay is merely "subject to" impermissible deductions; instead, the employer must have an "actual practice" of making improper deductions. There is a "safe harbor" rule that protects employers from violations of the salary basis test through impermissible pay deductions if the employer demonstrates a good faith effort to comply with the FLSA by:

1. Having a clearly communicated policy that prohibits improper pay deductions;
2. Having a complaint mechanism in place that allows employees to bring the mistake to the employer's attention;
3. Reimbursing the employee for improper deduction(s); and
4. Making a good faith commitment to comply in the future.<sup>[8]</sup>

Under old rules, it was possible to violate the salary basis test by seemingly inconsequential actions as having exempt employees punch a time clock, or by paying exempt employees overtime and compensatory time. The

current regulations eliminate these problems by providing that an exempt employee can receive additional compensation above the guaranteed minimum salary, and it can be based on additional hours worked beyond the normal workweek. The additional compensation may be paid on any basis, including flat sum, bonuses, straight-time hourly amounts, time-and-one-half or any other hourly basis, and it may include compensatory time. 29 C.F.R. § 541.604.

The following groups of employees are *not subject to the salary basis test*: teachers, doctors, lawyers, and those software professionals who are paid on an hourly basis at least \$27.63 per hour. These occupations have special rules exempting them from the salary basis test.<sup>[9]</sup> Also, for academic administrative employees the salary basis requirement can be met by compensation on a salary basis at a rate at least equal to the entrance salary for teachers in the educational establishment where the employee is employed.<sup>[10]</sup>

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[1] The salary basis requirement does not apply to lawyers and licensed or certified doctors and teachers. For certain computer-related occupations under the professional exemption, they need not be paid a salary if they are paid on an hourly basis at a rate not less than \$27.63 an hour. See FLSA Fact Sheet No. 17A, Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees under the Fair Labor Standards Act (U.S. Department of Labor, Wage and Hour Division). Also, for academic administrative employees the salary basis requirement can be met if the employee is compensated on a salary basis at a rate at least equal to the entrance salary for teachers in the educational establishment where the employee is employed. 29 C.F.R. §§ 541.204(a)(1), 541.600.

[2] 29 C.F.R. §§ 541.600, 541.602.

[3] 29 C.F.R. § 541.600(b).

[4] 29 C.F.R. § 541.602.

[5] 29 C.F.R. § 541.710.

[6] These special provisions apply only when the absence is occasioned by the employee for illness or personal reasons. Deductions cannot be made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions cannot be made for time when work is not available. 29 C.F.R. § 541.602.

[7] 29 C.F.R. § 541.602(b)(5). In the preamble to the 2004 amendments the DOL stated that the rules regarding deductions for violations workplace conduct rules are to be narrowly construed to apply only to serious conduct issues and not to employee performance or attendance. Accordingly, disciplinary deductions for chronic tardiness or absenteeism would not be allowed.

[8] 29 C.F.R. § 541.603.

[9] 29 C.F.R. §§ 541.303, 541.304, 541.600.

[10] 29 C.F.R. §§ 541.204(a)(1), 541.600.

## The Primary Duty Requirement

**Reference Number:** CTAS-139

In addition to the salary basis test, each of the white-collar exemptions contains a primary duty requirement, which varies with the exemption. “Primary duty” is defined as “the principal, main, major or most important duty that the employee performs” and it “must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.”<sup>[1]</sup> The regulations set out the following factors that may be considered, among other things, as a guide to determining whether an employee satisfies the primary duty requirement:

- The relative importance of the exempt duties as compared with other types of duties;
- The amount of time spent performing exempt work;
- The employee’s relative freedom from direct supervision; and
- The relationship between the employee’s salary and the wages paid other employees for the kind of non-exempt work performed by the employee.

The amount of time spent performing exempt work is considered a “useful guide” under the regulations, but it is not the determining factor. The regulations have eliminated any absolute requirement that an employee spend more than 50 percent of his or her time performing exempt work, stating instead that employees who spend more than 50 percent of their time performing exempt work generally will satisfy the primary duty requirement but time alone is not the sole test. Employees who spend less than 50 percent of their time performing exempt duties can still be exempt if the other factors warrant that conclusion.<sup>[2]</sup> Executive employees who perform both exempt and non-exempt work generally will not be disqualified from exemption as long as the executive makes the decision

regarding when to perform non-exempt duties and the executive remains responsible for the success or failure of the business operations under his or her management while performing non-exempt duties.<sup>[3]</sup>

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<sup>[1]</sup> 29 C.F.R. § 541.700(a).

<sup>[2]</sup> 29 C.F.R. § 541.700.

<sup>[3]</sup> 29 C.F.R. § 541.106.

## Executive Employee Exemption

**Reference Number:** CTAS-140

The executive exemption applies to managerial employees. To be classified as a bona fide executive employee under the FLSA regulations, all of the following requirements must be met:<sup>[1]</sup>

1. The employee must be compensated on a salary basis at a rate not less than \$684 per week (\$35,568 per year);
2. The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
3. The employee must customarily and regularly direct the work of two (2) or more other full-time employees, or their equivalent; and
4. The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

The regulations give the following examples of "management" functions: interviewing, selecting, and training employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; appraising their productivity and efficiency for the purpose of recommending promotions or other changes in their status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among employees; determining the type of materials, supplies, machinery or tools to be used; and providing for the safety of the workers and the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.<sup>[2]</sup>

The requirement that an executive employee direct the work of two or more employees is satisfied when the executive supervises at least two full-time employees or the equivalent. For example, the executive could supervise one full-time employee and two part-time employees, or four part-time employees.<sup>[3]</sup> The phrase "customarily and regularly" as used in the regulations signify a greater frequency than occasional, but may be less than constant.<sup>[4]</sup>

The regulations also contain factors that may be considered in determining whether the executive employee's suggestions and recommendations are given "particular weight." These factors include: whether it is part of the employee's job to make suggestions and recommendations; the frequency with which they are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon. The employee's suggestions and recommendations may have "particular weight" even if a higher level manager's recommendation has more importance or even if the employee does not have the ultimate decision making authority.<sup>[5]</sup> Evidence that an employee's recommendations are given particular weight could include the employee's job description, testimony that the recommendations were made and considered, and performance reviews that show the employee's role in other Workers' promotions or other change in status.

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<sup>[1]</sup> 29 C.F.R. § 541.100.

<sup>[2]</sup> 29 C.F.R. § 541.102.

<sup>[3]</sup> 29 C.F.R. § 541.104.

<sup>[4]</sup> 29 C.F.R. § 541.701.

<sup>[5]</sup> 29 C.F.R. § 541.105.

## Administrative Employee Exemption

**Reference Number:** CTAS-141

To qualify for this exemption, an employee's primary duty must be the performance of work that is directly related to the management or general business operations of the employer. The exemption generally includes executive and administrative assistants, advisory specialists, and employees who are in charge of a functional department that may include only one person. To be classified as a bona fide administrative employee under the FLSA, all of the following requirements<sup>[1]</sup> must be met:

1. The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$684 per week (\$35,568 per year);
2. The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
3. The employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.

To meet the requirements of the exemption, the employee must perform work that is directly related to assisting with the running or servicing of the business. Work directly related to management policies or general business operations is defined under the regulations to include, but not be limited to, work in functional areas such as tax, finance, accounting, budgeting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, government relations, computer network and Internet activities, legal and regulatory compliance and similar activities.<sup>[2]</sup>

The regulations set out ten factors for determining whether an employee meets the requirement that the employee exercise "discretion and independent judgment with regard to matters of significance." These factors are:

1. Whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices;
2. Whether the employee carries out major assignments in conducting the operations of the business;
3. Whether the employee performs work that affects the business operations to a substantial degree, even if the employee's assignments are related to the operation of a particular segment of the business;
4. Whether the employee has authority to commit the employer in matters that have significant financial impact;
5. Whether the employee has authority to waive or deviate from established policies and procedures without prior approval;
6. Whether the employee has authority to negotiate and bind the company on significant matters;
7. Whether the employee provides consultation or expert advice to management;
8. Whether the employee is involved in planning long- or short-term business objectives;
9. Whether the employee investigates and resolves matters of significance on behalf of management; and
10. Whether the employee represents the company in handling complaints, arbitrating disputes, or resolving grievances<sup>[3]</sup>

The regulations also state that the "discretion and independent judgment" requirement still can be met even if their decisions are subject to review at a higher level, and even if the employee's duties consist of recommending action rather than the actual taking of action, as long as the other relevant factors warrant the conclusion. However, it must be more than the use of skill in applying well-established procedures or standards described in manuals<sup>[4]</sup> or other sources, and it does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work.<sup>[5]</sup>

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<sup>[1]</sup> These requirements are set out in 29 C.F.R. § 541.200.

<sup>[2]</sup> 29 C.F.R. § 541.201.

<sup>[3]</sup> 29 C.F.R. § 541.202.

<sup>[4]</sup> In 29 C.F.R. § 541.704, it is noted that the use of manuals does not automatically exclude an employee from an exemption. The use of manuals, guidelines or other procedures that relate to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills does not affect an employee's exempt status.

<sup>[5]</sup> 29 C.F.R. § 541.202.

## Professional Employee Exemption

**Reference Number:** CTAS-142

Generally included in this exemption are the so-called “learned professions” such as medicine, law and dentistry; artistic professions and architects; teachers and professors; engineers and scientists; registered nurses; computer programmers, computer systems analysts, and software engineers; and some accountants, depending on training and job duties.<sup>[1]</sup> To qualify for the learned professional exemption under the FLSA, all of the following requirements<sup>[2]</sup> must be met:

1. The employee must be compensated on a salary or fee basis at a rate not less than \$684 per week (\$35,568 per year);<sup>[3]</sup>
2. The employee’s primary duty must be the performance of work requiring advanced knowledge, defined as work that is predominantly intellectual in character and includes work requiring the consistent exercise of discretion and judgment;
3. The advanced knowledge must be in a field of science or learning; and
4. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

The regulations state that the phrase “work requiring advanced knowledge” means that it must be predominately intellectual in character which requires the exercise of discretion and judgment. The phrase “field of science or learning” includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status. The phrase “customarily acquired by a prolonged course of specialized intellectual instruction” restricts this exemption to professions where specialized academic training is a standard pre-requisite for entrance into the profession, or employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained their knowledge through a combination of work experience and intellectual instruction.<sup>[4]</sup>

Certified public accountants generally meet the requirements for the exemption, and many other accountants who are not CPAs but who perform similar job duties may qualify, but accounting clerks, bookkeepers and other employees who perform a great deal of routine work usually will not qualify as exempt professionals.<sup>[5]</sup>

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<sup>[1]</sup> There is also an exemption for creative professionals such as artists, musicians, actors and writers, but since counties generally do not employ these kinds of professionals the exemption is not discussed. For more information, see 29 C.F.R. § 541.302.

