FLSA LEGAL GUIDE

(Rev. Feb. 2018)

I. INTRODUCTION

The purpose of this guide is to summarize basic elements of the Fair Labor Standards Act (FLSA). It discusses matters related to minimum wage, overtime compensation, exemptions, recordkeeping, and enforcement that are most relevant to state employment.

While the guide references certain state policies and practices regarding payment of employee wages, it should not be relied on as the sole resource, or authority, for administering state policies or practices. In addition, not every portion of this guide is applicable to all state employees. State agencies seeking more specific information on how the FLSA affects their employees are encouraged to contact the California Department of Human Resources (CalHR)

II. STATE ADMINISTRATION OF THE FLSA

In 1985, the United States Supreme Court held the FLSA is applicable to public employees, including state employees. Codified at Title 29, section 201 et seq. of the United States Code, the FLSA sets the federal requirements for payment of overtime and minimum wage compensation for covered employees. It also establishes law pertaining to child labor, equal pay, recordkeeping, retaliation and nursing mothers. FLSA principles are set forth in statute and regulations, and are interpreted in state and federal cases and U.S. Department of Labor (DOL) opinion letters.

The FLSA does NOT require meal and rest breaks, separation pay, or matters related to leave accounting (except compensatory time off, or, where such areas implicate unpaid overtime compensation or minimum wages). These areas are typically governed by a combination of state law and, where applicable, the terms of a collective bargaining agreement.

While the FLSA sets the minimum statutory wages and overtime compensation owed to covered employees, it does not prevent an employee from receiving compensation greater than what the FLSA requires if greater compensation is mandated by another law or contract. In no case may compensation fall below the FLSA's statutory floor. In order to determine which wage obligations apply to a state employee, departments are encouraged to consult CalHR.

To assist in administering the FLSA and the various statutes, regulations, and contracts affecting employee wages and related terms of employment, the state classifies its employees into the following Work Week Groups (WWG).

Work Week Group 2:
Employees in WWG 2 are covered by the FLSA and are entitled to receive overtime compensation. WWG 2 employees may be either represented or excluded from collective bargaining.

Most employees in WWG 2 are hourly employees entitled to overtime compensation for all hours worked in excess of 40 hours in a workweek. However, as described in the following chapters, WWG 2 employees who engage in firefighting or law enforcement activities are subject to alternative overtime thresholds that vary based on work periods of between 7 to 28 days.

Work Week Group E:
Employees in WWG E are exempt from the FLSA's minimum wage and overtime compensation requirements. WWG E employees perform administrative, executive, and professional work duties and, therefore, fit within at least one of the FLSA's "white collar" or other exemptions. The white collar exemptions

include the Executive Exemption, Administrative Exemption, Learned Professional Exemption or the Creative Professional Exemption.

Work Week Group SE:
Employees in WWG SE are employed as Attorneys, Physicians or Teachers. Employees in these professions are also exempt from the FLSA's minimum wage and overtime compensation requirements under specific provisions of the Learned Professional Exemption.

III. NON-EMPLOYEES UNDER THE FLSA

The FLSA does not cover all individuals who perform services for the state. Separate and apart from whether an employee is exempt from overtime or the minimum wage, certain categories of individuals are not covered by the FLSA because they are not considered employees under the FLSA. Such categories include:

- Trainees
- Volunteers
- Prisoners
- Elected officials, staff and employees of legislative bodies
- Independent contractors

A. TRAINEES

Under the FLSA, individuals engaged in pre-employment training are not covered by the FLSA because the FLSA does not consider them employees. When determining whether an individual is a trainee under the FLSA, courts apply the "primary beneficiary test," which considers:

1) The extent to which the trainee and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa;
2) The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions;
3) The extent to which the internship is tied to the trainee's formal education program by integrated coursework or the receipt of academic credit;
4) The extent to which the internship accommodates the trainee's academic commitments by corresponding to the academic calendar;
5) The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning;
6) The extent to which the trainee's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern; and
7) The extent to which the trainee and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

If the factors weigh in favor of status as a trainee and not an employee, the individual does not benefit from the minimum wage and overtime protection of the FLSA.

B. VOLUNTEERS

Individuals who perform volunteer services for state or local governments are not "employees" under the FLSA. Under the FLSA, a volunteer is one who performs "hours of service for a public agency for civic, charitable, or humanitarian reasons," and does so "without promise, expectation or receipt of compensation for services rendered." Volunteers may not be paid for their volunteer services. The public agency may not coerce or otherwise place undue pressure on an individual to volunteer.

An employee of a public agency cannot volunteer for his or her employer to perform the same activities which the individual is employed to perform. "Same activities" means "similar or identical services." Determination of what constitutes the "same activities" must be made in light of all the facts and circumstances.

C. PRISONERS

Prisoners who are required to perform labor during the term of their imprisonment, such as producing goods or performing services that are sold for a profit to other entities, are not entitled to FLSA protection because they are not deemed "employees" of the state within the meaning of the FLSA.

However, the DOL takes the position that when inmates are contracted out to a private employer, an employer-employee relationship is created between the private employer and the inmate. In such cases, the private employer may be held to FLSA standards with respect to the inmate.

D. ELECTED OFFICIALS, STAFF AND EMPLOYEES OF LEGISLATIVE BODIES

Employees of state or local public entities who are closely associated with elected officials are not subject to the FLSA. Such individuals include:

1) Elected officials.
2) Members of an elected official's personal staff.
3) Those appointed by elected officials to a policymaking level.
4) The elected official's immediate advisor with respect to the constitutional or legal powers of the elected official's office.
5) Employees in the legislative branch or a legislative body.

A condition for exclusion from the FLSA is that the employee must not be subject to the civil service laws of the employing state or local agency.
In order to be considered a member of an elected official's "personal staff," an individual must be under the official's "direct supervision" and must have regular contact with the official. Merely having been selected by the official, but not directly supervised by the official, does not qualify. Personal staff members must be appointed by and serve solely at the pleasure of the elected official.

The exclusion for legislative staff does not extend to those employed by the legislative library or employees of school boards.

E. INDEPENDENT CONTRACTORS

Independent contractors are individuals who are not employees of the state but who, nevertheless, perform services for the state. This type of relationship occurs when an individual or business enters a contract to perform services for the state. For example, a state agency that contracts with a staffing agency to provide security personnel to attend the front desk of the department is likely not the security officer's employer.

Whether an individual performing services for the state is an employee or independent contractor is often disputed, and subject to a variety of multi-factor tests. For example, California applies the "economic realities" test, which considers the employer's (1) Power to hire and fire; (2) the rate and method of payment; (3) the maintenance of employment records; and (4) Supervision and control over employee work schedules or conditions of employment.

If an individual is determined to be an employee rather than an independent contractor, the employer may be required to pay minimum wage and overtime compensation under the FLSA.

IV. WHITE COLLAR EXEMPTIONS

Exemptions, particularly the so-called "white collar" exemptions, are among the most disputed areas of the FLSA, and one of the most common sources of lawsuits against employers. An employee working in a "bona fide executive, administrative, or professional capacity," is exempt from the FLSA's minimum wage and overtime requirements under the FLSA's "white collar exemptions."

White collar exemptions include the Executive Exemption, Administrative Exemption, Learned Professional Exemption and the Creative Professional Exemption. In order to qualify for any of the white collar exemptions, an employee must satisfy both the (1) Salary Basis Test and (2) Primary Duties test.

A. SALARY BASIS TEST

The salary basis test consists of two elements:

First, the employee must be paid a salary of not less than $455 per week, or its equivalent. In the case of state employees paid on a monthly basis, the minimum payment amount is $1,971.66 per month. The minimum amount excludes board, lodging or other facilities.
Employers may pay exempt employees compensation in addition to their salary without violating the salary basis test. The additional compensation may be in the form of a commission, flat sum, hourly rate or any other basis, and may include paid time off.

Second, the employee must be paid on a salary basis. An employee receives a salary if he or she regularly receives a predetermined amount of compensation that is not subject to reduction because of variations in the quality or quantity of the work performed. Generally, the employee must receive the full salary without regard to the number of days or hours worked in a workweek. An employee is not paid a salary if deductions are made for reasons occasioned by the employer or by the operating requirements of the business. In other words, salary cannot be reduced if the employee is ready, willing and able to work, but no work is available.

1. Exceptions To The Prohibition Against Deductions

In some circumstances, salary may be deducted without violating the salary basis test. In the state workforce, the deductions can occur in the context of approved salary dock, among other scenarios.

*a. Exception #1: Deductions In **Whole Week** Increments*

Salary deductions in whole week increments may be made during any week in which no work was performed.

Example: An employee who is suspended from work for a week may have his pay deducted in whole week increments without violating the employee's exempt status.

*b. Exception #2: Deductions In **Whole Day** Increments*

Salary deductions in whole day increments may be made for:

i. Absences for personal reasons, other than sickness or disability

Example: The DOL states that if an employee is absent for two full days to handle personal affairs, the employee's salaried status will not be affected if deductions are made from the salary for two full-day absences. However, if an exempt employee is absent for one and a half days for personal reasons, the employer can deduct salary only for the one full-day absence.

ii. Sickness or disability (including work-related accidents)

Deductions in whole day increments may be made in instances of sickness or disability provided the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability.

Example: An employer may deduct salary from an employee who is absent for a whole day due to sickness and who has exhausted his/her sick leave hours.

iii. Absences for unpaid disciplinary suspensions for violation of a workplace conduct rule

The workplace conduct rule, such as a workplace policy, must be in writing. Discipline for performance-related reasons does not fall within this exception.

Example: The DOL states that an employer may suspend an exempt employee without pay for three days for violating a written sexual harassment policy without violating the salary basis test. When applying this exception, departments should consult the MOU or any applicable rule governing discipline of state employees.

*c. Exception #3: Deductions In **Whole Or Partial Day Increments***

Salary deductions in whole or partial day increments may be made in the following instances without violating the salary basis test:

i. Penalties for infractions of major safety rules

An example of a safety rule of major significance includes rules to prevent serious danger in the workplace, such as rules prohibiting smoking in explosive plants, oil refineries or coal mines.

ii. Initial or final week of employment

The employer may pay the proportionate amount according to the hourly or daily equivalent of the employee's salary.

iii. FMLA Leave

An employee who takes unpaid leave under the Family and Medical Leave Act (FMLA) may have his/her salary deducted in whole or partial day increments.

