



The Fair Labor Standards Act (FLSA) has been around for a long time—since 1938 to be exact, with a limited number of changes being made since then. So why do we continue to have such a difficult time with it? After all, we’ve had 65 years to perfect it, right? If you think you are alone in your confusion, you are not. Most conference sessions on FLSA are standing room only and there is ultimately the one attendee in the back who stands and asks, “We pay our exempt employees on an hourly basis. Is that OK?” While heads turn to see who is asking such a ridiculous question, you can invariably see some faces wondering, “Well, is it OK?” (Just in case you are wondering, it isn’t OK. In addition to performing exempt duties, exempt employees must be paid on a salary basis.) There have been numerous lawsuits in the past two years involving violations of the FLSA—some involving big names like Starbucks and Wal-Mart. The most common violation involves misclassification of status, which leads to overtime payment errors, which can lead to costly lawsuits.

Effective August 23, 2004, the U.S. Department of Labor (DOL) issued sweeping changes to the FLSA regulations that affect most employers in the United States and its territories. Many of our employees have changed exemption status under the new regulations due to increases in salary thresholds and/or changes in the various duties tests applicable to administrative, executive, professional, and outside sales exemptions. This course will review the new Fair Labor Standards Act regulations as it relates to the University of Alabama at Birmingham.

Agenda

- Define Fair Labor Standards Act
- Legal Liability
- Salary Level Test
- Salary Basis Test
- Job Duties Tests
 - Executive
 - Computer
 - Outside Sales
 - Learned Professional
 - Creative Professional
 - Administrative

Fair Labor Standards Act

Purpose

- Eliminate detrimental working conditions
- Establish minimum wage rate
- Protect educational opportunities of youth

Major Provisions

- Federal Minimum Wage: \$7.25/hour
- Overtime: 1 ½ times the regular rate of pay for all hours over 40 hours in work week
- Recordkeeping
- Child-labor restrictions

The **Fair Labor Standards Act (FLSA)**, also known as the federal Wage and Hour Law, regulates minimum wage, overtime, equal pay, recordkeeping, and child labor for employees of enterprises engaged in interstate or foreign commerce and employees of state and local governments. It can be found in section 29 of the US Code (and section 29 of the Code of Federal Regulations).

Enforcement. The FLSA is enforced by the Wage and Hour Division of the U.S. Department of Labor (DOL).

Important: There are a number of employment practices that FLSA does not regulate. For example, it does not regulate: vacation, holiday, severance, or sick pay; meal or rest periods, or time off for holidays or vacations; premium pay for weekend or holiday work; pay raises or fringe benefits; and a discharge notice, reason for discharge, or immediate payment of final wages to terminated employees.

The FLSA requires that most employees in the United States be paid at least the federal minimum wage and overtime pay at time and one-half their regular rate of pay after 40 hours in a workweek.

Impetus for Reform: Growth of Litigation

- “Collective” actions in wage-hour area now exceed employment discrimination class actions
- Misclassification damages = [(Hours > 40 x 1.5 Regular Rate) x (2 or 3 years) x (2 for Liquidate Damages)] x (Number of Employees) + Attorney’s Fees + Court Costs

The U.S. Department of Labor's (DOL) primary objective in revising the white collar exemptions from the minimum wage and overtime rules under the Fair Labor Standards Act (FLSA) in 2004 was to make it easier for employees and employers to understand their rights and obligations under the law. There have been many cases concerning FLSA litigation in the past few years. As a result, employers have paid millions of dollars in jury awards and settlements. The average settlement per plaintiff has increased every year since 2010. (NERA Economics)

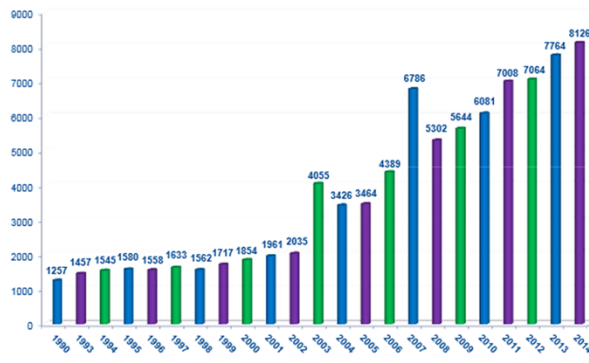
Recent cases include:

- **Puerto Rico Department of Corrections and Rehabilitation** – \$35.0 Million. This case included 4,500 workers alleging they were denied overtime. This settlement was for one class year and represented the highest settlement value observed in 2013.
- **24 Hour Fitness USA, Inc.** – \$17.5 Million. This case included over 850 plaintiffs who alleged they were misclassified and denied overtime.
- **Roto-Rooter Services Co.** – \$14.3 Million. Plaintiffs asserted the company violated both state and FLSA laws. More specifically, they asserted they were not paid minimum wage, were denied overtime, and that the company took improper deductions.
- **Old Republic Title Co.** – \$12.0 Million. Approximately 1,100 current and former employees allege they were denied overtime, did not receive the proper meal and rest breaks, and were required to work off-the-clock during a six-year period.

- **Tesoro Refining and Marketing company** – \$11.6 Million. Plaintiffs allege they were not permitted to take the proper meal and rest breaks. The case involved approximately 700 workers, claiming the company violated California labor laws

Impetus for Reform: Growth of Litigation

FLSA Cases 1990¹, 1993-99¹, 2000-14²



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¹ Federal Judicial Caseload Statistics for period ending September 30
² Federal Judicial Caseload Statistics for period ending March 31

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As you can see the number of FLSA cases continues to rise. The latest increase was the seventh straight year of increases for these types of cases. In fact, they have jumped 438 percent since 2000 and this trend is expected to continue.

Impetus for Reform: Growth of Litigation

- Increased DOL enforcement activity: 350 new wage & hour investigators
- “We Can Help” - DOL public service announcements & toll-free numbers
- DOL iPhone apps to track time & report issues
- “Bridge to Justice” - refers complainants to plaintiffs’ lawyers through ABA referral service
- Gold mine for plaintiffs’ attorneys
- \$1,000,000,000 per year in claims paid

Why so much litigation? Government interest in FLSA matters. The Obama administration has made enforcing wage laws a priority. DOL’s goal has been to increase visibility and accessibility through their We Can Help campaign. DOL has developed public service announcements advising on how to report an issue. They also developed an app for employees to track their time to ensure their paychecks are correct. The app also allows the employee to report an issue via the app. Workers are more educated about their rights. The Bridge to Justice initiative refers complainants to plaintiffs’ lawyers through American Bar Association referral service since DOL WHD has limited capacity.

Reasonable estimates indicate that companies collectively have paid out over \$1 billion annually to resolve these claims.

Impetus for Reform: Growth of Litigation

What can you do to avoid litigation?

- Understand FLSA exemptions
- Review duties of jobs in your department
- Update job descriptions frequently
- Understand “hot spots” and common mistakes

What can you do to avoid litigation? Employers bear the proof of burden in disputes.

- **Understand the exemptions.** Familiarize yourself with the requirements of each exemption.
- **Take a careful look at the duties of the jobs in your department.** The FLSA’s current salary exemption requirements are easy to overcome because they are so low. The determinative factor will undoubtedly be the duties test (i.e., what is the employee actually doing all day?). Then, make sure that the employee is actually doing those things.
- **Update position descriptions frequently.** Many departments write position descriptions when posting a position and never look at it again. If litigation ever occurs, an employee’s position description may be critical as it is a written document showing what the employer thinks that employee should be doing. **How often is ‘frequently’?** A good practice is to require your managers to review position descriptions of their direct reports when updating work plans at the start of a performance period.

“White Collar” Exemptions

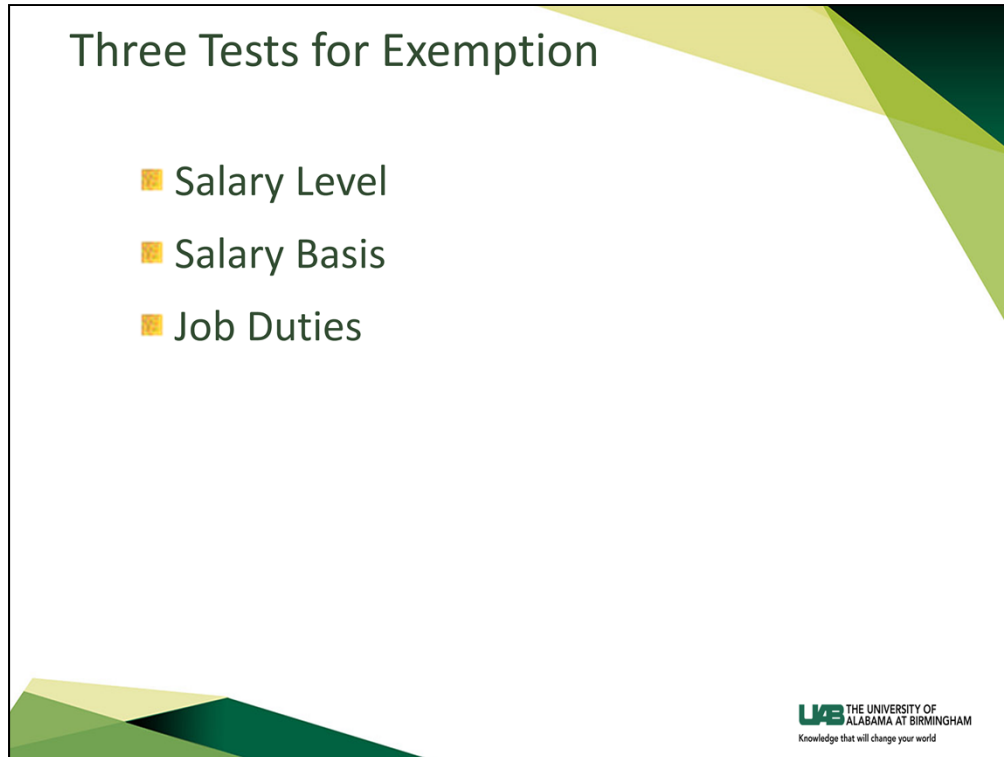
- Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees who are employed in a bona fide:
 - Executive;
 - Administrative;
 - Professional; or
 - Outside Sales capacity
- Certain computer employees may be exempt professionals under Section 13(a)(1) or exempt under Section 13(a)(17) of the FLSA

Nonexempt Employees

Nonexempt employees are those that are covered by FLSA minimum wage and overtime pay provisions. An employee who is paid on an hourly basis is usually considered to be nonexempt, regardless of the hourly rate paid. (There is an exception: Computer programmers, systems analysts, and similar professionals are considered exempt if they earn an hourly rate of \$27.63 or more.) Employees are also nonexempt if they do not qualify for one of several “white-collar” exemptions. Employees generally classified as nonexempt include, but are not limited to, clerical, blue-collar, maintenance, construction, and semiskilled workers, as well as technicians and laborers.

