Appendix 8: Coverage Under the Fair Labor Standards Act

Most jobs are governed by the FLSA. Some are not. Some jobs are excluded from FLSA coverage by statute. Other jobs, while governed by the FLSA, are considered "exempt" from the FLSA overtime rules.

Exclusions from FLSA coverage

Particular jobs may be completely excluded from coverage under the FLSA overtime rules. There are two general types of complete exclusion. Some jobs are specifically excluded in the statute itself. For example, employees of movie theaters and many agricultural workers are not governed by the FLSA overtime rules. Another type of exclusion is for jobs which are governed by some other specific federal labor law. As a general rule, if a job is governed by some other federal labor law, the FLSA does not apply. For example, most railroad workers are governed by the Railway Labor Act, and many truck drivers are governed by the Motor Carriers Act, and not the FLSA. Many of FLSA exclusions are found in §213 of the FLSA.

Exempt or Nonexempt

Employees whose jobs are governed by the FLSA are either "exempt" or "nonexempt." Nonexempt employees are entitled to overtime pay. Exempt employees are not. Most employees covered by the FLSA are nonexempt. Some are not.
Some jobs are classified as exempt by definition. For example, "outside sales" employees are exempt ("inside sales" employees are nonexempt). For most employees, however, whether they are exempt or nonexempt depends on (a) how much they are paid, (b) how they are paid, and (c) what kind of work they do.

With few exceptions, to be exempt an employee must (a) be paid at least $47,476 (subject to change) per year ($913 per week), and (b) be paid on a salary basis, and also (c) perform exempt job duties. These requirements are outlined in the FLSA Regulations (promulgated by the U.S. Department of Labor). Most employees must meet all three "tests" to be exempt.

Salary level test

Employees who are paid less than $47,476 per year ($913 per week) are nonexempt (salary level subject to change). (Employees who earn more than $100,000 per year are almost certainly exempt.)

Salary basis test

Generally, an employee is paid on a salary basis if s/he has a "guaranteed minimum" amount of money s/he can count on receiving for any work week in which s/he performs "any" work. This amount need not be the entire compensation received, but there must be some amount of pay the employee can count on receiving in any work week in which s/he performs any work. Some "rules of thumb" indicating that an employee is paid on a salary basis include whether an employee's base pay is computed from an annual figure divided by the number of paydays in a year, or whether an employee's actual pay is lower in work periods when s/he works fewer than the normal number of hours. However, whether an employee is paid on a salary basis is a "fact," and thus specific evaluation of particular circumstances is necessary. Whether an employee is paid on a salary basis is not affected by whether pay is expressed in hourly terms (as this is a fairly common requirement of many payroll computer programs), but whether the employee in fact has a "guaranteed minimum" amount of pay s/he can count on.
The FLSA salary basis test applies only to reductions in monetary amounts. Requiring an employee to charge absences from work to leave accruals is not a reduction in "pay," because the monetary amount of the employee's paycheck remains the same. Similarly, paying an

employee more than the guaranteed salary amount is not normally inconsistent with salary basis status, because this does not result in any reduction in the base pay.
With some exceptions, the base pay of a salary basis employee may not be reduced based on the "quality or quantity" of work performed (provided that the employee does "some" work in the work period). This usually means that the base pay of a salary basis employee may not be reduced if s/he performs less work than normal, if the reason for that is determined by the employer. For example, a salary basis pay employee's base pay may not be reduced if there is "no work" to be performed (such as for a plant closing or slow period), and a salary basis employee's base pay may not be reduced for partial day absences. However, employers may "dock" the base pay of salary basis employees in full day increments, for disciplinary suspensions, or for personal leave, or for sickness under a bona fide sick leave plan (as for example if the employee has run out of accrued sick leave).

Thus, there can be "permissible" and "impermissible" reductions in salary basis pay. Permissible reductions have no effect on the employee's exempt status. Impermissible reductions may, in that the general rule is that an employee who is subjected to impermissible reductions in salary is no longer paid on a salary basis, and is therefore nonexempt. However, employers have several avenues by which they can "cure" impermissible reductions in salary basis pay, and as a practical matter these make it unlikely that an otherwise exempt employee would become nonexempt because of salary basis pay problems. The salary basis pay requirement for exempt status does not apply to some jobs (for example, doctors, lawyers and schoolteachers are exempt even if the employees are paid hourly).

Teachers
Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. Exempt teachers include, but are not limited to, regular academic teachers; kindergarten or nursery school teachers; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrument music teachers. **The salary and salary basis requirements do not apply to bona fide teachers.** Having a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge includes, by its very nature, exercising discretion and judgment.

