

WELCOME TO THE FAIR LABOR STANDARDS ACT

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I. What is the Fair Labor Standards Act?

The Fair Labor Standards Act (“FLSA”) is a federal statute enacted in 1938 that governs wage and hour issues for most employees in the private sector. It was made applicable to the public sector by the Supreme Court in the case of *Garcia v. San Antonio Metropolitan Transit Authority* 469 U.S. 528 (1985). The FLSA establishes requirements relating to minimum wage, overtime pay, record keeping, equal pay for equal work and child labor.

II. Coverage of the Act

A. Exempt Workers

Not all workers are covered by the FLSA. Exempt workers include:

1. Elected officials and their personal staffs
2. Political appointees and legal advisors
3. Bona fide volunteers
4. Independent contractors
5. Prisoners
6. Certain seasonal recreational employees

B. Partially Exempt Workers

The following classes of workers are exempt from the overtime provisions of the FLSA, but not from its recordkeeping provisions:

1. Executive
2. Administrative
3. Professional

III. Minimum Wage

The FLSA establishes a **federal** minimum wage that must be paid to all employees, unless they are specifically exempted from the application of the FLSA. That federal minimum wage is currently \$5.85 per hour and will become \$655 on 7/24/08 and \$725 on 7/24/09. Employees need not be paid on a hourly basis so long as the pay covering each workweek equals or exceeds the minimum wage standard. Similarly, the minimum wage need not be paid in cash; it can be paid in whole or in part in board, lodging or other facilities. The federal law sets the **minimum** standard for covered employees, it does not preempt the states from establishing a higher minimum wage. The minimum wage in New Mexico is \$6.50 per hour.

III. Overtime

- A.** The FLSA requires that employees be paid one and one-half times the employee's regular rate of pay for each hour worked over 40 hours per week.
- B.** Overtime pay is payable on a workweek (regularly recurring period of seven consecutive 24 hour days) basis.

- C. Certain employees (e.g. hospital and nursing home employees and firefighters and law enforcement personnel) may average hours worked or establish a longer work period.
- D. Overtime **IS NOT** required for work exceeding 8 hours in one day, but not more than 40 hours in a week, unless the employer's personnel policy or work rules establish a different rule.

IV. Compensatory Time

- A. Public employers may “pay” overtime in the form of compensatory time off if the amount of compensatory time off equals one and one-half times the employee’s regular rate of pay.
- B. Compensatory time must be provided for under a collective bargaining agreement, employment agreement or memorandum of understanding which is negotiated with individual employees, a representative of the employees or through a collective bargaining agent.
- C. Compensatory time earned by an employee constitutes a legal liability for the employing jurisdiction

1. Employees may generally accrue up to 240 hours compensatory time, this is really only 160 hours of actual overtime work).
2. An employee who has accrued compensatory time and requests use of the time must be permitted to use the time within a reasonable period after making the request if it does not unduly disrupt the operations of the agency.
3. On the other hand, employers **MAY** require the use of accrued compensatory time to forestall accrual of large amounts of compensatory time by employees.

V. Hours Worked

- A. Employees must be compensated for all “hours worked” including:
 - a. Principal activities of regular work for the employer, regardless of where the work is performed.
 - b. Required incidental activities such as:
 - i. Setting up equipment
 - ii. Picking up mail
 - iii. Completing paperwork
 - iv. Waiting time during regular work hours

- v. Travel during regular work hours (except travel to and from work)
- c. Breaks of less than 20 minutes.
- d. Meal periods of over 30 minutes if the employee's freedom is restricted by the employer.
- e. Sleeping time for employees on duty for less than 24 hours.
- f. Training programs and meetings—unless the employee voluntarily attends the training outside normal work hours and the training was not directly related to the employee's job or work.

B. Rounding work time to the nearest quarter of an hour or shorter period is acceptable if it is done so that over a period of time employees are compensated for all time actually worked.

C. Paid holidays and annual or sick leave **DO NOT** count as hours worked. Hours worked means hours **actually worked** by the employee.

D. Unauthorized work

- a. Employees who, with the knowledge or acquiescence of their employer, continue to work after their shift is over, albeit voluntarily, are engaged in compensable time.

- b. The reason for the work is immaterial as long as the employer “suffers or permits” the employee to work on the employer’s behalf.
- c. Mere promulgation of a rule prohibiting unauthorized work is not sufficient, nor is the employee’s violation of the employer’s rule a *per se* bar to recovery by the employee.

E. Split Shift

- a. If an employee has time off in the middle of a workday which is long enough to effectively use as he or she wishes; and
- b. The employee understands that (s)he does not have to return to work until a definite specified time; then
- c. The employee will not be considered to be working during the time-off period.

VI. Record Keeping Requirements

- A.** There is no particular form in which records must be maintained, and time clocks need not be used, however, an employer cannot complain that evidence on which claims were based were uncertain or vague if the employer failed to keep adequate records.

