

## MODERN MANAGEMENT

# FEDERAL WAGE & HOUR GUIDELINES FOR EMPLOYERS

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## **Introduction**

The federal wage and hour law is a complex and difficult law to administer. Every year, since the law was enacted in 1938, numerous employers have been subjected to time consuming audits by the United States Department of Labor Wage and Hour Division (“DOL–WHD”). Those audits usually uncover violations that result in the assessment of substantial sums of back pay and penalties. With the government’s continued vigorous enforcement of the law, it is more important than ever that employers familiarize themselves with the wage and hour requirements.

This booklet/CD presents a general overview of the highlights of this law, provides answers to some of the more common issues, and explains what occurs during a government audit. It is not intended to be a complete review of the law and regulations, nor is it an attempt to refer to the scores of interpretations of this complex law.

## **Overview of the Wage & Hour Law**

The federal wage and hour law (Fair Labor Standards Act – “FLSA”) sets standards for the basic minimum wage and overtime pay for most private and public employment. The law requires employers to pay covered employees, who are not exempt, at least the federal minimum wage and overtime pay of 1½ times the regular rate of pay.

Hours and types of jobs that children can work are legally restricted, and record keeping requirements are established. The law is administered by the Employment Standard Administration’s Wage and Hour Division (“WHD”), a part of the DOL.

## **Application of Law to Employees**

Generally, anyone who performs services is an “employee” to whom the wage and hour law applies, if the employer can control what will be done and how it will be done. The deciding factor is the right to control the method of work and the result of the services. If there is no right to control, then the person performing the services may be what is referred to as an “independent contractor.” However, that depends on the facts and circumstances of each situation, and the courts and DOL have interpreted independent contractor status very narrowly.

There are also situations in which an individual can be considered an employee of two or more employers without there being a separate employment relationship for each employer. This is called “joint employment,” and means that each employer is both individually and jointly responsible for complying with all parts of the wage and hour law.

The law defines “to employ” as including “to suffer or permit to work.” Usually, when a person has done something of economic value for another with the person’s knowledge

or permission, there is an employment relationship. However, some individuals who perform work of an economic value may still not be “employees.” Examples include:

- Those who work for their own advantage (such as a “trainee”);
- Those who volunteer or donate their time for public, religious or humanitarian services (such as “community workers”); and
- Those who are prisoners on work release programs.

### **Minimum Wage**

On May 25, 2007, President George W. Bush signed legislation that, in part, increased the federal minimum wage in three steps:

1. To \$5.85 per hour effective July 24, 2007;
2. To \$6.55 per hour effective July 24, 2008; and
3. To \$7.25 per hour effective July 24, 2009.

### **Compensable Time**

#### ***General Rule***

An “employee” must be compensated (paid) for all “hours worked.” This includes all hours an employee is required to be on the employer’s premises, on duty or at a prescribed work place. The work must be primarily for the employer’s benefit. Compensation is due for all hours devoted to work controlled or required by the employer.

“Hours worked” includes time an employee is “suffered or permitted to work.” Thus, work which the employer does not request, but permits, is work time. For example, employees may voluntarily continue to work at the end of the shift to finish a task, make corrections, or prepare reports. Regardless of the reason, if the employer knows or has reason to believe that the employee is continuing to work, the time must be counted as hours worked. Management cannot accept the benefits of labor without compensating for the hours worked. Merely establishing rules against working beyond quitting time is not enough; management must enforce its rules.

### ***Rest Periods, Holidays, Vacations***

The wage and hour law does not require an employer to count as “hours worked” those time periods that are paid but no work is performed, such as a rest period (at least 21 minutes of consecutive uninterrupted time), meal period (at least 30 minutes of consecutive uninterrupted time), holidays, vacations, or sick leave. Generally, whether an employer pays for these periods is a management policy decision.

### ***Waiting Time–Down Time***

Normally, all hours which the employee is required to give the employer are compensable “hours worked” and there need not be any physical or mental exertion. A person may be hired to do nothing or merely wait for something to happen. The general test to determine if the hours are compensable is whether the employee is able to use the time effectively for his/her own purposes.

### ***Preparatory and Concluding Activities***

Generally, “hours worked” includes all activities which are an indispensable part of the employee’s principal activity. Included in the principal activity are activities that are closely related. All time spent engaging in these activities must be compensated. If the activity is an integral part of the workday or is performed before and/or after the workday, then it must be compensated.

