

## FLSA Challenge Part II

### Protecting & Maintaining Exempt Status: 50 Ways to Lose Your Exempt Status - Actions That Could Jeopardize the Exempt Status of Your Employees

The Fair Labor Standards Act of 1938 (FLSA) establishes federal standards for overtime pay, the minimum wage, child labor, and related recordkeeping requirements. The Act is complex, antiquated, and difficult to apply in today's workplace. Consequently, employer violations of the FLSA are common and many organizations violate the law without knowing it. Failure to comply with the FLSA can be costly, as it may affect a large number of your employees and penalties may extend over a lengthy time period.

The FLSA can be challenging for even experienced HR professionals to apply. Most company managers and supervisors have little, if any, understanding of the Act. Part I of the FLSA Challenge included 20 basic issues that should be of concern to all managers. Part II addresses 3 key concerns of HR Managers: how to protect and maintain an employee's exempt status; determining what constitutes 'hours worked' and therefore must be considered paid time; and what must be included in overtime calculations.

**CAUTION:** All questions are based on federal law and are applicable to private sector employers. Remember that some states have imposed additional requirements beyond those required federally. Additionally, there are many exceptions to the FLSA. Contact the Department of Labor, Wage and Hour Division or your attorney for answers to specific questions.

## FLSA Challenge Part II

### Protecting And Maintaining Exempt Status

As Paul Simon sings...there must be 50 ways to lose your exempt status (or something like that!). List as many actions as you can that an employer may take that might jeopardize an employee's exempt status. There may not be 50 but there are at least 6 biggies! (Loss of exempt status would require that you pay the employee overtime, as required.)

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_
5. \_\_\_\_\_
6. \_\_\_\_\_

**Hours Worked**

What are 'hours worked' under the FLSA and why should you care? After all, it's probably never going to be a question on Jeopardy!

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**What Activities Are Considered 'Hours Worked?'**

Check the activities that would be considered "hours worked" and therefore must be paid. As there are no simple "yes" or "no" answers under the FLSA, describe the circumstances under which an employee must be paid for each activity.

Activity	Describe Circumstances
<input type="checkbox"/> 1. Waiting time	<hr/>
<input type="checkbox"/> 2. Preparation and concluding activities	<hr/>
<input type="checkbox"/> 3. On call or 'beeper' time	<hr/>
<input type="checkbox"/> 4. Reporting pay (paying an employee when no work is available)	<hr/>
<input type="checkbox"/> 5. Travel time	<hr/>
<input type="checkbox"/> 6. Meetings and training	<hr/>
<input type="checkbox"/> 7. Handling grievances	<hr/>
<input type="checkbox"/> 8. Medical attention	<hr/>
<input type="checkbox"/> 9. Volunteer work	<hr/>
<input type="checkbox"/> 10. Unauthorized work	<hr/>

**What Must Be Included In Calculating Overtime?**

Check the types of compensation that must be included when calculating overtime. Add additional comments to explain your answers and/or the circumstances under which they must be paid.

Payment	Comments
<input type="checkbox"/> 1. Shift differentials	<hr/>
<input type="checkbox"/> 2. Call pay	<hr/>
<input type="checkbox"/> 3. Productivity, quality or efficiency bonuses, incentives, or prizes	<hr/>
<input type="checkbox"/> 4. Safety bonuses	<hr/>
<input type="checkbox"/> 5. Attendance bonuses or awards	<hr/>
<input type="checkbox"/> 6. Bonuses based on hours worked	<hr/>
<input type="checkbox"/> 7. Commissions	<hr/>
<input type="checkbox"/> 8. Gifts	<hr/>
<input type="checkbox"/> 9. Discretionary bonuses	<hr/>
<input type="checkbox"/> 10. Vacation, sick leave, or holiday pay	<hr/>

## Answers to FLSA Challenge Part II

### Protecting & Maintaining Exempt Status: 50 Ways to Lose Your Exempt Status - Actions That Could Jeopardize the Exempt Status of Your Employees

1. **Paying on an hourly basis.** For Executive, Administrative, Professional, and Highly Compensated employees to be considered exempt under the FLSA, they must be paid on a "salary basis." To be paid on a "salary basis" employees must receive a predetermined amount in each pay period that is not reduced because of the quantity or quality of work performed. Salaried employees are compensated for the general value of the services they perform, not for the amount of time spent on the job. Therefore, with a few exceptions, an exempt employee must receive his full salary for any week in which he performs work, without regard to the number of days or hours worked.  
  
