



## **FLSA & Your Organization:**

### **Summary:**

In organizations across America, compliance with the Fair Labor Standards Act (FLSA), especially as it relates to overtime pay, is increasingly crucial. The burden of proof is 100% on the employer to comply with FLSA regulations. Many unclassified employee groups have filed, and won, suits against organizations for underpayment of overtime.

Federal lawsuits alleging violations of FLSA have more than doubled nationwide in recent years. An increased emphasis on overtime – along with nonpayment for the work – is alleged to be a big part of the problem.

Retroactive payments of twice the amount of overtime owed, along with legal fees, put pressure on a business. Attendance on Demand® blended rates provide a way for organizations to calculate overtime compliance with FLSA regulations. This document details the impact the FLSA is having upon employers, examines ways in which your organization is affected by these regulations, and explains how Attendance on Demand can be your solution.

## **What Is the Fair Labor Standards Act?**

The Fair Labor Standards Act advocates for workers by establishing minimum-wage, overtime, and child labor standards in the United States. These standards usually apply only to hourly employees, but some salaried employees also are covered under FLSA. In fact, the only true measure of whether or not employees are covered by the FLSA is their status: exempt or nonexempt, as determined by the employee's primary duties.

### **Wages & Hours**

The Fair Labor Standards Act (FLSA) prescribes standards for wages and overtime pay, which affect most private and public employment. The act is administered by the Wage and Hour Division of the Employment Standards Administration (ESA). It requires employers to pay covered employees who are not otherwise exempt at least the federal minimum wage and overtime pay of one-and-one-half-times the regular rate of pay. For nonagricultural operations, it restricts the hours that children under age 16 can work and forbids the employment of children under age 18 in certain jobs deemed too dangerous. For agricultural operations, it prohibits the employment of children under age 16 during school hours and in certain jobs deemed too dangerous.

### **What Does the FLSA Say About Overtime?**

According to the U.S. Fair Labor Standards Act, overtime must be paid at 1.5 times the employee's average pay rate after the employee has worked 40 hours. Because some employees work at different rates throughout the week, it can be complicated to calculate a fair overtime wage. According to the U.S. Department of Labor:

“Where an employee in a single workweek works at two or more different types of work for which different straight-time rates have been established, the regular rate for that week is the weighted average of such rates. That is, the earnings from all such rates are added together and this total is then divided by the total number of hours worked at all jobs.”

(<http://dol.gov/esa/regs/compliance/whd/whdfs23.htm>)

## How Do Fair Labor Standards Act Regulations Affect My Organization?

According to information recently released by the Administrative Office of the U.S. Courts, the number of federal lawsuits alleging violations of the Fair Labor Standards Act has recently doubled.

A large portion of the increase in cases is being widely attributed to low-paid workers in a variety of industries, including landscaping, shop clerks, restaurant workers, warehouse laborers and construction contractors. These workers are seeking thousands of dollars in back wages from employers who they say failed to pay the mandated minimum wage or to provide overtime pay.

This recent litigation is fueled by several factors:

- Nonexempt employees often work more than one job.
- Employees “volunteer” for regular work activities.
- Employee gap time is not always considered.
- Records of hours are frequently inexact.
- Payroll and human resources staff are inadequately staffed or trained.

First on the list is that employees can often have multiple jobs. For example, in a hospital setting the same person can work 25 hours a week as a maintenance worker, and 20 hours a week as a cafeteria server. Although it is easy to consider this worker as having two separate jobs, for the purposes of FLSA this worker has one job, works over 40 hours a week, and is entitled to overtime pay at 1.5 times the average pay of those two activities.

A second consideration is nonexempt employees volunteering for work that is similar to the work for which they are paid. Furthermore, if an employee does a task on a regular basis, even if it is considered volunteering, the employee must be paid—and that pay goes towards the calculation of overtime hours. In fact, nonexempt employees can volunteer only on an “occasional and sporadic” basis. Regular volunteering, and volunteer work in which the employee performs his or her regular duties, is considered work. So, the employee who works 25 hours as a maintenance worker, 20 hours as a cafeteria server, and volunteers 5 hours as a reception desk worker must be paid for all 50 hours of work, 10 hours of which must be paid at an overtime rate. Because the employee is volunteering as a server, the volunteer work must be paid.

Gap time can also lead to underpayment of nonexempt employees. For example, in a healthcare setting, if a nurses aide is paid a salary to work 37.5 hours a week and works 42 hours, that employee is due 2 hours of overtime and 2.5 hours of gap pay. An employee must be paid for 100% of her work; if she works more than her contracted amount, the hours up to 40 hours must be paid at a regular rate, and the hours over 40 hours must be paid at an overtime rate.

## Accurate Tracking Methods

Another consideration for organizations is the accurate recording of employee time. If your business keeps paper time sheets that record the employee's schedule (not the hours the employee actually works), these records are considered inaccurate and do not comprise an accurate legal record of employee attendance. For example, if an employee comes in late on Monday morning due to a sick child, but stays late on Friday evening, her time sheet may be recorded like this:

	In	Out	In	Out	Total
Monday	8AM			4PM	8
Tuesday	8AM			4PM	8
Wednesday	8AM			4PM	8
Thursday	8AM			4PM	8
Friday	8AM	4PM	7PM	10PM	11
Weekly Total					43

Even though the manager and the payroll manager know that on Monday she was in at 11AM, counteracting her overtime on Friday— this is not recorded in the time sheet. She is paid for 40 hours at her regular wage. A later audit would find the employee due overtime pay.

