

FAIR

LABOR

STANDARDS

ACT



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A Manager's Desk Reference

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Wayne A. Coleman

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## **Chapter 1 - Management Issues Raised by FLSA**

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Why learn about the Fair Labor Standards Act (FLSA) and its provisions? Primarily because of the potential impact it has on a manager's or a supervisor's responsibilities and budget. Where can these impacts be seen? The impacts may appear in one or more of the following areas: fiscal resources, management responsibility, and complexity of application.

Fiscal impacts derive from several FLSA provisions. There are no limitations on how much the employee can earn. Under the FLSA the longer the employee works, the more she or he is paid.

### **Impact on Fiscal Resources**

This is particularly important because of the suffer and permit concept, under which the employee is entitled to be paid for work performed even when the supervisor does not order or approve it.

Additionally, FLSA provisions allow crediting some hours towards an overtime entitlement that would not be credited under other federal laws.

Finally, the method for computing FLSA overtime pay includes various types of remuneration not included in computing overtime under other federal laws.

Thus, managers and management advisors must be aware of FLSA provisions to prevent unexpected impacts on an organization's fiscal resources.

Managers and supervisors always are responsible for effectively managing fiscal and human resources.

### **Impact on Management Responsibility**

FLSA makes this responsibility more important because all work performed by an employee that is accepted by the manager and most time on the job that benefits the agency is compensable under the Act.

This makes it important for federal managers to ensure that employees perform work when it is wanted and, perhaps more importantly, assure employees do not perform work when it is not wanted or when budget limitations do not allow payment.

One way to assure that employees work only when it is appropriate is to apply the regulations in Part 610, Title 5, Code of Federal Regulations to establish employee schedules. While the FLSA does not establish requirements for scheduling employee work, the regulations in Part 610 do establish such requirements and apply to nonexempt employees as they do to all federal employees.

Under 5 CFR 610.102, 610.111 and 610.121 an administrative workweek of 7 consecutive days is to be established by the head of each executive agency and military department. For example, the Treasury Department established 0001 Sunday to 2400 Saturday as the administrative workweek.

Within this administrative workweek, each employee should have a regularly scheduled administrative workweek. The full time employee's basic workweek typically is 40 hours on 5 consecutive days with each day 8 hours in length. However, schedules must represent the employee's real work requirements and be established to accomplish the agency's mission without unduly increasing agency costs. Flexible and compressed schedules also can be established.

Once schedules are established, they should be clearly communicated to employees. Next the manager must assure that employees work only the scheduled hours. More importantly, the manager must actively assure that nonexempt employees do not work any unscheduled hours unless directed by the manager. To allow the nonexempt employee to work beyond the scheduled hours, establishes a requirement under the FLSA to pay for the additional hours.<sup>1</sup>

Thus, managers must be more vigilant in supervising their employees to assure that work is performed when it is wanted and the funds are available to pay for it. And, they must ensure work is not performed when funds are not available to pay for it. Management advisors can help by advising on the flexibilities available in the scheduling regulations, and the conditions under which overtime must be paid. Their advice will help supervisors to assure that management responsibilities are carried out effectively.

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<sup>1</sup> Reference: 5 C.F.R. § 551.402(a)

The FLSA is designed to be a floor below which a federal employee's pay for overtime will not fall. Thus, if the employee is covered by the FLSA and another overtime law, then the employee is provided with payment under whichever law provides the largest benefit. The passage of the Federal Employees Pay Comparability Act of 1990 (FEPCA) eliminated one of these entitlements. NONEXEMPT employees now are paid for overtime work only under the FLSA provisions. Dual computations under both FLSA and FEPA provisions are no longer required.

## **Interaction with Other Laws**

However, NONEXEMPT employees continue to be eligible for premium pay under the provisions of FEP A. If an employee is assigned to work at night, on a Sunday or a holiday or under hazardous conditions, for example, then she or he is entitled to the appropriate premium pay under the Title 5 or FEPA provisions.

Thus, managers and management advisors need to be aware that FLSA provides for overtime pay for NONEXEMPT employees. But, there are circumstances when federal employees may have entitlements to other kinds of premium pay or overtime time pay under other laws. To assure employees are properly paid, the Act's interactions with other laws must be kept in mind when planning and scheduling work.

While the FLSA is an old law, its application to federal employees is relatively recent. As a result, the decisions being rendered by federal courts, through grievance and arbitration procedures, and under administrative claims processes give us an evolving understanding of the Act's provisions and the entitlements employees have under them.

## **Complexity of Application**

In addition, there are changes to statute and regulation that help to make the application of the FLSA complex. For example, the U.S. Office of Personnel Management (OPM) issued completely revised regulations related to coverage and exemption under the FLSA that apply to Executive Branch federal employees on 17 September 2007. These revisions must be carefully reviewed to assure that previous determinations regarding coverage and exemption under the FLSA remain correct under the many changes the new regulations put in place.

Finally, the Act has specific and extensive rules regarding hours of work and overtime pay. These provisions often differ from other laws that apply to federal employees, and sometimes are difficult to understand.

Thus, managers and management advisors must learn about the intricacies of the FLSA to assure that this complex law is applied properly to NONEXEMPT federal employees.

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## Chapter 2 - Coverage by the FLSA

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There are two groups of employees when we discuss the FLSA. The first group is those who are covered by the provisions of the FLSA; they are called **NONEXEMPT** employees. Because the FLSA was created as an employee protection act, the FLSA presumes that an employee is covered or **NONEXEMPT** unless she or he meets one of the exemptions.

### **NONEXEMPT: EMPLOYEES COVERED BY THE FLSA**

**GEOGRAPHIC COVERAGE:** Employees stationed in the United States and its possessions are covered by the provisions of the FLSA. This includes all of the United States and the District of Columbia, as well as Puerto Rico and other possessions outlined in 29 USC 213(f) and 5 CFR 551.104.

**AGENCY COVERAGE:** Those employed as a civilian in an executive agency as defined in 5 USC 105 are covered by the FLSA provisions. This includes those working for a federal department, such as the Departments of Justice, Treasury and Transportation; those working in a government corporation such as the Saint Lawrence Seaway Development Corporation; and, those working in an independent establishment such as the Government Accountability Office.

In addition, those employed as a civilian in a military department as defined in 5 USC 102 are covered by the FLSA provisions. This means the Departments of the Army, Navy and the Air Force. Also, it includes those employed in a nonappropriated fund instrumentality of an executive agency or military department.<sup>2</sup>

**EMPLOYEE COVERAGE:** The U.S. Office of Personnel Management (OPM) has identified several groups of employees who are expected to meet none of the criteria for being exempted from the FLSA. These groups are:<sup>3</sup>

- Non-supervisory trades and labor employees and working leaders under WG and WL pay schedules and comparable employees under other blue collar systems. This group includes occupations like carpenters and plumbers.

