

PUBLICATION

You Need to Understand the Fair Labor Standards Act Part 1 - The Basics

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This is the first of a five-part series of newsletters covering a topic you can overlook during a construction project - wage and hour issues under the Fair Labor Standards Act (FLSA).¹ You may know the key protections the FLSA provides - a minimum wage and the requirement that you pay overtime for hours worked over 40 hours per week.² As you probably suspect, though, the FLSA contains more than this, and ignorance of its provisions can delay your project and cost you money.

The FLSA is broad; it covers almost all employers.³ While contractors must focus on their work, coordinate trades, order materials, and fight schedules, civil litigation under the FLSA is increasing. You need to have a general understanding of the FLSA and some of its pitfalls. In particular, you should be aware of (a) the basic structure of the FLSA; (b) common mistakes made by employers; (c) ways it may be enforced; and (d) ways to mitigate some of the potential liability you may face.

Are all of your employees covered by the FLSA?

No. While the FLSA generally applies to all employees, the rules for minimum wage and overtime do not apply to "any employee employed in a bona fide executive, administrative, or professional capacity."⁴ These exemptions are based on a factual analysis of the employee's actual duties.⁵ Of significant importance to you is that these exemptions do not apply to people who perform manual labor; the regulations note that "carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the Fair Labor Standards Act, and are not exempt under the regulations in this part no matter how highly paid they might be."⁶

Keep in mind that the FLSA is a remedial statute.⁷ That means you should consider it to be employee-friendly; i.e., exceptions are construed against the employer. You should take the time to consider the job responsibilities of your employees, because in the construction industry, there are examples of each of these exemptions.

Do you have any "bona fide executives"?

"Bona fide executives" are owners of more than 20% of the company and employees who make a certain salary, help manage the company or a division of it, and directs multiple employees, including having the authority to hire and fire them.⁸

Do you have any "bona fide administrative employees"?

"Bona fide administrative employees" are employees who make a certain salary, perform office or other non-manual work related to the management of the company, and have sufficient discretion about and can exercise judgment concerning company matters.⁹ This exemption can apply to construction project managers, personnel management, human resources, employee benefits, labor relations, database administration, or similar activities.¹⁰

Do you have any "bona fide professional employees"?

"Bona fide professional employees" are employees who make a certain salary and perform a fairly narrowly defined type of work related to an advanced field.¹¹ This exemption is limited because a "primary duty test" requires proof that (1) the employee performs work requiring advanced knowledge, (2) in a field of science or learning, and (3) acquired the knowledge by course of specialized intellectual instruction. It can apply, however, to actuarial computation, engineering, architecture, or similar areas, assuming that formal educational training (but not on-the-job training) was received.¹²

Why is knowing whether you have any exempt employees important?

The FLSA requires all non-exempt workers to be paid "time and a half" the regular rate for every hour worked over 40 in a week. An employee's "regular rate" is calculated based upon all pay for hours worked during the week, except for gifts, vacation, bonuses, or similar payments.¹³ Similarly, amounts that a contractor contributes to a third person for the benefit of an employee (such as health or workers' compensation insurance premiums) are not considered as part of the regular pay.¹⁴

1. 29 U.S.C. §§ 201-19.

2. 29 U.S.C. § 206(a); 29 U.S.C. § 206(a)(1).

3. 29 U.S.C. § 203(s).

4. 29 U.S.C. § 213(a)(1); 29 U.S.C. § 203(e)(1).

5. 29 C.F.R. § 541.2; see, generally, *Cowan v. Treetop Enterprises, Inc.*, 120 F.Supp.2d 672 (M.D.Tenn. 1999).

6. 29 C.F.R. § 541.3; 29 C.F.R. § 541.601(d). 7. 29 C.F.R. § 541.3; 29 C.F.R. § 541.601(d). See *Belcher v. Shoney's Inc.*, 30 F.Supp.2d 1010 (M.D. Tenn. 1998).

8. 29 C.F.R. § 541.100; 29 C.F.R. § 541.101.

9. 29 C.F.R. § 541.200.

10. 29 C.F.R. § 541.203; 29 C.F.R. § 541.201.

11. 29 C.F.R. § 541.300.

12. 29 C.F.R. § 541.301(a); 29 C.F.R. § 541.301(c).

13. 29 U.S.C. §§ 207(a)(1), 207(e), and 215(a)(2).

14. 29 U.S.C. § 207(e).