

# Monitoring Fair Labor Standards Act Compliance in the Long-Term Health Care Industry

A Guide for the Personal Care Industry

U.S. Department of Labor  
Employment Standards Administration  
Wage and Hour Division



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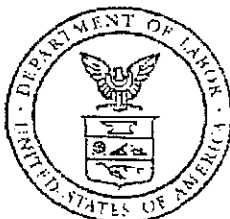
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Wage and Hour's long term compliance goal for this industry is 90 percent. This guide outlines some of the more common issues and concerns raised throughout the initiative. However, this guide only addresses the requirements of the Federal Wage and Hour law in general terms. Most States have their own local laws with which employers must also comply. If, for example, your State has a minimum wage that is higher than the Federal, you must satisfy its requirements, as well. Sometimes States are stricter or different with respect to breaks or meal periods, on-call time, training time, and child labor provisions.

The Wage and Hour Division is providing this information as a service to employers in the health care industry. The user should be aware that legislative or judicial action may have an impact on the positions set forth herein. Therefore, users of this guide are encouraged to contact their local Wage and Hour office for

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further assistance or publications; visit the Department of Labor's website at [www.dol.gov](http://www.dol.gov) where they can download the portions of the Code of Federal Regulations that are of interest; or take advantage of *elaws*—an interactive electronic data source on the FLSA and child labor requirements that is also available on the Department's home page.



## Monitoring Fair Labor Standards Compliance in the Long-Term Health Care Industry

The U.S. Department of Labor's Wage and Hour Division (Wage and Hour) is responsible for administering and enforcing a variety of laws that establish standards for wages and working conditions in this country. Wage and Hour's mission is to increase compliance with these labor standards laws through enforcement, administrative and educational programs. The Fair Labor Standards Act (FLSA) of 1938, as amended, sets forth minimum wage, overtime, child labor, and record keeping requirements for all covered employers. Wage and Hour has for a number of years focused its compliance activities on low-wage industries—industries where violations are more often egregious and complaints less common.

### **Wage and Hour Division Mission**

*"To achieve and promote compliance with labor standards through enforcement, administrative, and educational programs to protect and enhance the welfare of the nation's workers."*

### **BACKGROUND**

In 1997, the health care industry became one of three nationally targeted industries. Along with garment manufacturing and agriculture, Wage and Hour identified the health care industry for particular attention because of the preponderance of low-wage workers, the growth of the industry and historical enforcement data that suggested a high rate of FLSA violations. Because the health care industry is so diverse, the agency is concentrating its FLSA compliance efforts on a segment of the industry characterized by rapid growth and increased demand—long-term care. This industry sector typically includes nursing homes, adult family care facilities, assisted living facilities, and group homes.

Of 288 randomly-selected nursing or personal care facilities investigated by Wage and Hour in 1997, 86 were in violation of the minimum wage and overtime provisions of the FLSA—yielding an overall compliance rate of 70 percent. Just over three-fourths of the companies previously investigated by Wage and Hour were in compliance. FLSA overtime violations were by far the most common. Most occurred because employers incorrectly calculated their employees' regular rate of pay (the rate upon which the "time-and-a-half" overtime pay is based). Nurses' assistants were most often affected by the violations. Nearly two out of ten nursing homes found in violation were illegally employing children.

In 1998, Wage and Hour continued its activities in this industry by targeting the residential care (group homes) segment of the industry. A randomly-based investigation sample found 57 percent of the 221 resi-

dential care facilities investigated in compliance with the FLSA provisions. As with nursing homes, the majority of violations were violations of the FLSA overtime provisions. Unlike nursing homes, however, the majority of overtime violations occurred because employers simply failed to pay the required overtime premium after 40 hours in a workweek. Instead, workers were paid a flat weekly fee or semi-monthly rate regardless of the number of hours they worked.

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## COVERAGE

**Q.     *Are my employees covered by the Fair Labor Standards Act (FLSA)?***

The FLSA "covers" or applies to all employees of certain enterprises having workers engaged in interstate commerce, producing goods for interstate commerce, or handling, selling, or otherwise working on goods or materials that move in or are produced for such commerce. Covered enterprises include private businesses with an annual gross volume of sales made or business done of \$500,000 or more, and certain named facilities like hospitals, nursing homes and schools. All employees of an enterprise, as defined by the FLSA, are covered regardless of the duties they perform. Employees of firms that are not covered enterprises under the FLSA may still be subject to its provisions if they are individually engaged in interstate commerce or in the production of goods for interstate commerce, or in any closely related process or operation directly essential to such production.

Employees of a hospital, or an institution primarily engaged in the care of the sick, the aged, or the mentally ill or mentally retarded who live on the premises (it does not matter if the hospital or institution is public or private or is operated for profit or not-for-profit), are within the coverage of the FLSA.

The term "hospital" refers to those establishments which primarily engage in the offering of medical and surgical services to patients who generally remain at the establishment either overnight, several days, or for extended periods. Clinics and dispensaries are not included within the term hospital unless operated by the hospital as part of the hospital.

The phrase "institution primarily engaged in the care of the sick, the aged, the mentally ill or developmentally disabled who live on the premises" means an institution (other than a hospital) primarily engaged in (*i.e.*, more than 50 percent of its income is attributable to) providing personal care to individuals who reside on the premises and who, if suffering from a physical or mental infirmity or sickness of any kind, will require only general treatment or observation of a less critical nature than that provided by a hospital. Such institutions are not limited to nursing homes, whether they are licensed or not licensed, but include those institutions generally known as rest homes, convalescent homes, homes for the elderly, the ill, and the like.

A private institution for the residential care of emotionally disturbed persons would come within the coverage of the FLSA if more than 50 percent of its residents have been admitted by a qualified physician, psychiatrist or psychologist. For purposes of the 50 percent test, the term "admitted" includes evaluations of mental or emotional disturbance by a qualified physician, psychiatrist, or psychologist either subsequent to admission to the institution or preceding admission and if the evaluation is the cause for referral.

