

Fair Labor Standards Act Non-Profits

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WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR



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Outline: Conference Topics

- FLSA Coverage
- Employment Relationship
- Minimum Wage and Overtime Basics
 - Minimum Wage
 - Overtime Pay
 - Exemptions
- Recordkeeping and Posting
- Q's & A's Segment



FLSA Coverage

Coverage

Two types of coverage:

- Enterprise coverage: If an enterprise is covered, all employees of the enterprise are entitled to FLSA protections; and
- Individual coverage: Even if the enterprise is not covered, individual employees may be covered and entitled to FLSA protections

Enterprise Coverage

A non-profit may operate a covered enterprise under the FLSA if:

- It engages in ordinary commercial activities—performed for a business purpose—that result in sales made or business done of no less than \$500,000 (the Annual Dollar Volume or “ADV” threshold).
- It has two or more employees engaged in commerce or in the production of goods for commerce.

Note: §3(s)(1)(A) – *Enterprise Coverage*

Enterprise Coverage – Non-Profit

- A non-profit's charitable activities are not ordinary commercial activities and are not part of a covered enterprise.
- The "ADV" threshold:
 - Includes only activities performed for a **business purpose**.
 - Does not include income—from donations, membership fees, etc.—used for **charitable activities**.

Note: 29 C.F.R. §779.214 – Business Purpose

Enterprise Coverage – Non-Profit

Non-profit organizations may also be “named enterprises.”

- Named enterprises include hospitals, organizations providing medical or nursing care for residents, schools, preschools, and **government agencies (federal, state, and local)**.
- Named enterprises are covered regardless of their ADV.
- Every employee of a named enterprise is entitled to minimum wage and overtime protections, unless the employee is exempt.

Individual Coverage

Employees of non-profits who are not covered on an enterprise basis may still be covered individually.

- The employee's (not the establishment's) activities, determine coverage.
- Individual coverage applies on a workweek basis.

Note: 29 C.F.R. §776.0 – Individual Coverage

Individual Coverage

Includes workers who are engaged in:

- Interstate commerce or the production of goods for interstate commerce
- Domestic service—including home care.

Note: 29 C.F.R. §776.11 – *Individual Coverage*

Individual Coverage

- Interstate commerce includes:
 - making out-of-state phone calls;
 - receiving/sending interstate mail or electronic communications;
 - ordering or receiving goods from an out-of-state supplier;
 - handling credit card transactions or performing the accounting or bookkeeping for such activities.



Employment Relationship

Employment Relationship

In order for the FLSA's minimum wage and overtime provisions to apply, there must be an employment relationship between the "employer" and the "employee."

Note: Fact Sheet #13:
Am I an Employee?:
Employment Relationship
Under the Fair Labor
Standards Act (FLSA)



Employment Relationship

The following economic realities factors should be considered and analyzed to determine whether the worker is an “employee” or an “independent contractor/business”:

- The extent to which the services rendered by the worker are an integral part of the employer’s business;
- Does the worker’s managerial skill affect his/her opportunity for profit or loss;
- The worker’s relative investment in the work and a business as compared to the employer’s investment;
- Whether the services rendered by the worker require special skills and initiative;
- The degree of permanency and duration of the working relationship; and
- The nature and degree of the employer’s control over the manner in which the work is performed.

Employment Relationship

- Section 3(d) of the FLSA defines "*employer*" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee."
- Section 3(e) defines "*employee*" as "any individual employed by an employer."
- Section 3(g) further defines "*employ*" to include "to suffer or permit to work."

Note: <http://www.dol.gov/whd/flsa/employmentrelationship.ppt>

Interns

The determination of whether an internship or training program meets this exclusion depends upon all of the facts and circumstances of each such program.

The following six criteria must be applied when making this determination:

- The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
- The internship experience is for the benefit of the intern;
- The intern does not displace regular employees, but works under close supervision of existing staff;
- The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
- The intern is not necessarily entitled to a job at the conclusion of the internship; and
- The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

Volunteers

- The Department of Labor recognizes the generosity and public benefits of volunteering and allows individuals to freely volunteer in many circumstances for charitable and public purposes.
 - Volunteers may provide services to charitable, civic, humanitarian and other non-profit organizations.
 - Volunteers may not perform commercial activities in businesses that are run by non-profit organizations, such as gift shops.

Volunteers

Who is a volunteer:

- Volunteers provide their time freely for public service, religious, or humanitarian objectives.
- They do not receive compensation other than expenses, reasonable benefits or nominal fees.
- They do not displace or perform the work that is ordinarily performed by regular employees.



Minimum Wage and Overtime Basics

Minimum Wage: Basics

- Covered, non-exempt employees must be paid not less than the federal minimum wage for all hours worked
- The minimum wage is \$7.25 per hour
- Cash or equivalent – free and clear

Workweek

- Compliance is determined by workweek, and each workweek stands by itself
- Workweek is 7 consecutive 24 hour periods (168 hours)

Regular Rate

- Is determined by dividing total earnings in the workweek by the total number of hours worked in the workweek
- May not be less than the applicable federal minimum wage

Hours Worked: Issues

- Suffered or Permitted
- Waiting Time
- On-Call Time
- Meal and Rest Periods
- Travel Time
- Sleep Time

Suffered or Permitted

- Work not requested but suffered or permitted is work time.

