

Department of Labor Audit Lessons Learned

Fair Labor Standards Act

(Remember this was 18 years ago, so I may not remember it
correctly)

Pick your battles carefully, all
causes are not worth falling on
your sword for

You cannot slay the dragon every
day. Some days the dragon wins

The Fair Labor Standards Act (FLSA): What Employers Should Know

The Fair Labor Standards Act (FLSA) is a labor law that the United States Congress passed in 1938 to protect the rights of manufacturing workers. In the more than 80 years since the FLSA was first introduced, Congress has revised the law to adjust the minimum wage, expand employee protections and protect more than just the rights of manufacturing workers.

As an employer, FLSA is an important law to understand since it involves regulations that apply to both **salaried and hourly employees**.

What is FLSA?

The Fair Labor Standards Act (FLSA) is a law that governs standards for minimum wage, **overtime pay, recordkeeping, child labor** and various other labor regulations. The **law applies** to many full-time and part-time employees in the private sector and those who work for federal, state and **local governments**.

It also applies to most businesses, since the basic requirements include employers who earn \$500,000 in annual sales or are engaged in interstate commerce — including sending mail to other businesses across state lines or using telephones and the internet for business purposes.

Other employees that are typically protected by FLSA regulations include domestic service workers (e.g., housekeepers, full-time babysitters), hospital employees and **people who work at educational institutions of any level, from preschools to colleges**.

FLSA laws

The [U.S. Department of Labor \(DOL\)](#) enforces much of the criteria set out in the FLSA, often through the [Wage and Hour Division \(WHD\)](#). The [Equal Employment Opportunity Commission \(EEOC\)](#) enforces provisions that concern workplace discrimination.

The FLSA sets the **standards** for the following workplace elements:

The workweek

The FLSA measures wages based on the workweek, which consists of 168 hours during seven consecutive 24-hour periods. While the FLSA [doesn't actually define full-time or part-time employment](#), non-exempt employees are eligible for overtime if they work more than 40 hours per week.

The bottom line on overtime

Overtime laws are straightforward, **with some exceptions based on local regulations.** Pay attention to each employee's job duties to make sure you classify employees correctly. **Use time tracking and payroll systems to ensure employees are paid accurately and on time.** Employee workweeks are fixed, recurring periods of 168 hours, or seven consecutive 24-hour days. **Workweeks can begin any day of the week and at any hour.**

Our Audit at Sevier School District created a discussion around how to define our work week, which was one of many topics that were discussed.

Here are some questions we asked ourselves after the audit:

Where are the most likely places that overtime would occur?

Can we impact the management of those places by modifying the work week?

What is the language we should use and is there the need to put it into policy?

What is the best methodology to track the record keeping requirements for time worked?

Would time clocks pay for themselves **over time**?? (No pun intended)

Our answers to the above questions helped us develop our new Overtime Policy - #2530 Adopted shortly after our DOL Audit

SSD OVERTIME POLICY 2530

1. DEFINITION:

Overtime represents **time actually worked** by a non-exempt employee **in excess of forty (40) hours during any workweek**. Unless otherwise directed in writing by the Superintendent or designee, **the workweek is defined as the period beginning Saturday morning at 12:01 a.m. and ending the following Friday evening at midnight**.

Our reasoning behind choosing this particular workweek allowed us to manage our most common overtime occurrences:

Bus drivers, Maintenance and Custodial which dealt with a couple of primary issues:

- School Activities

- Unforeseen Facility Issues

- Tending Coal Fired Furnaces over the weekend during the winter months

So why Saturday morning?

By choosing Saturday morning to Friday at midnight as the workweek, it gave us the entire following week to manage any extra ordinary hours worked over a weekend. Bus driver routes or activity trips could be reduced, custodians or maintenance workers could also manage the remainder of their hours to avoid any overtime.

In the end, we felt like this defined workweek would allow us to keep our overtime to a minimum. Nothing can really eliminate it, but this really did help us along with other measures I'll discuss later.

Minimum wage

The FLSA mandates that all employers subject to FLSA guidelines pay their employees whichever is higher: the federal minimum wage (currently \$7.25 per hour) or the minimum wage required by the state where the business is headquartered.

