

Wage and Hour Issues in the Workplace:

Understanding the
Fair Labor Standards Act (FLSA)

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Objectives

- Understand legal provisions on wage and hour laws and proposed updates to wage and hour laws
- Discuss distinctions in categories of exempt and non-exempt workers
- Review application of law to specific worker compensation issues
- Discuss common errors to avoid
- Review joint employment issues

Major Provisions

- Intent of the FLSA
- Exempt Status vs. Non-Exempt Status
- Coverage
- Minimum Wage
- Hours Worked Issues
- Overtime Pay
- How Exemption is Determined
- Recordkeeping

Intent of the FLSA

FLSA was enacted on June 25, 1938 to create more jobs by:

- Requiring payment for all hours worked.
- Discouraging employers from requiring employees to work more than 40 hours in a week by requiring the payment of overtime pay.
- Establishing a minimum wage for to provide reasonable wage for each hour worked.

Who is Covered by the FLSA?

- Everyone who is a paid employee at JCU is covered.
- Unpaid volunteers are not covered.
- Certain employees are exempt from provisions based on the work they perform.

Exempt vs. Non-Exempt

Exempt (Salaried) Employees:

- Are regularly paid a pre-determined amount
- Meet FLSA “salary level” test
- Are engaged in supervisory, administrative, or executive job duties
- Are not entitled to Overtime

Non-Exempt (Hourly) Employees:

- Do not meet one or more of the FLSA exemption tests
- Do not meet “salary level” test
- Are not engaged in supervisory, administrative or executive job duties
- Are “Covered” by wage and hour laws (minimum wage, hours worked, overtime)
- Are Eligible for Overtime

Exempt vs. Non-Exempt

- Three tests for Exemption
 - Salary Level (amount per week)
 - Salary Basis (pre-determined, fixed amount)
 - Job Duties (criteria)
- Human Resources determines an exempt or non-exempt status for each position with information from departments and review of Job Descriptions.



Exempt vs. Non-Exempt

Salary Basis Test – To Be Exempt

- Regularly receives a predetermined amount of compensation each pay period
- The compensation cannot be reduced because of variations in the quality or quantity of the work performed
- Must be paid the full salary for any week in which the employee performs **any** work
- Does not need to be paid for any workweek when no work is performed

Salary Level Test: Proposed Regulatory Changes

- May 18, 2016 - DOL announced changes to Salary Level test
 - Would have impacted 4.2 million U.S. workers
 - Minimum salary increased, with 3-year increases
 - \$455 to \$913 per work week
 - \$23,660 to \$47,476 (full-time annual)
- Courts declared the revised regulations invalid because of procedural issues, and DOL dismissed appeal
- March 8, 2019 - DOL Proposed Regulations- New Proposed salary level of **\$679 per work week** or **\$35,308 a year** (full-time)

Salary Level Test: Proposed Regulatory Changes

- Effective Date: expected January 2020
 - Comments accepted to May 21, 2019
- Will increase number of employees who will be non-exempt (hourly) employees – 1.1 million more
- Updates to salary levels every 4 years AFTER notice-and-comment period (not automatic)
- Duties test does not change.
- Nondiscretionary bonuses can be included to account for 10% of the salary amount

Salary Level Test: Proposed Regulatory Changes

- Process:
 - HR is reviewing positions that would be affected
 - Review if affected by part-time or ten-month
 - Review if few exceptions to salary level applies
 - i.e. ministerial exception
- HR will meet with affected supervisors and department heads.
- Determine if changes needed to hours, structure or pay
- Written notifications will be provided to those affected

Salary Level Test

- The minimum salary level required for exemption is \$455 per week (**proposed \$679 per week**).
 - Does not apply to teachers, coaches, academic administrative personnel etc.
 - The \$455 per week (**\$679/week**) may be paid in equivalent amounts for periods longer than one week.
 - Biweekly (26 pay periods): \$910.00 (**\$1,358**)
 - Semimonthly (24 pay periods): \$985.83 (**\$1,471**)
 - Monthly (12 pay periods): \$1,971.66 (**\$2,942**)

Key Exemptions

The most common FLSA minimum wage and overtime exemption applies to certain employees that fall in the following categories:

- Executive
- Administrative
- Professional
- Computer

Executive Exemption

- Primary duty must consist of managing the organization or of a customarily recognized department of the organization
- Customarily and regularly directs the work of two or more other employees
- Supervision: Authority to hire or fire other employees or makes recommendations as to the hiring, firing, advancement, performance or other change of status of other employees

Examples: VP, Director

Administrative Exemption

- Primary duty is the performance of non-manual work directly related to the management or general business operations
- Work includes the exercise of discretion and independent judgment with respect to matters of significance

