The Fair Labor Standards Act

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Major Provisions of the FLSA

• Coverage
• Minimum Wage
• Overtime Pay
• Youth Employment
• Recordkeeping
Employment Relationship

In order for the FLSA to apply, there must be an employment relationship between the “employer” and the “employee”
Employ and some other definitions

• § 203(d) defines an “employer” as “any person acting directly or indirectly in the interest of an employer in relation to an employee . . . .”

• Subsection (e) of that same section defines an “employee” as an individual “employed by an employer.”

• By statutory definition the term “employ” includes (section 3(g)) “to suffer or permit to work.”
Coverage

More than 130 million workers in more than 7 million workplaces are protected or “covered” by the Fair Labor Standards Act (FLSA), which is enforced by the Wage and Hour Division of the U.S. Department of Labor.
Coverage

Two types of coverage

• Enterprise coverage: If an enterprise is covered, all employees of the enterprise are entitled to FLSA protections

• Individual coverage: Even if the enterprise is not covered, individual employees may be covered and entitled to FLSA protections
Enterprise Coverage

• Enterprises with
  - At least two employees
  - At least $500,000 a year in business

• Hospitals, businesses providing medical or nursing care for residents, schools, preschools and government agencies (federal, state, and local)
Individual Coverage

• Workers who are engaged in:
  - Interstate commerce
  - Production of goods for commerce
  - Closely-related process or occupation directly essential to such production
  - Domestic service

• Engaging in “interstate commerce” which may include:
  - Making telephone calls to other states
  - Typing letters to send to other states
  - Processing credit card transactions
  - Traveling to other states
The Bottom Line

• Almost every employee in the United States is covered by the FLSA

• Examples of employees who may not be covered
  - Employees working for small construction companies
  - Employees working for small independently owned retail or service businesses
Deductions

Deductions from pay are illegal if

- Deduction is for item considered primarily for the benefit or convenience of the employer; and
- The deduction reduces employee’s earnings below required minimum wage

Examples of illegal deductions

- Tools used for work
- Damages to employer’s property
- Cash register shortages
What you have to do

29 USC § 206 provides that:

• Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

• (1) except as otherwise provided in this section, not less than THE MINIMUM WAGE
29 USC § 207 says:

• (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed. The amount of money an employee should receive cannot be determined without knowing the number of hours worked. . . .
So what?

So you have to pay at least the minimum wage and all covered, non-exempt employees must receive one and one-half times the regular rate of pay for all hours worked over 40 in a workweek.
Workweek

• Compliance is determined by workweek, and each workweek stands by itself

• Workweek is 7 consecutive 24-hour periods (168 hours)
Regular Rate

- Is determined by dividing total earnings in the workweek by the total number of hours worked in the workweek

- May not be less than the applicable minimum wage
Regular Rate Exclusions

• Sums paid as gifts
• Payments for time not worked
• Reimbursement for expenses
• Discretionary bonuses
• Profit-sharing plans
• Retirement and insurance plans
• Overtime premium payments
• Stock options
Regular Rate requires math. I hate math!

Step 1: Total Straight Time Earnings
(Minus Statutory Exclusions)
Divided By Total Hours Worked = Regular Rate

Step 2: Regular Rate x .5 = Half Time Premium

Step 3: Half Time Premium x Overtime Hours
= Total Overtime Premium Due
The Basic Rule

Work not requested but suffered or permitted is work time.

Who talks like that?
The Basic Rule

- **Work not requested but suffered or permitted is work time.** For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time.

29 CFR § 785.11.
The Basic Rule

• The rule is also applicable 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 the work is being performed, he must count the time as hours worked. 29 CFR § 785.12.
The Basic Rule

Wait, I have a rule . . . .

• In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so. 

29 CFR § 785.13.
Wait, what about waiting time?

- A stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, a fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity. The rule also applies to employees who work away from the plant. For example, a repairman is working while he waits for his employer’s customer to get the premises in readiness. The time is work time even though the employee is allowed to leave the premises or the job site during such periods of inactivity. The periods during which these occur are unpredictable. They are usually of short duration. In either event the employee is unable to use the time effectively for his own purposes. It belongs to and is controlled by the employer. In all of these cases waiting is an integral part of the job. The employee is engaged to wait.

