

# Wage and Hour Issues in the Workplace:

Understanding the  
Fair Labor Standards Act (FLSA)  
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# Objectives

- Understand legal provisions on wage and hour laws and proposed updates to wage and hour laws
- Discuss distinctions in categories of exempt and non-exempt workers
- Review application of law to specific worker compensation issues

# Intent of the FLSA

FLSA was enacted on June 25, 1938 to create more jobs by:

- Requiring payment for all hours worked.
- Discouraging employers from requiring employees to work more than 40 hours in a week by requiring the payment of overtime pay.
- Establishing a minimum wage for to provide reasonable wage for each hour worked.

# Who is Covered by the FLSA?

- Everyone who is a paid employee at JCU is covered.
- Unpaid volunteers are not covered.
- Certain employees are exempt from provisions based on the work they perform.

# Exempt vs. Non-Exempt

## Exempt (Salaried) Employees:

- Are regularly paid a pre-determined amount
- Meet FLSA “salary level” test
- Are engaged in supervisory, administrative, or executive job duties
  - Are not entitled to Overtime

## Non-Exempt (Hourly) Employees:

- Do not meet one or more of the FLSA exemption tests
- Do not meet “salary level” test
- Are not engaged in supervisory, administrative or executive job duties
- Are “Covered” by wage and hour laws (minimum wage, hours worked, overtime)
- Are Eligible for Overtime

# Exempt vs. Non-Exempt

- Three tests for Exemption
  - Salary Level (amount per week)
  - Salary Basis (pre-determined, fixed amount)
  - Job Duties (criteria)
- Human Resources determines an exempt or non-exempt status for each position with information from departments and review of Job Descriptions.



# Exempt vs. Non-Exempt

## *Salary Basis Test – To Be Exempt*

- Regularly receives a predetermined amount of compensation each pay period
- The compensation cannot be reduced because of variations in the quality or quantity of the work performed
- Must be paid the full salary for any week in which the employee performs **any** work
- Does not need to be paid for any workweek when no work is performed

# Salary Level Test: Proposed Regulatory Changes

- Current, salary level test is \$23,660 or \$455 per week
- Prior attempts in 2016 to increase Salary Level test
  - Courts declared them invalid due to procedural issues
- Sept. 24, 2019 - New salary level of **\$684 per work week** or **\$35,568 a year** (full-time)
- Effective **January 1, 2020**



# Salary Level Test: Proposed Regulatory Changes

- Will increase number of employees who will be non-exempt (hourly) employees – 1.1 million more
- Updates to salary levels every 4 years AFTER notice-and-comment period (not automatic)
- Duties test does not change.
- Nondiscretionary bonuses can be included to account for 10% of the salary amount

# Salary Level Test: Proposed Regulatory Changes

- Process:
  - HR is reviewing positions that would be affected
  - Review if affected by part-time or ten-month
  - Review if few exceptions to salary level applies
    - i.e. ministerial exception
- HR will meet with affected supervisors and department heads.
- Determine if changes needed to hours, structure or pay
- Written notifications will be provided to those affected

# Salary Level Test

- The minimum salary level required for exemption is \$455 per week (1/1/2020 - \$684 per week).
  - Does not apply to teachers, coaches, academic administrative personnel etc.
  - The \$455 per week (\$684/week) may be paid in equivalent amounts for periods longer than one week.
    - Biweekly (26 pay periods): \$910.00 (\$1,368)
    - Semimonthly (24 pay periods): \$985.83 (\$1,482)
    - Monthly (12 pay periods): \$1,971.66 (\$2,964)

# Key Exemptions

The most common FLSA minimum wage and overtime exemption applies to certain employees that fall in the following categories:

- Executive
- Administrative
- Professional
- Computer

# Executive Exemption

- Primary duty must consist of managing the organization or of a customarily recognized department of the organization
- Customarily and regularly directs the work of two or more other employees
- Supervision: Authority to hire or fire other employees or makes recommendations as to the hiring, firing, advancement, performance or other change of status of other employees

**Examples:** VP, Director

# Administrative Exemption

- Primary duty is the performance of non-manual work directly related to the management or general business operations
- Work includes the exercise of discretion and independent judgment with respect to matters of significance

**Examples:** Manager, Supervisor, Senior Administrator

# Professional Exemption

## *Learned & Creative*

- Primary duty is the performance of work requiring advanced knowledge beyond high school or degree in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction
- Advanced knowledge needed in a field of science or learning that was acquired by a prolonged course of specialized intellectual instruction
  - appropriate academic degree or combination of degree and experience

**Examples:** accountant, engineer, professor, lawyer, doctor

# Computer Category

- The application of systems analysis techniques and procedures, including consulting with users to determine hardware, software, or system specifications
- The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs
- A combination of the above requiring the same level of skills

**Examples:** network analyst, developer, software engineer



# Scenario: Exempt vs. Non-Exempt

- Brenda, a supervisor, wants to be sure a Coordinator remains exempt
- She says it has to be classified as exempt because the Coordinator, Josh, runs the office by himself, and works some nights and weekends
- Her supervisor confirmed this is a very important position

**Will this information help Human Resources with the FLSA classification?**

# Scenario: Exempt vs. Non-Exempt

- **Key issue:** What does the job description say?
- What are the actual duties performed by Josh?
- Does Josh play a role in determining direction, strategy or does he exercise independent judgment?

