

Guide to the

Fair Labor Standards Act

For West Virginia School Districts



**West Virginia Department of Education
Office of School Finance**

**GUIDE TO THE
FAIR LABOR STANDARDS ACT
FOR COUNTY BOARDS OF EDUCATION
IN THE STATE OF WEST VIRGINIA**

Issued March 1, 2005

**West Virginia Department of Education
Office of School Finance**

GUIDE TO THE FAIR LABOR STANDARDS ACT FOR SCHOOL DISTRICTS

Foreword

The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, record keeping, and child labor standards affecting full-time and part-time workers in the private sector and in federal, state, and local governments, including local boards of education.

This guide was developed by the Department of Education, Office of School Finance, to provide school administrators, principals, assistant principals, supervisors, and other personnel of the school districts in the State of West Virginia guidance on the requirements of the FLSA and the special overtime requirements in West Virginia Code pertaining to county boards of education.

The information is provided as general guidance for the school districts in the State. Although due care and diligence was exercised in the research and compilation of the information, the guide does not constitute legal advice. The advice of legal counsel should be obtained regarding any specific legal issues that may arise related to the FLSA.

Organizationally, the publication is divided into five separate sections. The first section provides a general description of the FLSA, along with related requirements of West Virginia Code; the second section provides a listing of the "white-collar" exemption tests; the third section presents a compliance checklist for school districts in the State to use; the fourth section includes a glossary of terms used throughout the publication; and the fifth section presents a number of frequently asked questions and responses.

To ensure compliance with the Fair Labor Standards Act, it is strongly recommended that all county boards of education in the State adopt a local policy on overtime. The compliance checklist includes a sample policy that county boards may adopt along with recommendations that should be included. The sample policy may be revised as needed to address the particular employment practices of each district.

I would like to take this opportunity to thank the staff of the offices of School Finance and Legal Services, the members of the Accounting Procedures Committee, and the staff of the U.S. Department of Labor, for their many hours of dedicated work in order to develop this guide.

David Stewart
State Superintendent of Schools

March 1, 2005

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FAIR LABOR STANDARDS ACT
FOR SCHOOL DISTRICTS**

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A - SUMMARY OF THE FAIR LABOR STANDARDS ACT:

1. INTRODUCTION

The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, record keeping, and child labor standards affecting full-time and part-time workers in the private sector and in federal, state, and local governments.

The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all actual hours worked in excess of forty (40) hours in a workweek. In many cases, however, state statutes alter these requirements.

Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional (which includes teachers), and outside sales employees.

In 1985, the U.S. Supreme Court held that the Fair Labor Standards Act (FLSA) applied to schools and other public agencies. Subsequently, Congress passed legislation modifying the impact of the court decision and delaying its effective date until April 15, 1986. In January 1987, the Department of Labor adopted regulations regarding the application of FLSA to employees of state and local governments.

In 2004 the U.S. Department of Labor revised the overtime provisions of the Fair Labor Standards Act. These changes, which became effective August 23, 2004, eliminated the "long list" for determining if an employee is exempt from overtime, and has, instead made a single test for each employment category. This means employers will no longer have to determine if an exempt employee is devoting more than 20 percent of his or her time performing non-exempt duties. In addition, the salary limit for these categories was raised to \$23,660 per year or \$455 per week.

The U.S. Department of Labor, Wage and Hour Division (Wage-Hour) administers and enforces FLSA with respect to private employment, state and local government employment, and federal employees of the Library of Congress, U.S. Postal Service, Postal Rate Commission, and the Tennessee Valley Authority. The U.S. Office of Personnel Management enforces FLSA for employees of the agencies of the Executive Branch and the U.S. Congress enforces FLSA for covered employees of the Legislative Branch.

Additional information on the Fair Labor Standards Act can be obtained from the U.S. Department of Labor, Wage and Hour Division's website at www.wagehour.dol.gov or by calling the division's toll-free help line at 1-866-487-9243.

2. GENERAL PROVISIONS

Generally, the FLSA requires that all non-exempt employees be compensated at one and one-half times their regular rate of pay for all **actual hours worked** in excess of 40. A workweek consists of seven consecutive 24-hour periods, i.e., 168 consecutive hours, designated by the employer. An employer who requires or permits an employee to work overtime is normally required to pay the overtime premium for overtime work.

For an employer to be subject to this requirement, a non-exempt employee must actually work in excess of 40 hours during a workweek. Under the FLSA, time taken off work on paid or unpaid leave, including personal, sick, or military leave, vacation, time off without

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pay, jury duty, or other absences from work, whether approved or unapproved, outside school environment days, and days canceled due to inclement weather (snow days) is not counted as hours worked.

Employees who, with the knowledge or acquiescence of their employer, continue to work after their shift is over, albeit voluntarily, are engaged in compensable working time. The reason for the work is immaterial; as long as the employer “suffers or permits” employees to work on its behalf, proper compensation must be paid.

The overtime provisions of the FLSA apply to all non-exempt employees. While the FLSA includes a wide variety of partial and complete exemptions from its minimum wage and overtime requirements, most employer classification procedures are confined to evaluating an employee’s status under the FLSA’s so-called white-collar exemptions for executive, professional and administrative employees. These exemption tests are included in Section B of this publication.

Although administrators, teachers and instructors are categorically exempt from these overtime provisions, the status of other public school employees must be carefully scrutinized.

The FLSA provides minimum standards that may be exceeded by county boards of education, but cannot be waived or reduced by any agreement. Employers must comply, for example, with all applicable federal or state laws, regulations, or policies in establishing a higher minimum wage or lower maximum workweek than those established under the FLSA. In addition, employees cannot waive or reduce FLSA protections through collective bargaining agreements.

The Equal Pay Act (EPA) was enacted in 1963 as an amendment to the FLSA. The EPA prohibits discrimination between employees on the basis of sex regarding the compensation received by employees within an establishment for work performed under similar working conditions that requires equal skill, effort, and responsibility.

The FLSA contains provisions regulating child labor that prescribe both minimum wages and maximum hours to be worked. Lower minimum ages for workers are permitted in certain occupations.

3. EXCLUSIONS

Certain public employees are excluded from coverage under the FLSA, including elected public officials, their immediate advisors, and certain individuals whom they appoint or select to serve in various capacities. In addition, the 1985 Amendments exclude employees of legislative branches of state and local governments. A condition for exclusion is that the employee must not be subject to the civil service laws of the employing state or local agency. The FLSA also provides for an exclusion from coverage for officials elected by the voters of their jurisdictions.

As long as overtime pay provisions are met, neither the Fair Labor Standards Act or the West Virginia Code require:

- § Extra pay for Saturdays, Sundays, or holidays, as such
- § Pay for vacations or holidays, or severance pay
- § Discharge notices
- § Limits on the number of hours of work for persons 16 years of age or over
- § Time off for holidays or vacations

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West Virginia law, however, modifies these provisions of the FLSA as follows:

- West Virginia Code §18A-4-8(d) states that no service employee, without his or her agreement, may be required to report for work more than five days per week and no part of any working day may be accumulated by the employer for future work assignments, unless the employee agrees thereto.
- West Virginia Code §18A-4-8(e) requires that an employee whose regular work week is scheduled from Monday through Friday and agrees to perform any work assignments on a Saturday or Sunday is to be paid for at least one-half day of work for each day he or she reports for work, and if the employee works more than three and one-half hours on any Saturday or Sunday, the employee is to be paid for at least a full-day of work.

Note: In computing the overtime rate for a workweek in which this provision applies, only the actual hours worked on a Saturday or Sunday and the pay related to those hours need to be included in the overtime computations. The pay for hours not actually worked may be EXCLUDED from overtime, but must be paid at the employee's regular rate of pay.

- West Virginia Code §18A-4-8(f) requires an employee who is a custodian, aide, maintenance, office or school lunch employee and who is required to work a daily work schedule that is interrupted and not a continuous period to be paid additional compensation equal to at least one eighth of the employee's total salary, as provided by their state minimum salary and any county supplement for each day that the employee works an interrupted work schedule.
- West Virginia Code §18A-4-8a requires that the minimum monthly pay of any service personnel whose employment is for a period of more than three and one-half hours a day be at least the amount indicated in the "State Minimum Pay Scale Pay Grade" related to the employee's pay grade and years of employment and the minimum monthly pay of any service personnel whose employment is for a period of three and one-half hours or less per day be at least one-half the amount indicated in that table.
- West Virginia Code §18A-4-8a(5) provides that when any part of a school service employee's daily shift of work is performed between the hours of six o'clock p.m. and five o'clock a.m. the following day, the employee shall be paid no less than an additional ten dollars per month.
- West Virginia Code §18A-4-8a(6) provides that any school service employee required to work on any legal school holiday, as identified in West Virginia Code §18A-5-2, shall be paid at a rate one and one-half times the employee's usual hourly rate.
- West Virginia Code §18A-4-8a(7), requires county boards of education to compensate any full-time service personnel who are required to work in excess of their normal working day during any week which contains a school holiday for which they are paid at a rate of one and one-half times their usual hourly rate for all **additional** hours or fraction of additional hours worked during the week.
- West Virginia Code §18A-4-8a(8) states that no service employee may have his or her daily work schedule changed during the school year without the employee's written consent and the employee's required daily work hours may

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not be changed to prevent the payment of time and one-half wages or the employment of another employee.

- West Virginia Code §18A-4-8a(9) requires that the minimum hourly rate of pay for extra duty assignments, as defined in West Virginia Code §18A-4-8b, be no less than one seventh (1/7) of the employee's daily total salary for each hour the employee is involved in performing the assignment. In addition, employees who are regularly employed on a half-time basis and are performing extra-duty assignments, the pay must be computed on the same hourly basis as though they were employed on a full-time basis.
- West Virginia Code §18A-4-14 provides that every teacher who is employed for more than half of the class periods and service personnel who is employed for a period of more than three and one-half hours a day must be provided a daily lunch period of not less than thirty consecutive minutes, the employee shall not be assigned any responsibilities during this recess, and the recess shall be included in the number of hours worked.
- West Virginia Code §18A-4-16 specifies that extra-curricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designed representative, subject to board approval. A minimum rate of pay, however, is not specified for extra-curricular assignments.
- West Virginia Code §21-5C-3(f)(2) specifies that county and municipal governments may provide compensatory time only pursuant to a written agreement arrived at between the employer and the employee before the performance of the work. Any written agreement may be modified at the request of either the employer or the employee, but under no circumstances shall changes in the agreement deny an employee compensatory time heretofore earned.
- West Virginia Code §21-5C-3(f)(4) specifies that upon termination of employment, an employee who has unused compensatory time accrued shall be paid for the unused time at a rate of compensation not less than: (A) the average regular rate received by such employee during the last three years of the employee's employment; or (B) the final regular rate received by such employee, whichever is greater.
- West Virginia Code §21-5C-3(f)(5)(B) specifies that compensatory time must be used within one year after it is earned.

4. "WHITE-COLLAR" EXEMPTIONS

IMPORTANT NOTE: As part of the revisions the U.S. Department of Labor (DOL) made to its rules under the Fair Labor Standards Act, which became effective August 23, 2004, the DOL revised the white-collar exemptions from overtime. The "long test" for determining if an employee is exempt from overtime was eliminated, and, instead, a single test for each of the categories was created. This means employers will no longer have to determine if an exempt employee is devoting more than 20 percent of his or her time performing non-exempt duties. An employee's "primary duty" is now the critical factor in determining whether an employee is exempt. In addition, the salary limit for these categories has been raised to \$455 per week.

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The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 in a work week. However, the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional (including teachers) and outside sales employees. The FLSA also exempts certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than \$455 per week. **Job titles do not determine exempt status.** In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department of Labor's regulations. See Section B for a more detailed explanation of the "white-collar" exemptions.

The exemptions provided by the FLSA apply only to "white-collar" employees who meet the salary and duties tests set forth in the Part 541 regulations. The exemption tests are presented in Section B of this guide. The exemptions do not apply to manual laborers or other "blue collar" workers who perform work involving repetitive operations with their hands, physical skill and energy. FLSA-covered, non-management employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under FLSA, and are not exempt under the Part 541 regulations no matter how highly paid they might be.

An employee's "primary duty" is critical in determining the exemption, particularly for higher salaried employees. In most cases, the primary duty consumes the majority (over 50 percent) of the employee's time.

Time is not the only test that needs to be considered in determining an employee's primary duty. If an employee spends less than 50 percent of the time in management, that responsibility could still be the primary duty if other aspects of his or her job support that conclusion. Federal courts have ruled that an employee's chief or principal duty is the essence of the test for primary duty; the primary duty is the work that is of principal value to the employer, rather than the collateral duties the employee performs.

FLSA exemptions are subject to the rule of strict construction and are narrowly construed against the employer, which has the burden of proving the exemption. Courts must focus on the actual activities of employees in determining their exempt status under the FLSA, and need not rely on resumes and position descriptions that may be vague or contradictory to the employees' testimony concerning their day-to-day job activities.

5. CLASSIFYING EMPLOYEES

Misclassifying employees for purposes of complying with federal and state wage-hour laws can be a costly mistake. Employers who mistakenly classify nonexempt employees as exempt can be required to pay fines and back wages due employees. However, an employer can help minimize these risks by establishing procedures governing who is responsible for classifying employees and how classification decisions are made.

While the FLSA includes a wide variety of partial and complete exemptions from its minimum wage and overtime requirements, most employer classification procedures are confined to evaluating an employee's status under the FLSA's so-called white-collar exemptions for executive, professional, and administrative employees.