Exempt Employees

FLSA exempts broad categories of “white collar” jobs from minimum wage and overtime requirements if they meet certain tests regarding job duties and responsibilities and are paid a certain minimum salary. These categories include executives, administrative employees, professional employees, and outside sales personnel. Employers should periodically review the duties of exempt employees to ensure that they still qualify for exempt status, especially if the company has undergone restructuring or downsizing.

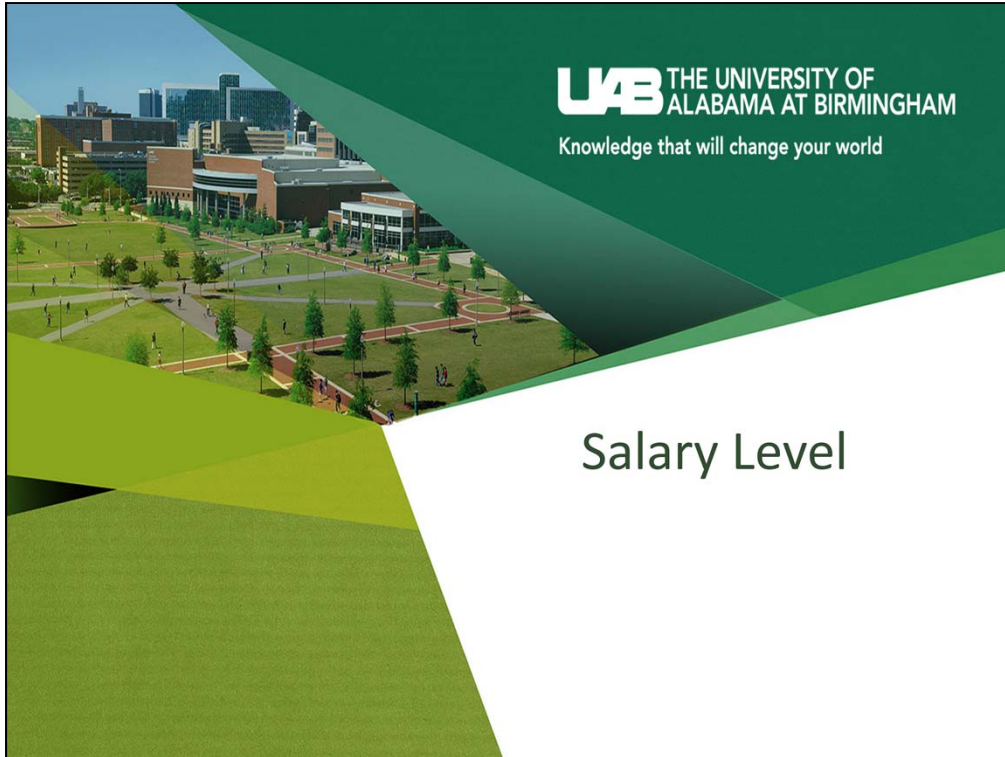


Human Resources classifies positions based on the FLSA regulations. That's why the information submitted on the Compensation Request Form is so important. It is the information that is used to determine job title, pay grade and exemption status. The white-collar exemptions include the executive, administrative and professional exemptions, computer professionals, outside salespersons, and highly compensated employees who regularly perform at least one of the duties of an exempt executive, administrator or professional.

Generally speaking, for an employee to fall within any one of these exemptions, the following three requirements must be met:

- The employee must be paid at least the regulatory minimum salary. (Outside salespersons and certain professional employees, such as attorneys, are not subject to this requirement.)
- The employee must be paid on a salary—rather than an hourly—basis, and the employer must make no deductions from that individual's pay that are not consistent with being paid a salary.
- The employee's primary duties must be "exempt" in nature.

The purpose of this course is to review the basics.



This section of the seminar provides information on the salary level requirement.

Minimum Salary Level: \$455

- For most employees, minimum salary level required for exemption is \$455 per week
- Must be paid “free and clear”
- The \$455 per week may be paid in equivalent amounts for periods longer than one week:
 - Biweekly: \$910
 - Monthly: \$1,971.66

The new regulations threw out the old long and short duties tests and their respective minimum salary levels in favor of a single, higher minimum salary of \$455 per week or \$23,660 annually. The \$455 per week can not include the value of any non-cash items that an employer may furnish to an employee, like board, lodging or other facilities (for example, meals furnished to employees of restaurants). The equivalent of the \$455 per week salary level is \$910 for biweekly pay periods and \$1,971.66, for monthly pay periods.

Employees who earn less than \$455 per week ordinarily cannot be exempt, regardless of the nature of their job responsibilities. Those employees paid on an hourly basis, with the exception of computer employees (explained below), are considered nonexempt employees and must be paid overtime (one-and one-half times their regular rate of pay) for any hours worked over 40.

Computing an employee's regular rate can be a complex problem under the FLSA. In general, the regular rate is the employee's average hourly earnings for that workweek. It includes compensation in the form of base pay, piece rates, commissions, shift premiums, and nondiscretionary bonuses.

Payments not included in the regular rate of pay for overtime calculation purposes include discretionary bonuses (i.e., holiday, gifts), vacation, holiday, sick, expense reimbursements and contribution to bona-fide profit-sharing plan/trust, or thrift/savings plan.

Highly Compensated Test

- **Total annual compensation** of at least \$100,000
- At least \$455 per week paid on salary or fee basis
- Perform **office or non-manual work**
- **Customarily and regularly** perform any one or more exempt duties identified in standard tests for executive, administrative or professional exemptions

The regulations also recognize that highly compensated employees performing office or non-manual work and paid total annual compensation of \$100,000 or more, which must include at least \$455 per week paid on a salary or fee basis, are exempt if they customarily and regularly perform at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

Total Annual Compensation

- Total annual compensation includes:
 - Base salary
 - Commissions
 - Nondiscretionary bonuses
 - Other nondiscretionary compensation earned during a 52-week period
- Total annual compensation does not include:
 - Credit for board, lodging or other facilities
 - Payments for medical or life insurance
 - Contributions to retirement plans or fringe benefits

Total annual compensation includes base salary, commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period, but does not include credit for board, lodging and other facilities, payments for medical or life insurance, or contributions to retirement plans or other fringe benefits.

Make-Up Payment & Pro-Rating

- If employee's total annual compensation does not equal \$100,000 by end of the year:
 - Employer may, within one month after end year, make one final payment to reach \$100,000 level; or
 - Employee will be tested for exemption under standard duties tests
- \$100,000 may be pro-rated for employees who do not work full year
- Employer may use any 52-week period

Special rules allow the employer to make one final payment within one month after the end of the year to satisfy the required \$100,000 annual amount. But what happens if an individual is employed for less than a full year? The regulations provide that the minimum salary can be prorated so as to preserve the exemption, but they do not directly address what to do if an individual is employed for the entire year and then takes an extended unpaid leave of absence. Can the employer prorate the \$100,000 requirement based on the period of time the employee is on unpaid leave? Although the regulations are silent on this precise issue, the DOL has stated in its regulatory preamble that its enforcement position will be that proration is not available for employees on unpaid leave for some portion of the qualifying year.

The DOL failed to anticipate the substantial problems its interpretation could create for employers. Assume that an employee who performs exempt duties is expected to earn \$100,000 in salary for the year. Accordingly, you don't pay her overtime. Unexpectedly, however, she goes out on a four-month leave and fails to meet the \$100,000 standard by the end of the year. Under the DOL's enforcement position, the employer may owe the employee overtime for the eight months she worked, unless the employer is able to establish that the employee satisfies all of the requirements of either the executive, administrative or professional exemption—in other words, if she performs all, not just one, of the duties for a particular exemption.

Accordingly, the less risky practice is to classify even highly compensated employees under one of the traditional exemptions, when possible, and to rely on the highly compensated exemption only when no other exemption clearly applies.

In addition, departments should have a mechanism in place to automatically reassess the exempt status of highly compensated employees who go out on Family and Medical Leave Act (FMLA) leave or other extended leave.

Office or Non-manual Work

- Highly compensated test is not available for
 - Non-management production line workers
 - Non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremens, construction workers and laborers
 - Other employees who perform work involving repetitive operations with their hands, physical skill and energy

The highly compensated test is not available for non-management production line workers and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremens, construction workers, laborers and other employees who perform work involving repetitive operations with their hands, physical skill and energy.