29 CFR § 785.15.
The Workday

• (b) “Workday” as used in the Portal-to-Portal Act means, in general, the period between the commencement and completion on the same workday of an employee’s principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period.

29 CFR § 790.6.
Split Shifts

• (a) General. Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked. 29 CFR § 785.16(a).
On Call . . . Anybody remember beepers?

- An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while “on call”. An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call. 29 CFR § 785.17.
While the FLSA does set basic minimum wage and overtime pay standards and regulates the employment of minors, there are a number of employment practices which the FLSA does not regulate. For example, the FLSA does not require:

1. vacation, holiday, severance, or sick pay;
2. meal or rest periods, holidays off, or vacations;
3. premium pay for weekend or holiday work;
4. pay raises or fringe benefits; or
5. a discharge notice, reason for discharge, or immediate payment of final wages to terminated employees.
Rest Periods

- Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time. 29 CFR § 785.18.
Meal Periods

• (a) *Bona fide meal periods.* Bona fide meal periods are not work time. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. 29 CFR § 19(a).
Donning and Doffing, Oh my!

• (c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance. If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a “preliminary” or “postliminary” activity rather than a principal part of the activity. 29 CFR § 24.
Training Time

Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:

- (a) Attendance is outside of the employee's regular working hours;
- (b) Attendance is in fact voluntary;
- (c) The course, lecture, or meeting is not directly related to the employee's job; and
- (d) The employee does not perform any productive work during such attendance.

29 CFR § 785.27.
Of course it is voluntary

- Attendance is not voluntary, of course, if it is required by the employer. It is not voluntary in fact if the employee is given to understand or led to believe that his present working conditions or the continuance of his employment would be adversely affected by nonattendance. 29 CFR § 785.28.
Travel Time

• An employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. This is true whether he works at a fixed location or at different job sites. Normal travel from home to work is not work time. 29 CFR § 785.35.
Travel Time

Home to Work in Emergency Situations

• When an employee has completed his normal day’s work and is called upon to travel a substantial distance to perform a special job at the request of his employer, the resulting travel time must be counted as hours worked. 29 CFR § 785.36.
Travel Time

Home to Work on Special One Day Assignment in Another City

• When an employee who normally works in a fixed location is given a special one day assignment in another city, the resulting travel time must be counted as hours worked. 29 CFR § 785.37.
Travel Time

Travel that is All in a Day’s Work

• Time spent by an employee in travel as part of his principle activity, such as travel from job site to job site during the work day, must be counted as hours worked. For example, an employee is required to report at a meeting place to receive instructions or to perform other work there or to pick up and carry tools and travel from the designated place to the workplace, that is all work that is all in a day’s work and must be compensated. 29 CFR § 785.38.
Travel Time

Travel Away From the Home Community

• Travel that keeps an employee away from home overnight is considered travel away from home. Travel away from home is work time when it cuts across the employee’s normal workday.

29 CFR § 785.39.
Travel Time

Travel by Automobile Away From the Home Community

• If an employee is offered public transportation but requests permission to drive instead, the employer can count as hours worked either the time actually spent driving the car or the time the employee would have spent traveling had he taken the public transportation. 29 CFR § 785.40.
Civic and Charitable Work

• Time spent in work for public or charitable purposes at the employer’s request, or under his direction or control, or while the employee is required to be on the premises, is working time. However, time spent voluntarily in such activities outside of the employee’s normal working hours is not hours worked. 29 CFR §785.44.
There are numerous exemptions and exceptions from the minimum wage and/or overtime standards of the FLSA.
“White Collar” Exemptions

The most common FLSA overtime exemption – often called the “541” or “white collar” exemption – applies to certain:

- Executive Employees
- Administrative Employees
- Professional Employees
- Outside Sales Employees
- Computer Employees
“White Collar” Exemptions

- In a Memorandum to the Secretary of Labor issued on March 13, 2014, the President directed the Secretary to update regulations regarding who qualifies for overtime protection.

- In so doing, the Secretary shall consider how the regulations could be revised to:
  - Update existing protections in keeping with the intention of the Fair Labor Standards Act.
  - Address the changing nature of the American workplace.
  - Simplify the overtime rules to make them easier for both workers and businesses to understand and apply.