Practice of Law or Medicine
An employee holding a valid license or certificate permitting the practice of law or medicine is exempt if the employee is actually engaged in such a practice. An employee who holds the requisite academic degree for the general practice of medicine is also exempt if he or she is engaged in an internship or resident program for the profession. **The salary and salary basis requirements do not apply to bona fide practitioners of law or medicine.**

Ministerial Exemption
Under the FLSA itself (as well as other employment statutes, like Title VII), the only thing you need to know is that there is no ministerial exception in the statute. To the extent an exception from the FLSA exists for ministers, federal (and state) court judges have created it in the tradition of judge-made law under our common law system. Obviously, determining which positions are “ministerial” depends on the specific facts and the particular court interpreting those facts. However, religious entities do have some guidance. First, organizations must ensure that their governing/founding documents, policies, handbooks and other key documents demonstrate that they do have a clear religious purpose and that they adhere to them. Second, organizations should look to the Supreme Court’s factors to analyze whether a particular

position might qualify for a ministerial exception to the FLSA (or other employment laws). Some positions, such as a Catholic priest or other congregational leader, likely fall squarely within the ministerial exception.

In the latest Supreme Court ruling in 2012, the following statement was made on the topic: "The First Amendment protects the freedom of religious groups to engage in certain key religious activities, including the conducting of worship services and other religious ceremonies and rituals, as well as the critical process of communicating the faith. Accordingly, religious groups must be free to choose the personnel who are essential to the performance of these functions. The "ministerial" exception should be tailored to this purpose. It should apply to any "employee" who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith…." In the Diocese of Pensacola-Tallahassee, the ministerial exception applies to all clergy, religious (brothers & sisters), directors of religious education, youth ministers, liturgical music ministers, and other positions to which the ministerial exception applies.

The duties tests

An employee who meets the salary level tests and also the salary basis tests is exempt only if s/he also performs exempt job duties. These FLSA exemptions are limited to employees who perform relatively high-level work. Whether the duties of a particular job qualify as exempt depends on what they are. Job titles or position descriptions are of limited usefulness in this determination. (A secretary is still a secretary even if s/he is called an "administrative assistant," and the chief executive officer is still the CEO even if s/he is called a janitor.) It is the actual job tasks that must be evaluated, along with how the particular job tasks "fit" into the employer's overall operations.

There are three typical categories of exempt job duties, called "executive," "learned professional," and "administrative."

Exempt executive job information

Job duties are exempt executive job duties if the employee:

- regularly supervises two or more other employees, and also
- has management as the primary duty of the position, and also,
- has some genuine input into the job status of other employees (such as hiring, firing, promotions, or assignments).

Supervision means what it implies. The supervision must be a regular part of the employee's job, and must be of other employees. Supervision of non-employees does not meet the standard. The "two employees" requirement may be met by supervising two full-time employees or the equivalent number of part-time employees. (Two half-time employees equal one full-time employee.) "Mere supervision" is not sufficient. In addition, the supervisory employee must have "management" as the "primary duty" of the job. The FLSA Regulations contain a list of typical management duties. These include (in addition to supervision):

- interviewing, selecting, and training employees;
- setting rates of pay and hours of work;
- maintaining production or sales records (beyond the merely clerical);
- appraising productivity; handling employee grievances or complaints, or disciplining employees;
- determining work techniques;
- planning the work;
- apportioning work among employees;
- determining the types of equipment to be used in performing work, or materials needed;
- planning budgets for work;

- monitoring work for legal or regulatory compliance;
- providing for safety and security of the workplace.

Determining whether an employee has management as the primary duty of the position requires case-by-case evaluation. A "rule of thumb" is to determine if the employee is "in charge" of a department or subdivision of the enterprise (such as a shift). One handy clue might be to ask who a telephone inquiry would be directed to if the called asked for "the boss." Typically, only one employee is "in charge" at any particular time. Thus, for example, if a "sergeant" and a "lieutenant" are each at work at the same time (in the same unit or subunit of the organization), only the lieutenant is "in charge" during that time.

An employee may qualify as performing executive job duties even if s/he performs a variety of "regular" job duties as well. For example, the night manager at a fast food restaurant may in reality spend most of the shift preparing food and serving customers. S/he is, however, still "the boss" even when not actually engaged in "active" bossing duties. In the event that some "executive" decisions are required, s/he is there to make them, and this is sufficient.

The final requirement for the executive exemption is that the employee has genuine input into personnel matters. This does not require that the employee be the final decision maker on such matters, but rather that the employee's input is given "particular weight." Usually, it will mean that making personnel recommendations is part of the employee's normal job duties, that the employee makes these kinds of recommendations frequently enough to be a "real" part of the job, and that higher management takes the employee's personnel suggestions or recommendations seriously.

Exempt learned professional information

To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $913 per week;
- The employee’s primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Primary Duty

“Primary duty” means the principal, main, major or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.

Work Requiring Advanced Knowledge

“Work requiring advanced knowledge” means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment. Professional work is therefore distinguished from work involving routine mental, manual, mechanical or physical work. A professional employee generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

Field of Science or Learning
Fields of science or learning include law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but is not in a field of science or learning.

Customarily Acquired by a Prolonged Course of Specialized Intellectual Instruction
The learned professional exemption is restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best evidence of meeting this requirement is having the appropriate academic degree. However, the word "customarily" means the exemption may be available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. This exemption does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.