<sup>[2]</sup> The requirements are set out in 29 C.F.R. § 541.301.

<sup>[3]</sup> These salary requirements do not apply to teachers, doctors, or lawyers. 29 C.F.R. §§ 541.303 and 541.304

<sup>[4]</sup> 29 C.F.R. § 541.301.

<sup>[5]</sup> 29 C.F.R. § 541.301(e)(5).

## Computer Employee Exemption

**Reference Number:** CTAS-143

The regulations consolidated the requirements for certain highly-compensated computer professionals. Computer analysts, computer programmers, software engineers and other similarly skilled workers in the computer field are eligible for this exemption. To qualify for the computer professional exemption under the FLSA, the following requirements<sup>[1]</sup> must be met:

1. The employee must be compensated either on a salary or fee basis at a rate not less than \$684 per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;
2. The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
3. The employee’s primary duty must consist of:
  - 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; or
- A combination of the aforementioned duties, the performance of which requires the same level of skills.

This exemption does not include employees who repair computer hardware and related equipment. Computer employees who do qualify for this exemption often have duties that would qualify them for the administrative or executive exemptions.

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[1] The requirements are set out in 29 C.F.R. § 541.401.

## Highly Compensated Worker Exemption

**Reference Number:** CTAS-144

The regulations create a special category of exemption for employees who earn \$107,432 or more per year, known as the “highly compensated worker” rule. An employee meets this exemption if he or she meets the following requirements:<sup>[1]</sup>

1. The employee earns total annual compensation of \$107,432 or more, which includes at least \$684 per week paid on a salary or fee basis;
2. The employee’s primary duty includes performing office or non-manual work; and
3. The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

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[1] The requirements are set out in 29 C.F.R. § 541.601.

## Seasonal Recreational Employees

**Reference Number:** CTAS-145

Section 13(a)(3) of the FLSA provides an exemption from the minimum wage and overtime provisions of the FLSA for “any employee employed by an establishment which is an amusement or recreational establishment, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33-1/3 per cent of its average receipts for the other six months of such year.” Receipts for this purpose are fees received from admissions. Examples of recreational or amusement establishments that may qualify for this exemption are outdoor swimming pools, golf courses and recreational parks that operate on a seasonal basis. A publicly operated amusement or recreational establishment whose operating costs are met wholly or primarily from tax funds would fail to meet the requirements of (B) above so its employees could not qualify for the exemption under that section, but the employees could qualify under (A) above if the establishment is not open more than seven months each year.

## Public Safety Employees

**Reference Number:** CTAS-146

There is an extremely limited exemption from the overtime provisions of the FLSA for law enforcement and fire department personnel in counties that employ fewer than five full or part-time firefighters or fewer than five full or part-time law enforcement officers. All employees on the payroll must be counted, regardless of whether they are currently working, including employees on worker’s compensation leave, parental leave, FMLA leave, administrative leave, etc. This exemption can apply during one week and be inapplicable during the next week.<sup>[1]</sup> See [Public Safety](#) for more details.

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[1] See 29 U.S.C. § 213(b)(20) and 29 C.F.R. § 553.200.

## Wages and Overtime

**Reference Number:** CTAS-147

Payment of both minimum wage and overtime compensation due an employee must ordinarily be made at the regular payday for the workweek, or when the pay period covers more than a single week, at the regular payday for the period in which the particular workweek ends. However, when it is not possible to ascertain, prior to preparing the payroll, the number of overtime hours worked by an employee in the last workweek of the pay period, the requirements of the FLSA will be satisfied if the employer pays the overtime compensation as soon after the regular payday as is practicable. Such a payment should not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for the payment of the amounts due, but in any event not later than the next payday after such computation can be made.

## Minimum Wage Provisions

**Reference Number:** CTAS-164

Every covered, non-exempt worker is entitled to a minimum wage of not less than \$6.55 per hour effective July 24, 2008, and \$7.25 per hour effective July 24, 2009.<sup>[1]</sup> An employee may be paid on a weekly, monthly, or some other basis as long as the employee receives at least the minimum wage for each hour actually worked. Employees may be paid a salary in lieu of hourly compensation so long as the salary meets minimum wage and overtime requirements.

Under some circumstances, certain employees such as disabled workers, apprentices, student workers, and messengers can be exempted from the minimum wage requirements. Special certificates for these exemptions must be obtained from the Wage and Hour Division of the DOL.

**Deductions from Wages.** Deductions may be made from wages for the employee's share of social security, as well as other federal, state, or local taxes, levies or assessments, and for voluntary payments to insurance and retirement plans, without affecting the minimum wage rate. No deductions can be made for any tax which the law requires to be borne by the employer.

Deductions made from wages for items considered primarily for the benefit or convenience of the employer are permitted only to the extent that they do not reduce the wages of employees below the minimum wage or cut into overtime compensation required by the FLSA for non-exempt employees. These items include deductions for damage to the employer's property, cash shortages, uniforms, and tools or equipment used in the employee's work.

If an employee is required to wear a uniform, the cost of the uniform is considered to be a business expense of the employer. If the employer requires the employee to bear the cost, it may not reduce the employee's wage below the minimum wage or cut into overtime compensation required by the FLSA. For example, if an employee who is subject to the statutory minimum wage of \$7.25 is paid an hourly wage of \$7.25, the employer may not make any deduction from the employee's wages (either regular wages or overtime wages) for the cost of the uniform, nor may the employer require the employee to purchase the uniform on his/her own. However, if the employee is paid \$8.00 an hour and works 40 hours in the workweek, the maximum amount the employer could legally deduct from the employee's wages would be \$30.00 ( $\$7.75 \times 40$  hours).

If an employee is required to purchase a uniform and equipment as a condition of employment, the employer is required to reimburse the employee, no later than the first regular payday, to the extent that the cost of the uniform and equipment cuts into the minimum wage or overtime compensation required by the FLSA. For example, if a police officer hired at an hourly rate of \$10.00 is required to purchase a \$65.00 uniform, \$50.00 leather goods and a \$200.00 revolver as a condition of employment, and works 80 hours in his or her first 14-day tour of duty, the \$315.00 of required expenses would have the effect of reducing the officer's compensation below minimum wage and would therefore violate the FLSA ( $\$10.00 \times 80 = \$800.00 - \$315.00 = \$485.00$  or \$6.06 per hour). The employee would have to be paid the difference to bring the wages up to minimum wage ( $\$7.25 - \$6.06 = \$1.19 \times 80 = \$95.20$ ). The \$95.20 must be added to the employee's next paycheck in order for the minimum wage requirements to be met.

There are methods of requiring employees to pay for their uniforms and equipment which are acceptable under the FLSA. The most common method is for the employer to make the initial purchase and prorate deductions from the employees' wages for reimbursement. Another method is by periodic payment of uniform allowances with the employer paying for the initial uniform and equipment. The predominant point to keep in mind is that the employ-

ee's wages can never be reduced below minimum wage, nor can the payment of overtime required by the FLSA be reduced, by the purchase of such required items.<sup>[2]</sup>

If the employer is required by court order to pay monies from wages to a third party under garnishment, wage attachment, or bankruptcy proceedings, such deductions from wages are permissible so long as neither the employer nor anyone acting on the employer's behalf derives any profit or benefit from the transaction.<sup>[3]</sup> Payments so made are considered equivalent to payments of wages to the employee. Further, the FLSA does not prohibit voluntary assignment of wages by the employee to a third party provided that neither the employer nor anyone acting on the employer's behalf directly or indirectly derives any profit or benefit from the transaction.

Detailed rules for deductions from wages can be found in 29 C.F.R. § 531, and are explained in [FLSA Fact Sheet #16, Deductions From Wages For Uniforms and Other Facilities under the Fair Labor Standards Act](#).

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<sup>1</sup> See 29 U.S.C. § 206.

<sup>2</sup> It is the DOL's position that non-voluntary deductions cannot be made from an employee's wages during any week the employee has worked overtime.

<sup>3</sup> The requirements of Title III of the federal Consumer Credit Protection Act (the federal Wage Garnishment Law), 15 U.S.C. § 1671 *et seq.*, and the regulations found at 29 C.F.R. part 870, must be considered when making deductions of this type. That act contains restrictions on the amount of deductions from wages that may be made for payment of debts. State garnishment laws must also be followed.

## Overtime Provisions

**Reference Number:** CTAS-165

The FLSA requires that an employer compensate covered, nonexempt employees who work in excess of a maximum number of hours in an applicable workweek or work period on a time-and-one-half basis for all hours in excess of the number of allowable hours. For most employees the relevant work period is the seven-day workweek, and the maximum number of hours is 40. However, a longer work period may be used for public safety employees and hospital and similar employees if the local government follows specific procedures established by the FLSA. If these specific procedures for establishing longer work periods are not followed, all local government employees covered by the FLSA, including firefighters and law enforcement officers, must be compensated for hours worked in excess of 40 hours in a seven-day period.

Many employees work only a part-time work schedule (e.g., 15 to 20 hours per week). Other employees work full-time but work 35- or 37½-hour workweeks. In such instances, overtime pay under the FLSA is not required to be paid to employees until they work in excess of 40 hours in a workweek. (Note, however, that the employee may be entitled to pay at the regular rate for any additional hours up to 40, depending on the employer's established policy.)

There is no limitation under the FLSA on the number of hours employees may work in any work period. They may work as many hours as they and their employer see fit, as long as they are compensated in accordance with the FLSA's requirements. The FLSA does not require overtime compensation for hours in excess of eight per day (except under the special provisions relating to hospital and similar employees) or for work on Saturdays, Sundays or holidays.