### ***Training Programs, Lectures, and Meetings***

For training programs, meetings, etc., the time spent is not working time if all of the following four criteria are met:

1. Attendance is outside of the employee’s regular working hours;
2. Attendance is in fact voluntary;
3. The program, lecture, or meeting is not directly related to employee’s job; and
4. The employee does no productive work while attending.

### ***Travel Time***

Whether travel is compensable depends on the kind of travel involved. For instance, home-to-work travel generally is not compensable either when an employee works at a fixed location or at different job sites.

Travel during the work day, from job site to job site is “all in a day’s work” and must be counted as part of hours worked. For out-of-town travel, time spent traveling from home to airport or railroad depot is not compensable, but an employee must be paid for all other travel time during normal working hours.

## **Regular Rate**

The regular rate is the fixed hourly rate or, absent that, is computed by dividing all earnings in a workweek by the total number of hours worked. The workweek is any period of seven consecutive calendar days selected by an employer for pay purposes. Salaried employees who are not exempt from overtime, and those employees who are paid or provided allowances of anything of value in lieu of, or in addition to, a fixed hourly rate, are examples of employees whose regular rate must be computed each workweek in which more than forty hours are worked.

Among the items included in the determination of the regular rate are commissions, incentives, regular or periodic bonuses, shift premiums and the reasonable cost or fair market value of meals or lodging which are furnished. Examples of items not included are reimbursement expenses, unexpected special gifts (like a Christmas bonus which is not guaranteed or fixed in amount), payments made to pensions or thrift and savings plans, cost of life, accident, or health insurance, paid leave from work, employee referrals, on-call or call-back pay, and subsistence pay.

## **Overtime Calculation**

The federal wage and hour law does not limit the numbers of hours that an employee may be required to work, either daily or weekly (except for children). The law does require that overtime pay be given to nonexempt employees for any time worked in a workweek in excess of forty hours a workweek. Overtime must be paid to nonexempt employees at a rate of not less than 1½ times the employee’s regular rate of pay for each hour worked in a workweek in excess of forty hours. Hours may not be averaged over two or more weeks—each workweek must stand alone. Employees may be paid on a bi-weekly or monthly basis, but the overtime calculations must be performed on a weekly basis.

The requirement is that employees must be paid overtime only for all hours worked in excess of forty hours in one workweek. If an employee is out on holiday, vacation or sick leave for part of a workweek, the time out for these periods does not count as hours worked, even though the employee may be paid for those hours.

## Common Exemptions under the Law

### *General Rule*

There are two major types of exemptions from the wage and hour law:

1. The “white-collar exemptions” (executive employees, administrative employees, professional employees, outside sales representatives, computer-related occupations, and highly-compensated employees) provide an exemption from both the minimum wage and overtime provisions; and
2. Exemptions for particular occupations which provide for exemption from one of the two, minimum wage or overtime, depending on the occupation.

Misunderstandings of these exemptions often result in violations of the wage and hour laws. Therefore, the guidelines set forth below should be carefully examined before an employee is treated as exempt from the minimum wage and/or overtime provisions of the law.

### *White-Collar Exemptions*

One common misconception is that the payment of a salary in and of itself satisfies the prerequisites for the white collar exemptions. However, white collar exemptions will only be available where there is compliance with all provisions of one of the following tests:

1. Executives:
  - a. Earn a weekly salary of at least \$455;
  - b. Have authority to hire or fire other employees, or the executive’s suggestions and recommendations regarding the hiring and/or firing of other employees must be given “particular weight”:
    - “Particular weight” entails the recommendation being part of the employee’s regular duties;
    - An “executive employee” must be able to change the status of an employee to fall within this exemption.
  - c. Have the “primary duty” consisting of management of the enterprise or a customarily recognized department or subdivision:
    - “Primary duty” is not limited to the duty an executive spends most of his/her time performing, but is described as the “principal, main, major, or most important duty that the employee performs”;

- “Management” includes activities such as interviewing employees, training employees, setting the employee’s rate of pay, scheduling employee’s hours of work, directing the work of employees, maintaining business records, evaluating employees, disciplining employees, handling employee complaints and grievances, and distributing work to employees; and
- A “customarily recognized department or subdivision” is a department or subdivision that has a degree of permanence and continuing function as opposed to a group of employees assembled to perform a specific job or project.

d. Regularly supervise the work of two or more full-time equivalent employees.

