



**The Fair Labor Standards Act:
Wage and Hour Pitfalls and
How to Avoid Them**

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Why The FLSA Matters

- More than 50,000 FLSA lawsuits filed nationwide since 2000.
- Wage and hour lawsuits have outpaced all other types of workplace claims since 2010.
- Since January 2010, more than 3,000 FLSA lawsuits have been filed in the Middle District of Florida – FLSA collective actions in federal court outnumbered all other types of private class actions.
- FLSA claims are easy to litigate and replicate for plaintiffs' attorneys – mandatory attorneys' fees for the employee.

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Why The FLSA Matters

- The Wage and Hour Division of the DOL has increased its workplace investigations/audits, as well as enforcement actions.
- USDOL hired more than 350 new investigators.
- Now trained and experienced, "true believer" mindset.
- Aggressively pursuing enforcement – not assistance.
- Adversarial, "employers-are-scofflaws" attitude.
- Demanding, intrusive investigative approach.

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Non-Compliance Consequences Fisher Phillips

- Back Wages
- Liquidated Damages (Automatic)
- Civil Money Penalties
- 2-year Limitations Period, 3 Years If "Willful"
- Individual Liability
- Attorney's Fees
- Criminal Penalties
- Injunctions
- Probably Not Insurable

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Agenda Fisher Phillips

- Minimum Wage
- Overtime
- Recordkeeping
- Exemptions
- Addressing DOL Regulation Changes



WEEKLY TIMESHEET			
	Mon	Tu	Wed
Start Time	9 AM	9 AM	
End Time	5 PM	6 PM	
Reg Time	8-	8-	
Over Time		1-	

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Minimum Wage Fisher Phillips

- Covered employees must receive at least the applicable minimum wage for all hours worked in a workweek:
 - Federal minimum wage is now **\$7.25** per hour
 - Florida minimum wage is now **\$8.05** per hour
- The minimum wage must be paid to employees in cash (check) or the equivalent (e.g., room, board and other facilities provided to the employee).

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Minimum Wage



- Minimum wages must be paid “free and clear.”
- Most deductions or payments cannot “cut into” the minimum wage:
 - Examples: tools, equipment, supplies, mileage costs, shortages, uniforms, unreturned property



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Overtime



- Employers must establish and document a seven-day “workweek.”
 - Cannot change to avoid overtime
- Employers must pay nonexempt employees 1.5 times the “regular rate” for time **suffered or permitted** to work over 40 hours in the “workweek.”
- The “regular rate” is “all remuneration for employment” divided by all hours the pay covers.
 - This usually includes things like bonuses, commissions, and incentive pay — exclusions are very limited.

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Hours Worked Includes




- | | |
|---|--|
| <ul style="list-style-type: none"> • Punching in early • Working through or during lunch • Leaving late • Taking work home • Work-related emails and calls off duty • Coming in on an off day | <ul style="list-style-type: none"> • Short rest or coffee breaks, 20 minutes or < • “Volunteer” work • Drug test and initial worker’s comp treatment • Running by the bank or post office on the way home |
|---|--|

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Not Hours Worked

- Lunch breaks of at least 30 minutes
- Normal commute to and from work
- Vacation or holidays
- Sick days
- "On call" time
 - Paid to wait
 - Waiting to be paid



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Travel Time

- Normal commuting to and from home and work in a personal vehicle is not hours worked
- Commuting to and from home and a work site in a company vehicle is hours worked unless:
 - use of the vehicle to travel to and from home is strictly voluntary;
 - the vehicle is of a type normally used for commuting;
 - the employee incurs no costs for driving or parking the vehicle; and
 - work sites are within the normal commuting area of the employee.

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Training Time

- Time spent at meetings, training programs, and similar activities is hours worked unless:
 - the attendance is outside of the employee's regular working hours;
 - the attendance is voluntary;
 - the meeting, training, or other such activity is not directly related to the employee's current job; and
 - the employee does not perform any productive work during the attendance.
- Overnight out-of-town travel is hours worked if it occurs during normal working hours, even if the traveling is done on weekends and holidays.

