

Complying with the Fair Labor Standards Act and Prevailing Wage Laws

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FLSA in perspective

- Enacted in 1938, FLSA is the second oldest federal statute that regulates the employment relationship
- Since then, it has been amended to address specific “hot topics”
- FLSA details are set out in regulations.
- One of the most frequently violated federal employment statutes

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FLSA regulates

- FLSA mandates minimum hourly wage and overtime for all but a few specifically exempted employees
- Regulates youth employment
- Defines exemptions from the separate minimum wage and requirements
- Imposes recordkeeping obligations

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FLSA does not regulate

- Number of hours worked in a day
- Shift length
- Vacations, sick leave or other benefits;
- Smoking, bathroom, meal or coffee breaks
 - though it regulates when an employee must be paid for breaks the employer chooses to provide

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FLSA application

- Applies to nearly all private & public sector employers – engaged in interstate commerce and have 2 or more employees
- If state law is more strict than federal, state law supersedes

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Enforcement

- U.S. Department of Labor (DOL) also enforces FLSA provisions
- DOL can bring civil action in court for lost wages
 - obtain order forcing future compliance
 - criminal contempt for defiance of compliance order
- DOL can collect civil money penalties for repeated or willful violations
 - penalties litigated in agency proceeding, not court

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Private enforcement

- Employees may file individual civil suits
- Class claims are common under FLSA provision permitting “collective” actions
- Because FLSA regulates compensation policies, collective actions can be costly

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Consequences of violation

- Employers may be required to pay
 - 2 (3 if a willful violation) years of unpaid overtime or lost wages
 - Liquidated damages (2 times the lost wages)
 - Interest, possible attorneys’ fees
- Supervisors/Owners can be held personally responsible

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It happens here

- Jan. 9, 2012: Custom Security Solutions Inc. agrees to pay **\$62,038** in back wages to 34 security guards for not paying overtime rates.
- Jan. 30, 2012: King’s Daughters and Sons Home of Bartlett, Tenn., agrees to pay **\$54,081** in back wages to 66 employees because employer deducted 30 minutes per day for meal breaks even though employees worked through the breaks.
- March 13, 2012: Countryside Veterinary Services in Louisville, Tenn., pays **\$61,097** in back wages to 11 employees who were denied overtime.
- May 23, 2012: Bierlein Cos. Inc. in Clarksville, Tenn., agrees to pay 147 employees almost **\$217,000** for overtime and record-keeping violations.
- Oct. 1, 2012: K-9 SOS Search on Site, in Oak Ridge, a federal subcontractor, agrees to pay **\$178,721** in back wages and benefits to dog handlers for overtime and hours worked violations.

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Hours Worked

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Determining hours worked

- Unless exempt, employees must be paid at least the minimum wage for each hour worked
 - overtime (1.5 times regular rate) must be paid for hours work over 40 in a work week
- Easy in theory but sometimes complex to apply

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What are “hours worked?”

- FLSA defines work in circular fashion: “to suffer or permit to work”
 - all time employee is “permitted” to work must be paid, even if specific task not requested
 - example: worker stays on at end of shift to finish task or correct errors
 - reason is immaterial
 - time spent by worker compensable

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Travel time

- Ordinarily, commuting time to and from work site is not compensable
- Travel between locations during workday is compensable (continuous workday rule)
- Special rules apply for compensability of out of town travel time

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Work from home implications

- Work performed by a non-exempt employee at home is compensable
 - This can include time spent checking voice mail and email if it takes more than a few seconds or minutes
- Ordinary travel from home to work is almost never compensable

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Travel and the continuous work day

- Employees frequently argue that work performed *at home* makes the commute to and from work compensable
- Most courts reject argument on basis that work done at home can be done at time of employee's choosing.
 - employee is thus "completely relieved from duty"
 - one outlier decision
- 1999 DOL Opinion concluded that while work from home was compensable, that did not, per se, affect the compensability of the travel time

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Driving the company car

- Employee Commuting Flexibility Act (“ECFA”), 29 U.S.C. § 254(a)(2) (1996)
- 1995 DOL Opinion said that if employer required employees to use company provided vehicle, travel time was compensable
- ECFA changed law so that employer may make use of vehicle term and condition of employment

