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FLSA

**Exemptions, Recordkeeping
& Compliance**

FLSA

EXEMPTIONS, RECORDKEEPING & COMPLIANCE

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This booklet should not be construed as legal advice or legal opinion on any specific facts or circumstances. You are urged to consult competent counsel concerning your particular situation and any specific legal questions you may have. Employers are specifically encouraged to consult an attorney to determine whether they are subject to state requirements that extend beyond the scope of this booklet.

T

his is the second booklet in our series dealing with the Fair Labor Standards Act. The first covered the basics of the minimum wage, overtime and child labor requirements. In this booklet, we will look at several of the key exemptions from the law's requirements and will explain the enforcement and recordkeeping provisions. We will also outline important compliance considerations.

Our discussion is limited to provisions dealing with private employers. As with the previous booklet in this series we do not address FLSA provisions relating to state and local governments.

As with any brief overview of a complex subject, this is no substitute for competent legal counsel. Rather, our goal is to provide a clear explanation, in non-technical language, of the highlights of this important area of the law.

EXEMPTIONS FROM THE FLSA'S REQUIREMENTS

The FLSA exempts certain types of employees from some or even most of its requirements. The U.S. Labor Department and the courts apply these exemptions very narrowly. If an exemption is challenged, it is the employer's burden to prove that every element of a claimed FLSA exemption applies to the employee for whom it is asserted. There are many misconceptions about how exemptions work, and improperly applied exemptions are among the most-common FLSA violations.

Here is a summary of the exemptions most frequently relied upon — and most often in dispute.

A. The “White Collar” Exemptions

The so-called “white collar” exemptions from the FLSA's minimum wage, overtime, and timekeeping provisions apply to those employed in a bona fide executive, administrative, or professional capacity or as an “outside” salesperson. Whether these exemptions apply to a particular person depends in part upon what kind of work he or she actually performs, rather than whether the employee is well-paid, well-educated, well-thought-of or highly skilled, or whether the employee has a high-sounding job title or is in a position covered by an impressive-looking job description.

Whether the person is an exempt executive, administrative, or professional employee also depends upon how he or she is paid. With few exceptions, exempt individuals generally must be paid on a “salary basis,” described below. But the reverse is not true: salaried employees are *not* necessarily exempt.

There are two sets of tests for the executive, administrative, and professional exemptions: a more detailed “long” test, and a streamlined “short” test. Which set applies depends upon the level of the person's salary. For executive and administrative employees, the minimum salary is \$155 per week; for professional employees, it is \$170 per week. At \$250 per week, or about \$13,000 a year, the “short” tests apply. Since few employers nowadays claim these exemptions for employees paid lower salaries than that, we have summarized below only the “short” tests.

1. Executive Employees

An executive employee's primary duty (as a rule of thumb, 50% of his or her time) must be spent managing the business or a customarily recognized department or other subdivision of the business. "Management" can mean lots of different things, but it generally includes activities like being involved in hiring, directing, evaluating, disciplining, and firing employees; deciding what work will be done; planning, assigning, and prioritizing work; determining what materials will be used, bought, stocked, or sold; and so on.

The executive must customarily and regularly direct the work of at least two or more other full-time employees or the equivalent ("full-time" usually means 40 hours a week but can be less in particular instances).

2. Administrative Employees

A person whose primary duty is performing office or non-manual work directly related to the employer's management policies or general business operations (or to those of the employer's customers) can be an administrative employee.

This work can include things like advising management, planning, consulting, negotiating, deciding on or recommending courses of action, participating in the formulation of business policy, making decisions affecting business policy, executing or carrying out business policy, and the like. The work must affect matters of consequence or of substantial importance.

The administrative employee's work must also include the exercise of independent judgment and discretion. This is usually said to consist of evaluating possible courses of action and then, free from immediate direction, taking or effectively recommending one of those courses. Again, this judgment and discretion must relate to matters of substance, and it cannot consist of applying only skills or rote procedures.

A person can also be an exempt administrative employee if his or her primary duty consists of performing functions in the administration of a school system, an

educational establishment or institution, or a subdivision of such an entity in work directly related to academic instruction or training carried on there. Again, this work must include the exercise of discretion and independent judgment.

Administrative employees generally must also be paid on a “salary basis.” They can instead be paid on a “fee basis,” but this method is both highly arcane and rarely used, so it is not covered in this booklet.

3. Professional Employees

There are four types of exempt professional employees, that is, those whose primary duty consists of:

- work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education or from an apprenticeship, or from training in the performance of routine mental, manual, or physical processes;
- teaching, tutoring, instructing, or lecturing in the educational establishment or institution employing them;
- work requiring invention, imagination, or talent in a recognized field of artistic endeavor; or
- work requiring theoretical and practical application of highly specialized knowledge in computer systems analysis, programming, and software engineering and who are employed as skilled workers of that sort in the computer-software field.

