C S E A

Guide to the FLSA

A discussion of the Fair Labor Standards Act and related wage and hour provisions.

CSEA

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INTRODUCTION

This guide was prepared to help inform unit members, officers and staff of CSEA about the general provisions of the Fair Labor Standards Act ("FLSA"), the federal law that sets forth certain wage and hour standards. At times, other statutes may be mentioned where relevant.

It is important to note that **the FLSA only provides a floor.** CSEA can and usually does negotiate wage and overtime provisions that are more generous than those provided by the FLSA. In order to answer many wage and hour questions, both the FLSA and the applicable collective bargaining agreement need to be reviewed.

Any represented employee who feels that his or her employer is violating the FLSA or the collective bargaining agreement should contact his or her CSEA Local or Unit President or CSEA Labor Relations Specialist immediately.

Finally, it should be kept in mind that this guide addresses only some of the major components of the FLSA. It is not an exhaustive or complete explanation of the entire act. Complicated questions should be directed to the CSEA Legal Department.

ACKNOWLEDGMENT

The information contained in this report was obtained through a variety of sources. Some of the major sources of information include:

- Fair Labor Standards Handbook - Published by the Thompson Publishing Company, Washington DC;
- Various Cases, Related Publications and Articles;
- USDOL Regulations; and
- Fair Labor Standards Act.

I. MINIMUM WAGE

Effective July 24, 2009, the federal minimum wage is $7.25 per hour for covered non-exempt employees. (Note: the New York State minimum wage law does not apply to public employees.)

As to public employees, the FLSA requires payment for non-overtime hours at the minimum wage.

*****IMPORTANT NOTE:** The FLSA, as interpreted in this federal circuit, does not require payment of one's usual wage for each non-overtime hour worked (i.e., 40 or less hours). The FLSA only requires, for non-overtime hours, that an employee be paid at least an amount equal to the minimum wage floor.

Thus, if a public employee works 40 hours in a week and is entitled under the contract to $10.00 an hour, but is only paid for 30 hours of work (that is, $300.00), there is no FLSA violation because the public employee has received more than the minimum wage (40 hours x $6.55 minimum wage = $262.00). [Note: there is, of course, a contract violation in this situation.]

As can be seen then, the federal minimum wage provisions have very limited usefulness in their application to public employees.

For overtime pay, however, the USDOL regulations specifically require payment for each overtime hour worked. In the above example, therefore, if the public or private sector employee worked 50 hours but is only paid for 45 hours, there is a violation regardless of whether the total pay is above or below the minimum wage floor.

II. NON-COVERED EMPLOYEES

The definition of "employee" under the FLSA is very broad and covers most private sector, state and local government workers; however, there are some exclusions. **Non-covered employees are not covered at all by the Act**, while exempt employees are excluded from certain sections of the Act (such as the overtime requirements).

Non-covered Employees:

A. Elected Officials

B. Personal Staff of Elected Officials

The USDOL has set forth the following tests for non-covered personal staff of elected officials:

1. Is the person's employment entirely at the discretion of the elected officeholder?

2. Is the position not subject to approval or clearance by the personnel department or division of any part of the government?

3. Is the work performed outside of any position or occupation established by a table of organization as part of the legislative branch or committee or commission formed by an act of the legislature?

4. Is the person's compensation dependent upon a specific appropriation or is it paid out of an office expense allowance provided to the officeholder?

Individuals such as pages, stenographers, telephone operators, clerks, typists, and others employed by the branch or commission as a whole, may be considered "employees" under the Act. An additional example would be deputy sheriffs who, although they are selected by and work under the direction of the Sheriff, are employed only after approval of their employment by the Board of Commissioners. They are not employed at the sole discretion of the Sheriff.

Generally, staff includes only persons who are under the direct supervision of the elected official and who have almost daily contact with him. It would, for example, include the official's private secretary, but not the secretary to his assistant, or the stenographers in a pool that services the official's department, or staff members in an operational unit whose head reports to the elected official. It would typically not include all members of an operational unit, since all the members could not have a personal working relationship with the elected official.

C. Policy Making Employees

Individuals who are appointed by the elected official to serve on a policy making level are considered to be excluded from the Act's provisions, providing that such individual is outside the Civil Service. Examples include appointed members of the state cabinet, directors of city and county boards, commissioners, and agency heads.

Those individuals who merely implement and apply policy are still covered by most of the Act's provisions but may be exempt from some provisions depending on what category they fall into. This subject will be detailed in the "exempt" employees section.

D. Legal Advisors

An immediate legal advisor with respect to constitutional or legal powers who is outside the Civil Service Law is not covered by the FLSA. Examples include certain lawyers; state's attorneys; attorneys general; and county, city, town, and village attorneys who work in a legal advisory capacity.

E. Legislative Employees

Legislative employees are placed in the non-covered category with respect to FLSA. Almost all non-civil service employees in the state legislature, county or city councils or boards are excluded from the FLSA. Only those employees who work in the library of the legislative branch remain covered.