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6. COMPENSABLE HOURS WORKED

In general, compensable hours worked include: all the time that an employee must be on duty; all the time that an employee must be on the employer's premises; all the time that an employee must be at any other prescribed place of work; and any additional time that the employee is allowed (i.e., "suffered or permitted" to work). This includes the employee's primary and subsidiary duties, including extra-curricular and extra-duty assignments such as mid-day, evening and weekend bus trips for bus operators, coaching, performing duties at evening and weekend activities, and attending training conferences, workshops and meetings related to work.

Compensable hours include reporting early to open buildings and warm up equipment, performing preparatory work necessary for the primary activity, clean-up work at the end of the day, on call time, taking work home, physical examinations required for continued service, mandatory drug and alcohol testing, and break period, IF the employees are not relieved of duties, if not free to leave posts, or too short to be used for personal reasons (less than ½ hour).

If an employer knows or has reason to know that an employee is continuing to work, it is considered work time. This includes allowing employees to work at home (such as when a principal's secretary calls for substitutes from home before getting to work or takes the school's accounting records home on week-ends to get "caught up"). Section C.5 of this guide presents an illustrative listing of compensable and noncompensable time.

Non-exempt employees must be compensated (at the federal minimum wage) for all hours worked during a workweek, even if the work is performed without authorization. An employer, however, may discipline an employee for violation of the board's policy or for insubordination for working without authorization.

Employees cannot volunteer to perform their regular work duties off the clock and without compensation. Employees cannot waive the requirements of the FLSA.

7. COMPENSATORY TIME

As discussed in preceding paragraphs, the FLSA requires that covered, nonexempt employees be paid not less than one and one-half times their regular rate of pay for hours worked in excess of 40 during a workweek. The FLSA, however, provides an exemption for a public agency that is a state, a political subdivision of a state (including a county board of education), or an interstate governmental agency.

The exemption authorizes such public agencies to provide compensatory time off (within certain limitations discussed in the following paragraphs) in lieu of monetary overtime compensation that would otherwise be required. Compensatory time received by an employee in lieu of cash must be at the rate of not less than one and one-half hours of compensatory time for each hour of overtime work, just as the monetary rate for overtime is calculated at the rate of not less than one and one-half times the regular rate of pay.

The Act requires that an **agreement** or understanding between the employer and employee exist **prior to the performance of work**. West Virginia Code §21-5C-3(f)(2) further **requires that the agreement be in writing** and be recorded in the employer's record of hours worked. The statute goes on to state that the written agreement may be modified at the request of either the employer or the employee, but under no circumstances can the changes in the agreement deny an employee compensatory time previously acquired.

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According to the FLSA, an employee of a public agency engaged in work other than in a public safety activity may accrue not more than 240 hours of compensatory time. This 240-hour limit represents no more than 160 hours of actual overtime worked. Additional hours are allowed for employees engaged in public safety activities. An employee who has accrued 240 hours of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation. Any additional overtime work will be paid at the time and one-half rate.

An employee who has accrued compensatory time off shall, upon termination of employment, be paid for the unused compensatory time at a rate of not less than the average regular rate received by such employee during the last three years of the employee's employment or the final regular rate received by such employee, whichever is higher. West Virginia Code §21-5C-3 contains similar requirements.

An employer may use discretion as to when an employee is permitted to use compensatory time earned and may establish limits as to how long compensatory time may be carried. For example, an employer may require that any compensatory time earned be used within 30, 45 or 60 days after being earned, or by the end of the fiscal year. West Virginia Code §21-5C-3(f)(5)(B) requires that compensatory time be used within one year from the time it is earned.

The FLSA requires that any unused compensatory time be paid at the employee's current rate of pay. West Virginia Code §21-5C-3(f)(4) further requires that, upon termination of employment, an employee who has unused compensatory time accrued shall be paid for the unused time at a rate of compensation not less than: (A) the average regular rate received by such employee during the last three years of the employee's employment; or (B) the final regular rate received by such employee, whichever is greater.

Employers must allow employees to use any compensatory time within a reasonable period of time after the employee's request, work schedules permitting. Also, an employer may elect to 'buy-out' an employee's accrued compensatory time at any time, but must compensate the employee at the employee's current hourly rate of pay. Compensatory time taken during a workweek does not count toward the 40-hour workweek for overtime purposes.

To preclude misunderstandings, county boards should establish written procedures as to how compensatory time may be earned and taken.

8. ADJUSTED WORK WEEK (FLEX TIME)

Normally, an employer can make adjustments to an employee's regular work schedule during a workweek in order to accomplish a specific task and yet not have the employee work in excess of 40 hours during the week. Further, an employer may allow an employee to adjust his or her regular workday to accommodate a medical or other appointment without utilizing sick or personal leave. (For example, an employee who normally works from 8:00 a.m. until 4:00 p.m. may work from 8:30 a.m. to 4:30 p.m. in order to attend a medical appointment.) This is described as an adjusted workweek, or is sometimes referred to as flex time. This practice is not prohibited under the FLSA, however, West Virginia Code §18-4-8(d) states that no service employee, without his or her agreement, may be required to report for work more than five days per week and no part of any working day may be accumulated by the employer for future work assignments, unless the employee agrees thereto.

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Furthermore, West Virginia Code §18A-4-8a(8) states that no service employee may have his or her daily work schedule changed during the school year without the employee's written consent **and the employee's required daily work hours may not be changed to prevent the payment of time and one-half wages or the employment of another employee.**

In addition, West Virginia Code §18A-4-8a(9) states that the minimum hourly rate for an employee performing an extra duty assignment, as defined in West Virginia Code §18A-4-9b, shall be no less than one seventh of the employee's daily salary for each hour the employee is involved in performing the extra-duty assignment.

9. ON CALL TIME

An employee who is required to remain on call on the employer's premises or so close thereto that he or she cannot use the time effectively for his or her own purposes is working while "on call." An employee who is not required to remain on the employer's premises but is merely required to leave work at his or her home or with company officials where he or she may be reached is not working while on call.

10. WAITING TIME

Whether waiting time is time worked under the FLSA or off duty time depends upon particular circumstances. The determination involves scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the circumstances. Facts may show that the employee was "engaged to wait" or they may show that he or she "waited to be engaged."

See the following sections related to on duty and off duty for a more extensive discussion of whether waiting time is considered work time or not.

In situations where an employee is "on call," either on the employer's premises or elsewhere, waiting time will be excluded from overtime calculations only where such time is not considered hours worked. Even if the time spent on call cannot be allocated to any specific hours of work, waiting-time pay may still be included in the regular rate if it is paid as compensation for performing a duty of the employee's regular job.

Payment for "idle time" (periods when employees are kept off the job by unusual circumstances) may be excluded from employees' regular rates only where such payments are sporadic and infrequent in nature. Such situations might include:

- A failure by the employer to provide sufficient work
- An inability of employees to reach the workplace because of weather conditions
- The failure of materials to arrive
- Equipment or machinery breakdowns
- Other unexpected obstacles or emergency conditions beyond the control of the employer

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11. ON DUTY

Periods of time when an employee is performing duties for the benefit of his or her employer, whether the duties are performed on the employer's premises or elsewhere, are considered hours of work. On duty time may include periods of inactivity.

A bus operator who is reading a newspaper while waiting for a football game to end in order to transport students back to school, a custodian who is knitting while waiting for a basketball game to end in order to clean the gymnasium, or a maintenance worker who is watching television in the shop while waiting for a maintenance call are all working during their periods of inactivity. The time is work time even though the employee is allowed to leave the premises or the job site during such periods of inactivity. The periods during which these occur are unpredictable. They are usually of short duration. In either event, the employee is unable to use the time effectively for his or her own purposes. It belongs to and is controlled by the employer. In all of these cases, waiting is an integral part of the job. The employee is **"engaged to wait."**

12. OFF DUTY

Periods during which an employee is completely relieved from duty and which are long enough to enable him or her to use the time effectively for his or her own purposes are not hours worked, even if the employee is away from his or her normal work location overnight.

In order to be relieved from duty, an employee must be definitely told in advance on each "tour of duty" that he or she may leave the job and will not have to commence work until a definitely specified hour has arrived. Otherwise, the employee is not completely relieved from duty and cannot use the time effectively for his or her own purposes.

Whether the time is long enough to enable an employee to use the time effectively for his or her own purposes depends upon all of the facts and circumstances of the case. For enforcement purposes, the Department of Labor uses a minimum of 30 minutes.

In situations where these requirements are met, the employee is considered to be **"waiting to be engaged"** and the time does not need to be considered work time.

Example: If the bus operator for a school district is told in advance that upon arrival at the destination, he/she will be completely relieved from all duties until a specific time when he/she again goes on duty for the return trip, the idle time is not work time. As discussed in the preceding paragraphs, the employee is "waiting to be engaged."

On the other hand, if the bus operator who transports students on a school sponsored activity is not told in advance of a specific time when the activity will end, and therefore must wait until the activity ends to transport the students on the return trip, is working during the entire activity. In this case, the employee cannot use the time effectively for his or her own purposes and is therefore "engaged to wait."

13. OVERNIGHT TRIPS

Where an employee is required to be on duty 24 hours or more, such as an aide who may be accompanying students on an overnight trip, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than eight hours from hours worked, provided adequate

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sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. If the sleeping period is of more than eight hours, only eight hours will be credited. Where no expressed or implied agreement to the contrary is present, the eight hours of sleeping time and meal periods constitute hours worked.

If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted. For enforcement purposes, the Department of Labor has adopted the rule that if the employee cannot get at least five hours' sleep during the scheduled period, the entire time is working time.

On single day trips of less than 24 hours duration, the entire day is counted as work time. Even if an employee is permitted to sleep during a portion of the trip, the entire trip is compensable working time. Allowing employees to sleep when they are not busy does not render the time "sleep time"; nor does the furnishing of facilities to sleep, as long as the employee is still on duty.

As discussed in the preceding section, however, if the employee is notified in advance that he/she will be relieved from all duties during a portion of the overnight trip, regardless of the length of the trip, those hours are not hours worked.

14. BREAKS

Rest periods of short duration, running from five minutes to about 20 minutes, are common in business and industry. They promote the efficiency of the employee, are scheduled at the convenience of the employer, and are customarily paid as working time.

County boards of education, however, are not required to grant breaks in excess of the thirty-minute duty-free lunch during the workday, but if breaks are granted, they must be counted as hours worked. In addition, compensable time during rest periods may not be offset against other working time, including waiting time or on call time.

15. MEAL PERIODS

Under the Fair Labor Standards Act, bona fide meal periods are not considered work time as long as:

- § The employee is completely relieved from duty (uninterrupted). The employee is not relieved if he or she is required to perform any duties, active or inactive (subject to interruption)
- § The period is long enough to allow the employee to use it for eating a meal. Thirty minutes is long enough to qualify as a bona fide meal period
- § The period occurs at a scheduled hour or within a specified period at a time of day suitable for a normal meal period

Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals.

West Virginia Code §18A-4-14, however, requires that every teacher who is employed for more than one-half of the class periods of the regular school day and every service

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personnel who is employed for more than three and one-half hours each day be provided a daily lunch recess of at least 30 consecutive minutes, they are not to be assigned any responsibilities during such recess, and the meal break **must be included in the number of hours worked**. Furthermore, no county board may increase the number of hours to be worked as a result of the meal break.

The employee is not relieved if he or she is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his/her desk or a maintenance worker who is required to remain in the shop is working while eating. It is not necessary that an employee be permitted to leave the premises if he or she is otherwise completely freed from duties during the meal period.

16. EMPLOYEES RESIDING ON EMPLOYER'S PREMISES

An employee who is permitted to reside on his or her employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he or she is on the premises. Ordinarily, he or she may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he or she may leave the premises for purposes of his or her own.

It may be that the employee may not be required to perform any additional duties while living on the employer's premises. This may be the situation, for example, where a nonexempt employee is permitted to reside on school property just to have someone residing near the school to deter vandalism, but is not assigned any additional duties as a result. In this case, only the time that the employee is actually performing his regular job would be counted as compensable time.

It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties that takes into consideration all of the pertinent facts will be accepted.

In situations where the benefit provided the employee is at a rate below fair market value (for example, where the employee lives on the property rent free or at a reduced rental rate) and the employee works overtime, the difference between the rate paid for the benefit by the employee and the fair market value of the benefit provided, must be included in the employee's regular rate of compensation to determine the employee's overtime rate.

17. TRAINING TIME

Generally, attendance at lectures, meetings, training programs, and similar activities by non-exempt employees is work time. Attendance is compensable time if the training is conducted during the employee's regular scheduled work time, if it is required by the employer, or is considered to meet a part of the employee's continuing education requirements.

The training is also compensable time if it is designed to make the employee handle his or her job more effectively as distinguished from training him or her for another job, or to acquire a new or additional skill. For example, a secretary who is given a course in computer skills is engaged in an activity to make him/her a better secretary. Time spent in such a course given by the employer or under his auspices is hours worked.

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The FLSA also requires all employers to compensate their non-exempt employees for all compensable time at least at the federal minimum wage. Boards of education need to be mindful of this requirement in the special situations where they allow a non-exempt employee to attend a conference or workshop related to the employee's job on days that are not within the employee's regular employment term (such as attending a workshop or conference during the summer) and to take the time off during a regularly scheduled continuing education (CE) day. Since the time in attendance at the workshop is considered compensable time, the employee must be paid for the time at a rate of at least federal minimum wage.

There are certain special situations where the time spent in attending meetings or training sessions is not regarded as hours worked, but before the time can be considered non-work time, all four the following four criteria must be met:

- § Attendance is outside of the employee's regular working hours
- § Attendance is, in fact, voluntary
- § The course, lecture, or meeting is not directly related to the employee's job, and
- § The employee does not perform any productive work during such attendance

For state and local governments, the criteria are different than the rules for all other employers, eliminating the requirement that the training must be voluntary and not related to the employee's current job in order for the time not to count as working time.