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Working while travelling

- If employee performs legally cognizable work while driving to the job site, that work time is compensable. *Adams v. United States*, 471 F.3d 1321 (Fed. Cir. 2007)
- Prohibiting passengers and requiring employee to drive company car directly to first job did not amount to compensable work. *Rutti v. Lojack Corp., Inc.*, 578 F.3d 1084 (9th Cir. 2009)

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Time spent waiting

- Waiting time counts if employee unable to effectively use it for own purposes and time is controlled by employer
- DOL uses “engaged to wait”(hours worked) vs. “waiting to be engaged”(not hours worked) test
- Test too simplistic to be of much help

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Waiting time, continued

- Employee generally needs to be *completely* relieved of duty (with some exceptions for on-call employees).
- Examples of compensable time: waiters who show up at a set time but do not begin serving immediately; workers who are left idle while mechanical problem is fixed.

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Meals and rest periods

- FLSA only regulates payment for the time
- Employee is working unless completely relieved of duties
- DOL position is that 30 minutes is generally minimum time for meal break but "special conditions" may permit shorter period
 - have persuaded DOL that 20 minutes is enough time where employees chose to eat lunch on site
- Employer cannot require employees to remain on site
- Employee should not remain at work station

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Automatic Meal Break Deductions

- Recent CA6 decision held employer could make automatic deductions for meal breaks and put burden on employee to report exceptions
- Automatic-deduction policy permissible under FLSA
 - commonly used where employees don't have ready access to a time clock
 - popular in hospitals and other health-care facilities
- Employer must establish a reasonable process for an employee to report uncompensated work time the employer
- Employer cannot:
 - prevent the employees from reporting overtime or
 - Ignore fact that employees often failed to report time worked during meal breaks
- Question is whether employer knew or had reason to know it was not compensating employee for working during her meal breaks
- White v Baptist Memorial, 2012 FED App. 0379P (6th Cir. Nov. 6, 2012)
 - <http://www.ca6.uscourts.gov/opinions.pdf/12a0379p-06.pdf>

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Tennessee break requirements

- T.C.A. § 50-2-103
 - mandates 30 minute unpaid break
 - unless work environment provides *ample* opportunity for rest or break
 - required to be given, not just offered
 - each violation is a Class B misdemeanor
- 2012 exemption for tipped servers
 - may *voluntarily* opt-out of break requirement

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Training time

- Time spent in lectures, meetings, conferences, etc. must be counted and paid unless *all* criteria met
 - Held outside regular working hours
 - Attendance is voluntary
 - Training is not job related and
 - No productive work is performed

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Sleep time

- If shift less than 24 hours and employee is “engaged to wait,” sleeping or eating employee is working
- If shift lasts 24 hours or more, parties may agree to exclude bona fide sleep and meal periods
- Document employee agreement

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Overtime and “regular rates”

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Overtime generally

- Non-exempt employees entitled to 1.5 X regular rate for all time worked in excess of 40 in any given **work week**
- Only minors have restrictions on number of hours which they may work
- OT is not due for hours worked in excess of 8 hour day

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Key phrase: work week

- Work week, *not* pay period, determines right to OT pay
- Common Mistake – Thinking OT hours worked in first week of the pay period can be “adjusted” in the second week
- Select any work week that works for you.
- Work week can be changed, but not in order to create moving target

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Calculating the “regular rate”

- Primary OT calculation issue is what to include in “regular rate”
- Convert *all* nonexempt employees’ pay into regular rates (whether paid hourly, salary, commission, by the day or by the job)
- One hourly rate? Multiply by 1.5 for OT rate
- Two or more hourly rates? Use “weighted average” (total non-OT earnings divided by hours worked)

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Regular rates continued

- Salaried *nonexempt*, divide weekly salary by 40 and pay time and a half based on that rate for hours worked over 40
- If salary covers period longer than work week, convert it to work week equivalent

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Commissions

- Include commissions in regular rate.
 - source of commission irrelevant
- If paid weekly, simply add to total of other wages for that week
- If deferred commission
 - exclude from regular rate until determined,
 - pay known OT based on other compensation
 - When commission realized, apportion it back into each week earned, or allocate equally and recalculate weekly regular rate
 - Pay any additional OT due

