

Understanding the Fair Labor Standards Act

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The Fair Labor Standards Act of 1938, or FLSA, is a federal statute that provides certain protections to workers. These protections include the 40-hour work week, a national minimum wage, and non-oppressive employment of minors.

Additionally, the FLSA guarantees time-and-a-half pay for overtime in certain jobs. The FLSA allows employers to classify certain employees as “exempt” from this overtime pay rule based on both the pay rate and the duties and responsibilities of the employee’s position. This aspect of the FLSA often causes confusion for co-op managers. With upcoming changes to the FLSA pending in Washington, there’s no time like the present to familiarize yourself with some important aspects of the FLSA.

Who can be classified as exempt?

Certain classifications are used to describe employees who are eligible for exempt status. Note that some states have additional provisions—it’s important to be aware of your state’s requirements as well as federal rules.

These classifications for exempt employees are determined by “duties tests”:

Executives: An employee is an executive if the employee’s primary duty:

- is management-related, and the employee customarily and regularly directs the work of two or more employees, including processing the authority to hire or fire other employees; or
- is in a position to make suggestions and recommendations as to the hiring, firing, advancement, promotion, or another change of status of other employees that will be given particular weight.

Retail supervisors can be included under the executive exemption, even if they perform the same duties as subordinates, if they also perform managerial functions including assigning work, scheduling employees, and/or managing inventory.

Administrative: An employee is in an administrative position if the employee’s primary duties are:

- the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and
- the exercise of discretion and independent judgment with respect to matters of significance.

Professionals: An employee is a professional if the employee’s primary work:

- requires advanced knowledge in the field of science or learning, is predominantly intellectual, and includes work requiring the consistent exercise of discretion and judgment; and
- the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction; or
- the employee is a creative professional whose primary duty is the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

Computer: An employee who is a computer systems analyst, a computer programmer, a software engineer, or is a similarly skilled worker in the

computer field is exempt from the overtime pay rules if the primary duties performed consist of:

- the application of systems analysis techniques and procedures;
- the design, development, documentation, analysis, creation, testing, or modification of computer systems and/or programs based on and related to user or system design specifications;
- the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
- a combination of these duties, requiring the same level of skills.

Minimum salary requirement: In addition to passing the “duties test” for one of the above classifications, in order to qualify for exempt status an employee must pass the “salary requirement test” by meeting the minimum salary level required by the FLSA. Currently, that salary level is \$455 per week or \$23,660 annually. An employee must be paid at or above this minimum salary requirement to be classified as exempt.

Salaried versus exempt

People often use the terms “salaried” and “exempt” interchangeably to describe someone who can work as many hours as needed to get the job done while getting paid a regular salary. In fact, these are two separate concepts and can be used independently of each other. Salaried refers to how someone gets paid—a consistent amount on each paycheck, with few exceptions. Exempt refers to someone’s relationship to the FLSA—someone exempt from this law does not need to receive overtime pay for any hours worked over 40 in a week.

With these two definitions, it is possible to have a nonexempt, salaried person. That means that someone could receive a regular salary each pay period, but would also receive overtime pay for any hours worked over 40 in a week. Not surprisingly, few employers choose this option, which creates a best of both worlds scenario for employees.

Similarly, simply having the title of manager or department head does not mean that someone must be paid on a salaried basis or classified as exempt. ALL employees can be paid on an hourly basis and receive overtime pay for hours worked over 40 in a week. Exempt status under the FLSA only applies to those employees who meet the duties and salary tests described above.

Exempt status in practice

Your employee handbook should include a policy that sets expectations for exempt employees. Below are some tips for managing those with exempt status.

Schedules: Exempt employees are assumed to have some degree of control over the timing and the amount of time needed to fulfill their responsibilities. This typically means that exempt employees have some degree of flexibility in scheduling. One possible benefit of being classified as exempt is setting one’s own work schedule. However, this aspect is not a requirement. It is acceptable for exempt employees to be required to work a schedule set for them, or to ensure that certain duties are covered whenever they may be needed. Being classified as exempt does not mean an exemption from being accountable to a work schedule or that the ▷



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The biggest proposed change is to the minimum salary for exempt employees.

employee is free to come and go as they please. Those who manage exempt employees should require that a predetermined schedule be adhered to, according to the co-op's personnel policies. Failure to comply with scheduling expectations should be treated as a disciplinary issue, whether the employee is exempt or nonexempt.

Using a time clock: Similarly, it is acceptable under the FLSA for an employer to require exempt employees to keep track of hours worked via a timekeeping system. If your nonexempt employees punch in and out on a time clock, it might make sense to require the same of your exempt employees, even though they are being paid on a salaried basis. On the other hand, exempt employees may feel micromanaged by such requirements. It's important to consider carefully whether to require this level of hours tracking or not.

