

Clarifications of the Fair Labor Standards Act

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As employers cut back on employee hours and rearrange duties to economize, be mindful of requirements to pay overtime to employees who are not exempt from the requirements of the Fair Labor Standards Act (FLSA). A flurry of opinion letters from the Department of Labor should provide some clarity to an employer's obligations under the FLSA.

To determine whether the FLSA requires payment of overtime compensation, an employer must understand what time is considered to be "compensable." The FLSA requires that employees receive overtime pay for any compensable hours worked beyond 40 hours in a work week. Employees are only exempt from this overtime pay requirement if they are paid on a salary basis, or "salaried," and if they perform exempt duties as defined by the FLSA. The DOL's recent opinions help to define these requirements for exempt status.

What Time is Compensable?

Employers often wonder whether time spent in an on call status is compensable. One group of on-call employees were not working compensable hours during the times they were at home with the possibility of being called in for an emergency, where they were still able to use that time for their own purposes, and the calls only occurred 2 to 5 times per month.¹ The time spent on the work responding to the call is compensable, but the time spent traveling to and from the site is compensable only if the employee must travel a substantial distance, but not if the employee is called to a regular work site (including a client site).

Time spent by employees in a training course required by their employer, as well as time spent studying and reading materials during non-work hours, is considered to be compensable time.² Similarly, employers must compensate employees for time spent in most voluntary training during working hours, as well as time spent in prerequisite classes taken at home, if the training is directly related to the employee's job.³

Time in classes taken voluntarily that benefit the employee and correspond to courses offered by a bona fide institutions of learning can be non-compensable. For example, an employer need not compensate time spent in training voluntarily taken by employees of day care and educational facilities for young children, which was needed to maintain their state certification.⁴

¹ Wage and Hour Opinion Letter FLSA2009-17.

² Wage and Hour Opinion Letter FLSA2009-15.

³ Wage and Hour Opinion Letter FLSA2009-13.

⁴ Wage and Hour Opinion Letter FLSA2009-1.

Like classes that are taken voluntarily, public employees who are volunteer to perform duties similar to their paid work need not be compensated for that time, as long as the volunteer work is not performed for the “public agency” that is their employer. For example, Emergency Medical Technicians (EMT’s) who volunteered for a local voluntary emergency crew were not working compensable hours, since the crew was a separate and independent entity, rather than being part of the county which employed the EMT’s.⁵

Salaried Status

To be exempt, employees must be “salaried.” The DOL has clarified in two opinion letters that employees are not salaried and therefore not exempt if an employer reduces the salary of employees in weeks where they work less than a full normally scheduled work week, if they have no time left in a paid time off bank.⁶ Similarly, a third opinion letter clarified that employees can be required to use accrued vacation time to maintain their salary during a plant shutdown of less than a workweek without losing their exempt status, so long as the employer does not reduce the salary of employees who have exhausted their vacation time.⁷

This situation contrasts with employees who can maintain their exempt status even if they are paid less in weeks where they are normally scheduled to work less than a full work week. Such employees can maintain their salaried status so long as the prospective reduction of pay in those weeks is not designed to circumvent their salaried status. Even if the salary is reduced on an ad hoc basis and the employee loses her salaried status for that pay period, an employee can regain her salaried status if she receives her full salary in subsequent weeks. However, an employee may not regain her salaried status if the changes in salary and status “occur so frequently that one can conclude that the employee is not really paid” a regular salary.⁸

Exempt Duties of Employees

In addition to being salaried, an exempt employee must perform duties which are categorized as “exempt” by the FLSA. Insurance agents were found to be potentially exempt as outside sales agents under the administrative exemption.⁹ Insurance agents fit within the outside sales exemption because their primary duty was to sell insurance and financial products through meetings outside of the insurance office, as long as those meetings outside of the office were “normal and recurrent” rather than isolated or one-time practices, and activities at the office were “incidental and in conjunction with” those outside sales activities.

⁵ Wage and Hour Opinion Letter FLSA2008-13.

⁶ Wage and Hour Opinion Letters FLSA2009-14 and FLSA2009-18.

⁷ Wage and Hour Opinion Letter FLSA2009-2 (citing Wage and Hour Opinion Letter FLSA2005-41).

⁸ Wage and Hour Opinion Letter, 1998 WL 852696 (Feb. 23, 1998).

⁹ Wage and Hour Opinion Letter FLSA2009-28.

Insurance agents who advise clients on insurance and financial products, as well as marketing those products, were also found to be exempt, under the administrative exemption.¹⁰ DOL found that their work was directly related to the management or general business operations of the insurance company, and used sufficient discretion and judgment in performing those duties. Similarly, a city employee charged with marketing and promoting the city as a destination for visitors and conventions was deemed exempt as an administrative employee since her duties were intended to enhance the city's image to improve its economic growth (related to its general business operations).¹¹ In addition, she was required to exercise discretion and judgment since she had little supervision and prepared both promotional materials and bids to potential clients.

Employees of certain types of businesses can also be exempt. A town's lifeguards were exempt since they were employed by a recreational establishment (the town pool) that did not operate for more than 7 months a year.¹² In contrast, the employees of a catering service at a recreational facility were not exempt, since they were not employed by the recreational establishment.¹³

In light of these recent opinions, employers should keep the following in mind:

- Consider whether time spent by employees is compensable
- Employees can lose their salaried status if they lost pay based on hours worked
- Employers need to establish that employees are performing exempt duties to avoid paying them overtime

To access the full DOL opinion letters, visit <http://www.dol.gov/esa/whd/opinion/flsa.htm>.

¹⁰ Wage and Hour Opinion Letter FLSA2009-28.

¹¹ Wage and Hour Opinion Letter FLSA2009-4.

¹² Wage and Hour Opinion Letter FLSA2009-5 (citing 29 U.S.C. § 213(a)(3)(A)).

¹³ Wage and Hour Opinion Letter FLSA2009-11.