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Bonuses

- Excludable only if truly discretionary
 - Fact of payment and amount at employer's sole discretion at or near end of period
 - No agreement, promise or contract
- Examples of bonuses to include in regular rate
 - hiring
 - attendance
 - production
 - quality and other work incentive bonuses

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Exclusions from the regular rate

- Christmas turkey money or a 30 year service award
- Vacation, holiday, sick pay, "show-up" or "reporting" pay, travel and reasonable business expenses not made as compensation
- Bona fide discretionary bonuses and profit-sharing plans, "talent fees" for media appearances
- Pension, life, accident, health insurance or retirement plans
- Certain premium rates
- Employee expense reimbursements (if made at cost)

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Employer credits for overtime

- If employer pays extra for hours worked in excess of a *daily* or *weekly* standard, these premiums may be "credited" toward OT due
- Some restrictions for shift pay or hazardous work pay

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Deductions from Wages

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Permissible deductions from pay

- For lodging, meal and other facilities, divide total compensation before deductions by total hours worked
- For tools and uniforms, include value in regular rate of pay, but these amounts cannot reduce the worker's earnings for the week below minimum wage or cut into OT due

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Deductions for overpayments

- Employers may deduct amounts employee owes to employer
 - Special procedures required for payroll advances or loans. Tenn. Code Ann. § 50-2-110
- Deduction may not effectively reduce hourly rate below minimum wage
 - Conviction or indictment exception
- Employers should have written policies permitting deductions
 - Must have agreement to recover for loans

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Other minimum wage laws

- The federal government sets standards relative to how much and how contractor employees are paid in
 - Davis-Bacon Act (1931)
 - Service Contract Act (1965)
 - Copeland “Anti-Kickback” Act (1934)
 - requires weekly statement of the wages paid
 - prohibits kickbacks of wages by construction employees

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Fringe benefits

- Required by
 - Davis Bacon
 - Service Contract Act
- Different treatment
 - Davis Bacon – wages and fringes can be combined
 - Service Contract – wage and fringes must be separately stated

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Tips, tip credits and tip pools

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Tipped employee issues

- Tipped employees may be paid a base hourly rate lower than the minimum wage (currently \$2.13 per hour)
 - The employee receives enough in "tips" so that the employee earns the minimum wage. (This is the "tip credit.")
- Customer must make the payment voluntarily
- Employee must regularly receive more than \$30 a month in *tips*
- Employer must make sure and document that "tip credit" makes up difference to minimum wage
- Employees must be told in advance
- All tips must be retained by employee unless through valid "tip pooling" arrangement

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Tips v. service charges

- "Tips" an employer requires customers pay are not "tips" but "compulsory service charges"
- Only tips count toward the "tip credit"
- compulsory service charge does not count toward tip credit
- In Tennessee, all tips *and* service charges must be paid to the employees who performed the services. Tenn. Code Ann. 50-2-107
 - not applicable to "banquet, convention or meeting facility segregated from the public-at-large" unless at a private club

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Revenue Ruling 2012-18

- Discusses the assessment of employer FICA taxes on tips
- Employer characterization as tip doesn't matter
- A payment that constitutes a "service charge" is wages, and is subject to withholding and reporting as such
- Four conditions must *all* exist for a payment to be classified as a "tip"
 - the payment must be made voluntarily, without any compulsion;
 - the customer must be free to determine the amount of the payment;
 - the payment cannot be dictated by employer policy or be subject to negotiation; and
 - the customer must generally have the right to determine who is entitled to receive the payment.

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Overtime for “tipped” employees

- Tipped employees who work in excess of 40 hours per work week get OT.
- Regular rate is calculated as follows
 - “tip wage” is paid for *all* hours worked
 - add in “tip credit” for each hour worked
 - divide by total hours worked to get regular rate
 - pay .5 of the regular rate for hours worked above 40
- If some or all of “service charge” received, entire charge must be added to the regular rate calculation.

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Credit card service charges

- Employers can pass on processing expense for tips on credit cards, but method must be reasonable and employer cannot profit.

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Is your tip pool valid?

