

Legal Q & A
Texas Town & City
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Q. What is the Fair Labor Standards Act?

The Fair Labor Standards Act (FLSA) generally provides that a covered, non-exempt employee must be compensated at a rate of one-and-one-half times his or her regular hourly rate of pay for all hours worked over 40 in a standard seven-day work period. It also provides for exemptions to this general rule.

The majority of employees are generally covered by the FLSA (non-exempt) and, thus, entitled to overtime compensation if the employee works more than 40 hours a week. However, not all employees of a city are affected by the FLSA. Certain employees are not covered by the Act, and some are covered but exempted by a specific provision of the FLSA. Employees that are not covered by the Act include elected officials and their personal staffs, legal advisors, and bona fide volunteers. Exempt employees (those who are not entitled to overtime pay) generally fall into three categories: executive, professional, and administrative. These exemptions will be discussed below.

Q. Is my city required to comply with the FLSA?

Yes. Section 3(s)(1)(C) provides that the FLSA covers all public employees of a state, a political subdivision, or an interstate government agency.

Q. What are the new rules regarding overtime exemptions?

The U.S. Department of Labor (DOL) issued new tests, effective August 2004, for determining when an employee is entitled to overtime pay. The new tests revise the salary tests and the definitions of the executive, professional, and administrative exemptions to the overtime pay regulations.

The DOL changed the “**standard**” salary test to provide that any employee who earns less than \$455 a week (\$23,660 a year) is automatically entitled to overtime pay, regardless of the employee’s position. For example, an assistant city manager who earns less than \$23,660 a year and works over 40 hours a week is eligible for overtime pay, regardless of her “management” status. On the other hand, an employee who earns more than \$100,000 a year is exempt from overtime compensation, regardless of job classification, under the “**highly compensated employee**” test.

The three primary exemptions for overtime pay are executive, professional, and administrative. For an employee to be considered exempt under the **executive employee** test, the employee must: (a) have as a primary duty the management of the enterprise or

of a recognized department or subdivision; (b) customarily and regularly direct the work of two or more employees; (c) have authority to hire or fire other employees (or the employee's recommendations as to hiring, firing, promotion, or other change of status of other employees are given particular weight); and (d) be compensated on a salary basis at a rate not less than \$455 a week.

To qualify under the **professional employee** exemption, an employee must have as a primary duty the performance of office or non-manual work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience.

Finally, under the revised laws, an employee is exempt under the **administrative employee** test if the employee: (a) is responsible for 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; (b) exercises discretion and independent judgment with respect to matters of significance within the organization; and (c) is compensated on a salary or fee basis at a rate no less than \$455 a week.

Note: the new rules may not apply to employees who perform public safety-related work, such as fire fighters and police officers (see next question).

Q. Are there special rules that apply to police officers and fire fighters?

Yes. Section 207(k) of the FLSA provides that employees engaged in fire protection or law enforcement may be paid overtime on a "work period" basis. The employer is responsible for setting the "work period." A "work period" may be from seven consecutive days to 28 consecutive days in length. For example, fire protection personnel are due overtime under such a plan after 212 hours worked during a 28-day period (53 hours in a seven-day work period), while law enforcement personnel must receive overtime after 171 hours worked during a 28-day period (43 hours in a seven-day work period).

Q. If a city has fewer than five employees in either the police or fire department, is the city required to pay overtime for employees in that department?

No. Section 213(b)(20) of the FLSA provides an overtime exemption for law enforcement or fire protection employees of a police or fire department that employs less than five employees in law enforcement or fire protection activities.

Q. Is a police chief considered exempt under the executive or administrative test?

If the duties and salary of a police chief, ranking police officer, or detective would meet the "standard" or "highly compensated employee" tests for executive or administrative

employees, then he or she could be considered exempt. The police chief is almost certain to qualify for one or the other exemption. Other ranking police officers and detectives may be exempt, depending on their job duties and responsibilities, and how closely they are supervised.

Q. If a public safety officer works 40 hours a week in the public safety capacity at one rate of pay and works 10 hours on the weekend driving a city bus at a different rate of pay, how is his or her overtime calculated?

The FLSA provides a formula to determine compensation for “dual employment.” Section 207(p)(2) of the FLSA provides a complicated test to determine overtime for dual employment that is only “sporadic or occasional.” In the above question, the dual employment is not sporadic or occasional, so it does not qualify for that test. Similarly, the employee is not on special detail doing law enforcement, fire protection, or related activities as defined in section 207(p)(1).

Thus, the employee may be paid overtime on the basis of a regular rate of pay calculated as the weighted average hourly rate for both the public safety and bus driving jobs (29 CFR §778.115). In the alternative, he may be paid overtime on the basis of an established policy of the employer agreed to by the employee, such as paying for the overtime on the basis of the work performed during the overtime hours (29 CFR §778.419). Remember that a “20 percent rule” applies to the use of the seven-to-28-day work period for law enforcement and firefighting personnel (29 USC §207(k)); that is, the time spent in non-public safety work cannot exceed 20 percent of the employee’s working time during the work period.

Because dual employment is complicated, city officials should contact TML or local counsel to discuss these issues.

Q. What employment law posters are required to be posted in the workplace?

Federal and state laws require employers to post certain notices regarding employee rights in the workplace. Required posters include, but are not limited to, the following: (1) federal minimum wage; (2) Family and Medical Leave Act; (3) Employee Polygraph Protection Act; (4) Occupational Safety and Health Act; (5) Equal Employment Opportunity Act; (6) Uniformed Services Employment and Reemployment Rights Act; (7) Fair Labor Standards Act; (8) Americans with Disabilities Act; (9) Texas Payday Law; and (10) Texas Workers Compensation Act.

Q. Where can I obtain the posters?

The U.S. Department of Labor and the Texas Workforce Commission maintains a website where employers may obtain required employment law posters. For federally-required employment law posters, go to: <http://www.dol.gov/osbp/sbrefa/poster/main.htm>. For state employment law posters, go to: <http://www.twc.state.tx.us/ui/lablaw/posters.html>.

