

# Complying with the Fair Labor Standards Act - Part 1

By Lesley Sifers, Tax Favored Benefits, Inc.

The Fair Labor Standards Act (FLSA) is one of the oldest pieces of labor law enacted in the United States. In 1938, after much labor union activism to attain a 40-hour workweek, the FLSA was passed. The Wage & Hour Division of the Department of Labor (DOL) enforces the FLSA.

The Act has been amended, expanded and restricted many times. Even so, the majority of employers are covered by these regulations although there are some limited exceptions – notably, agriculture related concerns get a few breaks. Even if your firm does not have to comply with the FLSA, it is prudent to have some understanding of the regulations and how they work. And, yes, the devil will be in the details.

On the face of it, the FLSA is pretty straightforward. The Act addresses

- Payment of the Minimum Wage
- Child Labor
- Overtime Pay
- Recordkeeping (What a surprise!)

Most employees think there are laws about many other elements of a job. However, the Act DOES NOT address:

- Pay for Time not Worked (vacations, holidays, sick pay)
- Meal periods, rest breaks, maximum hours of work
- Time off for holidays or vacations
- Premium Pay for Working on Holidays or Weekends
- Pay Increases or Fringe Benefits
- Frequency of Pay or Immediate Payment of Final Wages
- Pay Stubs or “W-2” Forms

Here’s the rub, STATE laws often DO address issues such as meal periods, rest breaks, payroll frequency and payment of final wages. Although you may not have to comply with some of the FLSA requirements, you almost certainly will have to observe STATE laws. For example, Nebraska is one of only a few states with a statute concerning lunch periods. The law applies to any “assembling plant, workshop, or mechanical establishment” employing one or more persons. Under Nebraska law, such an employer must allow a thirty minute lunch break between the hours of 12:00 Noon and 1:00 P.M. unless the concern has 24-hour operations in which case, “Never mind.”

In this brief article it is not possible to discuss the entire Act in detail so I will focus on one area that seems to cause the most confusion and misconception – the payment of overtime. The Act requires overtime pay (1-1/2 times the hourly rate) for hours in excess of 40 in a pay week. (For certain agriculture related jobs, the cut-off can be 45 hours.) Seems pretty straightforward until you get into the details.

Under the FLSA, there are two categories of work - “exempt” and “non-exempt.” Some employees may be “exempt” from the overtime requirement based on the nature of the work performed. There are certain tests for “Executive”, “Administrative” and “Professional” positions. Keep in mind, however, that the DOL does not care about titles. You can call someone a “manager” but overtime status is determined by job content. The level of responsibility, authority, and autonomy in the position are determining factors. For example, a

supervisor would fall under the “Executive” exemption if they supervise two or more people, have the authority to hire, discipline or discharge workers (or have “significant” influence over such decisions) and spends 80% of his/her time in supervisory functions. On the other hand, a “working” supervisor who spends a lot of time doing the same work as those being “supervised” may not be “exempt.” The first step is to identify the overtime status of the positions in your company.

A common misconception is that, by paying a straight salary, overtime pay is not required. How a person is paid does not apply – as discussed, it’s job content that matters. When “exempt” employees are paid a straight salary, you are guaranteeing to pay that amount each pay period regardless of hours worked. Generally speaking, you cannot dock pay for absence or tardiness. (There are some exceptions related to sick leave policies and disciplinary actions.)

You must still pay overtime to a “non-exempt”, salaried employee if they work over 40 hours in the pay week. For example, your pay periods are bi-weekly. A non-exempt clerical employee works 38 hours in one week and 45 hours in the following week. The employee should receive 5 hours of overtime pay. However, you are allowed to combine the total hours worked in the pay period and divide that into the salary amount to determine an hourly base wage. Overtime can then be based on that hourly rate – as long as it is not less than minimum wage. Many employers do not use this method because it’s more trouble than it’s worth. In my opinion, it’s easier and cleaner to pay non-exempt employees an hourly rate and keep records of hours worked.

This article will be continued in the next issue. Part II will address other overtime pay issues, recordkeeping, and the consequences of non-compliance. If you have specific questions about the FLSA, or, if you would like checklists to evaluate “exempt” and “non-exempt” positions, please contact the Association.