- Only customarily tipped employees can participate (yes to hosts and hostesses, no to salad prep workers)
- Participation can be required, but employees must have prior notice
- Use either a % of sales or % of tips method and
- Voluntary tip sharing by employees is OK, but it must be voluntary and cannot count toward tip credit
- Beware state laws - \$14 million Aff’d against Starbucks

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Positions Exempt from Overtime

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- ### Exempt job duties
- Most common exempt positions are:
 - Managers (Executives)
 - Administrative employees
 - Creative professionals and
 - Retail and service commission employees
 - Teachers
 - Non-exclusive list
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- ### Overtime exemptions
- Three prerequisites:
 - gross salary level (generally \$455 per week)
 - salary basis
 - job duties must meet tests for statutory exemptions
 - Burden is on employer
 - All criteria must be met
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Salary basis

- Employee receives predetermined amount each pay period
- Not subject to reductions for quantity or quality of work
- Must be paid in *full* for any week in which work is performed
- Salary basis destroyed if deductions made for absences due to employer's operating needs
 - full week exception where employee performs no work

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Salary basis exceptions

- Certain categories of exempt employees do not have to be paid on a salary basis
 - attorneys
 - physicians
 - teachers
 - business owner (20-percent equity interest)
 - outside salesman
 - certain computer employees paid at least 27.63 per hour
- Other exempt employees be paid salary to be exempt
 - accountants and engineers

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Danger of improper deductions

- Result: destruction of "salary basis" and loss of exemption.
- Will not be lost if occurrence is isolated or accidental, as long as employee promptly reimbursed (Safe Harbor).

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“Safe Harbor” shelter requirements

- Publish policy prohibiting improper deductions, establishing a complaint mechanism, providing for reimbursement for errors, and prohibiting retaliation
- Follow the policy. Don't repeat the same sins, and DO NOT retaliate against employees who draw attention to problems.

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“Safe” deductions for exempt employees

- Personal absences of 1 or more full days
- Full day absences for sickness or disability if pursuant to bona fide sick leave plan (5 or more days per year)
- Jury duty pay, witness fee, or military pay offsets

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“Safe” deductions for exempt employees

- Good faith penalties for violations of safety rules of major significance
- Unpaid disciplinary suspension of one or more full days for violations of written rules
- Prorated pay in initial and terminal weeks
- Unpaid FMLA leave (even partial days)

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Exempt hours worked

- employers are not generally required to maintain any records of daily or weekly hours worked by exempt employees
- without affecting their employees' exempt status, employers may
 - take deductions from accrued leave accounts
 - require exempt employees to record and track hours
 - require exempt employees to work a specified schedule
 - implement across-the-board changes in schedule under certain circumstances

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Recordkeeping

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FLSA record-keeping

- FLSA requires employers to keep certain records for all employees, and a total of a dozen kinds of records for nonexempt workers
- Need not be retained in any particular format or all in one record

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Required records for all employees

- Full name for Social Security purposes; on the same record, include employee's identifying payroll symbol (if any)
- Home address, including zip code
- Date of birth if under 19
- Gender and job title

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Nonexempt employee records

- Time of day and date work week begins
- Regular hourly rate for any week in which OT is due. Explanation of how employee is paid (e.g., hourly, piece, job, salary)
- Hours worked each day and total hours in each week
- Total daily or weekly straight-time wages, excluding premium OT compensation
- Total premium paid over and above straight-time earnings for OT hours
- Total additions or deductions from wages for each pay period, including wage assignments and purchase orders. Include dates, amounts, and nature of deductions
- Total wages paid in each pay period
- Date of payment and the pay period covered by the payment

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Record retention

- Keep records for three years from date of last entry
- Basic payroll and employment and earnings records (e.g., time cards and sheets) need only be kept for two years, but since many employers rely on them to meet "dirty dozen" requirements, keep for three years
- Keep records safe, accessible, and ready for inspection

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DOL/IRS Conflict on Withholdings

- Most DOL settlements have employer pay back wages directly to employees
- Sometimes, DOL wants “gross wages” paid to DOL so it can pay employees
- IRS position is that withholdings should be deducted by the employer at the time the wages are paid over to the Government for distribution to the employees
 - Rev. Rul. 55-203 & 1998 Chief Counsel Memo.
- Report on next Form 941 filing.

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