Example: The DOL states that when an employee takes unpaid leave under the FMLA, the employer may pay a proportionate part of the full salary for time actually worked. If an employee who normally works 40 hours per week uses four hours of unpaid leave under the Family and Medical Leave Act, the FLSA permits an employer to deduct 10 percent of the employee's normal salary that week.

iv. Public employees

The FLSA permits deductions in whole or partial day increments for public employees provided all of the following factors are met:

a. The employee is paid according to a pay system established by statute, ordinance or regulation, or by a policy or practice established pursuant to principles of public accountability;
b. The pay system allows employees to accrue personal leave and sick leave;
c. The employee does not use accrued leave because:
    i. Permission for its use has not been sought or has been sought and denied;
    ii. Accrued leave has been exhausted; or
    iii. The employee chooses to take leave without pay; and

d. As a result of (c), the pay system requires the employee's pay to be reduced or such employee to take leave without pay for absences for personal reasons or because of illness or injury.

v. Public employees during furlough

Deducting pay from public employees for absences due to a budget-required furlough will not violate the salary basis test, except in the workweek in which the furlough occurred and for which the employee's pay is accordingly reduced. For example, when a budget-required leave of absence results in a reduction in pay, an otherwise exempt employee will not lose the exemption except in the workweek the furlough was taken and for which pay was accordingly reduced.

vi. Deductions for reduced workweeks

Bona fide reductions in salary caused by a reduction in a normally scheduled workweek are permissible so long as the reduction is not designed to circumvent the salary basis test. Permissible reasons for reducing the workweek may be to reduce costs or to avoid layoffs.

NOTE: Subject to an applicable MOU, it is currently state policy that FLSA-exempt employees should not be docked salary for partial day absences. There may be limited exceptions, including but not limited to, instances where an employee is absent for reasons covered by the FMLA. For additional clarification, departments should consult with CalHR.

d. Exception #4: Leave Deductions

The FLSA permits employers to deduct leave credits for partial day absences without violating the salary basis test.

NOTE: Subject to an applicable MOU, it is currently state policy that FLSA-exempt employees should not be charged leave for partial day absences. As above, there may be limited exceptions where an employee is absent for reasons covered by the FMLA. For additional clarification, departments should consult with CalHR.

2. Absence Occasioned By Civic Duty

Exempt employees who are absent from work because of jury duty, attendance as a witness or temporary military leave may not have their pay deducted. However, the FLSA allows employers to offset pay with any amounts the employee receives as jury fees, witness fees, or military pay. While state practices may differ, the DOL typically defines "temporary military leave" as the usual short-term duty for reservists or

members of the National Guard lasting two weeks or a month. However, the DOL may also consider periods of up to three months to be "temporary military leave."

The prohibition on deducting pay for appearing as a witness does not extend to instances where the employee attends as a party to the action, such as when the employee has initiated the legal action requiring his/her appearance as a witness.

Note: Requiring exempt employees to record and track their hours worked, or to work a fixed schedule, does not violate the salary basis test. For example, the FLSA allows employers to record hours worked for any purpose, including but not limited to accountability, productivity, or invoicing clients, without violating the salary basis test.

B. PRIMARY DUTIES TEST

In addition to meeting the salary basis test, an employee must also meet the primary duties test in order to claim a white collar exemption. The primary duties test requires an employee's "primary duty" to be the performance of exempt work. "Primary duty" means the "principal, main, major or most important duty that the employee performs." This is a fact-intensive inquiry, requiring employers to consider the nature of the employee's job as a whole.

Factors considered include:

1) The relative importance of the exempt duties as compared with other types of duties;
2) The amount of time spent performing exempt work;
3) The employee's relative freedom from direct supervision; and
4) The relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee

The so-called "white collar" exemptions are distinguished from what the DOL refers to as "blue-collar" workers who perform work involving repetitive operations with their hands, physical skill and energy.

The three main white collar exemptions are the Executive Exemption, the Administrative Exemption, and the Professional Exemption, which consists of the Learned Professional Exemption and the Creative Professional Exemption.

1. Executive Exemption

To qualify for the Executive Exemption, an employee must meet the salary basis test and s/he must perform primary duties consistent with the following criteria:

1) Manage the enterprise, or customarily recognized department or subdivision thereof;

2) Customarily and regularly direct the work of two or more other employees; and
3) Have the authority to hire or fire other employees, or have particular weight given to his/her suggestions or recommendations as to hiring, firing, promotion or any other change in status of other employees.

a. Criteria #1: "Manage"

The DOL defines the term "manage" as including such activities as:

- Interviewing, selecting, and training employees;
- Setting and adjusting their rates of pay and hours of work;
- Directing the work of employees;
- Maintaining production or sales records for use in supervision or control;
- Appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status;
- Handling employee complaints and grievances;
- Disciplining employees;
- Planning work;
- Determining the techniques to be used;
- Apportioning work among employees;
- Determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold;
- Controlling the flow and distribution of materials or merchandise and supplies;
- Providing for the safety and security of the employees or the property;
- Planning and controlling the budget; or
- Monitoring or implementing legal compliance measures.

b. Criteria #1: "Customarily Recognized Department Or Subdivision"

A "customarily recognized department or subdivision" is considered a unit with permanent status and function, as opposed to a collection of employees assigned from time to time to perform a specific job. A "customarily recognized department or subdivision" need not be limited to one fixed physical location, and need not be staffed by the same subordinate personnel (for example, if personnel are drawn from a pool).

c. Criteria #2: "Customarily And Regularly" Supervising "Two Or More Employees"

"The phrase "customarily and regularly" means "greater than occasional," and may be "less than constant." It does not include isolated or one-time tasks.

The phrase "two or more other employees" means two full-time employees or their equivalent. For example, two half-time employees are "equivalent" to one full-time employee.

d. Criteria #3: Hiring Or Firing Authority

Even if an employee does not have authority to hire or fire a subordinate, the employee may be covered by the executive exemption if his/her suggestions or input regarding such matters are given particular weight. Courts evaluating this element will consider (a) whether it is within the employee's duties to make such suggestions; and (b) the frequency such suggestions are made or requested and the frequency with which they are relied upon. The exemption is not lost if other employees' suggestions are given greater weight. This element does not extend to an occasional suggestion regarding a co-equal employee.

2. Administrative Exemption

To qualify for the Administrative Exemption, an employee must meet the salary basis test and s/he must perform primary duties consistent with the following criteria:

1) Perform office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

2) Exercise discretion and independent judgment with respect to matters of significance.

a. Criteria #1: "Directly Related To Management"

The DOL defines the phrase "directly related to management" as performing work characterized as "running or servicing" the business or operation, as compared to "production or line" work. DOL regulations provide a number of examples of activities "directly related to management," including tasks related to the following areas:

- Tax;
- Finance;
- Accounting;
- Budgeting;
- Auditing;
- Insurance;
- Quality control;
- Purchasing;
- Procurement;
- Advertising;
- Marketing;
- Research;
- Safety and health;
- Personnel management;
- Human resources;

- Employee benefits;
- Labor relations;
- Public relations;
- Government relations;
- Computer network, internet and database administration; or
- Legal and regulatory compliance.

b. *Criteria #2: "Discretion And Independent Judgment" And "Matters Of Significance"*

Exercising discretion and independent judgment means the act of comparing and evaluating possibilities and subsequently making a decision. Factors to consider include whether:

- The employee has authority to formulate, affect, interpret, or implement management policies or operating practices;
- The employee carries out major assignments in conducting the operations of the business;
- 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 segment of the business;
- The employee has authority to commit the employer in matters that have significant financial impact;
- The employee has authority to waive or deviate from established policies and procedures without prior approval;
- The employee has authority to negotiate and bind the company on significant matters;
- The employee provides consultation or expert advice to management;
- The employee is involved in planning long- or short-term business objectives;
- The employee investigates and resolves matters of significance on behalf of management; or
- The employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

Exercising discretion and independent judgment means the employee has independent choice free from immediate direction or supervision.

c. *Criteria #2: "Matters Of Significance"*

"Matters of significance" refers to the importance of the work or the consequences of the work performed. Simply because a matter may have a financial impact on the employer does not necessarily make it a "matter of significance."

d. Educational Establishments

The DOL has issued regulations specifically applying the administrative exemption to employees in educational establishments who perform administrative functions directly related to academic instruction or training. Activities directly related to academic instruction include those in the field of education, as opposed to duties pertaining to general business operations.

The exemption applies to superintendents or other top level positions in a school system, assistants responsible for the curriculum, principal, vice-principal, department heads, academic counselors, etc. The exemption does NOT apply to jobs related to building maintenance, student health, and other school staff, such as social workers, lunch room managers, or dietitians (although such employees may qualify for another exemption).

In addition, the DOL provides an exception to the minimum salary requirement for administrative employees in educational establishments. The minimum compensation requirement must equal or exceed the "entrance salary for teachers in the educational establishment by which the employee is employed."

3. Learned Professional Exemption

To qualify for the Learned Professional Exemption, an employee must meet the salary basis test and s/he must perform primary duties consistent with the following criteria:

1) The employee must perform work requiring advanced knowledge;

2) The advanced knowledge must be in a field of science or learning; and

3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

A limited exception, discussed below, allows doctors, teachers and lawyers to claim the exemption without meeting the salary basis test.

a. Criteria #1: "Work Requiring Advanced Knowledge"

"Work requiring advanced knowledge" means work that is intellectual in nature, and requires the consistent exercise of discretion and judgment. "Advanced knowledge" is that which cannot be acquired at a high school level.

b. Criteria #2: "Field Of Science Or Learning"

"Field of science or learning" includes the traditional fields of study (e.g. law, medicine, accounting, engineering, architecture, chemical or biological sciences, pharmacy), and

also other similar occupations having a recognized professional status, as opposed to a skilled trade or mechanical art.

c. Criteria #3: "Customarily Acquired By A Prolonged Course Of Specialized Intellectual Instruction"

This description requires the field of knowledge to be acquired through specialized academic training. This is most commonly demonstrated by an appropriate academic degree. However, an academic degree is not required. For example, an employee employed as a lawyer need not have attended law school to claim the exemption.

d. Doctors, Teachers And Lawyers

Doctors, teachers and lawyers fall within a special category of the Learned Professional Exemption, and need not be paid on a salary basis in order to maintain their exempt status. These include state employees categorized as WWG SE.

For the purposes of this exemption, teachers are defined as those whose primary duty is teaching, tutoring, instructing or lecturing in order to impart knowledge in an educational establishment. Although it is not necessary for a teacher to have a teacher's certificate, it is an indication that this exemption applies.

