LBAEE

October 2021 News

Nuts & Bolts – The Fair Labor Standards Act

The Federal Fair Labor Standards Act (FLSA) guarantees certain workplace protections for California government workers. It establishes a minimum wage, overtime pay, recordkeeping, and youth employment standards. It applies to government (Federal, State, and local) employees as well as private sector workers. Franklin Delano Roosevelt signed the FLSA into law on June 25, 1938. It took effect later that same year, on October 24, 1938. This month, we take a brief look at the FLSA's protections. Contact your professional staff for help with how it might affect you, specifically.

Brief History: U.S. Senator (and future Supreme Court Justice) Hugo Black originally drafted the FLSA in 1932. Mr. Black had first proposed a 30-hour workweek requirement but faced with legislative opposition, he set forth a revised version of an 8-hour day and 40-hour workweek. Ultimately this set the framework for the FLSA's overtime protections which are described more fully below. The FLSA is widely considered one of the most important pieces of "New Deal" legislation, along with the Social Security Act of 1935.

The first major revision to the FLSA came with the 1947 Portal-to-Portal Act. The revision overturned a U.S. Supreme Court Decision in *Anderson v. Mt. Clemens Pottery Co.* which held that preliminary work activities controlled by the employer and performed entirely for the employer's benefit are properly included as working time under the FLSA. The Portal-to-Portal Act narrowed this decision by specifying exactly what type of time is considered compensable. In general, however, if an employee engages in activities that benefit the employer, regardless of where the work is performed, the time is likely compensable. The Portal-to-Portal Act also specified that ordinary travel to and from the workplace is a normal incident of employment and is not compensable. In some cases, travel time when responding to an after-hours emergency call out may be compensable. The Act also set a 2-year period for seeking legal relief for uncompensated time.

Other notable amendments include: (1) in 1949, defining an employee's "regular rate" of pay for computing overtime; (2) in 1961, bringing state and local government workers under the FLSA's coverage; (3) in 1963, making it illegal to pay some workers lower wages

based strictly on their sex (Equal Pay Act); (4) in 1966, bringing federal employees under the FLSA's coverage; and (5) in 1974, expanding coverage to other state and local government employees who were not previously covered.

An amendment in 1985: (1) allowed state and local government employers to compensate their employees' overtime hours with paid time away from work in lieu of overtime pay (known as compensatory time); (2) exempted state and local governments from paying overtime for special detail work performed by fire-protection, law enforcement, and prison-security employees; and (3) exempted state and local governments from paying overtime to volunteers who perform services for a state or local government agency if the person receives no compensation or nominal compensation.

A controversial rule change in 2004 made substantial modifications to the definition of an "exempt" employee. In short, it allowed employers to shield more workers from the FLSA's overtime requirements. Workers previously eligible for overtime were later deemed exempt. While a 2014 rule change narrowed the scope of the exemption to make more workers eligible for overtime pay, a court later stopped the rule from taking effect.

On September 27, 2019, the Department of Labor released a new rule significantly increasing the salary levels an employer must satisfy to apply an exemption to an executive, administrative, professional, or highly compensated employee. The levels are based on the 80th percentile of weekly earnings for full-time salaries of employees in the U.S. In addition, it broadened overtime eligibility, bringing more workers under the FLSA.

Minimum Wage Benefit: The Federal minimum wage has been increased several times since 1938. It was last increased in a 2007 amendment to the FLSA that set the minimum wage at $7.25 per hour effective July 24, 2009. But it has not been raised since.

Many states and local governments, including California, have adopted a higher minimum wage. In cases where an employee is subject to federal, state, and local minimum wage laws, the employee is entitled to the higher minimum wage.

Effective January 1, 2021, California's minimum wage is either $13 or $14 per hour, depending on whether the employer has 26 employees or more. Those amounts will increase to $14 and $15 effective January 1, 2022. Starting January 1, 2023, California's minimum wage is $15 per hour regardless of the size of the employer's workforce.

Overtime Benefit: A key feature of the FLSA is the overtime benefit. Employees classified as "exempt" are not eligible for overtime under the FLSA. But hourly employees must receive overtime pay for hours worked over forty per workweek at a rate not less than one and one-half times the regular rate of pay. The FLSA does not require overtime pay

for work on Saturdays, Sundays, holidays, or regular days off unless it results in the employee working more than forty hours that workweek.

