

The Complete Compliance and Ethics Manual 2024

Wage and Hour Compliance Under Federal and State Laws

by Allan S. Bloom, Rachel S. Phillion, and Laura L. Vaughn^[1]

Introduction

Compliance with wage and hour regulations is a complex undertaking due to overlapping, and often contradictory, federal, and state regulations. It is also one of the most significant risk areas for companies, given the explosion of costly class action claims with sizeable settlements and verdicts in the past 20 years. Year after year, class action wage and hour lawsuits have outpaced other types of employment litigation, including discrimination claims, in the federal courts. In 2022, settlements in wage and hour cases exceeded \$574 million combined,^[2] and the U.S. Department of Labor's Wage and Hour Division collected, in fiscal year 2022, more than \$213 million in back wages from employers.^[3] Indeed, over this time, a number of major companies have agreed to multimillion dollar settlements. In addition to the cost and disruption of defending and settling these cases, wage and hour claims are generally excluded from employment practices' insurance coverage. Along with the financial and other costs, significant reputational harm can also stem from wage and hour class action lawsuits.

Given these risks, it is critical that employers accurately track hours worked by nonexempt employees and remain vigilant in ensuring that their payroll practices (including their classification of employees as exempt or nonexempt) comply with the federal, state, and other applicable laws and regulations.

These materials cover the basic landscape of wage and hour compliance, including the federal Fair Labor Standards Act (FLSA) and its provisions related to minimum wages and other benefits, overtime, hours worked, meal and rest periods, child labor, record keeping, and equal pay. In addition, these materials address exemptions from overtime under the FLSA. Finally, these materials address the classification of independent contractors and the importance of that issue under the FLSA.^[4]

Federal Fair Labor Standards Act and State Laws Overview

The FLSA is administered by the U.S. Department of Labor's Wage and Hour Division. The FLSA sets the basic federal minimum wage, overtime pay, child labor, and record-keeping requirements for covered employers and workers.

Covered workers are generally those engaged in or producing goods for interstate commerce, using the instrumentalities of interstate commerce (phone, wire, etc.) and the vast majority of employees of federal, state, and local governments. The FLSA also generally applies to employers with at least two employees and an annual dollar volume of sales or business of at least \$500,000, as well as government contractors and subcontractors. Certain exemptions apply to specific types of businesses or specific types of work.

In addition to the FLSA, various states have their own laws related to minimum wages, overtime pay, hours worked, child labor, and record keeping. These state laws have their own sets of associated civil and criminal penalties. For example, California's wage and hour laws are generally found in the wage orders of the California Industrial Welfare Commission. If the FLSA and state laws conflict, the law that is more favorable to the

employee applies.

Minimum Wage and Other Benefits

Workers covered by the FLSA are entitled to a minimum wage of no less than \$7.25 per hour (effective July 24, 2009).^[5] Proposed legislation in 2021 would have raised the federal minimum wage to \$15.00 per hour, but as of this writing, no such federal legislation has been enacted.

Most states, as well as the District of Columbia, also have minimum wage laws, which may differ from federal requirements. As of this writing, seven states had no state minimum wage or a rate lower than the federal rate (in which case the federal minimum wage applies); 13 states mirrored the federal minimum; and the rest imposed rates higher than the federal rate.^[6] The District of Columbia has the highest minimum wage at \$17.00 per hour, though the minimum wage in some cities is higher. For example, in San Francisco, California, the minimum wage increased from \$16.99 per hour to \$18.07 per hour on July 1, 2023.^[7] Many states have passed legislation that will increase the minimum wage in coming years, some in phases, and many municipalities have done the same. Some of these laws differentiate between regions or industries. For example, New York's minimum wage rose to \$15.00 per hour in New York City at the end of 2018 (for employers with 11 or more employees) and at the end of 2019 (for employers with 10 or less employees)—and increased from \$14.00 to \$15.00 per hour for all employers in Westchester and Long Island counties at the end of 2021. In the rest of New York State, the minimum wage increased from \$13.20 to \$14.20 per hour at the end of 2022 and will continue to increase at a rate pegged to economic indices at the end of each year until it reaches \$15.00 per hour.^[8] In general, where an employee is covered by federal, state, and/or local minimum wage laws, and the minimums are different, the employee is entitled to the highest minimum wage among the applicable laws.