To be exempt, the doctor or lawyer in question must hold a valid license permitting the practice of law or medicine, and be actually practicing that trade. For doctors, the employee must hold the requisite academic degree, but may be engaged in an internship or resident program pursuant to the practice of the profession. This exemption applies to those practicing any medical specialty, including general practitioners and specialists, osteopathic physicians, podiatrists, dentists and optometrists.

4. Creative Professional Exemption

To qualify for the Creative Professional Exemption, an employee must meet the salary basis test and s/he must perform primary duties requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. A "recognized field of artistic or creative endeavor" incudes music, writing, acting or graphic arts.

5. Highly Compensated Employees

The Highly Compensated Employee exemption exists as a subset of the white collar exemptions that allows an exemption to be applied to employees who do not meet all of the primary duties listed above for any exemption.

To qualify for the Highly Compensated Employee Exemption, an employee must meet the following criteria:

1) The employee must receive total annual compensation of at least $100,000, along with the minimum $455 per week salary.

2) The employee must perform office or non-manual work; and

3) The employee must customarily and regularly perform **any one** of the exempt duties of an executive, administrative or professional employee.

a. Criteria #1: "Total Annual Compensation"

To calculate total annual compensation, the employer may utilize any 52-week period. If an employee does not receive the minimum amount at the end the year, the employer may, within one month or pay period after the end of the 52-week period, pay the employee the amount sufficient to meet the minimum annual compensation requirement.

b. Criteria #2: "Non-Manual Work"

The requirement the employee must perform office or non-manual work excludes the so-called "blue-collar" work typically involving repetitive operation, or physical skill and energy.

c. Criteria #3: Exempt Duties

Meeting the annual compensation requirement eliminates the need to perform a detailed analysis of the employee's job duties.

C. FIRST RESPONDERS

The "white collar" exemptions generally do not apply to employees characterized as "first responders." This category includes those employed as:

- Police officers
- Detectives
- Deputy sheriffs
- State troopers
- Highway patrol officers
- Investigators
- Inspectors
- Correctional officers
- Parole or probation officers
- Park rangers
- Fire fighters
- Paramedics
- Emergency medical technicians

- Ambulance personnel
- Rescue workers
- Hazardous materials workers and similar employees.

First responders are those employees who perform such work as preventing, controlling or extinguishing fires; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals; interviewing witnesses; interrogating and fingerprinting suspects; and preparing investigative reports.

The white collar exemptions do not apply because to first responders because their primary duty is not management, is not the performance of office or non-manual work directly related to the management, nor is it the performance of work requiring knowledge of an advanced type in a field or learning customarily acquired by a prolonged course of specialized intellectual instruction.

While the FLSA's white collar exemptions might not apply to first responders, the FLSA's other exemptions may still apply. In addition, the exception for "first responders" may not extend to higher-level employees engaged in public safety, such as fire battalion chiefs or law enforcement captains, who may meet the primary duties test for the executive or administrative exemption.

V. OTHER EXEMPTIONS

A. COMPUTER EMPLOYEES

The FLSA's minimum wage and overtime provisions do not apply to those employed as computer systems analysts, computer programmers, software engineers, or other similarly skilled workers.

To qualify for the computer software exemption, an employee must be paid a salary of not less than $455 per week, or its equivalent, or at least $27.63 per hour, and his or her primary duties must include:

1) Application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
2) Design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
3) Design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

The computer software exemption does not extend to those engaged in computer hardware equipment manufacture or repair, and does not cover those whose work is highly dependent on computers, such as engineers. For example, the DOL states that "IT Support Specialists," responsible for the diagnosis and resolution of computer-related problems, do not fall under the computer software exemption. This is because the act of "installing, configuring, testing, and troubleshooting computer applications, networks, and hardware" does not fall within the scope of duties for the computer software exemption.

NOTE: Employees who do not qualify for the computer software exemption may be exempt under the professional or administrative employee exemption if they otherwise meet the primary duties test for these other exemptions.

B. OUTSIDE SALESPERSONS

The FLSA's minimum wage and overtime provisions do not apply to those employed as outside salespersons. Unlike other exempt classes under the FLSA, outside sales persons do not need to earn a specific salary or hourly rate to qualify for the exemption.

To qualify as an FLSA-exempt outside salesperson, an employee must meet the following requirements:

1) The employee must, as a primary duty, make sales or obtain orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
2) In performing the primary duty, the employee must customarily and regularly be engaged away from the employer's place or places of business.

Work that is incidental to or in conjunction with outside sales or solicitation, including incidental deliveries and collections, or writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences, may be considered within the scope of the employee's primary duties qualifying the employee for the exemption.

The requirement that the employee perform work "away from the employer's place of business" typically means the employee must make sales at the customer's place of business or home. The exemption does not apply where sales are conducted by mail, telephone, or online, unless such activity is performed in conjunction with outside sales.

Promotional work, such as putting up displays and posters, removing damaged or spoiled stock from the merchant's shelves or rearranging merchandise, is considered exempt work if it is incidental to or performed in conjunction with outside sales. In order for promotional work to be considered within the scope of the employee's primary duties, it must be performed by the same employee who is making outside sales. Accordingly, an employee who assists the outside salesperson with promotional activities, or who visits customers to arrange merchandise, replenish stock, or set up displays, is not performing exempt outside sales.

Finally, an employee who both delivers and also sells products may qualify as an exempt outside salesperson, as long as the employee has a primary duty of making sales. For example, the DOL states that an individual employed to drive may fall under the outside salesperson exemption if the driver: (1) is the only sales contact between the employer and the customers visited; (2) obtains or solicits orders for the employer's products; (3) calls on new prospects for customers along the employee's route; or (4) persuades regular customers to accept delivery of increased amounts of goods or of new products.

C. EMPLOYEES OF AMUSEMENT OR RECREATIONAL ESTABLISHMENTS

Individuals employed by an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center are exempt from the FLSA's minimum wage and overtime provisions. To qualify, the employing establishment must meet the following criteria:

1) The establishment must be "amusement or recreational" in nature.
2) The establishment must operate seasonally.

a. Criteria #1: "Establishment"

The term "establishment" means a single, distinct place of business. Where a single employer conducts its operations at multiple units/locations, these various units will be deemed separate establishments if:

1) The units are physically separated;
2) The units are functionally operated as separate entities, having separate records and separate bookkeeping; and
3) There is no interchange of employees between the units.

b. Criteria #1: "Amusement Or Recreational" In Nature

In order for an establishment to be "amusement or recreational" in nature, it must be frequented for amusement or recreational purposes. Determining whether an establishment is recreational in nature requires a fact-specific inquiry. The DOL has stated that state and county fairs typically fall within the definition of a recreational or amusement establishment and could qualify for the exemption.

c. Criteria #2: "Seasonal In Nature"

In order to be considered "seasonal" in nature, the establishment (1) may not operate for more than seven months in any calendar year; or (2) must demonstrate, during the preceding calendar year, that its average receipts for any six months of such year were not more than 33 ⅓ percent of its average receipts for the other six months of the same year.

The so-called "receipts test" requires the cash method of accounting, as opposed to the accrual method of accounting. The cash method of accounting records money as income when it is received, as opposed to the accrual method of accounting, which records money as income when the underlying obligation for which the money was paid is fulfilled. For example, professional sports teams typically play all of their games during a specific season. However, sales of tickets may occur during the off-season. Under the cash method of accounting, off-season ticket sales would be recorded when the cash was actually received in the off-season. Under the accrual method of accounting, receipts would be recorded when the game for which the tickets were purchased is played.

NOTE: Employees of the state's district agricultural associations, which run the state's fairs and other recreational events, may be subject to the amusement or recreational establishment exemption.

D. EMPLOYEES OF FISH HATCHERIES

The FLSA exempts from minimum wage and overtime those employees engaged in:

1) Catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life; or
2) The first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading.

Certain employees at the state's fish hatcheries may be included in this exemption.

E. SEAMEN

Under the FLSA, a seaman is an employee who works primarily in the operation of a vessel as a means of transportation, and does not perform a substantial amount of work of a different character. "Substantial work of a different character" means more than 20 percent of the time during a work week. Seamen who are engaged on a vessel other than an American vessel are exempt from the FLSA's minimum wage and overtime requirements. This exemption may apply to certain state employees at the California Department of Fish and Wildlife.

F. DOMESTIC SERVICE EMPLOYEES

Individuals who are employed as domestic service employees are those who perform services of a household nature. Such employees include cooks, waiters, butlers, valets, maids, housekeepers, nannies, or janitors. Although exceptions apply, domestic service employees are generally entitled to receive minimum wage and overtime compensation under the FLSA.

Individuals who provide companionship services to those who are unable to care for themselves due to age or infirmity are not entitled to minimum wage and overtime. Companionship services include fellowship and protection. Fellowship means the employee engages the person in social, physical, and mental activities, such as conversation, or accompanying the person on walks, errands, or to social events. Protection means the employee is present with the person in his or her home or to accompany the person when outside of the home to monitor the person's safety and well-being. Employees may also provide care services, meaning the employee may assist the person with activities of daily living (such as dressing, grooming, feeding, bathing, toileting, and transferring) and instrumental activities of daily living. However, in order for the companionship services exemption to apply, an employee may not spend more than 20 percent of his/her work time providing care services.

Individuals who are employed by an outside entity to provide such companionship services are entitled to minimum wage and overtime.

G. INDIVIDUALS EMPLOYED IN BOTH EXEMPT AND NON-EXEMPT ESTABLISHMENTS IN SAME WORKWEEK

If an employer employs an individual to work in both an exempt and nonexempt establishment during the same workweek, the employee is not considered "employed by" an exempt establishment during that workweek and the exemption will not apply. For example, an employee employed to work at an exempt county fair and another non-exempt establishment in the same workweek will not be covered by the amusement or recreational establishment exemption during that workweek.

VI. WORK PERIOD

The work period, and its corresponding overtime threshold, is the foundation upon which the FLSA's overtime requirements are based. Employers may require an employee to work any number of hours provided the employee is paid overtime compensation for hours worked in excess of the overtime threshold. The FLSA does not require overtime to be paid for hours worked in excess of eight hours per day, or for work on Saturdays, Sundays, holidays or regular days of rest.

A. 40-HOUR WORK WEEK

For most FLSA-covered employees, the overtime threshold is 40 hours in a workweek. As a general policy, the state recognizes a workday consists of 8 hours per day, and a workweek consists of 40 hours, although workweeks and workdays of a different number of hours may be established to meet a department's specific needs.