**Note**, however, that Outside Sales Employees may be paid on an hourly, commission, fee, or other basis and certain highly paid Computer Professionals also do not have to be paid on a salary basis, if their hourly rate of pay is at least \$27.63/hour.
2. **Paying an employee less because of the number of hours worked or the quality or quantity of work.** Exempt employees' salaries may not be reduced because of the number of hours worked each week or the quantity or quality of work performed. Exempt employees generally must receive their full salaries for any week in which they perform work, without regard to the number of days or hours worked.
3. **Not paying when no work is available.** An exempt employee who is willing and ready to work must be paid even if no work is available.
4. **Docking the employee's salary for partial day absences.** Generally, employers jeopardize an employee's exempt status by making pay deductions for absences of less than a day. The employer is considered to be treating the employee as an hourly (non-exempt) employee. An important exception exists for employees taking Family & Medical Leave Act (FMLA) leave.
5. **Docking the employee's salary for partial week absences because of jury duty, court attendance as a witness, or military leave.** Partial week deductions for these reasons are not permitted. However, payment may not be required if the employee does not perform any work during the entire week. Additionally, an employer may offset any payments received for jury or witness duty.
6. **Docking the employee's salary for disciplinary reasons.** Generally, employers may not dock an exempt employee's salary for disciplinary reasons, except for serious violation of workplace rules. Deductions must be paid for one or more full days.
7. **Having a job description that does not support the exempt status.** If you believe that the position meets the exempt tests, but such a finding is not consistent with the job description, it would be advisable to amend the job description so that it supports your position.

**The Following May Not Violate the FLSA, But Should Be Undertaken Cautiously**

1. **Docking pay for full-day absences.** Be cautious. There are only a few limited instances when an employer may “dock” an exempt employee for absences of a full day or more without threatening the exemption. Such deductions may be made when an employee is absent for a day or more for personal reasons other than sickness or accident. Deductions may also be made for absences of a day or more because of sickness or accident if the employer has a bona fide plan, policy, or practice that allows accrual of paid leave (e.g., paid sick leave) and if the exempt employee has not yet qualified for the plan or has exhausted the plan’s sick leave allowance. Partial work salary payments are also permitted where the exempt employee did not work a full week during the first or last week of employment.
2. **Docked (salary reduced) because of an FMLA leave.** Such reductions are allowed under the FMLA. Under the FMLA, an employer may make deductions from an exempt employee’s salary for FMLA leave without threatening the employee’s exempt status.
3. **Paid an “hourly-based” incentive or overtime.** The DOL has stated that extra compensation does not affect exempt status if it is in addition to a guaranteed salary. Additional compensation may include commissions, bonuses, flat sums, straight hourly amount, time and one-half or any other basis.
4. **Charging for sick or vacation leave in increments of less than 1 day.** Considerable confusion exists regarding this issue. According to the DOL, an employer may require use of paid leave for partial day absences. Such actions would be justified because an exempt employee’s salary isn’t docked only his/her accrued leave reduced.

However, several courts have suggested that reducing leave in partial day increments (especially very small increments, such as an hour or two) may violate the salary basis test, contending that accounting for an exempt employee’s time on such a basis is inconsistent with exempt status.

5. **Requiring exempt employees to complete strict time records.** Another area of confusion involves requiring exempt employees to keep set schedules and records of their time worked. Some courts have contended that such requirements conflict with exempt status.

The DOL has taken the position that such recordkeeping and scheduling policies do not in themselves violate the salary basis test. However, employers should use caution and reason in implementing these requirements. Many organizations simply require exempt employees to account for the days they work and paid leave taken. The DOL also makes clear that requiring an exempt employee to work a certain schedule is also acceptable.

### **Define “Hours Worked”**

Determining the number of hours that an employee works is important to ensure compliance with the FLSA overtime and minimum wage requirements. This determination can be very complex. Basically, “hours worked” includes the time that an employee is engaged in activities controlled or required by the employer and that primarily benefit the employer.