Attendance at lectures, meetings, training programs, and similar activities by employees of state and local governments need not be counted as working time (even if all or part of the cost of the training is borne by the employer), if the following three criteria are met:

- § Attendance is outside of the employee's regular working hours
- § It is specialized or follow-up training
- § It is required by law or a higher jurisdiction for certification of employee

There are other special situations where the time spent in attending lectures, training sessions, and courses of instruction is not regarded as hours worked. For example, an employer may establish for the benefit of his or her employees a program of instruction that corresponds to courses offered by independent bona fide institutions of learning. Voluntary attendance by an employee at such courses outside of working hours would not be hours worked, even if they are directly related to his or her job, or paid for by the employer. This would include attendance of evening courses offered by a county board of education.

Where a training course is instituted for the bona fide purpose of preparing for advancement through upgrading the employee to a higher skill, and is not intended to make the employee more efficient in his or her present job, the training is not considered directly related to the employee's job even though the course incidentally improves his or her skill in doing his or her regular work. Of course, if an employee on his or her own initiative attends an independent school, college, or independent trade school after hours, the time is not hours worked for his or her employer, even if the courses are related to his or her job.

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18. TRAVEL TIME

Excluding normal commuting time, the general rule is that employees should be compensated for all travel, unless: it is overnight, outside of regular working hours, and on a common carrier where no work is done. Travel during normal working hours, even on overnight trips, is considered work time.

On overnight trips, travel outside of normal work hours is, generally, not working time, even if the employee is driving, as long as he/she is not performing any work during the travel. Of course a school bus operator or a truck driver would be performing work during the trip, therefore, the entire trip would be compensable. Special rules can apply to special situations.

The Portal-to-Portal Act specifically excludes from compensation time spent “walking, riding, or traveling to and from the actual place of performance of the principal activity” of an employee and the time spent in “activities which are preliminary to the principal activity”. Travel time at the beginning or end of the workday, therefore, is not compensable. Note, however, that under the Portal-to-Portal Act, an employer must compensate employees for such time if agreed to in a contract agreement, or if it is customary to do so.

An employee who travels from home before his or her regular workday and returns to his or her home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. This is true whether he or she works at a fixed location or at different job sites. Normal travel from home to work is not work time.

The Department of Labor has taken no position on whether travel to the job and back home by an employee who receives an emergency call outside of his or her regular hours to report back to his or her regular place of business to do a job is working time.

Time spent by an employee in travel as part of his or her principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice.

If an employee normally finishes his work on the premises at 5:00 p.m. and is sent to another job that he/she finishes at 8:00 p.m. and is required to return to his employer's premises arriving at 9:00 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8:00 p.m. is home-to-work travel and is not hours worked.

Travel that requires an employee to be away from home overnight is travel away from home. Travel away from home is clearly work time when it is done during the employee's normal working hours. The employee is simply substituting travel for other duties. The time is not only hours worked on regular working days during normal working hours but also during the corresponding hours on non-working days. Thus, if an employee regularly works from 9:00 a.m. to 5:00 p.m. from Monday through Friday the travel time during these hours is work time on Saturday and Sunday as well as on the other days.

Regular meal period times are not counted under the FLSA, however, West Virginia Code §18A-4-14 requires that every service personnel whose employment is for a period of more than three and one-half hours per day be provided a daily lunch recess of not

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less than thirty consecutive minutes, and the meal period must be included in the number of hours worked.

As an enforcement policy, the Department of Labor will not consider as work time that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile unless work is performed. This also includes driving a motor vehicle, regardless of whether the vehicle is owned by the employee or the employer, as long as no work is being done during the drive. Of course a school bus operator transporting students or a truck driver delivering goods would be working during the travel.

If an employee is offered public transportation but requests permission to drive his or her car instead, the employer may count as hours worked either the time spent driving the car or the time he or she would have had to count as hours worked during working hours, if the employee had used the public conveyance.

Any work that an employee is required to perform while traveling must, of course, be counted as hours worked. An employee who drives a school bus, truck, automobile, boat, or airplane, or an employee who is required to ride therein as an assistant or helper, is working while riding.

19. COMPUTATION OF OVERTIME PREMIUM

Overtime compensation must be paid or compensatory time awarded for actual hours worked in excess of 40 during a given workweek, as defined by the employer. In computing the total number of overtime hours worked, time worked may be rounded to the nearest hourly increment, such as to the nearest five minutes ($1/12$), ten minutes ($1/6$), or fifteen minutes ($1/4$), as long as it is reasonable and done consistently. Rounding to the nearest 30 minutes or whole hour would, most likely, not be considered reasonable.

Overtime compensation must be paid at the rate of one and one-half times the employee's regular rate of pay for each hour **worked** in excess of 40 during a workweek. Generally, the regular rate will include all compensation earned by the employee during the workweek divided by the total number of hours worked. Certain compensation may be excluded, however. For example, as discussed in Section 3 entitled Exclusions, the pay paid to an employee pursuant to the provisions of West Virginia Code §18A-4-8(e) for hours not actually worked may be excluded.

In situations where an employee performs two or more different duties during the workweek with differing regular compensation rates, such as his/her regular duty and an extra-curricular and/or extra-duty assignment, overtime compensation will be computed using one of the following methods:

- (a) **Weighted average method** – This involves calculating the employee's regular rate of pay for the workweek by taking the weighted average of all jobs performed during the workweek. To find the weighted average, determine the employee's total earnings for the week and divide this total by the total number of hours worked on all jobs. Once the weighted average has been determined, overtime will be calculated at one and one-half times this average.
- (b) **Separate rates method** - This involves calculating the employee's regular rate of pay for the workweek by computing the rate for each job separately. The overtime rate is based on the regular rate that applies to the type of work

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performed during the hours in excess of forty. **This method is available for hourly workers only (including non-exempt service personnel employed by county boards of education), but before it can be used, the employer and employee must agree, prior to the additional work being performed, on this method of computation.**

Care must be exercised in using this method to ensure that the appropriate overtime premium is paid for each hour worked in excess of 40 during the workweek, since the overtime premium applies for the type of work being performed after the 40th hour.

For example, if an employer has established a separate lower rate for cutting the grass as opposed to working as a custodian, the employee would have to report the actual work performed for all hours worked beyond 40 during the workweek. If all those excess hours were worked cutting the grass, then the overtime premium would be based on the lower rate for cutting the grass. Conversely, if all hours worked beyond 40 were as a custodian, the overtime premium would be based on the higher rate. However, if the hours worked beyond 40 consisted of a combination of both jobs, then the overtime premium would have to be based on the appropriate rate for each task actually performed during the hours worked beyond 40.

20. GRIEVANCES, MEDICAL ATTENTION, CIVIC AND CHARITABLE WORK, AND SUGGESTION SYSTEMS

Normally, time spent in adjusting grievances between an employer and employees during the time the employees are required to be on the premises is hours worked.

Time spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when he is working constitutes hours worked.

Time spent in work for public or charitable purposes at the employer's request, or under his direction or control, or while the employee is required to be on the premises, is working time. However, time spent voluntarily in such activities outside of the employee's normal working hours is not hours worked.

Generally, time spent by employees outside of their regular working hours in developing suggestions under a general suggestion system is not working time, but if employees are permitted to work on suggestions during regular working hours the time spent must be counted as hours worked. Where an employee is assigned to work on the development of a suggestion, the time is considered hours worked.

21. CIRCUMSTANCES IN WHICH AN EMPLOYER MAY MAKE DEDUCTIONS FROM AN EXEMPT EMPLOYEE'S PAY

According to the FLSA, an employer may make deductions from an exempt employee's pay without jeopardizing the employee's exempt status: when the exempt employee is absent from work for one or more full days for personal reasons other than sickness or disability; for absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness; to offset amounts employees receive as jury or witness fees, or for military pay; for penalties imposed in good faith for infractions of

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safety rules of major significance; or for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions.

For teachers, an employer may make deductions from a teacher's pay for the same reasons discussed in the preceding paragraph for absences of less than a full day or impose an unpaid disciplinary suspension of less than a full day without jeopardizing the teacher's exempt status.

Also, an employer is not required to pay the full salary in the initial or terminal week of employment, or for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act (FMLA).

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B – WHITE-COLLAR EXEMPTION TESTS:

Executive Employees:

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

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than \$455 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire and fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Under a special rule for business owners, an employee who owns at least a bona fide 20-percent equity interest in the enterprise in which employed, regardless of the type of business organization (e.g., corporation, partnership, or other), and who is actively engaged in its management, is considered a bona fide exempt executive.

Administrative Employees:

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

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

The administrative exemption is also available to employees compensated on a salary or fee basis at a rate not less than \$455 a week and whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment. Academic administrative functions include operations directly in the field of education, and do not include jobs relating to areas outside the educational field. These employees can include: the superintendent or the head of an elementary or secondary school system, and any assistants responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program; the principal and any assistant principals responsible for the operation of an elementary or secondary school, department heads in institutions of higher education responsible for the various subject

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matter departments; academic counselors and other employees with similar responsibilities.

(Note: Since superintendents, assistant/associate superintendents, treasurers/chief school business officials and directors/coordinators also meet the test for executive employees, these are listed under that category in the checklist in Section C.)

Professional Employees:

Learned Professional

To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. Exempt teachers include, but are not limited to, regular academic teachers; kindergarten or nursery school teachers; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrument music teachers. The salary and salary basis requirements do not apply to bona fide teachers.

An employee holding a valid license or certificate permitting the practice of law or medicine is exempt if the employee is actually engaged in such a practice. An employee who holds the requisite academic degree for the general practice of medicine is also exempt if he or she is engaged in an internship or resident program for the profession. The salary and salary basis requirements do not apply to bona fide practitioners of law or medicine.

Registered nurses who are paid on an hourly basis should receive overtime pay. However, registered nurses who are registered by the appropriate state examining board generally meet the duties requirements for the learned professional exemption, and if paid on a salary basis of at least \$455 per week, may be classified as exempt. Licensed practical nurses and other similar health care employees, however, generally do not qualify as exempt learned professionals, regardless of work experience and training, because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations, and are entitled to overtime pay.

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Creative Professional

To qualify for the creative professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate of not less than \$455 per week; and
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Computer-Related Occupations

To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated either on a salary or fee basis at a rate not less than \$455 per week, if compensated on a weekly basis, or at a rate not less than \$27.63 an hour, if compensated on an hourly basis;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below; and
- The employee's primary duty must consist of:
 - 1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
 - 2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
 - 3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
 - 4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in the primary duties test described above, are also not exempt under the computer employee exemption.

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Highly Compensated Employees:

The regulations contain a special rule for “highly compensated” workers who are paid total annual compensation of \$100,000 or more. A highly compensated employee is deemed exempt under the FLSA if:

- The employee earns total annual compensation of \$100,000 or more, which includes at least \$455 per week paid on a salary basis;
- The employee’s primary duty includes performing office or non-manual work; and
- The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

Thus, for example, an employee may qualify as an exempt highly-compensated executive if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements in the standard test for exemption as an executive.

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C - FLSA COMPLIANCE CHECKLIST FOR BOARDS OF EDUCATION

The purpose of this checklist is to provide West Virginia school districts assistance in complying with the requirements of the Fair Labor Standards Act (FLSA). The list is to be used as a guide by the various districts in evaluating their employment practices under the FLSA. Although due care and diligence was exercised in the research and compilation of the information, the guide does not constitute legal advice. The advice of legal counsel should be obtained regarding any legal issues that may arise related to the FLSA.

1. To ensure compliance with the Fair Labor Standards Act, it is strongly recommended that every county board of education develop a local policy on overtime that specifies the workweek, describes overtime and compensatory time and ensures that all employees have access to and understand the policy.

The policy should identify:

- a. The 7-day **workweek** for the school district;
- b. The **number of hours expected** to be worked each week by employees (i.e., clarify if you expect employees to work a 40-hour workweek);
- c. Whether employees need prior **authorization** (oral or written) to work overtime;
- d. Whether overtime will be compensated by the use of compensatory time instead of overtime pay for employees working more than 40 hours per week (employees must agree); and
- e. How employees are made aware of the policy.

(See Subsection C.1 for a sample policy and Subsection C.2 for a sample agreement for the use of compensatory time.)

2. Classify employees as exempt or non-exempt.

Identify which employees are covered by the overtime requirements of the Fair Labor Standards Act, i.e. **"non-exempt,"** and which employees are **exempt** from the overtime requirements.

Remember that the Department of Labor considers an exemption from the overtime pay/compensatory time requirements of the FLSA to be the exception, rather than the rule. Any "gray areas" should be resolved in favor of finding the employee to be non-exempt and the overtime compensable, as the burden is on the school system to prove that exemptions are applicable.

(See Subsection C.3 for a list of county board of education employee positions that are traditionally considered exempt and non-exempt.)

3. Notify non-exempt employees of their expected work hours in a workweek. This should be made clear in both policy and in administrative regulations.

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A school district may regularly schedule non-exempt employees to work less than the 40-hour workweek, for example 37.5 hours per week, and leave the remainder as possible work time. To avoid the possibility of "straight-time" claims for hours worked between the end of an employee's normal work week and the overtime threshold, (per the example, the hours between 37.5 and 40), the district needs to clearly communicate to all non-exempt employees that the pay they receive is for up to 40 hours of work, and that the school system retains the right to request an employee to perform additional duties up to 40 hours without additional pay. As long as compensation for the week constitutes at least minimum wage and it is clear that the district is paying the employee for a 40-hour workweek, a district should not find itself facing "straight-time" claims.

