



VETHAN LAW FIRM P.C.

Getting Rid of the Sweatshop

# **THE U.S. FAIR LABOR STANDARD ACT (FLSA)**

“The Act was a response to a call upon a Nation’s conscience, at a time when the challenge to our democracy was the tens of millions of citizens who were denied the greater part of what the very lowest standards of the day called the necessities of life; when millions of families in the midst of a great depression were trying to live on incomes so meager that the pall of family disaster hung over them day by day; when millions lacked the means to buy the products of farm and factory and by their poverty denied work and productiveness.”

*See Willis J. Nordlund, A Brief History of the Fair Labor Standards Act, 39 Lab. L.J. 715, 724 (1988).*

# Objectives of the Fair Labor Standards Act (“FLSA” or “Act”) were that:

1. The FLSA would create an economic incentive for an employer to increase the size of their work force.
2. Overtime would motivate employers to hire additional workers rather than pay the overtime penalty.
3. To ensure a fixed, fair minimum wage and a reasonable workweek.

See H.R. Rep. No. 871, 89<sup>th</sup> Cong., 1<sup>st</sup> Sess. 21 (1968).

# What is Work?

The United States Supreme Court held that employees subject to the Act must be paid for all time spent in “physical or mental exertion (whether burdensome or not) controlled or required by the employers and purveyed necessarily and primarily for the benefit of the employer of his business.”

*Tennessee Coal, Iron & Railroad Co. v. Muscaela Local No. 123*, 321 U.S. 590 (1944).

The DOL Prescribes extra compensation for overtime (hours over the maximum weekly hours of work permitted for the employment of that employee); and such rate cannot be less than 1.5 times the employee's regular rate.

See 29 CFR § 778.100 (Section 7(a) of the Act).

# Regular Rate in Addition to Pay Scale

Under the Act, the following items are excluded from the regular rate calculation:

- Gifts
- Discretionary Bonuses (recognition of services).
- Idle hours, such as vacation, holiday, or employer cannot provide work.
- Insurance (life, accident, health)
- Premium rate hours (eg. Saturday or Sunday rates- if so agreed)
- Overtime premium (contractually agree to a premium rate in excess of 8 hours per day).
- Bona fide profit sharing plans.
- Expense reimbursement.

However, a regular rate must also include goods of facilities which are provided by the employer to the employee (such as lodgings, additional cash, vehicles, etc.) See 29 CFR § 778.116.

Commissions must also be included in the calculation of the regular rate. See 29 CFR § 778.117-778.121.

# Time Excluded From Regular Rate

Excluded from the regular rate calculation:

- Paid vacation
- Paid holiday
- Paid illness
- No work provision

# Waiting and 'On Call' Time

- Employer is obligated to pay for waiting, traveling and other non-productive time

## Unless

- Contractually agree/implement a policy that non-productive hours are:
  1. Not counted-employee is free to roam at will, or
  2. Paid at a reduced rate



# Regular Rate for Fixed Employees

If an employee receives a fixed weekly rate, such rate is divided by 40 for an effective hourly regular rate.

The regular rate will be used in overtime calculations.

Test to see whether employee is exempt.

# What is Work?

## Waiting & On Call Time

If waiting time or on call time is part of the job, it is work.

If, during time or on call time, the employee is completely relieved of duty, and is able to (but not obligated to) use this time for personal purposes, it is not work.

# What is Work? Meals & Breaks

Meal time is not work time if:

1. The meal period is at least 30 minutes
2. The employee is not disturbed by the “call of work” at any time during the break

29 CFR §785.19

# **CALCULATING PAYMENTS DUE**

# Scenario 1: Employee works 50 hours

## Salary

- Straight salary 400 for the week
- Regular  $400/50=8/\text{hr}$ .
- 10 OT which is calculated  $4/\text{hr}$  ( $\$8*.5$ ).
- 10 OT hours \*  $\$4$  OT hours =  $\$40$  OT total
- Total Payment  $\$440.00$

# Scenario 1: Employee works 50 hours Hourly

- Straight Hourly for 50 hours at \$10/hour
- \$400 for regular rate
- \$150 for OT (10 hour\*\$15/hour)
- Total Payment \$550

## Scenario 2: Employee works 75 hours week

### Salary

- \$400 week
- $\$400/75 \text{ hours} = \$5.33$  Regular Rate (Below minimum wage)
- $\$7.25$  (minimum wage) -  $\$5.33 = \$1.92$
- $\$1.92 * 75 = \$144$
- $\$144 + \$400 = \$544$  Regular Rate
- $\$7.25$  (minimum wage) \*  $.5 = \$3.63$  OT Rate
- $\$3.63 * 35$  (OT hours) =  $\$127$
- $\$544 + \$127 = \$671$  Total Payment

## Scenario 2: Employee works 75 hours week Hourly

- \$400 week( $\$10/\text{hour} * 40 \text{ hours}$ )
- $\$525 = (\$15/\text{OT hour} * 35 \text{ hours})$
- \$925 Total Payment



# Exempt vs. Non-Exempt Employees

## White Collar Exemptions

3 tests for exemptions:

- Salary level
- Salary Basis
- Job Duties

# Job Duties

- Executive duties
  - Principal duty
  - Management
  - Supervise two or more employees
- Administrative duties
  - Duties
  - Independent judgment
  - Non-exempt positions
- Learned professional duties
- Creative professional duties

# They are not Contractors just because You Say They Are

## Am I a Contractor or Employee? The IRS' definitions

Before you can determine how to treat payments you make for services, you must first know the business relationship that exists between you and the person performing the services. The person performing the services may be:

- An independent contractor
- An employee (common-law employee)
- A statutory employee
- A statutory nonemployee

# Texas Factors for Independent Contractors

- The independent nature of the business
- The worker's obligation to furnish necessary tools, supplies, and material to perform the job
- The worker's right to control the progress of the work, except as to final results
- The time for which the worker is employed
- The method of payment, whether by time or by the job