Except for the “artistic endeavor” category above, the primary duty of professional employees must include work requiring the consistent exercise of discretion and independent judgment.

Professional employees generally must be paid on a “salary basis,” although the little used “fee basis” alternative exists for them as well. However, exempt computer employees can be paid on an hourly basis, if their hourly rate is at least \$27.63 per hour.

4. Outside Sales Employees

To be an outside salesperson within the FLSA's meaning, an employee must be employed for the purpose of customarily and regularly working away from the employer's place of business in making sales or obtaining orders or contracts.

Of course, an outside salesperson may engage in activities directly related to his or her own sales or solicitations, such as calling on potential customers, drawing up sales contracts, or making incidental deliveries and collections, without affecting the exemption. However, the exemption will be lost if the outside salesperson's time spent in nonexempt work in a workweek exceeds 20% of the hours worked by the employer's nonexempt employees (eight hours as a rule of thumb). An outside salesperson need not be paid in any particular way.

B. The "Salary Basis" Issue

Paying a person on a "salary basis" generally means that he or she receives a fixed, predetermined payment made for every workweek in which the employee performs any work, without regard to the number of days or hours worked. Ordinarily, deductions may not be made based upon the quality or quantity of work performed. On the other hand, the salary need not be paid for a workweek in which the employee performs no work.

In most cases, an employee who is paid other than on a "salary basis" is not exempt as an executive, administrative, or professional employee. For many years, the test has been said not to be met where the pay method is purely hourly, or where impermissible deductions have been made. However, U. S. Labor Department interpretations outline certain circumstances under which deductions from the salary of an exempt executive, administrative, or professional employee *are allowable*. Those situations are limited to the following:

1. Personal Leave

Deductions may be made for absences of one or more whole days caused by sickness, disability, or accident.

2. Sick Leave

Deductions may be made for absences of one or more whole days caused by sickness, accident, or disability, if the employer maintains a plan which provides compensation for loss of salary caused by sickness, accident, or disability, such as a sick pay plan.

These deductions may be made both before the employee is qualified for compensation under the plan and after the employee has exhausted his or her leave or sick pay under the plan.

Absent such a plan, no deductions may be made for days missed due to sickness, accident, or disability, unless the employee is off for a whole workweek, or unless the absence falls under a special Family and Medical Leave Act exception.

Under the FMLA, deductions may be made without affecting the salary basis for any hours, part-days, or whole days taken as FMLA-qualifying intermittent leave, which can be either 1) leave in separate blocks of time due to a single FMLA-qualifying reason; or 2) FMLA-qualifying reduced-schedule leave, that is, leave scheduled on a part-day basis or a whole-day basis, such as a half-day off or a whole day off every other day.

3. First and Last Weeks

Deductions for days not worked in the initial or terminal weeks of employment are allowable. In such circumstances, it will suffice to pay a proportionate part of the employee's salary for the time actually worked.

4. Offsets

You may make deductions to offset any amounts received by an employee as jury fees, witness fees, or as military pay. However, deductions may not be made for *absences* caused by jury duty, attendance as a witness, or temporary military leave, unless the employee is off for an entire workweek.

5. Discipline

Disciplinary deductions may be made as penalties imposed in good faith for violating safety rules of major significance. This is the only permissible deduction based

upon quality of work; for example, deductions generally may not be made for cash shortages or for other disciplinary reasons.

6. Rules Applying To All Salary Deductions

Permissible whole-day deductions generally must be computed in terms of a day's pay or in multiples of that amount for each whole day missed. For instance, permissible deductions for an employee who normally works a five-day week would be calculated in increments of 1/5th of the individual's salary.

Employers should be very careful to see that the "salary basis" of pay is properly maintained. Failure to do so can mean the employee is not considered exempt, resulting in substantial liability for any unpaid minimum wages or overtime.

C. Other Exemptions

There are a number of other exemptions from one or more of the FLSA's requirements. Some of these are for obscure industries (such as the one applying to people making particular kinds of wreaths, for example). These exemptions typically are subject to multiple conditions, limitations, and interpretations. It is not possible to do more than briefly list some of the exemptions here.

1. Exemptions From The Minimum Wage, Overtime, And Timekeeping:

- employees of certain amusement or recreational establishments, organized camps, or religious and nonprofit educational conference centers;
- employees working in certain fishing activities;
- certain agricultural employees;
- employees who are exempted by a proper regulation, order, or certificate as a learner, apprentice, messenger, worker with a disability, or as students employed under particular circumstances;
- employees engaged on a casual basis in domestic service employment to provide babysitting services, and employees employed in domestic service to provide companionship services for certain incapacitated individuals;

- employees who deliver newspapers to consumers.