It is not required that overtime compensation be paid weekly. The general rule is that overtime pay earned in a particular work period must be paid on the regular payday for the period. If the correct amount of overtime pay cannot be determined until sometime after the regular pay period, the employer must pay the overtime compensation as soon thereafter as practical, but not later than the next regular pay period.

## Calculating Overtime Pay

**Reference Number:** CTAS-129

Overtime pay is calculated by multiplying the employee's regular rate of pay by one and one-half times the number of overtime hours worked. The regular rate is defined as the rate per hour paid for normal non-overtime work. In cases in which the employee is paid on a weekly basis, the regular rate is determined by dividing the weekly salary by the number of hours in the employee's regular workweek. Payments which need not be included in the regular rate include reimbursement for expenses incurred on the employer's behalf; premium pay for extra time



worked (holidays, weekends, additional hours over regular schedule); discretionary bonuses, gifts and payments in the nature of gifts on special occasions; reasonable uniform allowances; and payments for occasional periods when no work is performed due to vacation, holidays or illness.

The following are examples of compensation paid to non-exempt employees that is includable in the regular rate of pay:

- On-call pay
- Bonuses promised for good attendance, continuation of the employment relationship, incentive, production, and quality of work
- Employee lunch or meal expenses paid by the employer, unless the expense is incurred on the employer's behalf or for the employer's benefit (e.g., dinner money while working late or meal expenses while out of town on business)
- Salaries
- Salary increases, including retroactive increases
- Shift differentials, hazardous duty pay and longevity pay
- Travel expenses of employees going to and from work, if they are paid by the employer

The regular rate of pay and overtime must be calculated prior to making deductions from wages, such as deductions for charitable contributions by the employee, garnishments, insurance premiums paid for the employee's convenience, re-payment of salary advances, withholding taxes for or on behalf of the employee, health plan contributions, and voluntary wage assignments.

The FLSA does not require employers to pay employees on an hourly basis. Their earnings may be determined on a daily rate, salary, commission, or some other basis, but in such case the overtime pay due must be computed on the basis of the hourly rate derived from such earnings. The regular hourly rate of pay of an employee is determined by dividing the total remuneration for employment (except the statutory exclusions) in any workweek by the total number of hours actually worked in the workweek. A few examples will illustrate the application of this principle in particular instances.

## Hourly Rate Employees

**Reference Number:** CTAS-962

If an employee is employed solely on the basis of a single hourly rate, the hourly rate is the "regular rate." For overtime hours the employees must be paid, in addition to the straight-time hourly earnings, a sum determined by multiplying one-half the hourly rate by the number of hours worked over 40 in the week. If, for example, the hourly rate is \$10.00 and an employee works 46 hours in a week, the employee would be entitled to receive \$490.00 (46 hours at \$10.00 plus six hours at \$5.00; or stated another way, 40 hours at \$10.00 plus six hours at \$15.00 (time and one-half)). The regulations governing hourly rate employees are found at 29 C.F.R. § 778.110.

## Day Rates and Job Rates

**Reference Number:** CTAS-963

An employee may be paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and receive no other form of compensation. In such a case the employee's regular rate is found by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. The employee is then entitled to extra half-time pay at this rate for all hours worked over 40 in the workweek. This method of payment is common for school bus drivers. The regulations on this topic are found at 29 C.F.R. § 778.112.

## Employees Paid on a Salary Basis

**Reference Number:** CTAS-964

If an employee is employed solely on a weekly salary basis, the regular hourly rate of pay is computed by dividing the salary by the number of hours which the salary is intended to compensate. Example 1: If an employee is hired at a salary of \$250 and if it is understood that this salary is compensation for a regular workweek of 35 hours, or \$7.14 an hour, when overtime is worked the employee is entitled to receive \$7.14 for each of the first 40 hours and \$10.71 (time and one-half) for each hour thereafter. Example 2: If an employee is hired at a salary of \$350 for a 40-hour week, the regular rate is \$8.75 an hour.

For employees who regularly work less than 40 hours in a workweek, state law requires that the county employer have a written policy in place that states whether the salary is intended to compensate the employee for all hours worked up to and including 40 in the workweek, or whether it compensates the employee for the regular work schedule.<sup>[1]</sup> This will affect the hourly rate, as it did in the two examples above. Also, if the salary does not compensate the employee for the full 40 hours as in the first example above, and if the employee works more than the 35 hours (or other amount) that the salary covers, the employee will have to be paid for the additional hours at the regular hourly rate up to and including 40 hours, and for any hours worked over 40 at the rate of time and one-half.

Where the salary covers a period longer than a workweek, such as a month, it must be reduced to its workweek equivalent. A monthly salary can be converted to its equivalent weekly wage by multiplying by 12 (the number of months) and dividing by 52 (the number of weeks). A semi-monthly salary is converted to its equivalent weekly wage by multiplying by 24 and dividing by 52. The regulations on overtime for salaried employees are found at 29 C.F.R. § 778.113.

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<sup>[1]</sup> T.C.A. § 5-23-104. See Chapter 8.

## Employees Working at Two or More Rates

**Reference Number:** CTAS-965

Where an employee in a single workweek works at two or more different types of work for which different straight-time rates have been established, the regular rate for that week is the weighted average of such rates. That is, the earnings from all such rates are added together and this total is then divided by the total number of hours worked at all jobs. Such an employee may agree with his or her employer in advance to be paid overtime for the type of work that is performed during the overtime hours. An example of this might be a school librarian who also works part of the week as a teacher's aide at a different rate of pay. The regulations on this topic are found at 29 C.F.R. §§ 778.115 and 778.419.

## Multiple Jobs/Dual Employment

**Reference Number:** CTAS-966

The DOL views a county as a single employer so that an employee who works for two different departments of the same county is considered to be working for the same employer. Therefore, all jobs the employee performs for the county must be aggregated for overtime purposes. If both jobs are non-exempt work, see [Employees Working at Two or More Rates](#). If the two jobs are both exempt work, of course there is no overtime problem. If an exempt employee also performs a second job which is non-exempt, the employee's primary duty must continue to be exempt work or the employee will lose the exemption for all of the work. The primary duty requirement is discussed in more detail under [Exempt Employees](#), but essentially if the employee's primary duty continues to be exempt work, the employee may perform some nonexempt work without losing the exemption. The general rule of thumb is that non-exempt work cannot exceed 50 percent of the employee's time, but it depends on the facts and circumstances of each case. Also, while exempt employees must be paid on a salary basis, the regulations now allow exempt employees to receive additional compensation above the guaranteed minimum salary and it can be based on additional hours worked above the normal workweek.<sup>[1]</sup>

There is a limited exception to the requirement that the hours of both jobs be combined for overtime purposes. This occurs when an employee works on an "occasional or sporadic" basis in a different job for the county.

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<sup>[1]</sup> 29 C.F.R. § 541.604.

## Occasional or Sporadic Employment

**Reference Number:** CTAS-967

Where county employees, solely at the employee's option, work occasionally or sporadically for the county in a different capacity from their regular employment, the hours worked in the different jobs are not combined for the

purpose of determining overtime liability. However, two major restrictions apply to this exception: (1) the additional work may be done only on an occasional or sporadic basis; and (2) the work must be in a different capacity from the employee's regular work.<sup>[1]</sup>

"Occasional or sporadic" means infrequent, irregular, or occurring in scattered instances. However, the mere fact it is a recurring activity does not necessarily mean it fails to be occasional or sporadic. The regulations suggest that part-time work that is regularly scheduled is not sufficiently irregular to qualify for the exception.

"Solely at the employee's option" means freely and without coercion, implicit or explicit, from the employer. A suggestion that the employee is free to refuse is allowed. Examples of such activities include taking tickets or providing security for special events, officiating youth sporting events and concession work at special events.

Under the "different capacity" prong of the test, DOL will rely primarily on whether the two jobs are classified as different occupations under the three-digit classification system established by the U.S. Department of Commerce's Dictionary of Occupational Titles (DOT). If they are in the same three-digit occupational category, then they will be deemed not to be sufficiently different. If, however, they fall into separate three-digit occupational classifications, they are likely to be considered sufficiently different to qualify for the exception. The three-digit classifications tend to be relatively broad (e.g., secretaries, stenographers, and typists represent a single occupational category) and, consequently, certain jobs, even though clearly different in a practical sense, will not qualify as "different capacity" jobs for purposes of the exception.

Public safety employees taking on any kind of security or safety function within the same local government are never considered to be employed in a "different capacity," nor are teachers doing coaching or career counseling. It is not clear, however, that this provision is of any real significance as teachers are generally exempt from the FLSA under the exemption for professional employees.

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[1] See 29 C.F.R. § 553.30.

## On-Call Pay

**Reference Number:** CTAS-968

If an employee who is "on call" is free to use the time as he or she pleases, not confined to home or any particular place but required only to leave word where he or she may be reached, the hours spent "on call" generally are not regarded as working time. The FLSA does not require any compensation for carrying a beeper or being on call. However, if the employer chooses to pay the employee for this non-working time, the payment must be included in the employee's regular rate of pay even though it is not attributable to any specific hours worked.<sup>[1]</sup> For example, an employee is paid \$8.00 an hour for 40 hours of work and is paid \$25.00 for being on call over the weekend. If the employee is called back for four hours of work over the weekend, the employee's regular rate would be computed as follows: the employee's total straight time pay is \$320.00 (40 hours x \$8.00) plus \$25.00 "on call" pay plus \$32.00 for four weekend hours of work, or \$377.00. Dividing the employee's total earnings of \$377.00 by 44 hours of work yields a regular rate of \$8.57 for the employee. One-half the regular rate (\$4.29) times four overtime hours equals \$17.16 of overtime pay due the employee, making the total pay due the employee \$394.16 for the week.

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[1] See 29 C.F.R. § 778.223.