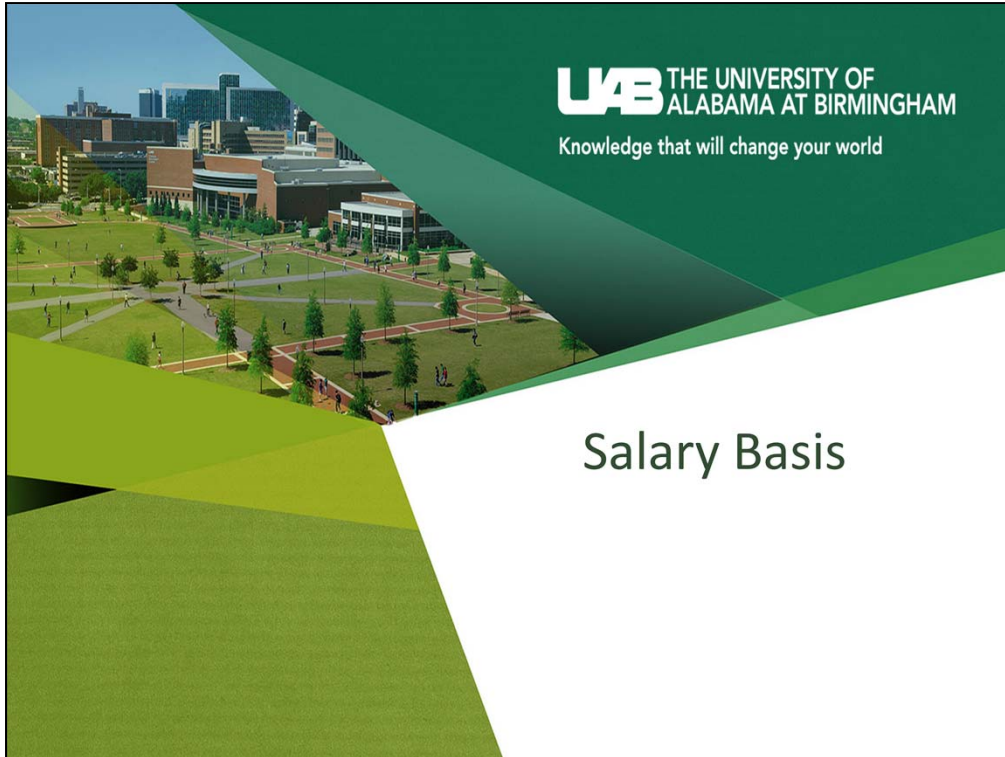
Customarily and Regularly

- Frequency must be greater than occasional but which, of course, may be less than constant
- Includes work normally and recurrently performed every workweek
- Does not include isolated or one-time tasks

The phrase “customarily and regularly” means a frequency that must be greater than occasional but which may be less than constant. Tasks or work performed “customarily and regularly” include work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.

If a highly compensated “white collar” employee customarily and regularly performs one or more exempt duties, detailed analysis of all the job duties performed is not necessary. For example, an employee may qualify as a highly compensated executive employee if the employee customarily and regularly directs the work of three or more other employees, even though the employee does not meet all of the other requirements in the standard test for exemption as an executive.

However, the less risky practice is to classify even highly compensated employees under one of the traditional exemptions, when possible, and to rely on the highly compensated exemption only when no other exemption clearly applies.



In addition to the minimum salary level, an exempt employee also must be paid on a salary basis.

Salary Basis Test

- Regularly receives predetermined amount of compensation each pay period (on weekly or less frequent basis)
- Compensation cannot be reduced because of variations in quality or quantity of work performed
- Must be paid full salary for any week in which employee performs *any* work
- Need not be paid for workweek when no work is performed

The FLSA defines a workweek as a period of 168 hours during 7 consecutive 24-hour periods. It may begin on any day of the week and at any hour of the day established by the employer. Generally, for purposes of computing minimum wage and overtime, each workweek stands alone, regardless of whether employees are paid on a weekly, biweekly, monthly, or semimonthly basis. Two or more workweeks cannot be averaged.

Generally, “salary basis” means that an exempt employee must regularly receive, each pay period and on a weekly or less frequent basis, a “predetermined amount” of compensation that cannot be reduced because of variations in the quality or quantity of work performed. But for a few identified exceptions, the exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked. However, exempt employees need not be paid for any workweek when they perform no work.

An employee is not paid on a salary basis if the employer makes deductions from the predetermined salary, for example, for absences caused by the employer or because of the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

A number of common payroll and recordkeeping practices are allowed that do not call into question whether someone is paid on a salary basis. For example: taking deductions from exempt employees’ accrued leave accounts; requiring exempt

employees to keep track of and record their hours worked; requiring exempt employees to work a specified schedule; and implement bona fide, across-the-board changes in schedules.

Permissible Deductions

Seven exceptions from the “no pay-docking” rule:

1. Personal absence from work for one or more full days
2. Sickness or disability absence from work for one or more full days
3. Witness Fee or Military pay offsets
4. Penalties for violating safety rules of “major significance”
5. Unpaid disciplinary suspension for violations of workplace conduct rules
6. Proportionate part of full salary for time actually worked in first and last weeks of employment
7. Unpaid leave under Family and Medical Leave Act

The permissible deductions area of law has always been difficult for employers and employees alike. While there are different answers to different scenarios, the general rule is that employers may deduct less than a full day’s wages from nonexempt employees, but may not deduct less than a full day’s salary from exempt employees.

The theory is that a nonexempt employee gets paid for doing a certain job—let’s say, producing widgets. When the day is over, the employee has earned his or her hourly rate for producing x number of widgets. If they don’t work, they don’t get paid (unless, of course they use a sick day, etc.). If they only work seven out of eight hours, that’s what they will be paid. Exempt employees, however, are paid on a salaried basis. They work until the job is done and will receive that same salary whether they work 1 hour per week or 100 hours per week. Therefore, deductions from salary are generally not permitted.

However, the regulations contain seven exceptions to this salary basis, “no pay-docking” rule. Employers may make deductions from salary of exempt employees in the following situations:

1. An absence from work for one or more full days for personal reasons, other than sickness or disability
2. An absence from work for one or more full days due to sickness or disability if deductions made under a bona fide plan, policy or practice of providing wage replacement benefits for these types of absences
3. To offset any amounts received as payment for jury fees, witness fees, or military pay
4. Penalties imposed in good faith for violating safety rules of “major significance,” such as “no smoking” rules in explosive plants, oil refineries and coal mines
5. Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of workplace conduct rules, such as rules prohibiting sexual harassment or workplace violence

6. Proportionate part of an employee's full salary may be paid for time actually worked in the first and last weeks of employment
7. Unpaid leave taken pursuant to the Family and Medical Leave Act (FMLA)

Effect of Improper Deductions

- Actual practice of making improper deductions from salary will result in loss of exemption:
 - During time period in which improper deductions were made
 - For employees in same job classifications
 - Working for same managers responsible for the actual improper deductions
- Isolated or inadvertent improper deductions, however, will not result in the loss of exempt status if the employer reimburses the employee

What is the effect on an employee's exemption status if an employer makes improper deductions from the salary? If the employer had an actual practice of making improper deductions from salary, the exemption will be lost, and overtime pay due for hours worked over 40 per week during the time period in which improper deductions were made, to employees in the same job classifications and who work for the same managers responsible for the actual improper deductions. Employees in different job classifications, or working for different managers, would not lose their exempt status. Isolated or inadvertent improper deductions, however, will not result in the loss of exempt status if the employer reimburses the employee for the improper deduction.

A key term here is actual practice. Factors considered when determining an actual practice include, but are not limited to: the number of improper deductions; the time period during which the employer made improper deductions; the number and geographic location of both the employees whose salaries were improperly reduced and the managers responsible for making the improper deductions; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.

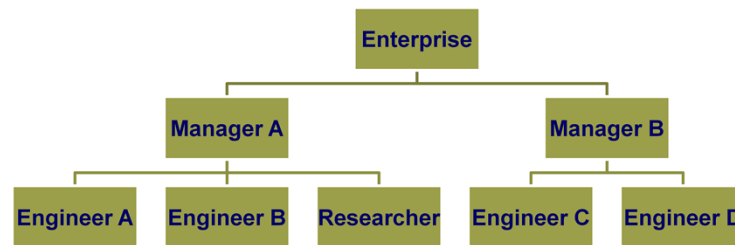
The regulations provide a safe harbor for employers who have a clearly communicated policy prohibiting improper deductions. If an employer (1) has such a clearly communicated policy which prohibits improper deductions and includes a complaint mechanism, (2) reimburses employees for any improper deductions, and (3) makes a good faith commitment to comply in the future, then the employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints.

The best evidence of a clearly communicated policy is a written one distributed to

employees before the improper pay deductions occur, for example, by providing a copy of the policy to employees when they are hired, publishing it in an employee handbook or distributing it to employees over the employer's Intranet.

Example: Effect of Improper Deductions

- Manager A has docked pay of Engineer A
- Exemption could be lost for Engineer A and Engineer B
- Not lost for Researcher or Engineers C and D



This slide includes an example to illustrate the effect of improper deductions. In the example, a manager who supervises two engineers and one chemist has docked the pay of an engineer on each of 12 days when the engineer arrived late for work during the last 3 months. Because this is an actual practice of making pay deductions, the exemption would be lost for the engineer whose pay was actually docked and for the other engineer supervised by that same manager. However, the exemption is not lost for the chemist supervised by the manager who made the improper pay deductions or for the engineers who are supervised by another manager. The employer would owe overtime pay for all hours worked over 40 per week during the 3 months that the manager made the improper pay deductions.

Additional Compensation

- Employer may provide compensation in addition to \$455 minimum guaranteed weekly salary, such as:
 - Commissions
 - Bonuses
 - Additional pay based on hours worked beyond normal workweek
- Regulations also allow employee's earnings to be computed on hourly, daily or shift basis, if employer:
 - Guarantees at least \$455 per week paid on salary basis, regardless of number of hours, days of shifts worked, fee basis; and
 - A **reasonable relationship** exists between guaranteed amount and amount actually earned

Another common question that arises is whether exempt salaried employees may be paid additional compensation, without affecting their exempt salaried status. An employer may provide additional compensation besides the minimum guaranteed salary to an exempt employee without losing the exemption or violating the salary basis test, as long as the employment arrangement includes a guarantee that at least the minimum \$455 weekly amount will be paid on a salary basis.

For example, an exempt employee guaranteed at least \$455 each week on a salary basis may also receive additional compensation for working beyond the normal workweek, which may be paid on any basis such as a flat sum, bonus payment, a straight-time hourly amount, time and one-half, or any other basis, and can include paid time off. Similarly, the exemption is not lost if an exempt employee who is guaranteed at least \$455 each week on a salary basis also receives additional compensation in the form of bonuses and/or incentive payments.

In addition, an employer can calculate an exempt employee's earnings on an hourly, daily or shift basis, without losing the exemption or violating the salary basis requirement, if the employer guarantees that at least the minimum weekly required amount will be paid on a salary basis regardless of the number of hours, days or shifts worked, and there is a "reasonable relationship" between the guaranteed amount and the amount actually earned.