2. Exemption From Overtime Only

- drivers, drivers' helpers, loaders, and mechanics as to whom the U.S. Secretary of Transportation has the power to establish qualifications and maximum hours of service;
- employees of certain railroads;
- employees of a certain airlines;
- seamen;
- salesmen, partsmen, or mechanics primarily engaged in selling or servicing automobiles, trucks, or farm implements, if employed by a nonmanufacturing establishment primarily engaged in selling such vehicles or implements to ultimate purchasers;
- salesmen primarily engaged in selling trailers, boats, or aircraft if employed by a nonmanufacturing establishment primarily engaged in selling trailers, boats, or aircraft to ultimate purchasers;
- certain drivers or drivers' helpers making local deliveries;
- some employees employed in agriculture or forestry;
- taxicab drivers;
- persons employed in domestic service in a household and who reside in that household;
- persons employed by a motion picture theater;

3. Partial Exemptions From Overtime

- an employee of a retail or service establishment need not be paid overtime if:
 - a. his or her regular rate of pay in an overtime workweek is more than 1.5 times the minimum wage; and
 - b. over 50% of the employee's earnings in a representative period (of not less than one month) comes from commissions.

- a hospital or residential-care home need not pay overtime after 40 hours worked in a 7-day workweek worked by healthcare employees:
 - a. who receive at least 1.5 times their regular rates of pay for hours worked over eight in a workday or over 80 hours in a 14-day work period, whichever is more; and
 - b. who agree or understand that they will be paid in this way before the work is done.
- an employee being provided remedial education by an employer for a total of no more than 10 hours over 40 in a workweek only has to be paid for those hours at his or her straight time rate, if the education:
 - a. is provided to employees who lack a high school diploma or educational attainment at the eighth-grade level;
 - b. is designed to provide reading and other basic skills at an eighth-grade level or below; and
 - c. does not include job-specific training.

RECORD-KEEPING

U.S. Labor Department regulations adopted under the FLSA impose recordkeeping obligations too numerous and detailed to be reproduced here. As an example, with respect to an employee subject to both the FLSA's minimum wage and overtime provisions, an employer must maintain the following information:

- personal information, including the employee's name, home address, occupation, sex, and birth date (if under 19 years of age);
- the hour and day when the workweek begins;
- total hours worked each workday and each workweek;
- the total daily or weekly straight-time earnings;

- the regular hourly pay rate for any workweek or work period when overtime is worked;
- the total overtime pay for the workweek or work period;
- any deductions from or additions to wages;
- total wages paid each pay period; and
- the date of payment and the pay period covered.

Special provisions also exist, such as those applying to employees who are exempt in one way or another, or who work in certain occupations (such as homeworkers, for instance), or who work under particular kinds of pay arrangements, or who receive room or board.

The FLSA requires employers to keep the following records for three years: individual employment contracts; collective bargaining agreements; records on employees' wages and hours; and records showing the employee's sales and purchases.

Employers must keep the following for two years: basic employment and earnings records; wage-rate records; order, billing and shipping records; and records of deductions from or additions to wages paid. Employers generally do not have to keep records in any particular form.

ENFORCEMENT

The FLSA prohibits an employer from:

- transporting or selling goods produced by employees working in violation of the FLSA's minimum wage, overtime, or child labor provisions;
- violating the FLSA's minimum wage, overtime, or child labor provisions;
- retaliating in any manner against an employee because the individual filed a complaint or instituted or testified in an FLSA proceeding;
- violating any of the FLSA's recordkeeping provisions.

Employers who violate the FLSA can be liable for such things as:

- the unpaid minimum wages or overtime compensation;
- an equal amount as “liquidated damages”;
- civil money penalties imposed by the U.S. Labor Department of up to \$1,000 for each “repeated” or “willful” minimum wage or overtime violation;
- civil money penalties imposed by the U.S. Labor Department of up to \$10,000 for each minor employed in violation of the FLSA’s requirements;
- court injunctions requiring compliance with the FLSA and/or which prohibit an employer from shipping so-called “hot goods” made under FLSA-violating conditions until the FLSA problems are remedied;
- “reasonable” attorney’s fees and costs; and/or
- criminal penalties (up to a \$10,000 fine for the first conviction, imprisonment for up to six months if convicted again).

The U.S. Secretary of Labor is authorized to investigate alleged FLSA violations and does so through the U.S. Labor Department’s Wage and Hour Division. The Secretary of Labor may also sue an employer.