F. Bona Fide Volunteers

The term "employee" does not include any individual who volunteers to perform services for a public agency which is a state, a political subdivision of a state, or an interstate governmental agency, if:

1. The individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and

2. Such services are not the same type of services which the individual is employed to perform for such public agency.

An individual may not then be a volunteer for a public agency when the volunteer hours involve the same type of service which the individual is employed to perform for the same agency. For example, a corrections officer could not volunteer to be a deputy sheriff.

An issue that sometimes arises is whether two agencies of the same state or local government constitute the same or separate public agencies. These issues are resolved on a case-by-case basis and the CSEA Legal Department should be consulted.

III. EXEMPT EMPLOYEES

Exempt employees need not be paid overtime under the FLSA.

To be exempt, an employee must meet both the "salary basis" test and the "duties" test. Simply put, an employee must be paid a salary, not wages (the salary basis test), and his or her work duties must be such as to qualify him or her for one of the exemptions established by the FLSA (the duties test).

Executive, administrative and professional employees are three of the major groups of employees considered to be exempt. These are known as the white-collar exemptions. Recreational employees are one of the smaller groups.

***Note: The white collar exemptions do not apply to "blue collar" workers no matter how much they make. Blue collar workers perform work involving repetitive operations with hands, physical skill and energy. These workers, the rules state, gain the skills and knowledge required for performance of their routine manual and physical work through apprenticeship and on-the-job training. Thus, non-management production-line employees and non-management employees in maintenance, construction, and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, and laborers are entitled to overtime.

A. Salary Basis

If the salary basis requirement is not satisfied, an employee will not meet the requirements of the white-collar exemptions, and overtime must be paid. Employees are considered to be paid on a salary basis if they regularly receive each pay period a predetermined amount constituting all or part of their compensation. This amount cannot be subject to reduction because of variations in the quality or quantity of the work performed.

Otherwise exempt employees must receive a full salary for any week in which they perform work, without regard to the number of days or hours worked, with certain limited exceptions: (1) absence for one or more full days for personal reasons, other than sickness or disability; (2) absence for one or more full days because of sickness or disability and the deduction is made in accordance with bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness and disability; (3) penalty in good faith for infractions of safety rules of major significance; (4) unpaid disciplinary suspension of one or more full days for infractions of workplace conduct rules; (5) leave under the Family and Medical Leave Act; (6) absence for the entire week or performs no work for the entire workweek; (7) absences caused by jury duty, attendance as a witness, or temporary military leave.

In the public sector, however, it is permissible for public employers to have pay systems where the theoretical possibility as well as actual deductions for absences of less than a day for

personal and sick leave occur, so long as the pay system is established by statute, ordinance, regulation, policy or practice.

The law also specifically allows exempt employees to be furloughed for budget-required reasons, without risking their exemption status, except for the workweek in which the furlough occurs.

Note: "Window of correction" and "safe harbor" provisions in the regulations provide the employer with opportunities under certain circumstances to correct improper deductions to avoid losing the exemption.

B. Exemptions

1. Executive Exemption

Generally speaking, for an employee who makes less than $100,000 a year to qualify as an executive employee, an employee must meet the following requirements:

(1) Management: primary duty that is management of the enterprise, or department or subdivision thereof, AND

(2) Supervision: customarily and regularly direct the work of two or more other employees, AND

(3) Authority: the authority to hire and fire, or suggestions in that regard must be given particular weight, AND

(4) Compensation: paid more than $455 per week.

Examples of positions that are covered by executive exemption:

- Department head
- Superintendent of construction project

Examples of positions that are not covered by executive exemption:

- Working foreman
- Supervising inspectors who spend most of time doing office work

2. Administrative Exemption

Generally speaking, for an employee who makes less than $100,000 a year to qualify as an administrative employee, an employee must meet the following requirements:

(1) Duties: primary duty includes the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer's customers, AND

(2) Discretion: primary duty includes the exercise of discretion/ independent judgment with respect to matters of significance, AND

(3) Compensation: paid more than $455 per week.

Examples of positions that are covered by administrative exemption:

- Insurance claims adjusters
- Team leaders
- Human resources managers
- Purchasing agents

Examples of positions that are <u>not</u> covered by administrative exemption:

- Inspectors
- Investigators
- Examiners or graders
- Personnel clerks

3. Professional Exemption

Generally speaking, for an employee who makes less than $100,000 a year to qualify as a professional employee, an employee must meet the following requirements:

(1) Duties: primary duty is the performance of work requiring knowledge of an advanced type, including the consistent exercise of discretion and judgment, in a field of science or learning, customarily acquired by a prolonged course of specialized intellectual instruction, AND

(2) Compensation: paid more than $455 per week.

Examples of positions that are usually covered by professional exemption:

- Physicians
- Physician assistants
- Registered nurses
- Certain registered or certified technologists
- Lawyers
- Accountants
- Engineers
- Scientists

- Pharmacists
- Architects
- Teachers

Examples of positions that are usually not covered by professional exemption:

- Licensed practical nurses (LPNs)
- X-ray technicians
- EMTs
- Paramedics
- Bookkeepers
- Paralegals

4. "Highly Compensated" Employees

Where an employee makes more than $100,000 a year, the requirements for the above white collar exemptions are relaxed. Those employees will qualify for exemption if they customarily and regularly perform any one or more (rather than all) of the exempt duties of an executive, administrative or professional employee.