Exempt creative professional information
To qualify for the **creative professional** employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $913 per week;
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Invention, Imagination, Originality or Talent
This requirement distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. Exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Whether the exemption applies, therefore, must be determined on a case-by-case basis. The requirements are generally met by actors, musicians, composers, soloists, certain painters, writers, cartoonists, essayists, novelists, and others as set forth in the regulations. Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent. Journalists are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product.

Recognized Field of Artistic or Creative Endeavor
This includes such fields as, for example, music, writing, acting and the graphic arts.

Exempt administrative job information
The most elusive and imprecise of the definitions of exempt job duties is for exempt "administrative" job duties. The regulatory definition provides that exempt administrative job duties are office or non-manual work, which:
(a) is directly related to management or general business operations of the employer or the employer's customers, and
(b) is a primary component of which involves the exercise of independent judgment and discretion about matters of significance.
The administrative exemption is designed for relatively high-level employees whose main job is to "keep the business running." A useful rule of thumb is to distinguish administrative employees

from "operational" or "production" employees. Employees who make what the business sells are not administrative employees. Administrative employees provide "support" to the operational or production employees. They are "staff" rather than "line" employees. Examples of administrative functions include labor relations and personnel (human resources employees), payroll and finance (including budgeting and benefits management), records maintenance, accounting and tax, marketing and advertising (as differentiated from direct sales), quality control, public relations (including shareholder or investment relations, and government relations), legal and regulatory compliance, and some computer-related jobs (such as network, internet and database administration). (See Computer employees.)

To be exempt under the administrative exemption, the "staff" or "support" work must be office or non-manual, and must be for matters of significance. Clerical employees perform office or non-manual support work but are not administratively exempt. Nor is administrative work exempt just because it is financially important, in the sense that the employer would experience financial losses if the employee fails to perform competently. Administratively exempt work typically involves the exercise of discretion and judgment, with the authority to make independent decisions on matters which affect the business as a whole or a significant part of it. Questions to ask might include whether the employee has the authority to formulate or interpret company policies; how major the employee's assignments are in relation to the overall business operations of the enterprise (buying paper clips versus buying a fleet of delivery vehicles, for example); whether the employee has the authority to commit the employer in matters which have significant financial impact; whether the employee has the authority to deviate from company policy without prior approval.

An example of administratively exempt work could be the buyer for a department store. S/he performs office or non-manual work and is not engaged in production or sales. The job involves work which is necessary to the overall operation of the store -- selecting merchandize to be ordered as inventory. It is important work, since having the right inventory (and the right amount of inventory) is crucial to the overall well-being of the store's business. It involves the exercise of a good deal of important judgment and discretion, since it is up to the buyer to select items which will sell in sufficient quantity and at sufficient margins to be profitable. Other examples of administratively exempt employees might be planners and true administrative assistants (as differentiated from secretaries with fancy titles). Bookkeepers, "gal Fridays," and most employees who operate machines are not administratively exempt.

Merely clerical work may be administrative, but it is not exempt. Most secretaries, for example, may accurately be said to be performing administrative work, but their jobs are not usually exempt. Similarly, filing, filling out forms and preparing routine reports, answering telephones, making travel arrangements, working on customer "help desks," and similar jobs are not likely to be high-level enough to be administratively exempt. Many clerical workers do in fact exercise some discretion and judgment in their jobs. However, to "count" the exercise of judgment and discretion must be about matters of considerable importance to the operation of the enterprise as a whole.

Routinely ordering supplies (and even selecting which vendor to buy supplies from) is not likely to be considered high- enough to qualify the employee for administratively exempt status. There is no "bright line." Some secretaries may indeed be high-level, administratively exempt employees (for example, the secretary to the CEO who really does "run his life"), while some employees with fancy titles (e.g., "administrative assistant") may really be performing nonexempt clerical duties.

Rights of exempt employees
An exempt employee has virtually "no rights at all" under the FLSA overtime rules. About all an exempt employee is entitled to under the FLSA is to receive the full amount of the base salary in any work period during which s/he performs any work (less any permissible deductions). Nothing in the FLSA prohibits an employer from requiring exempt employees to "punch a clock," or work a particular schedule, or "make up" time lost due to absences. Nor does the FLSA limit the amount of work time an employer may require or expect from any employee, on any schedule. ("Mandatory overtime" is not restricted by the FLSA.)

Keep in mind that this discussion is limited to rights under the FLSA. Exempt employees may have rights under other laws or by way of employment policies or contracts.

Rights of nonexempt employees
Nonexempt employees are entitled under the FLSA to time and one-half their "regular rate" of pay for each hour they actually work over the applicable FLSA overtime threshold in the applicable FLSA work period.

