



FAIR LABOR STANDARDS ACT

DISCLAIMER: This interpretive bulletin shall not be interpreted or construed to supersede any applicable federal, State, or local law or ordinance, or appointing authority policy. In the case of any inconsistencies it contains, the statutory and regulatory provisions shall prevail.

I. PURPOSE:

- A. This interpretive bulletin is to provide agencies with an overview of those aspects of the federal Fair Labor Standards Act of 1938 (FLSA), as amended, which are most commonly encountered in the course of business.
- B. This interpretive bulletin is intended to provide managers with a general understanding of those provisions and is not intended to be all-inclusive or utilized as a protocol in addressing FLSA issues. Managers should consult with appropriate agency, Department of Labor (DOL), and/or West Virginia Division of Personnel (DOP) staff when addressing FLSA issues.

II. DEFINITIONS:

- A. Exempt Employees: Those employees exempt from all but the record keeping provisions of the FLSA. These employees are not required by law to receive overtime compensation and are considered as “salaried.”
- B. Non-Exempt Employees: Those employees whose work is regulated by the FLSA minimum wage, overtime, and record keeping provisions.
 - 1. These employees are entitled to overtime compensation for all hours worked in excess of forty (40) in the workweek or work period (when designated by fire protection or law enforcement agencies).
 - 2. The FLSA requires employers to pay nonexempt employees a rate at least equal to the federal minimum wage and an overtime rate of one and-one-half times the employees’ regular rates for time worked in excess of forty (40) hours in a workweek or work period (when designated by fire protection or law enforcement agencies).
 - 3. Most State wage and hour laws are patterned after the FLSA, but some include provisions that are more protective of workers.
- C. Non-Exempt Salaried Employees: Those who are not exempted from the FLSA minimum wage and overtime provisions, but who are compensated on a per annum basis.
- D. Gap Time: The difference between the work hours, which are less than forty (40) hours, that an employee normally works and the forty (40) hour point beyond which the FLSA requires overtime to be paid.



FAIR LABOR STANDARDS ACT

For example, if an employee's normal workweek is 35, 37½, or 38 hours, the "gap time" would be those hours between 35, 37½, or 38 hours, respectively, and forty (40) hours.

- E. **Work Period:** Section 7(k) of the FLSA provides that employees engaged in fire protection or law enforcement may be paid overtime on a "work period" basis. A "work period" may be from 7 consecutive days to 28 consecutive days in length. For work periods of at least 7, but less than 28 days, overtime pay is required when the number of hours worked exceeds the number of hours that bears the same relationship to 212 (fire) or 171 (police) as the number of days in the work period bears to 28. For example, fire protection personnel are due overtime under such a plan after 106 hours worked during a 14-day work period, while law enforcement personnel must receive overtime after 86 hours worked during a 14-day work period.
- F. **Workweek:** A workweek is a fixed and regularly recurring period of 168 hours; seven (7) consecutive 24-hour periods and need not coincide with the calendar week but may begin on any day and at any hour of the day. Different workweeks may be established for different employees or groups of employees.

III. INTERPRETIVE MATERIAL

- A. **Exclusions.** Certain employees are not covered under the FLSA. These are employees who are not subject to the civil service laws of the State and who:
 - 1. Hold a public elective office;
 - 2. Are selected as a member of the personal staff by a public elective office holder;
 - 3. Are appointed by a public elective office holder to serve on a policy-making level or as an immediate advisor; or
 - 4. Are an employee of the Legislative Branch of same government (and who is not employed by the legislative library).
- B. **Misclassifying employees** for purposes of complying with federal and state wage-hour laws can be a costly mistake. Employers who mistakenly classify nonexempt employees as exempt can be required to pay fines and back wages due employees; however, an employer can help minimize these risks by establishing procedures governing who is responsible for classifying employees and how classification decisions are made.
- C. While the FLSA includes a wide variety of partial and complete exemptions from its minimum wage and overtime requirements, most employer classification procedures are confined to evaluating an employee's status under the FLSA's so-called white-collar exemptions for executive, professional, administrative, computer, outside sales, and highly compensated employees.