Reasonable Relationship

- “Reasonable relationship” means weekly guarantee is roughly equivalent to employee’s usual earnings at assigned hourly, daily or shift rate for employee’s normal scheduled workweek
- For example, exempt employee guaranteed at least \$500 per week and who normally works four or five shifts each week, may be paid \$150 per shift without violating salary basis requirement

“Reasonable relationship” means the weekly guarantee is roughly equivalent to the employee’s usual earnings at the assigned hourly, daily or shift rate for the employee’s normal scheduled workweek. For example, an exempt employee guaranteed at least \$500 per week and who normally works four or five shifts each week, may be paid \$150 per shift without violating the salary basis requirement. The reasonable relationship requirement applies only to situations where the employee’s pay is computed on an hourly, daily or shift basis; it does not apply, for example, to an exempt store manager paid a guaranteed salary of \$650 per week who also receives a commission on store sales or profits, which in some weeks may equal or even exceed the guaranteed salary without violating the salary basis requirement.

Fee Basis

- Administrative and professional employees also may be paid on “fee basis”
- Employee is paid on “fee basis” if employee is paid agreed sum for completing single job, regardless of time required to complete work
- Payment on a “fee basis” is not available for series of non-unique jobs repeated an indefinite number of times for which payment on an identical basis is made over and over again
- Fee payment meets minimum salary level required for exemption if, based on time worked to complete job, fee is at rate that would amount to at least \$455 per week if employee worked 40 hours

Administrative and professional employees may also be paid on a fee basis rather than on a salary basis. An employee is paid on a “fee basis” if the employee is paid an agreed sum for completing a single and unique job, regardless of the time required to complete the work. Payment on a “fee basis” is not available for a series of non-unique jobs repeated an indefinite number of times for which payment on an identical basis is made over and over again. Payments based on the number of hours or days worked and not on the accomplishment of a single, unique task are not payments on a fee basis.

To test whether a fee payment meets the minimum level required, consider the time worked to complete the job and determine if the payment is at a rate that would yield at least \$455 per week if the employee worked 40 hours. For example, an artist paid \$250 to paint a portrait that took 20 hours to complete meets the minimum salary requirement since the rate would yield \$500 if 40 hours were worked.

No Salary Requirements

- Salary level and salary basis tests do not apply to:
 - Outside Sales Employees
 - Doctors
 - Lawyers
 - Teachers
 - Certain computer-related occupations paid at least \$27.63 per hour

The salary level and salary basis requirements described in this course do not apply to outside sales employees, licensed or certified doctors, lawyers and teachers. Employees in these occupations are exempt regardless of their salary. In addition, Section 13(a)(17) of the FLSA exempts hourly paid employees in certain computer-related occupations if they are paid at least \$27.63 per hour.

Review

- Minimum Salary Level: \$455 per week
- Highly Compensated Level: \$100,000 per year
- Salary Basis:
 - Predetermined amount paid for every week in which employee performs *any* work, which is not subject to reduction because of variations in quality or quantity of work performed
 - Salary level and salary basis tests do not apply to outside sales employees, doctors, lawyers, teachers, and certain computer-related occupations paid at least \$27.63 per hour

Let's take a few minutes to review the salary requirements for exemption. To qualify as exempt, most employees must be paid at least \$455 per week on a salary basis. Generally, an exempt employee paid "on a salary basis" must regularly receive a predetermined amount each pay period, which is not reduced due to variations in the quality or quantity of work performed. While exempt employees do not have to be paid for any workweek when they perform no work, except for a few identified permissible exceptions, exempt employees must generally receive their full predetermined salary for any week in which they perform any work regardless of the number of days or hours worked. Certain highly compensated "white collar" employees performing office or non-manual work and paid total annual compensation of \$100,000 or more, if it includes at least \$455 per week paid on a salary or fee basis, may be exempt if they customarily and regularly perform at least one of the exempt duties or responsibilities in the standard tests for exemption as an executive, administrative, or professional employee.



In addition to the salary requirements, exempt employees must perform executive, administrative or professional duties set forth in the regulations. It is important to remember, job titles do not determine exemption status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations. The next several sections discuss the duties requirements for these tests.



This section discusses the duties requirements for the executive exemption.

Executive Duties

- **Primary duty is management** of enterprise or of customarily recognized department or subdivision;
- **Customarily and regularly** directs work of two or more other employees; and
- Authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status of other employees are **given particular weight**

In addition to the salary requirements, the executive exemption applies only if the following three duties requirements are met:

1. the employee's primary duty must be management;
2. the employee must customarily and regularly direct the work of two or more employees¹; and
3. the employee must have the authority to hire or fire other employees, or have her suggestions and recommendations as to hiring, firing, advancement, promotion or any other change of status be given particular weight. There are a number of important terms in these duties. Let's explore them.

¹ The revised regulations call for the employee to direct the work of two or more employees. UAB has set our threshold at three or more.

Primary Duty

- Principal, main, major or most important duty that employee performs
- Factors to consider include, but are not limited to:
 - Relative importance of exempt duties;
 - Amount of time spent performing exempt work;
 - Relative freedom from supervision
- Employees who spend more than 60% of their time performing exempt work will generally satisfy primary duty requirement
- However, regulations do not *require* that exempt employees spend more than 60% of time performing exempt work

Primary duty means the principal, main, major or most important duty that the employee performs. An employee's primary duty is determined by looking at all the facts, with the major emphasis on the character of the employee's job as a whole.

Important factors to consider when determining the primary duty include: the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other non-exempt workers for the same kind of nonexempt work.

Assume you have a salaried employee whom you think falls within the administrative exemption. This employee's nonexempt work involves inputting data into your computer system. You compare this employee's salary with the wages paid to the nonexempt employees whose primary responsibility is inputting data. If their wages average \$450 per week, then paying the employee whom you wish to treat as exempt \$455 per week may not be enough to classify the employee as exempt. Of course, this is only one of the four factors to be considered in determining an employee's primary duty. However, it is a factor that is often overlooked and could be the straw that breaks the camel's back if the employee's exempt status is otherwise questionable, so be sure to take it into account.

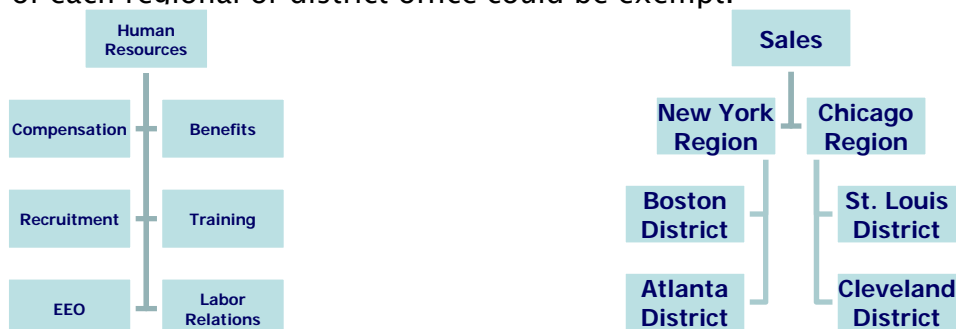
The amount of time spent performing exempt work can be a useful guide, and employees who spend more than 60 percent of their time performing exempt work generally will satisfy the primary duty requirement. Time alone, however, is not the sole test, and nothing in the regulations requires exempt employees to spend more than 60 percent of their time performing exempt work.

Department or Subdivision

- “Customarily recognized department or subdivision” must have permanent status and continuing function
 - Need not be physically within employer’s establishment, and may move from place to place
 - Continuity of same subordinate personnel is not essential to existence of recognized unit
 - Employee in charge of each branch establishment is in charge of recognized subdivision
- Does not include mere collection of employees assigned from time to time to specific job

An exempt executive must manage the entire business or have management responsibility over a “customarily recognized department or subdivision” of the business. A “department or subdivision” is a subpart of the business which has “a permanent status and continuing function.” The subdivision need not be physically within the employer’s establishment and may move from place to place. The mere fact that the employee works in more than one location does not invalidate the exemption. In addition, if an executive supervises employees in a recognized unit, it does not matter if some of the employees are drawn from other recognized units. On the other hand, a mere collection of employees assigned from time to time to a specific job or series of jobs is not a recognized subdivision.

For example, an organization may have several large departments such as finance, legal, marketing, and human resources, each of which is a customarily recognized department. But recognized subdivisions also include different areas organized under the larger departments. Thus, an exempt executive may manage the compensation, benefits or labor relations functions within the human resources department. Recognized subdivisions can also be geographically separate offices or branch establishments. In a sales organization, for example, the managers in charge of each regional or district office could be exempt.



Three or More

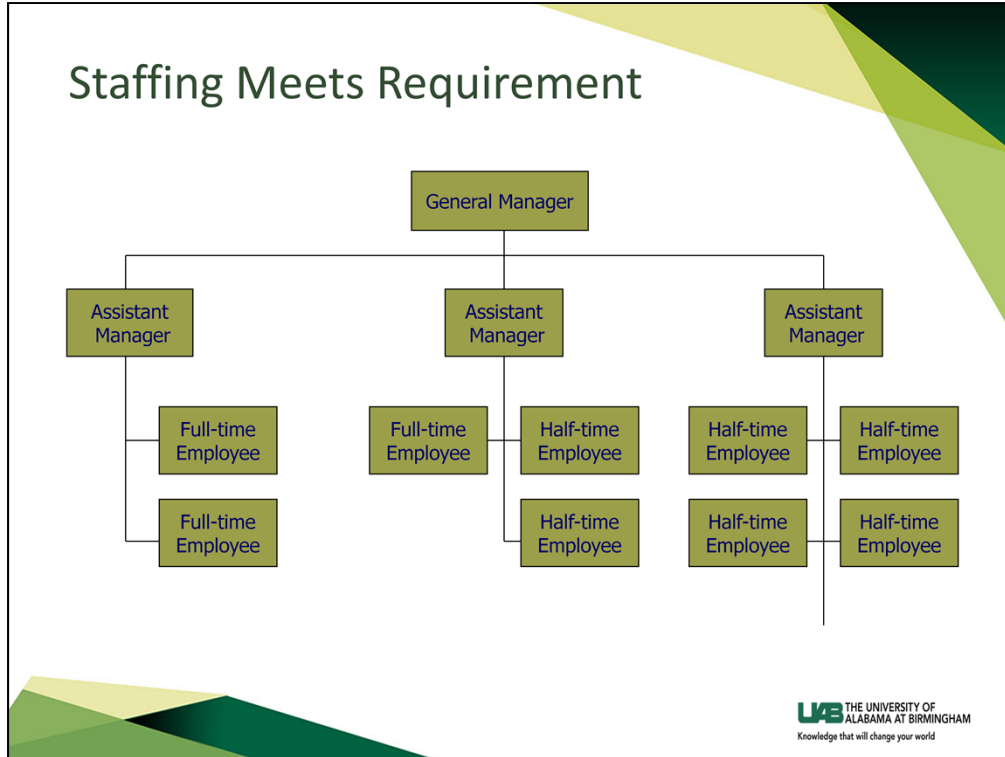
- Phrase “two or more other employees” means three full-time employees or the equivalent
- Full-time generally means 40 hours per week
- The supervision of the same employees can be distributed among two or more exempt executives, but the hours worked by an employee cannot be credited more than once

The term “three or more other employees” means that the exempt manager must supervise three full-time employees or the equivalent. Full-time generally means 40 hours per week. However, the Department will recognize industry standards defining full-time employment as 37 ½ hours or 35 hours per week, for example, but not less than that.

