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Frequently Asked Questions about the Fair Labor Standards Act (FLSA)

FLSA Questions and Answers

Q. What is the FLSA?

A. *The FLSA is the most general federal labor law. It contains the minimum wage provisions, Equal Pay Act, child labor restrictions, and a variety of other federal labor and employment law sections. A key provision of the Act is that most employees must be paid time and one-half for all overtime "hours worked."*

Q. Is the FLSA the same as the "Garcia Act?"

A. *Yes, but mostly as a matter of slang. The 1985 Supreme Court decision in Garcia v. San Antonio held that the FLSA applied to public sector (government) jobs as well as private sector employment. The FLSA has often been referred to as the "Garcia Act" since the Supreme Court decision. As a result of this court decision, Congress passed some FLSA amendments addressing the FLSA application to government employment, and these amendments have sometimes also been called the Garcia Act.*

Q. What activities are considered "work?"

A. *The courts have held that work time under the FLSA includes all time spent performing job-related activities which (a) genuinely benefit the employer, (b) which the employer "knows or has reason to believe" are being performed by an employee, and (c) which the employer does not prohibit the employee from performing. These can include activities performed during "off-the-clock" time, at the job site or elsewhere, whether "voluntary" or not.*

Courts have awarded FLSA damages for "off-the-clock" time spent by employees maintaining equipment, staying late after normal shifts without "putting in" for overtime, doing job-related paperwork "at home," making and responding to job-related telephone calls, working through meal periods, and many other activities. Employees sometimes underestimate the amount of "off the clock" time they spend performing compensable tasks.

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Q. What is "overtime?"

A. The word overtime has a technical definition under the FLSA, and means all time actually worked over a "threshold." The usual threshold is 40 hours per work week. Some government or medical jobs may have alternative thresholds.

Q. What is an FLSA threshold?

A. The FLSA generally requires overtime for hours worked in excess of 40 hours per week. In a regular, 40 hour week situation, the FLSA "threshold" is thus 40 hours per week. Some government employees, and some medical employees, may have different thresholds. For FLSA purposes, only "actual" work time counts toward the overtime threshold. Leave time does not count as work time under the FLSA, even if the time is paid for and considered working time for other purposes. For example, suppose an employee works 4 of his or her 5 regularly scheduled eight-hour days in a week, and takes leave on the fifth day. The employee will have worked 32 "regular" hours that week. Any additional time worked by the employee during that week (whether "on the clock" or "off the clock") will not "count" for FLSA overtime until (and to the extent that) the total number of hours worked that week exceeds 40 -- in the example, the first 8 "extra" hours need not be paid as overtime under the FLSA.

Q. A labor practice or contract may provide for overtime for employees working in excess of 8 hours per day, or 37.5 hours per week, or some other formula. Must this overtime be paid at time and one-half the officer's FLSA regular rate?

A. Not necessarily. The word overtime has a technical and restricted definition in the FLSA. FLSA requirements typically apply only when hours worked exceed the applicable FLSA overtime threshold in a work week or work period. FLSA overtime is due only for hours worked over the FLSA threshold, even if "contract overtime" may provide employees with overtime on some other formula (such as hours worked over 8 per day). Until and unless the FLSA overtime thresholds are met and exceeded, the FLSA rules for regular rates or overtime rates are generally inapplicable (assuming no minimum wage violations). If a labor-management contract or practice calls for overtime to be paid for hours worked below the FLSA threshold, neither the FLSA regular rate nor overtime rate requirements necessarily apply. Until and unless the FLSA overtime threshold is met and exceeded, an employee's wage rate can be different from the FLSA-mandated rate without violating the FLSA (again, assuming no minimum wage violation).

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Q. Does leave time count as work time?

A. No. "Hours not worked" need not be counted as "hours worked" for purposes of FLSA wage computations, even if they are counted as work time for some other purpose such as pensions or for pay computations under employment agreements.

Q. At what rate must FLSA overtime be paid?

A. Time and one-half the "regular hourly rate." (For employees whose normal pay is not an "hourly" rate, their regular rate requires converting pay to an hourly equivalent. There are some peculiar FLSA arithmetic rules about how to do this.) Longevity pay, shift differentials, and similar nondiscretionary wage augments paid for work should generally be included in calculating the FLSA overtime rate. There are provisions which may permit arrangements to pay for some work at a different rate, but only if the work is different from the employee's regular job, and only by agreement before the work is performed.