Three Tests for Exemption

Salary Level

Salary Basis

Job Duties
Minimum Salary Level: $913

• The Department of Labor stuck to its 40th percentile measure, but to throw a small bone to employers the final Regulations set the 40th percentile based on earnings of full-time salaried workers in the lowest wage census region instead of the 40th percentile of full-time salaried workers in the US.
Minimum Salary Level: $913

- For most employees, the minimum salary level required for exemption is $913 per week
- Must be paid “free and clear”
- The $913 per week may be paid in equivalent amounts for periods longer than one week
  - Biweekly: $1,826.00
  - Yearly: $47,746
Minimum Salary Level: Why?

• In 1978, the poverty income level for a family of 4 was $6,635.
  - A salaried worker making $250 (the then minimum salary) per week earned $13,000.
• In 2004, when the minimum salary went up to $455, the poverty level for a family of 4 was $19,223.
  - A salaried worker making $455 per week earned $23,660.
• In 2014, the poverty income level for a family of 4 was $23,850.
  - A salaried worker making $455 per week earned $23,660.
Minimum Salary Level:

• The final Regulations also allow employers to include:
  › non-discretionary bonuses
  › other incentive payments
  › commissions

• to satisfy up to 10% of the salary level as long as the bonuses, commissions and incentive payments are paid at least quarterly.
Minimum Salary Level: Highly Comped

• The highly compensated test is set at 90th percentile of full-time salaried workers in the country and comes out to $134,004 annually.
Salary Basis Test

- Regularly receives a predetermined amount of compensation each pay period (on a weekly or less frequent basis)
- The compensation cannot be reduced because of variations in the quality or quantity of the work performed
- Must be paid the full salary for any week in which the employee performs any work
- Need not be paid for any workweek when no work is performed
Deductions From Salary

• An employee is not paid on a salary basis if deductions from the predetermined salary are made for absences occasioned by the employer or by the operating requirements of the businesses.

• If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.
Permitted Salary Deductions

Seven exceptions from the “no pay-docking” rule

1. Absence from work for one or more full days for personal reasons, other than sickness or disability
2. Absence from work for one or more full days due to sickness or disability if deductions made under a bona fide plan, policy, or practice of providing wage replacement benefits for these types of absences
3. To offset any amounts received as payment for jury fees, witness fees, or military pay
Seven exceptions from the “no pay-docking” rule (cont.)

4. Penalties imposed in good faith for violating safety rules of “major significance”

5. Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of written workplace conduct rules

6. Proportionate part of an employee’s full salary may be paid for time actually worked in the first and last weeks of employment

7. Unpaid leave taken pursuant to the Family and Medical Leave Act
Effect of Improper Deductions

• An actual practice of making improper deductions from salary will result in the loss of the exemption
  – During the time period in which improper deductions were made
  – For employees in the same job classifications
  – Working for the same managers responsible for the actual improper deductions
• Isolated or inadvertent improper deductions, however, will not result in the loss of exempt status if the employer reimburses the employee
Safe Harbor

- The exemption will not be lost if the employer:
  - Has a **clearly communicated** policy prohibiting improper deductions and including a complaint mechanism;
  - Reimburses employees for any improper deductions; and
  - Makes a good faith commitment to comply in the future
- **Unless** the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints
Executive Duties

• Primary duty is management of the enterprise or of a customarily recognized department or subdivision

• Customarily and regularly directs the work of two or more other employees

• Authority to hire or fire other employees or recommendations as to the hiring, firing, advancement, promotion or other change of status of other employees given particular weight
20% Owner Executives

• The executive exemption also includes employees who
  – own at least a bona fide 20% equity interest in the enterprise
  – are actively engaged in management of the enterprise

• The salary level and salary basis requirements do not apply to exempt 20% equity owners
Administrative Duties

• Primary duty is 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

• Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance
Management or General Business Operations

- Tax
- Finance
- Accounting
- Budgeting
- Auditing
- Insurance
- Quality Control
- Purchasing
- Procurement
- Advertising
- Marketing
- Research
- Safety and Health
- Human Resources
- Employee Benefits
- Labor Relations
- Public and Government Relations
- Legal and Regulatory Compliance
- Computer Network, Internet, and Database Administration
Insurance Claims Adjusters