FAIR LABOR STANDARDS ACT

- D. An employee of a public agency who otherwise meets the salary basis requirements of Section 541.602 shall not be disqualified from exemption under Sections 541.100, 541.200, 541.300, or 541.400 on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave, and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because:
1. Permission for its use has not been sought or has been sought and denied;
 2. Accrued leave has been exhausted; or
 3. The employee chooses to use leave without pay.
- E. Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough will disqualify the employee from being paid on a salary basis only in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.
- F. State agencies and county health departments affiliated with DOP shall comply with all applicable provisions of the Fair Labor Standards Act, 29 U.S.C. 201, *et seq.* and its regulations 29 C.F.R. Chapter V, including, but not limited, to the following:
1. Working Time: The FLSA does not require:
 - a. Extra pay for Saturdays, Sundays, or holidays, as such;
 - b. Pay for vacations or holidays, or severance pay;
 - c. Discharge notices;
 - d. Limits on the number of hours of work for persons 16 years of age or over, as long as overtime pay provisions are met;
 - e. Time off for holidays or vacations.
 2. Overtime: The FLSA requires that covered, nonexempt employees receive not less than one and one-half times their regular rates of pay for hours worked in excess of forty (40) during a workweek or hours worked in excess of the established work period (when designated by fire protection or law enforcement agencies).

FAIR LABOR STANDARDS ACT

3. **Compensatory Time:** A public agency which is a state, a political subdivision of a state, or an interstate governmental agency, may provide compensatory time off in lieu of monetary overtime compensation. Compensatory time received by an employee in lieu of cash must be at the rate of not less than one and one-half hours of compensatory time for each hour of overtime work, just as the monetary rate for overtime is calculated at the rate of not less than one and one-half times the regular rate of pay. The FLSA requires an agreement or understanding between the employer and employee prior to the performance of work. Law enforcement, fire protection, and emergency response personnel and employees engaged in seasonal activities may accrue up to 480 hours of comp time; all other state and local government employees may accrue up to 240 hours. Compensatory time should be paid out upon separation from employment.
4. **On-Call Time:** An employee who is required to remain on call on the employer's premises or so close thereto that he or she cannot use the time effectively for his or her 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 or her home or with company officials where he or she may be reached is not working while on call unless a very short response time, e.g., within a few minutes, is required and such a response period is unreasonable.
5. **Rest Periods:** Rest periods of short duration, running from five (5) minutes to about 20 minutes, are common. 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.

Employers are required to provide a reasonable amount of break time for an employee to express breast milk for her nursing child for one (1) year after the child's birth each time such employee has need to express the milk. Employers are also required to provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.

6. **Meal Periods:**
 - a. **Bona fide meal periods** are not work time as long as:
 - 1) The employee is completely relieved from duty (uninterrupted). The employee is not relieved if he or she is required to perform any duties, active or inactive (subject to interruption);
 - 2) The period is long enough to allow the employee to use it for eating a meal. Thirty minutes is long enough to qualify as a bona fide meal period; and

FAIR LABOR STANDARDS ACT

- 3) The period occurs at a scheduled hour or within a specified period at a time of day suitable for a normal meal period.
- b. Bona fide meal periods do not include coffee breaks or time for snacks.
 - 1) These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals.
 - 2) Ordinarily, thirty (30) minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions.
 - 3) The employee is not relieved if he or she 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.
 - 4) It is not necessary that an employee be permitted to leave the premises if he or she is otherwise completely freed from duties during the meal period. **Unless an agency advises employees that meal periods are subject to interruption, paid meal periods are not authorized.**
7. Sleeping Time: An employee who is required to be on duty for less than twenty-four (24) hours is considered working even though they are permitted to sleep or take part in other personal activities when not busy. An employee required to be on duty for twenty-four (24) hours or more may agree with the employer to exclude from hours worked bona fide regularly scheduled sleeping periods of not more than eight (8) hours, provided adequate sleeping facilities are provided by the employer and the employee can usually enjoy an uninterrupted night's sleep. No reduction is allowed unless at least five (5) hours of sleep is taken.
8. Travel Time:
 - a. The Portal-to-Portal Act (29 U.S.C. §254(a)(1)) specifically excludes from compensation time spent "walking, riding or traveling to and from the actual place of performance of the principal activity" of an employee and time spent in "activities which are preliminary or postliminary" to the principal activity. Travel time at the beginning or end of the workday, therefore, is not compensable. Note, however, that under the Portal-to-Portal Act, an employer must compensate employees for such time if agreed to in a contract or collective bargaining agreement, or if it is customary to do so.
 - b. Excluding normal commuting time, the general rule is that employees should be compensated for all travel unless it is overnight, outside of regular working hours, on a common carrier, where no work is done.