As many California local government employees know, the devil is in the details. First and foremost is how the "FLSA workweek" is defined. The employer can set the FLSA workweek as any fixed and regularly recurring period of 168 hours over seven consecutive 24-hour periods. It does not have to coincide with the calendar week. It can begin on any day and any hour of the day. The employer cannot change this designated period to avoid paying overtime, but it can establish different workweeks for different employees or groups of employees. For example, for those on a 9/80 work schedule, the employer might set the FLSA workweek as starting half-way through the 8-hour day, so the total hours worked in any regular workweek is 40 hours. It is legal.

A second issue is how to define "hours worked." The FLSA only requires the employer to count actual hours worked, meaning all time during which an employee is required to be on the employer's premises, on duty, or at a prescribed workplace. This is often referred to as "FLSA overtime." The FLSA does not require the employer to count paid leave as hours worked for purposes of calculating overtime. But the FLSA does not prohibit an employer from including paid leave as hours worked for overtime calculations. Thus, in some labor contracts, you will find sick leave, vacation, holidays, compensatory time, or other forms of paid leave counted as hours worked under the overtime section. This is an excellent benefit, and it is negotiable. It is not set by default by the FLSA. This is often referred to as "contractual overtime."

A third issue is how to calculate the "regular rate of pay." A federal court case from 2016 called *Flores v. City of San Gabriel* established that cash-in-lieu of benefit payments (for example, cash payments for employees who opt-out of the employer sponsored medical plan) must generally be included in the regular rate of pay when calculating overtime payments. The U.S. Supreme Court rejected the City's appeal, and the precedent is now firmly established. Nevertheless, this case sent shockwaves through public agencies across the state, most of whom did not treat such payments as part of the "regular rate of pay." In the last five years, many agencies have since negotiated cuts to the cash-in-lieu benefit at least in part to reduce the amount of overtime the agency must pay.

The FLSA defines "regular rate" to include more than just the base wage. It includes "all remuneration for employment paid to, or on behalf of, the employee." 29 U.S.C. §207(e). The FLSA lists different types of compensation expressly *excluded* from the regular rate calculation, including gifts, discretionary bonuses, paid leave, reimbursement for travel and other business expenses (e.g., cell phones), benefit plan and profit-sharing plan

contributions, reporting pay, call-back pay, and other various extra compensation paid at a premium rate for non-FLSA overtime.

Exemptions: Under the FLSA, an employer may "exempt" an employee from the overtime benefit based on one of the FLSA's exemptions. Most exempt employees in the public sector fall into one of three categories – Executive, Administrative, or Professional. Each exemption has a specific duties test that must be met along with the salary test for an employer to exempt an employee from overtime pay. As a result, it is not uncommon for an employer to misapply an exemption or to re-evaluate a job's exempt status.

Generally speaking, (1) the *executive* exemption is for those who manage an agency or a department, and who have the authority to hire or fire employees; (2) the *administrative* exemption is for those who perform office or other non-manual work that is directly related to the management or general business operations, and whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance; and (3) the *professional* exemption is for those whose work requires advanced knowledge and specialized instruction and which requires consistent exercise of discretion and judgment. *Highly compensated* employees perform office or non-manual work. They must customarily and regularly perform at least one of the duties of one of the exemptions listed above.

The U.S. Department of Labor issued a Final Rule effective January 1, 2020, making 1.3 million American workers newly eligible for overtime pay under the FLSA. The major change is to update the earnings thresholds that must be met for an employer to legally classify an employee as exempt from the FLSA's overtime pay requirements. The new salary thresholds are supposed to account for growth in employee earnings since the thresholds were last updated in 2004. The new rule raises the standard salary level from $455 per week to $684 per week (equivalent to $35,568 per year) and raises the total annual compensation threshold for highly compensated employees to $107,432 per year, which equates to the 80th percentile of earnings for full-time salaried workers nationally.

One thing to remember is that even if an employer *can* classify a job as exempt, it does not have to. In other words, someone who satisfies the test for the administrative exemption may still be eligible for all the FLSA's protections, including overtime pay, if their employer chooses *not* to apply the exemption to their job. Keep in mind, employers typically take advantage of the exemptions offered by the Act when applicable.

But even for those classified as exempt, there may be other protections that apply. Remember, the FLSA sets a floor for what is required. It is possible, for example, to negotiate into a labor contract that exempt employees receive *contractual* overtime, administrative leave, flextime, or various other perks in recognition of the fact that the

job classification is exempt from the FLSA's overtime benefit. Keep in mind that although the employer has the right to apply, and the legal liability for misapplying, an FLSA exemption, it still may be possible for an employee organization to negotiate over the impacts of any change to a job classification's exempt status or to inquire as to whether the classification's exempt status should be reevaluated.