If a school district wishes to redefine an employee's expected work week to allow the possibility of assigning additional work as described above, all due process protections must be provided as it is likely that this action will constitute an alteration of contract.

4. Maintain an effective timekeeping system.

Establish a method for keeping track of the actual number of hours worked each week by all nonexempt employees, be it a timesheet, a time clock or an electronic time management system.

The following items have been identified as problem areas on some timesheets in Fair Labor Standards Act litigation.

- Employees with the exact in/out time and total hours worked EVERY DAY of the week. (This is a red-flag to the Department of Labor since it is rare that a person would begin and end work at the same time every day.)
- Timesheet not filled out by the employee. (If someone else fills out the timesheet, the employee should review the timesheet and sign the timesheet to acknowledge that it is correct.)
- Timesheet not signed by the employee. (Without a signature, employees can later claim that they never saw the timesheets.)
- Timesheet with multiple employees filled out by supervisor. (If this is used, each employee should review his/her time and sign the timesheet to acknowledge that it is correct.)
- Timesheet that does not record actual hours worked, just present/absent.
- Timesheet that does not record actual time/hours worked, but only contracted hours.

(See Subsection C.4 for a sample of a compliant time sheet.)

5. Provide periodic training for the supervisory staff on the following FLSA compliance issues.

- a. What counts as compensable work time;
- b. How time sheets must be completed for non-exempt employees; and

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- c. Their duty to monitor timesheets and verify time worked.

(See Subsection C.5 for a summary list of compensable and noncompensable work time for non-exempt employees and Subsection C.6 for a list of FLSA problem areas for school districts.)

- 6. Provide training for the non-exempt staff on timesheets and overtime requirements.

Train all non-exempt staff when hired and regularly thereafter on the following topics:

- a. Board policy requirements;
- b. What counts as compensable time; and
- c. How to complete timesheets correctly.

- 7. Decide whether non-exempt employees will be permitted to volunteer.

Non-exempt employees may not volunteer to perform services on behalf of the school system if the volunteer duties involve the same types of duties they regularly perform. Furthermore, in order to be a bona fide volunteer, an employee must freely and voluntarily (i.e., without any direct or implied coercion or requirement) agree to perform the volunteer duties for no compensation (a nominal fee is allowed).

If a school district is using non-exempt school employees as volunteers for any activities, the district may have the employees sign a form verifying that they are volunteering to perform these duties. Such forms are not guaranteed to protect the district from liability, but they may assist in demonstrating that the employee volunteered.

(See Subsection C.7 for additional information about volunteering and Subsection C.8 for a sample volunteer agreement.)

- 8. Have supervisory, payroll and finance staff monitor weekly time records.

Be certain that the supervisory staff regularly monitor weekly time records **for accuracy and completeness**, and that they **report all overtime worked by** non-exempt staff to the finance office. If there are any concerns about information being recorded properly or staff being paid properly, **ascertain whether an audit of employee records needs to be performed**.

- 9. Keep FLSA-required records for non-exempt and exempt employees.

(See Subsection C.9 for a list of records that must be kept for employees.)

- 10. Post all federal and state required employment posters.

Be certain that all required employment posters are posted in areas that are accessible to all employees, such as where paychecks are picked up, especially non-exempt employees.

(See Subsection C.10 for a list of employment posters that must be posted by employers.)

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C.1 - SAMPLE OVERTIME POLICY:

The purpose of this policy is to ensure that the _____ County Board of Education, hereinafter referred to as the Board, complies with the overtime provisions of the Fair Labor Standards Act (FLSA), regulations of the U.S. Department of Labor, Wage and Hour Division, and all applicable state statutes and regulations related to the compensation of full-time and part-time employees.

1. GENERAL:

1.1. All employees of the Board are expected to work a forty-hour workweek each week.¹

1.2. Board employees may regularly and routinely be scheduled to work less than a 40-hour workweek, however, the Board retains the right to request an employee to perform additional duties up to 40 hours during a workweek without additional compensation.

1.3. The length of the school day for licensed and professional staff will be a minimum of seven and one-half hours and will continue until professional responsibilities to students are completed. Administrative meetings, curriculum development, pupil supervision, assigned duties, parent conferences, group or individual planning and extra-curricular activities may require hours beyond the stated minimum.

1.4. Work schedules for all other employees will be defined by the superintendent or, his/her designee, and will be consistent with the Fair Labor Standards Act, West Virginia statutes, and provisions of this policy.

1.5. Non-exempt employees are not permitted to volunteer to perform services for or on behalf of the school system if the volunteer duties involve the same types of duties that the employees normally perform as a part of their regular duties for the school district.

2. WORKWEEK:

2.1. For purposes of the Fair Labor Standards Act, the workweek for all employees of the Board is defined as beginning at 12:00 a.m. Monday and ending at 11:59 p.m. Sunday.²

2.2. Working hours for all non-exempt employees of the Board under the Fair Labor Standards Act, including paraprofessionals, aides, secretaries, bus operators, and cafeteria, janitorial and maintenance personnel, will conform to federal and state regulations. The classification of all employee positions of the Board, as to whether they are exempt or non-exempt for the provision of the Fair Labor Standards Act, are shown in Subsection C.3 of this policy.

3. ATTENDANCE EXPECTATIONS:

3.1. All employees are expected to be present during their scheduled working hours. Absence without prior approval, chronic absences, habitual tardiness or abuses of designated working hours are all considered neglect of duty and will result in disciplinary actions, up to and including dismissal.

See footnotes at end of Sample Policy.

See footnotes at end of Sample Policy.

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3.2. Non-exempt employees who have not been granted prior approval by appropriate authority to work overtime may not arrive at their workstations earlier than their scheduled starting time and must leave their workstations at their scheduled ending time. Failure to comply with this requirement may result in disciplinary actions, up to and including dismissal.

4. TIME AND ATTENDANCE REPORTS:

4.1. Every employee classified as a service personnel is required to complete a time sheet for each week worked during the employees employment term, reflecting the actual starting and ending times for each day worked and the total time worked. The employee and the employee's immediate supervisor will each sign the time sheet prior to its submittal in a timely manner to the payroll office.

4.2. Employees classified as professional personnel are not required to file weekly time sheets, but must indicate days present and absent on the payroll report and initial the report.

5. OVERTIME AND COMPENSATORY TIME:

5.1. The Board discourages overtime work by non-exempt employees unless absolutely necessary.³

5.1. A non-exempt employee shall not work overtime without the expressed written approval of his/her supervisor. The request must be submitted in writing using the appropriate form. In an emergency situation, verbal approval may be granted, however, a written request must be submitted within 24 hours following the verbal approval.

5.3. Supervisory personnel must monitor overtime use on a weekly basis to ensure that all overtime worked is necessary. With the mutual agreement of the employee and the immediate supervisor, as required by the provisions of West Virginia Code §§18A-4-8a(8) and 18A-4-8(d), work schedules may be adjusted within a workweek to preclude the need for overtime. This is considered an adjusted workweek and would not be recorded as compensatory time, as long as the hours worked during the workweek do not exceed 40.

5.4. In lieu of overtime compensation, non-exempt employees may receive compensatory time off at a rate of not less than one and one-half (1.5) hours for each one hour of overtime worked, if such compensatory time (1) is agreed to by the employee in writing before the overtime work is performed and (2) is authorized by the immediate supervisor.

5.5. Employees will be allowed to use compensatory time within a reasonable period after requesting such use. Employees may accrue a maximum of 120 compensatory time hours (80 hours of actual work).⁴

5.6. All compensatory time earned must be used within 60 days after being earned and any compensatory time earned must be used before any personal, annual, or leave without pay is used. Any compensatory time that is not used within this time will be paid at the employee's current rate.⁵

See footnotes at end of Sample Policy.

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5.7. In computing the 40-hour workweek for overtime purposes, only actual hours worked will be counted. Time taken off work on paid or unpaid leave, including personal, sick, or military leave, vacation, time off without pay, jury duty, or other absences from work, whether approved or unapproved, outside school environment days, and days canceled due to inclement weather (snow days) will not be counted as hours worked.

5.8. Pursuant to the provisions of West Virginia Code §18A-4-8a(6), any service personnel who is required to work on any legal school holiday as described in West Virginia Code §18A-5-2, shall be paid at a rate of one and one-half times the employee's usual hourly rate.

5.9. Pursuant to the provision of West Virginia Code §18A-4-8a(7), any full-time service personnel who is required to work in excess of his/her normal working day during any week which contains a school holiday shall be paid at a rate of one and one-half times the employee's usual hourly rate for the additional hours or fraction of additional hours worked.

5.10. Pursuant to the provision of West Virginia Code §18-4-8(e), an employee whose regular work week is scheduled from Monday through Friday and agrees to perform any work assignments on a Saturday or Sunday is to be paid for at least one-half day of work for each day he or she reports for work, and if the employee works more than three and one-half hours on any Saturday or Sunday, the employee is to be paid for at least a full-day of work.

Note: In computing the overtime rate for a workweek in which this provision applies, only the actual hours worked on a Saturday or Sunday and the pay related to those hours will be included in the overtime computations. The pay for hours not actually worked will be paid at the employee's regular rate. ⁶

5.11. Upon resignation, retirement, or termination, an employee will be paid for any unused compensatory time at a rate of compensation not less than: (A) the average regular rate received by such employee during the last three years of the employee's employment; or (B) the final regular rate received by such employee, whichever is greater.

6. COMPUTATION OF OVERTIME PAY:

6.1. Overtime compensation will be paid or compensatory time awarded for actual hours worked in excess of 40 during a given workweek, as defined in Section 2.

6.2. In computing the total number of overtime hours worked, time worked will be rounded to the nearest fifteen-minute increment.⁷ For example, one hour and 5 minutes will be rounded to one hour (1.0 hour) and one hour and 10 minutes will be rounded to 1 hour and 15 minutes (1 and ¼ hour).

6.3. Overtime compensation will be paid at the rate of one and one-half times the employee's regular rate of pay for each hour worked in excess of 40 during a workweek. Generally, the regular rate will include all compensation earned by the employee during the workweek divided by the total number of hours worked.

See footnotes at end of Sample Policy.

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6.4. In situations where an employee performs two or more different duties during the workweek with differing regular compensation rates, such as his/her regular duty and an extra-curricular and/or extra-duty assignment, overtime compensation will be computed using one of the following methods:

- (a) **Weighted average method** – This involves calculating the employee's regular rate of pay for the workweek by taking the weighted average of all jobs performed during the workweek. To find the weighted average, determine the employee's total earnings for the week and divide this total by the total number of hours worked on all jobs. Once the weighted average has been determined, overtime will be calculated at one and one-half times this average.
- (b) **Separate rates method** ⁸ - This involves calculating the employee's regular rate of pay for the workweek by computing the rate for each job separately. The overtime rate is based on the regular rate that applies to the type of work performed during the hours in excess of forty. **This method is available for hourly workers only and before it can be used, the employer and employee must agree (prior to the additional work being performed).**

7. VIOLATIONS:

7.1 Any exempt or non-exempt employee who violates any provision of the board's overtime policy, or any regulations or procedures related thereto, may be subject to disciplinary actions, up to and including dismissal.

Note: Footnotes are for reference only. They should be eliminated from an individual board's policy.

1. The policy should identify the number of hours that employees are expected to work each week, but boards may select a number of hours less than forty and may establish different hours for different classes of employees.
2. A board is required by the FLSA to identify the workweek, but may designate any 7-day period as the school district's workweek.
3. More specific guidance could be provided as to when non-exempt employees will be permitted to work overtime, either within the policy or administrative procedures.
4. According to FLSA, an employee of a public agency engaged in work other than in a public safety activity may accrue up to 240 of compensatory time (160 of actual work time). It is recommended that local boards reduce the maximum amount of hours that can be accrued to reduce the likelihood of incurring a large salary liability should employees be unable to use the time within a reasonable time due to workload requirements.
5. The FLSA does not contain a time limit by which compensatory time must be used, but West Virginia Code §21-5C-3(f)(5)(B), compensatory time must be used within one year after it is earned. It is recommended that local boards reduce the maximum period of time in which compensatory time must be used for the same reason as the preceding recommendation.
6. In computing the overtime rate for a workweek in which West Virginia Code §18A-4-8(e) applies, according to FLSA, only the actual hours worked on a Saturday or Sunday and the pay related to those hours need to be included in the overtime computations. The pay for hours not actually worked may be EXCLUDED from overtime, but must be paid at the employee's regular rate of pay.
7. A local board of education may elect to round the amount of overtime worked differently, as long as it is reasonable and applied consistently.
8. Care must be exercised in using the separate rates method to ensure that the appropriate overtime premium is paid for each hour worked in excess of 40 during the workweek, since the overtime premium applies for the type of work being performed after the 40th hour.

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C.2 - AGREEMENT TO RECEIVE COMPENSATORY TIME OFF:

Pursuant to the Fair Labor Standards Act (FLSA), the _____
Board of Education has a policy of granting compensatory time off to non-exempt employees in
lieu of overtime pay for time worked in excess of 40 hours in any workweek. A copy of the policy
dated _____ has been provided to me.

I understand that I must obtain my supervisor's express written authorization to work overtime
prior to working in excess of 40 hours in any workweek. I understand that I will earn
compensatory time at a rate of one and one-half (1.5) hours for each hour of overtime worked. I
further understand that I may not earn more than 120 ¹ hours of compensatory time (80 hours of
actual overtime work), that I must take the time earned within 60 ² days after it is earned, and that
I must take the time before using any personal, annual, or leave without pay. I also understand
that if I am unable to use all compensatory time earned during the allotted time due to the work
requirements, that I will receive compensation for the unused compensatory time at my current
regular hourly rate of pay, but may be disciplined for failure to comply with the Board's overtime
policy.