FAIR LABOR STANDARDS ACT

- c. Travel as a passenger outside of normal work hours is, generally, not working time. Of course, special rules can apply to special situations. Travel during normal working hours is considered as work time.
 9. Training Programs, Lectures, and Meetings: The compensability of employee time spent in training programs, lectures, labor-management committee meetings, and safety meetings is addressed in the regulations (29 C.F.R. §785.27, §785.28, and §785.29). All of the following four general principles must be met for the activity not to be counted as working time:
 - a. Attendance must occur outside the employee's regular working hours; and
 - b. Attendance is in fact voluntary; and
 - c. The employee must do no productive work while attending; and
 - d. The program, lecture, or meeting should not be directly related to the employee's job if it aids the employee in handling his or her present job better, as distinguished from teaching the employee another job or a new or additional job skill.
 10. The Equal Pay Act (EPA) was enacted in 1963 as an amendment to the FLSA. The EPA prohibits discrimination between employees on the basis of sex regarding the compensation received by employees within an establishment for work performed under similar working conditions that requires equal skill, effort, and responsibility.
 11. Child Labor: The FLSA contains provisions regulating child labor that prescribe both minimum wages and maximum hours to be worked. Lower minimum wages for workers are permitted in certain occupations.
 12. Unauthorized Work: Employees who, with the knowledge or acquiescence of their employer, continue to work after their shift is over, albeit voluntarily, are engaged in compensable working time. The reason for the work is immaterial; as long as the employer "suffers or permits" employees to work on its behalf, proper compensation must be paid. Employees who work unauthorized overtime may be subject to disciplinary action.
- IV. REFERENCE:** 29 U.S.C. 201-219.
- V. EFFECTIVE DATE:** January 1, 2000 (This effective date refers to the original Policy DOP-P20, Fair Labor Standards Act for Public Employees).



FAIR LABOR STANDARDS ACT

VI. REVISIONS:

- A. Previous Revision: December 1, 2011.
- B. Latest Revision: January 1, 2020.

VII. BULLETIN NUMBER: DOP-B5.

Approved and Issued By:

A handwritten signature in blue ink that reads "Sheryl R. Webb". The signature is written over a horizontal line.

Sheryl R. Webb, Director of DOP

Date Signed: 01/01/2020



FAIR LABOR STANDARDS ACT

FAIR LABOR STANDARDS ACT EXEMPTIONS

Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than \$684 per week. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the DOL's regulations. Job titles do not determine exempt status.

Employers may use nondiscretionary bonuses and incentive payments (including commissions) paid on an annual or more frequent basis, to satisfy up to 10 percent of the standard salary level.

Employees can be classified as exempt under one or more of the following exemption categories: Executive; Administrative; Professional; Computer-Related; Outside Sales; and, Highly Compensated.

EXECUTIVE EMPLOYEES

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than \$684 per week;
- The employee's primary duty must be the managing of the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other fulltime employees or their equivalent, and
- The employee must have the authority to hire and 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.

NOTE: Under a special rule for business owners, an employee who owns at least a bona fide 20-percent equity interest in the enterprise in which employed, regardless of the type of business organization (e.g., corporation, partnership, or other), and who is actively engaged in its management, is considered a bona fide exempt executive.



FAIR LABOR STANDARDS ACT

ADMINISTRATIVE EMPLOYEES

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$684 per week;
- The employee's 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
- The employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.

NOTE: The administrative exemption is also available to employees compensated on a salary or fee basis at a rate not less than \$684 a week and whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment. Academic administrative functions include operations directly in the field of education, and do not include jobs relating to areas outside the educational field.

Employees engaged in academic administrative functions include: the superintendent or the head of an elementary or secondary school system, and any assistants responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program; the principal and any vice-principals responsible for the operation of an elementary or secondary school; department heads in institutions of higher education responsible for the various subject matter departments; academic counselors and other employees with similar responsibilities.