Note: 29 CFR §785.12, 785.13 - Hours Worked Under the FLSA

Waiting Time

- Employees must be paid for time on duty or controlled by the employer, or for periods of time too short to be used effectively by the employees for their own purposes.

On-Call Time

- On-call time is hours worked when either the employee is required to stay on the employer's premises or is so restricted that the employee cannot use the time effectively for his or her own purposes.

Meal and Rest Periods

- Meal periods are not hours worked when the employee is completely relieved of duties for the purpose of eating a meal
- Rest periods of short duration (normally 5 to 20 minutes) are counted as hours worked and must be paid

Travel Time

- Ordinary home to work travel is not work time
- Travel between job sites during the normal work day is work time
- Special rules apply to travel away from the employee's home community

Sleep Time

FAB 2016-1	Live-in employee		Shifts of 24 hours or more	Shifts of fewer than 24 hours
	Extended periods of time	Permanent		
Requirements for excluding an employee's sleep time from hours worked	<ul style="list-style-type: none"> Reasonable agreement to exclude sleep time Employer must provide private quarters in a homelike environment 		<ul style="list-style-type: none"> Employer provides adequate sleeping facilities Employee can usually enjoy an uninterrupted night's sleep (5 consecutive hours) Express or implied agreement to exclude sleep time 	Sleep time may not be excluded
Maximum number of hours that can be excluded	Up to 8 hours per night as long as the employee is paid for at least 8 hours during the 24-hour period	Up to 8 hours per night as long as the employee is paid for some other hours during the workweek period	Up to 8 hours, in a fixed period, in each 24-hour shift	Sleep time may not be excluded
Limitations on exclusion on a particular night	<ul style="list-style-type: none"> Any interruption to sleep time must be paid If during any night the employee does not get reasonable periods of uninterrupted sleep totaling at least 5 hours, the employer may not exclude any sleep time 			

Sleep Time

- Shifts of less than 24 hours
 - If an employee is on duty for a shift that is less than 24 hours, the employee must be paid even for time he/she is sleeping.

Sleep Time

Shifts of 24 Hours or More

- *If an employee is on duty for 24 hours or more, the employer and employee can exclude from hours worked up to 8 hours spent sleeping if:*
 1. The employer furnishes adequate sleeping facilities,
 2. The employee can usually enjoy 5 consecutive hours of uninterrupted sleep, and
 3. The employer and employee have an express or implied agreement to exclude sleep time.

Overtime Pay: Basics

- Covered, non-exempt employees must receive one and one-half times the regular rate of pay for all hours worked over forty in a workweek

Update: Overtime Rule

- **May 23, 2016** – Final Rule published
- **July 26, 2017** – Department published request for rulemaking

Exemptions and Exceptions

- There are numerous exemptions and exceptions from the minimum wage and/or overtime standards of the FLSA



“White Collar” Exemptions

“White Collar” Exemptions

The most common FLSA minimum wage and overtime exemption -- often called the “EAP” or “white collar” exemption -- applies to certain:

- Executive Employees
- Administrative Employees
- Professional Employees

Three Tests for Exemption

Salary Basis

Salary Level

Job Duties

Salary Basis Test

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

Duties Tests

- An employee's primary job duty must involve the kind of work associated with exempt executive, administrative, or professional employees.

Deductions From Salary

- An employee is not paid on a salary basis if deductions from the predetermined salary are made for absences occasioned by the employer or by the operating requirements of the business
- If the employee is ready, willing and able to work, deductions may not be made for time when work is not available

Executive Duties

- Primary duty is management of the enterprise or of a customarily recognized department or subdivision
- Customarily and regularly directs the work of two or more other employees
- Authority to hire or fire other employees or recommendations as to the hiring, firing, advancement, promotion or other change of status of other employees given particular weight

Administrative Duties

- Primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance

Professional Duties

- Primary duty is the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction OR
- Primary duty is 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 employee must receive either:

- A guaranteed salary or payment on fee basis, or
 - An hourly rate of not less than \$27.63 per hour
- and*
- Must be employed as an analyst, computer programmer, software engineer or other similarly skilled and the primary duty must be
 - In design, development, creations, systems analysis etc. (as defined in the regulations).

No Salary Requirements

- The salary level and salary basis tests do not apply to:
 - Outside Sales Employees
 - Doctors
 - Lawyers
 - Teachers
 - Employees in certain computer-related occupations paid at least \$27.63 per hour



Recordkeeping and Posting

Recordkeeping

- The FLSA requires that all employers subject to any provision of the Act make, keep, and preserve certain records.
- Time clocks are not required and records need not be kept in any particular form.
- Nonetheless, every covered employer must keep certain records for each non-exempt worker

Required Posting

- Covered employers must post a notice explaining the FLSA, as prescribed by the Wage and Hour Division, in a conspicuous place such as a lunch room or employee lounge area.
- *Posting*: Available electronically for downloading and printing at
www.dol.gov/oasam/boc/osdbu/sbrefa/poster/matrix.htm

Additional Information

Other resources include:

- Guidance Documents
- Fact Sheets
- Frequently Asked Questions
- Call or visit the nearest WHD Office
 - Visit the WHD homepages at:
 - www.dol.gov/whd
 - www.dol.gov/whd/overtime/final2016
 - Call the WHD toll-free information and helpline at: **1-866-4US-WAGE** (1-866-487-9243)