I hereby knowingly agree and consent to the use of compensatory time in lieu of overtime pay for
any time worked in excess of 40 hours in any workweek.

This agreement will continue in force until terminated.

Employee Signature

Date

Supervisor Signature (or designee)

Date

NOTES:

1. A board may select a different maximum number of hours, as long as it does not exceed 240 hours.
2. A board may select a different time limit, as long as it does not exceed one year.

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3. **C.3 - LIST OF EXEMPT AND NON-EXEMPT POSITIONS:**

The Fair Labor Standards Act (FLSA) designates some **employees who are exempt from the overtime and minimum wage requirements** of the FLSA.

1. There are four types of FLSA exemptions: **executive, administrative, professional employees and "highly compensated" employees** (29 Code of Federal Regulations (C.F.R.) Part 541)
2. Exempt employees generally must be paid on a "salaried" or fee basis, earn at least \$455 per week, and meet one of the "duties" tests below. The salary and salary basis requirements of the FLSA, however, do not apply to bona fide teachers.

For computer employees to qualify as exempt employees, they must be compensated either on a salary or fee basis at a rate not less than \$455 per week, if compensated on a weekly basis, or at a rate not less than \$27.63 per hour, if compensated on an hourly basis.

3. Employees who are exempt under the executive, administrative or professional exceptions must "primarily" perform executive, administrative or professional duties (i.e., generally at least 50% of the employee's time). (29 C.F.R. Part 541) "Highly compensated" employees must perform at least one of these duties.
 - a. **Executive employee:** Must be paid on a salary or fee basis and primary duty must include: (1) managing the enterprise in which he/she is employed or managing a recognized subdivision or department of the enterprise; AND (2) customary regular direction of two or more other employees AND (3) authority to hire and fire other employees or have hiring and firing recommendations carry significant weight. Includes superintendents, assistant superintendents, treasurers/chief school business officials and most directors.
 - b. **Administrative employee:** In addition to salary requirements, primary duty must include: (1) either performing office or nonmanual work directly related to management policies or general operations of the employer OR performing functions in the administration of a school system (or department or subdivision) in work directly related to the academic instruction or training AND (2) work requiring the exercise of discretion and independent judgment with respect to matters of significance. Includes principals, assistant principals, coordinators, and supervisors.
 - c. **Professional employee:** In addition to salary requirements, primary duty must include (1) **either** work requiring knowledge of an advanced type customarily acquired by a long course of specialized study (work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion) OR work requiring invention, imagination or talent in a recognized field of artistic endeavor OR teaching in a school system/educational institution OR work requiring highly specialized computer knowledge (primary duty consists of applying or designing systems, hardware or software.) Includes "learned professions" such as teaching, psychology, nursing (at the level of R.N. and above), counseling and accounting.

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- d. "Highly Compensated" Employee: Employee's salary is more than \$100,000 annually AND employee regularly performs one or more of the exempt duties of an executive, administrative or professional employee AND primary duty is non-manual office work.
- 4. If an employee **primarily performs non-exempt work**, overtime and minimum wage requirements may apply. For example, if the director of maintenance spends most of his /her time doing hands-on maintenance, then he/she is most likely a "non-exempt" employee.
- 5. Exempt employees are not covered by FLSA minimum wage and overtime provisions; however, they are covered by **equal pay and record-keeping** provisions.
- 6. FLSA provisions do not apply to the following "non-covered" persons: independent contractors, bona fide volunteers and trainees, such as student teachers.

The following list represents some of the common categories of school district employees under the exemptions as well as a list of common categories of non-exempt employees. Certain positions, such as superintendent, may qualify under more than one category, but are listed under the following categories below to be consistent with school districts in other states.

Executive Exemption:

Superintendent	102
Associate/Assistant Superintendent	103
Directors, Coordinators	106 -107
Treasurer/CSBO	108

Administrative Exemption:

Administrative Assistant	104
Principals	111-114
Assistant Principals	115-118
Head Teacher	119
Curriculum Specialist	201
Attendance Director	322
Director/Coordinator of Services	521
Supervisor of Maintenance	570
Supervisor of Transportation	650
Food Services Supervisor	670

Potential problem areas: "administrative assistants" (such as the secretary to the superintendent) who primarily spend their time doing secretarial work, not managerial work; maintenance, transportation, or child nutrition supervisors who primarily perform manual or non-office work.

Professional Exemption:

Librarian	203
Remedial Specialist	204

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Counselor	205-208
Teacher	210-241
Dentist	306
Professional Accountant	308
Physician	315
Psychiatrist	317
Psychologist	318
Registered Nurse	319
School Nurse	320-321
Attendance Officer	323
Social Worker	324
Physical/Occupational Therapist	331, 332
Dental Hygienist	403
Audiologist	405
Psychometrist	408

Potential problem areas: Computer personnel who do not (a) perform work requiring highly specialized knowledge in systems analysis, programming, or software engineering; (b) work as a systems analyst, computer programmer, software engineer or similarly skilled worker; and (c) consistently exercise discretion and judgment; or social workers (a) whose college degree is not in social work and (b) who do not perform work that is predominantly intellectual in character and requires the consistent exercise of discretion and judgment.

Non-Exempt Employees:

Aide	501-504
Paraprofessional	515
Autism Mentor	519
Accountant/Auditor	522-525
Buyer	526
Braille or Sign Language Specialist	527
Clerk	528-533
Secretary	535-538
Receptionist	541
Computer Technicians	545-547
Draftsman	549
Media Worker	551, 557, 559
Inventory Supervisor	555
Accounts Payable Supervisor	560
Payroll Supervisor	561
Audio Visual Technician	574
Maintenance Worker	576-644
School Bus Operator/Truck Driver	652, 655, 659,
Heavy Equipment Operator	657
Cafeteria Worker	672, 675-677
Custodians	681-684
Groundsman/Watchman	686, 688
Sanitation Plant Operator	690

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Note: If administrative assistants, supervisors of maintenance, transportation, child nutrition, or computer personnel are considered exempt, the positions should be listed as such in the local board's policy and the district should obtain written acknowledgement from the employees employed in those positions. Licensed practical nurses are non-exempt personnel.

As discussed in Section A, Paragraph 4 of this guide, an employee's "primary duty" is critical in determining whether the employee is exempt from the requirements of the FLSA. In most cases, the primary duty consumes the majority (over 50 percent) of the employee's time. All employees who are determined to be non-exempt must be compensated for all hours worked on behalf of the employer at the federal minimum wage, and compensated for all hours worked beyond 40 in a workweek at time and a half of their regular rate of pay for that workweek.

Consequently, all hours worked by non-exempt service personnel on behalf of the school system must normally be included in the computation, including the attendance of meetings and workshops, travel between work assignments, extra-curricular and extra-duty assignments, such as extra bus runs, working in an after school program, or coaching, and taking work home in the evenings or on weekends. The employer is responsible for maintaining a weekly record (timesheet) of ALL hours worked by non-exempt employees to ensure that the requirements of the FLSA are followed.

On the other hand, employees who are determined to be exempt from the FLSA, such as teachers, are exempt from all requirements, including minimum wage and overtime, and the employer is not required to maintain a record (timesheet) of hours worked.

In making the determination as to which employees are exempt from the FLSA, one should always keep in mind that FLSA exemptions are subject to the rule of strict construction and are narrowly construed against an employer, which has the burden of proving an exemption. Courts focus on the actual activities of employees in determining their exempt status under the FLSA, and need not rely on resumes and position descriptions that may be vague or contradictory to the employees' testimony concerning their day-to-day job activities.

Personnel who are employed by a school district on a temporary, part-time basis and whose "primary duty" for the district meets the "white-collar" exemption tests, such as a certified coach, may be considered to be exempt, since coaches are considered teachers. The salary and salary basis requirements of the FLSA do not apply to bona fide teachers.

Personnel employed on a temporary, part-time basis as athletic trainers, however, are not considered teachers and, therefore, may not meet the "white-collar" exemption tests. The salary and salary basis requirements do apply to athletic trainers, as well as all exempt personnel other than teachers. To be exempt, an employee must be compensated on a salary or fee basis at a rate not less than \$455 per week and must meet the other tests described in Section B for a learned professional.

Similar to other positions where there may be a question, if a school district considers temporary part-time coaches or athletic trainers as exempt, the positions should be listed as such in the local board's policy and the district should obtain written acknowledgement from the employees employed in those positions.

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C.4 - SAMPLE TIME SHEETS:

Employers may use any timekeeping method they choose. For example, they may have employees complete a timesheet, use a time clock, or use other electronic time management systems. Any timekeeping plan is acceptable as long as it is complete and accurate, and the actual times worked are recorded.

Samples of compliant time sheets are shown on the following pages.

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Board of Education

Regular Duty Time Sheet

Department: _____ Workweek: _____

Employee Name: _____ Employee No. _____

Day of the Week	Date	Beg. Time (Hour/Min)	Mid-Day Stop Time (Hour/Min)	Mid-Day Start Time (Hour/Min)	Ending Time (Hour/Min)	Hours Worked	Amount & Type of Leave Used
Monday							
Tuesday							
Wednesday							
Thursday							
Friday							
Saturday							
Sunday							
Total Hours							

- Summary of Total Hours for the Week -

	Regular	Extra-Curricular	Extra-Duty	Overtime	Leave	Total
Total Hours						

I hereby certify that this is a true and accurate representation of all hours that I have worked on behalf of the Board of Education during the designated workweek.

Employee's Signature: _____ **Date:** _____

I hereby certify to the best of my knowledge that this is a true and accurate representation of all hours worked by this employee during the designated workweek.

Supervisor's Signature: _____ **Date:** _____

Notes: Any changes must be initialed by both employee and supervisor.

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Board of Education

Extra-Curricular/Extra-Duty Time Sheet

Department: _____ Workweek: _____

Employee Name: _____ Employee No. _____

Day of the Week	Date	Type of Duty	Beg. Time (Hour/Min)	Mid-Duty Stop Time (Hour/Min)	Mid-Duty Start Time (Hour/Min)	Ending Time (Hour/Min)	Hours Worked
Monday		EC					
		ED					
Tuesday		EC					
		ED					
Wednesday		EC					
		ED					
Thursday		EC					
		ED					
Friday		EC					
		ED					
Saturday		EC					
		ED					
Sunday		EC					
		ED					
Total Extra-Curricular Hours Worked							
Total Extra-Duty Hours Worked							

I hereby certify that this is a true and accurate representation of all extra-curricular and extra-duty hours that I have worked on behalf of the Board of Education during the designated workweek.

Employee's Signature: _____ **Date:** _____

I hereby certify to the best of my knowledge that this is a true and accurate representation of all extra-curricular and extra-duty hours worked by this employee during the designated workweek.

Supervisor's Signature: _____ **Date:** _____

Notes: (1) Any changes must be initialed by both employee and supervisor.
(2) Type of Duty: Extra-Curricular Duty – EC; Extra Duty - ED

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C.5 – ILLUSTRATIVE LISTING OF COMPENSABLE AND NONCOMPENSABLE TIME:

The following is an illustration of compensable and noncompensable times spent by non-exempt employees during regular working hours:

COMPENSABLE	NONCOMPENSABLE
Primary and other assigned duties, including extra-curricular and extra-duty assignments such as mid-day, evening and weekend bus trips, coaching, evening and weekend activities, and attending training conferences, workshops and meetings related to work	Absence for illness, holiday or vacation
Reporting early to open buildings and turn on lights and heat	
Reporting early to warm up equipment	Apprentices during nonregular or nonproductive work under formal agreement
Reporting early to promptly relieve prior shift	Trade school attendance
Distributing work to work areas	
Make-ready work, preparatory work necessary for primary activity	Obtaining equipment from lockers, where lockers not recommended or required
Equipment maintenance before or after shift	Shutdown for regular maintenance
Arranging or putting supplies away	
Meetings to discuss daily operations problems	Union meetings concerning solely internal union affairs
Discussing work problems at shift change	Voluntary attendance at government-sponsored safety meetings
Totaling receipts or completing bank deposits	
Show-up time, if employees required to return to shop before being sent home	
Authorized attendance at conferences, workshops, or training meetings related to work	Training programs sponsored by employer if outside regular work hours, attendance is voluntary, employee does not perform productive work while attending and program is not directly related to employee's present job (as distinguished from teaching another job or additional skill)
Changing clothes, showering or washing if required by the nature of the work (such as asbestos removal that requires bathing for worker health)	Changing clothes, washing or showering for employees' convenience
Stand by time – remaining at post during lunch period or temporary shut down	Waiting time after relieved of duty for a specified period of time that allows employee to engage in personal activity
Waiting: (1) by homemaker to deliver or obtain work (2) by truck driver standing guard while loading (3) for work after reporting at a required time while on duty	Waiting: (1) for paycheck (2) at time clock to punch in (3) to start work at designated time after arriving early (4) periods during which an employee is completely relieved from duty and which are long enough to enable him/her to use the time effectively for his or her own purposes (At least ½ hour)
Suggestions developed pursuant to assignment	Suggestions pursuant to general suggestion system
On call time if employee must stay on or near premises so as to have liberty restricted or not use time as employee pleases	On call time when only telephone number to be reached or other similar contact device is required so that employee can come and go as pleases
Homework under contract with employer	
Taking work home, if employer has knowledge and permits or allows	

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COMPENSABLE	NONCOMPENSABLE
Fire drills	Voluntary firearms training
Mandatory drug and alcohol testing	Mandatory pre-employment drug and alcohol testing
Physical exam required for continued service	Pre-employment tests
Photography and fingerprinting for ID purposes	
Medical attention on work premises or if employer directs outside treatment	Medical attention by employee choice of outside physician
Travel: (1) from worksite to worksite (2) from central office or shop to worksite (3) from worksite to central office or shop (4) to conferences or workshops on a single day	Travel: (1) from home to work site or vice versa (even if employer provides transportation) (2) from outlying job to home
Overnight travel during normal working hours, both on regular work days and during the corresponding hours on nonworking days.	Overnight travel outside of regular working hours where no work is done.
Grievance hearing or conference during time employee is required to be on premises	
Civic or charitable work, if requested or controlled by employer, or if required to be performed on employer's premises	
Coffee and snack breaks	
Rest periods of 20 minutes or less	Sleeping time up to eight hours if tour of duty is 24 hours or longer, if an agreement to exclude sleep time exists, facilities for sleeping are furnished, interruptions to perform duties during sleep time are counted as hours worked, and at least five hours of uninterrupted sleep is obtained during scheduled period
Break periods, IF employees are not relieved of duties, if not free to leave posts, or if too short to be used for personal reasons (less than ½ hour)	Break periods of ½ hour or longer if relieved of all duties and free to leave post (but can be confined to work premises) but NOT duty-free lunch (18A-4-14(1))
Duty-free lunch (18A-4-14(1))	

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C.6 - FLSA POTENTIAL PROBLEM AREAS FOR SCHOOLS:

The following areas have been identified as problem areas in pending FLSA litigation in other states.

