

The Fair Labor Standards Act

“21 Things You Should Know”



June 2016

The Fair Labor Standards Act - “21 Things You Should Know”

All Employees

1. The federal minimum wage is \$7.25 per hour. 29 U.S.C. § 206(a). However, the Arkansas minimum wage has been increased as follows:

“Beginning January 1, 2015, every employer shall pay each of his or her employees wages at the rate of not less than seven dollars and fifty cents (\$7.50) per hour, beginning January 1, 2016 the rate of not less than eight dollars (\$8.00) per hour and beginning January 1, 2017 the rate of not less than eight dollars and fifty cents (\$8.50) per hour except as otherwise provided in this subchapter.” Ark. Code Ann. § 11-4-210. Since the Arkansas rate is higher, it is applicable to municipal employees in place of the federal rate.

2. Overtime or compensatory time must be paid at time and one-half of the employee’s regularly hourly rate. 29 U.S.C.A. § 207(a)(1) . Even if the employee receives a salary, overtime or compensatory time must be granted unless the employee is exempt as explained below.

Employers cannot avoid paying overtime or compensatory time by averaging hours over several workweeks. The FLSA requires that each workweek stand alone. 29 C.F.R. 778.104. (But see chart below for information on uniformed employee shifts).

3. If an employee volunteers to substitute shifts with another employee after first obtaining the employer’s approval and works more than the maximum hours for a given work period as a result of the switch, his employer is not responsible for paying the additional overtime. The regulations state that this may occur “only if employees’ decisions to substitute for one another are made freely and without coercion, direct or implied. An employer may suggest that an employee substitute or ‘trade time’ with another employee working in the same capacity during regularly scheduled hours, but each employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision.”

Employers are not required to maintain a record of time traded and there is no specific period of time in which the shift must be paid back. Therefore, the employee’s paycheck for that period would not reflect the switch in additional hours or overtime pay. 29 C.F.R. 553.31.

4. Employees do not have to be paid for “on-call” time unless their activities are “overly restricted.” On-call time should not be counted as compensable unless the employee is required to remain at or near the employer’s premises or otherwise cannot use his or her time freely. 29 C.F.R. § 785.17. Providing electronic pagers or cell phones to employees can solve many on-call time problems.

Exempt Employees

5. Elected municipal officials, their personal staffs, persons appointed by elected officials to serve on a policy making level, and legal advisors are considered exempt employees and are excluded from coverage under the Fair Labor Standards Act. 29 C.F.R. § 553.11.

6. Trainees and students are not employees within the meaning of the Fair Labor Standards Act if they meet all six criteria below:

- (1) The training, even though it includes actual operation of the facilities of the Federal activity, is similar to that given in a vocational school or other institution of learning;
- (2) The training is for the benefit of the individual;
- (3) The trainee does not displace regular employees, but is supervised by them;
- (4) The Federal activity which provides the training derives no immediate advantage from the activities of the trainee; on occasion its operations may actually be impeded;
- (5) The trainee is not necessarily entitled to a job with the Federal activity at the completion of the training period; and
- (6) The agency and the trainee understand that the trainee is not entitled to the payment of wages from the agency for the time spent in training.

5 C.F.R. § 551.104

7. Volunteers are not employees and an employee cannot volunteer to do the same work for which he is being paid. 29 C.F.R. §§ 553.100, 553.102.

8. Prisoners are generally not treated as employees under FLSA. *United States Department of Labor Field Operations Handbook 10b27*, http://www.dol.gov/whd/FOH/FOH_ch10.pdf

9. Executive, administrative, and professional employees are exempt from both minimum wage and overtime provisions if they meet all the requirements specified for their job category. These are not the only exemptions, but are the most typical in Arkansas cities and towns.

Note: the mere fact that an employee is being paid a salary is not sufficient by itself to exempt him or her from overtime requirements.

a. **Executive employees** - this exemption requires three requirements before it can be applied:

- (1) The employee make at least \$913 a week (\$47,476 per year);
- (2) At least 90% of the salary level (\$822 per week) must be paid on a “salary” basis, up to 10% (\$91 / week) may be satisfied with nondiscretionary bonuses or incentive payments; and
- (3) The employee’s “primary duty” must be that of an exempt executive employee, as described in the statute (contained below).

Per 29 C.F.R. § 541.100(a) the primary executive duties are:

- “(2) The employee’s primary duty must be managing the enterprise in which the employee is employed or managing a customarily recognized department or subdivision of the enterprise;
- (3) The employee must customarily and regularly direct the work of two or more other full-time employees or their equivalent; and
- (4) The employee must have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.”

b. Administrative employee - this exemption requires three requirements before it can be applied:

- (1) The employee make at least \$913 a week (\$47,476 per year);
- (2) At least 90% of the salary level (\$822 per week) must be paid on a “salary” or fee basis, up to 10% (\$91 / week) may be satisfied with nondiscretionary bonuses or incentive payments; and
- (3) The employee’s “primary duty” must be that of an exempt administrative employee, as described in the statute (contained below).