A workweek is defined as a fixed and regularly recurring period of 168 hours consisting of seven consecutive 24–hour periods. The workweek may begin and end on any day and at any hour, and need not conform to a Sunday through Saturday calendar week. The designated workweek need not be identical among different employer establishments or even between employees. Once designated, however, the workweek is fixed. The workweek may lawfully be changed if the change is intended to be permanent and not designed to avoid overtime liability.

Each workweek stands alone. This means hours worked in two or more workweeks may not be averaged to determine overtime obligations.

The employer must maintain records designating the day of week and time of day the employee's workweek begins. The employer determines the time and date a workweek begins and ends.

NOTE: The terms "work period" and "workweek" are used interchangeably in the FLSA regulations. "Workweek" or "work period" should not be confused with "pay period." Pay period refers to the recurring period of time covered by an employee's wages. Most state employees are paid on a monthly pay period basis. "Workweek" or "work period" refers to a recurring period of time designated for purposes of determining overtime compensation.

B. 7(K) WORK PERIOD FOR PUBLIC SAFETY EMPLOYEES

The FLSA allows employers to designate a different work period for public employees engaged in public safety. Known as a "7(k) schedule," this provision allows employers to apply a work period of between 7 and 28 consecutive days for public employees

engaged in fire protection or law enforcement activities. Employees engaged in law enforcement activities include personnel in correctional institutions.

For employees engaged in law enforcement activities, DOL regulations set forth a maximum overtime threshold of 171 hours every 28-day work period. For employees engaged in fire protection activities, the regulations require all hours worked in excess of 212 hours per 28-day work period to be compensated as overtime. Where the employer has set a shorter work period, the hours for which overtime compensation must be paid is determined by the ratio of 212 hours every 28 days for fire protection employees or 171 hours every 28 days for law enforcement employees. Accordingly, an employee is owed overtime compensation for hours worked in a work period that exceed the thresholds listed below:

	Overtime Threshold	
Work Period	**Fire Protection**	**Law Enforcement**
28	212	171
27	204	165
26	197	159
25	189	153
24	182	147
23	174	141
22	167	134
21	159	128
20	151	122
19	144	116
18	136	110
17	129	104
16	121	98
15	114	92
14	106	86
13	98	79
12	91	73
11	83	67
10	76	61
9	68	55
8	61	49
7	53	43

To maintain a 7(k) schedule, an employer must affirmatively demonstrate it has established a 7(k) work period for the affected employee. For the state employer, this may be accomplished by including language establishing the 7(k) work schedule in applicable collective bargaining agreements.

1. Qualifying For The 7(k) Exemption For Employees Engaged In Fire Protection Activities

Public employees eligible for the "fire protection" 7(k) exemption include firefighters, paramedics, emergency medical technicians, rescue workers, ambulance personnel, or hazardous materials workers. To qualify for the "fire protection" exemption, employees must be:

1) Trained in fire suppression, and have the legal authority and responsibility to engage in fire suppression;
2) Employed by a fire department of a municipality, county, fire district, or state; and
3) Engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

"Civilian" employees of a fire department, fire district or forestry service who are engaged in support activities do not qualify for the 7(k) exemption. "Civilian" employees include alarm operators, apparatus and equipment repair and maintenance workers, camp cooks, clerks and stenographers. Dispatchers and aeromedical technicians generally do not qualify for the exemption, even if they were previously trained for firefighting.

Rescue and ambulance personnel engaged in responding to emergency situations where life, property, or the environment is at risk may be covered by the fire protection exemption if they are trained and have legal authority to engage in fire suppression and are employed by a fire department.

2. Qualifying For The 7(k) Exemption For Employees Engaged In Law Enforcement Activities

Public employees eligible for the "law enforcement" 7(k) exemption include uniformed or plain-clothed officers and subordinates who:

1) Are empowered by statute or local ordinance to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes;
2) Have the power to arrest; and
3) Are presently undergoing or have undergone or will undergo on-the-job training, instruction and study which includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics.

The law enforcement 7(k) exemption applies regardless of rank or status as "trainee," "probationary," or "permanent," and regardless of assignment to perform duties

incidental to law enforcement duties, such as equipment maintenance, lecturing or other incidental activities.

However, "civilian" employees of law enforcement agencies do not qualify for the exemption. The FLSA identifies "civilian" employees as those performing support activities, including radio operators, apparatus and equipment maintenance and repair workers, janitors, clerks and stenographers. Employees in correctional facilities who engage in building repair and maintenance, culinary services, teaching, or in psychological, medical and paramedical services are also not included in the exemption, even if they regularly come into contact with inmates.

In evaluating whether the "law enforcement" exemption applies, the DOL applies a 20 percent threshold when determining when the performance of nonexempt work that is not incidental or performed in conjunction with exempt work defeats the exemption. Performance of nonexempt work will not defeat the exemption unless it exceeds 20 percent of the total hours worked during the work period.

The "law enforcement" 7(k) exemption applies to security personnel in correctional institutions who supervise or have responsibility for controlling and maintaining custody of inmates and of safeguarding them from other inmates. The DOL also applies the exemption to welfare fraud investigators, probation officers, and parole agents. The exemption also extends to rescue and ambulance service personnel if they form an integral part of the employer's law enforcement activities.

3. Employees Engaged In Both Fire Protection And Law Enforcement Activities

Employees may perform both fire protection and law enforcement activities without losing their FLSA exemption as long as each activity meets the appropriate test and the employee's non-exempt activities do not exceed 20 percent of their total activities for the work period. The overtime exemption applicable for such employees is the one whose activities the employee spends the majority of time performing.

Occasional and Sporadic Work

Public agency employees, who at their own option, occasionally or sporadically work on a part-time basis for the same public agency in a different capacity from their regular employment, may still be covered by the exemption. For example, the DOL states that hours spent performing occasional and sporadic work in a different capacity are not counted in determining whether the "law enforcement" exemption is lost because the employee spends more than 20% of his/her time performing non-exempt activities. In addition, as will be discussed below, time spent performing the occasional and sporadic work need not be considered when determining overtime compensation.

4. Training

Training at a fire or police academy or other training facility, when required by the employer, is considered incidental and part of an employee's law enforcement or fire protection activities, so long as the employee meets the other requirements of the "fire protection" or "law enforcement" 7(k) exemption. Accordingly, time spent training will not defeat the employee's exempt status.

C. 7(J) WORK PERIOD

An exemption exists for employees working in a hospital or establishment that is primarily engaged in the care of the sick, the aged, or the mentally ill and who reside on the premises. Under this exemption, employees are entitled to overtime when they work in excess of 80 hours in a 14-day work period. Employees must also be paid overtime for hours worked in excess of eight hours in a day. Any overtime payments for daily overtime may be credited towards overtime compensation owed for working over 80 hours in the work period.

VII. COMPENSABLE HOURS OF WORK

A. OVERVIEW

The United States Supreme Court defines "work" as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." It clarifies that "work" need not require "exertion," since an employer may "hire a man to do nothing, or to do nothing but wait for something to happen."

The DOL defines work time as including work that is not only requested or compelled, but that is "suffered or permitted." If the employer knows or has reason to believe an employee is performing work, the work time must be compensated. The reason an employee chooses to work is immaterial. Work is not limited to activities performed at the jobsite.

1. *De Minimis* Time

Certain periods of work may be so insubstantial or inconsistent that they need not be counted as hours worked. The *de minimis* doctrine excludes from compensation certain time worked when, as a practical matter, the employer cannot precisely record for payroll purposes a few uncertain or indefinite seconds or minutes of work. On the other hand, the employer may not purposefully fail to count time worked, especially if the employer can ascertain such time.

When determining whether certain periods of time should be disregarded as *de minimis*, courts will consider the difficulty of recording such time, the sporadic or uncertain nature of the period of time, or the relative amount of time for which compensation is sought.

The DOL allows, but does not require, work time to be recorded by timeclock. Where an employee uses a timeclock, failing to compensate employees who punch in early or punch out late will not result in liability, so long as the employee does not perform work.

Rounding of time entries, for example to the nearest five minute, one-tenth or quarter-hour increment is allowable, so long as the practice does not result, over time, in unpaid work time.

2. Additional Appointments

In instances where an employee is hired for and works in two or more positions for the same employer, or is jointly employed by two employers, hours worked for each

employer or in each position must be combined to determine whether overtime compensation is owed.

For example, an employee who is hired for and works in a second position for the same state agency is considered employed by one employer – the appointing authority or the State of California.

Where a state employee is appointed to work at more than one state department, the employee will likely still be considered employed by one employer - the State of California. An employee's hours worked in multiple positions are thus counted as hours worked for one employer, with overtime compensation calculated accordingly.

3. Leave Hours Are Not "Work" Hours

Many state departments use a recordkeeping system that tracks leave hours as "paid time." Such a system is in place to account for each scheduled work hour, even if no work is performed. The FLSA does not count such leave hours as hours "worked" and does not require such hours to be counted towards the applicable overtime threshold. For example, a full-time employee scheduled to work five eight-hour days a week, who takes two eight-hour days of leave but works an additional eight hours in the same workweek, has not worked in excess of the FLSA's 40-hour overtime threshold, and is not entitled to overtime compensation under the FLSA.

B. SPECIFIC ACTIVITIES CONSIDERED COMPENSABLE WORK TIME

The FLSA considers the following types of activities to be work. Accordingly, such activities are compensable, and the time spent performing such activities count towards the overtime threshold.

1. Waiting Time

Generally, an employee who is "engaged to wait" must be compensated for waiting time, while an employee who is "waiting to be engaged" is not considered working while waiting.

"Engaged to be waiting" is time where, as a result of waiting to perform work, the employee is unable to use time effectively for his/her own purposes. Examples of employees "engaged to be waiting," include:

1) A stenographer who reads a book while waiting for dictation;
2) A messenger who works a crossword puzzle while waiting for assignments;
3) A fireman who plays checkers while waiting for alarms; and
4) A factory worker who talks to his fellow employees while waiting for machinery to be repaired.

An employee who is "engaged to be waiting" may be able to leave the jobsite; however, the waiting time is typically of short duration. The crucial factor is whether the employee's time "belongs to and is controlled by the employer" and waiting is considered a part of the employee's job duties.

By contrast, an employee who is "waiting to be engaged" is relieved from duty and can effectively use such time for his own purposes. The inquiry is fact-specific. The predominant factors to examine are:

1) The degree to which the employee is free to engage in personal activities; and
2) The agreements between the parties.