1. **Bus drivers who are paid for only scheduled hours or the route time.** If the bus operator breaks down or traffic causes a delay in the completion of the route, the additional time spent must be counted as work time. In addition, most school districts require bus operators to perform safety checks at the beginning of routes and clean and secure the bus upon completion of the route. All of this would be considered compensable time.
2. **Employees who work multiple jobs/dual employment, such as classroom aides or cafeteria workers who also serve as bus aides.** Even though the employee is paid separately for each job, the hours must be combined to determine if the employee worked more than 40 hours during the workweek. In addition, if the employee actually performs work between the two scheduled positions, he/she must also be paid for this work.
3. **Aides who must eat with the students but whose meal period is deducted from the calculation of work time.** West Virginia Code § 18A-4-14 states that every teacher who is employed for more than one-half of the class periods of the regular school day and every service personnel who is employed for more than three and one-half hours each day shall be provided a daily lunch recess of at least 30 consecutive minutes, and such employee shall not be assigned any responsibilities during such recess.
4. **Employees who work through lunch and/or eat at desk.** Employees must be completely relieved from duty per West Virginia code §18A-4-14, otherwise the employee may be entitled to additional compensation.
5. **Cafeteria managers, maintenance supervisors, transportation supervisors and janitorial supervisors who mostly perform the same work as the people they supervise.** These employees are often misclassified as exempt employees; however, they should be considered non-exempt if they primarily perform non-exempt work.
6. **Maintenance employees who are paid on a per-call basis (i.e., receive a flat fee per call) when they have to work in the event of an emergency.** Hours spent working should be calculated and added to the regular hours to determine if the employee has worked overtime. Note: Extra-duty pay is governed by West Virginia Code §18A-4-8a(9).
7. **Non-exempt employees who serve as "volunteer" coaches.** The issue here is whether employees are truly considered "bona fide volunteers" or if the duty is an extra-curricular assignment. A bona fide volunteer (1) must offer his/her services freely, without coercion or pressure, direct or implied, (2) cannot perform the same type of services which he/she is normally employed to do, and (3) cannot be compensated, other than possibly a "nominal fee" to cover expenses *A question to ask when considering whether an employee is a volunteer is whether the employee could choose not to show up to do*

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the volunteer duties or could quit performing the duties they are volunteering to perform if they wanted to at any time without negative impact on his employment.

- 8. Non-exempt employees who stay after scheduled hours to perform school related work such as take tickets at an athletic event, attend parent-teacher conferences, work at open house, go to staff meetings, set up or close functions, etc.** Employees would have to be compensated for such activities, unless they are bona fide volunteers. However, if the activities are infrequent, irregular, or occurring in scattered instances, the hours spent doing them do not have to be added to the employee's regular work hours for overtime purposes. An activity is "occasional and sporadic" if it is (1) not a regular assignment; (2) is solely at the employee's option (no coercion, implied or explicit); and (3) is in a different capacity than the employee's regular work. (An example of this could be taking up tickets at home football games.
- 9. Non-exempt staff who attend training sessions or staff meetings during the summer or on weekends for which they are not paid.** Employees must be compensated at minimum wage (currently \$5.15 per hour) for each hour they are in attendance.
- 10. Computer technicians who do not perform the highly-skilled duties required by the exemption.** Computer personnel must (a) perform work requiring highly-specialized knowledge in systems analysis, programming or software engineering; (b) work as a systems analyst, computer programmer, software engineer or similarly skilled worker; and (c) consistently exercise discretion and judgment. A person's title does not automatically make them an exempt computer professional.
- 11. Employees who come to work early or stay late.** Employees must be compensated for all work suffered or permitted to perform.
- 12. Employees who work in after school programs at school for students.** Even though a program may be run by another group, like the YMCA, the Department of Labor may consider this to be joint employment unless the school and other group are entirely independent of each other and are completely disassociated with respect to the employment of the employee.
- 13. School employees who "volunteer" for school programs/functions.** Same concerns as discussed under items 7 and 8 above.
- 14. School employees working special functions held at school, but sponsored by others** (PTA, performance, etc.). The best practice is to require such groups to include in their rental fee an amount equal to the employee's overtime rate for the expected hours.
- 15. Outsourcing of work.** The Department of Labor does not consider it to be separate employment when school employees work for a company that is performing a school district function. It raises the "joint employment" issue.
- 16. Secretary calling substitutes from home or other employees who work at home.** Hours for such work must be recorded and compensated.

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- 17. The superintendent/board secretary who stays late for school board meetings.** All of the hours must be compensated.
- 18. Assuming that salaried means an employee is exempt.** Even though an employee receives a salary, he/she can still be non-exempt.
- 19. Conducting business with an employee as an independent contractor.** The courts have made it clear that the employment relationship under the Act is broader than the traditional common law concept of master and servant used by the Internal Revenue Service. The difference arises from the fact that the term “employ” as defined in the Act includes “to suffer or permit to work”. The courts have indicated that, while “to permit” requires a more positive action than “to suffer”, both terms imply much less positive action than required by the common law. Mere knowledge by an employer of work done for him by another is sufficient to create the employment relationship under the Act.

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C.7 - VOLUNTEER INFORMATION SHEET:

- 1) The FLSA allows people to volunteer for public agencies for civic, charitable or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered.
- 2) However, school district employees may not volunteer for the school district unless they are considered "bona fide volunteers."
- 3) An employee is a bona fide volunteer if:
 - a) the employee's services are offered freely and without pressure or coercion, direct or implied, from the employer, and
 - b) the employee does not perform the same type of services as his/her regular job.
- 4) Employees cannot volunteer to perform their regular work duties off the clock and without compensation. (29 U.S.C. § 203(e)(4)(A)) Even if employees offer to do the work on their own time, the employer must still pay them. Employees cannot waive the requirements of the FLSA.
- 5) A question to ask when considering whether an employee is a bona fide volunteer is whether the employee could choose not to show up to perform the volunteer duties or at any time could quit performing the duties he/she is volunteering to perform without negative impact on his/her employment.
- 6) Allowing non-exempt employees to volunteer for any activity is a risk, because the issue of whether the employee is truly volunteering is a factual issue that can be disputed. School districts in other states have had to pay back wages (of at least the minimum wage) and overtime for such employees. As a result, school districts in some states do not allow non-exempt employees to volunteer in the schools.
- 7) Remember, the volunteer restrictions apply to work done for the employer, not the particular school. Thus, a bus driver working at the elementary school cannot volunteer to drive the bus at the middle school.

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C.8 - SAMPLE VOLUNTEER AGREEMENT:

VOLUNTEER AGREEMENT

Board of Education: _____ School Year: _____

I, _____, of my own free will, volunteer my time and service to participate as _____ for _____ School. My time and service in this volunteer capacity are given without promise, expectation or receipt of any form of compensation, benefits or other remuneration for this service.

I understand and agree that my volunteer participation is not being performed in the course and scope of my regular employment at _____ School, and that my participation in this activity is not in any way required by _____ School or the _____ Board of Education.

I acknowledge and agree that my volunteer services do not involve the same or similar type of services I perform as an employee of the _____ County Board of Education. I further acknowledge and agree that my volunteer services are not closely related to my duties and responsibilities as an employee.

I understand that my participation as a volunteer may be terminated at any time, without cause, and that I may withdraw from participation at any time for any reason and that my withdrawal will not affect my continued employment with the Board of Education.

This agreement will continue in force until terminated.

Volunteer Signature

Date

Authorized School Official

Date

****NOTE: An employee of the Board of Education may NOT volunteer to perform a job that is the same or similar job for which he/she is employed.***

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C.9 - FLSA REQUIRED EMPLOYEE RECORDS:

- 1) **Required Records for Non-exempt Employees.** FLSA requires employers to keep records concerning non-exempt employees. (29 C.F.R. § 516.2) Records must include the following:
 - a) the employee's full name and social security number and, on the same record, any symbol that might be used in place of the employee's name on any time, work or payroll records;
 - b) the employee's home address, including zip code;
 - c) the employee's date of birth, if under age 19;
 - d) the employee's sex and the employee's occupation;
 - e) the time of day and day of week on which the employee's workweek begins;
 - f) the regular hourly rate of pay for any week when overtime is worked, the basis on which wages are paid and the amount and nature of each payment that is excluded from the regular rate;
 - g) the hours worked by the employee each workday and the total hours each workweek;
 - h) the total daily or weekly straight time earnings, excluding overtime pay;
 - i) total pay for overtime hours;
 - j) total additions to or deductions from wages paid each pay period;
 - k) total wages paid each pay period; and
 - l) the date of payment and the pay period covered by the payment.
- 2) **Required Records for Exempt Employees.** FLSA requires employers to keep for exempt employees records listed in **letters a-e, k and l above**. Employers also must keep records showing the basis on which the exempt employee's wages are paid. (29 C.F.R. § 516.3)
- 3) Records regarding the posting of notices must be kept. (29 C.F.R. § 516.5(6))
- 4) Generally, these records must be preserved for five years. (29 C.F.R. § 516.5)

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C.10 - LIST OF REQUIRED EMPLOYMENT POSTERS THAT MUST BE POSTED:

STATE POSTING REQUIREMENTS

- ☐ Human Rights Law (WVC §5-11-1 et seq.)
- ☐ Minimum Wage and Maximum Hours Standards (WVC §21-5C-1 et seq.)
- ☐ Parental Leave Act (WVC §21-5D-1 et seq.)
- ☐ Unemployment Benefits (WVC §21A-1-1 et seq.)
- ☐ Wage Payment and Collection Act (WVC §21-5-1 et seq.)
- ☐ Whistle-Blower Law (WVC §6C-1-1 et seq.)
- ☐ Worker's Compensation Law (WVC §23-1-1 et seq.)

FEDERAL POSTING REQUIREMENTS

- ☐ Employee Polygraph Protection Act
- ☐ Equal Employment Opportunity
- ☐ Family and Medical Leave Act
- ☐ Federal Minimum Wage Act
- ☐ Occupational Safety and Health Act

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D – DEFINITIONS:

Actual hours worked: The total hours that an employee performs duties for the benefit of his or her employer and includes all of the time that an employer “suffers or permits” an employee to work on its behalf. This time does not generally include paid time for vacation, holidays, sick or personal leave, outside school environment days, or canceled instructional days due to inclement weather (snow days).

Adjusted workweek: Adjustments made to an employee’s regular work schedule during a workweek in order to accomplish a specific task and yet not have the employee work in excess of 40 hours during the week. This is not considered compensatory time earned or taken, as long as the total hours worked during the workweek do not exceed 40.

Compensable hours worked: In general, compensable hours worked include: all the time that an employee must be on duty; all the time that an employee must be on the employer’s premises; all the time that an employee must be at any other prescribed place of work; and any additional time that the employee is allowed (i.e., “suffered or permitted” to work).

Compensatory time: Compensatory time is time earned during a workweek that is taken off during a subsequent workweek. It is an alternative method available to public agencies, including a state, a political subdivision of a state, or an interstate governmental agency, for compensating employees who work in excess of forty (40) hours in a workweek by which time off is provided in lieu of monetary compensation, as governed by the FLSA and West Virginia Code §21-5C-3. Compensatory time received by an employee in lieu of cash must be at the rate of not less than one and one-half hours of compensatory time for each hour of overtime work.

Customarily acquired by a prolonged course of specialized instruction: The learned professional exemption is restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best evidence of meeting this requirement is having the appropriate academic degree. However, the word “customarily” means the exemption may be available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. This exemption does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.

Customarily and regularly: The phrase “customarily and regularly” means greater than occasional but less than constant; it includes work normally done every work week, but does not include isolated or one-time tasks.

Department or subdivision: The phrase “a customarily recognized department or subdivision” is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function.

Directly related to management or general business operations: To meet the “directly related to management or general business operations” requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment. Work “directly related to management or general business operations” includes, but is not limited to, work in

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functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, Internet and database administration; legal and regulatory compliance; and similar activities.