• Exempt status depends on actual job duties
• May be exempt if duties include
  – Interviewing insured, witnesses, and physicians
  – Inspecting property damage
  – Reviewing factual information to prepare damage estimates
  – Evaluating and making recommendations regarding coverage of claims
  – Determining liability and total value of a claim
  – Negotiating settlements
  – Making recommendations regarding litigation
Financial Services

• May be exempt if duties include
  – Collecting and analyzing information regarding the customer’s income, assets, investments or debts
  – Determining which financial products best meet the customer’s needs and financial circumstances
  – Advising the customer regarding the advantages and disadvantages of different financial products
  – Marketing, servicing, or promoting the employer’s financial products

• An employee whose primary duty is selling financial products does not qualify for the administrative exemption
Professional Duties

• Primary duty is the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.

• Primary duty is the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.
Field of Science or Learning

Occupations with recognized professional status, as distinguished from the mechanical arts or skilled trades

Law
Theology
Medicine
Pharmacy

Accounting
Teaching
Architecture
Engineering

Actuarial Computation
Physical Sciences
Chemical Sciences
Biological Sciences
Exempt Medical Professions

- Doctors
- Registered Nurses
- Registered or certified medical technologists
  - 3 years of pre-professional study in an accredited college or university, plus 1 year of professional study in an accredited school of medical technology
- Dental hygienists
  - 4 years of pre-professional and professional study in an accredited college or university
- Certified physician assistants
  - 4 years of pre-professional and professional study, including graduation from an accredited physician assistant program
Other Commonly Exempt Professions

- Lawyers
- Teachers
- Accountants
- Pharmacists
- Engineers
- Actuaries
- Chefs
- Certified athletic trainers
- Licensed funeral directors or embalmers
Additional Non-Exempt Professions

- Licensed practical nurses
- Accounting clerks and bookkeepers who normally perform a great deal of routine work
- Cooks who perform predominantly routine mental, manual, mechanical or physical work
- Paralegals and legal assistants
- Engineering technicians
Recognized Field of Artistic or Creative Endeavor

- **Music**
  - Musicians, composers, conductors, soloists

- **Writing**
  - Essayists, novelists, short-story writers, play writers
  - Screen play writers who choose their own subjects
  - Responsible writing positions in advertising agencies

- **Acting**

- **Graphic Arts**
  - Painters, photographers, cartoonists
Computer-Related Occupations

Primary duty is:

- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications
- The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications
- The design, documentation, testing, creation, or modification of computer programs related to machine operating systems
- A combination of the above requiring the same level of skills, and
Computer-Related Occupations

The employee must also receive either

• A guaranteed salary or fee of $455 per week or more, or

• An hourly rate of not less than $27.63 per hour
Outside Sales

• Primary duty is
  - Making sales or
  - Obtaining orders or contracts for services or facilities for consideration paid by customer and
• Customarily and regularly engaged away from the employer’s place(s) of business in performing such primary duty
• No compensation test
Enforcement

• FLSA enforcement is carried out by Wage and Hour staff throughout the U.S.

• Where violations are found, Wage and Hour advises employers of the steps needed to correct violations, secures agreement to comply in the future and supervises voluntary payment of back wages as applicable.

• A 2-year statute of limitations generally applies to the recovery of back pay. In the case of a willful violation, a 3-year statute of limitations may apply.
Enforcement

In the event there is not a voluntary agreement to comply and/or pay back wages, the Wage and Hour Division may:

- Bring suit to obtain an injunction to restrain the employer from violating the FLSA, including the withholding of proper minimum wage and overtime

- Bring suit for back wages and an equal amount as liquidated damages
Employee Private Rights

- An employee may file a private suit for back pay and an equal amount as liquidated damages, plus attorney’s fees and court costs
Penalties

- Employers who willfully violate the Act may be prosecuted criminally and fined up to $11,000.
- Employers who violate the youth employment provisions are subject to a civil money penalty of up to $11,000 for each employee who was the subject of a violation.
- Employers who willfully or repeatedly violate the minimum wage or overtime pay requirements are subject to a civil money penalty of up to $1,100 for each such violation.
Thank you!

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