Examples: Manager, Supervisor, Senior Administrator

Professional Exemption

Learned & Creative

- Primary duty is the performance of work requiring advanced knowledge beyond high school or degree in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction
- Advanced knowledge needed in a field of science or learning that was acquired by a prolonged course of specialized intellectual instruction
 - appropriate academic degree or combination of degree and experience

Examples: accountant, engineer, professor, lawyer, doctor

Computer Category

- The application of systems analysis techniques and procedures, including consulting with users to determine hardware, software, or system specifications
- The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs
- A combination of the above requiring the same level of skills

Examples: network analyst, developer, software engineer

Scenario: Exempt vs. Non-Exempt

- Brenda, a supervisor, wants to be sure a Coordinator remains exempt
- She says it has to be classified as exempt because the Coordinator, Josh, runs the office by himself, and works some nights and weekends
- Her supervisor confirmed this is a very important position

Will this information help Human Resources with the FLSA classification?

Scenario: Exempt vs. Non-Exempt

- **Key issue:** What does the job description say?
- What are the actual duties performed by Josh?
- Does Josh play a role in determining direction, strategy or does he exercise independent judgment?

Hours Worked Issues

- Overtime
- What is a Workweek?
- Suffered or Permitted
- Waiting Time
- On-Call Time
- Meal and Rest Periods
- Training Time
- Travel Time

Overtime Pay

Covered, non-exempt employees must receive one and one-half times the regular rate of pay for all hours worked over 40 in a workweek



What is a Workweek?

- Hours are calculated by workweek, and each workweek stands by itself
- JCU's workweek runs from Sunday to Saturday
- Workweek is 7 consecutive 24-hour periods (168 hours)
- Averaging time worked during workweeks over a pay period is not permitted

Suffered or Permitted

*Work not requested but **suffered** or **permitted** is work time and must be compensated*

- “There is no such thing as an employee who volunteers to do work connected with his or her job.” - DOL
 - » i.e. a bus driver could not volunteer to drive the football team to a Friday night game
- Employees and employers **DO NOT** have the right to waive any hours worked by an employee as unpaid or to waive overtime

Flexible Schedule



- Supervisors can adjust the hours worked in a workweek so that hours stay within regularly scheduled hours worked.
- For example:
 - Sue works 10.5 hours on Monday. Her supervisor can provide 3 hours time off before Friday to keep her hours at 37.5 for the week.
 - If Sue works 10.5 hours on Friday, her hours cannot be adjusted because the week ends on Saturday at 11:59 PM. She would be entitled to straight time and overtime for the 3 hours.

De Minimus Rule

- *de minimus* rule:
 - Insignificant or insubstantial periods of time beyond the scheduled work hours, which cannot, for a practical matter, be recorded for payroll purposes
 - » These periods of time may be disregarded and considered ***de minimus***

Waiting Time

Counted as hours worked when

- Employee is unable to use the time effectively for his or her own purposes; and
- Time is controlled by the employer

Not counted as hours worked when

- Employee is completely relieved from duty; and
- Time is long enough to enable the employee to use it effectively for his or her own purposes

On-Call Time

On-call time **does** count as hours worked when

- Employee has to stay on the employer's premises
- Employee has to stay so close to the employer's premises that the employee cannot use that time effectively for his or her own purposes

On-call time **does not** count as hours worked when

- Employee is required to carry a pager or cell phone
- Employee is required to leave word at home or with the employer where he or she can be reached

Lunch Time or After-Hours Work

- Work not requested, but permitted to be performed, is work time that must be paid for by the employer.
- The employee should obtain advance authorization before working extra hours or overtime.
- Even if authorization is not given in advance, the employee is required to be paid for the time spent working if employer should have known work was being performed.



Meal and Rest Periods

- Meal periods of at least 30 minutes are not hours worked when the employee is relieved of duties for the purpose of eating a meal.
- Reasonable rest periods of short duration (normally 5 to 20 minutes) are considered “de minimus” and are counted as hours worked and must be paid.

Training Time

Time employees spend in meetings, lectures, or training is considered hours worked and must be paid, unless:

- Attendance is outside regular working hours, **(AND)**
- Attendance is voluntary, **(AND)**
- The course, lecture, or meeting is not job-related, **(AND)**
- The employee does not perform any productive work during attendance

Travel Time

- Ordinary home to work travel is not work time
- Travel between job sites during the normal work day is work time

Travel Time

Traveling away from home community

- Travel that keeps an employee away from home overnight is “travel time away from home”
- This time is considered hours worked **when** it cuts across an employee’s normal work day

Travel Time

Travel Time away from home community

- If an employee prefers to drive back and forth each day from a conference, and the **employer prefers** the employee to stay, the commute can be considered normal home-to-work commute and is not hours worked
- When traveling, if an employee is waiting for a flight **during normal work hours**, it is considered hours worked.

Scenario: Away-from-Work

Barb is asked to go on an admissions trip to California.