For employees who receive tips, such as restaurant servers, employers must pay them the minimum wage unless they regularly receive more than \$30 per month in tips. According to the FLSA, employers of tipped employees are [only required to pay \\$2.13 per hour](#) (although many states require a higher hourly rate). However, if the employee's pay (plus tips) doesn't equal the minimum wage, employers must make up the difference. The FLSA has further guidelines on gratuities, including [rules for tip pooling](#).

This really wasn't an issue with us, so I won't discuss it

Overtime

Employers subject to FLSA guidelines are required to pay their employees a **fair wage for every hour worked**. In many cases, employers also need to pay employees one-and-a-half times the hourly wage in [overtime pay](#) — also known as time-and-a-half — **for every hour worked in excess of 40 hours during the workweek**.

The District wasn't and isn't exempt from overtime, nor can you always control all the circumstances that will create an overtime situation. The real issue is being fair with employees and them in return being fair with their employer.

When justified, we all pay overtime. All of us can probably relate to situations where employees took advantage of the system and generated overtime without approval that could have easily been avoided. At least I can, both at Sevier and at Grand School Districts.

Sometimes we pay it even when it's not authorized, approved or justified because we had an employee actually work it. That's the law.

Our Policy wording to address this issue:

"Overtime pay" is **paid only for hours actually worked** by a non-exempt employee for more than 40 hours within a workweek as defined herein. Work in excess of eight hours in any workday is not overtime. Only where more than forty (40) hours are actually worked in any one workweek as defined herein does overtime occur. (Time off for vacation, holidays, leave, sickness, etc., are not included as hours actually worked.) **Each employee is responsible to clock in and clock out in order to record hours actually worked on a daily basis.** Daily hours shall be, whenever possible, varied within a workweek to accomplish necessary workloads and to limit or eliminate the necessity for overtime, but supervisors shall also exercise care that extended work schedules do not result in fatigue related safety problems. **Failure to maintain an accurate log of hours actually worked or any misstatement of hours worked shall be a violation of this Policy. Clocking out and returning to the employees work area to continue working in a clocked out status is also a violation of this Policy.**

Our DOL audit accelerated our desire to institute time clocks.

In a few slides we'll look at our existing timecards at the time of the audit

Exempt and non-exempt employees

[According to the FLSA](#), non-exempt employees, such as servers and retail workers, must receive at least the federal minimum wage plus time-and-a-half for every hour worked over 40 total hours in a workweek. [Exempt employees](#) may not receive a minimum wage or overtime because they receive salaries that are not based on the number of hours worked.

Exemptions exist for the following:

- Employers and employees of small farms
- Employers who have few outside paid employees
- Executive, administrative and professional employees, such as doctors and lawyers

What is an exempt employee?

An exempt employee is someone who cannot receive overtime pay. This distinction is based on certain job factors, as stated in the Fair Labor Standards Act (FLSA). These factors may include:

- Pay scale
- Job role
- Level of authority
- Place of employment

It is important for employers to understand who is exempt from overtime pay so that they can ensure they are acting in accordance with laws and regulations while also providing accurate pay information to candidates in their job postings.

How to determine if an employee should be considered exempt

Here is a list of steps you can use to determine whether or not you should give your employees an exempt status:

1. Establish whether they are salaried or hourly

The main distinction that separates exempt employees from non-exempt employees is the type of pay they receive while working at your company. Salaried employees are often expected to commit to working the average amount of 40 hours a week as well as however many additional hours it will take to complete their job duties efficiently.

As they have a set salary, they do not receive overtime pay for any additional hours they work. According to the Department of Labor (DOL), **employees who receive salaries of at least \$35,568 per year (\$684 per week) are considered exempt.**

In contrast, non-exempt employees are paid an hourly wage and are protected under the Fair Labor Standards Act (FLSA). If an hourly worker exceeds the limit of 40 work hours per week, their employer must pay them time and a half for each additional hour they work.

2. Determine their job position and level of authority

Hourly or "non-exempt" employees typically work in service and maintenance fields where the tasks they complete can be easily finished within their 40-hour workweek. However, salaried or "exempt" employees usually perform more complex and time-consuming responsibilities that may require them to work additional hours.