Whether they work for an insurance company or other type of company, insurance claims adjusters generally meet the duties requirements for the administrative exemption and are not entitled to overtime pay if their duties include activities such as interviewing insureds, 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; and making recommendation regarding litigation. The status of an insurance claims adjuster, however, does not rely on the "claims adjuster" job title alone. There must be a case-by-case assessment to determine whether the employee's duties meet the requirements for the exemption.



FAIR LABOR STANDARDS ACT

Employees in the financial services industry generally meet the duties requirements for the administrative exemption and are not entitled to overtime pay if their duties include work such as 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; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption. In applying the exemption, it does not matter whether the employee's activities are aimed to an end user or an intermediary. The status of financial services employees is based on the duties they perform, not on the identity of the customer they serve.

PROFESSIONAL EMPLOYEES

Learned Professional

To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$684 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning, and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

NOTE: Teachers are exempt if their primary duty is teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment.

Exempt teachers include, but are not limited to, regular academic teachers; kindergarten or nursery school teachers; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrument music teachers. The salary and salary basis requirements do not apply to bona fide teachers.

An employee holding a valid license or certificate permitting the practice of law or medicine is exempt if the employee is actually engaged in such a practice.



FAIR LABOR STANDARDS ACT

An employee who holds the requisite academic degree for the general practice of medicine is also exempt if he or she is engaged in an internship or resident program for the profession. The salary and salary basis requirements do not apply to bona fide practitioners of law or medicine.

Registered nurses who are paid on an hourly basis should receive overtime pay. However, registered nurses who are registered by the appropriate state examining board generally meet the duties requirements for the learned professional exemption, and if paid on a salary basis of at least \$455 per week, may be classified as exempt. Licensed practical nurses and other similar health care employees, however, generally do not qualify as exempt learned professionals, regardless of work experience and training, because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations, and are entitled to overtime pay.

Technologists and technicians, such as engineering technicians, ultrasound technologists, licensed veterinary technicians, avionics technicians and other similar employees are not exempt under Section 13(a)(1) from the minimum wage and overtime requirements of the FLSA because they generally do not meet the requirements for the learned professional exemption.

Technologists and technicians do not meet the requirements for the learned professional exemption because they do not work in occupations that have attained recognized professional status, which requires that an advanced specialized degree is a standard prerequisite for entrance into the profession.

Creative Professional

To qualify for the creative professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate of not less than \$684 per week, and
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

COMPUTER-RELATED OCCUPATIONS

To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated either on a salary or fee basis, as defined in the regulations, at a rate not less than \$684 per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;



FAIR LABOR STANDARDS ACT

- The employee's primary duty must consist of:
 - 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, and
 - A combination of the aforementioned duties, the performance of which requires the same level of skills.

NOTE: The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in the primary duties test described above, are also not exempt under the computer employee exemption.

OUTSIDE SALES

To qualify for the outside sales employee exemption, all of the following tests must be met:

- The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer, and
- The employee must be customarily and regularly engaged away from the employer's place or places of business.

NOTE: The salary requirements of the regulation do not apply to the outside sales exemption. An employee who does not satisfy the requirements of the outside sales exemption may still qualify as an exempt employee under one of the other exemptions allowed by Section 13(a)(1) of the FLSA and the Part 541 regulations if all the criteria for the exemption is met.

Promotion work may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work.



FAIR LABOR STANDARDS ACT

However, promotion work that is incidental to sales made, by someone else is not exempt outside sales work. Drivers who deliver products and also sell such products may qualify as exempt outside sales employees only if the employee has a primary duty of making sales. Several factors should be considered in determining whether a driver has a primary duty of making sales, including a comparison of the driver's duties with those of other employees engaged as drivers and as salespersons, the presence or absence of customary or contractual arrangements concerning amounts of products to be delivered, whether or not the driver has a selling or solicitor's license when required by law, the description of the employee's occupation in collective bargaining agreements, and other factors set forth in the regulation.

HIGHLY COMPENSATED EMPLOYEES

The regulations contain a special rule for "highly compensated" workers who are paid total annual compensation of \$107,432.00 or more. A highly compensated employee is deemed exempt under Section 13(a)(17) if:

- The employee must earn total annual compensation of \$107,432.00 or more, per year, which includes at least \$684 per week paid on a salary or fee basis;
- The employee's primary duty must include performing office or non-manual work, and
- The employee must customarily and regularly perform at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

NOTE: An employee may qualify as an exempt highly compensated executive if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements in the standard test for exemption as an executive.