# Hours Worked Issues

- Overtime
- What is a Workweek?
- Suffered or Permitted
- Waiting Time
- On-Call Time
- Meal and Rest Periods
- Training Time
- Travel Time

# Overtime Pay

Covered, non-exempt employees must receive one and one-half times the regular rate of pay for all hours worked over 40 in a workweek



# What is a Workweek?

- Hours are calculated by workweek, and each workweek stands by itself
- JCU's workweek runs from Sunday to Saturday
- Workweek is 7 consecutive 24-hour periods (168 hours)
- Averaging time worked during workweeks over a pay period is not permitted

# Suffered or Permitted

*Work not requested but **suffered** or **permitted** is work time and must be compensated*

- “There is no such thing as an employee who volunteers to do work connected with his or her job.” - DOL
  - » i.e. a bus driver could not volunteer to drive the football team to a Friday night game
- Employees and employers **DO NOT** have the right to waive any hours worked by an employee as unpaid or to waive overtime

# Flexible Schedule



- Supervisors can adjust the hours worked in a workweek so that hours stay within regularly scheduled hours worked.
- For example:
  - Sue works 10.5 hours on Monday. Her supervisor can provide 3 hours time off before Friday to keep her hours at 37.5 for the week.
  - If Sue works 10.5 hours on Friday, her hours cannot be adjusted because the week ends on Saturday at 11:59 PM. She would be entitled to straight time and overtime for the 3 hours.

# De Minimus Rule

- *de minimus* rule:
  - Insignificant or insubstantial periods of time beyond the scheduled work hours, which cannot, for a practical matter, be recorded for payroll purposes
    - » These periods of time may be disregarded and considered ***de minimus***



# Waiting Time

**Counted** as hours worked when

- Employee is unable to use the time effectively for his or her own purposes; and
- Time is controlled by the employer

**Not counted** as hours worked when

- Employee is completely relieved from duty; and
- Time is long enough to enable the employee to use it effectively for his or her own purposes

# On-Call Time

On-call time **does** count as hours worked when

- Employee has to stay on the employer's premises
- Employee has to stay so close to the employer's premises that the employee cannot use that time effectively for his or her own purposes

On-call time **does not** count as hours worked when

- Employee is required to carry a pager or cell phone
- Employee is required to leave word at home or with the employer where he or she can be reached

# Lunch Time or After-Hours Work

- Work not requested, but permitted to be performed, is work time that must be paid for by the employer.
- The employee should obtain advance authorization before working extra hours or overtime.
- Even if authorization is not given in advance, the employee is required to be paid for the time spent working if employer should have known work was being performed.



# Meal and Rest Periods

- Meal periods of at least 30 minutes are not hours worked when the employee is relieved of duties for the purpose of eating a meal.
- Reasonable rest periods of short duration (normally 5 to 20 minutes) are considered “de minimus” and are counted as hours worked and must be paid.

# Training Time

Time employees spend in meetings, lectures, or training is considered hours worked and must be paid, unless:

- Attendance is outside regular working hours, **(AND)**
- Attendance is voluntary, **(AND)**
- The course, lecture, or meeting is not job-related, **(AND)**
- The employee does not perform any productive work during attendance

# Travel Time

- Ordinary home to work travel is not work time
- Travel between job sites during the normal work day is work time

# Travel Time

## Traveling away from home community

- Travel that keeps an employee away from home overnight is “travel time away from home”
- This time is considered hours worked **when** it cuts across an employee’s normal work day

# Travel Time

## Travel Time away from home community

- If an employee prefers to drive back and forth each day from a conference, and the **employer prefers** the employee to stay, the commute can be considered normal home-to-work commute and is not hours worked
- When traveling, if an employee is waiting for a flight **during normal work hours**, it is considered hours worked.



# Scenario: Away-from-Work

Barb is asked to go on an admissions trip to California.