Here are the different levels of authority and areas of expertise that classify an employee as exempt:

- Executive roles: Executive employees are considered exempt from overtime pay, as their authoritative responsibilities, such as hiring, firing, management and decision-making, are compensated with higher salaries.
- Administrative roles: Employees who work in administrative roles within a company are typically salaried and therefore given exempt status. This is due to the nature of their responsibilities, such as coordinating with upper management, interacting with clients and exercising discretion with confidential company information.
- Professional roles: Professional roles include all employees who receive a salary for performing job duties within their area of expertise, such as marketing, engineering, science, teaching, business and all other areas that require a college degree.**
- Outside sales roles: Outside sales professionals can be salaried while also achieving commission and other sales-related perks. For this reason, they are classified as exempt employees and are not subject to receive overtime pay.

The Computer Professional Exemption

The U.S. Department of Labor regulations at 29 C.F.R. §541.400(b) require that in order for an employee to qualify as an **exempt computer professional, the employee’s “primary duty” must consist of the performance of any of the following duties, or any combination thereof, the performance of which requires the same level of skills:**

1. The application of systems analysis techniques and procedures including consulting with users, to determine hardware, software or system functional specifications;
2. 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; or
3. The design, documentation, testing, creation or modification of computer programs related to machine operating systems.

The courts narrowly construe the computer professional exemption. Specifically, the courts generally require that to fall within the computer professional exemption an employee’s primary duty “must require ‘theoretical and practical application or highly-specialized knowledge in computer systems analysis, programming and software engineering’ not merely ‘highly-specialized knowledge of computers and software.’” *Jackson v. McKesson Health Solutions LLC*, 10 WH Cases 2d (BNA) 374 (D. Mass. 2004). Significantly, writing computer code has been held to be “critical to the analysis of this exemption.” *Cruz v. Lawson Software Inc.*, 764 F.Supp. 2d 1050, 1064 (D. Minn. 2011).

Further, on the compensation side, in order to satisfy the exemption, the employee must be paid at least \$684 per week on a salary basis or on an hourly basis at a rate not less than \$27.63 an hour. Unlike other exemptions, there is no requirement that the employee be paid a weekly salary.

Equal pay

Under the [Equal Pay Act of 1963](#), which is a separate provision of the FLSA, men and women should receive equal pay for equal work and be offered the same level of responsibilities in the workplace.

Again, not an issue so I won't discuss anything regarding this

Recordkeeping

Businesses subject to the FLSA must keep records for each employee for at least three years. Basic payroll records should contain the following for each employee:

- Full name and social security number
- Address, including zip code
- Birthdate (if younger than 19)
- Sex
- Occupation or job title
- Time and day of the week when each employee's workweek begins
- Hours worked each day and Total hours worked each workweek
- Basis on which employee's wages are paid, hourly, weekly, monthly, piecework
- Total wages the employer pays for each pay period
- Date of payment and pay periods covered
- All additions to or deductions from the employee's wages

Employers may also need to keep additional information like hours worked each day, the regular hourly rate and total overtime earnings for the workweek, depending on the employee's status and their [job description](#).

This is where things went South for us!!!



As you can see, record keeping has been around a long time

Sevier School District

Payroll Ending December 15, 2001

	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	WEEKS TOTAL
					Nov. 16	17	
					8		
	19	20	21	22	23	24	25
	8	8	8	8 holiday	6	1 hr. 8	1 hr. 13
			***** Thanksgiving Vacation *****				
	26	27	28	29	30	Dec. 1	02
	8	8. 10 ^{AC}	8	8. 10 ^{APL}	8	1 hr. 8	1 hr. 14
						these 2 hrs. used Dec 6 th	
	2 hr. adjusted 2 hr. worked 4 hr. leave	4	5	6	7	8	09
	8	8	8	8	6. 8	1 hr. 8	1 hr. 15
	10	11	12	13	14	15	
	8	8	8	8	8		

TOTAL HOURS WORKED 168 hours

This was a copy of an existing timecard at the time of the DOL Audit.

The yellow is what was identified by the DOL as additional hours that should have been paid as overtime.

Every timecard for a two-year period of time was audited for most non-exempt employees.

What do your timecards look like??