Discretion and independent judgment: In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term must be applied in light of all the facts involved in the employee's particular employment situation, and implies that the employee has authority to make an independent choice, free from immediate direction or supervision. Factors to consider include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval, and other factors set forth in the regulation. The fact that an employee's decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.

Effect of deductions: The employer will lose the exemption if it has an "actual practice" of making improper deductions from salary. Factors to consider when determining whether an employer has an actual practice of making improper deductions include, but are not limited to: the number of improper deductions, particularly as compared to the number of employee infractions warranting deductions; the time period during which the employer made improper deductions; the number and geographic location of both the employees whose salary was improperly reduced and the managers responsible; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions. If an "actual practice" is found, the exemption is lost during the time period of the deductions for employees in the same job classification working for the same managers responsible for the improper deductions. Isolated or inadvertent improper deductions will not result in loss of the exemption if the employer reimburses the employee for the improper deductions.

Exempt employee: An employee who is generally referred to as a salaried employee and who is exempt from the overtime provisions of the FLSA.

Extra-curricular assignment: As defined by West Virginia Code §18A-4-16, an extra-curricular duty is any job assignment that occurs at times other than regularly scheduled working hours and which may include, but is not limited to, the instructing, coaching, chaperoning, escorting, providing support service or caring for the needs of students and which occur on a regularly scheduled basis.

Extra-Duty assignment: As defined by West Virginia Code §18A-4-8b, an irregular job that occurs periodically or occasionally, such as, but is not limited to, field trips, athletic events, proms, banquets and band festival trips. Extra-duty pay is governed by West Virginia Code §18A-4-8a(9).

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Fair Labor Standards Act (FLSA): The federal statute that establishes minimum wages, overtime pay, record keeping and child labor standards affecting full-time and part-time workers in the private sector and in federal, state and local governments.

Fee basis: Administrative, professional and computer employees may be paid on a “fee basis” rather than on a salary basis. If the employee is paid an agreed sum for a single job, regardless of the time required for its completion, the employee will be considered to be paid on a “fee basis.” A fee payment is generally paid for a unique job, rather than for a series of jobs repeated a number of times and for which identical payments repeatedly are made. To determine whether the fee payment meets the minimum salary level requirement, the test is to consider the time worked on the job and determine whether the payment is at a rate that would amount to at least \$455 per week if the employee worked 40 hours. For example, an artist paid \$250 for a picture that took 20 hours to complete meets the minimum salary requirement since the rate would yield \$500 if 40 hours were worked.

Field of science or learning: Fields of science or learning include law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but is not in a field of science or learning.

Invention, imagination, originality or talent: This requirement distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. Exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Whether the exemption applies, therefore, must be determined on a case-by-case basis. The requirements are generally met by actors, musicians, composers, soloists, certain painters, writers, cartoonists, essayists, novelists, and others as set forth in the regulations. Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent. Journalists are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product.

Management: Generally, “management” includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees’ productivity and efficiency for the purpose of recommending promotions or other change in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

Matters of significance: The term “matters of significance” refers to the level of importance or consequences of the work performed. An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance

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merely because improper performance of the employee's duties may cause serious financial loss to the employer.

Non-Exempt Employee: An employee who is generally referred to as an hourly employee and is not exempt from the overtime provisions of the Fair Labor Standards Act.

Off duty: A period of non-working time during which an employee is completely relieved from duty long enough to enable the employee to use the time effectively for his/her own purpose. The employee must be advised in advance that he/she is relieved from all duties until a specific time, may leave the job if the employee so desires, and is to return to work to resume his/her duties at the time specified.

On call time: A period of time when an employee is required to remain on call on the employer's premises or so close thereto that he/she cannot use the time effectively for his/her own purposes.

Overtime: Actual hours worked in excess of forty (40) hours during any given workweek.

Particular weight: Factors to be considered in determining whether an employee's recommendations as to hiring, firing, advancement, promotion or any other change of status are given "particular weight" include, but are not limited to, whether it is part of the employee's job duties to make such recommendations, and the frequency with which such recommendations are made, requested, and relied upon. Generally, an executive's recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include occasional suggestions. An employee's recommendations may still be deemed to have "particular weight" even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

Primary duty: Means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

Professional personnel: As defined in West Virginia Code §18A-1-1, professional personnel are employees of a county board of education who meet either the certification or licensing requirements of the state, or both, and include professional educators and other professional employees.

Recognized field of artistic or creative endeavor: This includes such fields as music, writing, acting and the graphic arts.

Regular rate of pay: The hourly rate at which an employee is compensated for the hours worked during a regular workweek, exclusive of any compensation for hours worked in excess of forty (40) hours.

Salary basis requirement: To qualify for exemption, employees generally must be paid at not less than \$455 per week on a salary basis. These salary requirements do not apply to outside sales employees, teachers, and employees practicing law or medicine. For computer employees to qualify for as exempt employees, they must be compensated either on a salary or fees basis at a rate not less than \$455 per week, if compensated on a weekly basis, or at a rate not less than \$27.63 per hour, if compensated on an hourly basis. Being paid on a salary basis means an employee regularly receives a

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predetermined amount of compensation each pay period on a weekly, or less frequent basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work. Subject to certain exceptions, an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked.

Safe harbor: If an employer (1) has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism, (2) reimburses employees for any improper deductions, and (3) makes a good faith commitment to comply in the future, the employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing the improper deductions after receiving employee complaints.

School personnel: As defined in West Virginia Code §18A-1-1, school personnel are all personnel employed by a county board of education whether employed on a regular full-time basis, an hourly basis or otherwise. School personnel are classified into two categories: professional personnel and service personnel.

Service personnel: As defined in West Virginia Code §18A-1-1, service personnel are employees of a county board of education who serve the school or schools as a whole, in a nonprofessional capacity, including such areas as secretarial, custodial, maintenance, transportation, school lunch, or aides.

Total annual compensation: The required total annual compensation of \$100,000 or more may consist of commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period, but does not include credit for board or lodging, payments for medical or life insurance, or contributions to retirement plans and other fringe benefits. There are special rules for prorating the annual compensation if employees work only part of the year, and which allow payment of a single lump-sum, make-up payment to satisfy the required annual amount at the end of the year and similar make-up payments to employees who terminate before the year ends.

Two or more: The phrase "two or more other employees" means two full-time employees or their equivalent. For example, one full-time and two half-time employees are equivalent to two full-time employees. The supervision can be distributed among two, three or more employees, but each such employee must customarily and regularly direct the work of two or more other full-time employees or the equivalent. For example, a department with five full-time nonexempt workers may have up to two exempt supervisors if each supervisor directs the work of two of those workers.

Waiting Time: The time when an employee is waiting for an assignment.

Work requiring advanced knowledge: Means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment. Professional work is therefore distinguished from work involving routine mental, manual, mechanical or physical work. A professional employee generally uses the advanced knowledge to analyze, interpret or make deductions from various facts or circumstances. Advanced knowledge cannot be attained at the high school level.

Workweek: The week designated by an employer, consisting of 168 consecutive hours (seven consecutive 24 hour periods) in which an employee is expected to work his/her regular weekly work schedule. A workweek need not coincide with the calendar week but may begin on any day and at any hour of the day.

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E – FREQUENTLY ASKED QUESTIONS (FAQs)

The following are the answers provided by the U.S. Department of Labor to frequently asked questions regarding the Fair Labor Standards Act as it relates to school districts.

1. Question: What is the Fair Labor Standards Act?

Answer: The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in federal, state, and local governments. Covered non-exempt workers are entitled to a minimum wage of not less than \$5.15 an hour. Overtime pay at a rate of not less than one and one-half times their regular rates of pay is required after 40 hours of work in a workweek.

2. Question: We have non-exempt employees who are paid on a salary basis for their full-time job, who also work part-time as coaches for various teams like the basketball team. Do we owe them overtime when they work over 40 hours in a workweek doing both jobs?

Answer: Yes, they are due overtime when they work more than 40 hours a week. School districts must keep an accurate record of all hours actually worked in a workweek by non-exempt employees, including the hours worked as coaches, and compute overtime based on a weighted average of the rates paid for each job.

3. Question: We have non-exempt employees who are paid on a salary basis for their full-time job and work 40 hours each week. These same employees also “volunteer” to take up tickets at the home football games for which they get paid \$20 per game. Are these employees to be paid overtime for the hours worked taking up tickets?

Answer: Probably not, as long as the task of taking up tickets is not related to his regular job and occurs on an occasional or sporadic basis.

4. Question: We pay a teacher’s aide who also acts as a football coach a salary for his teacher’s aide job and a seasonal stipend of \$1,500 for his coaching duties. The season starts two weeks before school is in session and lasts about 13 weeks. The only pay he receives for the two weeks prior to school being in session is the coaching stipend. Is he being paid in compliance with the FLSA when he is exclusively coaching?

Answer: For the period of time before school is in session, the answer depends on how many hours a week he works exclusively as a coach during this two-week period. Depending on the amount of the stipend earned per week and the number of hours spent working as a coach for the week, he may not be earning the minimum wage, and he may also be due overtime pay for those weeks spent exclusively coaching.

For the period of time after school starts, he is receiving his salary plus the coaching stipend. He is most likely receiving more than minimum wage during this period, however, he may not be getting paid the proper overtime, unless the total weekly pay for both jobs is combined for determining his overtime rate for hours worked in excess of 40 in a workweek.

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5. Question: We designate one non-exempt school secretary to call for substitute teachers as we find out they are needed. We usually become aware of the need for a substitute in the evening or very early morning before school opens. Frequently, the secretary will make several phone calls from home to a list of substitutes until she finds one who is available. Does the school system owe the secretary pay for the time spent making those calls?

Answer: Yes, calling substitute teachers on behalf of the school is compensable time worked. The district needs to keep an accurate record of the time spent and add that time to her regularly scheduled time in order to determine if she has worked more than 40 hours that week and, if so, pay her overtime.

6. Question: The secretary at one of the elementary schools works from 8:00 AM until 3:30 PM with ½ hour off for lunch. The lunch period is part of her workday (W. Va. Code §18A-4-14). The problem is that she is frequently interrupted by young students and sometimes parents all day long, including the lunch period. She has difficulty finishing her assigned clerical duties each day. She sometimes comes in early or stays late to finish her work, and she occasionally takes her work home and does it there on her home computer. How do we make sure we are paying her correctly?

Answer: All her work hours, in school and at home, must be accurately recorded. If she works more than a total of 40 hours in a workweek, she must be paid her hourly rate for all hours worked and additional half time for each hour over 40, even if all of the extra work is performed at home. Plus, since she was not completely relieved of duty during the lunch period, she may be entitled to additional compensation during that period.

7. Question: On special occasions, such as PTA meetings or School Open House, one of the custodial staff will “volunteer” to come in and sweep up after the event. Is this time spent volunteering count as hours worked that need to be paid?

Answer: Generally, a non-exempt employee cannot volunteer to perform work in the same capacity as his regular job without being compensated for the additional hours worked. In addition, he would have to be paid overtime compensation if his total number of hours worked exceeds 40 during that workweek. All hours worked must be recorded.

8. Question: We have a non-exempt teacher's aide who works full-time at one elementary school then goes to another elementary school in the same district to help run an after-school program sponsored by the YMCA. She is paid a salary for the teacher's aide position and paid \$6.00 per hour by the YMCA for working in the after school program. Do we have to add the hours worked at both schools for purposes of paying overtime?

Answer: Most probably, the time worked at both schools, plus any travel time from the first school to the second school, will need to be added together, and overtime paid if the total hours worked exceed 40 during a workweek, but the answer is dependent on whether a joint employment agreement exists. Consult the Department of Labor for assistance in making this determination.

9. Question: We have a non-exempt employee scheduled to work from 8:00 AM until 4:00 PM Monday through Friday. She has been instructed not to report early to work, but sometimes she does. Are we required to pay her overtime for the time she reports early, even though she has been told not to do so?

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Answer: If she reports early and **performs work of any nature**, you must pay her for the additional time, however, the employee may be disciplined for working without permission (This should be clearly addressed in the board's policy on overtime).

10. Question: School bus operators may have to work more hours than their scheduled runs because of bad weather or bus breakdowns. Do we owe them additional pay for these occurrences?

Answer: Not necessarily. All this time is considered compensable hours worked and should be accurately recorded. These employees must be paid at least the minimum wage for all hours worked and time and a half for hours worked in excess of 40. The answer is dependent upon a board's policy regarding expectation of hours worked.

11. Question: Custodial and maintenance supervisors are paid on a salary basis and are considered exempt by the district. However, they spend almost all of their time working right alongside the employees they supervise. Is their salary sufficient compensation under FLSA?

Answer: If a supervisor's primary duty is not supervision, the employee is actually not exempt. He/she must be paid additional compensation for hours worked in excess of 40 in a workweek and an accurate record of all hours worked must be kept.

12. Question: Is it possible to compensate non-exempt school employees with compensatory time off instead of paying for overtime?

Answer: Yes, if there is an agreement between the district and the employees regarding compensatory time off, the employee can be credited at one and a half hours per actual overtime hour worked, up to a total of 240 hours. However, any employee who has accrued compensatory time and requests to use this time must be permitted to do so in a reasonable period of time after the request. An employer may establish reasonable limits as to when compensatory may be taken. West Virginia Code §21-5C-3(f)(5)(B) specifies that compensatory time must be used within one year after it is earned.

13. Question: The District employs a custodian to work 40 hours per week and also permits him/her to live in a house on school district property at a reduced rental rate. It is understood by the employee and the district that the difference between the rental amount paid and the fair rental value of the property is to be considered as compensation for services performed by the employee outside of the normal workday and workweek. Is this acceptable?

