

## **Fair Labor Standards Act**

### ***What is the Fair Labor Standards Act?***

The Fair Labor Standards Act (FLSA) generally provides for minimum wage for employees and that a covered, nonexempt 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.<sup>1</sup> It also provides for exemptions to this general rule.

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 Act. Employees that are not covered by the Act include elected officials and their personal staffs, legal advisors, and bona fide volunteers.<sup>2</sup> These exemptions will be discussed below.

### ***Is my city required to comply with the FLSA?***

Yes. Section 203(s)(1)(C) provides that the FLSA covers all public employees of a state, a political subdivision, or an interstate government agency.<sup>3</sup>

### ***What is the minimum wage?***

The current minimum wage is \$7.25 an hour.<sup>4</sup>

### ***Which employees are required to be paid overtime?***

All employers must pay overtime to all “nonexempt” employees if they work more than 40 hours in a seven-day work period. However, some employees are “exempt” and do not have to be paid overtime if they work over 40 hours a week. The exemptions are based on a salary test and the definitions of executive, professional, and administrative employees. An “exempt” employee is not required to be paid overtime, but is paid his salary regardless of the number of hours the employee works.

### ***How can the city differentiate between exempt and nonexempt employees?***

Most employees are “nonexempt” and must be paid overtime if they work more than 40 hours in a seven-day work week. The “standard” salary test provides 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. 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.

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<sup>1</sup> 29 U.S.C. § 201, *et seq.*

<sup>2</sup> *Id.* § 203(e).

<sup>3</sup> *Id.* § 203.

<sup>4</sup> *Id.* § 206.

The three primary exemptions for overtime pay are executive, professional, and administrative.<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup> The employee must also be compensated on a salary basis at a rate not less than \$455 a week.

Finally, an employee is exempt under the administrative employee test if the employee: (a) is responsible for the performance of office or nonmanual 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.<sup>8</sup>

Whether an employee is exempt is a fact question based on job duties. The city should consult with its city attorney and human resources professional to determine which city employees are exempt from overtime.

### ***How is overtime calculated?***

If overtime is paid, it must be not less than one-and-one-half times the regular rate of pay.<sup>9</sup> The regular rate of pay is the hourly pay of the employee, which must be greater than \$7.25 an hour, plus any other bonuses or pay the employee receives.<sup>10</sup>

### ***Do we have to pay overtime if an employee works more than eight hours in a day?***

No. Overtime is based on the number of hours worked in a seven-day workweek, not on the amount of hours worked in a single day.

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<sup>5</sup> *Id.* § 213(a)(1).

<sup>6</sup> *Id.* § 213; 29 C.F.R. § 541.100

<sup>7</sup> 29 U.S.C. § 213; 29 C.F.R. § 541.300.

<sup>8</sup> 29 U.S.C. § 213; 29 C.F.R. § 541.200.

<sup>9</sup> 29 U.S.C. § 207(a).

<sup>10</sup> *Id.* § 207(e).

***Do we have to pay overtime or double time if an employee works on a state or federal holiday?***

No. Employees must only be paid overtime, one-and-one-half times the regular rate of pay, if the employee is nonexempt and works more than 40 hours in a seven-day workweek. It is generally up to the city to decide whether to pay additional amounts if an employee works on a holiday.

***Does the city have to give employees a certain amount of sick, vacation, or other paid time off?***

No. Generally the city decides when and how much sick, vacation, and other paid leave to give. However, federal and state laws such as the Family Medical Leave Act, the Americans with Disabilities Act, and laws dealing with the military may require some unpaid time off. A couple of state laws also have some time off requirements. Section 431.005 of the Government Code states that an employee who is a member of the state military forces or the armed forces is entitled to a paid leave of absence of up to 15 working days for authorized training or duty.<sup>11</sup> Finally, police and fire employees must be given the same number of days off as other city employees.<sup>12</sup> Also, fire employees must also have September 11<sup>th</sup> listed as one of their holidays.<sup>13</sup>

***What is the difference between a part-time and a full-time employee?***

State and federal law generally do not determine what is a full-time or part-time employee, the city's own policy does. Federal law only gets involved if a nonexempt employee works over 40 hours in one week, at which time they must be paid overtime. Many times benefits can be affected by an employee's full-time or part-time status. If the city wonders at which point it must provide benefits, such as health benefits or retirement benefits to its employees, the city should review its personnel policies and contact its benefits providers to see what their requirements are. The Texas Municipal Retirement System can be reached at <http://www.tmr.org/>. The Texas Intergovernmental Employee Benefits Pool can be reached at <http://www.tmliebp.org/>.

***Can we pay our employees in compensatory time instead of overtime?***

Yes. City employees can be paid in compensatory time (paid time off) instead of overtime. Compensatory time is paid time off, and a nonexempt employee earns one-and-one-half hour of compensatory time for every hour of work over 40 hours in a seven-day work period. However, compensatory time may only be given to employees if the employees agree before beginning work to accept compensatory time off in lieu of overtime through individual agreements or through a collective bargaining agreement.<sup>14</sup>

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<sup>11</sup> TEX. GOV'T CODE § 431.005.

<sup>12</sup> TEX. LOC. GOV'T CODE § 142.0013.

<sup>13</sup> *Id.*

<sup>14</sup> 29 U.S.C. § 207(o); 29 C.F.R. § 553.23.