FAIR LABOR STANDARDS ACT

FAIR LABOR STANDARDS ACT FOR PUBLIC EMPLOYEES FREQUENTLY ASKED QUESTIONS (FAQ)

1. Are State employees covered under the overtime standards contained in West Virginia Code §21-5C-1 et seq.?

West Virginia Code §21-5C-1(e) provides, in pertinent part, that, an “employer” for minimum wage and maximum hours purposes, “includes the state of West Virginia, its agencies, departments and all its political subdivisions.” Subsection (e) provides, however, that employer “shall not include any individual, partnership, association, corporation, person or group of persons or similar unit if eighty percent (80) of the persons employed by him or her are subject to any federal act relating to minimum wage, maximum hours and overtime compensation.” *Adkins v. City of Huntington*, 445 S.E.2d 500 (W. Va. 1994), held, in pertinent part, that all entities qualifying as an employer under subsection (e) are entitled to the exemption, provided that eighty percent (80) of their employees are subject to federal wage and hour laws. The finding in *Adkins* may be reasonably applied to conclude that the State of West Virginia, as an employer, is not subject to overtime pay requirements imposed by West Virginia Code §21-5C-3(a), as at least eighty percent (80) of State employees are subject to the overtime compensation provisions of the federal Fair Labor Standard Act (FLSA).

2. Do State labor laws supersede the FLSA?

State labor laws cannot supersede the FLSA. However, any State law or municipal ordinance which establishes more restrictive wage and hour requirements than the FLSA is permitted and will be enforced unless the State law itself specifies that it is not applicable.

3. Are all workers covered under the FLSA?

Certain workers are not covered under the FLSA. They include elected officials and their personal staffs, political appointees, and legal advisors, but not the staff of persons appointed by elected officials [29 U.S.C. 203(e)(2)(c)].

4. What is the difference between a non-covered and an exempt employee, under FLSA?

Non-covered employees are not bound by any provisions of the FLSA. Exempt employees, while covered by the FLSA, are exempt from the minimum wage and overtime provisions of the Act. Records are required to be kept for exempt employees, whereas there is no FLSA record keeping requirement for non-covered employees under the FLSA. Non-covered and exempt employees are basically treated the same under the FLSA, except for the record keeping requirements.



FAIR LABOR STANDARDS ACT

5. Does an exemption from civil service coverage automatically exempt an employee from FLSA minimum wage and overtime coverage?

No. Civil service coverage is not a consideration in any of the FLSA “white collar” exemptions. Employees of non-covered agencies may be FLSA exempt or non-exempt, depending upon their pay and job duties. The same applies for employees of civil service covered agencies.

6. Would the Governor’s personal secretary be considered a non-covered employee?

Members of the personal staff of elected officials are not covered under the FLSA. To be considered a personal staff member, the individual must be (1) under the direct supervision of the selecting elected official, in this case the Governor; (2) have regular contact with the official; and (3) not fall within the civil service laws of the employing agency. The regulations specifically state that a personal secretary may fall within this exception so long as the above conditions are satisfied [29 C.F.R. 553.11(b)].

7. Are registered nurses considered exempt employees? What about practical nurses?

Registered nurses who are paid on an hourly basis should receive overtime pay. However, nurses who are registered by the West Virginia Board of Examiners for Registered Professional Nurses generally meet the duties requirements for the learned professional exemption, and if paid on a salary basis of at least \$684 per week, may be classified as exempt. Licensed practical nurses and other similar health care employees, however, generally do not qualify as exempt learned professionals, regardless of work experience and training, because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations, and are entitled to overtime pay [29 U.S.C 541.301(e)(2)].

8. Can a person who is performing professional work, but has not obtained a degree, be considered exempt under the professional category?

It depends upon the extent of the “professional work”. A degree may be an indicator but is not necessarily the determining factor. “Professionals” include licensed teachers, computer programmers, software professionals, and creative artists. Other than those categories, however, an advanced degree is ordinarily required for one to qualify as a “professional.” The DOL might make allowances for life experiences but is very careful not to eviscerate the professional exemption. The employee may, however, be able to qualify under the administrative category, since there is no specific education requirement.