A private institution for developmentally disabled persons, sometimes called a community living center or halfway house, would come within the coverage of the FLSA, if more than 50 percent of its residents have an IQ of 69 or less as determined on the basis of a valid test administered by a qualified professional, and a reasonable degree of "care" is being provided. An individual with an IQ of 69 or below is considered mentally disabled. "Care" may include such services as waking up residents in the morning to see that they get breakfast in time to leave for work, picking up residents at night after work, special counseling, instruction in money management and health matters, and generally keeping an eye on them and listening to problems.

## EMPLOYMENT RELATIONSHIP

### *Q. Who is an employee?*

The FLSA only covers employees. The statute defines *employee* as "any individual employed by an employer" and the term *employ* is defined as "suffering or permitting to work." An employment relationship under the FLSA must be distinguished from a strictly contractual one. An employment relationship must exist for any provision of the FLSA to apply to any person engaged in work which may otherwise be subject to the Act. In the application of the FLSA, an employee, as distinguished from a person who is engaged in his/her own business, is one who—as a matter of economic reality—follows the usual path of an employee and is dependent on the business which he or she serves.

The concept of employment in the FLSA is interpreted broadly. Factors such as where the work is performed; the absence of a formal employment agreement; the time or method of payment; and whether an individual is licensed by the State or local government have no bearing on whether an individual is an employee under the FLSA.

Not all Federal laws share common definitions. Therefore a determination of employment status must be made separately under each law, including the FLSA. For example, a worker who is not an employee for purposes of tax law, may still be considered an employee under the FLSA.

*Q. How do I know if an employment relationship exists?*

The U.S. Supreme Court has on a number of occasions indicated that there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. The Court has held that it is the total activity or situation that controls. Among the factors which the Court has considered significant are:

- The extent to which the services rendered are an integral part of the principal's business
- The permanency of the relationship
- The amount of the alleged contractor's investment in facilities and equipment
- The nature and degree of control by the principal
- The alleged contractor's opportunities for profit and loss
- The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor
- The degree of independent business organization and operation

## **VOLUNTEERS**

Given the caregiving aspect of the health care industry, many employees develop bonds with their clients which may lead to situations where the employees "volunteer" their non-working time to participate in other activities with the clients. Civic and like-minded groups often "volunteer" their time and energies to the health care field. These practices may, under certain circumstance, result in violations of the FLSA.

*Q. Who is a volunteer?*

The FLSA defines employment very broadly, i.e., "to suffer or permit to work." However, the Supreme Court has made it clear that the FLSA was not intended "to stamp all persons as employees who without any express or implied compensation agreement might work for their own advantage on the premises of another."

## Private sector-for-profit

Individuals may not volunteer their services to for-profit entities engaged in commercial activities.

Volunteers may not replace regular employees or perform work that would otherwise be performed by regular employees.

Employees of private, for-profit organizations may not volunteer their services to their employers without compensation.

Individuals may volunteer to minister to the emotional needs of a patient or client in a for-profit institution or home, but they may not volunteer to perform work for the establishment or enterprise. For example:

- A local high school civic group that volunteers to read to patients at a nursing home does not create an employment situation.
- A local church group that volunteers to sit with patients and talk to them is performing volunteer activities.

## Private sector-not-for-profit

Individuals may volunteer without compensation to charitable, religious and similar private sector non-profit organizations that have public service, religious or humanitarian objectives.

Individuals may volunteer for charitable, humanitarian or religious reasons.

There should be no promise, expectation or receipt of compensation.

The employer should not derive immediate economic advantage through the efforts of the volunteer.

Volunteers may not replace regular employees or perform work that would otherwise be performed by regular employees.

Employees of non-profit organizations may not volunteer to perform their same job to their employer without compensation.

An individual, on the other hand, may volunteer to minister to a client's or patient's spiritual or emotional needs as long as they are not performing productive work for the employer. For example, a caregiver may volunteer in his/her off-duty hours to sit with or read to a patient as long as he/she is not providing direct care to the patient.



## Public sector

Individuals may volunteer to units of States or local governments if the services offered freely without pressure or coercion (direct or implied) from an employer.

Public employees can volunteer to their employer in any capacity other than their normal jobs. Public employees may not volunteer to their same employer to perform the same services which they are employed to perform. For public-run facilities, the State or county will be viewed as the employer, not the individual facility.

- A police officer can volunteer to read to patients;
- A nurse can volunteer to referee a soccer game.
- A caregiver can volunteer to do accounts payable for the facility by which he/she is employed.
- Public employees can volunteer in any capacity to a different public agency.

Volunteers to public agencies may be paid reasonable benefits, expenses, a nominal fee or some combination thereof. Such payments have to be analyzed in the context of the "economic realities" in each case.

## **RECORDKEEPING**

*Q. Am I required to post any notices?*

Employers must display an official poster outlining the provisions of the Fair Labor Standards Act, available at no cost from local offices of the Wage and Hour Division and from the Department of Labor's internet home page. This notice must be posted in conspicuous places.

*Q. What types of records am I required to keep?*

Every covered employer must keep certain records for each covered non-exempt worker. The FLSA requires no particular form for the records, but does require that the records include certain identifying infor-

mation about the employee and data about the hours worked and the wages earned. The law requires this information to be accurate. The following is a listing of the basic records that an employer must maintain:

1. Employee's full name and social security number
2. Address, including zip code
3. Birth date, if younger than 19
4. Sex and occupation
5. Time and day of week when employee's workweek begins
6. Hours worked each day
7. Total hours worked each workweek
8. Basis on which employee's wages are paid (e.g., "\$6 an hour", "\$200 a week", "piecework")
9. Regular hourly pay rate
10. Total daily or weekly straight-time earnings
11. Total overtime earnings for the workweek
12. All additions to or deductions from the employee's wages
13. Total wages paid each pay period
14. Date of payment and the pay period covered by the payment

*Q. What records are required for utilizing the 8 and 80 overtime plan?*

The FLSA provides that hospitals, nursing homes and other residential care establishments may adopt, by agreement with the employee(s), a 14-day overtime period in lieu of the usual 7-day workweek, if the employee(s) is paid at least one and one-half times the regular rate of pay for hours worked in excess of 8 in a day and 80 in such 14-day work period. The following is a listing of the basic records that an employer must maintain:

1. Employee's full name and social security number
2. Address, including zip code
3. Birth date, if younger than 19
4. Sex and occupation
5. Time of day and day of week on which the employee's 14-day work period begins
6. Hours worked each workday and total hours worked each 14-day work period
7. Total straight-time wages paid for hours worked during the 14-day work period
8. Total overtime excess compensation paid for hours worked in excess of 8 in a workday and 80 in the work period

**Q.    *How long should records be retained?***

Each employer shall preserve payroll records, collective bargaining agreements and individual employee contracts, and sales and purchase records showing total dollar volume of business, for at least three years.