- She flies to California on Sunday at 5 AM
- She works at the admissions program from 9-5:30 each day
- She returns to Cleveland by plane Friday at 8 PM
- Her usual work hours are 8:30 AM – 5 PM

**How should Barb's hours be calculated if she is a non-exempt employee? What if she is exempt?**

# Scenario: Away-from-Work Work

## Non-exempt:

- Barb does not need to be paid for her flight time Sunday
- She should be paid for 8:30 AM-5 PM for Sunday even if not working (travel away during non-work day)
- She should be paid each day for 7.5 hours
- She should be paid for any overtime worked each day
- She does not need to be paid for flight time home after 5 PM

**Exempt:** No overtime owed. Time off may be given in discretion of supervisor.

# Scenario: Bob's Fun Phone

- Bob is a non-exempt employee who loves his new I-Phone
- On his own, he happily answers work-related emails and texts while walking his dog, Buster
- He spends about 5 hours a week on his I-phone for work  
He works 37.5 hours a week in the office.

**What are the issues with Bob's usage of his I-Phone?**



# Bob's Fun Phone

## *Additional Work Performed*

- All hours worked must be included in the total hours worked by the employee whether performed at home, on campus, at an off-campus event, or at a designated workstation
- Total hours within the work week must not exceed 40 hours
- Did the supervisor know or have a reason to know the work was being performed?



# Scenario: Sally's Long Day at Work

- Sally is a non-exempt (hourly) employee who tends to eat lunch at her desk while performing basic duties like answering the phone and checking work email.
- After regular work hours, she is required to check her work Twitter, voicemail and email to be sure no emergencies have arisen.
- It takes Sally a few minutes to do this each night.

**What wage and hour issues can you identify in this scenario?**



# Sally's Long Day at Work

## *Working Additional Time*

- The question is whether the time is *de minimus*.
- Time spent working at home or during any non-office hours must be paid if the activity is occurring.
- *De minimus* = time is so small and minimal that as a practical matter, it cannot be calculated and recorded.
  - *Applies only where a few minutes of work are involved and not recording the time is justified as a matter of business practicalities .*



# Scenario: Stan is Happy to Work

## *After Hours Work*

- Stan is a non-exempt (hourly) employee who likes to stay late to work on projects and clean his desk.
- Larry, his supervisor, did not authorize Stan to work late.
- Larry sometimes sees Stan at his desk past 5:00 but isn't sure what Stan is doing.



# Stan's Happy to Work

## *After-Hours Work*

- Work not requested, but permitted to be performed, is work time that must be paid for by the employer
- The employee should obtain advance authorization before working extra hours or overtime
- Even if authorization is not given in advance, the employee is required to be paid for the time spent working if employer should have known work was being performed





# The FLSA Does Not Require

- Vacation, holiday, severance, or sick pay
- Meal or rest periods, holidays off, or vacations
- Premium pay for weekend or holiday work
- Immediate payment of final wages to terminated employees
- Any limit on the number of hours in a day or days in a week that an employee at least 16 years old may be required or scheduled to work
- Pay raises or fringe benefits

# Record Keeping Requirements

- The University must maintain a record of the hours worked each day and the hours worked each workweek for every non-exempt employee.
  - Records must be retained for **3 years**
  - Payroll records, hours worked, time cards/time schedules, records of additions to & deductions from pay
  - Hours spent by a non-exempt employee checking email, voicemail, or working from home must be included in the records
  - These records must be available upon request by the Department of Labor's Wage & Hour Division
- Supervisors must require their non-exempt employees to record this time in the Banner time management system.

# Enforcement

- Employees may bring complaints to the Department of Labor or file a lawsuit
- The Department of Labor may bring a lawsuit for any back pay owed, as well as for an equal amount to back pay for liquidated damages (“double damages”)
- Willful or repeated violations by employers can result in civil penalties, or criminal prosecution & fines



# Independent Contractor or Employee?

- Employers must classify workers correctly as employees or independent contractors
  - An employee is under the control of the employer in terms of results produced and means to achieve results
  - Independent contractors perform work independently for the employer and are hired to achieve the final result, not the method or means of reaching the result. i.e. report from consultant
- Independent contractors are not protected by wage and hour and labor laws
  - Paid on 1099 vs. W-2
- Key issues: behavioral, financial and relationship control

# Independent Contractor or Employee?

- Department of Labor and IRS have increased scrutiny and audits of employee vs. independent contractor status
- Tips:
  - Should have written agreements with all contractors
  - Should not be required to follow specific work rules or hours
  - Should be paid for the project vs. hourly
  - Usually work for others at same time
  - Should provide their own equipment, transportation etc.
  - Should be separate business entities whenever possible

# Questions?

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# Major Provisions

- Intent of the FLSA
- Exempt Status vs. Non-Exempt Status
- Coverage
- Minimum Wage
- Hours Worked Issues
- Overtime Pay
- How Exemption is Determined
- Recordkeeping

# Common Errors to Avoid

- Improperly applying an exemption so an employee is not paid overtime due
- Failing to pay for all hours an employee is “suffered or permitted” to work





# Common Errors to Avoid

- Failing to include all pay required to be included in calculating the regular rate for overtime
- Failing to add all hours worked in separate positions for the same employer when calculating overtime due