FAIR LABOR STANDARDS ACT

9. Would working supervisors or forepersons be considered exempt under the executive category?

A working supervisor or forepersons may meet the test for the executive exemption if: the employee is compensated on a salary basis at a rate not less than \$684 per week; the employee's primary duty is managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise; the employee customarily and regularly directs the work of at least two or more other full-time employees or their equivalent; and, the employee has the authority to hire and 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 is given particular weight.

10. Must employees be paid for time spent waiting to punch in on the time clock?

Most "preliminary" and "postliminary" activities outside an employee's principal activities are not considered compensable. They are only compensable if there is a contract, custom, or practice to pay for such time. Such activities would include checking in or out or waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks, unless required by the nature of the job [29 C.F.R. 790.7(g)]. To the extent that such waiting time is "*de minimis*" (i.e., very minor, such as one or two minutes), it would not normally have to be compensated, in any case.

11. Must employees who arrive early to work be paid for that time?

The conditions under which the employee comes into work early would determine whether that time would be considered working time. If an employee comes in early and reads a book until the time the workday begins, this time is not working time. However, if the employee comes in early and begins working or performing preliminary tasks necessary to the job, and the employer knows that the employee is working, the time is working time (29 C.F.R. 785.11). Employees who work unauthorized overtime may be subject to disciplinary action.

12. Are employees entitled to be paid for lunch time if they eat at their desks?

If an employee chooses to eat at his or her desk and is completely relieved from duty, that time would not be considered working time so long as no work is performed. However, if an employee is required to eat at his or her desk, the time would be considered working time (29 C.F.R. 785.19 and 21-3-10a). Be careful of employees who voluntarily eat at their desks, but answer phones or perform other work. They are "working," even though it is voluntary on their part. Unless an agency advises employees that meal periods are subject to interruption, paid meal periods are not authorized.



FAIR LABOR STANDARDS ACT

13. When must breaks and meal periods be given?

The FLSA does not require breaks or meal periods to be given to workers. West Virginia Code §21-3-10a provides that during the course of a workday of six or more hours, all employers shall make available for each of their employees, at least twenty (20) minutes for meal breaks, at times reasonably designated by the employer. This provision shall be required in all situations where employees are not afforded necessary breaks and/or permitted to eat lunch while working.

14. Are coffee breaks considered working time?

Coffee breaks and snack breaks are compensable rest periods and cannot be excluded from hours worked as bona fide meal periods. These rest periods must be counted as hours worked if they last twenty (20) minutes or less (29 C.F.R. 785.18).

15. Is extra pay required for weekend or night work?

Extra pay for working weekends or nights is a matter of agreement between the employer and the employee (or the employee's representative). The FLSA does not require extra pay for weekend or night work. However, the FLSA does require that covered, nonexempt workers be paid not less than time and one-half the employee's regular rate for time worked over forty (40) hours in a workweek.

16. Is on-call time considered working time?

The issue of pay for on-call time depends largely upon the employee's freedom while on call, including how quickly he or she is required to respond to the call. If the employee can come and go freely while on call, that time is not compensable (29 C.F.R. 785.17). If the employee, however, must remain on or close to the employer's premises and cannot use the time freely, the time may be considered working time and could be compensable (29 C.F.R. 785.17).

An employee who is required to carry a cell phone, or who is allowed to leave a message where he or she can be reached, would not normally be compensated for that on-call time, unless a very short response time, e.g., within a few minutes, is required and such a response period is unreasonable.

17. Do hours spent being treated (at the suggestion of the employer) for an on-the-job injury count as working time?

Time spent by an employee waiting for and receiving medical attention at the direction of the employer during the employee's normal working hours on days when the employee is working would be considered working time (29 C.F.R. 785.43).



FAIR LABOR STANDARDS ACT

18. Are sleeping periods considered working time?

The FLSA regulations (29 C.F.R. 785.20) establish three general policies regarding sleeping time. For employees on tours of duty of less than twenty-four (24) hours, sleeping time is compensable as long as the employee is on duty during that period and must work when required. For employees who work twenty-four (24) hours or more, up to eight (8) hours of sleeping time can be excluded from compensable working time if:

- An expressed or implied agreement excluding sleeping time exists (this means simply informing the employee of your practice to exclude such time);
- Adequate sleeping facilities for an uninterrupted night's sleep are provided;
- At least five (5) hours of sleep is possible during the scheduled sleeping period (though the five (5) hours need not be consecutive hours); and
- Any interruption to that period will be considered working time.