5. Computer Employees

Employees in computer-related occupations can be exempt from overtime compensation based on the general rules applicable to the three white collar exemptions. In addition, there are specific rules applicable to computer employees who are paid on a salary basis or earn at least $27.63 per hour.

To qualify as an exempt computer employee, a worker must have a primary duty that consists of:

(a) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specification;

(b) 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;

(c) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

(d) A combination of these duties, the performance of which requires the same level of skills.

Note: help-desk personnel usually (but not always) do not qualify for the computer employee exemption.

6. Seasonal-Recreational Employees

Any employee who is employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center may be exempt, if:

(a) It does not operate for more than seven months per calendar year, or

(b) During the preceding calendar year its average receipts for any 6 months of such year were not more than 33% of its average receipts for the other 6 months of the year.

Since some municipalities operate stadiums; convention centers; amusement parks and facilities; and recreational establishments (e.g., nature centers, ice skating rinks, tennis courts, golf courses, parks, gymnasiums, outdoor and/or indoor swimming pools, zoos and museums), this exemption from the Act can be significant for local government.

Applying the test set forth in the statute, it is apparent that a municipal swimming pool that is open seven months of the year or less would satisfy the first prong of the test. Thus, seasonal-recreational employees of the swimming pool or other seasonal swimming facilities would be exempt from the overtime and minimum wage provisions of the FLSA.

If the recreational establishment runs for 7 months or less, even though other facilities are open year round, employees of the seasonal establishment should be exempt from coverage while they are working in the seasonal program only.

7. Special Partial Unionized Employee Exemption

There is a little known special exemption that can allow for more flexible work schedules for unionized employees without imposing overtime pay requirements under certain limited circumstances.

Suppose, for example, an employer and CSEA are agreeable to employees working five 10 hour days one week, and three 10 hour days the following week. Ordinarily, an employer would still have to pay overtime for the first week as the employees have worked over 40 hours in that week, although they will work less than 40 hours in the following week. Other variations could be mixes of 12 hour days, or 20 weeks at 52 hours each with six weeks off, and so forth.

Overtime premium rates need not be paid for unusual flexible schedules if: (1) (a) employees are paid overtime rate for over 1040 hours in a 26 week period, or (b) employees are paid overtime rate for more than 2040 hours for a 52 week period under certain other very specific and detailed additional limitations set out in the

statute; AND (2) there is an agreement with a union that has been specially certified by the National Labor Relations Board.

Note: the individual bargaining unit has to be so certified by the NLRB, even where, strangely, the unit includes only public employees. There is a special application process for this type of certification.

Any bargaining unit that is considered this type of arrangement should consult with the CSEA Legal Department.

IV. HOURS OF WORK

The amount of pay an employee should receive under the minimum wage provisions of FLSA depends on exactly how many hours the employee has worked during the time period in question (weekly period, biweekly period or other). Overtime compensation also is determined by the number of hours worked in a work period.

FLSA determines that the term "employ" means "to suffer or permit to work." This term has a broad meaning and is used by USDOL to identify hours that are to be counted as hours worked.

There have been a considerable amount of questions over what constitutes "work time" under FLSA.

A. Preliminary and Postliminary Activities

The Portal-to-Portal Act of 1947 eliminated from compensable working time certain travel and other preliminary and postliminary activities performed prior or subsequent to a workday. However, preliminary or postliminary work, which is considered compensable by contract, custom or practice, is still considered working time under the FLSA. Job-related activities that are required as part of an employees' work are also compensable even if performed outside the employee's regular work schedule.

Certain other preliminary and postliminary duties are considered to be work time under FLSA, if the work is done at the employer's behest and for the employer's benefit. Some of these duties include filling-out time sheets, material or requisition sheets, checking job sites, removing trash, fueling cars, and picking up plans.

B. "Voluntary" Work by Regular Employees

If a covered employee continues to work after his or her shift is over, such time is considered to be "work time" for minimum wage and overtime provisions even though the time is not approved or authorized by the employer. As long as the employer "suffers or permits" employees to work on their behalf, proper compensation must be paid.

The responsibility rests with the employer to make certain that overtime work it does not want performed is not in fact performed. Management must take steps necessary to prevent the unauthorized additional hours of work. Mere promulgation of a rule to prevent additional hours of work is not sufficient. Employers must actively prevent unauthorized hours of work.

C. Waiting Time

Waiting time can be counted as time worked for overtime purposes in some instances and is not considered to be time worked in other situations.

Under FLSA, all time during which employees are required by the employer to wait while on duty is considered as compensable waiting time.

An example of compensable waiting time is when an employee reports to the workstation at the beginning of the regular workday and is directed to wait because there is no work to start on. An example of non-compensable waiting time is when an employee reports to the workstation earlier than the required time and waits without performing any work. If work is performed during this pre-work daytime, such time is considered as compensable unless the employer actively prohibits such extra work. If an employee, while in an on-duty status, is required to wait due to equipment breakdown, such time is considered to be compensable.

Waiting by an employee who has been relieved from duty need not be counted as hours worked if: (1) the employee is completely relieved from duty and allowed to leave his or her job; or (2) the employee is told he or she is relieved until a definite specified time; and (3) the relief period is long enough for the employee to use the time as he or she sees fit.