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<sup>2</sup> Reference: 29 U.S.C. § 203(e)(2), and 5 C.F.R. §§ 551.102 and 551.104

<sup>3</sup> Reference: 5 C.F.R. § 550.204

**NONEXEMPT  
EMPLOYEES –  
continued**

- Non-supervisory employees in equipment operating and protective occupations, and most clerical occupations, such as office, computer and communications equipment operators in the General Schedule (GS), and those working in equivalent occupations in other white-collar pay systems.
- Non-supervisory employees performing technician work in positions classified below GS-9 or the equivalent in other white-collar pay systems. It also covers many of those classified at or above GS-9 or the equivalent in other white collar pay systems. Examples include biological, engineering, library and other kinds of technicians.
- Non-supervisory employees in occupations requiring highly specialized technical skills and knowledge that can be acquired only through prolonged job training and experience. Examples include the Air Traffic Controllers and Airplane, Aircraft or Helicopter Pilots.

**SALARY BASED COVERAGE:** With the release of revised regulations in September 2007, the OPM recognized a new category of covered employees. It provides that employees whose annual rate of basic pay is less than \$23,600 are NONEXEMPT or covered by the FLSA. This includes both supervisory and non-supervisory employees.

When making this decision, the annual rate of basic pay includes any locality pay the employee receives, any special salary rate supplement the employee receives, and any similar payment or supplement under other legal authority that is identified as basic pay.<sup>4</sup>

As mentioned, there are two groups of employees when we discuss the FLSA. The second group is those who are not covered by the provisions of the FLSA; they are called **EXEMPT** employees. There are a number of ways that an employee can be **EXEMPT** from or not covered by the FLSA. The primary ones follow.

**EXEMPT: EMPLOYEES  
NOT COVERED BY THE  
FLSA**

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<sup>4</sup> Reference: 5 C.F.R. § 551.203

**FOREIGN EXEMPTION:** Under the Foreign Exemption, the provisions of the FLSA do not apply to federal employees when they are stationed outside the United States in a foreign area such as India, Germany or Japan.

**EXEMPT EMPLOYEES**  
– continued

The foreign exemption applies to federal employees stationed overseas on a permanent basis. It also applies to federal employees stationed overseas on a temporary basis as long as no hours of work are performed in a covered area, i.e., as long as no work is performed within the United States or its possessions, during the workweek. Remember that work can include travel.

Employees who perform any hours of work in a covered area lose their exemptions for the entire workweek. Thus, if an employee who is stationed in Great Britain travels on Sunday to the United States for two days of training on Monday and Tuesday, the employee is covered by the FLSA for that workweek even though the employee returns to Great Britain on Wednesday and works in his office in London on Thursday and Friday.<sup>5</sup>

**EMPLOYEE EXEMPTION:** The FLSA establishes criteria that enable a federal agency to exempt employees performing certain kinds of work. In addition, other statutes may be written to remove employees from beneath the FLSA umbrella of coverage.

- Executive Employees – under this exemption, an employee whose primary duty is management of a federal agency or any subdivision thereof (including the lowest recognized organizational unit with a continuing function), and who customarily and regularly directs the work of two or more other employees, and either has authority to hire or fire other employees or whose recommendations as to hiring, firing, advancement, promotion or other change of status of other employees is given particular weight is exempted from the FLSA. Typical of such employees are those with the term supervisor, manager or executive in their titles or responsibilities.<sup>6</sup>

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<sup>5</sup> Reference: 5 C.F.R. § 551.212

<sup>6</sup> References: 29 U.S.C. § 213(a)(1), and 5 C.F.R. § 551.205

**EXEMPT EMPLOYEES**  
**- continued**

- Administrative Employees – under this exemption, an employee whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the agency or the agency’s customers, and whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance is not covered by the FLSA. Examples include those who work in the fields of human resources, safety management, program and management analysis, and similar occupations not performing the mission-related work of the agency.<sup>7</sup>
- Professional Employees – under this exemption, an employee whose primary duty is the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor is not covered by the FLSA.<sup>8</sup>

This group is divided into three sub-groups. The first sub-group is those in the **Learned Professions**. Such employees typically perform work the sciences, engineering and other fields that customarily require a bachelor’s degree or higher in order to perform the work. This sub-group includes such occupations as attorneys, doctors, librarians, chemists, teachers, engineers, and the like.<sup>9</sup>

The second sub-group is those who perform work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. They include those OPM has identified as the **“Creative Professionals,”** such as actors, musicians, composers, conductors, painters, writers, and commentators.<sup>10</sup>

The third sub-group is the **Computer Employees**. These employees perform work requiring an application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional

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<sup>7</sup> References: 29 U.S.C. § 213(a)(1), and 5 C.F.R. § 551.206

<sup>8</sup> References: 29 U.S.C. § 213(a)(1), and 5 C.F.R. § 551.207

<sup>9</sup> Reference: 5 C.F.R. § 551.208

<sup>10</sup> Reference: 5 C.F.R. § 551.209

specifications; design, develop, document, analyze, create, test or modify computer systems or programs, including prototypes, based on and related to user or system design specifications; or design, document, test, create or modify computer programs related to machine operating systems. In addition to performing these kinds of tasks, computer employees must pass a salary test also, i.e., must earn \$23,600 or more per annum or \$27.63 per hour or more. Examples include Computer Scientists and Information Technology Specialists.<sup>11</sup>

## **EXEMPT EMPLOYEES** **- continued**

- Exempted by Other Law – when this occurs, another statute removes certain groups of employees from beneath the umbrella of FLSA coverage. An example is Criminal Investigators who are paid Law Enforcement Availability Pay (LEAP). When the LEAP law was passed, it contained a provision removing the Criminal Investigators from FLSA coverage.

### **EXCEPTIONS TO SALARY BASED COVERAGE:**

Previously we discussed the new provision that requires all Executive Branch federal employees who earn less than \$23,600 per annum to be covered by the FLSA. There are a few exceptions to this rule.

Employees in the following occupations are exempt from FLSA coverage as long as they are performing as a full professional in their field utilizing discretion and independent judgment under only limited supervision regardless of their rate of annual basic pay:

- Attorneys or those who practice law;
- Doctors or those who practice medicine; and,
- Teachers or those who impart knowledge.

When an employee temporarily performs work or duties that are different from the primary or grade controlling duties of the employee's permanent position, there may be a change in the employee's status under the FLSA.

## **TEMPORARY DUTY** **AND COVERAGE**

If there is a change in the employee's FLSA status, and if this change goes on for an extended period of time, i.e., 30 days or more, then the employee's overtime payment for the period of time she or he is performing the temporary duties may require recalculation.

