

HR COMPLIANCE OVERVIEW



Avoiding Common FLSA Overtime Mistakes

The federal Fair Labor Standards Act (FLSA) requires employers to pay nonexempt employees with overtime pay for every hour they work over 40 during a workweek. Overtime pay must be paid at a rate of one and one-half the employee's regular rate of pay.

An employee's regular rate of pay is the average compensation an employee receives for every hour the employee worked during a workweek. To calculate an employee's regular wage rate, the employer must divide the employee's total wages for a workweek by the number of hours the employee actually worked during that workweek.

Employers may not average the hours an employee works during one workweek with the hours the employee works during other weeks. An employee's total wages may be determined on a piece-rate, salary, commission or some other basis.

LINKS AND RESOURCES

- DOL Wage and Hour Division [website](#)
- Fair Labor Standards Act [advisor](#)
- Overtime pay requirements [fact sheet](#)

Overtime Pay

- Overtime pay is one and one-half times the employee's regular wage rate for any time worked over 40 hours during a workweek.
- Overtime payment exemptions are very specific and all requirements must be satisfied.
- Compensable time includes any time an employee is required or permitted to work, as well as any time the employee is on duty or at a prescribed workplace.

Common Mistakes

- ❌ Misclassifying employees
- ❌ Miscalculating total wages
- ❌ Failing to account for all work hours
- ❌ Refusing to pay for unauthorized overtime work

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On April 23, 2024, the U.S. Department of Labor (DOL) announced a final rule to amend current requirements employees in white-collar occupations must satisfy to qualify for an overtime exemption under the FLSA. The [final rule](#) increased the standard salary level, starting July 1, 2024, from:

- \$684 to \$844 per week (\$35,568 to \$43,888 per year); and
- \$107,432 to \$132,964 per year for highly compensated employees.

On Jan. 1, 2025, the standard salary level was set to increase from:

- \$844 to \$1,128 per week (\$43,888 to \$58,656 per year); and
- \$132,964 to \$151,164 per year for highly compensated employees.

The DOL's final rule also included mechanisms allowing the agency to automatically update the white-collar salary level thresholds without having to rely on the rulemaking process starting on July 1, 2027, and every three years thereafter. However, on Nov. 15, 2024, the U.S. District Court for the Eastern District of Texas [vacated](#) the DOL's final rule. This ruling sets aside the final rule's increases to the standard salary level nationwide, returning the salary threshold to the pre-July 2024 threshold. On Nov. 26, 2024, the DOL filed a notice of appeal seeking to overturn the District Court's ruling.

Compensable Time

To comply with FLSA regulations, employers must keep track of the number of compensable hours employees work during a workweek.

Compensable time (or hours worked) ordinarily includes all time during which employees are required to be on the employer's premises, on duty or at a prescribed workplace. "Workday" generally means the period between the time on any particular day when employees commence their "principal activity" and the time on that day when they cease that principal activity or activities. For this reason, an employee's workday may be longer than his or her scheduled shift, hours, tour of duty or production line times.

Employers should consider the following circumstances when calculating an employee's amount of accrued compensable time:

- ☒ **Waiting Time:** Whether waiting time is "hours worked" under the FLSA depends upon the particular circumstances. Generally, if employees engaged to wait are working during these periods of inactivity, they must be paid for this time. Examples of waiting time that would be considered hours worked would be the time spent by a line worker waiting for a machine to be repaired or a fireman who reads a book while waiting for an alarm.
- ☒ **On-call Time:** Any time employees are required to remain on call at the employer's premises likely qualifies as working time. However, time employees are required to remain on call at home often will not qualify as working time.
- ☒ **Rest and Meal Periods:** Short rest periods (usually 20 minutes or less) are common in certain industries and must be counted as hours worked. Unauthorized extensions of authorized work breaks do not need to be counted as compensable time when the employer has communicated to employees 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. Meal periods (typically 30 minutes or more) generally are not compensated as work time, but only if employees are completely relieved from their work responsibilities for the purpose of eating a meal. Employees

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are not relieved of their responsibilities if they are required to perform any duties—whether active or inactive—while eating.

- ✓ **Sleeping Time and Certain Other Activities:** Employees who are required to be on duty for less than 24 hours are working even if they are permitted to sleep or engage in other personal activities when not busy. Employees required to be on duty for 24 hours or more may agree with the employer to exclude regularly scheduled sleeping periods of not more than eight hours from their compensable time. This arrangement is valid only when employers provide adequate sleeping facilities and the employees can usually get an uninterrupted night's sleep of at least five hours.
- ✓ **Lectures, Meetings and Training Programs:** An employee's attendance to lectures, meetings, training programs and similar activities need not be counted as compensable time if the activity is outside normal hours, voluntary, not related to the employee's job and the employee does not perform any concurrent work.
- ✓ **Travel Time:** Daily home to work travel is not work time; however, travel from jobsite to jobsite during the workday must be counted as hours worked. Travel from home to work on a special one-day assignment in another city (less the time the employee would normally spend commuting) or travel away from the employee's home community overnight is considered compensable time and must be included in the employee's accrued number of hours worked.