D. On-Call Time

The compensability of on-call time depends on the employee's freedom while on call. If an employee must remain on the premises of the employer or so near that they cannot exercise free use of their time, this time might be compensable. If an employee can come and go freely, even if they are required to leave a telephone number where they can be reached or carry a beeper, that time can be excluded from hours worked. Time spent at home in on-call status is not considered to be time worked because of the relative freedom the employee has.

E. Show-Up, Call-In, or Reporting Time

In many agreements, there is language that guarantees a "minimum call-in" period of between one and three hours. These guaranteed hours (if not actually worked) cannot be considered as hours worked under FLSA.

When an employee is required to show-up or is called-in to work and then is required to wait (10-15 minutes) before being told that there is no work available, this time is compensable. In this particular situation, the employee would be “engaged to wait” and not “waiting to be engaged.”

F. Breaks

FLSA does not require breaks or a rest period. Under the FLSA, however, any rest period which lasts for 20 minutes or less must be counted as hours worked. Coffee and snack breaks of that duration are compensable rest periods and cannot be excluded from hours worked.

If a break lasts longer than 20 minutes the compensability of such time depends on the employees' freedom during such breaks.

G. Meal Periods

FLSA does not require any breaks for meal periods. (Note: There are provisions of the New York State Labor Law that do require unpaid meal breaks in certain circumstances.)

Where meal periods are provided by an employer, such period is not considered work time if the employee is completely relieved from duty. The meal period does not include short rest periods or coffee breaks.

If any one of the following conditions is met, time during the meal period is not considered as time worked, although special rules may apply if the shift is 24 hours or more:

1. Meal period is at least 30 minutes (shorter periods may qualify under special circumstances).

2. Employee is completely relieved of all duties. The incidental possession of the employer's property (keys, beeper, auto, supplies, etc.) during the meal period does not indicate that such time is compensable. If the employee must remain at the workstation during the meal period, such time is considered to be compensable.

3. The employee must be free to leave his or her duty post. There is no requirement, however, that the employee be allowed to leave the worksite.

H. "Voluntary" Work During Meal Periods

All voluntary work done during meal periods must be compensated as time worked under FLSA if the employer has reason to believe that such work is being performed.

I. Meals While on Round-the-Clock Duty

If an employee (guards, fire, police, other safety personnel, hospital employees and institution employees) is required to be on the job for more than 24 consecutive hours, meal periods during such time must be considered working time, unless such time is excluded from hours worked by express or implied agreement.

J. Sleeping Time

If the employee works less than 24 hours during a tour of duty, such time that he or she is permitted to sleep is compensable as long as the employee is on duty and must work when required. Sleep time during non-busy hours should be considered as work time rather than sleep time.

If the employee works for 24 hours or longer, up to eight (8) hours of sleep time can be excluded from hours of work, if:

1. An expressed or implied agreement exists which excludes sleep time; and

2. At least five (5) hours of uninterrupted sleep is possible; and

3. Adequate sleeping facilities for an uninterrupted sleep are furnished; and

4. Any time that the employee is interrupted is considered to be compensable work time.

K. Sleep Time for Employees Who Reside on an Employer's Premises

An employee who resides on his employer's premises on a permanent basis for extended periods of time is not considered as working all the time he is on the premises. If the employee can engage in normal private pursuits (thus having enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own) such time is not considered to be work time according to the USDOL.

L. Training Programs, Lectures and Meetings

Time spent by an employee in lectures, safety meetings or training programs is or is not determined to be compensable time under the general policies listed below:

Non-compensable training time:

1. If attendance occurs outside the employee's regular work hours and the employee is not required to attend the session, this time spent is not compensable.

2. If attendance is voluntary, time spent is not compensable.

3. If the employee does no productive work while attending, the time need not be counted as working time.

4. If the training program, lecture, meeting, etc., is not directly related to the employee's job, no compensation is required.

5. If the training program, lecture, meeting, etc., is directly related to the employee's job, it still may be excluded if the subject corresponds to that offered by an institution of learning.

6. Attending independent trade school classes outside regular work hours is not compensable.

7. Time spent in labor management caucuses related solely to internal union affairs is not compensable.

8. Voluntary attendance at government sponsored safety meetings after hours is non-compensable.

Compensable training time:

1. Labor management meeting times spent discussing day-to-day business, grievances, etc., is compensable if hours are during the normal workday of the employee.

2. Time spent in contract negotiations has been determined by the DOL on a case-by-case basis.

3. Time spent in fire drills or building evacuation tests is compensable.

4. Required safety program training after hours is compensable.

M. Travel Time

Compensability of travel time depends on the type of travel involved. Employers under the Portal-to-Portal Act are generally not responsible for time spent by employees who walk, ride or otherwise travel to their principal work site.

N. Routine Commuting

Home-to-work and work-to-home travel is not compensable work time. Work time begins when the employee reaches his or her work site. If an employee is required to report to a designated area or place where he or she is to pick up materials, equipment or other workers to receive instructions, plans, tools etc., compensable time begins at the employee's first required stop.

O. Travel during Workday

Traveling by employees between work sites is compensable. Traveling from outlying job sites at the end of the day to the employer's premises is compensable.