An exempt executive generally must supervise other employees who work a total of 120 work hours not including the hours the executive works themselves. Supervision can be distributed among two or more exempt executives, as long as each executive is responsible for supervising 120 work hours of other employees each week. Thus, for example, a department with six full-time nonexempt workers may have up to two exempt supervisors. Of course, the work hours of nonexempt employees cannot be counted more than once. Thus, if two supervisors share responsibility for two full-time nonexempt workers, neither of the supervisors would be exempt.

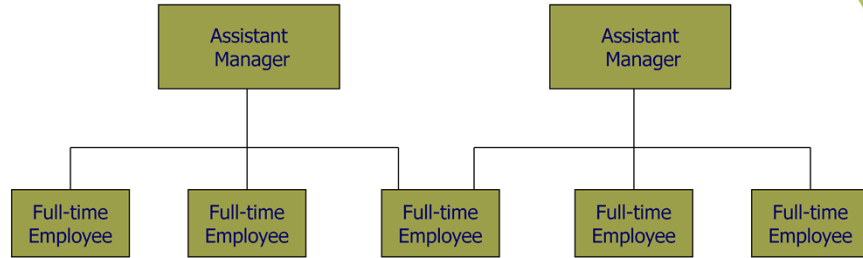
Only UAB employees count. You cannot count employees of a temporary agency or contract employees (including subcontractors on a project).

Staffing Meets Requirement



This slide shows some examples of acceptable full-time equivalents: three full-time employees; two full-time employee and two half-time employees; and six half-time employees.

Staffing Does Not Meet Requirement



This slide shows staffing that would not meet the three or more standard. In this example, each assistant manager is responsible for only two and a half full-time equivalent employees, and thus, neither assistant manager would qualify for exemption.

Particular Weight

- Factors include, but are not limited to:
 - Whether it is part of the employee's job duties to make suggestions and recommendations
 - The frequency with which suggestions and recommendations are made or requested
 - The frequency with which the employee's suggestions and recommendations are relied upon
- Suggestions and recommendations may be reviewed by a higher level manager
- The exempt executive need not have authority to make the ultimate decision
- Making an occasional suggestion regarding a change in status of a co-worker does not meet the "particular weight" standard

An exempt executive employee must have “the authority to hire or fire other employees” or must have his or her suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status be given “particular weight.” A key term in this element is “particular weight.” Factors to consider when determining whether an employee’s recommendations are given “particular weight” include, but are not limited to: whether it is part of the employee’s job duties to make recommendations; the frequency with which recommendations are made or requested; and the frequency with which the recommendations are relied upon.

Generally, an exempt executive’s recommendations must pertain to the employees he or she supervises. A recommendation can be given particular weight even if it is reviewed by a higher level manager. The exempt executive need not have authority to make the ultimate decision. However, “particular weight” does not include the occasional suggestion about a co-worker.

Concurrent Duties

- Concurrent performance of exempt and nonexempt work does not automatically disqualify an employee from exemption
- Exempt executives generally decide when to perform nonexempt duties and remain responsible for the success or failure of business operations
- Nonexempt employees generally are directed by a supervisor to perform the exempt work or perform the exempt work for defined time periods

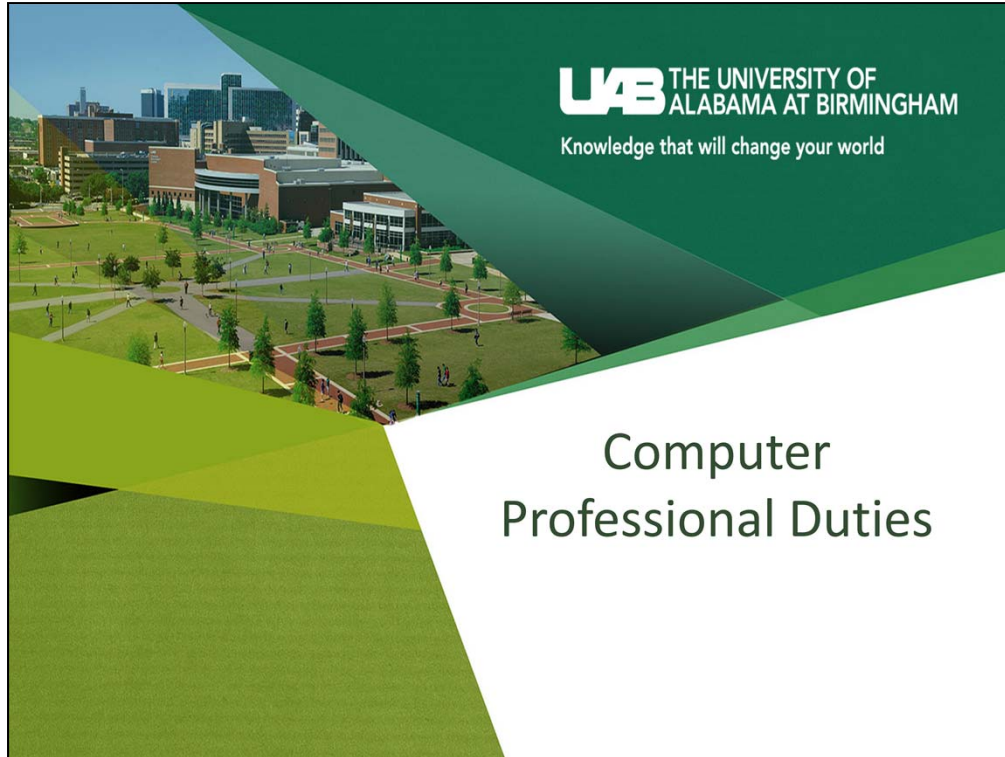
A common question that arises under the executive exemption is how to classify employees who perform both exempt management duties and nonexempt duties. The regulations state that a manager who performs both exempt and nonexempt work at the same time is not automatically disqualified from the executive exemption. Generally, the exempt executives themselves make the decision regarding when to perform nonexempt duties. In contrast, the nonexempt employee generally is directed by a supervisor to perform the exempt work or performs the exempt work for defined time periods.

For example, if an assistant manager's primary duty is management, performing work such as serving customers, cooking food, stocking shelves and cleaning the establishment does not preclude the exemption. An assistant manager can supervise employees and serve customers at the same time without losing the exemption. In contrast, a relief supervisor or working supervisor whose primary duty is performing nonexempt work on the production line in a manufacturing plant does not become exempt merely because he occasionally has some responsibility for directing the work of other nonexempt production line employees when, for example, the exempt supervisor is on vacation.

Executive Duties Review

- Duties requirements for executive exemption:
 - Primary duty of management;
 - Customarily and regularly directs the work of three or more other employees; and
 - Authority to hire or fire or having suggestions and recommendations as to hiring, firing, advancement promotion or any other change of status to other employees be given particular weight

In review, the executive exemption is available only if, in addition to meeting the salary requirements, the employee's primary duty is management; the employee customarily and regularly directs the work of three or more employees; and the employee has administrative supervisory responsibility including the authority to hire or fire other employees, or has her recommendations be given particular weight.



This section discusses the duties requirements for the computer professional exemption.

Computer Professional Duties

To qualify for the computer professional exemption, the following tests must be met:

- Employees paid \$455 per week salary or
- Employees paid \$27.63 per hour or more, but no 1.5 OT
- Employee employed as a computer systems analyst, computer programmer, software engineer or similarly skilled worker in the computer field performing duties described below
- Employee's **primary duty** must consist of:
 - The application of systems analysis techniques and procedures, including consulting with users, to determine hardware and software specifications
 - The design of computer systems based on and related to user specifications
 - The creation or modification of computer programs related to system design specifications or machine operating systems
 - A combination of these duties, the performance of which requires the same high level of skills

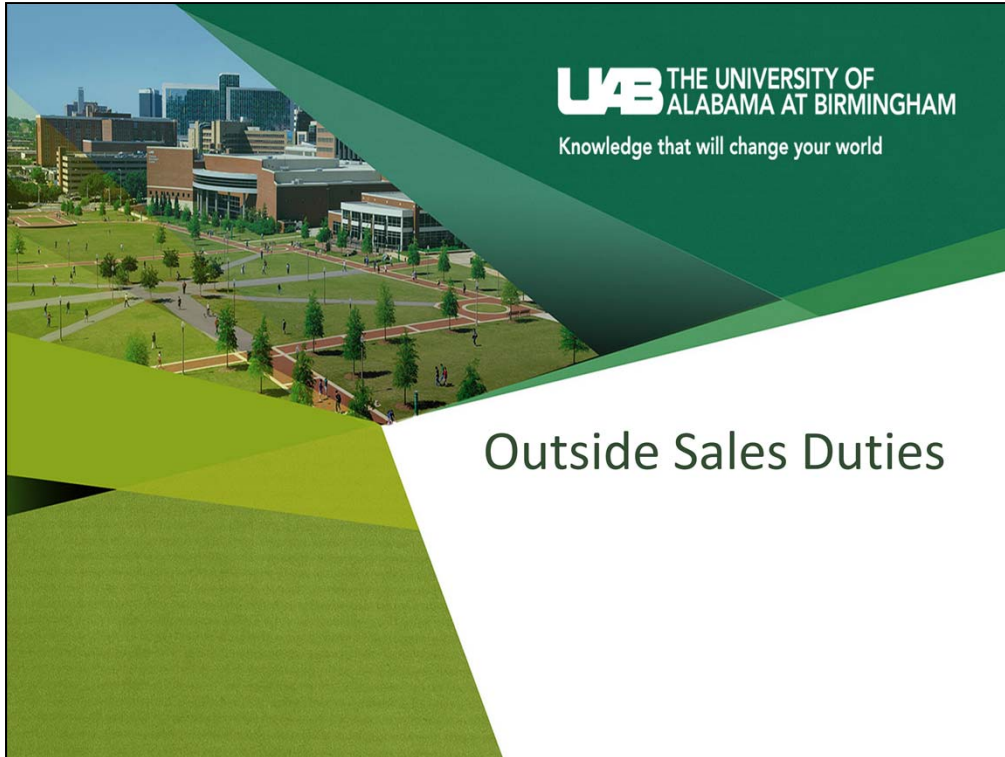
Employees paid on an hourly basis are nonexempt, even if they are nuclear chemists with multiple Ph.Ds. Computer professionals are the exception. They can be paid an hourly wage of at least \$27.63, as established by the DOL's regulations, and still be exempt. But computer professionals still have to pass the duties test. Being paid the requisite salary of at least \$455 per week or the required hourly wage does not create an automatic exemption.