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<sup>11</sup> References: 29 U.S.C. § 213(a)(17), and 5 C.F.R. § 551.210

Being detailed to another position that is similar to the employee's permanent position and at the same grade, band or pay level, or to a position at another duty station performing the same or similar work to that in the employee's permanent position typically will not result in a change in FLSA status.<sup>12</sup>

**Nonexempt Employees:** A NONEXEMPT employee who temporarily performs work that is different from his or her primary duties remains NONEXEMPT for the entire period of temporary duty unless all both of the following conditions are met.

- The period of temporary duties is more than 30 calendar days long; AND
- The employee's primary duties during the temporary work is EXEMPT work, as discussed earlier in this chapter.

**Exempt Employees:** An EXEMPT employee who temporarily performs work that is different from his or her primary duties remains EXEMPT for the entire period of temporary duty unless both of the following conditions are met.

- The temporary work or duties exceed 30 calendar days; AND
- The employee's primary duties during the period of temporary assignment does not meet the criteria for one of the FLSA exemption categories discussed above.

**Emergency Situations.** An agency may determine that an emergency exists when conditions threaten the life or safety of people, serious damage to property, or serious disruption to an activity's operations.

NONEXEMPT employees remain NONEXEMPT whether the employees perform NONEXEMPT work or EXEMPT work directly related to resolving or coping with the emergency.

When an EXEMPT employee is engaged in work that is directly related to resolving or coping with the agency identified emergency or its immediate aftermath the employee's FLSA status may be affected. The EXEMPT employee's FLSA status must be determined on a

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<sup>12</sup> Reference: 5 C.F.R. § 551.211

workweek basis when she or he is engaged in work directly related to resolving or coping with the emergency using the following guidelines.

- EXEMPT employees remain EXEMPT for any workweek in which their primary duties for the workweek in which they are engaged in work directly related to resolving or coping with the emergency are EXEMPT as discussed earlier in this chapter; OR
- EXEMPT employees become NONEXEMPT for any workweek in which their primary duties for the workweek in which they are engaged in work directly related to resolving or coping with the emergency are NONEXEMPT as discussed earlier in this chapter.

As noted above, any change in FLSA status resulting either from temporary assignment to different duties or from assignment to duties directly related to resolving or coping with an agency declared emergency may require a recalculation of an employee's overtime pay for the period of time affected.

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## Chapter 3 - Hours of Work under FLSA

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When determining whether or not a nonexempt employee has an entitlement to overtime compensation under the FLSA you must ensure that all hours considered to be hours of work under the FLSA are included in the calculation. The varieties of hours that can be credited to a nonexempt employee under the FLSA are more generous than those that can be credited to employees covered by other laws.

The FLSA requires that all time spent by an employee performing an activity for the benefit of or under the control or direction of an agency will be credited to the nonexempt employee as hours of work. This includes:

- on-duty time;
- suffered and permitted time; and,
- waiting or idle time.<sup>13</sup>

**On-Duty Time** includes both time the employee is required to be on duty and performing work, and paid non-work time, such as paid leave, holidays, compensatory time off and excused absence.

**Suffered or Permitted Time** is a concept unique to the FLSA. Under FEPA or Title 5, the employee must prove overtime was ordered or approved before payment is required. Under the FLSA, it does not matter whether or not the employee was asked to stay and work. If work:

- is performed for the benefit of the agency,
- the supervisor knows or has reason to believe work is being performed, and
- the supervisor has an opportunity to prevent the work from being performed,

then the work has been suffered or permitted and is payable.

Examples of such suffered and permitted time include an employee who comes into work early, stays at his or her desk during designated lunch periods or other scheduled breaks, or stays after the end of scheduled work hours.

**On-Duty Time  
Suffered or Permitted  
Time  
Waiting or Idle Time**

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<sup>13</sup> Reference: 5 C.F.R. § 551.401

**Waiting or Idle Time** includes time controlled by and benefitting the agency where the employee is waiting for work. Typically, this happens when there is no work to perform for a short period of time and the employee is asked to wait while machinery is repaired, materials arrive, etc. An example is the time an employee spends waiting between the drop-off and the pick-up of passengers the employee is transporting by bus or other vehicle.

To the maximum extent possible travel time should be scheduled during the employee's basic work hours.<sup>14</sup>

**Time spent traveling during regular work hours** is considered hours of work for FLSA purposes.<sup>15</sup>

## **Time Spent Traveling**

When travel cannot be scheduled during the employee's basic work hours, **time spent traveling outside of regular work hours** is considered hours of work for the nonexempt employee under the FLSA if it:

- is approved/directed by a manager,
- benefits the agency, and
- meets one of the following requirements.

**Work is Performed while Traveling.** Such work can include operating a vehicle, operating some device on a vehicle, assisting in operating the vehicle (if sharing the driving, then each is working during the period of operation only). Examples of those who are performing work while traveling include couriers with classified documents, guards escorting prisoners, security specialists guarding equipment in transit. OR

**Employee Travels as a Passenger on a One-Day Assignment Outside the Duty Station.** If such travel time when added to the time spent on the employee's regular duties extends the employee's workday beyond the regular scheduled hours, then such travel time can be counted as hours of work for nonexempt employees under the FLSA. An example: a one-day trip to Indianapolis when stationed in Washington, DC. Both normal waiting time at a common carrier terminal and actual travel time are counted as hours of work. Normal home to terminal/terminal to home time, and meal times are not counted as hours of work. OR

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<sup>14</sup> Reference: 5 C.F.R. § 610.123

<sup>15</sup> Reference: 5 C.F.R. § 551.422; see also the definition of regular work hours at 5 C.F.R. § 551.421

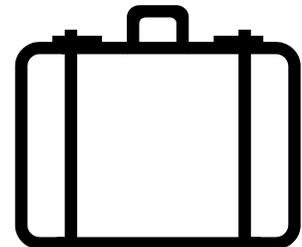
## Travel Time – continued

**Employee Travels on a Multi-Day Trip Away from the Duty Station.** When an employee travels away from the duty station on a multi-day trip there are very specific rules on the amount of travel time that can be credited as hours of work. If the travel is performed on non-workdays during hours that correspond to normal duty hours, the travel time is counted as hours of work for the nonexempt employee under the FLSA. Travel time outside of normal duty hours, either on a workday or a non-workday, on a multi-day trip cannot be counted as hours of work.

An example: an employee stationed in Chicago is assigned to Dallas for one week. The employee's normal work schedule is Monday through Friday from 8 a.m. to 4:30 p.m. with one-half for lunch. The employee leaves Chicago on Sunday on a 3 hour flight that departs at noon, and returns on the following Saturday on a 3 hour flight that departs Dallas at 1 p.m. All of the travel time is counted as hours of work for FLSA nonexempt employees because it occurs during hours that the employee would have been at work if it had been a regular workday.