## Fixed Salary for Fluctuating Hours

**Reference Number:** CTAS-168

The FLSA authorizes the payment of a fixed salary for fluctuating hours. The regulations<sup>[1]</sup> provide that a salaried employee may have hours of work that fluctuate from week to week and the salary may be paid pursuant to an understanding with the employer that the employee will receive such fixed amount as straight time pay for whatever hours the employee is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding between the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, this kind of salary arrangement is permitted by the FLSA. The amount of the salary must be sufficient

to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour the employee works. The employee must also receive extra compensation, in addition to the regular salary, for all overtime hours worked at a rate not less than one-half his or her regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because the hours have already been compensated at the straight time regular rate under the salary arrangement. The fixed salary can cover hours in excess of 40 hours a week, provided the employee has a clear understanding that the salary constitutes straight-time pay for all hours worked and the straight-time pay is equal to or exceeds the required minimum wage of \$7.25. The fixed salary must be large enough to insure that the employee's hourly earnings from the salary will not fall below minimum wage. The employee must understand that the salary covers whatever hours the job may demand in a particular workweek. The employer must pay the salary even though the workweek is one in which a full schedule of hours is not worked. Also, it should be noted that employees who are paid under the rules for fluctuating workweeks are not eligible to receive compensatory time in lieu of cash overtime payments.

For an employee whose hours of work fluctuate from week to week and who is paid a fixed salary with the clear understanding that the salary constitutes straight-time pay for all hours worked, the regular rate of pay will vary from week to week. The regular rate is obtained for each week by dividing the fixed salary by the number of hours worked in that week, but cannot, of course, fall below the required minimum hourly wage in any week. Since straight-time compensation has already been paid for all hours worked by way of the fixed salary, the employee is entitled to receive overtime pay for each hour worked over 40 in the workweek at a rate of not less than one-half this straight-time compensation. As an example, consider the employee who is compensated on a fluctuating workweek basis at a weekly salary of \$500. If during the course of four weeks the employee works 40, 44, 50 and 48 hours, the regular hourly rate of pay in each of these weeks is \$12.50, \$11.36, \$10.00 and \$10.42. Since straight-time pay for all hours worked has already been paid by the fixed salary, only an additional half-time pay is due for each hour over 40 in each week. For the first week the employee is due \$500.00; for the second week \$522.72 (\$500 plus 4 hours at \$5.68); for the third week \$550.00 (\$500.00 plus 10 hours at \$5.00); for the fourth week \$541.68 (\$500 plus eight hours at \$5.21).

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[1] These regulations are found at 29 C.F.R. § 778.114.

## Determination of Applicable Workweek or Work Period

**Reference Number:** CTAS-969

The FLSA authorizes the establishment of different work periods for different types of employees. The general rule for regular employees applies to all covered local government employees, unless a different work period is properly established as authorized by the FLSA for public safety employees or hospital workers.

For regular employees, the maximum number of allowable hours that may be worked before overtime must be paid is 40 hours per workweek. The workweek, as defined by the FLSA, is a fixed and regularly recurring period of 168 hours or seven consecutive 24-hour periods. The workweek need not coincide with the calendar week but may begin on any day and at any hour of the day. A single workweek may be established for all employees, or different workweeks may be established for different employees or groups of employees. Once the beginning time of an employee's workweek is established it remains fixed, but may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the FLSA.

The FLSA requires a single workweek as its standard and does not permit averaging of hours over two or more weeks. For example, an employee who works 30 hours one week and 50 hours the next must receive overtime pay for the hours worked beyond 40 in the second week, even though the average number of hours worked in the two weeks is 40. This is true regardless of whether the employee works on a standard or swing shift schedule and regardless of whether payment is made on a daily, weekly, bi-weekly, monthly or other basis.

## Overtime Pay May Not Be Waived

**Reference Number:** CTAS-992

The requirement that overtime must be paid after 40 hours a week cannot be waived by agreement between the employer and employees. Similarly, an agreement that only eight hours a day or only 40 hours a week will be counted as working time will clearly fail. An announcement by the employer that no overtime work will be permitted, or that overtime work will not be paid for unless authorized in advance, also will not impair the employee's right to compensation for the overtime work that the employer suffers or permits (has knowledge of).

## Public Safety Employees-7(k) Exemption

**Reference Number:** CTAS-970

The FLSA contains a provision that allows the establishment of longer work periods of not less than seven days nor more than 28 days for public safety employees of state and local governments. This partial exemption from the overtime provisions of the FLSA is often referred to as the "7(k)" exemption, or the "tour of duty" rules.<sup>[1]</sup>

Public safety personnel employees are those employees engaged in fire protection or law enforcement activities. The term also may include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection or law enforcement activities. Since these special rules are limited to public agencies, they do not apply in cases in which public safety services are provided to a county under a contract with a private organization.

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[1] The regulations for this somewhat complicated procedure are found in 29 C.F.R. part 553, subpart C.

## Fire Protection Activities

**Reference Number:** CTAS-971

The regulations setting out the requirements of the § 7(k) partial exemption for fire protection personnel are found at 29 C.F.R. § 553.210. To be eligible for this exemption, an employee must meet all of the following criteria:

- be trained in fire suppression;
- have the legal authority and responsibility to engage in fire suppression;
- be employed by a fire department of a municipality, county, fire district, or state; and
- be engaged in the prevention, control and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

Fire protection employees can include firefighters, paramedics, emergency medical technicians, rescue workers, ambulance personnel, and hazardous materials workers as long as they meet the criteria listed above. There is no limit on the amount of nonexempt work that an employee employed in fire protection activities may perform. If the employee meets the criteria, the employee qualifies for the partial exemption. (The 80/20 rule for firefighters was deleted from the regulations in 2011.)

Not included in the term "employee in fire protection activities" are the so-called "civilian" employees of a fire department, fire district, or forestry service who engage in such support activities as those performed by dispatchers, alarm operators, apparatus and equipment repair and maintenance workers, camp cooks, clerks, stenographers, etc. These support employees do not qualify for the partial exemption.

## Law Enforcement Personnel

**Reference Number:** CTAS-972

The regulations setting out the requirements of the § 7(k) exemption for law enforcement personnel are found at 29 C.F.R. § 553.211. To be eligible for the exemption for law enforcement officers, an employee must meet each of the following three criteria:

- be a uniformed or plain-clothed member of a body of officers and subordinates who are empowered by State statute or local ordinance to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes,

- have the power to arrest, and
- be presently undergoing or have undergone or will undergo on-the-job training and/or a course of instruction and study that typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics.

In order to qualify, a law enforcement employee must spend 80 percent or more of his or her time engaged in law enforcement activities, or activities that are incidental to or in conjunction with fire protection or law enforcement duties. This is sometimes referred to as the “80% rule” or the 20 percent limitation on non-exempt work, found in 29 C.F.R. § 553.212.

Employees who meet these tests are considered to be engaged in law enforcement activities regardless of their rank, or of their status as “trainee,” “probationary,” or “permanent,” and regardless of their assignment to duties incidental to the performance of their law enforcement activities such as equipment maintenance, lecturing, or support activities, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity.

Typically, employees engaged in law enforcement activities include deputy sheriffs, criminal investigators or detectives who are regularly employed and paid as such, and court marshals or deputy marshals. The term also may include rescue and ambulance service personnel if such personnel form an integral part of the county’s law enforcement activities.

The exemption also specifically covers security personnel in correctional institutions, which includes county jailers.<sup>[1]</sup> A correctional institution is any governmental facility maintained as part of a penal system for the incarceration or detention of persons suspected or convicted of having breached the peace or committed some other crime, and includes county jails and workhouses. Employees of correctional institutions who qualify as security personnel for purposes of the special rules are those who have responsibility for controlling and maintaining custody of inmates and of safeguarding them from other inmates or for supervising such functions, regardless of whether their duties are performed inside the correctional institution or outside the institution (as in the case of road gangs). These employees are considered to be engaged in law enforcement activities regardless of their rank (e.g., warden, assistant warden, guard) or of their status as “trainee,” “probationary,” or “permanent,” and regardless of their assignment to duties incidental to the performance of their law enforcement activities, or to support activities of the type described whether or not such assignment is for training or familiarization purposes or for reasons of illness, injury or infirmity.

Employees who do not meet the tests described above are not engaged in “law enforcement activities” and do not qualify for the exemption. Employees who normally would not meet these tests include (1) most building inspectors, (2) health inspectors, (3) animal control personnel, (4) sanitarians, (5) civilian traffic employees who direct vehicular and pedestrian traffic at specified intersections or other control points, (6) civilian parking checkers who patrol assigned areas for the purpose of discovering parking violations and issuing appropriate warnings or appearance notices, (7) tax compliance officers, and (8) building guards whose primary duty is to protect the lives and property of persons within the limited area of the building.

Also not included within the exemption are the so-called “civilian” employees of law enforcement agencies or correctional institutions who engage in such support activities as those performed by dispatchers, radio operators, apparatus and equipment maintenance and repair workers, janitors, clerks and stenographers. The exemption also does not include employees in correctional institutions who engage in building repair and maintenance, culinary services, teaching, or in psychological, medical or paramedical services. This is true even though such employees may, when assigned to correctional institutions, come into regular contact with the inmates in the performance of their duties.

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[1] 29 C.F.R. § 553.211(f).

## Fire Protection and Law Enforcement

**Reference Number:** CTAS-973

Employees who engage in both fire protection and law enforcement activities may use the special § 7(k) rules, provided that each of the activities performed meets the appropriate tests. This is true regardless of how the employee’s time is divided between the two activities. However, all time spent in nonexempt activities by public safety officers within the work period, whether performed in connection with fire protection or law enforcement functions,

or with neither, must be combined for purposes of the 20 percent limitation on nonexempt work discussed in 29 C.F.R. § 553.212.

The maximum hours standards are different for employees engaged in fire protection and for employees engaged in law enforcement. For those employees who perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period. For more information on this topic, see the regulations found at 29 C.F.R. § 553.213.

## Trainees

**Reference Number:** CTAS-974

Attendance at a bona fide fire or police academy or other training facility, when required by the county, constitutes engagement in fire protection or law enforcement activities as long as the employee meets all the applicable tests (except for the power of arrest for law enforcement personnel) for the partial exemption under § 7(k). If the applicable tests are met, then basic training or advanced training is considered incidental to, and part of, the employee's fire protection or law enforcement activities. See 29 C.F.R. § 553.214. For more information on this topic, see [Training Time](#) under Compensable Hours.

