



Fair Labor Standards Act (FLSA) Exempt and Non-Exempt

Status

Adam Borgman

614.464.5693 | amborgman@vorys.com

Vorys, Sater, Seymour and Pease LLP

Agenda

- FLSA Overview
- Exemptions
- Covid-19 Emergency Exemption
- Enforcement
- Exposure

Fair Labor Standards Act

- The FLSA Sections 6 and 7 require employers to pay all employees the federal minimum wage and time and one-half overtime pay for hours worked beyond 40 hours in a particular workweek.
- Three noteworthy exemptions from this general rule are the “white collar exemptions,” including “**executive**,” “**professional**,” and “**administrative**.”

Covered Employers

- The FLSA covers employers that:
 - have two or more employees
 - have gross annual sales of not less than \$500,000 (except hospitals, nursing homes, public agencies, and schools are covered by the Act regardless of their dollar volume of business) -and-
 - produce or handle goods in interstate commerce or are part of an "enterprise" engaged in producing or handling goods in interstate commerce

“Employment Relationship”

- FLSA applies only to employment relationships
- The concept of employment is construed broadly under the FLSA and courts usually tend to find that an employment relationship exists
- Important to carefully scrutinize wage and hour treatment of independent contractors, volunteers, trainees, students, and interns.

"Hours Worked"

- **Must Pay for All "Hours Worked"**

Includes all time which an employer knows or has reason to know an employee spends in activities that are:

- Controlled or required by the employer - and-
- Pursued necessarily and primarily for the benefit of the employer's business

Overtime Pay

- Overtime pay must be calculated at 1.5 times the employee's "regular rate" of pay for all time worked over 40 hours in a workweek.
- Potential issues:
 - Defining the "workweek"
 - Determining the "regular rate"

The Workweek

- A "workweek" is a fixed and regularly recurring interval of seven consecutive 24-hour periods.
 - The workweek does not have to coincide with a calendar week and can begin on any day and at any time of day.
 - In most cases, an employer may not average an employee's hours over two or more workweeks to see whether it owes any overtime pay.

Regular Rate

The regular rate used to calculate overtime must be an hourly rate regardless of how the employee's pay is otherwise computed.

- The regular rate is determined by dividing an employee's total compensation (except for certain exclusions) for any workweek by the total number of hours worked.
- An employer may pay the employee a salary, commissions, piece rates, day-rates, or a number of other ways.
- Regardless of how the employee is paid, the FLSA *does* require employers to convert those earnings to a regular hourly rate in order to calculate overtime pay.

Exemptions

- Three noteworthy exemptions from the overtime rule are the “white collar exemptions,” including “**executive,**” “**professional,**” and “**administrative.**”

Qualifying for the Exemptions

- To qualify for an exemption the employer has the burden to show that an employee meets both a duties test and a salary test.
 - The duties test is more subjective; the salary test is more objective.
 - The three key exemptions each have their own duties test, focused on actual duties rather than job descriptions or titles.

Step 1: Salary Test

- Employees paid at least \$684.00 per week (including non-discretionary bonuses and incentive payments, paid at least annually, up to 10% of total) on a salary basis.
- Salary test depends on pay that is predetermined and cannot be reduced based on work quality.
- Any employee below \$684.00 per week cannot qualify for exemption regardless of duties.

Salary Test: “On a Salary Basis”

Hewitt v. Helix Energy Solutions Group (U.S. 2023)

- Employer paid Hewitt \$200,000 per year using a daily rate (\$963/day) without guaranteed weekly amount.
- Despite high compensation, employee entitled to overtime because pay was based on days worked.

Step 2: Duties Test

- **"Primary duty"** means the principal, main, major, or most important duty that the employee performs.
 - Importance of exempt duties to employee's role,
 - Time spent on exempt duties (50% as rule of thumb, but not determinative),
 - Relative lack of direct supervision (who assigned the non-exempt work), and
 - Relative salary compared to wages of non-exempt employees for that kind of work.

Step 2: Duties Test: Executive Exemption

- Primary duty of managing the enterprise or a customarily recognized department or subdivision.
- Customarily and regularly directs two or more employees in the department or establishment.
- Authority to hire, fire, promote, or have their recommendations on personnel matters receive particular weight.