Firefighters, police officers, and other public safety personnel who are on duty exactly twenty-four (24) hours cannot have their sleeping time excluded (29 C.F.R. 553.15). They must work duty shifts in excess of twenty-four (24) hours before sleeping time can be excluded.

19. Are paid sick days, vacation days, holidays, etc., considered compensable working time?

The FLSA does not require payment for nonworking time such as holidays, sick leave, vacations, or jury duty for nonexempt employees.

20. When is double time due?

The FLSA has no requirement for double time pay. This is a matter of agreement between an employer and employee (or the employee's representative).

21. When is overtime due?

For covered, nonexempt employees, the FLSA requires overtime pay at a rate of not less than one and one-half times an employee's regular rate of pay after forty (40) hours of work in a workweek, or after the designated number of hours in each work period (when designated by fire protection or law enforcement agencies).



FAIR LABOR STANDARDS ACT

- 22. Given a Sunday through Saturday workweek, does an employer have to pay overtime to an employee who took eight (8) hours sick leave on Monday, but was then required to work eight (8) hours on Saturday? The employee's total work time for the week was forty (40) hours plus eight (8) hours sick leave.**

No. The FLSA requirement to pay premium rates (time and one-half) for hours worked over forty (40) in a week applies only to the time the employee actually spends working. Sick leave time, even if the employer pays the employee for the hours, is not considered hours worked. Other types of non-compensable time, such as holidays, annual leave, weather-related absences and jury duty, are treated the same way as sick leave.

- 23. If an employee works forty (40) hours during the week and then volunteers to help paint a State building on the weekend, would he or she have to be paid overtime?**

If the employee truly "volunteered" to work on the weekend without contemplation of pay, then that time would not be compensable. However, an employee cannot work for the same employer as a nonpaid volunteer doing the same type of work for which he or she is paid. In addition, such "volunteer" work is deemed suspect by the DOL, and the State would be required to demonstrate that the State neither solicited nor induced the employee to volunteer his time [29 U.S.C. 203(e)(4)(A)].

- 24. Must exempt employees who work overtime be paid for that overtime?**

Exempt employees are not subject to the overtime provisions of the FLSA. Such workers need not be paid overtime. Employers may choose to pay overtime or compensatory time if they wish, but they are not required to do so by the FLSA.

- 25. Must an employee receive premium pay of time and one-half for working on holidays?**

There is no requirement under the FLSA, and it is not State policy, that employees be given premium pay for holidays, weekends, or evening shifts. Overtime is only required for time actually worked in excess of forty (40) hours per week.

- 26. Must the actual overtime pay be included in the paycheck for the pay period in which the overtime was worked?**

The FLSA does not mandate when employees are to be paid. However, a delay beyond the pay period after the period in which the work was performed would most likely not be acceptable with the DOL.



FAIR LABOR STANDARDS ACT

27. Can compensatory time be substituted for overtime pay with prior agreement of the employee?

Under the 1985 Amendments to the FLSA, state and local governments may award compensatory time instead of paying overtime. However, there are certain stipulations in the use of compensatory time. First, compensatory time must be awarded at time and one-half for hours worked over forty (40). Second, law enforcement, fire protection, emergency response, and seasonal employees can accrue 480 hours of compensatory time before any overtime payment must be made. All other employees can accrue up to 240 hours of compensatory time.

28. How are vacation pay, sick pay, and holiday pay computed, and when are they due?

The FLSA does not require payment for time not worked, such as vacations, sick leave, or holidays (federal or otherwise). These benefits are matters of agreement between an employer and an employee (or an employee's representative).

29. Is longevity pay (annual increment) included in the regular rate of pay?

Yes. The FLSA requires inclusion into the regular rate of pay "all remuneration for employment paid to, or on behalf of, the employee," except for:

- Sums paid as gifts or discretionary bonuses (longevity pay is not discretionary);
- Payments made for occasional periods when no work is performed due to vacation, holiday or illness;
- Sums paid for benefit plans, including profit-sharing plans or trusts providing similar benefits;
- Contributions pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits;
- Premium pay for hours in excess of eight (8) in a day or in excess of forty (40) in a week or in excess of the employee's normal working hours;
- Premium pay of at least time and one-half for work on Saturdays, Sundays, and other special days, and
- Premium pay of at least time and one-half for hours in excess of the basic day or workweek established in a collective bargaining agreement or employment contract.