Q. Does it matter that an employee did not "put in for" the time spent performing work activities?

A. Probably not. "Failure to ask" is not a defense for an employer in an FLSA case. Failure to ask might conceivably be relevant on the question of whether an employer knew or had reason to believe that an employee was performing off duty work, but even in this situation failure to ask would be only one factor on the question.

Q. How does an employee prove that the employer knew or had reason to believe that off the clock work was being performed?

A. An employer will be held to "know" what it "could have found out" if it had paid attention to what its employees were doing. The legal standard is whether an employer could have learned of the handler's activities by making reasonably diligent inquiries. According to the courts, it is a "rare" case in which an employer will be found to lack the requisite knowledge when the activities in question are "part and parcel" of an employee's job, unless the employee has deliberately hidden the fact that s/he is performing them.



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Q. How do I prove the amount of time spent doing off-the-clock compensable activities?

A. It is up to the employer to control the work of its employees, and to maintain records of the time spent by employees performing compensable activities. If an employer does not maintain the required records, the employee is entitled to recover based on good faith, reasonable and realistic estimates.

Q. What are liquidated damages?

A. The FLSA provides that a successful employee is usually entitled to double the amount of unpaid back wages, called "liquidated damages." Essentially, liquidated damages are in lieu of interest. An employer can avoid paying liquidated damages only if it shows that it acted in good faith in failing to pay for off the clock work, and that it had a reasonable basis to believe that it need not pay for off the clock work. "Good faith" has a special meaning under the FLSA, and requires that employers have made specific investigation of the application of the FLSA to particular types of employees. Liquidated damages are the rule, not the exception. Employees are normally entitled to liquidated damages.

Q. What is the 7(k) Exemption?

A. The FLSA generally requires overtime at time and one-half for all hours worked over 40 per week. There is, however, a special rule for government police agencies and fire departments which allows a different "work period" in some circumstances. If the employer establishes an alternative work period under section 7(k) of the FLSA, overtime is owed (under the FLSA) only for hours worked in excess of a threshold number of hours per work period, which will be different from (and more than) the normal 40 hours per week. For example, a police employer may establish a 7(k) work period of 14 days. If the employer has complied with the requirements for establishing such an alternative work period, FLSA overtime is owed only for hours worked in excess of 86 hours in a 14 day work period.

Q. I already get overtime. Does the FLSA apply to me?

A. Maybe. Many employees put in off the clock time for which they are entitled to be paid. The Act defines "work" very broadly, and sometimes employers have failed to capture or compensate a variety of "off the clock" activities which count as work under the Act.

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Q. Does it matter that I never reported the time or asked for overtime?

A. Probably not. It is the employer's obligation to control the work. If an employer does not wish work to be performed it must prohibit it. "Failure to ask" for overtime is usually not a defense for an employer in an FLSA case. An exception might be if the employer has a requirement that generally all time be reported and actually has enforced it, or if an employee's failure to report means that the employers did not know the work was being performed.

Q. I get "compensatory time" in lieu of cash for overtime. Is this allowed?

A. Maybe, but only for public sector (government) employees. Comp. time in lieu of cash for FLSA overtime is not generally permitted in the private sector. A public sector employer may pay (at least some) FLSA overtime with comp. time.

Q. How do I enforce my FLSA rights?

A. Either by complaining to the U.S. Department of Labor or bringing a private lawsuit. Private lawsuits are more common.

Q. How does an employee start an FLSA case?

A. Usually by hiring an attorney. The FLSA is not "rocket science," but it is also not part of most "regular" lawyers' day to day practices. As a consequence, many employees will seek out attorneys with substantial FLSA experience, or local attorneys will "affiliate" with FLSA lawyers on particular cases (usually at no additional cost to the employee).

Q. What do I get if I win?

A. Money. Successful FLSA plaintiffs are entitled to back pay for all unpaid overtime, usually beginning two years before the complaint is filed. In most cases, they are also entitled to double the amount of back pay. This is called liquidated damages, and is essentially in lieu of interest on the unpaid wages. The Act also requires the employer to reimburse out of pocket litigation expenses and pay an additional attorneys' fee award. Some pre-tax FLSA recoveries by employees have been quite substantial. For employees nearing retirement, back pay awards may increase pension benefits.

Q. Is money recovered in an FLSA case taxable?

A. Yes.

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Q. What is the effect of an FLSA recovery on a pension?