Records on which wage computations are based should be retained for two years, i.e., time cards and piece work tickets, wage rate tables, work and time schedules, and records of additions to or deductions from wages.

These records must be open for inspection by the Division's representatives, who may ask the employer to make extensions, computations, or transcriptions. The records may be kept at the place of employment or in a central records office.

## **MINIMUM WAGE**

**Q.    *What is the minimum wage?***

As of September 1, 1997, the federal minimum wage is \$5.15 an hour.

**Q.    *What's my obligation if a State law requires a different minimum wage than the federal law?***

Where a State law requires a higher minimum wage, the higher standard applies. The employer must pay the higher rate. If the State minimum is lower, the Federal minimum wage must be paid to covered non-exempt employees.

**Q.    *Am I required to reimburse employees for the cost of a uniform and/or equipment?***

When an employee is required to purchase a uniform and/or equipment, the employee must be reimbursed for the cost when the expense reduces his/her rate of pay below the minimum wage or overtime compensation required by the FLSA.

*Q. Can I take credit for the value of meals?*

Meals furnished by the employer are regarded as primarily for the benefit and convenience of the employees. The employer may take a credit for the reasonable cost or fair value of meals provided to his/her employees. This rule does not apply, however, to the meal expenses incurred by an employee while traveling away from home on the employer's business.

*Q. Can I take credit for lodging?*

Lodging, like meals, is ordinarily considered for the convenience of the employee. However, with respect to residential care establishment employees, we would consider housing to be for the employer's benefit (and no credit allowed) rather than for the employees' benefit. Except, credit for lodging may be taken for those employees who permanently reside on their employer's premises (*i.e.*, those who have no home of their own other than the one furnished to them by their employer under the employment contract).

## **HOURS WORKED**

Employees must be compensated for all hours that they work. Whether certain times are considered work hours or not often depends on the particular circumstances of each case.

*Q. Am I required to pay for waiting time?*

Whether waiting time is hours worked under the FLSA depends upon particular circumstances. If the facts show that an employee is "engaged to wait," then that waiting time is work time under the statute. If on the other hand, the employee is "waiting to be engaged," the time is not work time.

For example, a nurse who reads a book while waiting for the doctor to finish examining a patient is "engaged to wait" and must be compensated.

A fireman who plays checkers while waiting for an alarm is working during such a period of inactivity, and he must be paid for such time. On the other hand, if a van driver reaches his/her final destination at midday

and is completely relieved of all duties until he/she begins the trip home at a specific time some hours later, then his/her idle time is not working time. In this case, the van driver is "waiting to be engaged."

*Q. When do I have to pay an employee for on-call time?*

An employee who is required to remain on-call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is considered working while on-call. An employee who simply carries a beeper or who is allowed to leave a message where he/she can be reached is, on the other hand, usually not working while on call. Additional constraints on the employee's freedom, however, could require this time to be compensated.

*Q. Am I required to pay my employees for break time?*

Although not required, rest periods of short duration, usually 20 minutes or less, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked.

*Q. Am I required to pay my employees for meal periods?*

Although meal periods are not required, bona fide meal periods (typically 30 minutes or more) generally need not be compensated as work time. The employee must, however, be completely relieved from duty. The employee is not relieved if he/she is required to perform any duty whether active or inactive. For example:

A nurses' aide who is required to eat at her station while monitoring the patients is working while eating and should be paid.

A caregiver who must eat with the clients to ensure their safety and otherwise attend to their needs is not relieved of his/her duties and must be compensated for that time.

*Q. Must I allow my employees to leave the premises during meal periods so that I don't have to pay for meal period time?*

It is not necessary that an employee be permitted to leave the premises if he/she is otherwise completely freed from duties during the meal period.

*Q. Am I required to pay my employees for seminars, meetings, and training time?*

Attendance at lectures, meetings, training programs, and similar activities need not be counted as working time if all the following four criteria are met:

1. Attendance is outside of the employee's regular working hours;
2. Attendance is voluntary;

Where a State **requires individuals** to take training as a condition of employment with any employer—e.g., continuing education required of an individual to be licensed to practice the profession—attendance at such training would be voluntary and this criterion met, provided the employer does not impose additional requirements on the employee, such as requiring him/her to take a particular course(s).

Where a State **requires employers** to provide training as a condition of the employer's license to remain open for business; and the employer requires employees to attend such training, the training is not considered voluntary.

3. The course, lecture, or meeting is not directly related to the employee's job;

When all other criteria are met, training directly related to an employee's job does not need to be counted as hours worked if:

- It is secured at an independent school, college, or independent trade school which employees attend on their own initiative; and,

- It is established by the employer for the benefit of the employees and corresponds to courses offered by independent bona fide institutions of learning.

4. The employee does not perform any productive work during such attendance.

**Q.** *Am I required to pay for travel time?*

Whether time spent in travel status is compensable time depends upon the kind of travel involved. For example:

**Home To Work Travel**—An employee who travels from home before the regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel. This is not work time, and therefore, not compensable time.