Duties Test: Highly Compensated

- “Highly compensated” workers are paid total annual compensation of \$107,432 or more. Exempt if:
 - Total annual compensation of \$107,432 or more, which includes at least \$684 per week paid on a salary basis (effective January 1, 2020)
 - Primary duty includes performing office or nonmanual work -and-
 - The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative, or professional employee

Duties Test: Administrative Exemption

- Primary duties consist of:
 - office or non-manual work directly related to the employer's management policies or business operations.
 - The exercise of discretion and independent judgment on matters of significance.

Duties Test: Professional Exemption

- Learned professional: Primary duty of performing work that requires advanced knowledge in a field of science or learning customarily acquired by prolonged course of specialized intellectual instruction.

Summary of White Collar Exemptions

- Step 1: Salary test (\$684.00 predetermined per week)
- Step 2: Duties tests (primary duties of employee)
 - Executive (managing, directing, personnel decisions)
 - Administrative (office work, discretion or judgment)
 - Professional (advanced knowledge or creative field)

Exempt Employees Performing “Too Much” Non-Exempt Work

- Employees have only one “status”
- The general rule: concurrent performance of exempt and non-exempt work does not disqualify employees exempt status.

Non-Exempt Work for Each Exemption

- Examples may include:
 - Executive: leading temporary work units; supervision only in another's absence; serving clients, stocking shelves, cleaning, and other non-supervisory tasks.
 - Administrative: manual labor or other production work; applying well-established procedures (e.g., performing inspections, tabulating data, other forms of analysis).
 - Professional: tasks where skill comes from experience rather than intellectual instruction; tasks that involve non-creative copying or recording.

The Emergency Exemption and COVID-19

- FLSA allows exempt employees to perform normally non-exempt work without change of status.
- Requires emergency which threatens (a) employee safety, (b) cessation of operations, or (c) serious damage to employer property AND work done to prevent that result.
- July 2020 DOL website guidance (since removed) said COVID-19 met emergency criteria. No 6th Circuit or Ohio case law.
- *Crayton v. Sailormen, Inc.* (S.D. Ga. July 2023)
 - COVID-19 qualified as an emergency but open question about how long that exemption lasted.

DOL Enforcement

Enforcement is by the DOL's Wage & Hour Division

- Investigations:
 - Employee complaints
 - Tax return audit
 - Targeted industries
- Enforcement mechanisms include (1) requests/subpoenas for documents (72 hours' notice) (2) on-site investigations (72 hours' notice) and (3) litigation.

Recent DOL Initiative

- The DOL has been intensifying its pursuit of FLSA violations by residential care facilities, nursing facilities, home health and home care services and other care-focused industry employers.

Private Actions

- Individual employees may bring private FLSA lawsuits for:
 - Violations of minimum wage and overtime provisions
 - Retaliation

Damages and Penalties

- Unpaid wages + equal amount in liquidated damages. Equates to 2x unpaid wages.
 - Even small per-employee damages multiply quickly across your entire workforce or department.
- 2 year statute of limitations; 3 years if willful – may cover a lot of employees and former employees.
- Automatic attorney's fees and costs.
- Note: No "intent" required – much easier to prove than a discrimination claim.

Costs of Misclassification

- Number of hours > 40 x 1.5 Regular Rate
 - x 2 years (not willful) or 3 years (willful))
 - x 2 (Liquidated Damages)
 - x Employees
 - + Attorney Fees (Employer and Plaintiff)
 - + Costs of Litigation + Costs of Employees Participating in Litigation

Adding It Up

- Individual Action
 - 150 weeks (for the three years) x 5 hours per week = 750 overtime hours
 - 750 overtime hours x \$22.50 (\$15 x 1.5) = \$ 16,875 in unpaid wages
 - Liquidated damages : \$16,875 x 2 = **\$33,750**

Adding It Up (Cont.)

- Collective Action
 - 100 current and former assistant managers join the collective action
 - $100 \times \$16,875 = \$1,687,500$ in unpaid wages
 - Liquidated damages: $\$1,687,500 \times 2 = \mathbf{\$3,375,000}$

Best Practices

- Internal Audit
 - Pay Practices (regular rate)
 - Exemptions
 - Job Duties
- Attorney Consultation
- Reasoned Action



Questions?

Adam Borgman

614.464.5693 | amborgman@vorys.com

Vorys, Sater, Seymour and Pease LLP

VORYS

"It depends."