In addition, when travel cannot be scheduled during the nonexempt employee's basic work hours, time spent in authorized travel outside of regular work hours also is considered hours of work for the nonexempt employee under the provisions of the Federal Employee's Pay Comparability Act (FEPCA) and will be counted as hours of work under the FLSA in the following circumstances.<sup>16</sup>

**Travel involves the performance of work while traveling or is incident to travel that involves the performance of work.** An example: a WG Motor Vehicle Operator (MVO) is directed to fly to Detroit from her duty station, pick up a truck just purchased by the agency, and drive it back to her official duty station. Under this provision, both the time spent traveling to Detroit (which is incident to travel where work is performed) and the time spent driving the truck back to the duty station will be counted as hours of work for the nonexempt MVO under the FLSA. OR



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<sup>16</sup> Reference: 5 C.F.R. § 550.112(g)

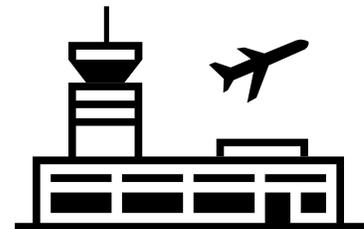
## Travel Time – continued

**Travel is performed under such arduous or unusual circumstances that it is inseparable from work.** This infrequently used provision authorizes travel in difficult or challenging conditions to be counted as hours of work for nonexempt employees. Travel over hard surface road or where no unusually adverse weather conditions are encountered or travel by rail or other common carrier (e.g., scheduled airline) is not arduous even when it extends over many hours. OR

**Travel results from an event that could not be scheduled or controlled administratively, including traveling to and returning from such an event.** To qualify the event requiring off duty travel must be an event not controlled by an Executive Branch agency of the federal government, and there must be an immediate official necessity to perform the travel as soon as the event becomes known. An example: employees of the National Transportation Safety Board (NTSB) who must immediately travel to the sight of aircraft crash in order to investigate the cause.

**Commuting.** Time spent traveling is NOT considered hours of work if it is commuting (home to work/work to home travel). This is considered a normal incident of employment and is not counted as hours of work.

**Travel Within the Official Duty Station.** Travel within the bounds of the employee's official duty station that is directly related to the performance of a given assignment and serves to extend the employee's regular tour of duty is considered hours of work and is counted as hours of work for the nonexempt employee under the FLSA. An example: an employee is transported to another work site from the normal work location in his duty station, travels from the second work site to another, and returns to the normal work location from the third work site. However, if the employee goes directly from home to an alternate work site or from the alternate work site to home, this is NOT hours of work - essentially this is commuting.



**Special Circumstances.** If an employee chooses not to use the mode of transportation the agency selects, OR if the employee chooses not to travel at the times selected by the agency, OR if the employee chooses to travel by an indirect route, OR if the employee chooses

to stop somewhere en route, then the employee will be credited with the LESSER of either:

- That portion of the actual travel time considered work time under FLSA, or
- That portion of the estimated travel time considered work time under FLSA,

if the employee had gone by the route and time selected by the agency. An example: an employee is directed to fly from Denver to Seattle, decides to drive instead. The estimated travel time by aircraft is 4 hours while the estimated travel time by auto is over 19 hours. Driving a vehicle, in this circumstance, is not considered work under the FLSA, which makes the estimated flight time of 4 hours the lesser amount and the time that would be counted as hours of work and credited to the nonexempt employee for compensable time.

**Two or More Time Zones.** The time zone in which travel originates is the one used to determine the number of hours during which travel took place and to determine if the time spent traveling is compensable. An example: for a trip from Los Angeles to Denver to Washington DC, the supervisor and timekeeper will use the Los Angeles time zone to determine if the travel time is compensable under the FLSA.

**Time spent in training during regular working hours** is considered hours of work for nonexempt employees under the FLSA.<sup>17</sup>

**Time spent in training outside of regular working hours** shall be counted as hours of work for the nonexempt employee under the FLSA if both of the following conditions are met.

- The employee is directed to participate by the employing agency; the training is required by the agency, and the employee's performance or retention is jeopardized by not taking the training. AND
- The purpose of the training is to improve the employee's performance of the current duties and responsibilities. This can be remedial or refresher training to bring the employee to an

**Travel Time –  
continued**

**Time Spent in  
Training**

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<sup>17</sup> Reference: 5 C.F.R. § 551.423; see also the definition of regular work hours at 5 C.F.R. § 551.421

acceptable level of performance. It also can be training to learn a new method or procedure, new piece of equipment or technique that becomes a part of the job, e.g., an employee learning a new automated system.

## **Training Time – continued**

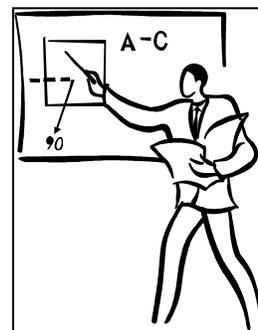
The fact that an agency pays for all or part of the training expenses does NOT create an entitlement to overtime. If the training is not required by the agency, but is paid for at the employee's request, then the time is not counted as hours of work for a nonexempt employee under the FLSA.

In addition, required training that occurs outside the nonexempt employee's basic 40 hour workweek also is considered hours of work for the nonexempt employee under the provisions of the Federal Employee's Pay Comparability Act (FEPCA) and will be counted as hours of work that is compensable in the following circumstances.<sup>18</sup>

**Training given when the employee is already receiving premium pay** will be counted as compensable hours of work for nonexempt employees. An example: training is given on a scheduled Sunday shift when the employee is receiving Sunday premium pay.

**Training given at night** because situations the employee must learn to handle only occur at night will be counted as compensable hours of work for nonexempt employees. For example: training is given at night because an employee must learn how to use a night vision device when the employee is receiving night premium pay.

**Training given during premium hours when the costs** of training, including premium pay, are less than the costs of the same training that is confined to regular duty hours will be counted as compensable hours of work for nonexempt employees. For example: an employee is directed to take a course that is given on 5 consecutive 12-hour days, rather than a similar course given during 7 ½ days over a two week period.



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<sup>18</sup> Reference: 5 C.F.R. § 410.402

**Training given to criminal investigators who are eligible for availability pay.**

**Training Time – continued**

**Training given to employees receiving annual premium pay** for standby and administratively uncontrollable overtime duty will be counted as compensable hours of work for nonexempt employees.

**Training required by the agency is given to firefighters** paid under 5 CFR 1301-1308 in any week in which attendance at agency sanctioned training reduces the hours in the firefighter's regular tour of duty will be counted as compensable hours of work for nonexempt employees. If the training is voluntary, i.e., not ordered by the agency, then this protection does not apply.