Additional Fair Labor Standards Act Information

"Overtime" and "FLSA overtime."
Under the FLSA, "overtime" means "time actually worked beyond a prescribed threshold." The normal FLSA "work period" is the "work week" -- 7 consecutive days -- and the normal FLSA overtime threshold is 40 hours per work week. Some jobs may be governed by a different FLSA overtime threshold. These will be addressed specifically, below. For present purposes, the discussion will assume employees are regular "40 hours per week" employees.
Time actually worked over 40 hours in a work week is "FLSA overtime." Note that some jobs may use the word "overtime" differently, as for example to describe "time worked outside of the employee's normal schedule" or "time worked over 8 hours in a day." An employer may pay employees on any basis it wishes, provided only that actual pay does not fall below the minimum standards required by the FLSA. It is, therefore, permissible for an employer to use the word "overtime" to mean something different from the definition of "overtime" in the FLSA. That, however, does not change the meaning of the word overtime for FLSA purposes, and it is important to restrict the meaning of "overtime" to its statutory definition in determining the FLSA rights of employees. "Time worked outside of normal schedule" may not be the same as "time worked over 40 hours in a work week." Only the latter is "overtime" under the FLSA, and the FLSA governs only pay due for "FLSA overtime" worked.

Thus, under the FLSA overtime rules, "nothing happens" unless and until a nonexempt employee has actually worked more than 40 hours in a work week. Stated another way, if an employee's total hours actually worked in a work week are not more than 40, the FLSA overtime rules are not triggered at all. No FLSA overtime pay is due. If, and only if, total hours actually worked exceed 40 in a work week, then the FLSA overtime rules may come into play.
FLSA overtime pay for nonexempt employees is computed based on all the time the employee has actually worked in a work week. All time actually worked counts, but only time "actually" worked counts. Therefore, the first step in the FLSA overtime formula is to determine how much time a nonexempt employee has actually worked in a work week.

Work time.
All time spent by an employee performing activities which are job-related is potentially "work time." This includes the employee's regular "on the clock" work time, plus "off the clock" time spent performing job-related activities (which benefit the employer). Potential work is actual

work if the employer "suffered or permitted" the employee to do it. An employer suffers or permits work if it knows the employee is doing the work (or could have found out by looking), and lets the employee do it.

With only a few exceptions, all time an employee is required to be at the premises of the employer is work time. All regular shift time is work time. This includes "breaks" (if there are breaks), and "nonproductive" time (for example, time spent by a receptionist reading a novel while waiting for the phone to ring). In addition, all time spent by an employee performing work-related activities that the employer suffers or permits is work time, whether on premises or not and whether "required" or not. Work done "at home" or at a place other than the normal work site is work, and the time must be counted. "Voluntary" work is work, and the time must be counted. "Unauthorized" or "unapproved" work is work and must be counted (provided that the employer knows or should know it is being done and permits the employee to do it). It is the privilege and responsibility of the employer to "control the work" of its employees. If an employer does not wish an employee to perform work, it must prohibit the employee from doing so if it does not wish to include that work time in the required FLSA pay computations. An employer may not accept the benefit(s) of work performed by its nonexempt employees without counting the time in computing pay due under the FLSA. Important FLSA regulations on these points are at *29 CFR §§785.11, 785.12, and 785.13.*

While all actual work time must be counted, only actual work time must be counted. "Time not worked" need not be included in computing FLSA pay due. Time not worked includes leave time (for whatever reason), even if leave time is considered "work time" for some other purpose (such as pension accruals, or "overtime" pay due under an employer policy or collective bargaining agreement). Time not worked may also include meal periods (if there are meal periods), whether paid or unpaid, if the employee is actually relieved of active duties during the meal period. For example, assume an employee's regular schedule is 5 shifts per week from 8:00 am to 5:00 pm, Monday through Friday, with an hour per shift for lunch. If the employee actually gets to "take lunch," and works the normal work week (no more, no less), s/he will have 40 hours of actual work time. If, however, the employee takes a vacation day on Thursday, s/he will have actually worked only 32 hours in that work week. If the employee takes Thursday off, but worked a double shift the previous Monday, s/he will have 40 total hours actually worked that work week (and no FLSA overtime pay is due). If the employee works the normal schedule, but works through lunch on Wednesday and Friday, s/he will have 42 hours actually worked in that work week (and will be owed 2 hours of FLSA overtime pay at time and one-half).
In addition to leave time and meal periods, other potential "time not worked" may include some travel time, and "sleep time." These are treated separately.

"Off the clock" work.
Many FLSA lawsuits have involved employers failing to include time spent by employees performing work activities outside of their normal shifts. Some employees, for example, may "come early" and start working before the official start time of their shifts. Such time counts as work time and must be included in FLSA pay computations, provided only that the employer knew or should have known that the employee was beginning work early (and, of course, to the extent that the employee spent pre-shift time actually performing work activities). Pre-shift "roll calls" are work time. Time spent setting up equipment before the official start time of a shift is work time. Some employees may similarly "stay late" after shifts performing work; this time must be counted as work time, as well. Time spent by an employee cleaning equipment after the close of a shift is work time. Post-shift work time could also include time spent by an employee performing job-related activities "on the way home," as for example a secretary who drops off the day's mail at the post office or delivers some paperwork to a customer or supplier. Some

employees take work home. That time may well be work time. Similarly, if an employee is contacted at home by telephone for work related reasons, the time spent is work time (and, of course, if an employee is "called back" to work, the time counts as work time).