**Home to Work on a Special One Day Assignment in Another City**—An employee who regularly works at a fixed location in one city is given a special one day assignment in another city and returns home the same day. The time spent in traveling to, and returning from, the other city is work time, except that the employer may deduct that time the employee would normally spend commuting to the regular work site.

**Travel That is All in the Day's Work**—Time spent by an employee in travel as part of his/her principal activity, such as travel from job site to job site during the workday must be counted as hours worked, and the employee must be paid for such time.

**Q.** *If I have an employee who begins to work prior to his/her scheduled shift, or works beyond his/her scheduled shift, without authorization, am I required to pay him/her for this time?*

Work that is not requested by an employer, but "suffered or permitted" to take place is work time that must be paid for by the employer. The reason the employee performed the work outside the scheduled shift is immaterial. The hours are work time, and the employee must be compensated.

## SLEEP TIME

*Q. Am I required to pay for sleep time for an employee who is on duty less than 24 hours?*

An employee who is required to be on duty for less than 24 hours is working even though he/she is permitted to sleep or engage in other personal activities when not busy. It does not make a difference that he/she is furnished facilities for sleeping. He/she is required to be on duty and the time is work time.

*Q. Am I required to pay for sleep time for an employee on duty 24 hours or more?*

An employer and an employee may reach an agreement (express or implied) to exclude from hours worked a bona fide regularly scheduled sleeping period of not more than 8 hours for a 24-hour period, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night of sleep.

If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked.

If the sleep period is interrupted to such an extent that the employee cannot get a reasonable night of sleep (at least five hours), the entire period must be counted as hours worked.

*Q. Am I required to pay a "full-time" employee, who stays on my group home premises for an extended period of time, for all the time he/she is there?*

A "full time" employee—an employee that resides on the premises permanently or for an extended period of time—does not have to be compensated for all of the time he/she is at a group home. He/she may reach an agreement (express or implied), prior to employment, not to be paid for sleep time (up to 8 hours), bona fide meal periods, and/or scheduled free time. The following conditions must be met:

- The employee is on duty at the group home for 5 consecutive days and nights or resides on the premises at least 120 hours per week; and,
- is compensated for at least eight (8) hours in each of the five (5) consecutive 24-hour periods (120 hours). The 120 hour period may end with an off-duty period.
- The employee sleeps on the premises for all sleep periods between the beginning and the end of the 120-hour period or during the 5 consecutive days or nights.



- The employee has private quarters in a **homelike environment**; and,
- During an off-duty period, the employee is completely relieved from duty and is free to leave the employer's premises or otherwise use the time for his/her own benefit.

*Q. Would an employee who works a staggered schedule (four straight days of work followed by a day off, in turn followed by the fifth work day) meet the test for residing on the premises for "extended periods of time?"*

In order to meet the "extended periods of time" test, an employee must work a continuous period of time spanning at least five consecutive 24-hour periods.

*Q. Am I required to pay a "relief employee" for all the time he/she is at a group home?*

Relief employees do not have to be compensated for all of the time they are at the group home. They may agree, prior to employment, not to be paid for sleep time (up to 8 hours), bona fide meal periods, and/or scheduled free time in the middle of the day under certain conditions.

**Wage and Hour has a special enforcement policy with regard to hours worked (sleep time) for group homes. This enforcement policy permits a deduction under certain conditions for sleep time for "relief employees" when they relieve "full time employees" who reside on the premises permanently or for extended periods of time.**

Relief employees must be on duty and compensated for at least eight (8) hours in each 24-hour period in question, and must sleep on the premises each night within their relief period.

A part-time employee cannot be considered a "relief employee" if that person and the full-time employee, being relieved, are on-duty simultaneously for more than one hour a day.

Sleep time may not be deducted for "relief" or other part-time employees who are not relieving a "full-time" employee unless such employees are themselves on duty for 24 hours or more.

**Q. What is considered "private quarters?"**

Sleeping facilities must be separate from those of the clients and from those of any other staff members, and have, as a minimum, the same furnishings available to clients (i.e., bed, table, chair, lamp, dresser, closet, etc.). The employee also must be able to leave his/her belongings in his/her sleeping facility during on-and off-duty periods.

**Q. What is considered a "homelike environment?"**

A "homelike environment" would typically be "private quarters" plus:

- Accessible facilities on the same premises for cooking and eating (barracks that usually provide no cooking facilities or dormitories that have a single institutional kitchen for many rooms do not qualify);
- A bathing area that can be used by the employee in private; and,
- An accessible recreational area for such activities as watching television, listening to music, or reading.

## OVERTIME

Unless specifically exempted, employees covered by the FLSA must receive overtime pay for hours worked in excess of 40 in a workweek at a rate not less than time and one-half their regular rates of pay.

### The "8 and 80" Overtime Plan

There is a special overtime provision available under section 7(j) of the FLSA for hospitals, nursing homes and other residential care establishments. This overtime provision states that by agreement with the employee(s), a 14-day overtime period in lieu of the usual 7-day workweek is permitted. The employee(s) must be paid at least one and one-half times the regular rate of pay for hours worked in excess of 8 in a day and 80 in such 14-day work period.

*Q. What is considered a workweek?*

An employee's workweek is a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week, but may begin on any day and at any hour of the day. Different workweeks may be established for different employees or groups of employees.

Under section 7(j) of the FLSA, the 14-day work period consists of 336 consecutive hours (i.e., 14 consecutive 24-hour workdays). The 14-day period may begin at any hour and on any day designated by the employer.

*Q. Is extra pay required for weekend or night work?*

Extra pay for working weekends or nights is a matter of agreement between the employer and the employee (or the employee's representative). The FLSA does not require extra pay for weekend or night work. However, the FLSA does require that covered, nonexempt workers be paid not less than time and one-half the employee's regular rate for time worked over 40 hours in a workweek.

*Q. When do I have to pay double time?*

The FLSA has no requirement for double time pay. It is entirely a matter of agreement between an employer and an employee (or the employee's representative).