Courts will consider many factors when determining whether the employee is free to engage in personal activities, including whether:

1) There is an on-premises living requirement;
2) There are excessive geographical restrictions on employee's movements;
3) The frequency of calls is unduly restrictive;
4) A fixed time limit for response is unduly restrictive;
5) The on-call employee could easily trade on-call responsibilities;
6) Use of a pager could ease restrictions; and
7) The employee has actually engaged in personal activities during on-call time.

The employee who cannot use his or her time effectively for her own purposes may be considered "on-call." For example, the employee may be required to remain on the employer's premises or close by. Such time is considered work time. On the other hand, an employee who is merely required to leave word with the employer where the employee may be reached is not considered working.

2. Sleep Time

a. On-Duty For Less Than 24 Hours

An employee who is required to be on-duty in less than 24 hour increments is considered to be working while on-duty and must be compensated for all hours, even if the employee is permitted to sleep during this time.

b. On-Duty For More Than 24 Hours

An employee who is required to be on-duty for 24 hours or more may agree with the employer, either expressly or impliedly, to exclude bona fide regularly scheduled sleeping periods of 8 hours or less from the definition of work time. This provision requires adequate sleeping facilities to be provided where the 8 hour sleeping period is uninterrupted.

If the sleeping period is more than 8 hours, only 8 hours may be excluded from the definition of work. If sleep is interrupted by a call to duty, the interruption is considered work time. If the interruptions are such that the employee cannot get a reasonable night's sleep of five hours, no sleep time may be excluded from the definition of work time. The five hours of sleep need not be five consecutive hours.

c. <u>While Residing On Employer's Premises</u>

When an employee resides on the employer's premises, all time spent on the premises need not be considered work time. Employees must still be afforded time to pursue personal activities with complete freedom. To determine compensable time, all relevant specific facts should be considered, including any reasonable agreement between the employer and employee.

A separate set of guidelines that govern sleep time for law enforcement and fire protection employees is discussed below.

3. <u>Rest Breaks</u>

Although the FLSA does not require employers to provide a minimum number of rest breaks, the FLSA requires that rest breaks of "short duration," lasting between 5 and 20 minutes, must be counted as hours worked. In addition, such time may not be used to offset other periods of work.

The FLSA requires employers to provide a "reasonable break time" to allow non-exempt employees to express breast milk for a nursing child for up to one year after the child's birth. The break time must be allowed for each time such employee has a need to express the milk. The employer must provide a place that is not a restroom and that is shielded from view and free from intrusion from coworkers and the public for the employee to perform this activity. Time spent expressing breast milk need not be paid, unless the activity is performed during a compensated rest break.

4. <u>Meal Periods</u>

While the FLSA does not require employers to provide a meal period, the FLSA does not consider bona fide meal periods to be compensable work time. A bona fide meal period is one where the employee is completely relieved from duty for purposes of eating a regular meal. Active or inactive work requirements, such as a requirement to eat at a desk or other work location, will not be considered a bona fide meal period. However, employers may require employees to stay on premises without converting a meal period into a compensable work activity, as long as the employee is otherwise free from duty. The DOL's requirement that an employee must be completely relieved from duty has been interpreted, in some courts, to mean the meal period was spent "primarily for the employer's benefit."

5. Travel Time

The compensability of travel time is an often-disputed area of the FLSA. Although not every scenario is addressed, the following summarizes the FLSA's general rules regarding travel time. Departments with questions regarding specific circumstances should consult with CalHR.

a. Ordinary Home To Work Travel

Ordinary home to work travel is not compensable. An employee who travels from home before the regular workday and returns home at the end of the workday is engaged in ordinary home to work travel. This principle applies whether the employee works at a fixed worksite or at different job locations.

However, the DOL recognizes there may be instances where travel between home and work may be compensable. For example, if an employee is called back to work at night, after having completed a normal day of work, to travel a substantial distance on an emergency basis, all time spent on such travel is considered work time.

b. Home To Work On Special One-Day Assignment In Another City

When an employee travels to another city for a special one-day assignment, the travel to and from the location of assignment is compensable. However, the employee need not be compensated for time spent traveling between home and the airport or other common carrier location, as that would fall within the "home to work" category. Meal time may also be excluded.

c. All In A Day's Work

Time spent by an employee traveling as part of his principal activities, such as travel from job site to job site during the workday, must be counted as compensable work time. For example, if an employee is required to report to one location for work purposes and then travel from that location to another work location, the travel time from the first location to another work location is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. As the DOL states, "If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked."

d. Overnight Travel

Overnight travel time that falls within the employee's normal worktime, even if the travel occurs on a day of the week the employee does not usually work, is compensable.

According to the DOL, "if an employee regularly works from 9 a.m. to 5 p.m. from Monday through Friday, the travel time during these hours is worktime on Saturday and Sunday as well as on the other days."

e. Work Performed While Traveling

The time spent performing work while traveling is compensable work time. An employee should not be deprived compensation for performing regular work duties simply because the employee performs them while travelling instead of in the office. However, each circumstance must be considered independently. For example, courts have held that law enforcement officers who were required to drive employer-provided vehicles, have their equipment on and monitor the vehicles' equipment, and could not make unauthorized detours, were not entitled to compensation for their home to work commutes.

f. Mode Of Transportation

If travel is outside the employee's normal work hours, the time is not compensable if they are a "passenger on an airplane, train, boat, bus, or automobile." On the other hand, if the employee is required to drive a vehicle outside their normal work hours, that time is compensable because the employee has been required to perform work.

When the employee is traveling outside of the employee's normal work hours and is offered the choice of public transportation but chooses to drive his own car, the employer may choose to compensate the employee for either the amount of time the employee spent driving, or the amount of time that would have been compensable if the employee had taken the public transportation.

g. Driving An Employer-Owned Vehicle

An employee's commute time in an employer owned vehicle is not compensable if the commute is (1) within the "normal commuting area for the employer's business or establishment" and (2) if the use of the employer's vehicle is "subject to an agreement on the part of the employer and the employee or representative of such employee." The agreement may be a written agreement, set forth in a collective bargaining agreement, or may merely be an understanding based on established industry or employer practices. Driving time is not work time when driving an employer's vehicle for convenience and the employee/driver elects to transport other employees to or from work.

h. Transporting Animals

The FLSA's travel time provisions also apply to employees who transport animals. For example, employees may transport canines or horses as part of their home-to-work travel. Generally, transporting animals as part of the regular commute does not make

the commute compensable, even if the employee is prohibited from making personal stops during the commute. However, an employee who performs more than *de minimis* work during the commute may be entitled to compensation.

6. Pre- And Post-Shift Work

The Portal–to–Portal Act, a subsection of the FLSA, generally excludes not only certain time spent traveling to work, but also, excludes activities which are performed prior to ("preliminary to") or following the performance of ("postliminary to") an employee's principal work activity. In California, preliminary or postliminary activities are compensable if:

1) The activity constitutes "work;"
2) The activity is "integral and indispensable;" and
3) The activity is not *de minimis*.

a. Criteria #1: Work

"Work," as discussed in the previous chapter, is "physical or mental exertion" both "controlled or required by the employer" and "pursued necessarily and primarily for the benefit of the employer." Both conditions must be met in order for an activity to be considered "work."

Whether an employer controls or requires an activity is determined by examining a number of factors, including whether the employer selected the individuals who participated, dictated the extent of participation, or disciplined individuals for not participating.

b. Criteria #2: Integral And Indispensable Activities

An activity is integral and indispensable if it is necessary to the employee's principal work activity.

Examples of integral and indispensable activities include removing and sanitizing protective equipment, showering and changing clothes to remove toxic chemicals, sharpening knives at a meat packing plant, or powering up an x-ray machine to take x-rays.

Examples of non-compensable activities include undergoing anti-theft security screenings at the end of the workday, transporting "light equipment," checking in and out and waiting in line to check in and out, waiting for paychecks, placing personal items in lockers, reviewing a schedule, or bidding on vacation and work schedules.

c. Criteria #3: De Minimis

Certain periods of work may be so insignificant or erratic that the FLSA does not require such time to be compensated. Discussed previously, these periods include periods of time that, as a matter of practical administration, cannot be precisely recorded.

d. Compensability By Custom Or Contract

Where an agreement, custom, or practice requires payment for pre- and post-shift activities, the FLSA will not void those provisions. Accordingly, where a contract explicitly requires payment for otherwise non-compensable preliminary activities, an employer maintains at least a contractual obligation to compensate the employee for such time.

7. Donning And Doffing

Time spent changing clothes or washing at the beginning or end of the workday is not considered time worked, as long as such time is not considered worktime according to custom or practice under a collective bargaining agreement.

The United States Supreme Court defines "clothes" as "items that are both designed and used to cover the body and are commonly regarded as articles of dress." The Court also defines "changing" clothes to mean not only "substituting" articles of clothing, but "altering" articles of clothing as well. Accordingly, in a case involving steelworkers, the Court determined that such items as "a flame-retardant jacket, pair of pants, and hood; a hardhat; a snood; wristlets; work gloves; leggings; and metatarsal boots" were "clothing," but "safety glasses; earplugs; and a respirator" were not. Clothing designed to protect the wearer against workplace hazards fall within the definition of "clothing."

The explicit terms, custom or practice under a collective bargaining agreement may exclude time spent changing clothes or washing at the beginning or end of a workday from the definition of work time. However, even if the terms, customs or practice under a collective bargaining agreement do not exclude changing clothes or washing from the definition of work, such activities must still be integral and indispensable to the employee's principal activities in order to be included in the definition of compensable work time.

If an employer compensates employees for time spent changing clothes or washing, the DOL will allow the employer to establish a formula allotting a reasonable amount of time to perform such activities.

8. Lectures And Training Time

Employees are not entitled to compensation for attending lectures, meetings, training programs or similar activities, as long as all four of the following factors are met:

1) Attendance is outside of the employee's regular working hours;
2) Attendance is voluntary;
3) The course, lecture, or meeting is not directly related to the employee's job; and
4) The employee does not perform any productive work during such attendance.

a. Criteria #2: Voluntary Attendance

Attendance is not voluntary if it is required by the employer, or if the employee is led to understand that non-attendance would have an adverse effect on the employee's present working conditions or continuance of employment. However, training that is a pre-condition of hire may not be compensable, even when the employer allows the training to occur after an offer has been accepted and the employee has begun working.

b. Criteria #3: Directly Related To The Employees Job

Training is related to the employee's job if it is intended to help the employee perform her present job more effectively, as opposed to helping the employee obtain a new job or learn a new skill. However, even training that is related to an employee's job is not compensable if the employee undertakes the training after hours and, most importantly, on his own initiative.