A. This will depend on the pension system's rules. However, at least some of an FLSA award may be considered "back pay." Therefore, if pensions are based on a percentage of wages earned or "average salary," an FLSA recovery may increase the amount of pension an officer can receive. Thus, in some circumstances an FLSA award can be "the gift that keeps on giving."

Q. Are employees obligated to pay the employer's legal fees if they lose the case?

A. No (except in the unlikely event a court were to decide the suit was "frivolous").

Q. How do employees pay their FLSA lawyers?

A. This is between the individual employees and the lawyers. Many FLSA lawyers will take FLSA cases on some variation of a "contingency fee." This usually means that the employees pay no legal fees unless and until they win the case, and then fees are based on a percentage of the amount recovered. Successful FLSA plaintiffs are entitled to an attorneys' fee award from the employer in addition to any other recovery (like in civil rights cases).

Q. What actual financial costs or risks are there for an employee to bring an FLSA case?

A. To some extent this is between the individual employee and the attorney. If the employee hires attorneys on a contingency fee basis, there are no "up front" expenses for legal fees. However, employees are responsible for court costs, such as filing fees, stenographic transcription fees, etc. These may, or may not, be "fronted" by the attorneys, but employees are ultimately responsible for paying (or reimbursing) these expenses. (Court costs are paid by the loser, so employees are actually "on the hook" for these expenses only if they lose the case.) Individual arrangements with particular lawyers may also involve the employees paying some additional expenses directly, or not.

Q. How long does an FLSA case take?

A. Who knows? Almost everyone understands that legal proceedings are often slow. Most FLSA cases are filed in federal courts, and how fast a case can get to trial varies from district to district (and judge to judge). Many FLSA cases settle before trial, but this is unpredictable.

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Q. What are the time limits on FLSA suits?

A. The FLSA normally permits recovery for work performed beginning two years before a complaint is filed in court (and continuing "forward" until the case is resolved). Recovery for this period is essentially on a "no fault" basis. An additional year's recovery period is permitted if the employer "knew" that its employment and pay practices violated the FLSA, but "disregarded" these obligations. "Third year" cases are rare, but not unheard of. Nothing but the filing of a legal complaint in court "stops the clock." (A complaint to the employer, or the Department of Labor, does not "toll" the FLSA statute of limitations.)

Q. What are the "downstream consequences" of an FLSA case?

A. The FLSA prohibits retaliation or discrimination against an employee who brings an FLSA case. These provisions have "teeth," but do not cover "routine hassling." The FLSA does not prohibit management from changing working conditions or schedules to minimize or eliminate FLSA overtime liabilities in the future. Local laws or collective bargaining agreements may govern and limit the changes an employer may make.

Q. Do all "similarly situated" employees have to participate in an FLSA suit if one employee decides to sue?

A. No. FLSA cases are not "class actions." No employee need bring or join an FLSA suit if s/he does not want to. However, similarly situated employees are permitted to join an existing FLSA case, and this is a common procedure. If an employee does not join an existing FLSA suit s/he will not be entitled to recover any money as a result of the suit. And as a practical matter, any downstream consequences which may result from one employee bringing an FLSA action (such as schedule restructuring) will likely apply equally to all similar employees in an organization.

Q. What effect do the provisions of a collective bargaining agreement have on FLSA overtime rights?

A. Almost none. FLSA rights cannot be waived, by collective bargaining or otherwise. (Generally, employees are entitled to the benefits of the FLSA or their CBA, whichever is more favorable. However, a violation of a CBA would not itself be a violation of the FLSA and would not be enforced in an FLSA legal action.)



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Q. I'm a federal employee. Am I covered by the FLSA?

A. Yes, with some differences. The FLSA applies to federal employees, unless some specific federal statute creates different wage rules. There are some of these (typically in Title 5). In addition, federal employees FLSA rights are regulated by OPM, whose regulations are similar but not identical to the DOL FLSA regulations.

Q. Where do I get more information?

A. Good question. There are few general information sources on the FLSA, and in most cases individual employees will want analysis and evaluation of their individual circumstances. The statute itself is at 29 USC §201 et seq. There are many, many Regulations, administrative interpretations, and judicial decisions. The U.S. DOL website is linked to this one at Resources. Your best bet may be to contact an attorney with experience in FLSA matters.

Employees with individual questions may contact Chamberlain, Kaufman & Jones for [free consultations](#). Send e-Mail to: ckj@flsa.com.