*Q. If my employees are not on the 8 and 80 plan but work 80 hours in a bi-weekly pay-period, (30 hours in one week and 50 hours in the next), am I required to pay any overtime?*

The FLSA takes a single workweek as its standard and does not permit averaging of hours over 2 or more weeks. The employee must receive overtime compensation for the overtime hours worked beyond 40 hours in the second workweek.

*Q. How do I compute overtime for an employee on the 8 and 80 plan?*

Day of the Week	Number of Hours Worked	Number of Hours Worked
	First Workweek	Second Workweek
Sunday	0	12*
Monday	12*	12*
Tuesday	12*	0
Wednesday	12*	0
Thursday	0	8
Friday	0	10*
Saturday	6	0
Total Hours	42	42

Employee's regular rate of pay is \$12.00.

Employee worked 84 hours in the pay period.

\*Employee worked 22 hours over 8 hours in a day.

**Correct Overtime Payment**

84 hours x \$12.00 = \$ 1008.00

22 hours x \$ 6.00 = 132.00

**\$ 1140.00**

**Q. Can I pay an employee at two different rates? If yes, at which rate would the overtime be computed?**

There is nothing in the FLSA which prohibits an employer from paying an employee different rates of pay for work at different times or for various types of work as long as no rate is less than the statutory minimum wage.

Where an employee in a single workweek works at two or more different types of work, for which different non-overtime rates of pay (of not less than the applicable minimum wage) have been established, one method of computing the employee's regular rate for that week is the weighted average of such rates. The employee's total earnings are computed to include his/her compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs. For example:

An employee works as a certified nursing assistant (CNA) for 26 hours during a workweek. The rate of pay for a CNA is \$6.75 an hour. During this same workweek, the employee works an additional 20 hours in the dietary department, at a rate of \$7.15 an hour. The regular rate for this week is calculated as follows:

$$26 \times \$ 6.75 = \$ 175.50$$

$$20 \times \$ 7.15 = \underline{143.00}$$

$$\$ 318.50/46 = \$ 6.92 \text{ regular rate}$$

$$\text{Overtime due: } \$ 6.92 \times \frac{1}{2} \times (6 \text{ overtime hours}) = \$ 20.76$$

**Q. If my employee works at the nursing home for 30 hours a week and the main office for 20 hours a week, do I have to pay overtime?**

Yes. When an employee works at different locations for his/her employer during the workweek, the hours worked at each location must be combined to determine the total number of hours worked in that workweek. For example:

A nurse's aide works at the hospital on Monday, Tuesday, and Wednesday of a workweek. During the same workweek, he/she works for the hospital's home health unit making home visits on Thursday and Friday. The total hours worked for the nurse's aide during this workweek would include the time spent working at

the hospital, the time spent in conducting home visits and travel time between the home visits. If the total hours in the workweek exceed 40, then the nurse's aide must receive overtime pay.

***Q. What if I don't pay my employees on an hourly rate basis?***

The FLSA does not require employers to compensate employees on an hourly rate basis. Earnings may be determined on a piece-rate, salary, commission, or other basis, but in all cases the overtime compensation due to the employees must be computed on the basis of the average hourly rate derived from such earnings—i.e., the “regular rate of pay.” This rate is calculated by dividing the total pay for employment in any workweek by the total number of hours actually worked by him/her in that workweek for which such compensation was paid. Section 7(e) of the FLSA identifies those payments that may be excluded from the “regular rate of pay.” Examples are discussed later in this section.

The following gives some examples of the proper method of determining the “regular rate of pay.” (The 40 hour standard is used in these examples.)

**Hourly rate employees**—Where an employee is paid a single hourly rate, that rate is his/her “regular rate” for purposes of computing overtime. If the employee receives other non-excludable payments, such as a production bonus or shift differential pay, in addition to his/her earnings at the hourly rate of pay, the amount of the additional payments must be added to his/her total straight time earnings and a new “regular rate” computed. The new “regular rate” is determined by dividing the total straight time earnings by the number of hours worked. For example:

A housekeeping employee is paid \$8.00 per hour and is paid a production bonus of \$2.00 for each room he/she cleans in excess of 8 rooms per day. The employee works 43 hours in a workweek and receives a production bonus of \$18.00 (cleaned 9 extra rooms). The employee's regular rate for this week is calculated as follows:

$$43 \times \$ 8.00 = \$ 344.00$$

$$\begin{array}{r} 18.00 \text{ (production bonus—9 extra rooms @ \$ 2.00)} \\ \$ 362.00 \end{array}$$

$$\$ 362.00 / 43 \text{ hours} = \$ 8.42 \text{ (regular rate)}$$

$$\text{Overtime due: } \$ 8.42 \times \frac{1}{2} \times 3 \text{ (overtime hours)} = \$ 12.65$$

**Pieceworkers**—When an employee is employed on a piece-rate basis, his/her “regular rate of pay” is computed by adding together his total weekly earnings from piece rates, any production bonuses, and any sums paid for waiting time or other hours worked (except statutory exclusions). This sum is then divided by the number of hours worked in the week to yield the pieceworker’s “regular rate” for that week.

A kitchen employee is paid \$.12 for each napkin folded and \$.17 for each tablecloth folded and set. During the week, the employee folded 1759 napkins and set 575 tablecloths. He works 47 total hours in a workweek.

$$\begin{array}{rcl} 1759 \text{ folded napkins @ } \$ .12 & = & \$ 211.08 \\ 575 \text{ folded/set tablecloths @ } \$ .17 & = & \underline{97.75} \\ & & \$ 308.83 \end{array}$$

$$\$308.83/47 \text{ hours} = \$6.57 \text{ regular rate}$$

$$\text{Overtime due: } \$ 6.57 \times \frac{1}{2} \times 7 \text{ (overtime hours)} = \$ 23.00$$

**Day rates and job rates**—If the employee is paid a flat sum for a day’s work or for doing a particular job without regard to the number of hours worked in the day or at the job and if he/she receives no other form of compensation for his/her services, his/her regular rate is determined by totaling all the sums received in the workweek at the day or job rates divided by the total hours actually worked.