What About Timekeeping: Employers may use any timekeeping method they choose. For example, they may use a time clock, have a timekeeper keep track of employee's work hours, or tell their workers to write their own times on the records. Any timekeeping plan is acceptable as long as it is complete and accurate.

The following is a sample timekeeping format employers may follow but are not required to do so:

DAY	DATE	IN	OUT	TOTAL HOURS
Sunday	6/3/07	-----	-----	-----
Monday	6/4/07	8:00am	12:02pm	
		1:00pm	5:03pm	8
Tuesday	6/5/07	7:57am	11:58am	
		1:00pm	5:00pm	8
Wednesday	6/6/07	8:02am	12:10pm	
		1:06pm	5:05pm	8
Thursday	6/7/07	-----	-----	-----
Friday	6/8/07	-----	-----	-----
Saturday	6/9/07	-----	-----	-----
Total Workweek Hours:				24

Employees on Fixed Schedules: Many employees work on a fixed schedule from which they seldom vary. The employer may keep a record showing the exact schedule of daily and weekly hours and merely indicate that the worker did follow the schedule. When a worker is on a job for a longer or shorter period of time than the schedule shows, the employer must record the number of hours the worker actually worked, on an exception basis.

This is a copy of a timecard from the DOL website under the recordkeeping link.

Again, the question, what do you timecards look like, will they pass the standards established by the DOL?

To review how other types of time are calculated into a person's work time, see the DOL website Fact Sheet #22. There is additional detail on rest, meal periods, on-call time, waiting time, etc. shown.

Department of Labor Audit
Head Custodians

Year	School	Name	Hourly Rate	Over Time Rate	Hours Paid	Wage Due	FICA 7.65%	RRT 11.90%	LTD 0.42%	Total Due
01 - 02			\$15.32	\$22.98	\$597.48					
00 - 01			\$14.22	\$21.33	\$554.58	\$1,152.06	\$88.13	\$137.10	\$4.84	\$1,382.13
<i>1 hr x 26 wks</i>										
01 - 02			\$14.87	\$22.31	\$490.71					
00 - 01			\$13.81	\$20.72	\$455.73	\$946.44	\$72.40	\$112.63	\$3.98	\$1,135.44
<i>00 - 01 2hr X 11 wks 01 - 02 2 hr X 11 wks</i>										
01 - 02			\$12.82	\$19.25						
00 - 01			\$11.91	\$17.87		\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
<i>Furnace put on hold fire for the weekends</i>										
01 - 02			\$12.83	\$19.25	\$750.56					
00 - 01			\$11.91	\$17.87	\$696.74	\$1,447.29	\$110.72	\$172.23	\$6.08	\$1,736.31
<i>1.5 hr x 26 wks</i>										
01 - 02			\$13.86	\$20.79	\$1,081.08					
00 - 01			\$12.82	\$19.23	\$999.96	\$2,081.04	\$159.20	\$247.64	\$8.74	\$2,496.62
<i>2 hr x 26 wks</i>										
01 - 02			\$15.32	\$22.98	\$2,389.92					
00 - 01			\$14.22	\$21.33	\$2,218.32	\$4,608.24	\$352.53	\$548.38	\$19.35	\$5,528.51
<i>1 hr x 26 wks</i>										
01 - 02			\$12.83	\$19.25						
00 - 01			\$11.91	\$17.87		\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
<i>Weekend Custodian maintains furnace when needed.</i>										
01 - 02			\$0.00	\$0.00						
00 - 01			\$14.22	\$21.33		\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
<i>Weekend Custodian maintains furnace when needed.</i>										
01 - 02			\$15.32	\$22.95	\$896.22					
00 - 01			\$14.22	\$21.33	\$831.87	\$1,728.09	\$132.20	\$205.64	\$7.26	\$2,073.19
<i>1.5 hr x 26 wks</i>										
01 - 02			\$13.61	\$20.02	\$0.00					
00 - 01			\$12.64	\$18.96	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
<i>Weekend Custodians maintain furnace when needed.</i>										
01 - 02			\$14.02	\$21.03	\$2,187.12					
00 - 01			\$13.02	\$19.53	\$2,031.12	\$4,218.24	\$322.70	\$501.97	\$17.72	\$5,060.62
<i>4 hr x 26 wks</i>										
TOTALS						\$16,181.40	\$1,237.88	\$1,925.59	\$67.96	\$19,412.83

This was a copy of one of the many proposals by the DOL for the Head Custodian group and the additional overtime wages payable based on their audit.