## Emergency Medical Service Employees

**Reference Number:** CTAS-975

Emergency medical service employees often work in conjunction with law enforcement agencies and/or fire departments. Under regulations found at 29 C.F.R. § 553.210, paramedics, emergency medical technicians, rescue workers, and ambulance personnel may qualify for the § 7(k) exemption if they meet all of the requirements for an "employee in fire protection activities," which means that the employee: (1) is trained in fire suppression, (2) has the legal authority and responsibility to engage in fire suppression, (3) is employed by a fire department of a municipality, county, fire district, or state, and (4) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

Courts interpreting these requirements appear to focus on whether the employee has the responsibility to engage in fire suppression. The outcome turns on whether the employee has a real obligation or duty to fight fires. The court in *Cleveland v. City of Los Angeles*, 420 F.3d 981 (9th Cir. 2005), *cert. denied* 126 S. Ct. 1344 (2006), looked at six factors to determine whether dual function paramedics/firefighters had "some real obligation or duty" to engage in fire suppression. The Department of Labor also used these factors in making its determination in Wage and Hour Opinion Letter FLSA2006-20, dated June 1, 2006, noting, "If a fire occurs, it must be their job to deal with it." The six-factor test examines evidence of the following:

1. the paramedic carries firefighting gear and breathing apparatus,
2. dispatchers assume that at least one dual function firefighter/paramedic is in each ambulance dispatched to a call,
3. paramedic ambulances are regularly dispatched to fire scenes and not just when there is a need for advanced life support medical services,
4. dual function firefighter/paramedics are always expected to wear fire protective gear at a fire suppression scene,
5. they are expected to provide emergency medical services as their primary responsibility but they also routinely perform fire suppression duties when not needed for medical care, and
6. they are routinely ordered to perform fire suppression duties.

Based on the evidence presented, the court in *Cleveland v. City of Los Angeles* found that there was no real duty to perform fire suppression activities. Applying these factors to different facts and circumstances, the Department of Labor found in its 2006 opinion that the dual-function firefighter/paramedics did have a real obligation to engage in fire suppression. The Department of Labor also noted that those firefighter/paramedics, as part of their fire suppression duties, regularly attended fire suppression training and presented fire prevention awareness programs.

## Tours of Duty

**Reference Number:** CTAS-976

The FLSA authorizes the establishment of work periods of not less than seven nor more than 28 days for public safety personnel. The regulations establish the maximum allowable non-overtime hours as 212 hours per 28-day period for firefighters, and 171 hours per 28-day period for law enforcement officers. For tours of duty of less than

28 days, the maximum allowable non-overtime hours of work during the tour of duty must bear the same ratio as 212 hours to 28 days for firefighters (7.57 hours per day), and 171 hours to 28 days for law enforcement personnel (6.1 hours per day). For those local governments that may wish to use the “tour of duty” option, the maximum number of allowable hours in work periods of particular lengths before overtime compensation must be paid to public safety personnel for additional hours have been calculated in the following table:

Work Period (days)	Maximum Hours	
	Fire	Police
28	212	171
27	204	165
26	197	159
25	189	153
24	182	147
23	174	140
22	167	134
21	159	128
20	151	122
19	144	116
18	136	110
17	129	104
16	121	98
15	114	92
14	106	86
13	98	79
12	91	73
11	83	67
10	76	61
9	68	55
8	61	49
7	53	43

A firefighter or law enforcement officer may perform work that is not related to fire protection or law enforcement activities. However, if more than 20 percent of an employee’s work hours are spent on unrelated activities, the employee cannot qualify for use of the tour of duty rules and would therefore have to be paid overtime on a time and one-half basis for any hours worked in excess of 40 hours in a seven-day period.

Public agency fire protection and law enforcement personnel may, at their own option, undertake employment for the same employer on an occasional or sporadic and part-time basis in a different capacity from their regular employment. The performance of such work does not affect the application of the special rule with respect to the regular employment. In addition, the hours of work in the different capacity need not be counted as hours worked for overtime purposes on the regular job, nor are such hours counted in determining the 20 percent limitation for non-exempt work. In order to qualify, the work must not be regularly scheduled. This special rule is narrowly con-



strued by the DOL, and an employer must be careful to thoroughly examine the regulations found at 29 C.F.R. § 553.30 before relying on this rule.

## Sleep Time under § 7(k)

**Reference Number:** CTAS-977

For firefighters and law enforcement personnel using the § 7(k) rules, there is one sleep time rule for employees on duty for 24 hours or less, and another for those who work a shift of more than 24 hours. If an employee's shift is 24 hours or less, all of the time is considered work time and there is no sleep time exclusion; allowing employees to sleep when they are not busy does not render the time to be non-compensable sleep time, nor does the furnishing of facilities to sleep, as long as an employee is still on duty.

When an employee's shift is longer than 24 hours, up to eight hours of sleeping time can be excluded from compensable working time if:

1. An expressed or implied agreement excluding sleeping time exists; and
2. Adequate sleeping facilities for an uninterrupted night's sleep are provided; and
3. At least five hours of sleep is possible during scheduled sleep periods; and
4. Interruptions to perform duties are considered hours worked.

If the employee does not get at least five hours of sleep time during the scheduled sleeping period, the entire time is hours worked. The five hours of sleep time need not be five continuous, uninterrupted hours of sleep. However, if interruptions during the sleep period are so frequent as to prevent reasonable periods of sleep totaling at least five hours, the entire period would be considered hours worked. No more than eight hours of sleeping time may be excluded from hours worked in any 24-hour period. There must be an advance agreement with the employee, and sleeping facilities must be furnished. The regulations applicable to § 7(k) employees appear at 29 C.F.R. § 553.222, and refer to the regulations at 29 C.F.R. § 785.22.

## Outside Employment

**Reference Number:** CTAS-978

There is a special provision for fire protection and law enforcement employees who, solely at their own option, perform special duty work in fire protection, law enforcement or related activities for a separate and independent employer (public or private) during their off-duty hours, such as a sheriff's deputy working a funeral. These special detail assignments may be performed for the second employer without FLSA overtime obligations applying even if the county selects a particular police officer for the assignment from a list of officers who wish to perform the work, negotiates the fee, compensates the officer for the special detail work through the county's regular payroll system, or retains a fee for administrative expenses. However, the officer must perform the work at his or her option; the special detail exception will not apply if the employer directs the officer to perform the outside work. The two employers must also, in fact, be separate. Special detail assignments are exceptions to the general FLSA rules which, in the absence of the statutory exception, would define such arrangements as joint employment relationships and treat the two jobs as one job for purposes of the overtime provisions of the FLSA.<sup>[1]</sup>

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[1] See 29 C.F.R. § 553.227.

## Interrelationship with Other Exemptions

**Reference Number:** CTAS-979

Employees in fire protection and law enforcement activities also may be exempt as bona fide executive, administrative or professional employees, as those terms are defined and delimited. However, the election to take such an exemption for an employee who qualifies for it will not result in excluding that employee from the count that must be made to determine the application of the exemption for public safety agencies having five or fewer employees.

## Hospital and Nursing Home Employees

**Reference Number:** CTAS-980

Under § 7(j) of the FLSA, hospitals and residential care establishments, may, pursuant to a prior agreement or understanding with their employees, utilize a fixed work period of 14 consecutive days in lieu of the seven-day workweek for the purpose of computing overtime, if they pay time and one-half the regular rate for hours worked over eight in any work day or 80 in the fourteen day period, whichever provides the greater number of overtime hours. This rule is almost never used in practice, however, because it rarely results in a savings to the employer.

## Compensable Hours

**Reference Number:** CTAS-981

Compensable time refers to the hours of work for which an employee must be paid under the FLSA. This topic is covered in the regulations found at 29 C.F.R. part 785. Compensable hours of work include all times during which the employee is on duty or on the employer's premises available for work or time spent away from the employer's premises under conditions that prevent the employee from using the time for personal activities. The concept of "hours worked" is a crucial determining factor in complying with the FLSA. An employee must be compensated for "all time spent in physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer." *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U. S. 590 (1944). Employees who, even though voluntarily, continue to work after their shift is over are engaged in compensable working time. The reason for the work is immaterial; as long as the employer "suffers or permits" employees to work on its behalf, proper compensation must be paid. Management must make certain that overtime work it does not want performed is not in fact performed. Mere promulgation of a rule to that effect is not sufficient to avoid compensation for additional hours worked.

Work not requested or required by the employer but allowed or permitted is work time under the FLSA. This rule also applies to work performed away from the premises or the job site, or even at home. If the employer knows or has reason to believe that work is being performed, the work must be counted as hours worked.

In an Opinion Letter dated August 11, 1993 (FLSA-1112), the DOL stated that training and care of a police dog at home by a canine patrol officer is considered part of the officer's principal activities and is therefore compensable work time under the FLSA. However, DOL noted that this kind of work does not necessarily have to be compensated at the same rate of pay as paid for law enforcement activities, and that the employer and employee can work out a reasonable agreement as to compensable hours worked at home.

## Sleep Time

**Reference Number:** CTAS-982

There are two different rules applicable to sleep time, **one for firefighters and law enforcement personnel under the § 7(k) exemption,**<sup>[1]</sup> and one for all other employees.<sup>[2]</sup> The rules governing sleep time for all other employees differ from the rules for firefighters and law enforcement personnel under the § 7(k) exemption only with respect to employees whose shifts are exactly 24 hours – sleep time may be excluded from hours worked by employees whose shift is exactly 24 hours and who are not under the § 7(k) exemption. All other requirements for exclusion of sleep time are the same as those for **public safety employees under the § 7(k) exemption.**

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[1] 29 C.F.R. § 553.222.

[2] 29 C.F.R. § 785.20 *et seq.*

## On Call Time

**Reference Number:** CTAS-983

Whether or not the time an employee is on call must be counted as compensable working time depends upon the employee's freedom while on call. If an employee is required to remain on call on the employer's premises or so close that he or she cannot use the time effectively for personal purposes, the employee is working while "on call." An employee who is not required to remain on the employer's premises and is free to engage in his or her own pursuits, subject only to the understanding that the employee leave word at his or her home or with the employer

where he or she can be reached by the employer, is not working while “on call.” When an employee is called out on the job assignment, only the time spent making the call is counted as hours worked. Of course, if calls are so frequent or the readiness conditions are so restrictive that the employee is not really free to use the intervening periods effectively for his or her own benefit, the employee may be considered as “engaged to wait” rather than “waiting to be engaged.”