A worker is paid \$75.00 per day to drive the van for the seniors’ activities center. This week, the van driver worked 5 days for a total of 50 hours.

$$\$ 75.00 \times 5 \text{ days} = \$ 375.00$$

$$\$ 375.00/50 \text{ hours} = \$ 7.50 \text{ (regular rate)}$$

$$\text{Overtime due: } \$ 7.50 \times \frac{1}{2} \times 10 \text{ (overtime hours)} = \$ 37.50$$

**Salaried employees**—(This example applies only to non-exempt salaried employees. Please see the discussion on exempt employees.) If an employee is employed solely on a weekly salary for all hours worked and receives no other compensation, his/her regular rate of pay is computed by dividing the straight time salary by the total number of hours worked that workweek.

Employee "C" is employed at a salary of \$280.00. She works 42 hours in a workweek.

$$\text{\$ } 280.00 / 42 \text{ hours} = \text{\$ } 6.76 \text{ (regular rate)}$$

$$\text{Overtime due: } \text{\$ } 6.76 \times \frac{1}{2} \times 2 \text{ (overtime hours)} = \text{\$ } 6.76$$

**Commissioned employees**—When the commission is paid on a weekly basis, it is added to the employee's other earnings for that workweek (except for payments excluded under 7(e) of the FLSA) and the total is divided by the total number of hours worked in the workweek to obtain the employee's regular hourly rate.

An employee paid solely on commissions earns \$415.00 in a workweek and works 52 hours in the workweek. The employee's regular rate for the workweek would be:

$$\text{\$ } 415 / 52 = \text{\$ } 7.98 \text{ (regular rate)}$$

$$\text{Overtime due: } \text{\$ } 7.98 \times \frac{1}{2} \times 12 \text{ (overtime hours)} = \text{\$ } 47.88$$



*Q. At the end of the year, I provide a Holiday bonus to all my employees. Does this bonus have to be included in their earnings to compute proper overtime pay? What is excluded under section 7(e) of the FLSA?*

Section 7 (e) of the FLSA requires the inclusion in the regular rate of all remuneration for employment except certain specified types of payments. Among these excludable payments are:

- Discretionary bonuses
- Gifts and payment in the nature of gifts on special occasions
- Contributions by the employer to certain welfare plans
- Payments made by the employer pursuant to certain profit-sharing, thrift and savings plans
- Pay for foregoing holidays, vacation, and certain premium payments

Examples of bonuses which would normally be included in the regular rate are:

- Production bonuses
- Bonuses which are paid for performing work in less than an established standard time
- Bonuses which are paid when certain types of merchandise are sold through an employee's effort
- Cost of living bonuses
- Attendance bonuses
- Bonuses paid as an incentive to attract employees to an isolated or otherwise undesirable job site

*Q. Can I provide compensatory time off in lieu of cash overtime compensation and allow the compensatory time off to be used at any time of the year? Can my employees bank their hours?*

Private employers can not furnish compensatory time off in lieu of cash overtime payment (even at time and one half rate) to non-exempt employees. However, the FLSA was specifically amended to allow public employers to provide compensatory time off under certain conditions provided the premium pay principle of at least time and one-half is maintained.

## EXEMPTIONS

Some employees are specifically exempted from the minimum wage and/or overtime requirements of the FLSA. Courts have ruled that exemptions are to be applied narrowly. The following information addresses exemptions commonly used in the health care industry. This is not, however, an all inclusive "list" of exemptions.

*Q. What requirements does an employee have to meet in order to be exempt under the "executive" exemption?*

In order for an employee to be exempt as a bona fide executive, all the following tests must be met:

- The employee's primary duty must be management of the enterprise, or of a customarily recognized department or subdivision. A determination of whether or not an employee has management as his/her primary duty must be based on all the facts in a particular case. In the ordinary case, it may be taken as a rule of thumb that primary duty means the major part, or 50 percent of the employee's time.
- The employee must customarily and regularly direct the work of at least two or more other employees.
- The employee must be paid on a salary basis of at least \$250 a week.

*Q. What are some examples of duties that are considered exempt under the "executive" exemption?*

The following are examples of *managerial* duties performed by employees managing a department or supervising other employees:

- Interviewing, selecting and training employees
- Setting and adjusting pay rates and work hours
- Directing work
- Keeping production records of subordinates for use in supervision
- Evaluating the employees' efficiency and productivity
- Handling the employees' complaints
- Disciplining the employees
- Planning work

- Determining techniques
- Distributing work

*Q. What are examples of duties that are considered non-exempt under the "executive" exemption?*

The following are examples of *non-managerial* duties that might be performed by employees managing a department of supervising other employees:

- Performing the same kind of work as the employees supervised
- Performing any production work, even though it is not like that performed by subordinates, which is not part of supervisory functions
- Performing routine clerical duties, such as bookkeeping, billing, filing, operating business machines
- Keeping records on employees not under the executive's supervision.
- Preparing payrolls
- Performing maintenance work
- Repairing machines, as distinguished from an occasional adjustment

*Q. What requirements does an employee have to meet in order to be exempt under the "administrative" exemption?*

In order for an employee to be employed in a bona fide administrative capacity, the following tests must be met:

- Their primary duty must consist of :

Responsible office or non-manual work directly related to management policies or general business operations; or responsible work in the administration of a school or educational establishment or institution or department or subdivision thereof that is directly related to the academic instruction or training.

Their primary duty must include work requiring the exercise of discretion and independent judgment.

- The employee must be paid on a salary or fee basis of at least \$250 a week.

*Q. What requirements does an employee have to meet in order to qualify for the "professional" exemption?*

A professional employee must meet the following tests in order to be exempt under the professional exemption:

- The employee's primary duty consists of work requiring knowledge of an advanced type in a field of science or learning, customarily obtained by a *prolonged course of specialized instruction and study*; or work as a teacher in an activity of imparting knowledge, which requires consistent exercise of discretion and judgment; or the primary duty is artistic work that requires invention, imagination, or talent in a recognized field of artistic endeavor.
- The employee must be paid on a salary or fee basis at a rate of not less than \$250 a week.

