

Executive Summary Fair Labor Standards Act

The U. S. Department of Labor issued new overtime regulations on April 20, 2004. They will go into effect on August 23, 2004 (29 CFR 541). Section 13 (a) (1) of the FLSA includes exemptions from minimum wage and overtime provisions for “any employee employed as a bona fide

- Executive employee,
- Administrative employee,
- Professional employee,
- Computer professional employee, or
- Outside sales employee

There are three tests for exemption from the overtime rules: The salary level test, the salary basis test and the duties test. Generally speaking, to be exempt, an employee must meet all three tests, with the exception of teachers who are exempt from the salary tests.

1. **Salary Level Test:** a minimum salary level of \$455 per week must be earned. (We cannot annualize this for part-time employees. Usually part-time employees never work over 40 hours per week so this is not an issue. However, if they do and they normally earn less than \$455 per week, then we must pay them at the time and one-half rate for hours worked over 40 per week. They can be paid biweekly, semi-monthly, or monthly.

2. **Salary Basis Test:** The employee must be paid on a salary basis as opposed to an hourly basis. The employee must receive a predetermined amount of compensation each pay period, which is not contingent on the quality or quantity of work. This test does not apply to Southeastern, since we are a government agency. Section 541.710 applies to employees of public agencies. It states that an exempt employee who otherwise meets the salary basis requirements of 541.602 shall not be disqualified from exemption under section 541.100, 541.200, 541.300 or 541.400 on the basis that such employee is paid according to a pay system established pursuant to principles of public ordinance or regulation, or by a policy or practice established pursuant to principles of public accountability.

3. **Job Duties Test:**
 - a. **Executive Employees Exemption**
 - i. The primary duty is the management of a recognized department or subdivision;
 - ii. Regularly direct the work of two or more employees
 - iii. They have authority to hire or fire other employees or to recommend hiring and firing that is given particular weight.

You must also consider

- The relative importance of the exempt work

- The amount of time spent performing exempt work – 50% or more generally satisfies the primary duty requirement but it is not required.
- Relative freedom from direct supervision
- Relationship between the employee’s salary and those he/she supervises who are doing nonexempt work

Executive employees:

- Interview, select and train employees
- Set and adjust pay and work hours
- Maintain production records or sales records
- Conduct performance reviews
- Handle complaints or grievances
- Discipline employees
- Plan and distribute work among employees
- Determine techniques to be used
- Provide for the safety of employees and property

Supervisors aren’t exempt if their primary duty is to perform the same kind of work as their subordinates.

b. Administrative Employees Exemption

i. General Test

- Must make at least \$455 per week on a salary basis, excluding board, lodging, or other facilities.
- Primary duty must be to perform office or non-manual work directly related to the management or general business operations of the employer.
- Primary duty must include the exercise of discretion and independent judgment.

Administrative employees assist executives with their company’s management or general business operations in areas such as

- tax, finance, accounting, budgeting, auditing and insurance
- purchasing and procurement
- advertising, marketing and research
- safety and health
- quality control
- personnel management, human resources, employee benefits, and labor relations
- public relations and government relations
- computer network, Internet, and database administration
- legal and regulatory compliance

To determine if an employee exercises discretion and independent judgment ask if the employee

- has authority to formulate, affect, interpret, or implement management policies or operating practices
- carries out major assignments in conducting business operations
- performs work that affects business operations to a substantial degree or a particular segment of the business
- has authority to commit the employer in matters that have significant financial impact.
- Has authority to waive or deviate from established policies and procedures without prior approval
- Has authority to negotiate and bind the company on significant matters.
- Provides consultation or expert advice to management
- Is involved in planning long-term or short-term business objectives
- Investigates and resolves matters of significance on behalf of the company
- Represents the company in handling complaints, arbitrating disputes or resolving grievances.

ii. Additional Educational Establishments Test

- 1) Must make at least \$455 per week on a salary basis, exclusive of board, lodging or other facilities
- 2) Have the primary duty of performing administrative functions that are directly related to academic instruction in an educational establishment. The work covered in this exemption is related to the academic operations rather than administrative operations.

Examples of employees that would qualify under this exemption include school superintendent, principal, vice principal, academic department head, academic counselor. On the other hand, school nurses and social work counselors may qualify under another exemption but would not qualify under this academic instruction related exemption.

c. **Professional Employees Exemption** – This exemption is for “learned professionals”, creative professionals, teachers, lawyers, doctors, and computer professionals.

i. **Learned Professionals:**

- Must be paid at least \$455 per week on a salary basis, excluding board, lodging or other facilities and
- Have the primary duty of performing work that requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.
 - 1) The employee must perform work that requires advanced knowledge.