Training time.
Most training time is work time. All training time is work time if it occurs during an employee's regular shift, or if it is required by the employer. Training time need not be counted as work time only if it (a) occurs outside of an employee's normal work schedule, (b) is truly voluntary (as in with neither direct nor indirect pressure on the employee to attend, and with no "come back" if the employee chooses not to attend), (c) not directly related to the employee's current job (i.e., the training is designed to qualify the employee to get a new job, and not to enhance the skills used by the employee on the existing job), and (d) the employee does no other work during the training.

Travel time.
There are some "grey areas" about when the FLSA requires travel time to be treated as working time. However, as a general rule, "home to work" and "work to home" travel time is not work time, and this is true even if the "commute" is longer than normal, to or from a different work site than normal, or the employee uses a company vehicle for the trips. This assumes that the employee is performing no other work activities while commuting. Time spent by an employee writing a report is work time, even if it happens to occur while the employee is riding on a bus (or airplane) to or from work. Travel time which is "all in a day's work" is work time. Usually, this means that travel time is work time if it occurs between when the employee first arrives at the first work site and before the employee leaves the last work site at the end of the work day. The first work site is the place where the employee first performs work activities. For example, an employee who travels to the office, picks up equipment, then goes to a work site to perform the day's activities is working from the time s/he first arrives at the office. Picking up the equipment needed to do the day's activities is the first work activity of the day, and therefore the office is the first work site of the day.

Meal periods.
Meal periods need not be counted as work time if they are at least 30 minutes long and the employee is relieved from active duties during the meal period. An employee who "works through lunch" is working and that time must be counted. An employee who "eats a sandwich at the desk," or is required to monitor a machine, is working through lunch. However, a meal period need not be counted as work time if the employee is merely expected to "remain available" during the meal period but is otherwise relieved of active work duties. So, for example, a meal period may be time not worked even if the employee is not permitted to leave the facility, or expected to remain in uniform.

Sleep time.
For employees who work shifts of 24 hours or more, the FLSA permits a "sleep time exclusion" of up to 8 hours, if there is an "agreement" with the employees about this and adequate sleeping facilities are provided. All time during which an employee is required to perform active duties must be counted as work time, and if in reality the sleep period is interrupted to the point where the employee does not have the opportunity for at least 5 hours of sleep the entire time must be counted as working time. No sleep time exclusion is permitted for employees whose shifts are less than 24 hours. Home work. As noted, "off premises" work time must be counted as work time. However, some employees routinely perform work activities off premises, at home and outside of their normal shift times. There may be peculiar practical difficulties in an employer's ability to control this kind of work. There is a special FLSA rule which permits

employers and employees to agree to a predetermined amount of time which will be credited as work time under these circumstances. Essentially, this special rule permits the employer and employee to estimate a realistic average amount of off-premises time which is likely to be spent by the employee performing work activities on a "week in, week out" basis. The agreement must be "real and not just imposed by the employer, and it must be set up before the work is performed. The amount of time must be estimated after consideration of "all pertinent facts."

Alternative work periods.
Most nonexempt employees are "40 hours per week" employees, entitled to FLSA overtime pay if, when, and to the extent they have actually worked more than 40 hours in a work week. There are, however, exceptions to this general rule, two of the most important of which may apply to medical care providers, and government police officers, fire fighters, and (some) EMS employees. For these employees, the FLSA permits (but does not require) alternatives to the standard 40 hour per work week FLSA overtime threshold.
Nonexempt *medical care providers* working at medical care facilities may be paid based either on the standard 40-hour work week or on so-called "8/80" systems. If the medical employer chooses, it may pay these employees FLSA overtime for actual time worked in excess of 8 hours per day, or 80 hours every two weeks (whichever is better for the employee), instead of for hours worked in excess of 40 hours per work week.

Police officers, fire fighters and EMS employees.
Government police officers, fire fighters, and (some) EMS employees may be paid either on the standard 40-hour work week or on so-called *"7(k)"* systems (which are also sometimes called "Garcia cycles"). *29 USC §207(k)*. In 7(k) systems, FLSA overtime pay is due if, when, and to the extent a police officer, fire fighter or EMS employee actually works more than the number of hours specified by the Department of Labor as applying to a particular "work period." For example, under a "14 day 7(k) work period" system a police officer is due FLSA overtime pay only if, when and to the extent actual hours worked exceed 86 in the 14-day work period. Under a "28 day 7(k) work period" a fire fighter is due FLSA overtime pay only if, when and to the extent actual hours worked exceed 212 in the 28-day work period. Permissible work periods may be from 7 to 28 days, and the FLSA overtime thresholds applicable to particular work periods are set out in a chart published in the FLSA regulations. *29 CFR §553.230*.
A government employer may choose to use a 40-hour work week or a 7(k) system at its option, and may use a 7(k) system for FLSA compliance purposes even if it actually pays its employees on the basis of 40-hour work weeks. To use a 7(k) system for FLSA purposes requires only that the employer establish such a system (for example, by issuing a policy statement to that effect), and that the affected employees actually work on a schedule which repeats and recurs on some multiple of between 7 and 28 days. Which particular 7(k) threshold applies depends mostly on what the employees' schedule is. For 7(k) systems, pay computations mostly follow the regular FLSA rules, with the "work period" being substituted for the normal "work week."
Alternative 7(k) work period systems are not available to private sector (non-government) employers, which (with the exception of medical care personnel) must pay nonexempt employees based on 40-hour work weeks. For government employers, 7(k) systems are available for "sworn" fire fighters (even if their primary work is medical) or police officers. In some unusual situations "non-sworn" EMS employees may possibly qualify for 7(k) "law enforcement" pay plans.