*Q. What professions meet the requirements for a prolonged course of specialized intellectual instruction and study?*

Generally speaking, the professions which meet the requirement for a prolonged course of specialized intellectual instruction and study include law, medicine, nursing, accountancy, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, including pharmacy and registered or certified medical technology and so forth. The typical symbol of the professional training and the best prima facie evidence of its possession is the appropriate academic degree, and in these professions an advanced degree is a standard prerequisite.

*Q. Is a registered nurse exempt under the "professional" exemption?*

Registered nurses who have met the salary requirement have traditionally been recognized as professional employees by Wage and Hour in its enforcement of the FLSA. Although, in some cases, the course of study has become shortened (but more concentrated), nurses who are registered by the appropriate State examining board, and paid on a salary or fee basis of no less than \$250 a week, will continue to be recognized as having met the requirements of the professional exemption.

A licensed practical nurse (LPN) or licensed vocational nurse (LVN) is not considered exempt as a professional employee.

**Q. *When is a computer programmer considered an exempt employee?***

Computer systems analysts, computer programmers, software engineers, or other similarly skilled workers, whose primary duties are:

- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
- The 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;
- The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
- A combination of the three aforementioned duties which requires the same level of skills

are exempt if they are hourly employees paid at a rate of not less than \$27.63 per hour; or salaried employees, paid a guaranteed weekly salary of not less than \$250 per week.

## **CHILD LABOR**

The FLSA child labor provisions are designed to protect the educational opportunities of minors and prohibit their employment in jobs under conditions detrimental to their health or well-being. The provisions include a minimum age of 14 years for employment, restrictions on hours of work for minors under 16 years of age, and prohibitions on hazardous occupations declared by the Secretary of Labor to be too dangerous for minors to perform. All States have child labor standards. When Federal and State standards are different, the rules that provide the most protection to young workers will apply.

Every year, about 5 to 6 million teens from age 14 to age 17 work in regular jobs as employees. For the majority of teens, work will be a rewarding experience. However, each year nearly 70 teens are killed on the job—about one every 5 days; 210,000 working teens are injured; and 70,000 are injured seriously enough to

require hospital emergency room treatment. Back strains are often a consequence of employment in nursing homes and the health care industry, in general, may pose additional hazards associated with exposure to blood borne pathogens.

*Q. What is the youngest age at which a person can be employed?*

The FLSA sets 14 as the minimum age for most non-agricultural work. However, at any age, youths may deliver newspapers; perform in radio, television, movie, or theatrical productions; work in businesses owned by their parents (except in mining, manufacturing or hazardous jobs); perform babysitting or perform minor chores around a private home.

*Q. How many hours can 14-and 15-year olds work? During what part of the day can 14- and 15-year-olds work?*

Under the FLSA, the minimum age for employment in non-agricultural employment is 14 years of age. Youths 14- and 15-years-old may work outside school hours in various non-manufacturing, non-mining, non-hazardous jobs up to:

- 3 hours in a school day;
- 18 hours in a school week;
- 8 hours on a non-school day;
- 40 hours on a non-school week; and
- Hours between 7 a.m. and 7 p.m. (except from June 1 through Labor Day, when evening hours are extended to 9 p.m.) .

Youths 14 and 15 years old enrolled in an approved Work Experience and Career Exploration Program (WECEP) may be employed for up to 23 hours during school weeks and 3 hours on school days (including during school hours).

*Q. What hours can 16- and-17-year olds work?*

The FLSA does not limit the number of hours or times of day for workers aged 16 and over.

*Q. Must a youth have a work permit to work?*

The FLSA does not require that youths get work permits or working papers to get a job. Some States, however, do require work permits prior to getting a job. Young workers should ask their school counselors if a work permit is needed in their State.

*Q. Am I required to pay the minimum wage to young workers?*

The Federal minimum wage is currently \$5.15 per hour. However, a special minimum wage of \$4.25 per hour applies to young workers under the age of 20 during their first 90 consecutive calendar days of employment with an employer.

Other programs that allow for payment of less than the full Federal minimum wage apply to disabled workers, full-time students, and student-learners employed pursuant to sub-minimum wage certificates. (These programs are not limited to the employment of young workers.)

*Q. I recently hired a 17-year-old to work in the kitchen of a nursing home. Can you discuss what the Secretary of Labor has declared hazardous?*

Seventeen (17) hazardous non-farm jobs, as determined by the Secretary of Labor, are out of bounds for teens below the age of 18. Generally, they may not work at jobs that involve:

1. Manufacturing or storing explosives
2. Driving a motor vehicle and being an outside helper on a motor vehicle
3. Coal mining
4. Logging and sawmilling
5. Power-driven wood-working machines\*
6. Exposure to radioactive substances and to ionizing radiations
7. Power-driven hoisting equipment
8. Power-driven metal-forming, punching, and shearing machines\*
9. Mining, other than coal mining
10. Meat packing or processing (including power-driven meat slicing)
11. Power-driven bakery machines
12. Power-driven paper-products machines\*
13. Manufacturing brick, tile, and related products
14. Power-driven circular saws, band saws, and guillotine shears\*

15. Wrecking, demolition, and ship-breaking operations
16. Roofing operations\*
17. Excavation operations\*

\* Limited exemptions are provided for apprentices and student-learners under specified standards.

*Q. What kinds of work can 14- and 15-year-olds perform?*

Workers 14- and 15-years-old may be employed in a variety of jobs such as:

- Office work;
- Various food service jobs, including cashiering, waiting on tables, busing tables, washing dishes, and preparing salads and other food (although cooking is permitted only at snack bars, soda fountains, lunch counters, and cafeteria serving counters);
- Sales work and other jobs in retail stores;
- Errand and delivery work by foot, bicycle, and public transportation;
- Dispensing gas and oil and performing courtesy services in gas stations; and
- Most cleanup work.