Record Keeping Fisher Phillips

Basic records that an employer must maintain:

1. Employee's full name and social security number.
2. Address, including zip code.
3. Birth date, if younger than 19.
4. Sex and occupation.
5. Time and day of week when employee's workweek begins.
6. Hours worked each day.
7. Total hours worked each workweek.



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Record Keeping Fisher Phillips


Basic records that an employer must maintain:

8. Basis on which employee's wages are paid (e.g., \$9 per hr.)
9. Regular hourly pay rate.
10. Total daily or weekly straight-time earnings.
11. Total overtime earnings for the workweek.
12. All additions to or deductions from the employee's wages.
13. Total wages paid each pay period.
14. Date of payment and the pay period covered by the payment.

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Exemptions Fisher Phillips

- Default FLSA rule: Everybody is **non-exempt**, unless a full or partial exemption clearly applies.
 - Employer has burden of proving exemption.
- White Collar
- Computer Professional
- Outside Sales
- Section 7(k) Public Safety
- Section 7(i) Commissioned Sales




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White Collar Exemptions

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- The most common exemptions to both the minimum wage and overtime requirements:
 - Executive Exemption
 - Administrative Exemption
 - Professional Exemption
 - Highly Compensated Exemption
- Three general requirements for most “white collar” exemptions:
 1. Employee performs specific duties.
 2. Paid on a “salary basis.”
 3. Salary is at least a certain amount.



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Helpful Resources

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FLSA Exemption Review
Executive Exemption Worksheet

Name: _____

Business: _____

Title and location (street): _____

Salary per week of lowest paid incumbent: _____

Other types of compensation: _____

Average annualized compensation: _____

Section	Yes	No	Response
1. Is each incumbent paid on a "salary basis" at a rate of at least \$113.15/week?	<input type="checkbox"/>	<input type="checkbox"/>	Y N
2. What categorically recognized department(s) or subdivision(s) does each incumbent manage?	<input type="checkbox"/>	<input type="checkbox"/>	Y N
3. Does each incumbent engage in the following kinds of management identified below?	<input type="checkbox"/>	<input type="checkbox"/>	Y N
3.a. Hire, fire, and discipline employees	<input type="checkbox"/>	<input type="checkbox"/>	Y N
3.b. Set and adjust employee rates of pay	<input type="checkbox"/>	<input type="checkbox"/>	Y N
3.c. Set and adjust employee hours of work	<input type="checkbox"/>	<input type="checkbox"/>	Y N
3.d. Direct the work of employees	<input type="checkbox"/>	<input type="checkbox"/>	Y N
3.e. Maintain records and use such records to manage, supervise, and control the work activities	<input type="checkbox"/>	<input type="checkbox"/>	Y N

U.S. Department of Labor
Wage and Hour Division

2014 Revised FLSA Exemptions for Executive Employees Under the Fair Labor Standards Act (FLSA)

The Fair Labor Standards Act (FLSA) provides an exemption from both minimum wage and overtime pay for employees employed in certain executive, administrative, professional and outside sales occupations. Before 2014, the FLSA provided that an employee must be paid on a "salary basis" at not less than \$113.15 per week. The FLSA requires that an employer pay an executive employee on a "salary basis" if the employee's regular rate of pay for all time worked during the week is at least \$113.15.

However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed in certain executive, administrative, professional and outside sales occupations. Before 2014, the FLSA provided that an employee must be paid on a "salary basis" at not less than \$113.15 per week. The FLSA requires that an employer pay an executive employee on a "salary basis" if the employee's regular rate of pay for all time worked during the week is at least \$113.15.

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Executive Exemption

To qualify for the executive exemption, all of the following tests must be met:

1. The employee must be compensated on a salary basis (as defined in the regulations) at not less than \$113.15 per week.
2. The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise.
3. The employee must customarily and regularly direct the work of at least two or more other full-time employees of the enterprise.
4. The employee must have authority to hire or fire other employees, or the employee's regular rate of compensation must be equal to or greater than that of other employees of the enterprise.