**NOTE:** A “business owner” is an executive exempt employee and is defined as a person who owns at least 20 percent equity interest in an enterprise, regardless of the type of entity. The salary requirement of \$455 per week does not apply to the “business owner.”

## 2. Administrative Employees:

- a. Earn a weekly salary of at least \$455;
- b. Have the primary duty of performance of office or non-manual work directly related to the management or general business of the employer or the employer’s customers;
- c. The primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. The “exercise of discretion and independent judgment” is based on the following:
  - Whether the employee has authority to commit the employer in matters that have significant financial impact;
  - Whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices;
  - Whether the employee carries out major assignments in conducting the business operations;
  - Whether the employee performs work that affects business operations to a substantial degree, even if the employee’s assignments are related to operation of a particular business segment;
  - Whether the employee has authority to waive or deviate from established policies and procedures without prior approval;
  - Whether the employee has authority to negotiate and bind the company on significant matters;
  - Whether the employee provides consultation or expert advice to management;

- Whether the employee is involved in planning long-term or short-term business objectives;
- Whether the employee investigates and resolves matters of significance on behalf of management; and
- Whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

3. Professional Employees:

- a. Earn a weekly salary of at least \$455;
- b. Perform work requiring:
  - Advanced knowledge in the science field;
  - Learning that is customarily obtained by a prolonged course of specialized intellectual instruction; and
  - Invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.
- c. The work performed must require that the employee consistently exercise discretion and judgment.

4. Outside Sales Representatives:

- a. Have the primary duty of making sales or obtaining orders for contracts for services, or for the use of facilities for which a consideration will be paid by the client or customer; and
- b. Must be customarily and regularly engaged away from the employer's place or places of business.

**NOTE:** An outside sales employee does not need to meet the \$455 weekly salary basis to qualify for this exemption.

5. Computer-Related Occupations:

- a. Earn a weekly salary of at least \$455, or an hourly wage of \$27.63;
- b. Apply systems analysis techniques and procedures, including consulting with users to determine hardware, software or system functional specifications; and
- c. Have duties including design, development, analysis, creation, testing and/or modifying computer systems or programs, including prototypes, based on and related to user or system design specifications or machine operating systems or a combination of these duties.

6. Highly-Compensated Employees:

- a. Must receive a total annual compensation of at least \$100,000; and
- b. The employee must customarily and regularly perform one or more exempt responsibilities of an executive, administrative or professional employee.

**NOTE:** If the annual compensation does not equal \$100,000, the employer may, during the last pay period of the year or within one month after the end of the 52-week period, make on final payment to the employee to make his or her compensation reach the highly-compensated level of \$100,000.

### Permissible Deductions

Deductions from the salary of an exempt employee are allowed under the following circumstances:

1. If an exempt employee is absent from work for one or more full days for personal reasons other than sickness or disability;
2. To offset any amounts received by an employee, such as jury fees, witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption;
3. For penalties imposed in good faith for infraction of safety rules of major significance;
4. For unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules; or
5. For full day absences occasioned by sickness or disability if the deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation for loss of salary occasioned by sickness or disability. These deductions may be made prior to an employee qualifying for the plan, policy or practice, as well as after the employee has exhausted the leave allowance.

An employer is not required to pay the full salary in the initial or terminal week of employment, nor is an employer required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act ("FMLA").

## **Improper Deductions**

Improper deductions from an exempt employee's salary can result in loss of the exemption if the facts demonstrate that the employer did not intend to pay the employee on a salary basis.

Improper deductions, that are either isolated or inadvertent, will not result in the loss of the exemption for any employee subject to such improper deduction if:

1. The employer reimburses the employee for the improper deductions;
2. The employer has a clearly communicated policy that prohibits improper pay deductions which includes a complaint mechanism; and
3. The employer makes a good faith commitment to comply in the future.

## ***Exemptions from the Payment of Minimum Wage***

Only after receipt of a special certificate from the WHD is an employer allowed to take these exemptions. The exemptions apply only to the minimum wage and not the overtime pay or maximum hour requirements. Any employer who hires learners, apprentices, messengers, students, and handicapped workers may pay the subminimum wage. Each of those has specific requirements.