A common FLSA issue for exempt employees is deductions for absences. Under the FLSA, reducing an exempt employee's salary for partial day absences could cause the employer to lose the exemption for that employee. But an employer may deduct leave hours for an exempt employee's partial day absences under the employer's various leave policies without jeopardizing the exemption if the employee receives payment for their full salary. For partial day absences, the employer must pay the employee's full daily salary even if they have zero leave hours in their bank. Also, it's possible that even leave deductions may be impermissible under the FLSA based on how frequently an employer requires an exempt employee to respond to emails and/or check voice mail during their absence.

Compensable Time: A key issue is what constitutes compensable time. The FLSA defines "employ" as "to suffer or permit to work." 29 U.S.C. §203(g). The reason for working is immaterial. For example, an employee who voluntarily works at the end of the shift to finish an assigned task must be compensated for that work time. But it's important to note that an employer can direct an employee not to work outside of normal work hours. The time is still compensable, but the employer may enforce a violation of the policy or work directive via the discipline procedure.

The FLSA doesn't specify a rate of pay but does require that all compensable time be paid, including any compensable travel time. The rate must be at least the minimum wage and may even be your regular rate of pay. Any incidental work performed away from the worksite may be compensable too if it is related to the employee's "principal" work activities. The FLSA recognizes a "de minimis" exception (typically less than 5 minutes) and allows for the rounding of time if done in a manner that is consistent and does not result in a failure to compensate employees for all time worked. 29 C.F.R. §785.48.

<u>Waiting Time</u>: If an employee is "engaged to wait," the time is compensable. If an employee is "waiting to be engaged," the time is not compensable. The difference between the two is not always clear. A fireman who plays checkers while waiting for an alarm is considered working. The fireman is "engaged to wait" and the time is compensable. An employee who arrives to work an hour before their shift to avoid traffic delays is "waiting to be engaged." The waiting time is not compensable. If waiting is an intrinsic element of the employee's principal activities, the waiting time is compensable.

On-Call Time: Time for a worker who is required to remain on-call on the employer's premises is compensable, but time for a worker who is required to remain available for calls at home after hours is frequently not compensable. But constraints on the employee's freedom after regular work hours could make this time compensable. Factors include geographical restrictions on the worker's freedom of movement, required response time (e.g., within 30 minutes), and the effect on the worker's ability to engage in personal pursuits (e.g., use of alcohol, attend kid's soccer games, etc). The more restrictions an employer places on a worker, the more likely the time is compensable. Usually, these close distinctions are ironed out through a negotiated on-call policy which lays out when an employee is considered "on-call" and how they will be compensated. Often, the payment is a flat amount rather than an employee's regular rate.

Keep in mind that when an employee is called at home about a work problem or must perform work on a computer from home, the time is compensable regardless of whether an employee is "on-call." The employer must compensate the employee for all time worked, and after-hours, it will often be at the overtime rate. The FLSA does not require a minimum amount for the disruption caused to the employee's non-work time. But call-out policies are negotiable, and employee organizations can negotiate a minimum amount (e.g., 2 hours) for the inconvenience of working outside regular work hours.

Lectures, Meetings, and Training Programs: This time is typically compensable unless it is outside normal work hours, is voluntary, is not job-related, and no other work is concurrently performed.

Travel Time: The Portal-to-Portal Act of 1947 amended the FLSA, and one of those revisions specifically made normal everyday commuting to and from work non-compensable. Also, neither the FLSA nor California law requires an employer to treat ordinary commute time in an employer provided vehicle (e.g., a service truck) as compensable, unless the employee is required to perform work during the commute, or the employee's activities are significantly restricted in some way. *Rutti v. Lojack Corp.* (9th Cir. 2009) 578 F.3d 1084, 1093. On the other hand, time spent traveling to and from the job's primary location to another location during the normal workday is compensable.

There are certain instances, however, when home-to-work travel is compensable. For example, if the employee goes home after work and is called out to deal with an emergency in the field, the time spent traveling to and from that location *in the field* may be compensable. 29 C.F.R. §785.36. But if the employee reports to a regular worksite first (e.g., to pick up a work truck), the home-to-work travel is not compensable. The employee is only paid travel time for driving from the regular worksite to the field location and then back to the regular worksite.