An employee who is “on call” may be required to remain at home to receive telephone calls when the employer’s office is closed. If the employee is uninterrupted for long periods of time, any reasonable agreement of the parties for determining the number of hours worked will be accepted. The agreement should take into account not only actual time spent in answering the calls, but also some allowance for the restriction on the employee’s freedom to engage in personal activities resulting from the duty of answering the telephone.

## Waiting Time

**Reference Number:** CTAS-984

Whether waiting time is compensable depends on the particular factual circumstances.<sup>[1]</sup> The FLSA requires compensation for all time during which employees are required to wait while on duty even if allowed to leave the job site. The FLSA requires compensation because these waiting periods are of such short duration that the employees cannot use them for their own benefit. Employees who wait before starting their duties because they arrived at the place of employment earlier than the required time are not entitled to be paid for the waiting time. However, if an employee reports at the required time and then waits because there is no work to start on, the waiting time is compensable work time. Waiting by an employee who has been relieved from duty need not be counted as hours worked, if:

1. The employee is completely relieved from duty and allowed to leave his or her job; or
2. The employee is told he or she is relieved until a definite specified time; or
3. The relief period is long enough for the employee to use the time as he or she sees fit depending upon the circumstances in each case.

Whether waiting time is time worked under the FLSA depends upon the particular circumstances. A stenographer who reads a book while waiting for dictation, firefighters who watch television while waiting for alarms and police officers who are required to wait at home to be summoned to court are all working during their periods of inactivity. Generally, periods during which an employee is completely relieved from duty and which are long enough to enable the employee to use the time effectively for his or her own purposes are not hours worked.

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<sup>[1]</sup> See *Skidmore v. Swift & Co.*, 323 U. S. 134, 65 S. Ct. 161 (1944).

## Show-up, Call-in, Roll Call or Reporting Time

**Reference Number:** CTAS-985

If an employee is required to wait ten or fifteen minutes before being advised that no work is available, this time is compensable.

## Stand-By Time

**Reference Number:** CTAS-986

Workers who are required to stand by their posts ready for duty, whether during lunch periods, during machinery breakdowns, or during other temporary work shut-downs, must be paid for this time. Such periods of time are usually of short duration and their occurrence is not predictable. Since the employee is controlled by the employer during these periods, and is not able to use the time for his or her own purposes, this is working time.

## Meal Periods

**Reference Number:** CTAS-988

Meal time when the employee is completely relieved from duty is not work time. For an employee’s meal periods to be excluded from compensable working time:

1. The meal period generally must be at least 30 minutes; and
2. The employee must be completely relieved of all duties (if the employee must sit at a desk and incidentally answer the telephone, for example, this would be compensable time); and
3. The employee must be free to leave his or her duty post. However, there is no requirement that the employee be allowed to leave the premises or work site.

All voluntary work done during meal periods must be counted as compensable working time if the employer knows or has reason to believe work is being performed. Meal time spent out of town on business trips is generally not compensable time. Of course, if an employee works during the meal, such time is compensable.

A special meal time rule applies to law enforcement personnel using the special § 7(k) exemption. Under these circumstances, the county may exclude meal time from hours worked on tours of duty of 24 hours or less, provided that the employee is completely relieved from duty during the meal period, and all the other tests are met. On the other hand, where law enforcement personnel are required to remain on call in barracks or similar quarters, or are engaged in extended surveillance activities (e.g., “stakeouts”), they are not considered to be completely relieved from duty, and any such meal periods would be compensable.

With respect to firefighters employed under the § 7(k) exemption, who are confined to a duty station, meal time cannot be excluded from the compensable hours of work where (1) the firefighter is on a tour of duty of less than 24 hours, or (2) the firefighter is on a tour of duty of exactly 24 hours. In the case of police officers or firefighters who are on a tour of duty of more than 24 hours, meal time may be excluded from compensable hours of work provided that the regular tests are met and the employer and employees agree.

## Rest Periods or Breaks

**Reference Number:** CTAS-987

The FLSA does not require that employees be given rest periods or breaks, but if rest periods are provided, they must be counted as hours worked. Coffee and snack breaks are compensable rest periods and cannot be excluded from hours worked as meal periods. Periods of greater than 30 minutes might become meal periods or off time, and if so could be excluded from compensable time.

## Training Time

**Reference Number:** CTAS-989

The rules governing compensability of training time<sup>[1]</sup> for employees are often confusing. The general rule is that attendance at lectures, meetings, training programs, and similar activities must be considered working time *unless* the following four requirements are met:

1. Attendance is outside the employee’s regular working hours;
2. Attendance is voluntary;
3. The course, lecture, or meeting is not directly related to the employee’s job; and
4. The employee does no productive work while attending.<sup>[2]</sup>

Attendance is not voluntary if it is required by the employer or if the employee is led to believe that his employment would be adversely affected if he does not attend.<sup>[3]</sup> Training is considered to be directly related to the employee’s job if it is designed to help the employee perform his present job more effectively. On the other hand, training to learn a new job or an additional job skill or training for the purpose of advancement to another position is not considered directly related to the employee’s job, even though it may incidentally improve the employee’s skill in doing his regular job.<sup>[4]</sup> There is an exception to the requirement that an employee be paid for training directly related to the employee’s job – if an employee on his own initiative voluntarily attends a public school or takes training in an employer-sponsored on-the-job training program outside working hours, the time is not considered hours worked even if the courses are job related.<sup>[5]</sup>

Questions about employee training often arise in the context of firefighters and law enforcement officers. The regulations are reasonably clear that when firefighters and law enforcement officers attend training at a bona fide fire or police academy or other training facility that is required by the employing agency, the time is compensable. However, it is only the time actually spent in classes or training that is compensable time; law enforcement officers or firefighters who are in attendance at a police or fire academy or other training facility are not considered to be on duty during those times when they are not in class or at a training session if they are free to use their time for personal pursuits.<sup>[6]</sup>

With regard to non-required training for law enforcement officers, in a letter dated January 2, 1987, the DOL addressed a question concerning the compensability of work-related training sessions for police officers. The police officers attended state-certified training programs on a voluntary basis, sometimes during scheduled shifts and sometimes on their days off. The topics covered at these sessions included fingerprint analysis, accident investigation techniques, high-speed pursuit driving techniques and other law enforcement related training. The DOL noted that these training sessions are not compensable working hours only if the following criteria are met:

1. Participation in the training is outside the employee's regular working hours;
2. Participation is in fact voluntary;
3. The training is not directly related to the employee's job; and
4. The employee does not perform any productive work during such participation.

The DOL found that the first criterion was not met in some instances and the third criterion was not met at all. The training sessions were directly related to the employee's job, according to DOL. Therefore, the hours attending the police training sessions were compensable working hours, whether attendance was on a work day or not. Since the training program was work related, all hours of attendance were compensable under the FLSA.

In a Wage and Hour Opinion Letter dated February 16, 2001, the DOL was asked to address whether corrections deputies who "ride along" with road patrol deputies to gain experience for advancement opportunities must be paid for their time. The DOL found that because the deputies were providing hands-on assistance to the patrol deputies in the form of assistance in searching for weapons, handcuffing, etc., the fourth requirement that the employee not perform any productive work was not met and the time was compensable.

Finally, there are regulations setting out special situations in which employees of state and local governments do not have to be compensated for training time. These regulations state that while time spent attending training required by the employer is normally considered compensable time, state and local government employees do not have to be compensated for time spent in training under the following limited circumstances:

1. Attendance outside of regular working hours at specialized or follow-up training, that is required by law for certification of public and private sector employees within a particular governmental jurisdiction (e.g., certification of public and private emergency rescue workers), does not constitute compensable hours of work for public employees within that jurisdiction and subordinate jurisdictions.
2. Attendance outside of regular working hours at specialized or follow-up training, that is required for certification of employees of a governmental jurisdiction by law of a higher level of government (e.g., where a state or county law imposes a training obligation on city employees), does not constitute compensable hours of work.
3. Time spent in the training described in 1 and 2 above is not compensable, even if all or part of the cost of the training is borne by the employer.<sup>[7]</sup>

The intent of the foregoing regulation is far from clear, but in an Opinion Letter dated September 30, 1999, the DOL found that this regulation allows a law enforcement agency to deny compensation for time spent on tests for promotion administered to law enforcement officers by the civil service board. The tests were required by the state for an officer to become a commissioned police officer, they were voluntarily taken, and they occurred outside the regular hours of work.

The regulations discussed above are confusing, and the opinion letters interpreting them are not always consistent. In situations where it is not clear whether payment for attendance at training sessions is required under the regulations, it may be best to remember that an employer may choose to pay for training time even when it is not required by the FLSA. Before denying compensation for attendance at job-related training, the employer should discuss the matter with the county attorney.

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[1] Training for current employees should be distinguished from true trainees who have not yet been employed and who may be excluded from coverage under the FLSA if all of the following six conditions are met: (1) the training is similar to that which would be given in a vocational school; (2) the training is for the benefit of the trainees; (3) the trainees do not displace regular employees but work under close observation; (4) the employer providing the training derives no immediate advantage from the activities of the trainees and on occasion his operations may actually be impeded; (5) the trainees are not necessarily entitled to a job at the completion of the training period; and (6) the employer and the trainees understand that the trainees are not entitled to wages for the time spent in training. See Wage and Hour Opinion Letter dated Jan. 6, 1969. This type of arrangement is rarely encountered in county government.

[2] 29 C.F.R. § 785.27.

[3] 29 C.F.R. § 785.28.

[4] 29 C.F.R. § 785.29.

[5] 29 C.F.R. §§ 785.30 and 785.31.

[6] 29 C.F.R. §§ 553.214 and 553.226(c). A law enforcement agency may be able to enter into an agreement allowing it to recoup some of the cost of training a new officer if he or she leaves employment within a specified

time after training as long as certain conditions are met, including not reducing the officer's pay below minimum wage or reducing overtime payments for earned overtime. See *Heder v. City of Two Rivers*, 295 F.3d 777 (7<sup>th</sup> Cir. 2002); Wage and Hour Opinion Letter FLSA2005-18 (May 31, 2005).

[7] 29 C.F.R. § 553.226.

## Travel Time

**Reference Number:** CTAS-990

Whether travel time is compensable depends entirely on the kind of travel involved. The regulations governing travel time are found at 29 C.F.R. § 785.33 *et seq.* The employer generally is not responsible for time spent by the employee in traveling to the place of principal activity (home-to-work). This rule is true even if the employer provides transportation. Traveling by an employee from one job site to another job site during the work day is compensable work. Also, traveling from an outlying job at the end of the scheduled work day to the employer's premises is compensable.