Thus, annual increment pay would be included in the regular rate.



FAIR LABOR STANDARDS ACT

30. How is severance pay calculated and when is it due?

The FLSA requires payment of at least the minimum wage for all hours worked in a workweek and time and one-half an employee's regular rate for time worked over forty (40) hours in a workweek. There is no requirement in the FLSA for severance pay. West Virginia Code §29-6-10(12) provides for severance pay in most cases of involuntary discharge of a classified (civil service covered) employee for cause.

31. If employees are not paid for their meal breaks, do those hours count as hours worked for overtime purposes?

No. Only hours actually worked are counted toward the maximum 40 hours in the workweek. Unless an agency advises employees that meal periods are subject to interruption, paid meal periods are not authorized. Paid meal periods are considered as hours worked for overtime calculation purposes.

32. If an employee regularly works less than forty (40) hours in a workweek, does the FLSA require additional compensation for "extra" hours worked, up to and including forty (40) in the workweek?

No. Classified State employees are paid an annual salary, which is base compensation for forty (40) hours per week, 52 weeks per year (2,080 hours per year). Consequently, no additional compensation is required unless the employee exceeds forty (40) work hours in the workweek. See, *Monahan v. County of Chesterfield, Virginia*, 95 F.3d 1236 (4th Cir. 1996), *Braddock v. Madison County, Ind.*, 34 F.Supp.2d 1098 (S.D. Ind. 1998). For example, FLSA does not require that an employee who regularly works 37 ½ hours in a workweek receive additional compensation for working forty (40) hours in a particular workweek. If an agency has employees who are not in the classified service, and the agency has statutory authority to set work hours and compensation, then the agency may set an employee's workweek at less than forty (40) hours. Should the agency do so, then they must provide straight-time compensation for the hours worked between the "regular" workweek and a 40-hour workweek and, of course, time and one-half for all hours worked in excess of forty (40) in the workweek.

33. Who establishes the hours of work for classified employees?

West Virginia Code §29-6-10(2) vests the DOP with authority to establish a pay plan for all employees in the classified service. The DOP's Pay Plan establishes annual salaries for classified employees. Full-time classified employees are compensated by their base pay for forty (40) hours of work in each workweek.

Consequently, the employee who regularly works less than forty (40) hours in a workweek is not due additional compensation for "extra" hours worked when the total hours do not exceed forty (40) hours in the workweek (*Monahan*, 95 F.3d at 1266, 1277).



FAIR LABOR STANDARDS ACT

- 34. If an employee who normally works eight hours per day, Monday through Friday, is required to work 10 hours per day, Monday through Thursday, and calls off sick on Friday, is the agency obligated to pay for eight hours sick leave on Friday, for a total of 48 hours in the week?**

No. To avoid overtime or premium pay, the schedule of an employee who accumulates 40 paid hours prior to the end of his or her normal workweek should be adjusted to end his or her workweek upon the 40th hour. No leave should be paid beyond forty (40) hours in the workweek. Such adjustments are mandatory for classified State employees.

- 35. What is the correct method for compensating for travel time on an employee's scheduled off day?**

Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly work time when it cuts across the employee's workday. The employee is simply substituting travel for other duties. The time is not only hours worked on regular working days during normal working hours, but also during the corresponding hours on non-working days. Thus, if an employee regularly works from 9:00 AM to 5:00 PM, from Monday through Friday, the travel time during these hours is work time on Saturday and Sunday as well as on the other days. Regular meal period time is not counted. The DOL does not consider as work time that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

- 36. Does the break time for nursing mothers to express milk have to be paid break time?**

Nonexempt employees must be provided reasonable break time to express milk for her nursing child for one (1) year after the child's birth each time such employee has need to express the milk. Employers are not required under the FLSA to compensate nursing mothers for breaks taken for the purpose of expressing milk. However, where employers already provide compensated breaks, an employee who uses that break time to express milk must be compensated in the same way that other employees are compensated for break time. In addition, the FLSA's general requirement that the employees must be completely relieved from duty or else the time must be compensated as work time applies.