The work week standard.
The FLSA uses the work week as the standard for computing overtime pay due, and each work week stands alone. Thus, a nonexempt employee's time worked "vests" at the end of each work week (or work period). Work time may not be "averaged" from work week to work week. For

example, an employee who works 44 hours in week one, followed by 36 hours in week two, is entitled to 4 hours of FLSA overtime pay for week one and may not be paid based on an "average" of 80 hours in the two-week period. (Two exceptions to this might be for some medical care employees, and government police officers and fire fighters, who are permitted to be paid on special "alternative work periods.")

Similarly, time worked in one work week may not be offset against time off in some other work week (except for some government employees). An employer may not avoid paying FLSA overtime pay due in one work week by granting time off in another. However, nothing in the FLSA guarantees any employee any particular amount of work time, or requires any particular schedule of work. An employer may "adjust schedules" within a work week to avoid an employee working FLSA overtime. For example, if nonexempt employees work "extra" time early in a work week, the FLSA permits the employer to "send them home" later in the same work week so that total hours actually worked in that work week will not exceed 40. This raises no FLSA issues, since "nothing happens" under the FLSA overtime rules until and unless total hours actually worked in a work week exceed 40. Stated another way, the only number that matters is the time worked as of the last minute of the last day of the work week (when work time "vests"). How an employer chooses to schedule an employee during the work week is simply not an FLSA concern, since that does not affect the pertinent FLSA computations.

Wages must be in cash.
For non-government employees, FLSA wages due must be paid in money. "Compensatory time" off in lieu of cash for FLSA overtime wages due is not permitted in private sector employment. This rule is limited to wages for FLSA overtime work. How an employer chooses to compensate employees for hours worked up through 40 in a work week when no FLSA overtime is worked is not really an FLSA concern (except for the minimum wage laws). For example, assume a nonexempt employee is regularly scheduled to work 37.5 hours per work week, and actually works 40 hours in a work week. Since total time worked did not exceed 40 hours, the FLSA overtime rules have not been triggered. Therefore, there is no FLSA requirement about how hours 37.5-40 are paid (except for the minimum wage laws). An employer may compensate for these hours pretty much as it wishes, in wages at the regular rate, or some other rate, or in time off later, or for that matter with nothing extra at all (provided the minimum wage laws are adhered to).

The Regular Rate
FLSA overtime pay is time and one-half the employee's "regular rate" of pay. Therefore, to compute FLSA overtime pay due requires knowing what the regular rate is. In most cases, this is a straightforward inquiry, but in some situations the FLSA employs some peculiar arithmetic used to determine the regular rate.
The regular rate is defined as the hourly equivalent of all straight time compensation received by an employee for work. The FLSA formula is that an employee's regular rate is the total "straight time" compensation received by the employee "for work," divided by the number of hours that money is intended to compensate.
If an employee's straight time pay is a purely hourly wage, then that wage is the regular rate. However, in some employment situations, straight time pay is not simply an hourly rate. A nonexempt employee may be paid a "salary," and there may be additional compensation received by an employee which the FLSA requires be included as part of the regular rate.

"Salaried nonexempt employees."
The FLSA does not require that nonexempt employees be paid hourly. Nonexempt employees may be paid by means of a salary. Salaried nonexempt employees are still entitled to FLSA

overtime pay if, when and to the extent that they actually work more than 40 hours in a work week. FLSA overtime pay is time and one-half of the employee's regular rate of pay. When a nonexempt employee is paid by a salary, the amount of the salary must be converted to its hourly equivalent to determine the regular rate of pay (time and one-half of which is the employee's FLSA overtime rate of pay).

The FLSA formula for determining the regular rate is to divide the total amount of straight time compensation received by the employee "for work" by the number of hours that compensation was intended to pay for. For example, if nonexempt employee "A" is paid a salary of $400 per week for a normal 40-hour work week, the hourly equivalent is $10 per hour. However, the FLSA does not prescribe how many hours per week of straight time a salary must be intended to compensate. This is left to the market and the arrangements between employers and employees. Thus, for example, a nonexempt employee ("B") may be hired at a salary of $400 as straight time compensation for a normal work week of 50 hours. In that situation, the hourly equivalent of this salary is $8 per hour. If the employee ("C") is hired at a salary of $400 per week for 37.5 normal straight time hours per week, the hourly equivalent is $10.67 per hour. Assuming that the salary is the entire compensation received by the employee for work, the employee's regular rate of pay -- and therefore the FLSA overtime rate of pay -- varies depending on what the salary is "for." Assume the hypothetical employees described above actually worked 55 hours in a work week -- 15 FLSA overtime hours. Employee "A's" regular rate is $10 per hour, which paid straight time for 40 hours. S/he is due $15 per hour for each FLSA overtime hour, or an additional $225, for total pay due of $625.