- 2) The advanced knowledge must be in a field of science or learning.
- 3) The advanced knowledge must be customarily acquired by a degree.

Occupations with recognized professional status include: law, theology, medicine, pharmacy, engineering, architecture, teaching, registered nurses, actuarial computations, certified athletic trainers, accountants, physical sciences, chemical sciences, and biological sciences. This exemption does not apply to positions that only require a general degree in any field.

ii. **Creative Professionals:**

- Must be paid at least \$455 per week on a salary basis, exclusive of board, lodging or other facilities
- Have a primary duty of performing work that requires invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor. (Note: Recognized fields of artistic or creative endeavors include music, writing, acting, and graphic arts. Examples of positions include actors, musicians, composers, conductors, soloist, novelists, and some journalists.

iii. **Doctors, Lawyers, Teachers Exemption:** There is no minimum salary requirement for doctors, lawyers or teachers which makes them exempt from overtime requirements. Teachers must have a primary duty of teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge. Doctors are covered if they are licensed to and practice medicine. Lawyers are covered if they are licensed to and practice law.

iv. **Computer Related Professionals:** To be exempt, computer professionals must meet the salary test and the duties test.

- Be paid a salary of at least \$455 per week or an hourly rate of at least \$27.63 per hour.
- Have one of the following as their primary duty:
 1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications or
 2. The design and development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications or
 3. The design, documentation, testing, creation, or modification of computer programs or
 4. A combination of the above.

Computer related professionals must perform work that requires a high proficiency in the theoretical and practical applications of specialized knowledge in system analysis, programming and software engineering. Examples of exempt computer professionals include computer programmers, systems analyst, computer network administrators, Internet administrators and computer database administrators.

The professional computer exemption does not apply to employees in positions involving the operation, repair or maintenance of computer hardware or networks.

Southeastern Action Plan:

- A. Salary Test:** We have audited our payroll and identified employees making less than \$23,660 who are classified as exempt. We will ensure compliance with the salary test by adjusting the salaries of staff positions to the new minimum of \$23,660 no later than August 23, 2004 or convert the employees to nonexempt status. (Teachers are exempt from the salary test.)
- B. Duties Test:** All unclassified staff will be asked to complete a questionnaire to help determine their FLSA status. We will also ask budget unit heads to review job descriptions to ensure they reflect the actual duties of workers. A review of the completed questionnaire and the job description will be used to determine FLSA status. If an employee believes they have been classified incorrectly, they should discuss their concerns with their immediate supervisor and Human Resources to resolve the matter.

FLSA Requirements:

1. All employees should be making at least minimum wage. Teachers are exempt from the salary requirements.
2. Child Labor Provisions - If any minors are employed, make sure that required documents are on file. A work permit is required for anyone under 18. Proof of birth date is required for anyone under 19.
3. Make sure the required records are being kept on the hours worked. We are required to maintain a record of hours worked each day for nonexempt employees. The university prohibits under reporting, over reporting, or other falsification of payroll records. Employees are required employees to report any person who instructs an employee to make a false report. Improper payroll practices should be reported to the Internal Auditor or the Human Resources Director.
 - a. The workweek begins at 12:01 a.m. Sunday morning and ends at midnight on Saturday.
 - b. The workday begins at 12:01 a.m. and ends at midnight.
 - c. Employees are prohibited from recording co-workers time unless they are an official timekeeper or a supervisor.

- d. Employees may be required to work overtime as needed. The procedure for requesting overtime is to request it on the back of the Exceptions Log/Leave Request Form. Overtime must be approved prior to working it. Unauthorized overtime must be paid but employees will be subject to disciplinary action for working overtime without authorization.
- e. Each employee has an official work schedule. Changes to their official work schedule must be approved through the chain of command through the appropriate vice president if the schedule is different from regular university office hours. (7:45 a.m. – 4:30 p.m. for office staff and 7:00 a.m. – 4:00 for Physical Plant).
- f. Each department/office should have call-in procedures if the employee is not going to report to work as scheduled.
- g. The university pays a minimum of 2 hours reporting time for emergency “call backs” after hours or on weekends. This is for verifiable emergencies only.
- h. Employees and supervisors are required to maintain accurate payroll records recording all hours worked.

