

Fact Sheet

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OVERVIEW OF FAIR LABOR STANDARDS ACT OF 1938

The Fair Labor Standards Act of 1938 (FLSA) establishes minimum wage, overtime pay, and child labor standards for employees in the private sector and in federal, state, and local governments.

The statute:

- Established a minimum wage; currently \$7.25.
- Requires covered *nonexempt* employees be paid overtime at a rate of not less than one and one-half times their regular rate of pay after 40 hours of work in a workweek.
- Prohibited most child labor.

Coverage:

Businesses that are involved in interstate commerce and have a gross annual business volume of \$500,000 or more are covered as well as all employees working for the business.

However, individual employees can be covered even if they work for a business that is not covered as long as their work affects interstate commerce.

According to DOL “Almost every employee in the United States is ‘covered’ by the FLSA.” Over 129 million employees in more than 7 million workplaces are covered by the FLSA.

Self-employed and independent contractors are *not* covered by the FLSA.

Exemptions:

The FLSA contains a number of exemptions from the minimum wage and/or overtime standards for covered employees.

The “white collar” exemption is most common;

- Executive, administrative, and professional employees;
 - Primary duties tests developed in the 1940s, with minor update in 2004, are difficult to apply in today’s workplaces.
 - Secretary of Labor has broad regulatory discretion to define who is exempt.
 - Employees must be paid a salary of at least \$455 per week.

- Executive exemption duties test (most straightforward but still troublesome):
 - Primary duty must be managing an enterprise, or managing a customarily recognized department or subdivision of the enterprise;
 - Must customarily and regularly direct the work of at least two or more full-time employees or their equivalent; and
 - 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.
- Administrative exemption duties test (most difficult to apply):
 - 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
 - Include the exercise of discretion and independent judgment with respect to matters of significance.
- Professional exemption duties test (outdated and subjective):
 - Primary duty must be the performance of work requiring advanced knowledge, which is predominantly intellectual in character and requires the consistent exercise of discretion and judgment;
 - Advanced knowledge must be in a field of science or learning and be customarily acquired by a prolonged course of specialized intellectual instruction.
- Computer employee exemption (outdated and statutorily determined) :
 - 1996 amendments codified almost verbatim and locked into place the Department of Labor's 1992 regulatory text on the exemption.
- Outside sales employee exemption (outdated and statutorily determined):
 - Must be customarily and regularly engaged away from the employer's place of business and primary duty must be making sales.

Employees are generally considered nonexempt; employer has burden to prove employee is exempt.

Other statutory exemptions include: retail commissioned sales employees, certain amusement and recreation establishments, and 28 other exemptions (e.g. transportation, agriculture, very small newspapers, and movie theaters).

The federal FLSA does not preempt state and local laws that are more protective and a maze of statutes has developed since 1938.

What is Work Time?

Amendments made in 1947 specified what type of time was considered compensable work time.

- In general, employees are to be paid for all time worked regardless of when or where it is performed.
- Generally, travel to work and from work to home is not considered paid working time.
- However, time spent traveling during the course of a day from work site to work site is compensable.
- Under DOL regulations an employer can disregard insubstantial or insignificant (*de minimis*) amounts of time beyond a worker's scheduled hours if it cannot "as a practical matter" precisely record the small portions of time involved. However, the advent of PDAs, email, voice mail, and electronic calendars has blurred the line of when an employee's work day begins and ends.

Enforcement:

The Wage and Hour Division (WHD) is primarily responsible for enforcing the FLSA (sometimes coordinates with states) through complaint driven and directed investigations.

Remedies for violations include: 1) amount of unpaid wages for previous two years; 2) liquidated damages of double the unpaid wages unless employer can prove it acted in good faith, with reasonable grounds for believing it complied with the FLSA; and 3) attorney fees. Willful violations extend remedies to previous three years.

Individuals have a private right of action to recover unpaid overtime on behalf of themselves and others who are similarly situated (class action lawsuits).

- Over the past 10 years, the number of FLSA law suits has increased by almost 350 percent, jumping from 1,935 in 2000 to 6,761 in 2010.
- From 1993 to 2007 the median FLSA settlement for federal class action lawsuits was \$7.4 million.
- However, class action lawsuits can often be more costly. For example, in 2010, Wal-Mart settled one suit for \$86 million, Merrill Lynch \$44 million, Staples \$42 million, Home Depot \$25 million, UPS \$17 million, and AT&T \$17 million.

Conflicting Court Cases, Shifting Opinion Letters, and Continuing Ambiguity:

Much of the difficulty complying with the FLSA arises from the conflicting court cases, shifting Wage and Hour opinion letters, and continuing ambiguity surrounding the "white collar" regulations and determining which employees are subject to overtime requirements and which are exempt.

- For example, two federal appeals court decisions involving the same employer reached completely different conclusions in interpreting the executive employee exemption regarding store managers at Family Dollar.

- On September 8, 2006, the WHD determined that mortgage loan officers are exempt administrative employees. Then on March 24, 2010, WHD reversed itself and determined that they do not qualify for the exemption.
- Even the Department of Labor has difficulty determining which of its own employees are exempt. A recent action brought against the Department resulted in the reclassification of more than 1,900 employees from exempt to nonexempt, or more than 11 percent of DOL's total workforce. In addition to a large number of administrative employees, those reclassified included highly paid computer professionals, paralegals, litigation support specialists, pension law specialists, as well as highly paid WHD compliance specialists.
- The regulations defining the white collar exemptions were last updated in 2004. However, the revised regulations at best only marginally addressed the compliance difficulties underlying the "white collar" exemptions in part because of the continuing evolution of the workplace.