

## **(7) List of FLSA Terms**

### **Attorneys' Fees**

Successful FLSA Plaintiffs are entitled to an additional award for "reasonable attorneys' fees" (plus reimbursement for many out-of-pocket expenses incurred in litigating the lawsuit). Employees are not responsible for paying an employer's attorneys' fees unless their lawsuit is frivolous.

### **Compensatory Time ("Comp. Time")**

Employers often tell employees they will get "Comp. Time" instead of overtime pay. Comp. time instead of cash for overtime is not generally permitted by non-government employers. Non-government employers who have such systems are almost always in violation of the law and owe employees for unpaid overtime. Under certain circumstances a public employer (like the government) may pay (at least some) overtime with "comp. time" instead of cash. See "The Myth of Comp Time" for a more detailed discussion

### **Department of Labor (DOL)**

The DOL is the federal government agency in charge of enforcing the Fair Labor Standards Act. If a person does not want to hire a private attorney to enforce their rights, the DOL may be able to assist the employee, though the DOL does not always bring suit on behalf of employees.

### **Duties Test**

For employees to be exempt they must meet both the salary test and the "duties test." The duties test requires that employees perform duties that are considered exempt. Exempt duties usually involve relatively high-level work and is generally not work that only requires the application of skill. For a more extensive discussion of exempt work duties, see the "Are You Exempt" page.

### **Exempt Employees**

Exempt employees are not entitled to be paid overtime. They are called "exempt" because they are exempt from the overtime or minimum wage (or both) requirements of the FLSA. Generally, these employees are bona fide executive, administrative, or professional employees. They must be paid on a salary (or fee) basis and must perform the duties of an exempt employee. If an employee is paid on an hourly basis (with very few exceptions) he is not an Exempt employee, but is a Nonexempt employee. See "Are You Exempt" for more detail on this issue.

### **Fair Labor Standards Act**

Federal labor law of general and nationwide application, including Overtime, Minimum Wage, Equal Pay Act. Also known as the FLSA, or the "Garcia Act." Located at 29 USC§§201 et seq.

### **Hours Worked**

FLSA wages are determined by the number of hours an employee actually works. All time actually worked counts, but only time actually worked counts. "Hours not worked" are not governed by the FLSA, even if they are considered "work time" or "paid time" by the employer. Thus, "off the clock" work counts, but holidays, sick days, or other days off do not count as FLSA hours worked. Other hours worked but not counted by employers should be paid. For a more detailed discussion of what is and what is not "hours worked" see the "What Are Hours Worked?" page.

### **Independent Contractor**

An independent contractor is a person whose work arrangement with a company meet the definition of independent contractor under the law. Generally, people who can works for more than one company and who control their work in almost all respects will be considered independent contractors. If a company exercises too much control over how a person performs their job (including setting prices and heavily restricting or eliminating decision-making authority, then the person will probably be classified as an "employee" who would be entitled to overtime.

### **Joint Employment -- Dual Employment**

"Joint employment" refers to employees working the same job for two "different" employers. All hours must generally be aggregated, and each joint employer is equally responsible for wages, unless they are truly "separate and independent." "Dual employment" refers to employees performing separate jobs for the same employer. All hours must generally be aggregated for purposes of FLSA overtime wage computations.

### **Liquidated Damages ("Double Damages")**

Successful plaintiffs are usually entitled to recover double the amount of improperly unpaid back wages. This is called "liquidated damages" and is awarded in lieu of interest. Plaintiffs are entitled to this extra payment unless the employer can show they had a good faith belief that they were following the law and that they had reasonable grounds for believing they were complying.

### **Meal Periods**

The FLSA does not require meal periods. However, if there are meal periods permitted, they count as compensable hours worked unless the employee is actually relieved from active job

duties. If an employee actually gets an uninterrupted meal period, while free from active duties, the time need not be counted as work time.

### **Nonexempt Employees**

Nonexempt employees are generally entitled to be paid overtime (time- and- a- half of their regular rate of pay for all hours they work over 40 in one workweek). The law basically uses two tests to determine if an employee is nonexempt - salary AND duties (you must meet both tests). Generally, if you get paid by the hour, you are nonexempt. However, even if you get paid a salary you may still be entitled to overtime because even someone on salary still has to do exempt duties or else they are entitled to overtime. See "Are You Exempt" for more detail on this issue.

### **"Off-the-Clock Work"**

Also known as "off duty" work. Off the clock work is work performed outside the normal hours of the job. Some examples include "homework," equipment maintenance, "staying late" (without "putting in" for overtime), etc. Many FLSA cases involve employers not capturing and compensating off-the-clock work by employees. Saying something is "Off-the-clock" is a way of keeping the hours from being "hours worked." For more information about what hours should be counted as hours worked (work time), see the "What Are Hours Worked" page.