Hours Worked Under the Fair Labor Standards Act.

Work time is defined by the Department of Labor as time employees are "Suffered or Permitted" to work: "Work not requested but suffered or permitted to be performed is work time that must be paid for by the employer. For example, an employee may voluntarily continue to work at the end of the shift to finish an assigned task or to correct errors. The reason is immaterial. The hours are work time and are compensable.

Waiting Time: Whether waiting time is time worked under the Act depends upon the particular circumstances. Generally, the facts may show that the employee was engaged to wait (which is work time) or the facts may show that the employee was waiting to be engaged (which is not work time). For example, a secretary who reads a book while waiting for dictation or a fireman who plays checkers while waiting for an alarm is working during such periods of inactivity. These employees have been "engaged to wait."

On-Call Time: An employee who is required to remain on call on the employer's premises is working while "on call." An employee who is required to remain on call at home, or who is allowed to leave a message where he/she can be reached, is not working (in most cases) while on call. Additional constraints on the employee's freedom could require this time to be compensated.

Rest and Meal Periods: Rest periods of short duration, usually 20 minutes or less, are common in industry (and promote the efficiency of the employee) and are customarily paid for as working time. These short periods must be counted as hours worked. Unauthorized extensions of authorized work breaks need not be counted as hours worked when the employer has expressly and unambiguously communicated to the employee that the authorized break may only last for a specific length of time, that any extension of the break is contrary to the employer's rules, and any extension of the break will be punished. Bona fide meal periods (typically 30 minutes or more) generally need not be compensated as work time. The employee must be completely

relieved from duty for the purpose of eating regular meals. The employee is not relieved if he/she is required to perform any duties, whether active or inactive, while eating.

Sleeping Time and Certain Other Activities: An employee who is required to be on duty for less than 24 hours is working even though he/she is permitted to sleep or engage in other personal activities when not busy. An employee required to be on duty for 24 hours or more may agree with the employer to exclude from hours worked bona fide regularly scheduled sleeping periods of not more than 8 hours, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. No reduction is permitted unless at least 5 hours of sleep is taken.

Lectures, Meetings and Training Programs: Attendance at lectures, meetings, training programs and similar activities need not be counted as working time only if four criteria are met, namely: it is outside normal hours, it is voluntary, not job related, and no other work is concurrently performed. (Required attendance at training meetings is paid time.)

Travel Time: The principles, which apply in determining whether time spent in travel is compensable time depends upon the kind of travel involved.

Home To Work Travel: An employee who travels from home before the regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel, which is not work time.

Home to Work on a Special One-Day Assignment in Another City: An employee who regularly works at a fixed location in one city is given a special one-day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that the employer may deduct/not count that time the employee would normally spend commuting to the regular work site.

Travel That is All in the Day's Work: Time spent by an employee in travel as part of his/her principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.

Travel Away from Home Community: Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly work time when it cuts across the employee's workday. The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days. As an enforcement policy the Division will not consider as work time that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile " (U.S. Department of Labor Website).

Problem areas supervisors should watch for nonexempt employees includes:

- Taking work home, using laptop computers at home.
- Calling employees at home to ask work related questions
- Nonexempt employees checking work related email from home

- Not canceling the automatic lunch deduction in TimeCentre when a nonexempt employee works through lunch.
- Not paying employees for travel time correctly
- Not treating business meals or working lunches as work time
- Make sure there are appropriate records for time reporting edits to justify the reasons for the edits and who made them.

Reference Material:

BLR FLSA Wage and Hour Self-Audit Guide, 2004

“What Every Employer Needs to Know About The FLSA and Its Updated Exempt Status Regulations”, Seyfarth & Shaw, 2004.

The USA DOL Fair Pay website <http://www.dol.gov/esa/regs/compliance/whd/fairpay/main.htm>

The USA DOL Toll Free Help Line 1-866-487-2365

Fair Labor Standards Handbook for States and Local Governments, Thompson Publishing, www.thompson.com

1. Documenting Job Content by Thomas J. Hackett, CCP,CPB, Aon Compensation Consulting, 2001.
2. College and University Professional Association for Human Resources Website (For members only) DOL Compensation Compliance Library www.cupa.org
3. Overtime Revisited: The DOL Final Regulations: What You Need To Know To Comply, Julie K Athey, 2004.