FLSA Deconstructed: Step-by-Step Compliance

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The Fair Labor Standard Act (FLSA) is a broad federal law that covers several areas of the employment relationship. While the law contains many elements that employers need to be aware of, one of the areas that has received the most attention is the overtime pay rule.

In 2016, the Department of Labor (DOL) issued a regulation that would have dramatically changed the salary level requirements for exempt employees. While it was struck down, in the spring of this year, the DOL issued a proposed rule that followed many of the provisions from 2016 but adopted a lower salary requirement for overtime exemptions. On September 24, the DOL issued its final rule, which is effective January 1, 2020.

In preparation, it is important for employers to review both the existing FLSA rules and the new requirements and implement any necessary changes to comply. Here are five things every employer needs to know.

Covered Employers and Employees: FLSA coverage is very broad and covers most employers and employees. Under the Act, a covered enterprise is one that has at least two employees engaged in interstate commerce with at least $500,000 in gross annual business. There are also some specific types of business that are covered: hospitals, residential care facilities, schools, and public agencies.

If an employer is covered, its employees are also automatically covered. Even if the enterprise is not specifically covered, an employee can still be entitled to protection. Individual employees who work for employers that do not meet the definition of a covered enterprise are covered if they are involved in interstate commerce, which can involve activities like making phone calls or sending emails to other states. Domestic service workers such as full-time babysitters may also be covered.

While most employers and employees are covered, examples of some that are not include a construction company that only works locally or a small local retailer that is not involved in interstate commerce.

Minimum Wage and Overtime Pay Rules: The federal minimum wage for covered workers under the FLSA, set in 2004, remains $7.25 an hour. However, there are exceptions: lower rates apply for those who are under 20 years of age ($.25 per hour), student learners (75% of minimum wage), full-time students (85% of minimum wage), and disabled workers if the employer has a certificate from the DOL authorizing a lower minimum wage.

Tipped employees are also not required to receive the minimum wage rate. For them, the rate is $2.13 an hour. However, they must receive more than $30 a month in tips, with the employer subsidizing wages if necessary. And remember: beyond the FLSA, there are often state and local laws that can apply to workers like minimum wage so they still may be subject to some protections.

For overtime, the FLSA requires that employees be paid one and a half times the regular wage rate for all hours worked over 40 in a work week, which is defined as seven consecutive 24-hour periods. To determine the hours of work, an employer must consider all compensable time, which can even include unauthorized activities:

- Unauthorized work time if the employer knows or has reason to know and would benefit from it
- Time an employee is not able to effectively use for their own purposes
- Time an employee spends on preparatory and concluding activities like putting on and taking off gear
- Travel time other than normal commuting to and from work
- Job-related meetings and trainings
- Other time spent at the employer's request or discretion

When calculating overtime, the base regular wage rate is the average hourly compensation during a work week, which can vary from week to week. To determine the rate, an employer must take the total wages earned for the week that can include piece rate or bonus pay, then divide it by all the hours worked during the work week.

Exemptions:

Certain exemptions to the FLSA's minimum wage and overtime pay requirements exist, the most common of which is the white collar exemption. This exclusion applies to:

- Executive, administrative, and professional employees
- Outside sales employees
- Employees in certain computer-related occupations
- Highly compensated employees

The white collar exemption does not apply to manual laborers or others who perform work involving repetitive operations with their hands, physical skill and energy no matter how much they are paid.

To determine if an employee qualifies for the white collar exemption, there are three tests, each of which must be satisfied.

- Salary Basis Test: The employee must receive predetermined and fixed wages that are not subject to reduction due to the quality or quantity of work performed.
- Salary Level Test: Currently, the employees must be paid a minimum salary of $455 a week, but under the new rule effective in January, that figure rises to $684. The new rule also allows employers to use nondiscretionary bonuses and incentive pay to satisfy up to 10% of the salary level as long as they are paid at least annually.