P. Call-Back/Emergency Call-Outs

Callbacks or Emergency Call-outs are compensable when the employee involved is called back to work after the employee has gone home for the day. Compensability of travel time to and from the work site and home is questionable under FLSA during callback or emergency call-out situations.

Q. Out-of-Town Travel

Employees who must go out of town for one day do not have to be compensated for the time spent traveling to and from the railroad, bus depot or plane terminal, but are eligible for compensation for all other travel time (except any time spent in eating while traveling). Employees who must drive overnight are considered working while they are driving.

Where overnight travel is required, all travel time is compensable (except meal periods) during normal work hours on non-work days as well as regular workdays.

Travel time as a passenger on an airplane, train, boat, bus or automobile outside regular work hours is not compensable.

Any actual work that the employee does while traveling is considered as compensable work time.

R. Employer Provides Transportation

Just because the employer owns the vehicle an employee is allowed to commute with does not make such commuting time compensable.

If an employee is required to pick up other employees such time is considered to be compensable work time under FLSA.

S. Examples of Compensable Hours Worked

- Traveling between work locations;
- Traveling out-of-town during working hours;
- Coffee breaks/rest periods from 5 to 20 minutes or less;
- Meal periods where the employee is not free to leave the work station;
- Medical attention during working hours that is ordered by the employer;
- Fire drills during or after the regular working hours;
- Changing clothes if required and customarily paid in the past;
- Charitable work if requested by employer;
- Cleaning, oiling or greasing machinery;
- On-call time if freedom is restricted;
- Cleaning, storing or repairing tools (tools must be part of the principal activity);
- Stand-by time;
- Washing up or showering;
- Waiting for work after normal start time;
- Training programs if required by employer;
- Training in normal/regular duties for the purpose of increased efficiency;
- Labor/management committee meetings which discuss daily operations or contract interpretations (check your individual contract).

T. Examples of Non-Compensable Working Time

- Absences/leaves (bereavement leave/funerals, holidays, personal leave, vacations, annual leave, sick leave and weather-related absences);
- Jury duty;
- Civic or charitable work if time spent is voluntary;
- Employee organization leave for internal union business;
- Meal periods of 30 minutes or longer where no duties are performed;
- Medical attention not ordered by the employer;

- On-call time spent at home or where the employee need only leave a telephone number and is not restricted;
- Pre-employment tests or examinations;
- Home-to-work travel (Portal-to-Portal Act). This includes commuting time between your residence and work and vice versa;
- Voluntary training programs (program not related to regular duties);
- Residence on employer's premises if employee is free to leave premises;
- Sleeping time of up to eight (8) hours (by contract) if the tour of duty is 24 hours or longer.

NOTE: The FLSA does not require payment for the above. Your CSEA agreement may, however, require such payment.

V. OVERTIME

Under the FLSA, there is no limitation on the total number of hours that can be worked during a day, week, two-week period, or annually. The only requirements that deal with overtime deal with the rate of overtime pay. Overtime pay must be paid at the rate of at least one-and-one-half times the normal rate of pay of the non-exempted (covered) employee, for each hour worked in a workweek in excess of the maximum hours applicable to the type of employment in which the employee is engaged.

A. Hours of Work

Normally the basic workweek is limited to 40 hours before overtime pay applies.

What is important to determine before any overtime can be earned is the normal workday/week. FLSA sets a fixed workweek at 168 hours during 7 consecutive 24-hour periods. This workday/week arrangement may begin on any day of the calendar week and at any hour during the calendar day. The workweek need not coincide with the calendar week.

There are exceptions to the 40-hour per workweek rule for law enforcement, fire protection, hospital, nursing home and mental hospital employees, and certain other narrow circumstances.

B. Computing Overtime

The rate of overtime compensation pursuant to the FLSA is one-and-one-half times the regular rate of pay (which must be at least equal to the minimum wage).

Annual salaries are divided by the total number of regular hours worked per year to find the hourly rate. This hourly rate is then multiplied by 1.5 (time-and-one-half rate). This figure is then multiplied by the number of overtime hours.

For example: If a 40-hour-per-week employee's annual salary equals $24,960.00 and he or she works 3 hours overtime, the calculation would be as follows:

$24,960 (annual salary) divided by 2,080 hours (40 hrs per week x 52 weeks per yr) = $12.00 per hour

$12.00 (hourly rate) x 1.5 (time and 1/2) = $18.00 per hour = OT rate.

3 hours (OT) x $18.00 per hour = $54.00 OT Pay

C. Regular Rate of Pay

Generally speaking, the regular rate of pay of an hourly employee is the hourly rate plus other forms of nondiscretionary compensation received by the employee. Except as indicated below, on-call pay, shift differentials, hazardous-duty pay and longevity pay are supposed to be

included in computing the regular rate of pay. Reasonable uniform allowances and tuition reimbursement need not be.

Employers and employees, however, can agree to certain basic wage rates and thereby set a basic rate on which overtime will be calculated.

D. Required Time for Overtime Payment

There is no requirement that overtime compensation be paid weekly. The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends.

When the correct amount of overtime compensation cannot be determined until some time after the regular pay period, it is sufficient if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. Payment cannot be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may be delayed beyond the next payday after such computation can be made.