B. Records that MUST be kept:

- a. Employee's personal information
- b. Occupation
- c. Hour and day when workweek begins
- d. Total hours worked each workday and each workweek by each non-exempt employee. (May substitute a schedule if the employee works a regular schedule).
- e. Regular hourly rates for any week when overtime is worked.
 - i. an explanation of the basis for the pay by indicating the monetary amount paid on a per hour, per day, per week, per piece or other basis.
 - ii. and the amount and nature of each payment which is excluded from the regular rate.
- f. Total premium pay for the overtime hours
- g. Deductions from or additions to wages
 - i. Dates
 - ii. Amounts
 - iii. Nature of addition or deduction
- h. Total wages paid each pay period
 - i. Date of payment and pay period covered

- j. Time cards and other earnings records must be kept for 2 years
- C. Payroll records and contracts are to be retained for 3 years.
- D. Records identified in **B** (a), (b), (c), (h) and (i) must be kept for exempt employees, plus the basis on which wages are calculated.

VII. The Salary Basis Test

- A. Must be paid a predetermined amount, exceeding \$455 per week each pay period, which constitutes all or part of the employee's compensation.
- B. This amount is not subject to reductions for variations in the quality or quantity of the work performed.
- C. The employee must receive the full salary for any week in which work is performed without regard to the number of days or hours worked.
- D. An employer may deduct the hourly or daily equivalent of the employee's full weekly salary for any of the following absences:

1. A deduction from the weekly salary of an exempt employee may be made for absence from work for one or more **full days** for personal reasons other than sickness or disability.
 - (a) Thus, if an employee is absent two full days to attend personal business, the salary basis is not destroyed by taking a two-day deduction in the employee's pay. If, however, the employee is absent for a day and a half for the same reason, only one day's pay may be deducted.
2. Deductions from pay may be made for one or more **full day absences** caused by sickness or disability if made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary for such reasons.
3. Deductions (**in any amount**) from the salary of exempt employees for penalties imposed in good faith for violations of safety rules of **major significance**; those relating to the prevention of serious danger in the workplace or to other employees.

4. Deductions from an exempt employee's pay made be taken for unpaid disciplinary suspensions of one or more **full days** imposed in good faith for violations of workplace rules, if such deductions are in accordance with a written policy applicable to all employees.
 - (a) This is in contrast to the prior rule that only authorized full week suspensions for disciplinary reasons.

E. Public Sector Employees

1. The salary basis exemption is not lost if the employee's pay format is established pursuant to principles of public accountability providing for specific leave accrual rates and deductions from pay or leave without pay for absences for personal reasons, or illness of less than a full day.
2. This provision embodies the concept that public employees will not be paid for work that they do not perform.
3. Thus, partial day deductions can be made for absences for personal reasons, or illness, if there is a clearly stated

policy, and if the absence is without permission, the employee's accrued leave has been exhausted or the employee chooses leave without pay.

VIII. Administrative Employee Exemption

- A. Must earn a salary of at least \$455 per week.
- B. Primary duty must office or non-manual and be directly related to the management or general business operation of the employer or the employer's customers.
 - 1. Primary duty means the principle, main or most important duty the employee performs.
 - 2. Employees who spend more than 50% of their time performing exempt duties will generally satisfy the primary duty requirement.
 - 3. Functional areas include: tax, finance, accounting, budgeting, auditing, insurance, quality control, procurement, advertising, marketing, research, safety and health, personnel management and human resources, employee benefits, labor relations, public relations,

government relations, computer network and database administration, and legal and regulatory compliance.

- C. The employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance in the business.
 - 1. This requirement does not have to be customary or regular, it must merely be present in the employee's primary duty.
 - 2. This means that the employee exercises independent judgment, but not necessarily in all aspects of the employee's job.
 - 3. The exercise of discretion and independent judgment involves the comparison and evaluation of possible courses of action and acting or making a decision after the various consequences of action or inaction have been considered.

IX. Executive Employees Exemption

- A. Must earn a salary of at least \$455 per week.

B. The management of the enterprise or a customarily recognized department or subdivision of the company in which they are employed as their “primary duty”.

1. “Management” is not specifically defined in the regulations, but may include interviewing, selecting and training employees as well as setting and adjusting their hours of work and rates of pay. Supervision of and appraising the performance of employees is also an indicator that the position is in the nature of management. Workers who handle employee complaints and grievances and who also are responsible for employee discipline are often found to be in management positions.

C. The employee must also customarily and regularly direct the work of two or more full-time employees or their equivalent. The supervision must be greater than occasional, but need not be constant.

D. An exempt executive employee must have the authority to hire or fire other employees. As an alternative, the worker may be considered an exempt executive if the executive’s suggestions

and recommendations as to the hiring, firing, advancement, promotion or other change of employment status concerning employees under the executive's direction is given "particular weight".

X. Professional Employee Exemption

- A. Must earn a salary of at least \$455 per week.
- B. The employee's work must be intellectual in nature and that which includes the consistent exercise of discretion and judgment.
- C. In a field of science or learning.
- D. Customarily acquired by a prolonged course of specialized intellectual instruction.