Generally, an employee is not at work until he or she reaches the work site. But if an employee is required to report to a meeting place to pick up materials, equipment, or other employees, or to receive instructions, before traveling to the work site, compensable time starts at the time of the meeting. Also, when an employee is called back to work after going home for the day, the travel time to the job site is considered compensable.

When an employee who regularly works at a fixed location in one city is given a special one-day work assignment in another city, travel requires special consideration. For example, an employee who works in Nashville with regular working hours from 8 a.m. to 4:30 p.m. may be given a special assignment in Knoxville with instructions to leave Nashville at 7 a.m. The employee arrives in Knoxville three hours later ready for work. The special assignment is completed three hours later, and the employee arrives back in Nashville at 6:30 p.m. Such travel cannot be regarded as ordinary home-to-work travel occasioned merely by the fact of employment. It was performed for the employer's benefit and at the employer's special request to meet the needs of the particular and unusual assignment. It would thus qualify as an integral part of the principal activity that the employee was hired to perform on the work day in question. However, if the employee took an airplane to Knoxville, the travel to the airport could be treated like regular home-to-work travel since it is in the same city. Also, of course, the usual meal time would be deductible.

Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly work time when it cuts across the employee's work day. The employee is simply substituting travel for other duties. The time is not only hours worked on regular working days during normal working hours but also during the corresponding hours on non-working days. Thus, if an employee regularly works from 9 a.m. to 5 p.m. from Monday through Friday, the travel time during these hours is work time on Saturday and Sunday as well as on the other days. Regular meal period time is not counted. As an enforcement policy the DOL will not consider as work time that time spent in travel away from home outside of regular working hours as a passenger, on an airplane, train, boat, bus or automobile.

Any work that an employee is required to perform while traveling must, of course, be counted as hours worked. An employee who drives a truck, bus, automobile, boat or airplane, or an employee who is required to ride therein as an assistant or helper, is working while riding, except during bona fide meal periods or when the employee is permitted to sleep in adequate facilities furnished by the employer.

## De Minimis Time

**Reference Number:** CTAS-991

The courts and the DOL have recognized that insubstantial or insignificant periods of time outside scheduled working hours may be disregarded in recording working time. This rule applies, however, only where a few minutes of work are involved and where the failure to count such time is due to rounding off practices or considerations justified by operational realities. Such time is considered *de minimis*, i.e., minor or trivial. Counties rely on this exclusion at their peril.<sup>[1]</sup>

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[1] See 29 C.F.R. § 785.

## Compensatory Time

**Reference Number:** CTAS-993

Public employers are allowed to give an employee compensatory (“comp”) time off in lieu of cash payment for overtime worked.<sup>[1]</sup> Comp time accrues at the rate of one and one-half hours for each hour of overtime worked. A county may provide comp time instead of cash for overtime as long as an agreement or understanding with the employee (or a regular practice or policy in place prior to April 15, 1986) has been reached prior to the performance of the work. The FLSA does not require a written agreement with each employee; a notice or written policy can be used.<sup>[2]</sup> Different agreements can be reached with different employees. The agreement may take the form of a condition of employment so long as the employee knowingly and voluntarily agrees to it as a condition of employment. A statement may be placed on the employment application advising applicants that the county gives compensatory time off in lieu of cash payment for overtime worked and stating that acceptance of employment with the county constitutes the employee’s agreement to accept comp time.

If a notice or written policy is used, an agreement or understanding will be presumed to exist for any employee who fails to express to the employer an unwillingness to accept comp time off in lieu of overtime pay. However, the employee’s decision must be freely made without coercion or pressure. An agreement can restrict the taking of comp time to only certain hours of work and can provide for the use of a combination cash payment and comp time so long as the time and one-half principle is followed. Further provisions concerning preservation, use and cashing out comp time can be included. The regulations governing comp time are found at 29 C.F.R. § 553.21 *et seq.*

### Sample Compensatory Time Agreement

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[1] The regulations governing compensatory time are found at 29 C.F.R. § 553.20 *et seq.*

[2] For public employers, state law requires either a written compensatory time policy or a statement that comp time is not allowed. T.C.A. § 5-23-104.

## Accrual of Comp Time

**Reference Number:** CTAS-994

Compensatory time accrues at the rate of one and one-half hours of compensatory time off for each hour of overtime worked. Employees in public safety, emergency response or seasonal activities may accrue up to 480 hours, which represents 320 hours of actual overtime worked. Other employees may accrue up to 240 hours, which represents 160 hours of actual overtime worked.<sup>[1]</sup> Cash can always be used to compensate for overtime at the employer’s option.<sup>[2]</sup>

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[1] 29 C.F.R. §§ 553.21, 553.22, and 553.24.

[2] 29 C.F.R. 553.26.

## Use of Comp Time

**Reference Number:** CTAS-995

Comp time cannot be used as a means of avoiding statutory overtime pay. An employee has the right to use accrued comp time, and must not be coerced to accept more comp time than an employer can realistically and in good faith expect to be able to grant within a reasonable period of a request for use of such time. An employee must be permitted to use accrued comp time within a reasonable period after making the request, as long as it does not unduly disrupt the workplace.<sup>[1]</sup>

What is a reasonable period will be determined by considering the customary work practices based on case by case facts and circumstances, including:

1. Normal work schedule,
2. Anticipated peak workloads based on past experience,

3. Emergency requirements for staff and services, and
4. Availability of a qualified substitute staff.

To the extent the conditions are contained in an agreement or understanding, such can interpret what constitutes a “reasonable period.”

Being unduly disruptive means more than mere inconvenience to the employer. The employer, in order to turn down a comp time request made within a reasonable period of time, must reasonably and in good faith anticipate that it would impose an unreasonable burden on the employer’s ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee’s services.

Also, the employer may require employees to use their compensatory time. The U. S. Supreme Court has determined that the FLSA does not prohibit the practice of forcing employees to use accrued comp time.<sup>[2]</sup>

In a workweek or work period during which an employee works overtime hours for which cash overtime payment will be made, and the employee also takes compensatory time off, the payment for such comp time may be excluded from the employee’s regular rate of pay for overtime purposes.<sup>[3]</sup>

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<sup>[1]</sup> 29 C.F.R. § 553.25. The Sixth Circuit Court of Appeals has held that having to pay other employees overtime in order to allow someone to take banked comp time does not cause an “undue disruption” unless the parties have entered into an express agreement, such as a collective bargaining agreement, which allows financial considerations to be used to deny the use of comp time. *Beck v. City of Cleveland*, 390 F.3d 912 (6<sup>th</sup> Cir. 2004).

<sup>[2]</sup> *Christensen v. Harris County*, 529 U. S. 576, 120 S.Ct. 1655 (2000).

<sup>[3]</sup> 29 C.F.R. § 553.26(c).

## Payment for Accrued Comp Time

**Reference Number:** CTAS-996

The FLSA permits an employer to “cash out” an employee’s accrued comp time at any time by paying the employee cash for the unused comp time. These payments are to be made at the regular rate of pay the employee was receiving at the time the payment is made.<sup>[1]</sup>

Upon termination of employment, an employee with banked comp time must be paid for the banked comp time at the higher of:

1. The average rate received by the employee during the last three (3) years of employment, or
2. The final regular rate of pay.

The “last three (3) years of employment” means immediately prior to termination. If there is a break in service, the period of employment after the break is treated as a new period of service (so long as it was intended as permanent during the break, and accrued comp time was cashed out). Where the final period of service was less than three (3) years, the rate is calculated based on the rate in effect during the final period of service.<sup>[2]</sup>

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<sup>[1]</sup> 29 C.F.R. § 553.27(a).

<sup>[2]</sup> 29 C.F.R. § 553.27(b).

## Non-FLSA Comp Time

**Reference Number:** CTAS-997

Employers sometimes grant employees compensatory time off under circumstances where it is not required under the FLSA, such as when an employee works on a holiday even though the employee has worked no overtime in the workweek and the employer grants the employee another day off. This is considered “other” compensatory time. As long as this time is recorded separately from FLSA comp time, this “other” comp time is not subject to the requirements applicable to FLSA comp time such as the 240 (or 480) hour limit, or the requirement that it be earned at one and one-half times the regular rate.<sup>[1]</sup>

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<sup>[1]</sup> See 29 C.F.R. § 553.28.



## Substitution

**Reference Number:** CTAS-998

Employees, solely at their own option and with the approval of their employer, may substitute for one another during scheduled work hours in performance of work in the same capacity. The regulations on this topic are found at 29 C.F.R. §553.31. The hours worked are excluded by the employer in the calculation of the hours the substituting employee would be considered as having worked for FLSA purposes. In other words, each employee will be treated as if he or she worked their normal work schedule. For example: When Officer B substitutes eight hours for Officer A, recordkeeping of Officer B's time worked is credited toward Officer A's work period. Officer A now "owes" Officer B eight hours of working time. Officer A can repay that debt by substituting for Officer B.

A DOL opinion letter dated January 2, 1987, addressed the issue of overtime compensation where police officers trade or substitute time with one another and whether it would be permissible for an officer to have part of the officer's accrued comp time hours transferred to another officer's comp time as repayment for trading time. Such a transfer would not be permissible under the regulations because it would require the employer to maintain a separate recordkeeping system, which is specifically not required by the FLSA. However, DOL states the same result could be permissibly obtained under the following scenario: Officer A may pay back Officer B by using Officer A's own accrued compensatory time while substituting the appropriate number of hours for Officer B. Thus, both officers would receive pay for the time worked, Officer A would not have to work those eight hours, and Officer B's accrued comp time balance would be reduced by eight hours.

Paying back the time is a matter left to the police officers who traded with one another. There is nothing under the FLSA that specifies the period for repayment of the time substituted or stipulates the number of trades allowed.

## Child Labor Provisions

**Reference Number:** CTAS-999

The FLSA child labor provisions are designed to protect the educational opportunities of minors and prohibit their employment in jobs and under conditions detrimental to their health or well-being. These provisions include lists of hazardous occupations for jobs declared to be too dangerous for minors to perform. Additional information on child labor provisions is available from local [Wage and Hour Division](#) offices.

