

FAIR LABOR STANDARDS ACT

The Federal Overtime Law

The Fair Labor Standards Act¹ (FLSA or the Act) is a federal law that establishes overtime pay, minimum wage, equal pay, recordkeeping, and child labor rules for many employees.² Of all the Act's provisions, the overtime provisions are by far the most important and relevant to cities.

The FLSA does not impose a cap on the hours that an employee can work each week, nor does it require breaks or vacations. However, it does require that a covered, non-exempt employee be compensated at a rate of one-and-one-half times her regular hourly rate of pay for all hours actually worked over forty in a standard seven-day work period.³ Paid time off for illness or vacation does not generally count towards the 40 hours.⁴ There is a vast body of law that addresses when and if incidental activities associated with employment must be compensated and counted towards the forty-hour workweek.

For many cities, the majority of hourly employees will be covered by the FLSA overtime provisions. (Although whether an employee is paid "hourly" or "salary" is not dispositive of whether he or she must be paid overtime). In addition, police officers and firefighters in departments with five or more employees will usually be covered.⁵ These employees are referred to as non-exempt employees. As such, they are entitled to overtime compensation. For example, a non-exempt water department worker who makes \$10.00 per hour must be paid \$15.00 per hour for those hours worked in excess of forty over the course of a workweek.⁶

In addition, the Department of Labor (DOL) revised 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, a department head who earns less than \$455 a week is eligible for overtime pay, regardless of his or her possible "management" status. On the other hand, an employee who earns more than \$100,000 a year is exempt from overtime pay, regardless of job classification, under the "highly compensated employee" test.

Some employees are "exempt" from the overtime requirements if their position is covered by one of the specific exemptions in the Act. Employees that are exempt from

¹ 29 U.S.C. § 201, *et seq.*

² The FLSA covers all public employees of a political subdivision of a state, including cities. 29 U.S.C. § 203.

³ 29 U.S.C. § 207(a).

⁴ 29 C.F.R. § 778.218(d). An exception to this, however, would be if the city employment policy permits credit for paid time off towards overtime pay. In such cases a city would be bound to include paid time off when counting overtime hours.

⁵ *See* 29 U.S.C. § 213(b)(20); 20 C.F.R. § 553.200.

⁶ The FLSA authorizes a city to provide compensatory time off in lieu of monetary overtime compensation, at a rate of not less than one-and-one-half hours of compensatory time for each hour of overtime worked, up to 240 hours in some cases. A city and the employee must come to an agreement regarding this prior to any performance of work. 29 U.S.C. § 207(o).

the Act include elected officials and their personal staff, legal advisors, and bona fide volunteers.⁷ Other exempt city employees generally fall into one of three categories: executive, professional, and administrative.⁸

To be considered exempt under the **executive employee** test, generally, 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.⁹

To qualify under the **professional employee** exemption, generally, 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.¹⁰

Finally, 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.¹¹

Of course, classifying an employee as non-exempt or exempt requires an in-depth understanding of the exceptions to these general rules. Each city should consult with local legal counsel to ensure all employees are properly classified to avoid liability.

⁷ 29 U.S.C. § 203.

⁸ 29 C.F.R. Part 541, *et seq.*

⁹ 29 C.F.R. §§ 541.100-106.

¹⁰ 29 C.F.R. §§ 541.300-304.

¹¹ 29 C.F.R. §§ 541.200-204.