## ***Exemptions from the Payment of Overtime***

Employees who are exempt from the federal overtime requirements include drivers and mechanics who work on vehicles which cross state lines or carry goods within a state which cross state lines or carry goods within a state from a point of arrival from outside the state; certain radio and television employees; salesmen, partsmen, and mechanics in establishments engaged in the sale of automobiles, trucks, farm implements, trailers, boats, or aircraft to ultimate purchases; local drivers compensated by trip rates; certain agricultural employees; seamen; live-in domestics; certain gas station employees; employees performing work in foreign countries; and motion picture theater employees. Public employees are governed by a series of separate regulations which may permit compensatory time off in place of overtime.

Up to ten hours per week in excess of forty may be exempt from overtime requirements if during those hours the employee is receiving remedial education which does not include job-specific training. To qualify for this exemption, the employee must have neither a high school diploma nor "educational attainment" above the seventh grade level, and the training must be designed to provide eighth grade or lower reading and other skills.

## Typical Issues

### *Uniforms*

If employees are required to furnish or pay for uniforms, the WHD requires that the employees be reimbursed in full or the next regular payday for the cost of the uniforms and the cost of laundering, to the extent that such expenses reduce pay below the legal minimum wage. An employer may not take into account overtime pay when calculating whether an employee needs reimbursement.

### *Tip Credit*

Subject to certain limitations, employers of tipped employees (which are those who customarily and regularly receive more than \$30 per month in tips) may be able to take a tip credit if the employer has first informed the employee of the pertinent provisions of the wage and hour law. As of October 1, 1996, an employer must pay a cash wage of \$2.13, after which it may credit tips received to make up the rest of the applicable minimum wage. The credit, however, may not exceed the value of the tips received.

When tips are collected by the employer through a customer's credit card, the tips must be transferred to the employee by the next regular pay day even though the employer does not receive reimbursement until later. The employer may, however, take into account the service charge by the credit card company. For example, if the credit card company charges the employer five percent per transaction, the employer can legally pay the employee only 95 percent of the tip. "Tip Pools" are permissible; however, non-employees and supervisors cannot participate in the pooling process.

### *Fluctuating Workweek*

For non-exempt salaried employees working irregular (or fluctuating) hours without a fixed or predetermined hourly rate, there should be an agreement, preferably a memo signed by the employee, that the salary covers all straight-time pay for whatever hours are worked in a workweek, regardless of whether the employee works few or many. Of course, if no hours are worked, then no salary need be paid for that workweek.

Special caution should be exercised before deductions are made from a salary for certain hours or days missed in a workweek because deductions for absences of less than a full day may invalidate the salaried basis and require payment of additional overtime. The fluctuating workweek method of overtime payment will result in different amounts of compensation each week when the hours worked exceed forty.

## Record-Keeping Requirements

### *Non-Exempt Employees*

The failure of an employer to maintain adequate timekeeping records that are needed to determine the regular rate of pay or overtime pay is another common violation that can result in the assessment of substantial back pay.

Estimates, rather than actual time worked, are not acceptable. Where hours worked are not recorded by time clocks, a weekly time sheet should be used (completed by the employee) with the exact time of starting and leaving work recorded each day and time notations likewise on work breaks (lunch and otherwise). Under certain circumstances, travel time may be compensable, and if employees engage in work during breaks, that time is also compensable.

*Caution:* Timekeeping is an area where many troublesome questions arise. If time records show the same time in and out, day after day, the wage and hour investigator may become suspicious and ask employees (and former employees) questions concerning actual hours worked. Such investigations often result in the wage and hour office alleging violations and making substantial demands for overtime wages on behalf of current and former employees. Employees should be instructed not to record starting time until five minutes or less before work begins, with a like allowance of time after work ends. An employer should be aware that it is accountable for time recorded (or worked, even if not recorded), whether authorized or not.

Besides the accurate account of hours worked, the following information also must be recorded and kept available for inspection:

1. Full name of employee as shown on their Social Security card;
2. Home address, including zip code;
3. Date of birth, if under 19;
4. Sex and occupation;
5. Time of day and day of week on which the employee's workweek begins;
6. "Regular rate" of pay in any workweek in which overtime premium is due;
7. Basis of wage payment (such as \$5.10/hour, \$41/day, \$204/week, \$150/week plus 5 percent commission);
8. Total hours worked daily and weekly;

9. Total daily or weekly straight time earnings not including premium overtime earnings;
10. Total overtime excess compensation for each pay period, where applicable;
11. Total additions to, or deductions from, wages paid each pay period;
12. Total wages paid each pay period; and
13. Date of payment and the pay period covered by the payments.