The FLSA does not require employers to offer severance pay, sick leave, vacations, holidays, or other benefits, such as tuition assistance or life or accident insurance. That said, many states and local ordinances mandate some or all of these benefits for workers covered under their laws.

Overtime

Employees covered by the FLSA are entitled to an overtime premium for all time worked above 40 hours in a workweek, at a rate of at least one and one-half times the employee's regular rate of pay. The FLSA does not require an overtime premium for work on Saturdays, Sundays, or holidays unless the hours worked on those days exceed 40 in a workweek. Extra pay or shift premiums for working nights or weekends are a matter of agreement between the employer and the employee (or applicable state or local law), but if paid, must be factored into the regular rate for purposes of calculating the overtime premium. An employer who requires or permits an employee to work overtime is generally required to pay an overtime premium for such work, even if the employer did not request the work.

The majority of states have overtime pay requirements that match or exceed those imposed by federal law, and many states have special requirements. General information on specific state requirements can be found on the website of each state's department of labor or equivalent agency. For example, California requires employers to pay overtime at one and one-half times the regular rate of pay for all working time exceeding eight hours in any day, and at two times the regular rate of pay for all working time exceeding 12 hours in any day or eight hours on the seventh consecutive day of work in a workweek.^[9] Many class action lawsuits involve allegations that an employer misclassified employees as exempt from the overtime laws and therefore failed to pay the requisite overtime.

Under the FLSA, employers who are found to have willfully violated the overtime pay requirements are subject to

civil penalties for each such violation. Similarly, state laws have various fines and penalties for failure to pay required overtime wages. In private lawsuits under the FLSA and under the laws of many states, employees can recover double the amount of unpaid overtime wages, half of which is recoverable as liquidated damages for the violation.

Hours Worked

Employees in overtime-eligible positions are entitled to be paid not only for the time they spend engaged in productive work for their employer, but also for certain other times throughout the day. (See below for discussion of travel/commute time, waiting time, and on-call time.) It is therefore crucial for employers to understand exactly which hours in a workweek are compensable, as the answer is not always intuitive. The FLSA does not have any limit on the number of hours in a day or week worked, as long as overtime is paid for hours worked in excess of 40 in a workweek.

Travel/Commute Time

Generally, time spent in the normal “home to work” or “work to home” commute is not compensable under the FLSA. However, time spent in certain travel activities—such as travel during working hours—is considered work time for which employees must be paid. For example, time spent traveling to pick up supplies or equipment in the middle of a workday is considered compensable travel time or hours worked. Employers with overtime-eligible employees who travel as part of their jobs must be familiar with the variety of rules regarding the compensability of travel time.

Waiting Time

In certain circumstances, the time an employee spends waiting to work, such as waiting for customers or phone calls, supplies or equipment, or instructions may be compensable under the FLSA and/or state laws. This determination generally turns on whether the employee has been “engaged to wait” by the employer or is “waiting to be engaged” by the employer. If the employee has been engaged to wait—for example, if the employer asked the employee to remain available for an assignment or the arrival of customers—the employee is considered on duty, and thus the time spent waiting is compensable as hours worked. In these circumstances, the period during which the employee is not actively working and waiting is unpredictable and usually of short duration and, in any event, the employee cannot use the time effectively for their own purposes. The employee’s time belongs to and is controlled by the employer and therefore must be treated as hours worked. By contrast, if the employee is waiting to be engaged, the employee is off duty, and time spent waiting is not compensable as hours worked under the FLSA. These periods generally include complete relief of duties for periods long enough that the employee can use the time effectively for their own purposes, and the employee is typically advised as to when they will need to return to work.

On-Call Time

An employee who is required to remain on their employer’s premises or so close thereto that they cannot use the time effectively for their own purposes is working on call. Not all on-call time is compensable as hours worked; the determination is highly fact specific. Generally, employees who are required to remain on the employer’s premises or so close thereto that they cannot use the time effectively for their own personal purposes are considered working while on call and must be compensated for the time. By contrast, an employee who is allowed to leave the employer’s premises, but who is required to stay within a certain distance of the location and be available by phone, generally is not considered to be working while on call. All circumstances must be taken into consideration before determining the compensability of such on-call time.

This document is only available to subscribers. Please log in or purchase access.

[Purchase Login](#)