One factor to consider is whether the exempt employees' supervisor(s) are in a position to know when their direct reports are arriving at work and leaving. If they all work in the same office, a supervisor will have a general

sense. However, in a grocery store environment, it can be challenging to keep track of comings and goings. If you're hearing complaints from employees that certain exempt employees are frequently unavailable or come in at unpredictable times or go home early—and no one is in a position to have a general sense of what they are actually doing—requiring them to use the time clock might make sense.

While it may be easier to manage an "all-in" policy for time clock use, it is acceptable under FLSA rules to require some exempt employees to use the time clock while others don't have to. In the previous example, exempt office staff members might not be required to use the time clock while floor managers are required to punch in and out. Again, use your best judgement in making such a determination.

Exempt employees and salary deductions: To qualify for exemption, employees generally must be paid not less than \$455 per week on a salary basis. This means that the employee regularly receives a predeter-

mined amount of compensation each pay period, and the predetermined amount cannot be reduced because of the quality or quantity of work and regardless of the number of days or hours worked. (See below for proposed revisions to the minimum salary guideline.)

An exempt employee's salary may be reduced for certain types of deductions, such as insurance premiums; state, federal, or local taxes; Social Security; or voluntary contributions to a retirement savings plan. Additionally, in any work week in which an exempt employee performs any work, their salary may be reduced for any of the following reasons:

- Full-day absences for sickness or disability if the deduction is made in accordance with a bona fide plan. This provision means that if your co-op has a paid time off (PTO) or sick time policy in place (a "bona fide plan" generally), and an employee is absent, then PTO will be used to cover those hours. If an employee does not have enough PTO or sick time to cover the absence, you may reduce their salary accordingly.
- Full-day absences for personal reasons other than sickness or disability. Again, if the employee does not have PTO or sick time to cover the

absence but takes a full day off for personal reasons, their salary may be reduced accordingly.

- Full-day disciplinary suspensions for infractions of written policies and procedures. Do ensure that this type of corrective action is properly documented.
- Unpaid leave under the Family and Medical Leave Act.
- To offset amounts received as payment for jury-duty or witness-duty fees or military pay.
- During the first or last week of employment, in the event they work less than a full week.

Travel time as hours worked: For exempt employees, travel does not make any difference in the amount of their salary. However, if you require your exempt employees to track their hours, they should track their travel hours according to FLSA standards.

For nonexempt employees, time spent travelling for work during normal work hours (even if on a non-work day) is considered worked hours and must be tracked and paid accordingly. Travel for work outside of normal work hours is considered hours worked if you travel and return home in the same day. Employers do not need to consider any travel from home to work and back and/or travel as a passenger outside of normal working hours as hours worked.

For example, if a nonexempt employee attends an out-of-town conference and takes an evening flight home, outside of their normal working hours, the hours spent traveling home won't count as hours worked. For more information about travel time and other hours counted for hours worked visit: <http://www.dol.gov/whd/regs/compliance/whdfs22.pdf>.

Upcoming changes and how to prepare

As we were writing this article, the Department of Labor announced its "Notice of Proposed Rule-making" to change the FLSA. The biggest proposed change is to index the minimum salary amount test to equal the 40th percentile of weekly earnings for full-time, salaried workers, based on the Bureau of Labor Statistics data, or roughly \$50,440 in 2016. It is not clear whether or not bonuses and incentives would count towards achieving this salary level. This change is likely to significantly impact many co-ops. For information about the proposed rules coming in 2016 visit: <http://www.dol.gov/whd/overtime/NPRM2015/>.

To prepare to be in compliance with the final rule, review the salaries of all exempt employees. For those who are not at roughly \$50,000/year, you will need to consider how increasing their salaries to keep them exempt from overtime compares to the cost of paying time-and-a-half for overtime hours worked. Alternatively, if your co-op cannot afford to pay all exempt workers the new minimum salary,

then changes to the organizational structure or splitting up job descriptions may help ensure you are in compliance with the likely changes coming in 2016.

The DOL is currently soliciting feedback on its proposal, but it has said that the final rule will not be in effect until mid-2016. To comment on the proposed rule got to: <http://www.regulations.gov/#!docketDetail;D=>

WHD-2015-0001.

Once the rule is final, there may only be a few months' time to come into compliance. Even if there are legal challenges, President Obama has enough Democrats in the House and Senate to maintain his veto authority. Don't be caught off guard. Stay informed at: <http://www.dol.gov/whd/flsa/>. □

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