In certain instances, an employer may establish for the benefit of his employees a program of instruction corresponding to courses offered by an independent bona fide institution of learning. In such cases, voluntary attendance outside working hours would not be hours worked, even if the instruction directly related to the employee's job or was paid for by the employer.

9. Grievance Response Processing Time

Time spent adjusting employee grievances while the employee is required to be on work premises is compensable work time. Where a bona fide union is involved in the grievance, the DOL defers to the terms of the collective bargaining agreement or practice to determine compensable time.

10. Medical Appointments

Time spent waiting for or receiving medical attention on the employer's premises, or at the employer's direction during normal work hours constitutes compensable work hours. In certain circumstances, time spent receiving medical treatment outside of normal work hours may be compensable if required by the employer.

11. Civic or Charitable Work

Time spent working for public or charitable purposes at the employer's request, or under the employer's direction or control, or while the employee is required to be on the premises is compensable work time. Time spent volunteering in such activities outside of the employee's normal working hours is not compensable.

12. Fire/Disaster Drills

Time spent participating in fire or other disaster drills (voluntary or involuntary) is compensable because it is performed for the employer's benefit.

C. REGULATIONS PERTAINING TO LAW ENFORCEMENT AND FIRE PROTECTION WORK

The DOL has issued regulations that are specific to fire protection and law enforcement employees of public agencies.

The basis for these regulations involves the concept of a "tour of duty," which for employees subject to the "7k" partial overtime exemption, means the period of time during which an employee is considered to be "on duty." A tour of duty may be scheduled or unscheduled, and includes both time an employee is working during a scheduled shift or outside a scheduled shift.

1. General Rule Regarding Compensability

Similar to the provisions discussed above, compensable time for law enforcement or fire protection employees includes all time an employee is on duty on an employer's premises or worksite, including all time the employee is suffered or permitted to work. Preliminary activities which are integral to the employee's principal activities, such as attending roll call, writing up and completing tickets or reports, and washing and re-racking fire hoses could be compensable.

Time spent away from the employer's premises may be compensable if the employer effectively restricts the employee's time for personal pursuits. On the other hand, an employee who is not required to remain on the employer's premises but is only required to leave word where the employee may be reached is not working while on call. But if the employee cannot use the time effectively for personal pursuits, such time spent on call is compensable.

Normal home to work travel is not compensable, even where the employee is travelling to a location that is not the employer's premises.

2. Sleep Time

Sleep time is compensable for fire protection and/or law enforcement employees assigned tours of duty of 24 hours or less.

For tours of duty lasting more than 24 hours, sleep time may be excluded by an expressed or implied agreement to exclude such time. Without an agreement, the sleep time is compensable. At no point may excluded sleep time exceed eight hours in a 24–hour period.

If sleep is interrupted by a call to duty, the interruption is considered work time. If the interruptions are such that the employee cannot get a reasonable night's sleep of five hours, no sleep time may be excluded.

Note: the DOL treats shifts lasting 24 hours differently for public safety employees and non-public safety employees.

3. Meal Period

Regulations governing meal periods for fire protection and law enforcement employees dictate as follows:

1) For law enforcement personnel, meal periods are excluded from work time if the tour of duty is 24 hours or less and the employee is completely relieved of duty during the meal period.
2) For fire protection employees, meal periods are included as work time where tours of duty are 24 hours or less.
3) For fire protection and/or law enforcement employees with tours of duty exceeding 24 hours, meal periods may be excluded from work time if the employee is completely relieved of duty during the meal period.

4. Early Relief

FLSA regulations recognize the common practice among fire protection employees to arrive early and relieve employees on a prior shift before a scheduled start time. If such practice is voluntary and does not result in unpaid work time over a period of time, this practice will not result in FLSA liability.

5. Specialized Training and Certification

While employer-mandated training is typically compensable, an exception exists for state or local government fire protection and/or law enforcement employees, even if the training is required.

The exception applies if the mandatory training occurs outside of regular work hours and the training is required:

1) Within a particular governmental jurisdiction (for example, certification of emergency rescue workers); or
2) By a higher level of government (for example, where a state law imposes a training obligation on a city employee).

The time spent in the training is not compensable even if the costs of the training are borne by the employer.

6. Training Academy

Fire protection and/or law enforcement employees attending a police or fire academy or other training facility are not on duty during times they are not in class or at a training session and if they are free to use such time for personal pursuits. Such free time is not compensable.

7. Special Detail Work

Fire protection and/or law enforcement employees of public agencies may perform special detail work during off-duty hours for another public or private employer. The hours of work performed for both employers need not be combined for determining overtime compensation if (1) the special detail work is performed solely at the employee's option; and (2) the two employers are separate and independent.

8. Off-Duty Canine Care

Generally, caring for and training police dogs at home is compensable work under the FLSA. Such activities are usually considered integral and indispensable parts of the canine handler's principal activities. Time spent performing such activities is therefore considered compensable work time.

Courts will generally defer to compensation agreements for work performed at home if the agreement is reasonable, and takes into account all pertinent facts. The agreement should take into account some approximation of the actual amount of time spent working at home. The parties to the agreement must make a reasonable investigation of the number of hours reasonably spent on canine care while off-duty. According to the DOL, such agreements should also provide compensation for additional hours spent in extraordinary care (e.g. trips for veterinary care).

Canine care activities need not be paid at the same rate of pay as that paid for other law enforcement activities.

D. SUBSTITUTED WORK

The FLSA allows public employees to exchange or "substitute" scheduled work hours with another individual employed in the same agency and in the same capacity. The employee who works another employee's scheduled hours shall not have those hours added to her own regular hours of work for determining overtime. Instead, each employee will be credited as if he or she had worked his or her normal work schedule for that shift, including any planned overtime to which the employee would have been entitled.

Employees who substitute shifts must do so freely and without coercion, and must not be required to explain or justify the decision. The employee's decision must be made without fear of reprisal or promise of reward, and must be made exclusively for the employee's own convenience.

In addition, the public agency must be aware of a substitution arrangement prior to the work being done (i.e. what work is being done, by whom it is being done, and where and when it is being done), and must approve of the arrangement in whatever manner is customary for the agency. The public agency is not required, under the FLSA, to maintain a record of the substituted hours worked.

E. OCCASIONAL AND SPORADIC WORK

A public employee may occasionally work in a "different capacity" for the same public agency. The employer need not include such time when calculating overtime compensation. For example, the DOL states that a parks department bookkeeper may occasionally work as a referee for an adult evening basketball league sponsored by the department. Time spent refereeing need not be added to the employee's regular hours working as a bookkeeper.

In order to apply this exception, the following factors must be met:

1) The work must be "occasional and sporadic," meaning the work is infrequent, irregular or occurring in scattered instances. The work may be recurring, but may not be regularly scheduled.
2) The work must not be within the same general occupational category as the employee's regular work.
3) The employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision.

DOL regulations specify that public safety employees working any kind of security or safety function within the same local government are never considered to be employed in a different capacity.

The regulations also specify that teachers do not work in a different capacity when they perform tasks related to teaching, such as coaching or career counseling.

F. CONTINUOUS WORKDAY DOCTRINE

The continuous workday doctrine defines the "workday" as the period between the first compensable work activity ("first principal work activity") and the last compensable work activity "(last principal work activity") of the day. Generally, once the workday begins, an employee is entitled to compensation for activities performed during the workday, subject to certain exclusions (e.g. meal periods).

An individual assessment must be made to determine whether the activities employees perform at home are compensable work activities that could potentially extend the length of an employee's workday.

G. GAP TIME CLAIMS

"Gap time" claims are claims for compensation for work time that do not exceed the FLSA's overtime threshold or violate the FLSA's minimum wage provisions. Several courts have held that "gap time" claims may not be brought under the FLSA.

An example of a "gap time" claim is the following: the FLSA's "7k" schedule requires law enforcement officers to be paid overtime compensation for hours worked in excess of 86 hours in a 14-day work period. If an employment contract provides overtime compensation to law enforcement officers for working in excess of 80 hours every two weeks, officers who work 84 hours in a two-week period would be entitled to overtime under the contract but not under the FLSA. The officers' claim for overtime compensation for working four hours in excess of 80 hours every two weeks is a "gap time" claim.

VIII. PAYING OVERTIME

The FLSA requires overtime compensation to be paid at a rate of at least one and one-half times the employee's "regular rate" of pay. The regular rate of pay is computed on a per hour basis. Accordingly, employees who are paid on a salary basis, or who receive commissions, differentials, stipends or other additional pay, must convert their pay to an hourly rate to determine their regular rate.

An employer and employee may not agree to an artificial regular rate that does not reflect the regular rate actually paid to the employee for performing work.

A. TOTAL REMUNERATION

An employee's regular rate is calculated by dividing the employee's total remuneration (except payments excluded by statute) earned in a work period by the total number of hours worked in that work period for which compensation was paid.

The total "remuneration" used to calculate the regular rate is not limited to an employee's salary or hourly rate. A number of pay differentials unique to state employment should be included in the regular rate calculation. Such differentials may include shift differentials, hazard pay, longevity pay or bilingual pay.

The FLSA lists the types of remuneration that must be *excluded* from the regular rate calculation. These include:

1) Payment in the nature of gifts that are not dependent on hours worked, production, or efficiency;
2) Payment for periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar reason;
3) Reasonable payments for expenses incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer;
4) Discretionary bonuses;
5) Premium pay for working hours in excess of eight hours in a day, in excess of the maximum workweek, or in excess of an employee's regular working hours; and
6) Premium overtime payments provided by a collective bargaining agreement.

All remuneration which does not fall within the above categories must be included in the regular rate.

B. CALCULATING OVERTIME COMPENSATION

Collective bargaining agreements will often describe the overtime calculation method for represented state employees. The negotiated calculation methods must pay

employees above the minimum required by the FLSA. In the absence of a lawfully negotiated overtime formula, the FLSA sets forth the following principles for calculating overtime calculation.

1. Hourly Employees

For an individual employed on an hourly basis, with no additional remuneration, the regular rate is the employee's hourly rate.