***When does the city have to pay compensatory time?***

The city must allow an employee to use compensatory time off if the employee requests it and the use of the time does not “unduly disrupt” the city’s work.<sup>15</sup> The city also must pay the employee his compensatory time off hours when he leaves employment with the city, regardless of whether he is terminated or quits.<sup>16</sup>

***How many hours of compensatory time can an individual earn?***

An employee who is not engaged in public safety activities can only accrue 240 hours of compensatory time off (160 hours of overtime). If an employee works more than these hours they must be paid overtime wages.<sup>17</sup>

***Do we have to pay employees for the time they spend waiting “on call”?***

This question is a fact-based question and depends on what the employee is required to do during on call time. Issues that weigh towards the requirement of paying on call time include: (1) being required to stay at or near the job site; (2) short response times; (3) limitations on the types of activities that individuals can participate in while on call (for example a prohibition on drinking alcohol); (4) a high number of call ins during on call time; and (5) requiring that the employees respond to a high percentage of calls (for example if only one or two individuals must respond to a high number of calls). Issues that would make paying for on call time voluntary would be: (1) freedom of movement of the employees; (2) longer response times (30 minutes or more is a good limit); (3) no limitations on the activities of those on call; (4) low number of call ins; or (5) allowing individuals who are on call to respond to a limited number or low percentage of call ins. Of course, any time an employee is called in or otherwise works he must be paid for any time actually worked.

***Is a city required to provide an employee with a meal break or rest period, and does the city have to compensate an employee who takes such a break?***

A city is not required to provide an employee with a meal period or rest period. However, if a city allows an employee to take such a break, whether the break would be compensable depends on the duration of the break and whether the employee worked during the break. A city is not required to compensate an employee for a meal break if the following requirements are met: (1) the employee is completely relieved from performing any job duty; (2) the employee is free to leave the worksite; and (3) the meal break is at least thirty minutes long.<sup>18</sup> Rest breaks, including coffee breaks or smoking breaks, that are between five and ten minutes long are compensable.<sup>19</sup>

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<sup>15</sup> 29 U.S.C. § 207(o)(5).

<sup>16</sup> *Id.* § 207(o)(4).

<sup>17</sup> *Id.* § 207(o)(3).

<sup>18</sup> See *Bernard v. IBP., Inc.*, 154 F.3d 259, 265 (5th Cir. 1998); 29 C.F.R. § 785.19.

<sup>19</sup> 29 C.F.R § 785.15.

***Can a city deduct from an employee's salary or require an employee to reimburse the city for damage to or loss of city equipment, such as a laptop computer or cellular phone?***

It depends on whether an employee is exempt or non-exempt under the Fair Labor Standards Act (FLSA). Section 13(a)(1) of the FLSA provides a complete exemption from minimum wage and overtime for an employee who meets the duties test (administrative, executive, or professional), is paid at a rate of at least \$455 per week, and is compensated on a "salary basis."<sup>20</sup> For an employee to be considered paid on a "salary basis," the employee must be paid "a predetermined amount...not subject to reduction because of variations in the quality or quantity of the work performed."<sup>21</sup> Subject to limited exceptions, the FLSA requires an exempt employee to receive the full salary for any week in which the employee performs any work, regardless of quantity or quality of work.<sup>22</sup> Making deductions from the salary of an exempt employee's pay for any reason, other than for what is provided for under the regulations, would result in a violation of the "salary basis" rule and a loss of the employee's exempt status.<sup>23</sup>

Recently, the Department of Labor (DOL) held that a deduction from the salary of an exempt employee for the loss, damage, or destruction of the employer's property is an impermissible deduction, and would destroy the employee's exempt status because the employee's salary would not be "guaranteed" or paid "free and clear."<sup>24</sup> This holds true even if an employer and an employee have entered into an agreement that the employer will deduct for any damages, or that the employee will receive the full salary and the employer will seek a reimbursement.<sup>25</sup> With regard to nonexempt employees, the DOL opined that a policy allowing an employer to deduct from the salary of a nonexempt employee for damages would be valid as long as the employee's pay does not go below the minimum wage.<sup>26</sup>

***Is a city council authorized to give an employee a bonus?***

Cities are prohibited from granting extra compensation to an employee after her services have been rendered.<sup>27</sup> However, a city is authorized to correct improper payments. For example, if an employee who is classified as nonexempt under the Fair Labor Standards Act (overtime) was not properly compensated for his or her overtime work, back pay may be proper to remedy that situation. However, if a city gives longevity pay or some other pay that is included in the budget and is offered to the employee before the work is performed, such extra pay may be permissible. Please consult with local legal counsel regarding specific cases.

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<sup>20</sup> 29 U.S.C § 213(a) (1); 29 C.F.R. § 541.600(a).

<sup>21</sup> 29 C.F.R. § 541.602(a).

<sup>22</sup> *Id.*

<sup>23</sup> 29 C.F.R. §§ 541.602; 541.710.

<sup>24</sup> Dep't Labor Op. FLSA2006-7 (2006).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> TEX. CONST. art. III, § 53; *Fausett v. King*, 470 S.W.2d 770, 774 (Tex. Civ. App.—El Paso 1971, no writ).

*Resources*

**Department of Labor:**

<http://www.dol.gov/compliance/laws/comp-flsa.htm>

**FLSA Fact Sheets:**

<http://www.dol.gov/whd/fact-sheets-index.htm>

**FLSA Statute:**

<http://www.dol.gov/whd/regs/statutes/FairLaborStandAct.pdf>

**FLSA Regulations:**

[http://www.dol.gov/dol/allcfr/ESA/Title\\_29/Chapter\\_V.htm](http://www.dol.gov/dol/allcfr/ESA/Title_29/Chapter_V.htm)

**FLSA Poster:**

<http://www.dol.gov/whd/regs/compliance/posters/flsa.htm>

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