E. Substitution Situations

A public employee who works "substituted" hours for another employee (that is, they switched shifts) need not be paid at an overtime rate under the FLSA. In effect, each employee will be considered to have worked his or her normal schedule. Thus, if an employee works 40 hours and then substitutes in for another 8-hour shift, overtime need not be paid.

This is only permissible where the substitution is: (1) voluntarily undertaken and agreed to solely by the employees; and (2) approved by the employer.

F. Employee Working Two or More Rates

Where an employee works at two or more different types of work for which there are different rates of pay, the employee's regular rate of pay for that week for the purpose of computing his overtime rate of pay can be calculated as the weighted or blended average of such rates. That is to say that the earnings from all such rates are added together and this total is then divided by the total number of hours worked for all jobs.

Employers and employees, however, can agree to certain basic wage rate in such situations and thereby set the basic rate on which overtime will be calculated in these circumstances. Examples of such agreed-upon rates could be overtime at the higher rate or at the rate in which the extra hours were performed.

G. Employee Working for Two Different Public Employers

When an employee is employed by two different public employers, each employer is usually considered separately for the purpose of computing overtime hours. If an employee is

working two different jobs for the same public employer, however, overtime usually must be paid for hours worked in excess of 40 hours in a week.

Two state agencies will be considered separate employers where: (1) the agencies are treated as separate employers from other state agencies for payroll purposes; (2) the agencies deal with other state agencies at arm's length concerning the employment of any individual; (3) the agencies have separate budgets or funding authorities; (4) the agencies participate in separate employment retirement systems; (5) the agencies are independent entities with full authority to perform all of the acts necessary to their functions under state statutes; and (6) the agencies can sue and be sued in their own names.

There may be situations where two employers, although separate, are so intertwined they will be considered joint employers and overtime pay will be required. There are some special provisions that exempt police, fire and correctional employees in this situation.

H. Employee Holding Two Different Jobs or Titles

Usually, it is immaterial if a public employee holds two different titles for the same employer --- overtime must still be paid for hours worked in excess of 40 hours.

There is an exception, however, where a public employee undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency. In that situation, the hours such employee was performing the different employment can be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation.

"Occasional or sporadic" means infrequent, irregular, or occurring in scattered instances. The fact that an activity is recurring, such as a county fair where a county employee takes tickets or provides security, does not necessarily mean that the activity will not meet the "occasional or sporadic" test.

I. Part-Time and Under 40 Hour Workers

When the normal work week is less than 40 hours, the overtime provisions of the FLSA do not apply to hours worked in excess of the normal work week but less than 40 hours per week. For example, if an employee's normal workweek is 35 hours, then the overtime provisions of the FLSA do not apply to hours worked between 35 and 40 hours. (The FLSA overtime provision will of course apply to any hours that this employee works more than 40 hours per week.)

The rate of pay for such under-40 hour "overtime" can be paid according to local agreement or by the employer's discretion where no such agreement exists. Cash compensation can be at straight time, time-and-one-half or less than the normal hourly rate of pay providing the minimum wage requirement is met with respect to the employee's average wage.

Likewise, employees who work part-time but work more than their usual work hours in a week are not entitled to overtime compensation until they work over 40 hours.

J. ***De Minimis* Rule**

Insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded by employers. This rule applies only where there are uncertain and indefinite periods of time involved of a few seconds' or minutes' duration.

It is not completely clear exactly what amount of time is *de minimis* --- 15 minutes is not *de minimis*, but 10 minutes may be.

Where rounding of start and stop times occurs, as where, say, time clocks are used, a practice where employee starting and stopping times are rounded to the nearest five minutes, or to the nearest one-tenth or quarter of an hour, is proper.

VI. OVERTIME --- PARTICULAR PUBLIC EMPLOYEES

A. Public Safety Employees

Generally, police protection personnel, including deputy sheriffs and correctional officers (but not dispatchers), are allowed to work periods ranging from 7 to 28 days consecutively. Such employees cannot have a work period longer than 28 days. The employer is responsible for the setting of the work period.

Generally, fire protection personnel are also allowed to work periods ranging from 7 to 28 days consecutively. Such employees cannot have a work period longer than 28 days. The employer is responsible for the setting of the work period.

Such public safety employees must exceed the maximum number of hours indicated below before overtime pay is required:

Work Period (Consecutive Days)	Police (Law Enforcement) Max. Hours	Fire Protection (Excluding Dispatchers) Max. Hours
7	43	53
8	49	61
9	55	68
10	61	76
11	67	83
12	73	91
13	79	98
14	86	106
15	92	114
16	98	121
17	104	129
18	110	136
19	116	144
20	122	151
21	128	159
22	134	167
23	141	174
24	146	182
25	153	189
26	159	197
27	165	204
28	171	212

An employer could choose a work period from 7 to 28 days. Whatever work period is chosen, the corresponding "maximum hour" figure for police or fire personnel would be the maximum number of hours that can be worked before overtime must be paid at time-and-one-half, or “comp” time granted.

Note: Specific regulation provides that conducting an investigation, supervising a fire, or like activity, is not considered sufficient to qualify a public safety non-management employee for a white collar exemption.