Example:
An employee is paid $12 an hour, and works 46 hours in a week. The compensation owed the employee is calculated as follows:

Straight Compensation	**Overtime Compensation**
Rate: $12/hr	Overtime Rate: $18/hr ($12 x 1.5)
Non-Overtime Hours: 40	Overtime Hours: 6
Straight Compensation: $480 ($12 x 40hrs)	Overtime Compensation: $108 ($18 x 6hrs)
Total Compensation for the week: $588 ($480 + $108)	

Alternatively, pay in this example may be calculated as:

Straight Compensation	**Overtime Compensation**
Rate: $12/hr	Overtime Rate: $6/hr ($12 x 0.5 premium)
Total Hours: 46	Overtime Hours: 6
Straight Compensation: $552 ($12 x 46hrs)	Overtime Compensation: $36 ($6 x 6hrs)
Total Compensation for the week: $588 ($552 + $36)	

2. Hourly Employees Paid An Additional Amount

If an hourly employee is paid an additional amount, such as a bonus, the additional amount is part of the employee's total remuneration, and must be included in the regular rate.

Example:
An employee is paid $12 an hour, and works 46 hours in a week. The employee is also paid a bonus of $46 for the week. Compensation owed to the employee is calculated as follows:

Total Remuneration: ($12/hr x 46) + $46 bonus = $598
Total Hours: 46 hours
Regular Rate: Total Remuneration÷ Total Hours = $13

Straight Compensation	**Overtime Compensation**
Rate: $13/hr	Overtime Rate: $19.50/hr ($13 x 1.5 premium)
Straight Hours: 40	Overtime Hours: 6
Straight Compensation: $520 ($13 x 40hrs)	Overtime Compensation: $117 ($19.5 x 6hrs)

Total Compensation for the week: $637 ($520 + $117)

Alternatively, pay in this example may be expressed as:

Total Remuneration: ($12/hr x 46) + $46 bonus = $598
Total Hours: 46 hours
Regular Rate: Total Remuneration÷ Total Hours = $13

Straight Compensation	**Overtime Compensation**
Rate: $13/hr	Overtime Rate: $6.50/hr ($13 x 0.5 premium)
Total Hours: 46	Overtime Hours: 6
Straight Compensation: $598 ($13 x 46hrs)	Overtime Compensation: $39 ($6.5 x 6hrs)

Total Compensation for the week: $637 ($598 + $39)

This alternative method pays straight compensation for all hours worked, and the overtime premium, calculated at one-half (0.5) times the regular rate, for overtime hours worked.

State payroll records often indicate additional pay (such as stipends and pay differentials) as separate pay items. Keeping with this approach, the above employee's pay may be expressed as:

Straight Compensation	**Overtime Compensation**
Rate: $12/hr	Overtime Rate: $6.50/hr ($13 x 0.5 premium)
All Hours: 46	Overtime Hours: 6
Straight Compensation: $552 ($12 x 46hrs)	Overtime Compensation: $39 ($6.5 x 6hrs)
Stipend: $46	

Total Compensation for the week: $637 ($552 + $46 + $39)

3. Salaried Employees

To determine the regular rate for a salaried employee, the employee's salary must be converted to an hourly rate equivalent. This is done by dividing the salary by the number of hours the salary is intended to compensate.

Suppose an employee is hired at a salary of $350 and this represents compensation for 35 hours of work each week. The employee's regular rate of pay is $350 divided by 35 hours. The hourly rate is $10 an hour.

State employee salary ranges are based on full-time monthly employment consisting of either 21 or 22 workdays. The state employer also recognizes a standard workday consisting of eight hours. Accordingly, full-time monthly salaries are payment for the equivalent of 168 or 176 hours of work per month. Regulation provides that monthly salaries shall be converted into their equivalent hourly rate by dividing the monthly salary by 173.33. A different conversion rate is used for employees on a non-40 hour workweek schedule.

C. EMPLOYEES PAID AT MORE THAN ONE RATE

In instances where the employee is paid different hourly rates in the same workweek, the employee's regular rate may be calculated by one of two methods.

1. Weighted Average Calculation

The first method calculates a weighted average of the different rates. The weighted average regular rate is an average of two or more hourly rates that has been weighted according to the number of hours worked for each rate.

> **Example**: An employee works 40 hours in his first position at $20.00/hr. His total compensation for the first position is $800.00 ($20/hr x 40 hours). During the same workweek, the employee works 10 hours in his second position at $10.00/hr. His total compensation for the second position is $100.00 ($10/hr x 10 hours).

First Position	**Second Position**
Hourly Rate: $20/hr Hours Worked: 40 Total Compensation: $800 ($20/hr x 40 hrs)	Hourly Rate: $10/hr Hours Worked: 10 Total Compensation: $100 ($10/hr x 10 hrs)
Weighted Average Regular Rate Total Compensation: $900 ($800 + $100) Total Hours Worked: 50 hours (40 hrs + 10 hrs)	

Weighted Average Regular Rate = $18/hr ($900 / 50 hrs)

Overtime Hours worked: 10 hours
Overtime Compensation owed: $90 ($18.00 x 0.5 x 10) in addition to the $900 already paid.

As shown above, the (weighted average) regular rate, $18.00/hr, is calculated by dividing total compensation ($800 + $100 = $900) by total hours worked (40 hours + 10 hours = 50 hours). The overtime premium is then calculated by multiplying the number of overtime hours worked by one-half the regular rate, or $18.00/hr x 0.5 x 10 hours = $90.00.

2. Rate-in-Effect Method

The second method calculates overtime using the hourly rate applicable to the work performed during the overtime hours worked. An employer must meet a number of conditions in order to apply this method, including:

1) The employee's average hourly earnings for the workweek (excluding overtime and other excludable pay) may not be less than the federal minimum wage;
2) The overtime rate at issue must include all other types of pay required by the FLSA to be included in the overtime rate;
3) The regular rate upon which overtime is calculated must be the rate actually paid for such work when performed during non-overtime hours;
4) The overtime hours for which the overtime rate is paid must qualify as overtime hours;
5) The number of overtime hours for which the overtime rate is paid must equal or exceed the actual number of hours worked in excess of overtime thresholds;
6) The employer and employee must, prior to the employee's performance of work, have an agreement or understanding, such as in a collective bargaining agreement, that the employee will be paid overtime at the rate in effect;
7) The employer must maintain records containing information reflecting the hourly rate applicable to the employee, the basis on which it is paid, the amount of each payment that is excluded from the regular rate, the number of overtime hours worked in each workweek at each applicable hourly rate, and the total weekly overtime compensation at each applicable rate; and
8) The employer must also maintain a record of the date of agreement or understanding between employer and employee of the "rate-in-effect" method of compensation, and the period of time covered by the agreement.

Departments should consult with CalHR to determine whether the conditions above are met to allow a department to apply the rate-in-effect method.

D. OFFSETS

The FLSA allows employers to credit extra compensation earned under specific circumstances against overtime compensation earned in the same work period. For example, premium compensation earned for working eight hours on a holiday may be used to offset premium compensation earned for working eight hours of overtime in the same workweek.

The extra compensation that may be used to offset overtime compensation includes additional pay for working:

1) In excess of eight hours in a day, in excess of the maximum workweek applicable to the employee, or in excess of the employee's normal or regular working hours;
2) On Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek; or
3) For work outside of the hours established in good faith by a contract or agreement as the basic, normal, or regular workday or workweek.

Note: Before applying offsets, departments should review the MOU and consult with CalHR.

E. DIFFERENT RATES FOR DIFFERENT ACTIVITIES

The FLSA does not set the hourly rate an employer must pay its employees. The FLSA does not even require an employer to pay a uniform straight-time hourly rate for all employees performing the same type of work. As long as the differing hourly rates meet or exceed the mandated minimum wage, an employer may pay different employees or the same employee different rates.

However, the DOL prohibits setting an hourly rate for work performed during overtime hours that is less than the hourly rate for the same work performed during non-overtime hours. The DOL also prohibits setting an hourly rate that varies inversely with the length of the workweek. For example, an employer may not set an hourly rate that becomes incrementally smaller the more hours an employee works each week.

F. CALCULATING OVERTIME DURING CHANGE IN WORKWEEKS

When an employer changes the beginning and end of a workweek, hours worked during the “old” workweek may overlap with the “new” workweek. In such instances, a question arises whether to count any hours falling within the overlapping period towards the “old” workweek or the “new” workweek. According to the DOL, the overlapping hours must be counted towards the workweek that provides the employee the higher compensation.

Example:
An employee receives $5 an hour. The employee's "old" workweek runs from 7 a.m. Monday to 7 a.m. Monday. As illustrated below, he worked eight hours a day, Monday through Friday, and then five hours the following Sunday. He then works eight hours a day from Monday through Thursday, and three hours on Friday.

	Sun	Mon	Tue	Wed	Thu	Fri	Sat
Week 1		8 hrs worked	8 hrs worked	8 hrs worked	8 hrs worked	8 hrs worked	Day Off
Week 2	5 hrs worked	8 hrs worked	8 hrs worked	8 hrs worked	8 hrs worked	3 hrs worked	Day Off
Week 3	Day Off						

The employer applies a "new" workweek that runs from 7 a.m. Sunday to 7 a.m. Sunday, beginning on Week 2. Under these facts, the five hours worked on Sunday fall within overlapping workweeks.

As illustrated below, the five hours worked on Sunday should count towards the "old" workweek because it results in higher compensation.

Allocating Five Hours Worked on Sunday to the "Old" Workweek:	**Allocating Five Hours Worked on Sunday to the "New" Workweek:**
Rate: $5/hr Total Hours Worked: 45 Compensation: $237.50 (40hrs x $5) + (5hrs x 1.5 x $5)	Rate: $5/hr Total Hours Worked: 40 Compensation: $200.00 (40hrs x $5)

G. RETROACTIVE PAY INCREASES

Retroactive pay increases increase an employee's regular rate of pay for the period of its retroactivity. Thus, an employee who is awarded a retroactive increase of 10 cents per hour is entitled a retroactive increase of 15 cents for each overtime hour worked during the same period. A lump sum retroactive payment must be prorated over the hours of the period to which it is allocated.

H. WAGE INCREASES

Wage or salary increases cannot simultaneously be payment for overtime compensation. Wage payments that are not clearly designated as overtime compensation, particularly when such payments remain constant during periods the

employee works no overtime hours, are considered part of an employee's wages and must be reflected in the employee's regular rate.

I. CHANGES IN SCHEDULED HOURS WITHOUT CHANGES IN PAY

Where a permanent or temporary but long term reduction in a fixed schedule occurs without a reduction in salary, the regular rate must increase to reflect the increase in the rate of compensation for hours worked.

A reduction in hours that occurs on a temporary basis will be treated as vacation time. No change in regular rate will result.

Where an employer permanently schedules alternating work periods of different lengths, the employer may, by agreement or understanding, pay the same salary for both work periods, but must calculate overtime according to the regular rate applicable to each work period. For example, an employer may agree to pay an employee $500 every week, although the employee's scheduled hours of work alternate between 30 and 40 hours per week. If overtime is worked in a particular week, the employee's regular rate will change depending on the length of the scheduled workweek.