### **On-Call**

Nothing in the FLSA prohibits an employer from requiring employees to be "on call." Off-premises on call or standby time is not required to be counted as work time except under rare, peculiar and unusual circumstances.

### **Paydays**

FLSA wages must be paid "when due," which usually means at the next regularly scheduled payday. "Late payment" of wages is the equivalent of "nonpayment" of wages for most FLSA purposes. The FLSA does not prescribe how frequently wages must be paid. "Pay periods" may be different from "work weeks" or "work periods."

### **Regular Rate**

FLSA overtime is calculated at time and one-half of an employee's "regular rate" of pay. Subject to some special rules, the regular rate is the total non-overtime compensation received by an employee (for work) divided by the number of non-overtime hours these wages are intended to compensate. Most wage "augments" must be included in the regular rate, such as productivity bonuses, longevity pay, or shift differentials.

### **Retaliation and Discrimination**

The FLSA prohibits retaliation or discrimination in the terms and conditions of employment against employees for asserting rights under the FLSA. The anti-discrimination and anti-retaliation provisions have teeth, and are interpreted liberally in favor of employees.

## **Salary**

An employee is paid on a salary basis if s/he has a "guaranteed minimum" amount of money s/he can count on receiving in the paycheck for any work period during which s/he performs "any" work. The "salary basis test" is one way the FLSA distinguishes exempt from nonexempt employees. No matter what an employee's job duties are, with only a few exceptions s/he is nonexempt unless s/he is also paid on a salary basis. On the other hand, merely paying an employee on a salary basis rather than hourly does not make the employee exempt unless s/he also performs relatively high-level job duties.

## **Salary Basis Test**

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## **"7(K)" Exemption**

Section 207(a) of the FLSA requires employers to pay their employees overtime compensation for all hours worked over 40 hours per week. Section 207(k) provides a potential limited exemption from the overtime provisions of the FLSA for public agency employees who are engaged in "fire protection activities" or "law enforcement activities." In essence, "alternative 7(k) work periods" change the normal seven day, forty hour work week to "work periods" of from seven to twenty? eight days, with overtime owed for hours worked over a "threshold" per work period, which are larger than forty hours per week.

## **State Law**

Some States may have wages and hours laws similar to the FLSA. State law wages and hours laws are in addition to FLSA requirements, and do not supersede the FLSA. Employees typically are entitled to the benefits of the federal FLSA or their State wages and hours laws, whichever are better.

## **Statute of Limitations**

The normal FLSA statute of limitations entitles employees to recover back wages beginning two years before a complaint is filed and extending forward until the case is resolved. The statute of limitations is three years if the employer "willfully" or "recklessly" disregarded its FLSA obligations. An employee's FLSA rights become "vested" only by the filing of a complaint in court.

### **Settlements**

The FLSA provides two and only two mechanisms for an employee and employer to enter into a "binding" settlement of FLSA claims. One is to settle a matter under the "supervision" of the U.S. Department of Labor. The other is to settle a matter in the course of litigation. A settlement made with DOL supervision, or in litigation, will be binding, and operates as a waiver of additional claims by the employee.

### **Straight Time**

The FLSA has limited application to straight time wages, except for minimum wage laws. The only time the FLSA requires straight time pay at an employee's regular rate is when the employee has worked FLSA overtime.

### **Training Time**

Training time is generally compensable working time, with exceptions. Training time is not working time if it is specifically required by the law of a "higher jurisdiction" as a condition of employment. Training time is also not working time if it is (a) outside of the employee's regular working hours; and, (b) strictly voluntary; and, (c) not directly related to the employee's job; and (d) the employee must not perform any (other) productive work during the training.

### **Waiver**

FLSA rights may not be waived, by collective bargaining agreements, employment contracts, or otherwise. Generally, an employee is entitled to FLSA rights or collective bargaining rights, whichever are better. "Failure to ask" for FLSA compensation is almost always irrelevant. Failure to use administrative procedures is irrelevant. Work. Most "job-related" activities are considered work under the FLSA, and must be compensated accordingly. Work includes activities which "benefit the employer" and which the employer "knows or has reason to believe" the employee is performing.

### **Work Weeks**

The FLSA requires that wages due be calculated on a work week by work week basis. A work week is seven consecutive days. Work schedules must be translated into work weeks to determine FLSA wages due. (Some employees may have work periods different from seven days.)