B. Hospital, Nursing Home, and Mental Hospital Employees

Hospital, nursing home, and mental hospital employees who are primarily engaged in the care of the sick, the aged or mentally ill residing on the premises are allowed, by agreement, to have the overtime calculated on a 14-day period (instead of the normal 7-day period) as long as those employees are paid overtime for hours worked in excess of 8 hours per day and in excess of 80 hours per 14-day period.

Overtime for these employees is paid on a daily as well as biweekly basis.

The 14-day period generally would be available to municipal hospitals, state and local nursing homes or mental institutions, and halfway houses providing residential care for the mentally ill, alcoholics, or drug abusers. Non-residential facilities and/or clinics are not eligible and must use the standard 7 day/40-hour week system.

C. School District Employees

Teachers and other school district employees are governed by the same executive, administrative and professional exemptions that govern any other employees.

A major part of school district employees (teachers) are exempt from the Act's provisions. Some teachers whose job duties involve sufficient non-professional activities outside the instruction of students could be considered covered by the provisions of the Act.

Other school district employees who are generally considered to be EXEMPT include:

- Guidance Counselors (Professional Exempt)
- Directors of Computer Programming (Executive Exempt)
- School Psychologist (Professional Exempt)
- School Registered Nurse (Professional Exempt)
- Superintendent of Schools (Executive Exempt)
- Principals (Executive Exempt)

- Vice Principals (Executive Exempt)
- Student Workers (Limited Hours)

School district employees who are considered to be COVERED by the FLSA provisions include:

- Custodial Workers (Nonexempt)
- Bus Drivers (Nonexempt)
- Cafeteria Workers (Nonexempt)
- Secretarial Support (Nonexempt)
- Hall or Lunch Room Monitors (Nonexempt)
- Day Care Teachers & Monitors (Nonexempt)
- School Nurse (Non-R.N.)
- Security Personnel (Nonexempt)
- Warehouse Workers (Nonexempt)
- Athletic Equipment Managers (Nonexempt)

***Special note regarding bus drivers:** The "charter activities" exemption may apply to some of the hours of work of bus drivers. That exemption applies to special activities that are not part of such employees' regular employment. The hours for those special activities need not be paid at the time-and-a-half rate. Of course, while not required by the FLSA, the overtime rate may be required pursuant to the collective bargaining agreement or past practice.

D. Special District Employees

Although there are many different kinds of special district employees, there are no special FLSA rules for them.

Water or sewer authorities are the most common types of special districts. Appointed or elected commissioners are not covered. Engineers, which sometimes make up a large section of special district employees, would generally be considered as exempt professional employees.

VII. "COMP" TIME

Compensatory time ("comp" time) is defined as future time off in lieu of present cash payment for overtime worked. Compensatory time for public employees is allowed as long as it is provided for by a collective bargaining agreement or employment agreement or understanding.

Compensatory time must be earned at the same rate of cash compensation (time and one-half).

A. Maximum Accumulations

The compensatory time earned (at time-and-one-half) for hours worked more than 40 per week may be saved by the employee and carried by such employee until either used or liquidated at time of separation. However, the employer can require employees to use their compensatory time. The maximum amount of compensatory time that can be earned is:

240 hours (regular covered employee); or

480 hours (public safety, emergency response)

After these maximums have been reached, the employee must be paid at the rate of time and one-half times the regular rate in cash. Once an employee uses compensatory time in the bank, the total drops below the maximum level. Any additional compensatory time earned will be added to the unused balance until the maximum is reached. These balances can be carried from year to year and from contract to contract.

The compensatory time balances are an employer liability so that when an employee resigns, dies or otherwise leaves the employ of the employer, all outstanding balances are paid to the employee or the employee's beneficiary (estate).

B. Use of Accrued Compensatory Time

An employee who has accrued compensatory time must be permitted to use the time off within a "reasonable period" after making the request if it does not "unduly disrupt" the operations of the employer. It is not particularly clear what "unduly disrupt" means; it probably means undue disruption of operations and most certainly does not mean mere inconvenience of the employer.

The Supreme Court has held that the employer can compel an employee to use accrued "comp" time.

C. Employees Who Worked Less than 40 Hours Per Week

If there is an agreement between the employer and the employees who work less than 40 hours per week, all hours between the normal workweek and 40 hours may be accrued as "comp"

time. As the FLSA does not set any regulations on this type of overtime, there are no limits as to how much time can be accumulated or at what rate it can be accumulated.

D. Payment Upon Termination

Upon termination of employment, an employee must be paid for unused compensatory time computed at time and one half multiplied by (1) the average regular rate received by such employee during the last three years of employment, or (2) the final regular rate received by such employee, whichever is higher.

VIII. DEDUCTIONS FROM WAGES

A. FLSA Restrictions

As interpreted in this federal circuit, the FLSA does not specifically govern deductions from wages, except as it pertains to wage garnishments.

The FLSA limits the amount of wages that may be subject to garnishment to 25 percent of a worker's "disposable earnings," which are generally defined as the earnings remaining after withholding for taxes and other amounts required by law, or the amount by which the worker's weekly "disposable earnings" exceed thirty times the FLSA minimum wage, whichever is less.