J. DEDUCTIONS

Deductions for tools and uniforms, taxes, union fees, or deductions for disciplinary reasons or for shortened workweeks should not affect the calculation of the regular rate of pay. The regular rate should be calculated based on compensation paid before the deduction is applied.

K. TIMELY PAYMENT OF WAGES

The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the pay period in which such workweek ends. When the correct amount of overtime compensation cannot be determined until after the regular pay period, the DOL requires the employer to pay the overtime compensation as soon after the regular pay period as is practicable. In no event may payment be delayed beyond the next payday after the overtime computation can reasonably be made. Overtime compensation increases resulting from retroactive wage increases must be paid at the time the retroactive wage increase is paid.

IX. COMPENSATORY TIME OFF

In typical circumstances, the FLSA requires wages to be paid in the form of cash or other negotiable instrument, such as by check. Payment must be paid free of conditions, such as unlawful kickbacks. Deductions for taxes, or as required by law, are permitted.

The FLSA also allows employees of the state, a political subdivision of the state, or an interstate government agency to be paid overtime compensation in the form of paid leave, or, compensatory time off (CTO) at a rate of one and one-half hours of CTO for each overtime hour worked.

CTO is paid pursuant to either:

1) A collective bargaining agreement or other agreement between the employer and a representative of the employee; or
2) For employees not covered by a collective bargaining agreement, an agreement between employer and employee before the work is performed.

   Note: Departments should review the applicable MOU or department policy, and consult with CalHR, to determine whether a local agreement provides for CTO in lieu of overtime.

Employees engaged in work constituting public safety activity, emergency response activity, or a seasonal activity, may accrue no more 480 hours of CTO (representing no more than 320 hours of overtime worked).

Employees engaged in other types of activities may accrue no more than 240 hours of CTO (representing no more than 160 hours of overtime worked).

A. USING CTO

Any employee requesting CTO should be permitted to use the CTO "within a reasonable period" after making the request, as long as the use does not "unduly disrupt" the operations of the employer.

A "reasonable period" is determined by the agency's customary work practices, and based on the facts of each case. Employers should consider the employee's normal schedule or work, anticipated peak workloads, emergency requirements and availability of substitute staff. An employer-employee agreement setting terms of a "reasonable period" will govern.

To "unduly disrupt" an agency's operations does not mean that it would be merely inconvenient. A denial of a request for CTO must be reasonable and made in good faith

anticipation that granting the CTO would impose an unreasonable burden on the agency's ability to provide services.

Unless otherwise prohibited by an employer-employee agreement or other law, nothing in the FLSA prohibits an employer from cashing out CTO or requiring an employee to use CTO.

Note: Departments should review the terms of the applicable MOU and consult with CalHR to ensure the proper accrual and use of CTO.

B. CASH PAYMENT

CTO must be paid at the regular rate in effect at the time the employee is paid for using or cashing out CTO. Payment for taking CTO shall not be included in the calculation of the regular rate.

CTO may be cashed out pursuant to law or an applicable employer-employee agreement. Upon termination, CTO must be cashed out at the higher rate of either:

1) The average regular rate received by such employee during the last three years of the employee's employment; or
2) The final regular rate received by such employee.

C. NON-FLSA CTO

CTO that is earned for reasons other than working overtime as defined by the FLSA is called "other compensatory time." For example, a collective bargaining agreement may provide that compensatory time be granted to employees for hours worked in excess of eight in a day, for working on a scheduled day off in a non-overtime workweek. Or, state law or local ordinances may require payment of overtime for working certain hours which would not be considered overtime under the FLSA.

The FLSA's rules governing the rate at which CTO is earned or paid, or governing the use or accrual of CTO, do not apply to other compensatory time.

X. FEDERAL MINIMUM WAGE

The federal minimum wage is currently $7.25 per hour. The federal minimum wage is met if an employee's total weekly wage (excluding overtime compensation) exceeds the federal minimum wage multiplied by the number of hours worked.

XI. RECORDKEEPING

A. INFORMATION TO BE MAINTAINED IN EMPLOYEE RECORDS

Every employer covered by the FLSA must maintain and preserve employee records indicating the wages, hours and other conditions and practices of employment. The FLSA's recordkeeping requirements do not affect an employer's obligation to comply with the recordkeeping requirements under any other federal, state or local law.

1. FLSA-Covered Employees

Employee records for employees covered by the FLSA must contain the following information:

1) Name, and, on the same record, the employee's identifying symbol or number;
2) Home address, including zip code;
3) Date of birth, if under 19 years of age;
4) Sex;
5) Occupation in which employed;
6) Time of day and day of week on which the employee's workweek begins (for employees employed under a 7(k) exemption, the starting time and length of each employee's work period);
7) Regular hourly rate of pay for any workweek in which overtime compensation is due, along with an explanation of the basis upon which the employee is regularly paid (e.g., per hour, per day, per month);
8) The amount and nature, if any, of each payment which is excluded from the regular rate;
9) Hours worked each workday and total hours worked each workweek;
10) Total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek (excluding premium overtime compensation);
11) Total overtime compensation for overtime hours worked;
12) Total additions to or deductions from wages paid each pay period;
13) Total wages paid each pay period;
14) Date of payment; and
15) Pay period covered by payment.

Records for employees who work a fixed schedule need not indicate the hours actually worked for each day and each week. Instead, the record may show the employee's schedule of daily or weekly hours normally worked, so long as the records also contain the following:

1) In weeks in which the employee works the fixed schedule, the record must indicate by check mark, statement or other method that such hours were in fact actually worked; and
2) In weeks in which more or less than the scheduled hours are worked, the record shows the exact number of hours worked.

2. FLSA-Exempt Employees

Employees exempt under (1) the FLSA's "white-collar" exemptions; (2) who are employed in the capacity of academic administrative personnel or teachers in elementary or secondary schools; or (3) who are engaged in outside sales, need not maintain records containing all the information listed above. Instead, records for these employees must contain the following information:

1) Name, and on the same record, the employee's identifying symbol or number;
2) Home address, including zip code;
3) Date of birth, if under 19;
4) Sex;
5) Occupation in which employed;
6) Time of day and day of week on which the employee's workweek begins;
7) Total wages paid each pay period;
8) Date of payment; and
9) Pay period covered by payment.

In addition, the records must contain information reflecting the basis on which wages are paid in sufficient detail to permit calculation of the employee's total remuneration for employment including fringe benefits, for each pay period.

Failure to maintain accurate employee timekeeping or payroll records can have significant repercussions. In the event a lawsuit is filed alleging an employee was not compensated for working, the absence of employee timekeeping records may prompt a court to accept as true any employee's reasonable estimate of time worked.

B. POSTING OF NOTICES

Employers must post a notice explaining the FLSA's overtime and minimum wage provisions in a conspicuous area in every establishment where its employees are employed. The notice may be altered to indicate whether the FLSA's exemptions apply to a particular group of employees. Posters may be obtained from the DOL's website at: http://www.dol.gov/whd/resources/posters.htm.

Failing to properly post notices in violation of the FLSA's posting requirements may result in an equitable tolling of the statute of limitations, resulting in a larger potential backpay and damages period.

C. PRESERVING EMPLOYEE RECORDS

The FLSA requires employers to preserve the following items for a period of at least three years:

1) Payroll records;
2) Collective bargaining agreements or any other written agreements or memoranda summarizing the employment terms of oral agreements or understandings;
3) Certificates and notices listed or named in any part of the FLSA.
4) Sales and purchase records consisting of (1) the total dollar volume of sales or business, and (2) total volume of goods purchased or received during such periods (weekly, monthly, quarterly, etc.), in such form as the employer maintains records in the ordinary course of business.

Employers must preserve the following items for a period of at least two years:

1) Basic employment and earnings records, including daily starting and stopping time of individual employees;
2) Salary schedules which provide the piece rates or other rates used in computing straight-time earnings, wages, or salary, or overtime pay computation, and employee schedules;
3) Records of additions to or deductions from wages paid.
4) Order, shipping, and billing records.

Records must be kept safe and accessible at the place or places of employment, or at one or more established central recordkeeping offices. Where the records are maintained at a central recordkeeping office, and not at the place of employment, the records must be made available to the DOL within 72 hours of receiving notice.

XII. ENFORCEMENT

An employee may sue to recover unpaid wages in a lawsuit in state or federal court. An employee may also sue for being discriminated or retaliated against for exercising his/her rights under the FLSA. In addition, the DOL may investigate wage claims and subsequently sue to recover unpaid wages.

A. DAMAGES

The statute of limitations for an FLSA action is normally two years. However, where the defendant's violations are deemed "willful," the statute of limitations is extended to three years. A "willful" violation is one where the employer either knew its conduct was unlawful or showed reckless disregard for the lawfulness of its conduct.

In addition to unpaid wages, an employee may also be able to recover liquidated damages in an amount equal to the amount of unpaid overtime or minimum wage compensation. Liquidated damages are typically ordered unless the employer can demonstrate it acted in "good faith" and the defendant had "reasonable grounds" for believing it had not violated the FLSA. The test is both a subjective and objective test.

Prevailing plaintiffs are also entitled to interest on a money judgment. Pre-judgment interest will generally not be awarded if a plaintiff has also recovered liquidated damages, as this would have the effect of providing "double compensation" to the plaintiff. Post-judgment interest is mandatory. An employee who prevails on an overtime or minimum wage claim is also entitled to recover attorneys' fees and costs.

B. JOINT EMPLOYMENT

Where an employee is jointly employed by two or more employers, each employer is liable under the FLSA for the payment of wages. Courts have held that a joint employment relationship exists, for example, between state and county governmental entities where healthcare providers hired under county-administered state law provide in-home care support services. Another example of joint employment may exist where an entity leases land to grow vegetables and contracts with a farm labor contractor to provide farmworkers. Depending on the specific relationship, the farmworkers may be deemed jointly employed by both the farm labor contractor and entity leasing the land.

Federal regulations provide that a joint employment situation exists where:

1) There is an arrangement between the employers to share the employee's services, for example, to interchange employees; or

2) One employer is acting directly or indirectly in the interest of the other employer

(or employers) in relation to the employee; or

3) One employer controls, directly or indirectly, another employer with respect to the employment of the employee, or where the employee is commonly controlled by two or more employers.

Determining whether a joint employment relationship exists requires a fact-specific examination of the employer-employee relationship.