### ***Exempt Employees***

Records must also be kept on items 1 through 4 listed above, as well as the basis upon which the wages are paid in enough detail to permit calculation for each pay period of the exempt employee's total remuneration for employment. Because some of these records are required to be kept for up to three years, it is best to preserve all records for the maximum period, for exempt and non-exempt employees.

### ***Posters***

The DOL requires all employers to post notices that generally describe the provisions of the wage and hour law. Those notices must be posted where they can be easily viewed by employees and can be obtained from any WHD office.

### ***Child Labor***

Generally, an individual must be at least 16-years-old to be legally employed and, if under 18, must first obtain work certificates from the state department of labor or the WHD. (There is an 18 year minimum age with respect to employment in occupations deemed to be hazardous to the health and well-being of minors.) Employees under 18 are not permitted to drive automobiles, trucks, or other machinery, or work around hazardous equipment. Under limited circumstances an employer may hire employees between the ages of 14 and 15 (not in manufacturing and mining and only to the extent it will not interfere with their schooling or their health and well-being). However, there are numerous regulations restricting the hours such employees are permitted to work.

To avoid a possible violation of the law, an employer should require youthful-appearing applicants for employment to furnish age certificates or proof should be obtained through, or with, the assistance of the state department of labor or the WHD. Substantial penalties may be imposed for violating child labor laws. Violations which result in the death or serious injury of a minor will result in a civil fine of up to \$11,000

for each violation. Employers and their officers may also be criminally prosecuted for willful violations.

## **U.S. Department of Labor Investigations**

### ***General***

Most investigations are conducted as a result of complaints from employees who have been fired or perceive that they have been mistreated. In many instances, such employees are looking for ways to get even. Thus, in addition to contacting the WHD, they will often also file a charge with the state department of labor (to complain that they have not been paid their wages in full or within the required time limit, for which a stiff penalty may be levied), the National Labor Relations Board (“NLRB”) (if they have been fired after demanding a raise, better benefits, or working conditions), and the Equal Employment Opportunity Commission (“EEOC”) (if they are members of a protected group, alleging race, religion, national origin, sex, disability, or age discrimination).

The WHD also may institute a series of investigations in a particular industry, or in a particular locality, especially when there are indications of widespread violations. This has happened, for example, when the WHD learned that hotels and hospitals were requiring employees who were paid the minimum wage to furnish uniforms without reimbursement or in the offshore oil industry when employees on rigs were not paid for all the hours they were required to be on call for work. Other observations alerting compliance officers include minors riding on trucks, youthful looking people leaving manufacturing plants, newspaper ads soliciting workers to do work at home and ads for non-skilled workers on special projects.

Once an investigation is launched, the WHD usually does not confine itself to the specific complaint that may have been made; rather, it checks to determine whether there has been compliance with all aspects of the law and as to all employees on the employer’s payroll for the past two years. If such an investigation uncovers various violations, the WHD will make demands for a restitution of wages. Therefore, it is advisable that an employer regularly audit its wage and hour procedures at least annually.

### ***Potential Penalties***

Not only may the WHD demand restitution of wages, which is the usual remedy, but also a civil penalty of up to \$1,000 per violation may be assessed in cases of repeated or willful violations. It may also seek a federal injunction to restrain future violations, or even a criminal fine of \$10,000 and prosecution in cases involving blatant, willful violations, though the latter is rare. Moreover, aggrieved employees, or ex-employees, may privately sue. In which case they, and others joining them, are entitled to recover

liquidated damages in an amount double the unpaid wages for up to three years. (There is a two year limitation for non-willful violations and a three year limitation for willful violations.) In such cases, the court can also assess attorney's fees and court costs against the employer.

### **Conclusion**

Compliance with the federal wage and hour laws requires continuous effort to keep abreast of the most recent legal guidelines. It is imperative to remain vigilant to reduce the risk of significant monetary liability.

**About Lemle & Kelleher, L.L.P.**

Lemle & Kelleher is one of the oldest major law firms in Louisiana, tracing its origins to the late 19th century when New Orleans was experiencing a boom as the shipping and commercial center of the South. Building on that genesis, we have diversified and expanded our capabilities for more than 100 years to meet the growing needs of our clients regionally and nationally. Today, Lemle & Kelleher offers responsive, innovative, and experienced legal representation covering a broad range of practice areas. For more information please visit [www.lemle.com](http://www.lemle.com).

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