Whether salaried or hourly, a computer employee will be exempt as a professional only if the employee's **primary duty** (as defined earlier) is:

- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications
- 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
- The design, documentation, testing, creation or modification of computer programs related to machine operating systems, or
- A combination of these duties, the performance of which requires the same high level of skills

The computer exemption does not include employees engaged in the manufacture, or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitate by, the use of computers and computer software programs (e.g., webmasters, engineers, drafters and other skilled computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-

related occupations identified in the primary duties test described above, are also not exempt under the computer employee exemption.



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Outside Sales Duties

This section discusses the duties requirements for the outside sales exemption.

“Outside Sales” Exemption

- Employee’s **primary duty** is **making sales or obtaining orders** for services and
- Employee **customarily and regularly** engages in work **away** from the employer’s place of business
- No salary requirement or particular salary level
- No longer a requirement of 80% of employee’s time on employee’s own sales
- New regulations explicitly exclude “Inside Sales” by mail, telephone and Internet, except as an adjunct to personal sales calls

To qualify for the outside sales exemption, the employee’s **primary duty** (as defined earlier) must be making sales, or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer. In addition, the employee must be **customarily and regularly** engaged away from the employer’s place of business. The salary requirements of the regulation do not apply to the outside sales exemption.

“**Sales**” includes any sale, exchange, contract to sell, consignment for sales, shipment for sale, or other disposition. It includes the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. **Obtaining orders** for “the use of facilities” includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies. The word “services” extends the exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order.

But what does it mean to be “away from the employer’s business?” Does this cover sales employees who work out of their homes? For purposes of the outside sales exemption, an employee’s home is considered the employer’s business. “**Away**” from the employer’s business generally means at customer or client sites. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer’s places of business, even though the employer is not in any formal sense the owner or tenant of the

property.

What about promotional work designed to help facilitate outside sales? Can that count in determining whether the employee's primary duty is outside sales? The regulations provide that promotional work can be considered only if it is designed to facilitate an employee's own sales and not those of another employee. In short, it counts if the organization encourages selfish silos, but it doesn't count if the organization or the employee works collaboratively.



There are two general types of professional exemptions: one applying to employees who are learned professionals; the other to those employees who are creative professionals. This section discusses the duties requirements for the learned professional exemption.

Learned Professional

- The employee's **primary duty** must be the performance of work requiring **advanced knowledge**
- In a **field of science or learning**
- **Customarily** acquired by a **prolonged course of specialized intellectual instruction**

In addition to the salary requirements which we already discussed, the learned professional exemption applies only if the employee's primary duty is the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment. The advanced knowledge must be in a field of science or learning which is customarily acquired by a prolonged course of specialized intellectual instruction. We have already discussed the meaning of "**primary duty**." The next set of slides explores the definitions of the other key terms in the learned professional duties test.

Advanced Knowledge

- Predominately intellectual in character
- Includes work requiring the consistent exercise of discretion and judgment
- The advanced knowledge is generally used to analyze, interpret or make deductions from varying facts or circumstances
- *Not* work involving routine mental, manual, mechanical, or physical work
- *Cannot* be attained at the high school level

The regulations explain that work requiring “**advanced knowledge**” means work that is predominately intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment. An exempt professional employee generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Work involving routine mental, manual, mechanical or physical work is not work requiring advanced knowledge. Advanced knowledge cannot be attained at the high school level.

Field of Science or Learning

Occupations with recognized professional status, as distinguished from the mechanical arts or skilled trades

Law	Accounting	Actuarial Computation
Theology	Teaching	Physical Sciences
Medicine	Architecture	Chemical Sciences
Pharmacy	Engineering	Biological Sciences

Fields of science or learning are occupations with recognized professional status, as distinguished from the mechanical arts or skilled trades. Fields of science or learning include: law, theology, medicine, pharmacy, accounting, teaching, architecture, engineering and the physical, chemical or biological sciences.

Many accountants are exempt as professional employees. However, exemption of accountants, as in the case of other occupational groups, must be determined on the basis of the individual employee's duties and the other criteria in the regulations. Certified public accountants will almost always meet the requirements of the professional exemption. Accountants who are not certified public accountants may also be exempt as professional employees if they actually perform work that requires the consistent exercise of discretion and judgment and otherwise meet the tests prescribed in the definition of professional employee. Accounting clerks, junior accountants, and other accountants who perform a great deal of routine work that is not an essential part of, and not necessarily incidental to, any professional work that they may do are not exempt.

Prolonged Specialized Intellectual Instruction

- Specialized academic training is a prerequisite for entering the profession
- Best evidence that an employee meets this requirement is possession of the appropriate academic degree
- The learned professional exemption is *not* available for occupations that may be performed with:
 - Only the general knowledge acquired by an academic degree in any field
 - Knowledge acquired through an apprenticeship
 - Training in the performance of routine mental, manual, mechanical or physical processes
- The exemption also *does not* apply to occupations in which most employees acquire skill by experience

This phrase “**prolonged course of specialized intellectual instruction**” means that the learned professional exemption is limited to professions where specialized, academic training is a standard prerequisite for entering the profession. The best evidence that an employee meets this requirement is possession of the appropriate academic degree.

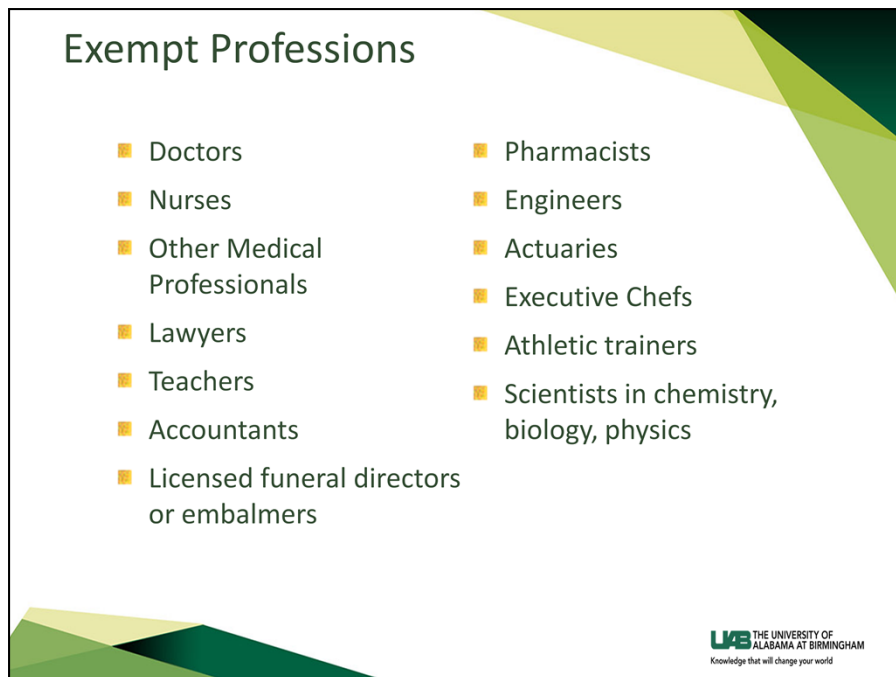
The learned professional exemption is *not* available for occupations that may be performed with only the general knowledge acquired by an academic degree in any field; knowledge acquired through an apprenticeship; or training in the performance of routine mental, manual, mechanical or physical processes. The exemption also *does not* apply to occupations in which most employees acquire skill by experience.

Customarily

- Exemption is also available to employees in learned professions who:
 - Have substantially the same knowledge level and
 - Perform substantially the same work as the degreed professionals,
 - But attained the advanced knowledge through a combination of work experience and intellectual instruction
- Examples:
 - Lawyer who did not attend law school
 - Chemist who does not have a chemistry degree

The word “**customarily**” means that this exemption is also available to employees in such professions who possess substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attain the advanced knowledge through a combination of work experience and intellectual instruction. Such employees may include the occasional lawyer who has not gone to law school, or the occasional chemist who does not have a degree in chemistry.

Exemption is not automatically available to members of occupations such as journalism, in which the bulk of employees have acquired their skill by experience rather than by any formal specialized training.



The learned professional exemption applies to any employee, such as **doctors**, who holds a valid license or certificate permitting the practice of medicine, including osteopathic physicians, podiatrists, dentists and optometrists. The exemption is also available to an employee who holds the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program. Registered **nurses** who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption. However, many registered nurses receive overtime pay because they are paid by the hour, not on a salary basis as required for exemption. Licensed practical nurses generally *do not* qualify as exempt learned professionals. Registered or certified **medical technologists**, **dental hygienists** and certified **physician assistants** also generally meet the duties requirements for the learned professional exemption. Registered or certified medical technologists may qualify after completion of 3 years of pre-professional study in an accredited college or university, plus 1 year of professional study in an accredited school of medical technology. Dental hygienists may qualify after 4 years of pre-professional and professional study in an accredited college or university. Certified physician assistants may qualify after 4 years of pre-professional and professional study, including graduation from an accredited physician assistant program.

Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. Exempt teachers include, but are not limited to, regular academic teachers; kindergarten or nursery school teachers; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrument music teachers.

Other exempt learned professionals include: **lawyers**, **accountants**, **pharmacists**, **engineers**, **actuaries**, **chefs**, **athletic trainers** and **funeral directors or embalmers**.

The salary and salary basis requirements do not apply to bona fide practitioners of law, medicine or teachers.

Exempt Professionals

Coaches

- Faculty engaged as teachers are generally exempt
- Non-faculty member bona fide executive employee

Athletic Trainers

- Completed 4 academic years of pre-professional and professional study
- Curriculum accredited by Commission on Accreditation of Allied Health Education Programs
- Certified by Board of Certification of National Athletic Trainers Association

Assistant Athletic Trainer

- 1998 DOL Opinion Letter: Non-exempt

Faculty members engaged as teachers, but also spend a considerable amount of their time in extracurricular activities such as **coaching** athletic teams, are engaged in “teaching” and are therefore generally exempt under the professional exemption. A non-faculty member engaged as a coach similarly qualifies for exemption, but as a bona fide executive employee. Therefore, head coaches are not entitled to overtime pay under the new regulations.

Athletic Trainers who completed four years or pre-professional and professional study in an accredited program, plus are certified by the National Athletic Trainers Association are considered exempt under the new learned professional exemption. However, as identified in the 1998 DOL opinion letter, **Assistant Athletic Trainers** generally do not meet the duties tests to qualify for exemption. The Assistant Athletic Trainer in that letter reported to a Head Athletic Trainer, and assisted with sports programs by providing supervision, training, evaluation, care, treatment prevention, and rehabilitation. The DOL decided that the duties and responsibilities did not meet the requirements for exemption under the FLSA because the employee lacked the discretion and independent judgment in the performance of his work required under the administrative exemption, and because the Assistant Athletic Trainer spent more than 50% of his time on non-exempt work.



Let's now turn to the second type of professional exemption, the creative professional exemption.

Administrative Duties

- 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
- Whose primary duty includes the exercise of **discretion and independent judgment** with respect to matters of significance

In addition to the salary requirements, the administrative exemption applies only if: the employee's 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 the employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. These elements contain a number of important terms that are defined in the regulations.

Discretion and Independent Judgment

Discretion and independent judgment does not include:

- Applying well-established techniques, procedures or specific standards described in manuals or other sources
- Clerical or secretarial work
- Recording or tabulating data
- Performing mechanical, repetitive, recurrent or routine work

The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. The exercise of discretion and independent judgment also does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work. For example, an employee who simply tabulates data is not exempt as an administrative employee, even if they are called a “statistician.” An employee who merely applies his or her knowledge in following prescribed procedures, determining which procedure to follow, or determining whether specified standards are met is not exercising discretion and independent judgment. For example, a quality control inspector is generally engaged in applying predetermined standards rather than using discretion and independent judgment.

The professional exemption also requires judgment, but there is no requirement that a professional's judgment be “independent.” Because the independent qualifier appears in the administrative exemption but not the professional exemption, it must be very important to the administrative exemption. On the other hand, some level of independence is important for all of the exemptions. As noted previously, one of the four factors in determining whether an employee's primary duties are exempt is the employee's relative freedom from supervision. Thus, an employee's relative degree of independence, especially with regard to the administrative exemption, creates substantial risk for employees whom you might want to treat as exempt but who report to micromanagers.

For example, two employees have the same job description but report to different managers in different units. One manager allows the subordinate substantial independence in decision-making. The other manager needs to approve font

changes in memos. Even if the first employee is exempt, the second employee may not be. The point is not that employers must evaluate separately the management style of each individual who supervises exempt employees to determine whether those subordinates are exempt. That is neither practical nor desirable. What is important is those who supervise exempt employees receive appropriate training so they don't micromanage their subordinates out of their exempt status.

Use of Manuals

- Exempt employees may use manuals, guidelines or other established procedures if they:
 - contain or relate to highly technical, scientific, legal, financial or other similarly complex matters
 - that can be understood or interpreted only by those with advanced or specialized knowledge or skills
- Employees are not exempt if they use manuals to apply well-established techniques or procedures within closely prescribed limits

Using a manual, however, does not automatically disqualify an employee from the Section 13(a)(1) exemptions. Exempt employees may use manuals, guidelines or other established procedures containing or relating to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills. The Section 13(a)(1) exemptions are not available for employees who simply apply well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances. These rules of the use of manuals applies to all of the Section 13(a)(1) exemptions.

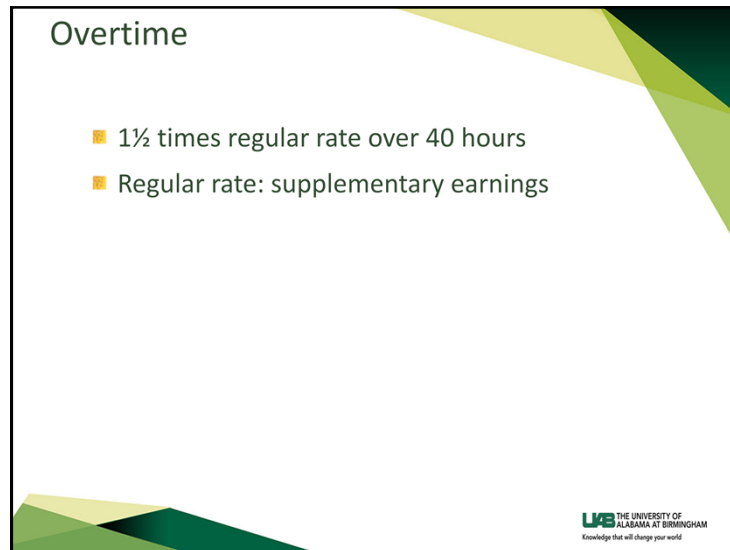
Review

- 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
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance
- Also includes work where the primary duty is the performance of office or non-manual work directly related to academic instruction or training in an educational institution

The administrative exemption is available only if the employee's primary duty is performing work directly related to the management or general business operations of the employer or the employer's customers; and the employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. For educational establishments, the administrative exemption also includes employee's whose primary duty is the performance of office or non-manual work directly related to academic instruction or training in an educational institution.

Combination Exemption

- An exempt employee's work may consist of the duties that meet 2 or more exemptions.
i.e. - Executive/Administrative
- All six Exemptions may serve
- Contact the Compensation Department for assistance



Overtime

- The FLSA requires employers to pay all nonexempt employees at least **one and one-half times regular rate of pay for all hours worked over 40 hours** each workweek (during established 168-hour period consisting of seven consecutive days).
 - In certain special cases, such as hospitals and nursing homes, you can use over 80 hours in a two-week period rather than 40 hours per week. This “8 and 80” allows greater scheduling flexibility in a two-week period, but does require paying the minimum rate for all hours over 8 worked in any given work day.
 - The workweek can begin on any day of the week and at any hour decided by the employer.
 - It is a period of 168 hours during the following seven 24-hour periods.
- **State law may require daily overtime.**
- **Regular rate includes supplementary earnings** such as commissions, non-discretionary bonuses or shift premiums.


An employer may require an exempt employee to work more than 40 hours in a workweek without having to pay a premium for overtime hours.

• For nonexempt employees the UAB provides payment at the rate of time and one-half for hours worked in excess of 40 hours per week.

• While schedules should not change day-to-day to avoid a special need for additional work hours and overtime compensation, you can change work schedules to accommodate the needs of your unit. Regarding Work Schedules, you should provide regularly recurring consecutive hours of work where practicable.

Hours of Work

- All time which employer requires, suffers or permits
- Nonexempt employees



Hours of Work

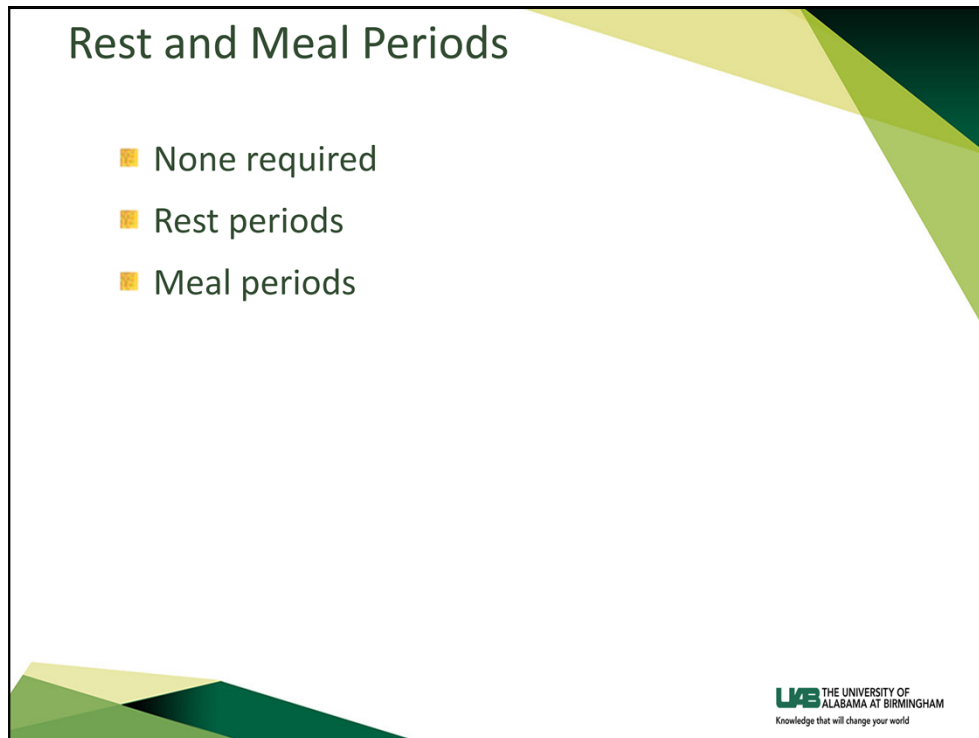
In order to implement its minimum wage and overtime provisions, the FLSA had to define the work hours for which payment is due.

- The term “hours of work” is defined as **all time in which the employer requires, suffers or permits** the employee to be on duty at a prescribed workplace or on employer’s premises.
- All hours worked must be paid to **nonexempt employees**.