Per 29 C.F.R. § 541.200(a) the primary administrative duties are:

- “2. Whose primary duty is 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
- 3. Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.”

c. Professional employee - this exemption requires three requirements before it can be applied:

- (1) The employee make at least \$913 a week (\$47,476 per year) (excluding doctors, lawyers, or teachers);
- (2) At least 90% of the salary level (\$822 per week) must be paid on a “salary” or fee basis, up to 10% (\$91 / week) may be satisfied with nondiscretionary bonuses or incentive payments(excluding doctors, lawyers, or teachers); and
- (3) The employee’s “primary duty” must be that of an exempt professional employee, as described in the statute (contained below).

Per 29 C.F.R. § 541.300(a) the primary professional duties are:

- “2. Whose primary duty is the performance of work:

- (i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or
- (ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.”

d. **Computer employee** - this exemption requires three requirements before it can be applied:

- (1) The employee make at least \$913 a week (\$47,476 per year), or at least \$27.63 per hour;
- (2) At least 90% of the salary level (\$822 per week) must be paid on a “salary” or fee basis unless the employee is paid on an hourly basis and receives at least \$27.63 per hour, up to 10% (\$91 / week) may be satisfied with nondiscretionary bonuses or incentive payments; and
- (3) The employee’s “primary duty” must be that of an exempt computer employee, as described in the statute (contained below).

Per 29 C.F.R. § 541.400 the primary computer employee duties are:

“In addition, under either section 13(a)(1) or section 13(a)(17) of the Act, the exemptions apply only to computer employees whose primary duty consists of:

- (1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
- (2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
- (3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
- (4) A combination of the aforementioned duties, the performance of which requires the same level of skills.”

10. Employees of amusement or recreational establishments are exempt from minimum wage and overtime if one of the following requirements is satisfied:

- (a) The establishment must not operate for more than seven months in any calendar year.
- (b) During the preceding calendar year, the establishment’s average receipts for any six months of that year must have been equal to or less than one-third of its average receipts for the other six months of that year.

29 C.F.R. § 779.385

Uniformed Employees-Police and Fire

11. Law enforcement officers in cities and towns with fewer than five (5) law enforcement officers, including the chief or marshal, are exempt from the overtime provisions. 29 U.S.C. § 213(b)(20); 29 C.F.R. §§ 553.200, 553.211. To count as a law enforcement officer, the officer must be someone: (1) who is a uniformed or plainclothed member of a body of officers and subordinates who are legally authorized to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes, (2) who has the power to arrest, and (3) who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics. 29 C.F.R. § 553.211.

Volunteers are not considered “employees” for this purpose however. No distinction is made between part-time and full-time employees.

This means that if you have four (4) or fewer than four (4) law enforcement officers (not including radio operators), the city does not have to pay overtime. You must be sure your officers receive a minimum wage for all hours worked in a work period.

12. Cities and towns with fewer than five (5) paid firefighters, including the chief (if paid), are exempt from paying overtime to those employees who meet the following definition: “Employee in fire protection activities” means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who--

- (1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and
- (2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

29 U.S.C.A. § 203(y).

You must be sure your paid firefighters (four or fewer) receive minimum wage for all hours on duty during the work period. 29 U.S.C. § 213(b)(20); 29 C.F.R. § 210.

13. Volunteer firefighters and auxiliary police officers are “volunteers” and are not treated as employees under the 1985 Amendments to the Fair Labor Standards Act. 29 C.F.R. § 553.104(b).

14. The FLSA provides a partial overtime exemption for law enforcement officers and firefighters who work a “work period” established by the city of no fewer than seven days and no more than twenty-eight days. The city can establish separate work periods for the police department and the fire department. If the city fails to establish a work period, 207(k) does not

apply and a fire or police employee working over forty hours will accrue overtime compensation. 29 C.F.R. § 553.230.

The Secretary of Labor has set maximum hour standards based on a 28-day work period for both fire department and law enforcement personnel, determining that law enforcement employees who work over 171 hours within a 28-day work period must be compensated for those hours in excess of 171 and that fire department employees working in excess of 212 hours within a 28-day period must also be compensated. These 28-day standards can be used as ratios to determine maximum hours for other approved work periods. See the following chart.

Maximum Hour Standards for work periods of 7 to 28 days – section 7(k). 29 C.F.R. § 552.230.