Outside of normal work hours, travel that keeps an employee away from home may be compensable. However, as an enforcement policy, the U.S. Department of Labor's Wage and Hour Division will not consider as work time any time spent travelling away from home outside regular work hours as a passenger on an airplane, train, boat, bus, or automobile. In any event, the employee organization can propose a contractual benefit (e.g., a stipend or extra leave hours) for the inconvenience of travelling outside of regular work hours. It is also common for labor contracts to include "call-out" or "after-hours" pay. Travel or call-out policies can be more generous than what the FLSA requires.

Security Screenings: Time spent waiting and undergoing mandatory post-shift security screenings are not compensable. In *Integrity Staffing Sols., Inc. v. Busk* (2014) 574 U.S. 27, warehouse workers had to remove belts and wallets and pass through metal detectors before leaving work. It took employees sometimes up to 25 minutes to wait in line and pass through the screening. The Court said that the screening was not integral and indispensable to their principal activities of warehouse workers because the screenings were not an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment and the employer could have eliminated the screenings without impairing the ability of the workers to perform their work. *Busk.* at 35.

Donning & Doffing Clothing and Protective Equipment: The *Busk* case has also made it less likely that time spent donning and doffing (putting on and taking off) uniforms and protective equipment is compensable. Prior cases found that clothes-changing activity required by law, by the employer, or by the nature of the work satisfies the "integral and indispensable" standard under the FLSA for compensable time. Yet, the reasoning behind those cases was largely rejected by the Court in *Busk*. Specifically, the notion that it turned on whether the activity at issue is required by or benefits the employer. Courts now look to whether it is an "intrinsic element" and not one that a worker can dispense with to perform their principal activities. In one case, firefighters were not entitled to pay for time spent donning and doffing at home when called in for an overtime assignment, or when at work early and told to report to a visiting station. *Balestrieri v. Menlo Park Fire Protection District*, (9th Cir. 2015) 800 F.3d 1094, 1101.

Enforcement: An employer who violates the FLSA can be held legally liable. For "willful" violations, an employee has up to 3 years to bring a claim. An employer is also subject to liquidated damages for willful violations. Non-willful violations are subject to a 2-year statute of limitations. The U.S. Department of Labor's Wage and Hour Division enforces FLSA violations. The Division's investigators will gather data to determine compliance and, where violations are found, recommend changes in employment practices. It is a separate violation for an employer to fire or in any way discriminate or retaliate against an employee for filing a complaint or participating in a legal proceeding under the FLSA.

News Release - CPI Increases!

The U.S. Department of Labor, Bureau of Labor Statistics, publishes monthly consumer price index figures that look back over a rolling 12-month period to measure inflation.

5.3% - CPI for All Urban Consumers (CPI-U) Nationally

5.0% - CPI-U for the West Region

4.0% - CPI-U for the Los Angeles Area

3.7% - CPI-U for San Francisco Bay Area

6.5% - CPI-U for the Riverside Area (from July)

6.0% - CPI-U for San Diego Area (from July)

Questions & Answers about Your Job

Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a specific problem, talk to your professional staff.

Question: Is there a law that requires the Agency to conduct performance evaluations? Some of us veterans have not received one in many years. Newer employees do get them occasionally but rarely by their anniversary date. Is there some way that we can force the managers to complete them?

Answer: There is no law that requires evaluations. But check your MOU or Personnel Rules. There may be language, for example, that requires annual evaluations, at least for those who are not at the top step of the salary range. Sometimes an evaluation is required to move up a step, or get a merit increase, or is a factor in promotional decisions. If a late evaluation results in you losing pay, talk to your Association about filing a grievance. The Association can also negotiate language into the next MOU that makes the merit increase automatic if the evaluation is not completed timely, or at least retroactive to the anniversary date, assuming the MOU doesn't already have similar language.

Keep in mind, it is common for evaluations not to be done in a timely manner, especially if pay is not tied to it and there's no performance issues or misconduct during the rating period. Performance evaluations are not given

regularly to employees who have no performance issues and have already reached top step. If no one is losing pay, but members still want an evaluation, talk to your Association, who can raise this topic on their behalf in a labor management meeting to help ensure they are conducted in a timely manner.