**Training given during premium time under circumstances approved** by the U.S. Office of Personnel Management will be counted as compensable hours of work for nonexempt employees.

**Homework.** Time spent in preparation for training, also known as homework, that the manager or instructor defines shall be counted as hours of work. The instructor or supervisor should clearly state the amount of time the preparation is expected to take. Any hours the employee spends beyond the stated time are not hours of work. The training must meet the requirements listed above in order for the homework to be compensable.

**Time Spent Attending a Meeting.** Time during which an employee attends a lecture, meeting or conference shall be considered hours of work if:

- It is held outside of regular working hours, AND
- The employee is directed by the agency to attend OR
- The employee performs work for the benefit of the agency during the meeting.

Examples include a professional society luncheon seminar, or a recruitment-fair.

**Pre- and Post-Shift Activities.** When pre-shift and post-shift activities are closely related to an employee's regular duties and are indispensable to their performance will considered hours of work for

**Other Time as Hours of Work under FLSA**

**Other Time –  
continued**

nonexempt employees under the FLSA. Once such compensable pre- and post-shift activities have been identified, the supervisor must include them on the employee's work schedule, and the scheduled time will be credited on the employee's time and attendance sheet. An example: employees required by their supervisor to report to work early to don uniforms worn during working hours and for a pre-shift briefing.

If the pre-shift and post-shift activities are NOT closely related to the employee's regular tasks, then they are not considered to be hours of work and are not compensable. An example: employees authorized to don uniforms at home and wear them to work will not have any time spent on the job site donning uniforms counted as compensable hours of work.<sup>19</sup>

**Time Spent Off Duty – Standby Duty vs. On-Call.**

Time spent off duty may be considered hours of work under certain circumstances. To be counted as hours of work and be compensable the employee must meet the following requirements.<sup>20</sup>

- The employee is restricted by official order to a designated post of duty for work related reasons; AND
- The employee's activities are substantially limited so that she/he cannot use the time for his/her own purposes; AND,
- The employee is required to remain in a state of readiness to perform work.

If the time primarily benefits the agency, and the employee's activities are severely limited so that she or he cannot utilize the time for his or her own purposes, then the time is identified as standby time, and is counted as hours of work for nonexempt employees under the FLSA.

In contrast, time spent off duty is not considered hours of work and, therefore, is NOT compensable if the following requirements are met.

- The employee is allowed to leave a telephone number or carry a "beeper" to allow quick contact; AND
- The employee must remain within a reasonable call back radius; OR,

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<sup>19</sup> Reference: 5 C.F.R. § 551.412

<sup>20</sup> Reference: 5 C.F.R. § 551.431

- The employee may arrange for any work that arises during the on-call period to be performed by another person without supervisory approval.

**Other Time –  
continued**

If the time primarily benefits the employee and allows the employee to use the time for his/her own purposes, then the time is identified as on-call time, and is not counted as hours of work for nonexempt employees under the FLSA.

An employee in an on-call status who is called to work will be paid for the time she or he actually performs work. For example, a duty officer who is contacted while on-call and performs some work as a result, will be compensated for the time spent performing the work. A duty officer will not be compensated for the time when she or he only is on-call waiting for the telephone to ring or the beeper to sound a tone.

**Adjusting Grievances.** Time spent by an employee adjusting his/her grievance or any appealable action within an agency during the time the employee is required to be on the agency's premises will be counted as hours of work. This includes such activities as developing the grievance, meeting with management, talking to a union representative, talking with a Labor Relations Specialist, etc.<sup>21</sup>

**Performing Representational Functions.** Official time granted by an agency to perform representational functions when the employee is in a duty status is counted as hours of work. This includes regular working hours and regularly scheduled overtime. Performing representational functions related to events that arise during irregular or unscheduled overtime and that must be dealt with during the irregular overtime also will be counted as hours of work, e.g., safety or health issue related to equipment breakdown.

**Medical Attention.** When an employee is receiving medical attention because for an illness or injury, it is counted as hours of work if all of the following conditions are met.<sup>22</sup>

- The medical attention is required on a workday the employee reported for work and subsequently became ill or was injured; AND

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<sup>21</sup> Reference: 5 C.F.R. § 551.424

<sup>22</sup> Reference: 5 C.F.R. § 551.425

**Other Time –  
continued**

- The time occurs during the regular working hours; AND
- The medical attention is provided on the agency's premises or at an outside medical facility to which the agency directs the employee to go.

Time spent taking a physical examination that is required for the employee's continued employment also is counted as hours of work. However, only the time spent taking the examination and associated tests is compensable.

**Charitable Activities.** Time spent working for public or charitable purposes, when requested or directed by the agency is counted as hours of work. For example, working on the Combined Federal Campaign or Blood Drive. However, time the employee volunteers for such activities outside his or her regular working hours is not counted as hours of work.<sup>23</sup>

**Sleep Time.** Genuine sleep time is NOT considered hours of work under the FLSA as long as all of the following conditions are met.<sup>24</sup>

- The work shift is 24 hours or more; AND
- Adequate facilities exist to allow an uninterrupted period of sleep, e.g., a place to sleep; AND
- There are at least 5 hours available for sleep during this period.

Special provisions related to scheduled sleep time have been established for employees engaged in law enforcement and fire protection activities who receive either standby premium pay or administratively uncontrollable overtime or are paid under 5 U.S.C. § 5545b. See 5 C.F.R. § 551.432 for provisions pertaining to these groups of employees.

Agencies may deduct no more than 8 hours for sleep and meal time in a 24-hour. When sleep time is interrupted by a call to duty, the time spent on duty is counted hours of work.

**Meal Time.** Genuine meal periods are NOT counted as hours of work under the FLSA as long as:

- Adequate facilities exist to allow the employee to get away from the work, and

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<sup>23</sup> Reference: 5 C.F.R. § 551.426

<sup>24</sup> Reference: 5 C.F.R. § 551.432

**Other Time –  
continued**

- The time usually is uninterrupted. Thus, for most nonexempt employees, lunch or other meal times, when they are relieved from performing work are not hours of work and, therefore, not compensable under FLSA.<sup>25</sup>

Special provisions related to scheduled meal time have been established for employees engaged in law enforcement and fire protection activities who receive either standby premium pay or administratively uncontrollable overtime or are paid under 5 U.S.C. § 5545b. See 5 C.F.R. § 551.411(c) for provisions pertaining to these groups of employees.

Agencies may deduct no more than 8 hours for meal and sleep time in a 24-hour. When meal time is interrupted by a call to duty, the time spent on duty is counted hours of work.