Workers 14- and 15-years-old may not work in the following jobs:

- Manufacturing;
- Mining;
- Most processing work;
- All occupations declared hazardous by the Secretary of Labor;
- Operating or tending most power-driven machinery;
- Public messenger service;
- Work connected with warehousing, storage, transportation, communications, public utilities and construction (except office and sales jobs when not performed on transportation vehicles or on construction sites).

*Q. If I am found in violation of a child labor law, what is the penalty?*

Civil money penalties may be assessed in amounts of up to \$10,000 for each minor who is subject to each violation that leads to the serious injury or death of a child.



The Department of Labor has created the following *Employer's Teen Safety Checklist* that employers can use to prevent injuries to working teens.

- Understand and comply with child labor laws and occupational safety and health regulations that apply to your business. The FLSA sets a minimum age of 14 years for employment, limits the hours minors under 16 can work, and prohibits employing minors under age 18 for certain hazardous occupations.
- Stress safety, particularly among first-line supervisors who have the greatest opportunity to influence teens and their work habits. Make sure that adolescent workers are appropriately trained and supervised to prevent injuries and hazardous exposures.
- Work with supervisors and experienced workers to develop an injury and illness prevention program and to help identify and solve safety and health problems. Many injuries can be prevented through simple work redesign.
- Assess and eliminate hazards for adolescent workers. The FLSA prohibits assigning teens to tasks and tools that have accounted for a large number of injuries, like:
  - Driving a car or truck on public roads;
  - Operating tractors or other heavy equipment; or
  - Using power tools.
- Train adolescent workers to recognize hazards and use safe work practices. This is especially important since teens may have had little work experience, and new workers are at a disproportionate risk of injury.

## ENFORCEMENT

Wage and Hour's enforcement of the FLSA is done by investigators stationed across the United States. As Wage and Hour's authorized representatives, they conduct investigations and gather data on wages, hours worked and other employment conditions or practices, in order to determine compliance with the law.

Where violations are found, investigators may recommend changes in employment practices to bring an employer into compliance.

It is illegal to fire, or in any other manner, discriminate against an employee for filing a complaint or for participating in a legal proceeding under this law.

## Investigations

### *Q. Why was my business selected for an investigation?*

The Wage and Hour Division conducts investigations for a number of reasons. Some investigations are initiated by complaints from either employees, competitors, or others. All complaints are confidential. The name of the complainant and the nature of the complaint are not disclosed.

In addition, Wage and Hour targets certain types of businesses or industries for investigations. Occasionally, a number of businesses in a specific industry or geographic area will be examined. In either situation, the objective is to assure compliance with the law in those businesses, industries, or localities. Regardless of the reason for the investigation, all investigations are conducted in accordance with established policies and procedures.

An investigation consists of the following steps:

- A conference between the Wage and Hour representative and representative(s) of the business, during which the Wage and Hour representative will explain the investigation process.
- Examination of records to determine what laws or exemptions apply to the business and its employees. These records include, for example, those showing the annual dollar volume of the business, the manufacture, handling or selling of goods moved in interstate commerce, and work on government contracts. **Information from an employer's records is not revealed to unauthorized persons.**
- Examination of time and payroll records, note taking or making transcriptions or photocopies of information essential to the investigation.
- Private interviews with certain employees. The purpose of these interviews is to verify the time and payroll records, to identify a worker's duties in sufficient detail to determine what exemptions, if any, apply and to determine if young workers are legally employed. Interviews are normally conducted

on the employer's premises, but other arrangements may be made. In some instances, present and former employees may be interviewed at their homes, by phone or by a mail interview form.

- When all the fact-finding steps have been completed, the employer and/or the employer's representative will be told whether violations have occurred and, if so, what the violations are and how to correct them. The employer will be asked to assure compliance in the future. If back wages are owed, the employer will be asked to pay the back wages and the employer may be asked to compute the amounts due.

### Recovery of Back Wages

Listed below are methods which the FLSA provides for recovering unpaid minimum and/or overtime wages:

- Wage and Hour may supervise payment of back wages.
- The Department of Labor may bring suit for back wages and an equal amount as liquidated damages.
- An employee may file a private suit for back pay and an equal amount as liquidated damages, plus attorney's fees and court costs.
- The Department of Labor may obtain an injunction to restrain any person from violating the FLSA, including the unlawful withholding of proper minimum wage and overtime pay.

Employees may not bring suit if he or she has been paid back wages under the supervision of Wage and Hour or if the Department of Labor has already filed suit to recover the wages.

A two-year statute of limitations applies to the recovery of back pay, except in the case of a willful violation, in which case a three-year statute of limitations applies. In other words, unless the violations are willful, back wages may only be recovered within two years of when the violations occurred.

### Penalties

Employers who willfully or repeatedly violate the minimum wage or overtime pay requirements are subject to a **civil money penalty** of up to \$1,000 for each such violation.

Violators of the child labor provisions are subject to a **civil money penalty** of up to \$10,000 for each young worker who was employed in violation.

Willful violations of the FLSA may result in **criminal** prosecution and the violator fined up to \$10,000. A second conviction may result in imprisonment.

## **TIPS FOR COMPLIANCE**

- ✓ **KNOW THE LAW**
- ✓ **UNDERSTAND WHAT JOB EMPLOYEES PERFORM**
- ✓ **BE CONSERVATIVE CLAIMING EXEMPTIONS**
- ✓ **MATCH RECORDS TO REALITY**
- ✓ **TRAIN ALL OF YOUR MANAGEMENT STAFF**
- ✓ **DON'T ASSUME EMPLOYEES DO ONLY WHAT YOU INTEND**
- ✓ **DESIGNATE SOMEONE TO MONITOR COMPLIANCE**
- ✓ **MAKE PERIODIC AUDITS AND ISSUE REMINDERS**
- ✓ **IDENTIFY MINORS**
- ✓ **WELCOME EMPLOYEE COMPLAINTS**
- ✓ **CORRECT PROBLEMS BEFORE THEY MUSHROOM**