- She flies to California on Sunday at 5 AM
- She works at the admissions program from 9-5:30 each day
- She returns to Cleveland by plane Friday at 8 PM
- Her usual work hours are 8:30 AM – 5 PM

How should Barb's hours be calculated if she is a non-exempt employee? What if she is exempt?

Scenario: Away-from-Work Work

Non-exempt:

- Barb does not need to be paid for her flight time Sunday
- She should be paid for 8:30 AM-5 PM for Sunday even if not working (travel away during non-work day)
- She should be paid each day for 7.5 hours
- She should be paid for any overtime worked each day
- She does not need to be paid for flight time home after 5 PM

Exempt: No overtime owed. Time off may be given in discretion of supervisor.

Scenario: Bob's Fun Phone

- Bob is a non-exempt employee who loves his new I-Phone
- On his own, he happily answers work-related emails and texts while walking his dog, Buster
- He spends about 5 hours a week on his I-phone for work
He works 37.5 hours a week in the office.

What are the issues with Bob's usage of his I-Phone?



Bob's Fun Phone

Additional Work Performed

- All hours worked must be included in the total hours worked by the employee whether performed at home, on campus, at an off-campus event, or at a designated workstation
- Total hours within the work week must not exceed 40 hours
- Did the supervisor know or have a reason to know the work was being performed?



Scenario: Sally's Long Day at Work

- Sally is a non-exempt (hourly) employee who tends to eat lunch at her desk while performing basic duties like answering the phone and checking work email.
- After regular work hours, she is required to check her work Twitter, voicemail and email to be sure no emergencies have arisen.
- It takes Sally a few minutes to do this each night.

What wage and hour issues can you identify in this scenario?



Sally's Long Day at Work

Working Additional Time

- The question is whether the time is *de minimus*.
- Time spent working at home or during any non-office hours must be paid if the activity is occurring.
- *De minimus* = time is so small and minimal that as a practical matter, it cannot be calculated and recorded.
 - *Applies only where a few minutes of work are involved and not recording the time is justified as a matter of business practicalities .*



Scenario: Stan is Happy to Work

After Hours Work

- Stan is a non-exempt (hourly) employee who likes to stay late to work on projects and clean his desk.
- Larry, his supervisor, did not authorize Stan to work late.
- Larry sometimes sees Stan at his desk past 5:00 but isn't sure what Stan is doing.



Stan's Happy to Work

After-Hours Work

- Work not requested, but permitted to be performed, is work time that must be paid for by the employer
- The employee should obtain advance authorization before working extra hours or overtime
- Even if authorization is not given in advance, the employee is required to be paid for the time spent working if employer should have known work was being performed



Common Errors to Avoid

- Improperly applying an exemption so an employee is not paid overtime due
- Failing to pay for all hours an employee is “suffered or permitted” to work



Common Errors to Avoid

- Failing to include all pay required to be included in calculating the regular rate for overtime
- Failing to add all hours worked in separate positions for the same employer when calculating overtime due



The FLSA Does Not Require

- Vacation, holiday, severance, or sick pay
- Meal or rest periods, holidays off, or vacations
- Premium pay for weekend or holiday work
- Immediate payment of final wages to terminated employees
- Any limit on the number of hours in a day or days in a week that an employee at least 16 years old may be required or scheduled to work
- Pay raises or fringe benefits

Record Keeping Requirements

- The University must maintain a record of the hours worked each day and the hours worked each workweek for every non-exempt employee.
 - Records must be retained for 3 years
 - Payroll records, hours worked, time cards/time schedules, records of additions to & deductions from pay
 - Hours spent by a non-exempt employee checking email, voicemail, or working from home must be included in the records
 - These records must be available upon request by the Department of Labor's Wage & Hour Division
- Supervisors must require their non-exempt employees to record this time in the Banner time management system.

Enforcement

- Employees may bring complaints to the Department of Labor or file a lawsuit
- The Department of Labor may bring a lawsuit for any back pay owed, as well as for an equal amount to back pay for liquidated damages (“double damages”)
- Willful or repeated violations by employers can result in civil penalties, or criminal prosecution & fines



Independent Contractor or Employee?

- Employers must classify workers correctly as employees or independent contractors
 - An employee is under the control of the employer in terms of results produced and means to achieve results
 - Independent contractors perform work independently for the employer and are hired to achieve the final result, not the method or means of reaching the result. i.e. report from consultant
- Independent contractors are not protected by wage and hour and labor laws
 - Paid on 1099 vs. W-2
- Key issues: behavioral, financial and relationship control

Independent Contractor or Employee?

- Department of Labor and IRS have increased scrutiny and audits of employee vs. independent contractor status
- Tips:
 - Should have written agreements with all contractors
 - Should not be required to follow specific work rules or hours
 - Should be paid for the project vs. hourly
 - Usually work for others at same time
 - Should provide their own equipment, transportation etc.
 - Should be separate business entities whenever possible

Questions?

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