**Call-Back Time.** An employee called in to work irregular or occasional overtime on a day when she or he was not scheduled will be credited with at least 2 hours of work. Similarly, one who is called back to his or her work place after going home at the end of a scheduled shift will be credited with at least 2 hours of work.<sup>26</sup>

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<sup>25</sup> Reference: 5 C.F.R. § 551.411(c)

<sup>26</sup> Reference: 5 C.F.R. § 551.401(e)

## Chapter 4 - Overtime under FLSA

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### Overtime Entitlement for NONEXEMPT Employees

Under the FLSA NONEXEMP employees are divided into two groups when overtime entitlements must be determined. The first group is composed of those who are NONEXEMPT and are engaged in carrying out the mission of the agency. The second group is composed of employees who are NONEXEMPT and is engaged in law enforcement or firefighting responsibilities. The first group is identified as 7(a) Employees while the second group is identified as 7(k) Employees.

For most NONEXEMPT federal employees, i.e., those carrying out the mission of the agency or are otherwise covered by the provisions of the FLSA, Section 7(a) of the FLSA defines overtime as all hours that exceed 40 in a workweek and that meet the Hours of Work criteria discussed above. In addition, NONEXEMPT employees also have all hours of work that exceed 8 in a day, that meet the hours of work criteria, counted as overtime.

Employees will not be given credit for the hours worked under both sets of criteria. Thus, a NONEXEMPT employee is entitled to overtime compensation either for overtime work that exceeds 8 hours in a day or that exceeds 40 hours in a week, but not for both.<sup>27</sup>

For NONEXEMPT federal employees who perform fire protection or law enforcement activities, separate overtime standards have been established. The separate standards for overtime are based on a survey of hours normally worked by non-federal fire protection and law enforcement employees.<sup>28</sup> Currently, the standards are all hours that exceed:

- 171 hours in a 28 day period (85 1/2 hours in a 14 day period or 423/4 hours in a 7 day period) for employees engaged in **law enforcement activities**; and,
- 212 hours in a 28 day period (106 hours in 14 days or 53 hours in 7 days) for employees engaged in **fire protection work**.

### **7(a) Employees or Employees Involved in Mission Related Work**

### **7(k) Employees or Employees Involved in Law Enforcement or Firefighting Activities**

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<sup>27</sup> References: 29 U.S.C. § 207(a), and 5 C.F.R. § 551.501

<sup>28</sup> References: 29 U.S.C. § 207(k), and 5 C.F.R. § 551.541

**Employees working on Flexible Work Schedules**

have hours of work that are officially ordered or approved in advance that exceed 8 hours in a day or exceed the overtime standard for the week credited as overtime hours. Hours worked voluntarily, including credit hours, are not counted as overtime for those on flexible schedules.

**Employees working on Compressed Work Schedules**

have hours of work in excess of the daily compressed work schedule credited as overtime. In addition, hours of work in excess of the weekly compressed work schedule will be overtime hours on the basis of exceeding the applicable weekly (or bi-weekly pay period) overtime standard.<sup>29</sup>

Some NONEXEMPT employees also have overtime entitlements under other statutes for performing certain kinds of duty. Typically, these statutes apply only to specified groups of federal employees. For example, 19 U.S.C. §§ 261, 267, 1450, 1451, 1452 (cover employees of Customs & Border Protection); 7 U.S.C. §§ 394, 394a, 2260 (cover U.S. Department of Agriculture employees); etc.

When employees are entitled to overtime under the FLSA and other statutory provisions (except Title 5), they shall be paid under whichever statutory authority provides the greater overtime pay entitlement in the workweek.<sup>30</sup>

**Compensation for FLSA Overtime**

NONEXEMPT employees who have exceeded the overtime requirements discussed above may be compensated through pay or, under certain circumstances, through compensatory time off.

**NONEXEMPT  
Employees on Flexible  
or Compressed Work  
Schedules****NONEXEMPT  
Employees with More  
than One Overtime  
Entitlement**

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<sup>29</sup> Reference: 5 U.S.C. § 6121(6) and (7)

<sup>30</sup> Reference: 5 C.F.R. § 551.513

## **FLSA Overtime Pay**

NONEXEMPT employees who are paid for their overtime will be paid one and one half times their "hourly regular rate of pay" for all hours that exceed the applicable overtime standard, discussed above. When computing the employee's pay, she or he receives:

- The straight time or basic rate of pay for all overtime hours worked.<sup>31</sup> AND
- One-half the employee's "hourly regular rate of pay" for all overtime hours worked.<sup>32</sup>

The employee's "Hourly Regular Rate of Pay" is one reason the NONEXEMPT employee's overtime may be higher than an exempt employee's overtime pay. It is computed by dividing the total remuneration paid to the employee in a workweek by the total number of hours of worked.

In addition to the basic rate of pay, one includes the following types of payments when computing the hourly regular rate of pay: (a) night shift differential; (b) environmental differential/hazard pay; (c) Sunday premium pay and holiday pay; (d) cost of living allowance; (e) recruitment incentive in Guam; (f) post differential; (g) representation allowance paid to employees assigned to the United Nations in New York; (h) locality payments; and, (i) retention allowances.

For firefighters who are paid under the provisions of 5 USC 5545b, overtime is paid at one and one-half times the firefighter hourly rate of basic pay as established under 5 CFR 550. 1303(a) and (b)(2) for all hours that exceed 106 in a biweekly pay period.

It is important to remember that there is no maximum limitation under the FLSA that curtails the amount of overtime pay a NONEXEMPT employee can earn. As long as an employee performs work, then she or he is entitled to be paid for it under the FLSA provisions.

## **No Maximum Overtime Pay Limit for FLSA Overtime Pay**

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<sup>31</sup> If the employee receives premium pay for regularly scheduled standby duty or administratively uncontrollable overtime (AUO), then the straight time rate includes the rate of basic pay plus the standby or AUO premium pay divided by the hours covered by the basic pay plus annual premium pay: 5 C.F.R. § 551.512(b).

<sup>32</sup> Reference: 5 C.F.R. §§ 551.511 and 551.512

## **Compensatory Time Off for NONEXEMPT Employees**

A NONEXEMPT employee may be granted compensatory time off from his/her tour of duty for an equal amount of irregular or occasional overtime work instead of being paid under the above provisions. Compensatory time off is provided at the rate of one hour off for each hour of irregular overtime worked.<sup>33</sup>

The NONEXEMPT employee may not be required to take compensatory time off in lieu of pay for overtime work. That is, an employee must not be intimidated, threatened, or coerced to request or not request compensatory time off.

For a NONEXEMPT employee working under a flexible work schedule, the head of an agency may grant compensatory time off for an equal amount of overtime work.