### **What Activities Are Considered ‘Hours Worked?’**

1. **Waiting Time.** If waiting is integral to the job, then the employee is considered to be “engaged to wait” and the time is “hours worked.” Such periods are often short, unexpected, and the employee cannot effectively use the time for her own purposes. Some examples include: an employee who waits for an assignment to be given or reads a book while waiting for equipment to be repaired or a sales clerk who waits until customers need her.
2. **Preparation and Concluding Activities.** Time spent preparing for the job and concluding work is compensable. Such time before or after the regular workday is counted as “hours worked” if it is integral to an employee’s main activities. Examples include: an employee in a chemical plant changing into and out of special clothes or an employee preparing or cleaning equipment.
3. **On Call or “Beeper” Time.** Carrying a beeper does not constitute “hours worked” provided the employee is relatively free to come and go as he pleases. The employee must also be given sufficient time to report to work (depending on location), so that he is free to use the time for his own benefit. Requiring an employee to stay at home or at work would be considered hours worked. Putting an employee on call constantly or frequently interrupting the on call period may mean that the time spent is compensable.
4. **Reporting Pay.** The FLSA does not require that non-exempt employees be paid for reporting to work when no work is available. Under the FLSA, employees must be paid only for the time actually worked. However, several states require that employers pay a minimum amount to employees who report for work.
5. **Travel Time.** Determining whether travel time is considered “hours worked” is often confusing and may depend upon when the travel takes place.

**Ordinary Home to Work Travel.** Normal travel from home to work is not work time, whether an employee works at a fixed site or at different job sites.

**Special Home to Work Assignments.** Travel in which an employee who regularly works at a fixed location is given a special assignment to work at a different location is not ordinary work travel. Such travel is considered work time. However, the employee’s normal home to work travel time may be deducted from the work time, as she would have had to go to work anyway.

**Daily Work Travel.** Time spent traveling as part of an employee’s principal job activities, such as from job site to job site during the workday is considered “hours worked.”

**Overnight Travel.** Travel away from home is work time when it cuts across the employee's workday. Travel on non-working days is also considered "hours worked" if it occurs during normal working hours. For example, if an employee normally works from 9:00 a.m. to 5:00 p.m. on Monday through Friday, the travel time during these hours is also considered work time on Saturday and Sunday.

Travel during non-work hours is not considered "hours worked" unless the employee is actually performing work while traveling. Time spent in travel away from home outside of normal working hours as an airplane, train, bus, or car passenger is not work time. However, an employee who drives a car, bus, or other means of transportation, or an employee required to assist her is considered to be working.

6. **Meetings and Training.** Attendance at lectures, meetings, and training is not counted as "hours worked" if all four of the following criteria are true:

- Attendance is outside of the employee's regular work hours;
- Attendance is truly voluntary;
- The course, lecture, or meeting is not directly related to the employee's job; and
- The employee does not perform any productive work while attending.

Attendance is not considered voluntary if the employee believes that his working conditions or employment opportunities would be adversely affected if he did not attend. If training is intended to prepare an employee for advancement and is not intended to make him more efficient in his current job, then such time is not working time. Further, if an employee attends classes after hours on his own initiative, the time is not considered hours worked, even if the courses are job-related.

7. **Handling Grievances.** Time spent in adjusting grievances between an employer and employee during the time the employee is required to be on the premises is hours worked.
8. **Medical Attention.** Time spent waiting for and receiving medical attention on the employer's premises or at the direction of the employer during the employee's normal working hours is work time.
9. **Volunteer Work.** Time working for public or charitable purposes at the employer's request or under the employer's direction or control, or while the employee is required to be on the premises, is work time.
10. **Unauthorized Work.** An organization that allows employees to work must pay for this time and include it as "hours worked" for overtime purposes. Examples of this include an employee who begins work early, stays late, takes work home, or works through the lunch break. While the employee must be paid for unauthorized work, she may be subjected to disciplinary action.

### **What Must Be Included When Calculating Overtime?**

- Shift Differentials
- Call Pay
- Productivity, Quality or Efficiency Bonuses, Incentives or Prizes
- Safety Bonuses
- Attendance Bonuses or Awards
- Bonuses That Depend on Hours Worked
- Commissions

Generally, all of the above must be included in an employee's regular rate of pay for overtime calculations, whether paid in the form of cash, prizes, awards, or otherwise. Such bonuses must be allocated over the periods they cover.

A few payments may be excluded including:

**Gifts.** Gifts such as Christmas or birthday gifts, which are not based on hours worked, production, or efficiency, need not be included in overtime calculations. However, if the payment is so significant that an employee could assume it is part of her wages, then the bonus may not be considered a gift.

**Discretionary Bonuses.** These "recognition bonuses" may be excluded from overtime only if the employer in its sole discretion determines their payment and amount. Such bonuses may not be made pursuant to any prior agreements, promises, or contracts that would lead employees to expect them in the future.

**Payments for Vacation, Sick Leave, or Holidays.** Payments for periods when no work is performed, due to vacations, holidays, or sickness are excluded from overtime calculations.