Employee "B" is different. S/he is also due time and one-half for 15 FLSA overtime hours worked, but s/he has "already" been paid the straight time rate of $8 per hour for the first 50 hours. S/he is therefore due "the difference" between the $8 of straight time already paid for these hours and the time and one-half overtime rate of $12 per hour for these hours, or an additional $4 per hour for 10 hours, or an additional $40. S/he has been paid nothing for hours 51-55, and is due $12 per hour for each of these. Thus, total wages due hypothetical employee "B" are $400 + $40 + $60 = $500. This kind of regular rate computation is sometimes, but inaccurately, known as a "half time" pay system.

Employee "C" has a regular rate of $10.67 per hour, and therefore an FLSA overtime rate of $16 per hour. The salary did not compensate for any of the FLSA overtime hours (hours 41-55), so s/he is entitled to an additional $240 for these. However, s/he also worked hours 37.5-40, which are not FLSA overtime hours. In a work week when employee "C" did not work any FLSA overtime, how s/he was paid for hours 37.5-40 would not be an FLSA concern at all. However, an FLSA regulation requires that in FLSA overtime work weeks, the employee must be paid "all straight time due" in addition to all FLSA overtime due. Absent some peculiar employment arrangement governing payment for hours 37.5-40 (and no such arrangement exists in the hypothetical), employee "C" must be paid straight time for those, or 2.5 hours at $10.67 per hour = $26.68. Total pay due employee "C" is therefore $400 + $26.68 + $240 = $666.68.
There is another possible way that nonexempt employees may be paid on a salary, and that is if a salary is intended to compensate at straight time for "all" hours worked by the employee, whether "few or many." This type of straight time pay arrangement is permitted under the FLSA for nonexempt employees whose hours of work vary from work week to work week (and typically when their normal hours vary so that in some weeks they work fewer than 40 hours). Under these circumstances, a salary designed to compensate at straight time for "all" hours worked is called a *"salary for fluctuating hours."* On this kind of pay plan, the FLSA regular rate arithmetic formula is the same, but it results in some unusual computations.

To determine the regular rate for a nonexempt employee paid a salary for fluctuating hours requires dividing the salary amount by how many hours the employee actually worked in the work week. (Since the salary for fluctuating hours compensates at straight time for "whatever" number of hours were worked, the number of hours it was "intended" to compensate depends on how many hours were in fact worked.) Since (almost by definition), the hours actually worked by such an employee may vary from week to week, the employee's regular rate of pay may also vary from week to week. The more hours were actually worked, the less the regular rate is. For example, if employee "D" receives a $400 "salary for fluctuating hours," and worked 60 hours in some week, the regular rate for that week is $6.67. However, if "D" worked 48 hours in the following week, the regular rate for that week would be $8.33. In the first week, "D" is entitled to 20 hours of FLSA overtime pay, at time and one-half the regular rate of pay for that work week. Time and one-half $6.67 is $10. However, the salary has already compensated "D" at straight time for each hour worked. What "D" is due is "the difference" between the $6.67 regular rate for that week and the $10 FLSA overtime rate for that week, for 20 FLSA overtime hours, or an additional $3.33 per hour for 20 FLSA overtime hours, for a total of $400 + $66.60 = $466.60. In the second week, when "D" worked 48 hours, s/he is due time and one-half of the regular rate of $8.33 for each of the 8 FLSA overtime hours worked. Since s/he has already been paid $8.33 for each of these FLSA overtime hours in the salary, what is due is an additional $4.16 for each FLSA overtime hour. Thus, for the 48-hour week, "D" is due $400 + $33.28 = $433.28. A salary for fluctuating hours is another variation of the type of FLSA overtime pay which is sometimes (but inaccurately) called a "half time" system. Valid wage plans using salaries for fluctuating hours are rare.

Wage augments.
Many nonexempt employees receive various wage augments in addition to their base wages. This may include items such as shift differentials, longevity pay, attendance pay, or "bonuses" of various kinds. Under the FLSA, any money received by an employee "for work" is part of the employee's regular rate of pay. Wage augments such as those listed are considered compensation for work, and must therefore be factored into the regular rate (on a "pro rata" basis).