Compensatory time off must be used within 26 pay periods after the pay period during which it was earned. If compensatory time off is not used within the 26 pay periods or if the employee transfers to another federal agency or separates from federal service, then the employee must be paid for the overtime work at the rate the employee was earning at the time the overtime work was performed.

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<sup>33</sup> Reference: 5 C.F.R. § 551.531

## Chapter 5 – Risk Management

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The many differences between the provisions of the Fair Labor Standards Act (FLSA) and those of other overtime laws that cover federal employees make it imperative that you, as a manager, be aware: first, of the Act's provisions; second, of your responsibility to ensure employees' are paid properly and, third, of your responsibility in preventing unexpected employee claims and unplanned overtime costs. The following recommendations should help you to fulfill these responsibilities.

- **Ensure position descriptions (PD) accurately reflect the duties and responsibilities performed** by the employees assigned to them. This is important because the PD is used to make FLSA coverage/exemption determinations. Remember job content evolves: as missions change; as systems used by employees change; as quality control and other kinds of systems foster consistency, uniformity and measurability thereby reducing discretion; as organizations are restructured to improve workflow and reduce costs; and, as other actions take place. Thus, PDs should be reviewed periodically and updated as needed.
- **Ensure proper controls are in place to assure that only that work for which you intend to make payment is performed.** Remember all work performed by an employee that is accepted by the manager and most time on the job that benefits the agency is compensable under the Act.

One way to accomplish this is to follow the guidance for scheduling employee work. There are five basic steps for accomplishing this: (1) identify the 7 day administrative workweek established by your agency; (2) establish a regularly scheduled administrative workweek indentifying the hours and days the employee is required to be at work; (3) communicate the scheduled administrative workweek to the employee; (4) amend the work schedule once the workweek begins if additional work hours will be required; (5) ensure the employee performs work only during the time she or he is scheduled to work. If you, the employee's supervisor, cannot be present to ensure the

employee stops working at the end of his or her scheduled work time, call on another supervisor or senior employee to ensure the employee leaves when the shift ends.

- **Ensure employees understand their entitlements and responsibilities under the FLSA.** Their entitlements for overtime are based on whether or not they are EXEMPT or NONEXEMPT. NONEXEMPT employees are entitled to overtime when the number and type of hours they work meet the requirements in the discussions in the earlier chapters.

Employees' responsibilities include (1) working only when scheduled; (2) contacting you before working any hours not included in their regular schedule; (3) reporting all hours worked during each workweek and pay period; and (4) discussing with you any questions they have regarding the FLSA coverage/exemption determinations of their positions, and/or the number of hours approved for payment and the amount of pay received for work performed during a particular pay period.

- **Ensure you understand your roles and responsibilities as a manager.** Besides establishing employee schedules, assigning and reviewing work and the other typical tasks expected of a manager, you have a responsibility to assure that questions raised by employees about the FLSA are answered in a clear and concise way. If you need assistance in doing so, the agency's human resources staff and payroll staff should be your first point of contact.

You also are responsible for periodically reviewing payroll records. This will help to ensure that all hours the employee works are being credited and compensated properly. The employee's productivity also should be reviewed periodically. If there is a mismatch between the number of hours included on time and attendance sheets, and the volume of work being produced, then the employee may be working additional hours for which she or he may file a claim at some later date.

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## Chapter 6 - Filing an FLSA Claim

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An administrative complaint program is designed to assure that individual dissatisfactions and perceived inequities or errors are resolved following an established procedure. A federal employee may file an FLSA claim when she or he believes proper payment has not been made or the employee believes the FLSA coverage/exemption determination is incorrect.

### **Employees NOT Covered by a Negotiated Grievance Procedure**

**Within the Agency** – A federal employee should be encouraged to try to resolve the problem within his or her supervisory channels when she or he believes an FLSA violation has occurred. The manager may respond directly to an employee's concern or may seek assistance from Human Resources Specialists to assist in resolving such concerns informally.<sup>34</sup>

If the employee is not satisfied with the result of the attempt at informal resolution of the concern or if the employee decides not to discuss the issue with his or her manager, the employee may file an FLSA claim by following the procedures contained in the agency administrative claim procedure. Once the agency has received an employee claim, it may respond to it or, at its discretion, the agency may forward the claim to OPM on the claimant's behalf.

**U.S. Office of Personnel Management (OPM)** – An employee is not required to use an agency's administrative claim procedure, but may file an FLSA claim directly with the U.S. Office of Personnel Management. The question or claim must be sent to the following address:

U.S. Office of Personnel Management  
Classification Appeals and FLSA Program  
1900 E Street N.W.  
Washington, DC 20415-0001

### **Where to File a Claim**

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<sup>34</sup> Reference: 5 C.F.R. §§ 551.703(b), and 551.705(a) and (b)

## **Employees Covered by a Negotiated Grievance Procedure**

If a federal employee is assigned to an organization that is covered by a bargaining unit agreement containing a negotiated grievance procedure that does not specifically exclude FLSA claims, then the employee's only option for filing an administrative FLSA claim is to do so through the negotiated grievance procedure.

Before filing a grievance, the manager and the employee should contact the agency's Labor Relations Specialists to determine if the claim must be filed following the negotiated grievance procedure or if the claim can be filed following the agency's administrative claim procedure.<sup>35</sup>

## **All Federal Employees**

The employee has a right to file a claim in the federal court system if she or he believes that a violation of the FLSA has occurred. The employee is not required to use the agency's administrative claims procedure or the negotiated grievance procedure or the OPM procedure, as applicable, before filing in Federal Court.<sup>36</sup>

Under the OPM regulations an employee, or a third party such as an employee representative, may file a claim covering any matter thought to be a violation of the FLSA. Normally, the matters raised involve:

- **Allegations of work suffered or permitted outside of regular work hours** without proper compensation;
- **Minimum wage violations** - employee believes that she or he was paid less than the prevailing minimum wage;
- **Child labor law violations** - while recent reports show dramatic increases outside the federal government, only one has been reported recently within the federal government; and,

## **Where to File a Claim - continued**

## **Matters Which May Give Rise to an FLSA Claim**

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<sup>35</sup> Reference: 5 C.F.R. § 551.703(a)

<sup>36</sup> References: 29 U.S.C. §§ 215 and 216, and 5 C.F.R. § 551.703(c)

- **Exemption determinations** - may be reviewed at anytime. Only determinations related to the employee's own position will be acted upon by OPM. No hypothetical exemption questions will be answered by OPM.