Question: I am an hourly employee and often work after-hours and on Saturdays for meetings and presentations. I generally try to adjust my schedule to make up for it. But if I cannot, I will show comp time accrued on my timesheet. Should this be just straight time or at time-and-one-half? My schedule is 7:30am to 6pm Monday through Thursday. Someone told me they thought I should get time and a half for anything I do on nights and weekends, even if I have not exceeded my 40 hours, simply because it is time worked outside my regular work schedule. For example, if I had a Sunday night meeting that lasted an hour, then I would be able to take an hour and a half off work on Monday. Is that correct?

Answer: The FLSA does not require the overtime rate for any work performed outside your regular work schedule unless you work over forty hours in the workweek. Since in your example you are not working over forty hours in a week, assuming you can "bank" the additional hours worked, it would probably be at straight time. If you are banking FLSA overtime (time worked over forty in a workweek) as comp. time, it is at the rate of time and one half.

The question about flexing your time – e.g., taking time off on Monday for the time spent Sunday night – is a separate issue. Check your MOU and Personnel Rules to see if there is any applicable language. The FLSA does not require this, but it does allow for it. In some agencies, policies allow employees to flex their time. Typically, it requires supervisor approval, and is on an hour-for-hour basis within the same workweek.

You note that hourly employees can accrue comp time. Under the FLSA, the employer can decide whether to permit overtime hours to be banked as comp. time, although the MOU may limit that discretion. But regardless, once FLSA comp time is banked, the employee can use it when requested unless doing so would "unduly disrupt" operations.

In your case, since the time worked Sunday night is not considered FLSA overtime, the employer may have more discretion to deny your request for leave the following Monday morning.

Question: I have information that two employees very high up in the organization are having an affair. Both are married, and not to each other! What should I do about this?

Answer: Nothing, unless the affair is impacting your working conditions. Is one of the employees receiving special treatment (e.g., a promotion) due to the relationship? If you can't identify any adverse effect on working conditions, any violation of policy, or any disparate treatment based on a protected classification (e.g., sex, race, etc.), then it's probably best to leave it alone.

Question: The Agency is recruiting for an Admin Analyst. The first sentence under minimum qualifications in the job specification says, "any combination of training, education, and experience which demonstrates the ability to perform the duties of the position." The fourth sentence says the position "requires graduation from an accredited college or university with a bachelor's degree in public administration, business administration or a related field." It goes on to say that "a master's degree in a relevant field is desirable" and "at least two years of increasingly responsible relevant experience is required." I do not have a Bachelor's degree, but I do have an Associate's degree and I can demonstrate a combination of years of training and experience to perform the duties of the position. I have been performing similar duties for many years now. Do I have a leg to stand on with the first sentence, or does the fourth sentence nullify it? HR will say that I don't qualify because of the Bachelor's. Please advise.

Answer: It does seem ambiguous, and therefore it might be helpful to know how the Agency has applied this in prior recruitments. The degree requirement seems clear, but the "any combination of training, education and experience…" language implies some flexibility.

Keep in mind that if they get a lot of qualified applicants who meet the degree requirement, they may rank those applicants higher. That may mean that only those who meet the degree requirement get interviewed, especially if those candidates also have the relevant training and experience.

This apparently conflicting language is not uncommon. You should apply for the position. If rejected, ask for your Association's assistance to see if this kind of language is being applied fairly. For example, if other staff had similar educational experience waived due to their experience, you might have grounds to appeal. It might also depend on who is ultimately selected and what their qualifications are. Still, you have an argument that the Agency should at least allow you the opportunity to explain why your experience should substitute for the degree requirement.

Question: The Department Director just sent all maintenance employees for hearing exams. One person failed and is being sent for a follow-up appointment with a specialist. They told him he must use his own time for the appointment.

Is this true? Also, if he fails the exam again, could they fire him?

Answer: As an initial matter, it sounds like the Director is placing a new qualification on your job class which they cannot do unilaterally. Contact your Association so they can ask to meet on the issue. And yes, the employer should pay the employee for the time spent going to the specialist if the employer requires it.

The employer cannot just fire the employee. Instead, the employer must follow the disciplinary procedure, including notice of the charges and all materials upon which it is based.

If the employer is separating the employee because he cannot perform the essential functions of the job, he may have grounds to request a medical accommodation. For example, if the employee has a hearing disability, the employer must engage in an interactive process to identify any reasonable accommodations (like a hearing aid) that would allow him to perform the job's essential functions. Have the employee contact professional staff who can assist him in those discussions and help identify an appropriate accommodation.