- Duties Test: The employee must perform typical duties of a white collar employee in specific occupations. Keep in mind that a job title is not determinative but rather the employee's actual responsibilities must align with the definitions under the law, which are:
  - Executive Exemption: An employee's primary responsibility must be managing the enterprise or a department or subdivision of it. The employee's job must involve regularly directing the work of at least two other full-time employees and the ability to hire or fire employees or, at a minimum, their suggestions must be given particular weight.
  - Administrative Exemption: The employee's primary duty must be the performance of office work directly related to the management or general business operations of the employer or its customers that includes the exercise of discretion and independent judgment with respect to matters of significance.
  - Professional Exemption: There are two categories of employees to which this exemption can apply: the learned professional, whose primary duty must require advanced knowledge in the field of science or learning that is customarily acquired by a prolonged course of specialized instruction such as a lawyer or architect, or the creative professional, meaning an employee who performs work requiring invention, imagination, or talent in a recognized field of artistic or creative endeavor like music, writing, or graphic arts.
  - Computer Employee Exemption: Those who work as a systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field can be exempt; however, they have a slightly different compensation test: they must be paid $684 per week under the new rule or an hourly rate of $27.63 an hour.
  - Outside Sales Exemption: Employees are exempt if their primary duty is making sales or obtaining orders or contracts for services or the use of facilities and they regularly work away from the employer's place of business. For this category of employees, the salary requirements do not apply because many outside salespeople work on commission.
  - Highly Compensated Employees: To qualify for this exemption, the employee's primary duty must include office or non-manual work and they must regularly perform at least one duty of an exempt executive, administrative, or professional employee. Under the new rule, they must also be paid a total annual compensation of $107,432 (currently $100,000) that includes at least $684 per week paid on a salary or fee basis.

Recordkeeping Requirements: Under the FLSA, detailed recordkeeping about employees, their wages, and hours is essential, particularly in the event of a wage and hour dispute. The rules require that records be kept at the place of employment or central records office and be open to inspection; however, there is not a specific form or format for the information.

The requirements for a basic employee record are different depending on whether the employee is exempt or non-exempt:

- Non-Exempt:
    - Name, address, Social Security number
    - Birth date if under 19
    - Gender
    - Occupation
    - Time of day and day of the week that the employee's work week begins
    - Hours worked per day and work week
    - Basis on which wages are paid
    - Regularly hourly rate
    - Total daily/weekly straight-time earnings
    - Total overtime earnings for the work week
    - Additions to/deductions from wages
    - Total wages paid each pay period
    - Date of payment and pay period covered by the payment
- Exempt:
    - Name, address, Social Security number
    - Birth date if under 19
    - Gender
    - Occupation
    - Time of day and day of the week that the employee's work week begins
    - Total wages for each pay period
    - Date paid and corresponding pay period
    - Basis on which wages are paid

The records must be kept for two or three years depending on the content. Time cards, piece work tickets, wage additions and deductions, wage rate tables, and work schedules must be kept for two years while payroll records, collective bargaining agreements, and sales and purchase records have to be maintained for three.

Failure to maintain accurate records will make it very difficult to prove compliance with the law so it is important to follow the requirements. And note that states may have additional recordkeeping laws so employers will want to make sure they are in compliance with those as well.

Compliance Strategies: Employers can take several actions to minimize their risk of FLSA violations. To start, employers must display an official poster outlining the provisions of the FLSA in a conspicuous place in all of their establishments. The poster can be downloaded directly from the DOL website.

Employers should also conduct periodic internal audits. During these reviews, the employers should look at the job descriptions and hour and payroll records related to each employee to make sure they are still classified correctly and afforded the correct protections since a determination made upon hiring may change over time. If an employer decides to make any changes, for instance, shifting an employee to exempt status, they should communicate that to the affected employees.

Another important way to avoid FLSA violations is to train managers, supervisors, and employees on what the law requires since these are often the individuals making decisions that affect an employee and their FLSA rights.

Lastly, while there is no sure-fire way to avoid a lawsuit, employers can take steps to minimize their risk. If an internal audit reveals an issue, be proactive rather than waiting for the employee to lodge an objection by:

- Addressing the issue promptly
- Identifying whether it was an isolated incident
- Putting policies in place to prevent future problems
- Determining how an employee can be made whole, which may require payment of back wages