Primary Duty

Generally, "primary duty" means the principal work, which is not dependent upon the other employee's position. However, that of an employer's primary duty need not be based on all the facts in a particular case, with the major consideration being the employee's primary duty.

Management

Generally, "management" includes, but is not limited to, activities such as supervising, controlling, and directing the work of other employees, and adjusting the rate of pay and hours of work, directing the work of employees, maintaining records and using such records to manage, supervise, and control the work of employees, and other activities.

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Salary Basis

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- Salary must be a predetermined amount.
- Weekly salary must be paid “free and clear.”
 - Salary cannot be subject to reduction based on the quality or quantity of the employee’s work.
 - Employee must be paid the full salary in any workweek in which any work is performed.
 - Deductions only allowed for reasons set forth in the regs:
 - Full personal days, sick days (if policy); safety rules; workplace conduct rules; jury/witness fees; military pay; unpaid FMLA; first and last week.
 - Partial days under public sector pay systems.

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Safe Harbor Fisher
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- The employer will not lose the exemption for an improper deduction if the employer:
 - (1) has a clearly communicated policy prohibiting improper deductions, which includes a complaint mechanism,
 - (2) reimburses employees for any improper deductions,
 - (3) makes a good faith commitment to comply in the future, and
 - (4) does not continue the improper deductions after receiving employee complaints.

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DOL's New Regulations Fisher
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- Effective December 1, 2016
 - Salary threshold will increase from \$455 per week to **\$913** per week (paid on a "salary basis").
 - Up to 10% can come from non-discretionary pay
 - Total annual compensation threshold for "Highly Compensated employee" exemption will increase from \$100,000 to **\$134,004**.
 - Both to be "updated" every three years, with 150 days' notice.
 - No changes to the duties tests.

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What To Do Fisher
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- Evaluate exempt employees with pay-period salaries annualizing to less than \$47,476
- Determine whether *other* FLSA exemptions might apply
 - Computer employee
 - Outside sales
 - Retail sales

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Computer Professional Exemption 


- An employee may be exempt from overtime and minimum wage if the employee is:
 - Paid not less than \$455 per week, or not less than \$27.63 an hour, and
 - Employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field, and
 - Performs high-level computer programming of systems design/development work.

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Outside Sales Exemption 

- To qualify for the outside sales exemption, all of the following tests must be met:
 - The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer.
 - The employee must be customarily and regularly engaged away from the employer's place or places of business.
 - **No salary or compensation requirements.**

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Section 7(i) Exemption 

- An employee may be exempt from overtime (but not minimum wage) if the employee is:
 - Employed by a retail or service establishment, and
 - The employee's regular rate of pay exceeds one and one-half times the applicable minimum wage for every hour worked in a workweek in which overtime hours are worked, and
 - More than half the employee's total earnings in a representative period must consist of commissions.

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If No Other Exemptions Apply



- Determine whether alternative FLSA-compliant pay plans would serve your needs
- Hourly equivalent of weekly rate based on average weekly hours worked
- Weekly rate plus overtime after 40 hours
- Fluctuating workweek plan
- Day Rate Plan
- Commissions-plus-overtime basis
- **Remember that the “regular rate” includes more than just base pay.**

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Other Considerations



- If no changes, tighten requirements for exempt employees:
 - Record time worked
 - No work over 40 hours without permission
 - No work away from office
- If changes, create implementation strategy:
 - Are there **additional** compensation areas that should be made changes at the same time
 - Have a tailored communications plan covering the nature of, reasons for the changes being made.

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Some Closing Thoughts




- **Don't fall for “conventional wisdom”:**
 - “**Everybody** treats this job as exempt.”
 - “The employee **wants** to be exempt.”
 - “The employee **agreed** to be exempt.”






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FINAL QUESTIONS

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THANK YOU

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