Only hours worked count in the overtime calculation. Therefore, holidays not worked, vacation days, sick days, etc., are not counted. The fact that an employee receives holiday pay, vacation pay, or sick pay is of no consequence for overtime purposes. The test is hours worked rather than hours paid. **At UAB, only hours worked count in the overtime calculation.**

Although overtime must be computed weekly, FLSA does not require that it be paid on a weekly basis; it only requires that overtime be paid in the next regular pay period following the period in which the overtime is earned. UAB chooses to

pay nonexempt employees on a biweekly pay frequency.



Rest and Meal Periods

- **None required** under FLSA
- **Rest periods** of 5 to 20 minutes count as hours worked
 - *UAB's policy concerning rest periods states "Rest periods are allowed, but they are not guaranteed. Where rest periods are allowed, they are limited to two 15-minute breaks per shift. Breaks may not be accumulated to allow employees to leave work early or to extend or replace a lunch period."*
- Bona fide **meal periods** of 30 minutes or more are not hours worked
 - *UAB's policy concerning lunch periods states "meal breaks of 30 minutes, 45 minutes or one hour depending on the work unit. Meal breaks of 30 minutes or more are unpaid and should be uninterrupted."*
- **Working meal or break periods** count as hours worked. If the employee is not fully relieved of responsibility, the break is for the benefit of the company.

Lectures, Meetings and Training Programs

- Attendance is work time if:
 - Required by the employer
 - Nonattendance would adversely affect employment
- Attendance is not work time if:
 - Outside of working hours
 - Voluntary
 - Not directly related to the job
 - No productive work during attendance

Lectures, Meetings and Training Programs

The most misunderstood part of the test for whether lectures, meetings and training time are hours worked is the decision about when attendance is voluntary or involuntary.

• **Attendance is work time if:**

- It is required by the employer
- The employee is given to understand or led to believe that present working conditions or the continuance of employment would be adversely affected by nonattendance

• **Attendance is not work time if all of the following four criteria are met:**

- Attendance is outside of the employee's regular working hours.
- Attendance is in fact voluntary
- The course, lecture, or meeting is not directly related to the employee's job
- The employee does not perform any productive work during such attendance

FLSA Ref. Title 29, Part 785 of the Code of Federal Regulations, Section 785.27 and 785.28

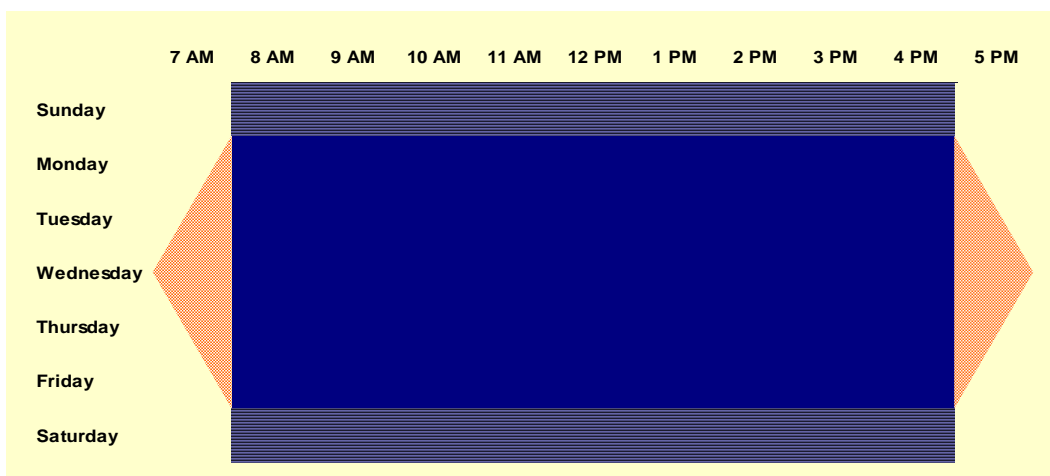
Travel Time

- Hours to work is not hours worked
- Operating a vehicle for employer is hours worked
- Out of town travel and work hours
 - During employee's normal work hours
 - Outside employee's normal work hours
 - Overnight travel

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Travel Time

- The time spent by nonexempt employees in **travel from domicile to workplace is generally not considered time worked.**
- If the employee makes a trip by **operating a vehicle on the employer's behalf** (such as a van pool driver), the trip is **counted as hours worked.**
- Any **other travel required by the employer during the employee's normal work week is usually counted as hours worked**, even if it occurs on the employee's normal day off.
 - Example: A nonexempt day-shift employee required to travel to another city and return in the same work day, would be "working" until final return.
 - Example: A nonexempt day shift employee required to make a business flight in the late evening would not be "working," but the same employee



- Employee regularly works 8:00 – 5:00 Monday through Friday
- Same day travel to another city that starts before or after the employee's regular work hours or ends after regular work hours, is generally compensable
- Travel on a day not normally worked, but during hours normally worked is generally compensable

making a similar flight during the day shift hours on Sunday would be “working.”

What FLSA Does Not Require

- Pay for time not worked
- Time clocks
- Premium pay
- Exempt/nonexempt differentiation
- Raises or benefits
- Discharge notice or reason
- Pay stubs or W-2s
- Limit on hours worked

What FLSA Does Not Require

There are a number of misconceptions in regards to the FLSA. It is often believed to mandate certain requirements that it does not cover. These requirements may (or may not) be covered under another act.

FLSA does not require the following:

- **Pay for time not worked**
- **Time clocks to record hours worked**
Variation: Holiday
- **Premium pay for**
 - Meal periods of 30 consecutive minutes or more, duty free
 - Saturday, Sunday, holiday, or sixth- or seventh-day work
 - Rest periods greater than 20 consecutive minutes
 - Sickness
 - Hours worked in excess of eight per day unless the employer chooses the 8/80 option
- **Differentiation between exempt and nonexempt employees** in any other way than minimum wage payments, overtime premiums, and records
- **Pay raises or fringe benefits**
- **A discharge notice**, reason for discharge or immediate payment of final wages to terminate employees

- **Pay stubs of W-2s**

- **A limit on number of hours in a day, or days in a week, an employee may be required or scheduled to work (if the employee is at least 16 years old)**

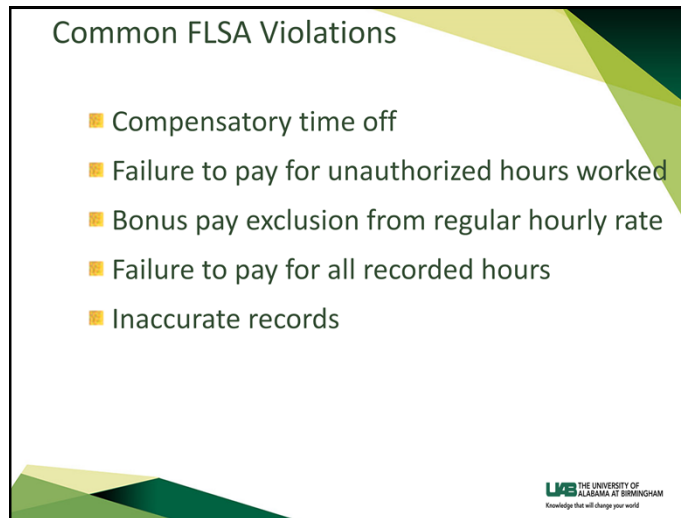
Common FLSA Violations

- Non payment for overtime
- Misclassification of employees as exempt
- Improper payment for break/meal time
- On-call time
- Training time
- Travel time

Common FLSA Violations

- **Misclassification of employees as exempt:** The Labor Department will take great care to confirm what criteria the employer used to establish exemption. What they are really looking for are attempts by employers to avoid the overtime penalty.
- **Improper payment for break time:** Any break of five to twenty minutes must be considered hours worked. Breaks greater than twenty minutes are not hours worked. Bona fide meal periods of 30 minutes or more are not hours worked.
- **On-Call time:** Whenever the employer requires an employee to be on call and the employee is not free to pursue the majority of his/her normal non-work activities, the on-call time is considered hours worked.
- **Training time:** If the time spent in training is during the regular hours of work, if any job-connected work is produced during training, or if the training is considered a requirement for the ongoing employment relationship (that is, training is not voluntary), the hours in training and some amount of study time must be considered hours worked.
- **Travel time:** A nonexempt employee traveling on company business must be paid within the framework of the FLSA provisions. Many employers think that nonexempt employees are somehow grateful for the opportunity to travel and

have the company pay for the airplane ticket. It is this innocent ignorance that can prove embarrassing.



Common FLSA Violations

- **Compensatory time off:** For the majority of employers, there is no such thing as compensatory time off for nonexempt employees. The simplest way to ensure compliance with the FLSA is to pay every nonexempt employee for all hours worked in the week that they are worked. If those hours worked exceed 40, under the act, pay time and one-half for all such hours.
- **Failure to pay for unauthorized hours worked:** The fact that you told your employees to leave their work stations for lunch and not show up early or leave late will not reduce your responsibility. Remember, the act specifies that you must pay the employee for all hours you “suffer, permit, or allow” the employee to work. If this situation persists, disciplinary action would be advisable.
- **Bonus pay exclusion from regular hourly rate:** With the growing interest in variable pay, at-risk pay, gainsharing, lump-sum merit bonuses and the like, it is critical that your legal counsel and/or the Labor Department be consulted before you implement a plan. You certainly do not want to find out via an audit that you have not included bonus earnings in the regular rate of pay. There is a strong likelihood that the Department would consider this not only a violation, but a willful violation of the act’s provisions.
- **Failure to pay for all recorded hours:** One of the risks for using time clocks is that employees do not generally clock in at precisely the shift start time. The time represented on the official time card vs. the time the employer actually pays the employee for may differ and may serve as an area of contention. Even for those companies that do not use time clocks, if your practice is not to pay for lunch time, but the employees record only their “start” and “stop” times, the official record of time will differ from the actual hours paid for.
- **Inaccurate records:** There are a number of ways that this can occur. Failure to pay for all recorded hours is arguably one of the ways that time records are inaccurate. Employees making changes, supervisors altering records, or lost records, someone else recording (punching in) as employee, are all ways that record keeping can become suspect. Great care must be taken to ensure that the recording of time and payments of nonexempt employees are handled correctly – these are legally required documents.