## Records to be Kept by Employers

**Reference Number:** CTAS-1000

Employers are required to keep certain records in order to comply with the FLSA, as prescribed in 29 C.F.R. § 516. No particular order or format is required, but specified data and information must be kept for each employee who is subject to, and not exempt from, the FLSA's minimum wage and overtime provisions, as follows:

1. Name in full (as used for social security purposes) and the employee's identifying symbol or number if such is used in place of a name on any payroll records;
2. Home address, including zip code;
3. Date of birth, if under 19;
4. Sex and occupation;
5. Time of day and day of week on which the employee's workweek begins (if all workers have the same workweek beginning at the same time of day, a single notation for the whole work force may be used; if any employee or group of employees has a workweek beginning and ending at a different time, a separate notation may be kept for that employee or group);
6. (a) Regular hourly rate of pay for any week when overtime is worked or overtime compensation is due, (b) basis on which the employee's wages are paid (such as \$12.00 per hour; \$480 per week), and (c) amount and nature of each payment that is excluded from the regular rate;
7. Hours worked for each work day and the total hours worked for each workweek (with respect to employees on fixed schedules, the employer may maintain records showing the schedule of daily and weekly hours the employee normally works, and, in weeks when an employee adheres to such schedule, indicate by check mark, statement or other method such were the hours actually worked; in weeks in which more or less than the scheduled hours are worked, the exact number of hours worked each day and each week must be shown; as a practical matter, it is recommended that employee's and immediate supervi-

or's signatures be used instead of using check marks, as such would be better evidence should the records be relied on in an investigation by the Wage and Hour Division);

8. Total daily or weekly straight-time earnings (including that earned during overtime, but excluding overtime excess compensation);
9. Total overtime excess compensation;
10. Total additions to or deductions from wages paid each pay period, with a record, for each employee, of the dates, amounts, and nature of each such item;
11. Total wages paid each pay period; and
12. Date of payment and the pay period covered by each payment.

With respect to bona fide executive, administrative or professional employees (including academic administrative personnel or teachers in elementary or secondary schools), items six through 10 are not required. However, records must be maintained to reflect the basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee's total remuneration, including fringe benefits and definitional prerequisites. This may be shown as a monthly or weekly amount with appropriate addenda such as "two weeks paid vacation," "plus hospitalization and insurance plan A," etc.

Additional records that must be kept for counties using comp time include:

1. Number of comp time hours earned each workweek (or work period) at the rate of time and one-half for each overtime hour worked;
2. Number of comp time hours used each workweek (or work period) by each employee;
3. Number of comp time hours compensated in cash, the total amount paid and the date of such payment; and
4. Any agreement or understanding with respect to earning and using comp time off, or if not in writing, a record of the existence of such an understanding.

For police and fire personnel using the § 7(k) rules, notation is required on the payroll records showing the work period for each employee, the length of that period and its starting time. If all workers (or a group of workers) have the same length, beginning at the same time on the same day, a single notation of the time of day and beginning day of the work period will suffice for these workers.

The following records must be kept for at least three years:

1. Payroll records containing the above required information (from the last date of entry);
2. Collective bargaining agreements (with amendments and additions), benefit plans, trusts, employment contracts (when such are oral, written memoranda summarizing such agreements), certificates and notices; and
3. Total volume sales and purchase records, as maintained in the ordinary course of business.

These records must be maintained for at least two years:

1. Basic employment and earnings records, including all basic time and earning cards or sheets on which are entered the daily starting and stopping time of individual employees, or of separate work forces;
2. Wage rate tables, including all tables or schedules of the employer that provide rates used in computing straight-time earnings, wages or salary, or overtime compensation, from their last effective date; and
3. Records of additions to or deductions from wages paid (from the date of last entry).

All records must be kept safe and accessible at the place or places of employment or at one or more established central recordkeeping offices where such records are customarily maintained, must be made available within 72 hours following notice from the administrator of the DOL, and must be open at any time to inspection and transcription by the administrator.

From time to time, notices prescribed by the Wage and Hour Division must be posted and kept posted in conspicuous places in every establishment where employees work so as to permit them to read notices on the way to or from their place of employment. An establishment must display the FLSA poster where the employees may readily see it. This poster briefly outlines the FLSA's basic requirements, and may be obtained free of charge from the nearest office of the Wage and Hour Division, or copies can be downloaded from the [DOL Web site](#). The DOL will not automatically send these posters to you. It is up to the county to contact the DOL to obtain a poster.

Employers also may be required to submit reports that the DOL determines are needed to carry out its enforcement duties, and DOL may enter and inspect places of employment to determine whether the FLSA has been violated.

## Enforcement and Penalties

**Reference Number:** CTAS-1001

Employees can sue their employers for back wages and liquidated damages (equal to the amount of back wages), together with attorneys' fees, costs, and other appropriate relief such as promotions and reinstatement, for violations of the FLSA. The Secretary of Labor also can bring a lawsuit on the employee's behalf for back wages and either liquidated damages or an injunction prohibiting the employer from committing further violations of the Act.

The DOL also can institute criminal prosecution for willful violations of the Act. Employers who willfully violate the minimum wage or overtime provisions of FLSA may be fined up to \$10,000, and if the employer has been convicted on a prior occasion may also be imprisoned up to six months. See 29 U.S.C. § 216. The statute of limitations is five years for criminal violations under the FLSA.

In addition to criminal penalties, the DOL is authorized to impose civil monetary penalties for repeated or willful violations of the FLSA. A penalty of up to \$1,964 per violation may be imposed for violations of the minimum wage or overtime provisions of the act, which means up to \$1,964 per employee due back wages. A violation is considered "repeated" if the employer has previously received notice of a violation of the act. A violation is considered "willful" where the employer either knew the conduct violated the act or showed reckless disregard for the requirements of the act, such as situations in which the employer should have inquired further into whether the conduct violated the act. 29 C.F.R. § 578.3.

Under the child labor provisions of the act, an employer can be fined up to \$12,529 per child labor violation. If the violation causes death or serious injury to an employee under the age of 18, the maximum penalty is \$56,947 and if that violation is repeated or willful the maximum goes up to \$113,894. 29 C.F.R. § 579.1.

An employer is prohibited from retaliating against an employee for filing a complaint or otherwise participating in an FLSA proceeding.

## Definitions

**Reference Number:** CTAS-1002

Employ	to suffer or permit to work.
Employer	any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency.
Public Agencies	includes counties and cities.
Employees	as defined in cases of public agencies, means all individuals employed by such public agency <i>other than</i> an employee who is: not subject to civil service laws of the state, political subdivision, or agency employing the individual and who holds a public elective office of that state, political subdivision or agency, is selected by the holder of such an office to be a member of his or her personal staff, is appointed by such officeholder to serve on a policymaking level or, is an immediate advisor to such officeholder concerning the constitutional or legal powers of his or her office.
Firefighters	employees of an organized fire department who have been trained to the extent legally required, and have responsibility for the prevention, control or extinguishment of fires and who perform activities required for incidental functions, such as housekeeping, equipment maintenance, and inspections.
Law Enforcement Personnel	members of a body of officers (uniformed and plain-clothed) who are empowered to enforce laws to maintain public peace or protect property from accidental or willful injury and to prevent and detect crimes, have the power of arrest and have undergone or are undergoing on-the-job training or a course of instruction that typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics, and may include security personnel in

	correction institutions and jails. Not covered by this term are civilian dispatchers, parking checkers, health inspectors, clerical support staff and building guards.
Workweek	a regularly recurring period of 168 hours in the form of seven consecutive 24-hour periods. The workweek need not be the same as the calendar week and may begin on any day of the week and at any hour of the day. Once established, a workweek may not be changed unless the change is intended to be permanent.
Compensable Hours all times	during which the employee is on duty, including time spent away from the employer's premises under conditions that do not permit the employee time for personal activities and in some circumstances may include sleep time, meal time, on call time and training time.
Hours Worked	in general, includes all the time an employee is required to be on duty, on the employer's premises or at a prescribed workplace and all time when the employee is suffered or permitted to work for the employer, and will include extra work, even if performed at home and even if the employee failed to work properly all day, if the employer has knowledge the person is working extra. Sick leave, vacation and holidays are not counted as hours worked.
Wage	compensation paid to an employee.
Minimum Wage	effective July 24, 2009, \$7.25 per hour worked.
Tour of Duty	with regard to law enforcement and fire protection activities with an established work period of at least seven days and up to 28 consecutive days, the number of hours such employee is engaged in work activities.
Regular Rate of Pay	the rate per hour paid for normal non-overtime work. Gifts, payments for vacation, holidays, illness, traveling expenses in furtherance of the employer's business, retirement, life, accident, health and similar benefits are not included. For salaried employees, divide the regular weekly salary by the number of hours in the employee's regular workweek. The regular rate may be more than the statutory minimum wage but it cannot be less (except for employment under subminimum wage certificates pursuant to section 14 of FLSA). The regular rate includes all remuneration for employment paid to an employee such as commissions, shift differentials, and other payments for work actually performed, including the cost of any facilities furnished to an employee.
Overtime	as a general rule, all hours over 40 worked in a particular workweek for which the law requires the employee be compensated at a rate not less than one and one-half times the employee's regular rate.
Compensatory ("Comp") Time	hours of work compensated by not working (having time off) during another regular working period.
Volunteer	an individual who performs work on a volunteer basis (without any express or implied compensation agreement) who may be paid expenses or a nominal compensation.
Oppressive Child Labor	a condition of employment under which any employee under the age of 16 is employed by an employer (other than a parent or person standing in place of a parent employing his or her own child or a child in his or her custody under the age of 16 years in an occupation other than manufacturing or mining or an occupation found by the DOL to be particularly hazardous for the employment of children between the ages of 16 and 18 years or detrimental to their health or well-being) in any occupation, or any employee between the ages of 16 and 18 years is employed by an employer in any occupation that the DOL finds and by order declares to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the DOL certifying that such person is above the oppressive child labor age. The employment of employees between the ages of 14 and 16 years in occupations other than manufacturing and mining is not deemed to constitute oppressive child labor if and to the extent that the DOL determines that such employment is confined to periods that will not interfere with their schooling and to conditions that will not interfere with their health and well-being.

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