Sometimes, this is easy to compute. For example, assume that a nonexempt employee is paid $10 per hour, plus $.50 per hour shift differential. For that work week, the regular rate is $10.50 per hour, time and one half of which is $15.75. In other circumstances, however, the FLSA arithmetic is more complicated. Assume, for example, a $10 per hour employee who also receives an "extra" $500 per year as longevity pay. That $500 per year is considered compensation for work and is part of the employee's regular rate of pay. The difficult question is how the $500 should be allocated to each hour actually worked by the employee; by how much per hour the longevity pay bonus increases this employee's regular rate. The answer is that the $500 has to be allocated on a pro rata basis among "all" the hours the employee actually worked during the period when the bonus applied (since the longevity pay was "earned" for "all" the hours the employee worked). Since the longevity pay bonus covered a year's worth of work, it would be allocated among all the hours the employee actually worked in the year to which the bonus applied. This, of course, makes it impossible to determine how much to allocate per hour until the total hours worked by the employee over the entire year is known. Therefore, at the end of the year, the $500 should be allocated to all the employee's work hours, and then the employee's FLSA overtime pay recomputed for each work week when FLSA overtime was worked using the adjusted regular rate. The employer should then tender the employee the "increase" in FLSA overtime pay attributed to the regular rate adjustment. Of course, for many employers this can be a daunting administrative task and it may be questioned whether the cost of performing these computations will exceed the value of the exercise. Because of this, some

employers may simply allocate the wage augments to the affected employees' normal "straight time" work weeks, increasing the regular rates accordingly even though ultimately that may result in employees receiving slightly more than the strict FLSA formula would require.
Most bonuses are required to be included in the employees' regular rates. The only exception is for bonuses which are entirely "discretionary" with the employer. A bonus is not discretionary if the employment policy is that an employee is entitled to the bonus if s/he meets certain predetermined requirements, such as successfully making a "quota." Nor are bonuses discretionary if they depend on the employer meeting predetermined goals, such as "profit sharing" triggered by a set revenue figure.

Payments to employees as reimbursements of out-of-pocket expenses are not required to be included in the regular rate, since they are not compensation "for work." For example, distinguish between educational "stipends" such as money paid to employees who have attained a specified degree, and "tuition assistance" programs in which the employer pays all or part of the costs of courses successfully completed by employees. The former is "compensation for work," includable in the regular rate. The latter is not, since it is a reimbursement for an expense. Extra money paid to employees to offset the cost of purchasing or dry cleaning work uniforms is not required to be included as part of the regular rate. Extra money paid to employees to compensate them for the time they may spend cleaning work uniforms is compensation for work and part of the regular rate. Mileage payments for the employee's use of a personally owned vehicle are reimbursements, not compensation for work.

Records to Be Kept by Employers
Highlights: The FLSA sets minimum wage, overtime pay, recordkeeping, and youth employment standards for employment subject to its provisions. Unless exempt, covered employees must be paid at least the minimum wage and not less than one and one-half times their regular rates of pay for overtime hours worked.

Posting: Employers must display an official poster outlining the provisions of the Act, available at no cost from local offices of the Wage and Hour Division and toll-free, by calling 1-866-4USWage (1-866-487-9243). This poster is also available electronically for downloading and printing at http://www.dol.gov/osbp/sbrefa/poster/main.htm.

What Records Are Required: Every covered employer must keep certain records for each non-exempt worker. The Act requires no particular form for the records, but does require that the records include certain identifying information 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., "$9 per hour", "$440 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.

How Long Should Records Be Retained: Each employer shall preserve payroll records, records on which wage computations are based, i.e., time cards and piece work tickets, wage rate tables, work and time schedules, and records of additions to or deductions from wages following the guidance in Appendix 11. These records must be open for inspection by the Department of Labor's Wage and Hour 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.

What About Timekeeping: Employers may use any timekeeping method they choose. For example, they may use a time clock, have a timekeeper keep track of employee's work hours, or tell their workers to write their own times on the records. Any timekeeping plan is acceptable as long as it is complete and accurate.

The following is a sample timekeeping format employers may follow but are not required to do so:

DAY	DATE	IN	OUT	TOTAL HOURS
Sunday	6/3/07	--------	--------	--------
Monday	6/4/07	8:00am	12:02 pm	
		1:00pm	5:03pm	8
Tuesday	6/5/07	7:57am	11:58am	
		1:00pm	5:00pm	8
Wednesday	6/6/07	8:02am	12:10pm	
		1:06pm	5:05pm	8
Thursday	6/7/07	--------		--------
Friday	6/8/07	--------	--------	--------
Saturday	6/9/07	--------	--------	--------
Total Workweek Hours:				**24**

Penalties/Sanctions

The Department of Labor uses a variety of remedies to enforce compliance with the Act's requirements. When Wage and Hour Division investigators encounter violations, they recommend changes in employment practices to bring the employer into compliance, and they request the payment of any back wages due to employees.

Willful violators may be prosecuted criminally and fined up to $10,000. A second conviction may result in imprisonment. Employers who willfully or repeatedly violate the minimum wage or overtime pay requirements are subject to civil money penalties of up to $1,100 per violation.

Summary of Revisions effective August 2014

The information included after the heading: Additional Fair Labor Standards Act Information is all new to provide additional insight into Department of Labor standards.

Summary of Revisions effective December 2016

The information pertaining to the salary test, learned professionals (including creative personnel) were updated. New sections for teachers, the practice of law/medicine and the ministerial exemption were added.