Maximum Hour Standards for work periods of 7 to 28 days – section 7(k). 29 C.F.R. § 552.230.		
Work period (days)	Maximum hours standards	
	Fire protection	Law enforcement
28	212	171
27	204	165
26	197	159
25	189	153
24	182	147
23	174	141
22	167	134
21	159	128
20	151	122
19	144	116
18	136	110
17	129	104
16	121	98
15	114	92
14	106	86
13	98	79
12	91	73
11	83	67
10	76	61
9	68	55
8	61	49
7	53	43

When determining compensatory time for either law enforcement personnel or firefighters who miss a shift due to illness, vacation, personal leave, or any other reason, hours missed will not count as hours worked and are not compensable for overtime purposes. 29 C.F.R. §§ 553.201, 553.230.

15. Civilian radio operators, clerks, secretaries, and janitors of police and fire departments are on a 40-hour work week with time and one-half for all hours over 40 hours per week. They do not qualify for the law enforcement officers or firefighters' "work period" hours exemption. 29 C.F.R. §§ 553.210, 553.211.

16. The city as employer has the option of paying overtime or of giving comp time off. The employee must understand that the city has a policy of compensatory time off. Compensatory time is accrued at 1 ½ hours for each hour worked. Public safety employees - police and fire – and emergency response employees can accrue a maximum of 480 hours of comp time or 320 hours worked. After an employee has accrued maximum compensatory time, the employee must be paid in cash for overtime worked.

An employee shall be permitted to use accrued comp time within a reasonable period after requesting it if to do so would not disrupt the operations of the employer. Payment of accrued comp time upon termination of employment shall be calculated at the average regular rate of pay for the final three years of employment or the final regular rate received by the employee, whichever is higher. 29 C.F.R. § 553.21.

If the employer pays cash wages for overtime hours rather than in compensatory time, the wages must be paid at one and one-half times the employee's regular rate of pay. 29 C.F.R. § 553.232.

The United States Supreme Court has held that a public employer may require its employees to use their accumulated compensatory time. *Christensen v. Harris County*, 529 U.S. 576, 120 S.Ct. 1655 (2000). If employees do not use accumulated compensatory time, the employer must pay cash compensation in some circumstances. In order to avoid paying for accrued compensatory time, Harris County, Tex., enacted a policy requiring its employees to schedule time off in order to reduce the amount of accrued compensatory time.

The Court described Harris County's policy as follows: "The employees' supervisor sets a maximum number of compensatory hours that may be accumulated. When an employee's stock of hours approaches that maximum, the employee is advised of the maximum and is asked to take steps to reduce accumulated compensatory time. If the employee does not do so voluntarily, a supervisor may order the employee to use his compensatory time at specified times." The Court held that, although § 207(o)(5) limits an employer's ability to prohibit the use of compensatory time when requested, that does not restrict the employer's ability to require employees to use compensatory time.

Non-Uniformed Employees

17. All non-uniformed employees are entitled to overtime or compensatory time off after 40

hours per week worked unless they are otherwise exempt (see, for example the categories discussed in No. 8 above). 29 C.F.R. § 778.101.

18. There is no FLSA limit on the number of hours per day worked (other than child labor). 29 C.F.R. § 778.102.

19. A work week under the FLSA is defined as seven consecutive 24-hour periods (although this may be altered for police and firefighters as discussed above). Note that this may not be the same as the city's "pay period." The city can determine the day and the time of day that the work week begins. Once the beginning time of an employee's workweek is established, it remains fixed regardless of the schedule of hours worked by him. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the Act. 29 C.F.R. § 778.105. We recommend that the city work week for water, sewer, street, sanitation, etc., employees begin at 5 p.m. on Fridays.

The city can schedule the hours worked within the work week to limit or prevent overtime. If an emergency occurs over the weekend and some employees must work 16 hours Saturday and 16 hours Sunday, then the city can (if their services are not absolutely needed) tell those employees to take off the rest of the week after working one eight hour shift each. This way each employee is limited to 40 hours per week for the week beginning 5 p.m. on Friday.

20. Only hours worked count in calculating overtime. Pay for holidays, vacations, sick time, jury duty, etc., do not count as hours worked. 29 C.F.R. § 778.102.

21. If an employee works more than 40 hours per week, the city could give him compensatory time off at the rate of 1 ½ hours for each hour worked over 40 hours per week. The compensatory time belongs to the employee and can accrue to a maximum of 240 hours (160 hours actual work).

The employee must be allowed to use his comp time when he desires unless it would unduly disrupt the city's operations to do so at that particular time. For a discussion of requiring the employee to take accumulated compensatory time, see point 16 above.

In case of termination of employment, an employee shall be paid for all accrued comp time at his then salary or the average rate of pay for the final three years of employment, whichever is greater.

29 C.F.R. §§ 553.21, 553.25.

(Prepared by Arkansas Municipal League Staff 6/2016)

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