Perhaps the fastest-growing FLSA threat to employers is the prospect of private lawsuits by one or more current or former employees. These lawsuits may be pursued as “collective actions” in which multiple plaintiffs join. The individuals bringing the suit are often allowed to send out notices to other current or former “similarly situated” employees inviting them to enter the lawsuit. Through this mechanism, a lawsuit which begins with one employee can mushroom into a company-wide action involving tens, hundreds, or even thousands of employees.

WHAT SHOULD AN EMPLOYER DO?

More than ever before, compliance and prevention are the key to dealing with the FLSA's requirements. Every employer should immediately evaluate how it is doing in those areas that commonly lead to compliance problems and potential liability:

A. Pay Every Nonexempt Employee The Required Minimum Wage.

Review all payroll deductions or employee payments, repayments, or work-related purchases to ensure that they do not cut your employees' pay to below the required minimum wage. For example, determine how your organization handles the cost of required uniforms and uniform maintenance, and be aware of whether your organization requires deductions or repayments for cash shortages or inventory shortages. Evaluate whether deductions or employee payments unlawfully reduce your employees' wages below the required minimum wage.

B. Pay Every Nonexempt Employee All Required Overtime.

Make sure that overtime pay is being figured correctly for every nonexempt employee. Check to see whether all bonuses, commissions, shift differentials, and other payments for work either are properly included in computing overtime or may be lawfully excluded from that calculation.

Evaluate all payroll deductions or employee payments, repayments, or work-related purchases to ensure that your organization is not unlawfully reducing employees' time-and-one-half overtime pay.

Ensure that you identify *all* overtime hours as such and properly pay for them, including, for example, work done at different locations or in different jobs.

Determine whether your organization has any formal or informal "comp time" systems because these are typically unlawful.

C. Ensure That Employees Accurately Record All "Hours Worked".

Pay special attention to whether employees are recording pre- and post-shift work; shift-change overlap; opening or

closing activities; compensable training time; meeting time; compensable travel time; compensable “on-call” work; and time spent doing work at home.

Analyze time records to determine accuracy: for instance, do the records show highly repetitive starting or stopping times; do they appear to mirror only scheduled or “expected” hours; are there recurring corrections, strike-outs, or white-outs; are there unexplained additions to or subtractions from employee worktimes; do the times and totals seem to be reasonable in light of organization or employee work patterns or unusual situations?

D. Justify *Every* Exemption

Decide whether you can prove that every requirement is met as to each employee you are treating as exempt.

Be careful about exemption decisions that might have been made simply based upon job titles, position descriptions, or vague ideas about what employees do or how they are paid.

Thoroughly review the exemptions’ requirements in light of a *candid* assessment of each employee’s day-to-day duties and responsibilities.

E. Pay Exempt Employees Properly

Make sure that individuals treated as exempt executive, administrative, and professional employees are paid on a “salary basis” or on some other qualifying basis.

Find out whether the salaries of these individuals are subject to any impermissible deductions.

Ensure that the pay of employees treated as exempt under some other exception meet any pay-related requirement for that exemption (such as the exemption concerning commissions).

F. Ensure Compliance With The Child Labor Provisions.

Identify every employee who is 16, 17, or 18, verify his or her age, determine his or her exact duties, and then evaluate whether the minor’s duties include hazardous work which requires an age-18 minimum.

Identify every employee who is 14 or 15, verify each individual's age, determine his or her exact duties and hours and times of work, and then evaluate 1) whether the minor's duties consist only of permissible kinds of work; and 2) whether the minor's work hours comply with the FLSA's applicable limitations upon a minor's hours worked and times-of-day worked.

Identify every employee under the age of 14, verify his or her age, and evaluate whether the minor's employment is subject to one of the limited exceptions.

G. Check State And Local Requirements.

Remember that the FLSA does not preempt tougher state or local wage-hour or wage-payment provisions, and many states do in fact have more stringent requirements.

These other laws might well include such things as a higher minimum wage; a daily-overtime requirement; a lower weekly-overtime threshold; minimum pay for reporting to work; strict limitations on deductions from wages; time limits for paying employees who resign or are fired; specific terms upon which bonus, incentive, or commission payments can be paid, lost, or forfeited; rules concerning accumulation and payment of vacation or leave; or requirements that certain employees be paid in cash.

Moreover, state and local laws might not recognize all of the exemptions available under the FLSA or might recognize them only on different or more-limited terms.

You might think that compliance with a law that has been around as long as the FLSA would be almost second nature for employers by now. As you can see, nothing could be further from the truth. Being sure that all your payroll practices and procedures will pass legal scrutiny requires a lot of careful review and concern — but compliance is definitely worth it.

For further information please contact any office of Fisher & Phillips LLP, or visit our website at www.labor-lawyers.com.

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