Additionally, it is clear that the previous timesheet is not exact. A realistic timesheet might look like this:

	In	Out	In	Out	Total
Monday	11:02AM			4:15PM	5:13
Tuesday	8:00AM			3:57PM	7:57
Wednesday	7:55AM			4:03PM	8:08
Thursday	7:59AM			4:00PM	8:01
Friday	8:02AM	4:02PM	6:55PM	9:45PM	10:50
Weekly Total					40:09

The last factor that can expose your organization to problems with FLSA is the sheer lack of personnel dedicated to recordkeeping. Overworked staffs often manage complex networks of employees, many of those employees with a multitude of job responsibilities. Inaccurate timekeeping and incorrect calculation of overtime pay can be an unintended consequence.

With all these factors to consider, even the most conscientious administrators can find their organization under legal and financial strain. Knowing how to quickly correct the process of overtime payment, and retroactively paying employees for overtime can, while financially draining, save the business from dire consequences.

### **How Can My Business Counter Lawsuits Due To Incorrect Overtime Calculation?**

- Classify employees correctly under FLSA regulations.
- Obtain a legal audit to retroactively pay employees back overtime pay.
- Keep accurate time and attendance records.
- Simplify the calculation of overtime pay using Attendance on Demand blended rates.

As noted above, the first step in avoiding the recent trend of lawsuits against employers is to correctly classify employees under FLSA regulations. Many payroll and human resources personnel believe that employees are exempt from FLSA if they are salaried. This is not always the case. The guidelines state that employees must also be executive, managerial, or professional workers, as well as be salaried, to be exempt from FLSA regulations. Key examples of employees who may be salaried, but who are nonexempt, include administrative assistants, custodians, food service, and computer technicians.

The issue can be further confused if employees work part of the time in exempt positions and part of the time at nonexempt positions. For example, a cafeteria manager is an exempt employee; however, he also works a portion of the time serving in the cafeteria. His primary duties determine whether he is considered exempt. While time is not the sole test, as a guideline, an activity at which an employee spends more than 50 percent of his time is considered his primary duty. If you have questions about whether or not your employees are exempt or nonexempt, contact the Department of Labor at [www.dol.gov](http://www.dol.gov) or 1-866-4-USWAGE.

Obtaining a legal audit to retroactively pay employees for unpaid overtime is a smart decision. One option is obtaining a Department of Labor audit. However, the employer is then obligated to pay any overtime costs that are due. Another option is to hire an outside law firm to conduct the audit, and then make an effort to pay employees unpaid overtime. This can help employers prevent, or at least prepare for and minimize the costs of, litigation.

## Improved Timekeeping

An important step to quickly becoming compliant with FLSA regulations is to adopt timekeeping practices that accurately record employees' time and overtime. Employees' actual time must be recorded.

Timekeeping can be dramatically improved with the use of time recorders and time and attendance software that keep a precise record of the exact minute employees begin and end work. If an employee performs diverse tasks with different pay rates, Attendance on Demand tracks the time spent performing each task and calculates an accurate wage. When an employee passes the 40-hour threshold, time is automatically recorded and paid as overtime.

Attendance on Demand<sup>®</sup> is powerful software that can be customized to reflect your time and attendance policies, as well as FLSA regulations for nonexempt employees.

The blended rates feature in Attendance on Demand makes it easy to manage employee overtime pay. All calculations happen behind-the-scenes. Even in complex situations where employees earn different hourly rates for several types of work, employers can use the technology to calculate and track hours using an overtime rate that is compliant with FLSA. That means that the employee's weighted average pay is used as the base pay for overtime calculations.

For example, if an employee makes \$6.50 an hour for 23 hours in a job for the first half of the week and \$5.75 an hour for 17 hours for the second half of the week (both nonexempt positions), then works 6 extra hours in the cafeteria, that employee will earn \$9.27 for each hour of overtime pay.

$$(6.50 * 23) + (5.75 * 17) / 40 = \text{Base Rate of } \$6.18$$

$$\$6.18 * \text{Overtime Multiplier of } 1.5 = \text{Overtime Rate of } \$9.27$$

$$\text{Weekly Salary} = (\$6.50 * 23) + (\$5.75 * 17) + (\$9.27 * 6) = \$302.87$$

This calculation highlights the importance of correct recordkeeping and calculation of employee time and overtime. Paying the employee \$8.63 ( $\$5.75 * 1.5$ ) for each hour of overtime in the cafeteria does not comply with FLSA regulations, even though it seems reasonable. Weekly overtime must be calculated with the entire week's salary in mind.

## Conclusion

The recent surge of legal actions taken against employers for incorrect payment of overtime can straining the limits of an organization. Businesses are 100% responsible for FLSA compliance. Investing the time to learn about and comply with FLSA overtime regulations can save your organization substantial amounts of money.

Industry-leading tools like Attendance on Demand can greatly simplify FLSA-compliant overtime calculation, as well as maintain accurate employee attendance records, for better protection against this type of litigation. Attendance on Demand records become invaluable legal records of employee attendance and pay.

[www.attendanceondemand.com](http://www.attendanceondemand.com) 1.800.465.9980

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**Disclaimer**

This document simplifies a complex Act as it is understood by Attendance on Demand<sup>®</sup>, Inc. It is not to be taken as legal advice. For further information about FLSA compliance, job classification, or proper overtime payment for employees please contact the U.S. Department of Labor at [www.dol.gov](http://www.dol.gov) or 1-866-4-USWAGE.