You can see in the yellow is the additional hours that were shown on the time card that was audited.

As a note, these additional hours were determined by a verbal conversation with the DOL representative and the employee. Even though the timesheet was signed, dated and filled out by the employee, the verbal notations of having worked additional time was accepted over the signed timesheet.

Gary

In the winter when it's the coldest I will come in and check my furnace on Saturday and Sunday when I come in to check the furnace I check the water and pull the clinkers it takes about 20 to 30 minutes when the weather gets a little warmer I just check it one day on the weekend. If the cold get below 0 the furnace is left running all the time and clinkers need to be pulled twice a day other wise I put my furnace on hold fire and it come on with the clock.

We solicited letters from each of our employees in question to justify what the DOL had received during their verbal conversations and interviews.

Our purpose was to attempt to reduce the overall overtime proposed by the DOL. They extrapolated across groups, which wasn't really in our best interests. Originally, they proposed 4 hours per winter weekend (26 weeks) for all custodians, which was the highest quantity of hours worked identified during their interviews.

The signed statements from our employees, if they voluntarily chose to submit them helped us reduce their individual overtime to what they identified in writing.

Saved us thousands from the original calculations.

Disagree without being disagreeable.

Just because the DOL Auditor said it, doesn't
make it necessarily true.

We both had completely different objectives
for the outcome of the audit

Child labor

The FLSA also has rules governing child labor, especially for minors under the age of 16. In most cases, 14 is the minimum age allowed for most non-farm work. Children younger than 14 must receive parental permission to work on any premises not owned by their parents. Most minors under 18 are barred from hazardous work and must work limited hours outside of school.

This category was also audited by the DOL concurrently with the overtime issue.

At the time we used students to assist custodians in sweeping hallways, and light custodial duties. They were paid for the work they performed thus they came under the FLSA Child Labor rules. It was generally a maximum of 10 hours per week.

Two violations of the Child Labor rules were identified by the DOL during the audit. These were both identified by the verbal interviews of the employees.

In this particular case the Head Custodian mentioned to the DOL reviewer that he had students who helped him around the school and campus. The DOL asked about specific things that had been done. Running a weed eater came up for two students. Then the DOL requested certification of the students age, which was under the age 16 rule, as this was a middle school.

We received this violation, but this is different because it's a civil penalty. During our exit interview, the DOL representative told us they would not waive these and that the maximum fine is \$10K per occurrence. Our final civil penalty was \$2,050.

Here is a copy of our final letter from the DOL. The final wages required to be paid for overtime ended up being just over \$20K plus all applicable benefits. The Child Labor civil penalty was \$2,050.

Lessons Learned:

1. Have a very well-defined policy that covers: (We updated our policy within a month of the DOL audit)
 1. Workweek
 2. What actual hours worked is defined as
 3. Who has authority to authorize overtime
 4. Consequences if proper authorization is not obtained (This is your management tool for repeat offenders)
2. Proper record keeping is a must:
 1. Timecards/timesheet should show exact time of start and stopping during a workday, not necessarily just hours per day, like our timecards showed
 2. Timeclocks solve almost everything under this category (something we instituted shortly after the audit)
3. Strive to be in compliance at all times, pay overtime when identified
4. Be familiar with the FLSA and how it impacts various groups of employees within your organization
5. Be cooperative, but don't just rollover to all recommendations by a DOL reviewer. You have the right to defend differences in how data is obtained and interpreted. Don't be afraid to challenge items that you have supporting documentation on that can reduce your costs.
 1. Our original DOL overtime payment was in excess of \$60K, we were able to reduce that to \$20K, it was worth the effort



The goal is fairness between the District and the employees and between the employees and the District. If you choose to use the resources of the District to pay overtime on a regular basis, then that should be something you choose as a District, not something that is created by an overzealous employee trying to take advantage of the FLSA and the systems you have in place.

Consistency and fairness builds a District's
credibility and effectiveness.

Actions need to be consistent
with Policies

Questions, Comments and Derogatory Remarks