## Complying with the Fair Labor Standards Act – Part II

**By Lesley Sifers, Tax Favored Benefits, Inc.**

You must pay overtime for all hours worked over 40 in a “workweek.” Under the FLSA, a workweek is a period of 168 hours during seven consecutive 24-hour periods. The manner and frequency of pay does not change the overtime requirement. For example, if you pay bi-weekly, it doesn’t mean that overtime begins after 80 hours in a pay period. If employees are paid an hourly rate, overtime is 1-1/2 times that rate. That one is pretty easy. It gets more complex if you pay on a salary basis. Computing the overtime pay rate is one of those devilish details that can trip you up.

First, if the salary is not paid on a weekly basis, you must determine weekly pay to properly compute the base and overtime rate. For example, if you pay semi-monthly, the salary for each pay period is multiplied by 24 and divided by 52 to get a weekly rate. For monthly pay periods, multiply by 12 and divide by 52.

Second, when an employee’s hours normally vary each week, the overtime rate will change depending upon actual hours worked. For example, you agree to pay \$500 a week for whatever hours are worked. An employee works 50 hours so the base rate is \$500 divided by 50 hours (\$10.00/hour). Overtime pay is \$5.00 for each hour over 40 or another \$50 for the week. The next week, the employee works 45 hours so the base rate is \$11.11 with overtime pay of \$27.80. The base rate cannot be less than minimum wage. If you paid an employee \$250 a week and they worked 50 hours, you cannot use \$5.00 as a base rate. You must use minimum wage instead.

Many employers believe they don’t have to pay for “unauthorized” overtime work. The regulations state that overtime pay is for any hours the employee is “suffered or permitted” to work in excess of 40. An employee

who stays late to finish a project without being asked is still eligible for overtime pay. The machinist who clocks in 30 minutes early may be due overtime pay even if he spends the time reading the morning paper at his bench. The secretary who prefers to eat lunch at her desk is working if she sometimes answers the phone and those lunch hours could add up to overtime pay.

Another very common mistake is to include hours paid but not worked when computing overtime hours. To illustrate, your workweek is from 12:01 a.m. Sunday to Midnight on Saturday. An employee takes a paid vacation day on Monday, works 8 hours daily from Tuesday through Friday and 4 hours on Saturday. The employee should be paid 44 hours at base rate. No overtime is due for Saturday. The employee actually worked 36 hours – vacation pay was for time not worked.

Some employees mistakenly believe they can trade extra time worked for future paid time off. Compensatory time off, referred to as “comp time,” is not legal for employers in private industry. Only public employers and certain non-profits are allowed to offer comp time. Employees of private companies cannot waive overtime payment. You must pay overtime even when an employee would prefer to take time off instead.

Most recordkeeping requirements under the FLSA are satisfied in the normal course of business. If you use a good payroll service, their reports should satisfy the Department of Labor in an investigation. You will probably want to keep your payroll records for a number of years even though the DOL usually does not go back more than three years.

You are required to keep records of hours worked by non-exempt employees. These do not have to be kept in any particular form. You can use a time clock and timecards, sign-in/sign-out sheets, a self-reporting system or you can assign someone to keep track of everyone’s hours – not a job I would want.

Be careful when figuring hours worked. The general rule is that you must figure time in the smallest increment that you would pay. For example, if you pay by the quarter hour, a worker who punches in at 7:07 is considered to have started at 7:00. A punch-in at 7:08 is considered 7:15. Keep this in mind for overtime and docking. And make sure employees understand and abide by any rules for timekeeping. An employee once explained to me how he made extra money by watching the time clock. If he came in 8 minutes early and left 8 minutes late he was credited with an extra 30 minutes a day. At \$10 an hour (\$15 overtime rate) the 2-1/2 hours of overtime a week was worth \$37.50. That’s \$1,950 a year – not bad for 16 minutes a day.

The Wage & Hour Division of the Department of Labor enforces the FLSA. The majority of investigations are prompted by employee complaints so be sure your employees understand how you handle timekeeping, overtime and so forth. Penalties for violations are stiff and can include paying back pay to current and former employees as far back as three years.

This article has only briefly covered some of the complexities of the FLSA. If you have specific questions or would like more information, please contact the Association office.