B. Statutory Restrictions as to State Employees

The State Finance Law prohibits the State from attempting to recover overpayments, by salary offset or otherwise, to a state employee that occurred as a result of administrative error, except where:

1. The overpayment was made during a period where the employee was neither performing services for the State nor on approved leave; or

2. The overpayment occurred under circumstances where the Comptroller reasonably determines that the employee knew, or that a reasonable employee should have known, that the salary paid to him or her was in excess of that which he or she was entitled to receive.

C. Restrictions as to Other Public Employees

Case law in New York provides that public employers may deduct overpayments from employee salaries provided that the employer advises the employee of the basis for its action and gives the employee an opportunity to be heard prior to making the deductions.

D. Restrictions as to Private Sector Employees in New York State

The New York State Labor Law prohibits private sector employers from making deductions to employee pay unless:

1. The deduction is made in accordance with law, rule or regulation; or

2. The deduction is expressly authorized in writing by an employee, and made for the benefit of the employee.

Authorized deductions are expressly limited to payments for insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States

bonds, payments for dues and assessments to a labor organization, and similar payments for the benefit of the employee.

Deductions from private sector employee pay may not be made for cash shortages or losses, damaged equipment or spoiled merchandise, fines or penalties for lateness or misconduct, and so forth.

Private sector employers are further prohibited from charging employees "by separate transaction" for these things.

IX. PREVAILING WAGE REQUIREMENTS

Certain statutory provisions of the New York State Labor Law provide that persons doing work involving the creation and repair of public work projects must be paid "prevailing wage rates."

These provisions, however, do not require such payment to civil service employees.

Rather, the typical situation where prevailing rates have to be paid involves employees of contractors and subcontractors doing construction or maintenance work on public property. Those workers must be paid the prevailing rate, which usually involves the applicable construction trade union rate in that locality.

Attention should nonetheless be given by our members to such projects, particularly smaller ones and ones involving only repair or maintenance, as prevailing rates are often relatively high, and public employers might be less apt to subcontract those jobs (thus taking work away from our members) if they are properly policed into paying those proper rates.

X. CSEA FLSA COMPLAINT PROCESS

A. Generally

Back pay can be obtained where there have been FLSA underpayments. Liquidated damages and attorney's fees are also available. It is further illegal for an employer to retaliate against an employee for making an FLSA complaint.

B. Available Legal Avenues

An administrative complaint with the USDOL can be filed about alleged FLSA violations. Alternatively, legal action can be brought. Employees can proceed on their own. Or, as discussed below, CSEA will assist employees with either procedure, depending on the circumstances.

C. Statute of Limitations

The statute of limitations for FLSA violations against most employers is two years (three years for willful violations), **but state employees have only six months to file a claim**. This period runs from the date of each paycheck where an underpayment is made.

As this is a very short time period, particularly for state employees, time is of the essence where FLSA violations are concerned!

D. CSEA Procedures

The Labor Relations Specialist should be notified as soon as possible of any potential FLSA violations. If the problem is substantial, the Labor Relations Specialist will notify the CSEA Legal Department for input and discussion.

Depending on the circumstances, the Labor Relations Specialist will ordinarily attempt to obtain compliance voluntarily from the employer. Both an immediate cessation of the FLSA-violative practice and back pay, if applicable, would be sought.

If FLSA compliance cannot be resolved satisfactorily and promptly with the employer, the Labor Relations Specialist may, depending on the circumstances, file a formal administrative complaint with the USDOL. A sample USDOL administrative complaint letter is at the end of this guide. The completed complaint letter (with any attachments) would be filed at the nearest USDOL Wage and Hour Division office. Wage and Hour Division offices are listed in the telephone directory under United States Government - Labor Department, and can be reached at (1-866-487-9243). Wage and Hour Division offices may also be found at https://www.dol.gov/whd/local/#stateDetails.

Alternatively, depending on the seriousness of the FLSA violations, the Labor Relations Specialist might seek CSEA Legal Assistance for legal or other action by the CSEA Legal Department or a CSEA Regional Attorney.

-APPENDIX-

Sample Complaint Letter

[date]

United States Department of Labor
Wage and Hour Division
[Address from page 31 of guide]

RE: Fair Labor Standards Act Violations

Dear Investigator:

Please consider this letter as a complaint alleging violations of the Fair Labor Standards Act.

The employer involved is: [name of head of employer; name of employer; address of employer; phone number of employer].

The employee(s) involved and their titles are: [name(s) of bargaining unit member(s); address(es) of bargaining unit member(s); phone number(s) of bargaining unit member(s); title(s) of the bargaining unit member(s)]

Their regular hourly rate of pay is:

A description of the violation(s) is as follows (use additional sheets if necessary):

We have enclosed the following relevant documentation:
[check one]
____Time sheets/cards
____Pay stubs
____Job descriptions
____Other [explain: _____]

If you have any questions or need additional information, do not hesitate to contact: [Name of CSEA LRS/Local officer/Unit officer; address; phone number]

Sincerely,

[name]

PL/09-000S/EEW/ac/#239195 03/31/19

Local 1000, AFSCME, AFL-CIO
143 Washington Ave., Albany, NY 12210

Mary E. Sullivan, President