A complaint about different wages being paid to men and women for performing the same or similar jobs in the same organization must be filed with the Equal Employment Opportunity Commission (EEOC).<sup>37</sup>

A complaint filed with OPM should be in writing, and must include: the employee's name, his or her agency, telephone number and mailing address, the position to which assigned, and organizational and geographic location. The same information must be submitted for the employee's representative, if one is selected. The employee also should include a description of the: situation or problem the employee has experienced; the employee's actions to resolve the problem; the remedy sought; and, a written statement requesting the claim period be preserved, or evidence that the claim period was preserved. Any decision the employee received from the agency, and evidence the employee has which supports the claim should also be sent to OPM also.<sup>38</sup>

### **Contents of an OPM Complaint**

The claim period is the time during which the employee is entitled to back pay if she or he is deemed to have been improperly paid under the provisions of the FLSA. Under most circumstances, the employee is entitled to two years worth of back pay, if violations of the FLSA's provisions have occurred. However, if it can be demonstrated that the agency willfully violated the provisions of the Act, then the employee will be eligible for three years of back pay.

### **Preserving the Claim Period**

To assure that the employee receives the full amount of back pay, she or he must preserve the claim period by securing the beginning date of the back pay entitlement. The employee does this by requesting it in writing. For example, "I wish to preserve my claim period as of the date you receive this. Please date stamp my claim and return it to me at the following address."

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<sup>37</sup> Reference: 5 C.F.R. § 551.701

<sup>38</sup> Reference: 5 C.F.R. § 551.705(c)

The written notice may be secured either from the agency that employed the claimant at the time the claim arose, if the claim is filed with agency first. The written notice also may be secured from OPM, if the claim is filed with OPM first. A copy of the written notice securing the employee's claim must be attached with any claim filed with U.S. OPM.<sup>39</sup>

An employee or former employee who files a claim concerning his or her FLSA exemption status, or entitlement to minimum wage or overtime pay for work performed under the Act may designate a representative. Such designation must be made in writing. A claimant's designated representative may not participate in OPM interviews with the claimant unless specifically requested to do so by OPM.

An agency may disallow a representative who is a federal employee in any of the following circumstances: (1) the individual's activities as a representative would cause a conflict of interest or position; (2) the designated representative cannot be released from his or her official duties because of the priority needs of the federal government; or, (3) the release of the designated representative would give rise to unreasonable costs to the federal government.

The claimant may request that his or her identity not be revealed to the agency, if she or he wishes the claim to be treated confidentially. Witnesses or other sources may also request confidentiality. OPM will make every effort to honor the claimant's request unless doing so will prevent OPM staff from gathering enough information to make a decision. In such circumstances,

OPM will notify the claimant that the claim will be terminated. At this point the claimant may voluntarily provide written authorization to reveal his or her name. This will allow OPM to move forward with information gathering and with decision making on the claim.<sup>40</sup>

## **Employee Representative**

## **Confidentiality**

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<sup>39</sup> Reference: 5 C.F.R. § 551.702

<sup>40</sup> Reference: 5 C.F.R. § 551.706(a)(2)

## Responsibilities

**Employee responsibilities** – The claimant or the claimant’s representative must supply information requested by OPM within 15 workdays after the date of request. If this is not possible, then the claimant may request additional time. If OPM grants a longer period of time, then the employee should promptly provide the information within the extended time.

The disclosure of information is voluntary on the claimant's part. However, without requested information, OPM may not be able to make a decision on a claim. As a result, when requested information is not provided, OPM may cancel the claim without further action.

If the claim involves pay under the FLSA, then it is the employee’s responsibility to provide evidence that the claim period was preserved which fixes the liability of the agency and the claimant’s right to payment.

**Agency responsibilities** – When the claim involves an FLSA exemption determination, the agency that asserts the FLSA exemption has the burden of proof.

The agency must provide the claimant with a written acknowledgement of the date the claim was received, in order to preserve the claim period.

An agency is responsible for providing the claimant with information relevant to his or her claim upon the claimant’s request, and subject to any Privacy Act requirements.

Finally, the agency faces the same 15 workday limit for providing OPM with requested information. The agency, too, may request an extension of response time from OPM, if needed.<sup>41</sup>

OPM typically relies on the written record to resolve an FLSA claim. It will request the agency to provide a written explanation of the situation covered by a claim. The claimant will have a chance to review and rebut the information the agency submits. In unusual situations, an OPM investigator may conduct an on-site review that may include such things as time and attendance records, payroll records, and other pertinent documents.

## Investigation

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<sup>41</sup> Reference: 5 C.F.R. § 551.706

An employee may withdraw an FLSA claim at any time prior to the issuance of a decision. To do so, the employee or employee's representative must submit a written request to OPM.

## **Withdrawing or Canceling a Claim**

OPM may, at its discretion, cancel a claim if the employee or his or her representative does not provide requested information within the timeframe established by OPM. If the claimant can show circumstances beyond his or her control prevented him or her from pursuing the claim OPM may, at its discretion, reopen a cancelled claim.<sup>42</sup>

OPM will use all of the information gathered from the employee, the agency and the on-site investigation, when made, to make a decision. A copy of this decision will be sent to the claimant or the claimant's representative, and to the agency. This decision is final, and the claimant has no further right of administrative appeal.

## **Finality & Effect of OPM FLSA Claim Decision**

A decision by OPM under the Act is considered a binding ruling. It is binding on all administrative, certifying, payroll, disbursing and accounting officials in the federal government.

Upon receipt, the agency employing the claimant during the claim period must take all steps necessary to comply with the decision. Compliance actions must be completed within the time specified in the decision, unless an extension is granted by OPM. All current and former employees similarly situated must be identified by the agency, and the agency must ensure that they are treated consistently with the decision made by OPM. All current and former employees affected by this order must be notified in writing.<sup>43</sup>

Such compliance actions may take the form of retroactive wage payments, assurance of future compliance, revision of procedures and practices, and other necessary or appropriate actions. OPM follows up to assure corrective actions are taken, as appropriate.

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<sup>42</sup> Reference: 5 C.F.R. § 551.707

<sup>43</sup> Reference: 5 C.F.R. § 551.708

Caution. Employees have a right, under statute and regulation, to file an FLSA claim. Thus, taking a discriminatory action or reprisal against an employee who files an FLSA claim is inappropriate and improper. Such prohibited action can be grounds for further claims, corrective action orders, and follow-up by OPM.

As noted, an OPM decision is considered final with no further administrative appeal available. However, at its discretion, OPM may reconsider a decision if it can be shown that material information was not considered, or a material error of law, regulation, or fact occurred in the original decision.

A request to reconsider may come from the employee, the employee's representative or the agency, but must be filed within 45 calendar days after the date of the decision. At its unreviewable discretion, OPM may waive the 45 day time limit. Like the original complaint, the request to reconsider should contain a detailed explanation, with appropriate documentation, explaining why the case should be reconsidered.<sup>44</sup>

## **Reconsidering a Decision**

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<sup>44</sup> Reference: 5 C.F.R. § 551.708(a) beginning at the third sentence