



# **Taking Care of FLSA Business & Working Overtime**

***Avoiding Wage and Hour Pitfalls for Non-Profits***

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## Four Main FLSA Requirements

1. A minimum wage (currently \$7.25 an hour).
2. Premium pay for overtime work (at a rate of 1.5 times the “regular rate” of pay for over 40 hours worked in a single workweek).
3. Certain recordkeeping, including accurate time records.
4. Limitations on the employment of minors under 18.

# FLSA Exemptions



## What Are “Exemptions”?

- “Exempt”: Not Subject To One Or More FLSA Requirements
- Some apply only to the overtime requirements, some apply to the minimum-wage and overtime requirements
- Default rule: Everybody is non-exempt, unless an exemption clearly applies
- New rules affect most “white collar” exemptions from minimum-wage and overtime

## “White Collar” Exemptions

- Executive, Administrative, Professional
- Also “Computer Employees,” “Highly Compensated” varieties
- Three general requirements for most of them:
  1. Paid on a “salary basis”
  2. Salary is at least a certain amount
  3. Employee performs specific kinds of work



## Executive Exemption

- Primary duty is managing the enterprise or a customarily-recognized department or unit
- Customarily and regularly directs the work of two or more other employees
- Authority to hire or fire, or suggestions and recommendations about hiring, firing, advancement, promotion, other status changes are given particular weight
- Paid on a “salary basis” at a rate of at least \$455 a week (for now)

# Administrative Exemption

- Primary duty is office or non-manual work directly related to management or general business operations of the employer or the employer's customers
- This work includes the exercise of discretion and independent judgment as to matters of significance
- Paid on a "salary basis" at a rate of at least \$455 a week (for now)
- Possibly one of the most often erroneously-applied FLSA exemptions

## Other Exemptions

- Job titles do not determine exemption status, but some examples of employees who might meet the requirements for other “white collar” exemptions include:
  - “Learned” Professional: Doctor, Some Engineers, Teacher, Scientist
  - “Creative” Professional: Painter, Musician, Screenwriter
  - Computer Employee: Programmer, Software Engineer, Systems Analyst
  - Highly-Compensated: “Project Manager” meets only one of the duties required for the administrative exemption

## Are They Really Exempt?

- Exemptions relate to individuals – Not to job descriptions, pay classifications, positions, job groups, conventional wisdom, etc.
- Detailed, accurate, current job information is essential
- Must be based upon actual work, real facts

# Non-Exempt Employees



## What If They're Non-Exempt?

- Different ways to pay non-exempt workers, such as:
  - Pay by-the-hour?
  - Pay a salary as straight-time compensation for 40 hours (or some other number)?
  - Pay a salary as straight-time compensation for all hours?
  - Another approach (for example, a day-rate, job-rate, or piece-rate basis)?

# Accurate Timekeeping

- If non-exempt, must keep accurate records of worktime:
  - Know everything that counts
  - Have a system and policies for capturing the time accurately
  - Train employees to follow
  - Train supervisors/managers to enforce
  - Periodically see whether the time records appear to be accurate

## The Three Pillars of Calculating OT

The FLSA generally requires employers to pay nonexempt employees:

- 1.5 times their **regular rate** of pay
- for all **hours worked** in excess of forty
- in a **workweek**.



## The Workweek

- A workweek is a fixed and regularly recurring period of seven consecutive 24-hour periods
- **EVERY WORKWEEK STANDS ALONE**
- Common mistake: Calculating OT on a pay period instead of a workweek

## The Regular Rate

- Employees must be paid time and a half their “regular rate”
- Regardless of how the employee is paid (e.g., hourly, salary, commission, etc.), the regular rate is determined as an “hourly rate.”
  - ✓ Total pay for the workweek (minus statutory exclusions) divided by the hours worked
  - ✓ Common mistake: Not including all pay to calculate the regular rate

## Hours Worked

Employers must compensate employees for unauthorized work where the employer knew or had reason to believe the employee was performing work

- ✓ Remember: Respond to “unauthorized” OT with discipline, not withholding of wages

## Bring Your Own Device?!

- No BYOD and remote access, or
- Multi-faceted approach
  - ✓ Policy against unauthorized work outside of shift
  - ✓ Policy requiring employees to report all hours worked
  - ✓ Employees review and sign off on time records as including all hours worked
  - ✓ Pay employees for unauthorized work reported

# Non-Compliance Consequences

- Back wages, plus equal amount (“liquidated damages”)
- Civil money penalties up to \$1,100 per person
- 2-year limitations period, 3 years if “willful”
- Court-ordered compliance in the future (possible “contempt of court” for later violations)

## Hypothetical

Bill is a non-exempt employee and is paid every two weeks. Bill worked 80 hours during the last two-week pay period. His employer did not pay him overtime because he did not work more than 80 hours.

- ✓ FLSA violation?
- ✓ Do we need more information?

## Hypothetical

Maria works 40 hours a week as a receptionist for a church. Due to a special event, she worked four extra hours this week. She asked her supervisor if she could take four hours off next week instead of being paid for the extra hours this week. Her supervisor agreed.

- ✓ FLSA violation?
- ✓ What if she took off six hours instead?

## Hypothetical

Shelley's Shelter has a policy that prohibits non-exempt employees from working unauthorized overtime. Richard, a renowned procrastinator, worked three hours past his shift to complete a report that he should have started a week ago. When Richard submitted his timesheet the next day, his supervisor wrote off the three hours because she did not authorize the OT.

✓ FLSA violation?



## Hypothetical

Henry is the Executive Director's executive assistant. He gets a one-hour unpaid lunch break, but he must eat lunch at his desk in case there are any emergency calls. Henry spends his lunch break surfing the internet and he has only had to answer the phone once during his lunch break in the last two years.

- ✓ FLSA violation?
- ✓ What if Henry is allowed to leave the office but must have calls forwarded to his cell phone?

## For More Information:

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