Common Overtime Mistakes

<i>Classifying non-exempt employees as exempt:</i>	Even when employers understand the law regarding exemptions, they still may misclassify an employee as exempt and wrongfully withhold overtime pay due to that employee.
<i>Making employees work off the clock:</i>	Employers may tell workers to clock out and finish their work, work before their shift begins or attend a pre-shift meeting. Working off the clock, working before the shift ends and attending work meetings may be considered compensable time.
<i>Refusing to pay unauthorized overtime work:</i>	An employer must pay for overtime work if it knows or has reason to know that an employee is working overtime, regardless of whether the employer pre-approved the overtime work.
<i>Paying an employee "straight time" rates for overtime work:</i>	The FLSA requires that overtime be paid at time and one-half, not straight time. Therefore, if an employee makes \$8 per hour, he or she should get paid \$12 per hour for hours worked over 40 in a workweek. Many employers simply continue to pay a straight time rate (\$8 in the example) for any hours over 40 worked by their employees in a workweek.
<i>Automatic deductions for lunch, break and other rest periods:</i>	Some employers automatically deduct break times from their employees' timecards to avoid the hassle of maintaining an accurate record of the beginning and ending time of employee breaks, regardless of whether their employees actually took the break, worked early, stayed late or worked through lunch. This practice is dangerous, and the FLSA clearly places the burden on employers to account for all hours of employee compensable time.
<i>Mistakenly offering compensatory time off:</i>	The FLSA prohibits employers from providing compensatory time off (comp time) at some later point for employees who work more than 40 hours in a workweek. For example, an employee that works 55 hours in a workweek may not receive time off in some other week to offset the extra 15 hours of work. Employers must pay an employee's overtime wages for

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the week in which the overtime work took place. However, compensatory time off may be allowed for certain government workers and under state or local laws.

Failing to include all types of payments when calculating an employee's total wages:

Employers should not fail to include productivity bonuses, shift premium payments and other employee payments when calculating an employee's total wages. A correct calculation of total wages is indispensable to determine an employee's regular and overtime wage rates. For example, if an employee makes \$8 per hour and gets a \$100 productivity bonus per week, the compensation must include the additional productivity bonus in calculating overtime due. As a result, an employee's overtime rate can be higher than his or her contractual rate of pay.

Allowing employees to "waive" their right to overtime:

Another common mistake, particularly among small businesses, is allowing employees to waive their right to overtime pay. An employer must pay time and one-half for all overtime hours worked, even if employees request extra hours and agree to only receive regular pay for those hours. Regardless of whether this is done with the employer or employee's good intentions, any type of deal that results in the nonpayment of overtime is void and will not be a defense if the employee later sues the employer for unpaid overtime wages.

Misclassifying employees as independent contractors:

The FLSA's overtime and minimum wage requirements apply only to employees, not independent contractors. Therefore, employers may want to avoid paying overtime by classifying their workers as "independent contractors." The determination of whether an individual is an employee or independent contractor depends on the facts and circumstances of the situation, not the label used by the employer, and misclassification exposes employers to expensive fines and litigation.

The U.S. Supreme Court has repeatedly stated that there is no one test for determining whether an individual qualifies as an independent contractor. However, some factors commonly used to make this determination include:

- The extent to which the services rendered are an integral part of the principal's business;
- The permanency of the relationship;
- The amount of the alleged contractor's investment in facilities and equipment;
- The nature and degree of control by the principal;
- The alleged contractor's opportunities for profit and loss;
- The amount of initiative, judgment or foresight in open market competition with others required for the success of the claimed contractor; and
- The degree of independent business organization and operation.

If an individual is determined to be an employee after an employer classifies them as an independent contractor, the employer may be required to pay a significant amount of back wages to the individual.

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Compliance Strategies

One easy way to ensure compliance with FLSA requirements is to make sure all personnel, employees and supervisors alike, understand the FLSA's rights and protections. The DOL FLSA poster provides a brief summary of FLSA provisions and can serve as a reminder of employer obligations.

All employers covered by the FLSA must display this official poster. The poster must be displayed in a conspicuous place, in all of the employer's establishments, in a way that makes the poster readily available for reading by all employees.

A downloadable version of the poster is available at <https://www.dol.gov/general/topics/posters>.

Preventing Violations

Establishing adequate recordkeeping systems and implementing sensible time-tracking policies are vital to prevent FLSA violations. To ensure that systems and procedures are functioning as planned, employers can conduct periodic, internal audits. These audits should review:

- Work hour records;
- Job descriptions;
- Payroll records; and
- Personnel training curriculum.

The audits should look specifically at each employee's employment relationship, exemption status, regular rate calculation, overtime hours and whether managers, supervisors and employees are being adequately trained.

Preventing Litigation

If a problem surfaces during an audit (or through any other means), employers may be able to avoid legal actions by fixing legitimate issues promptly. After solving the problem, employers should determine the cause and take any steps needed to ensure, to the best of their ability, that the problem doesn't happen again. Solving the problem may require paying back wages, adjusting a job description or reclassifying employees altogether.

Finally, employers should evaluate how best communicating the problem and its solution to any affected individuals.

More Information

Please contact Franconia Insurance & Financial Services for more information on the Fair Labor Standards Act.