Answer: Probably not under federal law and regulations. The value of "free rent" would be construed as an overtime bonus, which, because it is unrelated to the actual number of hours worked, would be rolled into the employee's regular rate only. This means that the district would still be obligated to pay the employee one and one-half times his or her regular rate for any work actually performed and that the regular rate would reflect the rental value of this house.

If a district wishes to have an otherwise full-time employee reside on school grounds to "keep an eye on things," he/she must still be actually paid time and a half for any work performed in excess of 40 hours per week. He/she may either be charged fair market value for the housing, or rent lower than the fair market value, in which case the difference would have to be rolled into the employee's regular rate, unless certain conditions are met.

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In this latter case, the person should be employed as, for example, a "caretaker," in addition to his other duties, with the express understanding that the lodging is furnished for the convenience of the district and the employee is required to accept such lodging. The district must still pay the employee time and a half for any work actually performed or for time the employee is required to remain on school grounds by the district.

14. Question: A class is going on an overnight field trip. Must the teacher who is working as a chaperone be paid overtime? If so, how much?

Answer: No. Teachers are exempt from FLSA, and an overnight field trip for FLSA purposes is merely an extension of their regular teaching duties.

15. Question: A class is going on an overnight field trip and an aide is going on the trip as a chaperone. Must the aide be paid overtime, and if so, how much?

Answer: The aide must be paid one and one-half times his/her regular rate for any hours worked in excess of 40 hours during the workweek. As to what constitutes an "hour worked" in this case, if the aide were clearly told in advance that at 5 p.m., after only eight hours worked that day, he/she would be off-duty until 8 a.m. the next day, and he/she was neither expected nor permitted to perform any duties (such as bed checks or being on call to help the teacher during the night), he/she would not be entitled to any overtime pay for the night.

However, if the aide is expected or permitted to continue to assist the teacher in supervising the children, he/she would have to be paid overtime pay for any such hours. In addition, if he/she is "on call" during the night, he/she must be paid for any time actually worked because of such "calls" and will be entitled to overtime pay for the entire sleep period if such "calls" prevent him/her from getting a "reasonable night's sleep" (At least 5 hours of uninterrupted sleep). In addition, if the aide is "on call" for a 24-hour period, he/she must expressly agree that the sleeping time are excluded from the "hours worked".

16. Question: May an aide go on a field trip on an unpaid status, volunteering his/her services during that time?

Answer: No. Because the services performed during the trip are essentially the same as those during the regular workday (i.e., assisting a certified employee with those duties which do not require a credential).

17. Question: May a teacher's aide volunteer to assist a different teacher outside of his/her regular work hours?

Answer: No. Because he/she is still performing the same duties.

18. Question: The only secretary working at the district office is scheduled to be at work for eight-hours each day (7 ½ hours of work time plus a half hour paid lunch break). If during her lunch break, the secretary is required/expected/ permitted to answer the telephone since she is the only one in the office, does this now count as overtime?

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Answer: No, since she did not work more than 40 hours during the week. She may, however, be entitled to additional compensation, since she wasn't provided a duty-free lunch period.

19. Question: A bus driver will be taking a bus on a field trip out of town. Upon his/her arrival at the motel where he/she and the children will be staying (at 5 p.m., the end of his/her normal day), he/she will be released and told to return Sunday morning at 10 a.m. He/she will then drive the bus from 10 a.m. until 2 p.m. on Sunday. How many hours of overtime must the bus driver be paid for?

Answer: Assuming he/she worked 40 hours by 5 p.m. on Friday, he/she must be paid for only four hours of overtime on Sunday pursuant to federal and state law.

20. Question: A student club uses the gymnasium to sponsor a student dance and reimburses the school district for the custodian's salary for the time it takes the custodian, who is employed by the district for 40 hours per week, to clean the gym after the dance. Does the time spent cleaning the gym count as district overtime?

Answer: Yes, because the custodian is employed by the school district.

21. Question: Rather than a student club, what if it were a booster club that reimbursed the district for the custodian's salary for cleaning the gymnasium after a student dance?

Answer: The same result as the preceding question, since the custodian is employed by the school district.

22. Question: When calculating overtime, can you consider the average number of hours an employee works over several weeks?

Answer: No. The FLSA requires employers to pay overtime for all hours worked over 40 in a single workweek period; the hours may not be averaged over two or more weeks. A workweek is defined as a fixed period of 168 hours or seven consecutive 24-hour days. Thus, if an employee works 30 hours one week and 50 hours the next, he must receive overtime compensation for the hours over 40 that he worked in the second week (even though the average number of hours for the two weeks is 40). This is the case regardless of whether the employee is paid on a daily, weekly, biweekly, monthly, or other basis.

23. Question: How do you calculate pay and overtime for a salaried, non-exempt employee?

Answer: For employees who are not paid a regular hourly rate (such as those whose compensation is determined on a salary, piece rate, or commission basis), you must determine what their regular hourly rate would be based on their total compensation. The regular hourly rate is computed by dividing the salary **by the number of hours the salary is intended to compensate**.

For example, if an employee is hired at a salary of \$350 and this salary is compensation for a regular workweek of 35 hours, the employee's regular rate of pay is \$350 a week divided by 35 hours, or \$10 an hour. If the employee works more than 40 hours in a week, he/she is entitled to receive \$10 for each of the first 40 hours and \$15 (one and one-half times \$10) for each hour thereafter. If that same salaried employee, however, is clearly expected to work 40 hours per week for the weekly salary of \$350, even though he/she is regularly permitted to work less than

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that, the employee's regular rate of pay would be \$350 a week divided by 40 hours, or \$8.75 per hour.

If the employee works more than 40 hours in a week, he/she is entitled to receive \$8.75 for the first 40 hours ($40 \times \$8.75 = \350) and \$13.13 (one and one-half \$8.75) for each hour thereafter.

24. Question: How do you calculate overtime for a non-exempt employee who works two or more jobs with different pay rates?

Answer: There are two methods for determining an employee's overtime rate when he/she works two or more jobs at different pay rates, one is the **weighted average method** and the other is to **calculate the rate for each job separately**.

As the name implies, the **weighted average method** involves calculating the employee's regular rate of pay for the workweek by taking the weighted average of all jobs performed during the workweek. To find the weighted average, determine the employee's total earnings for the week and divide this total by the total number of hours worked on all jobs. Once the weighted average has been determined, overtime will be calculated at one and one-half times this average. For example, the regular rate of an employee who works 35 hours per week at \$15 per hour as a machine operator (\$525) and works 10 hours that same week at \$7 per hour cutting the grass outside the plant (\$70) is \$595 divided by 45 hours or \$13.22 per hour. Thus, the overtime premium for this employee is one-half times \$13.22, or \$6.61 per hour, regardless of which job the employee performs during the extra hours. Of course, the employee's regular and overtime rates will vary from week to week with the number of hours spent performing each job, so the rates will have to be calculated for each workweek in which the employee works overtime.

An alternative method for computing the employee's total compensation for the week is the **separate rates method**. As this name implies, the rate for each job is computed separately and the overtime premium is based on the regular rate that applies to the type of work performed during the hours in excess of forty. To illustrate this method, assume that an employee spends 40 hours during a workweek working as a custodian, at \$20 per hour, and 10 hours during the workweek cutting the grass, at \$7 per hour. The overtime premium for cutting the grass would be \$3.50 per hour (one-half times \$7), and conversely, the overtime premium for working as a custodian would be \$10 per hour (one-half times \$20).

Care must be exercised in using this method to ensure that the appropriate overtime premium is paid for each hour worked in excess of 40 during the workweek, since the overtime premium applies for the work being performed after the 40th hour. If the additional 10 hours worked cutting the grass occurs at the end of the workweek, the overtime premium for all 10 hours would be \$3.50 per hour. However, if the additional work of cutting the grass occurs during the workweek, then the premium that would apply to the 10 additional hours worked during that workweek would most likely be at \$10 per hour. **This method is available for hourly workers only (which includes non-exempt service personnel employed by county boards of education) and before it can be used, the employer and employee must agree, prior to the additional work being performed, upon the use of this method.**

25. Question: Assuming a half-time custodian is also employed on a year round basis as a half-time bus driver and earns \$10 per hour as a bus operator and \$5 per hour as a custodian, what would be paid if he worked 40 hours as bus operator and 10 hours at the end of the workweek as a custodian?

Answer: He would be entitled to either \$495 or \$475, depending on which method of computation is used.

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Using the **weighted average method**, the employee's total compensation for the week is determined as follows: (1) The weighted average rate is determined by dividing the total regular compensation by the total hours $[(40 \text{ hours} \times \$10) + (10 \times \$5) = \$450 / 50 = \$9 \text{ average rate}]$; (2) This is multiplied by one-half to get the overtime premium of \$4.50/hour; (4) Multiplying this overtime premium by 10 hours of overtime, the overtime compensation is \$45; and (4) The employee's total compensation of \$495 is determined by adding his regular and overtime compensation for the week $(\$450 + \$45 = \$495)$.

Using the **separate rates method**, the employee's total compensation is determined as follows: (1) The regular compensation for both jobs is determined by adding the compensation for each job $(40 \text{ hours} \times \$10 \text{ per hour} + 10 \text{ hours} \times \$5 \text{ per hour} = \$450)$; (2) the overtime premiums are determined by multiplying the individual rates by one-half $(\$10 \times 1/2 = \$5 \text{ per hour for working as a bus operator and } \$5 \times 1/2 = \$2.50 \text{ per hour for working as a custodian})$; (3) Since the overtime work was as a custodian, the overtime premium for custodian is multiplied by the overtime hours worked $(\$2.50 \text{ per hour} \times 10 \text{ hours} = \$25)$; and (4) The employee's total compensation of \$475 is determined by adding his regular and overtime compensation for the week $(\$450 + \$25)$.

26. Question: How do bonuses and incentives affect a non-exempt employee's overtime pay?

Answer: Bonuses and incentives that are dependent on hours worked, productivity, or efficiency must be included in determining an employee's "regular rate" of pay, since the "regular rate" is the basis for determining the overtime rate.

For example, an hourly employee who earns \$7 per hour in a 40-hour workweek has a regular rate" of pay of \$7 per hour and an overtime rate of \$10.50 (one and one-half times \$7). If that same employee received a \$50 production bonus for that week, the employee's regular rate of pay would be \$8.25 per hour $(\$50 \text{ plus the regular weekly rate of } \$280, \text{ divided by } 40 \text{ hours})$ and the overtime rate is \$12.38 per hour for that week.

Other examples of bonuses or incentives that must be included in an employee's regular rate of pay are nondiscretionary bonuses paid according to contract; efficiency bonuses for completing work in less than the allotted time; attendance bonuses; and bonuses paid to employees to work in undesirable locations.

Under some bonus plans, the bonus is paid less than weekly. In this case, the employer may disregard the bonus until the time when the bonus may be determined and may pay compensation for overtime at one and one-half times the employee's hourly rate, exclusive of the bonus. When the amount of the bonus is known, it must be allocated over the period it covers, and a revised overtime rate must be applied to any hours in excess of 40 that were worked during that period. The employee should then be paid additional compensation for each workweek that he/she worked overtime during the period equal to one-half of the hourly rate of pay allocable to the bonus for that week multiplied by the number of overtime hours worked during that week.

To illustrate the calculation for this type of bonus, assume that a board of education has authorized the payment of a \$480 bonus to those employees who do not use any personal leave during the year. It obviously will not be known as to whether a particular employee will be entitled to receive the bonus until the end of the employment term. Once it is determined that an employee is entitled to the bonus, the bonus must be allocated to the employee's employment term for the year, since this particular bonus applies to the entire year. If any employee who receives the bonus worked overtime during the year, the employee is entitled to additional pay for all overtime worked during the year, equal to one-half of the hourly rate of pay allocable to the

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bonus. Assuming that the employee was employed for a 200-day employment term, when paid, the \$480 bonus must be allocated over the 200-day period to determine the regular hourly rate ($\$480 / 1,600 \text{ hours (200 days} \times 8 \text{ hrs/day} = 1,600 \text{ hours)} = \0.30 per hour). The employee is entitled to receive an additional \$0.15 per hour for each overtime hour worked during the year.

Bonuses that are not included in the regular rate of pay are those received on special occasions (such as Christmas) as a reward for service and which are not measured by, or dependent on, hours worked, productivity, or efficiency. In addition, premium pay for working on holidays, Saturdays, or Sundays does not have to be included in overtime calculations if it is at least one and one-half times the employee's regular rate of pay.

It should be noted that county boards of education may pay only the bonuses for which they have been granted statutory authority.

27. Question: Can you give non-exempt employees compensatory (comp) time-off in lieu of paying them overtime?

Answer: Private employers may not give comp time-off in lieu of overtime. However, state and local governments can give non-exempt employees compensatory time off at the rate of one and one-half hours for each hour of overtime worked, with certain defined limits.

28. Question: Do employees have to be paid extra for working weekends, nights, or holidays?

Answer: According to the FLSA, the answer is no. Non-exempt employees must be paid the overtime rate only for each hour actually worked in excess of 40 hours during a workweek. Thus, employers are not required to pay the overtime rate for work performed on a holiday, weekend, or evening, as long as the employee's total hours worked in that workweek are less than 40. Employers that voluntarily pay at least time and one-half for time worked on a holiday, weekend, or evening also may be able to credit the extra compensation towards overtime payments for the same week. Various West Virginia statutes require, however, that service personnel be paid additional compensation for working weekends, nights or holidays.

For example, West Virginia Code §18A-4-8a(5) provides that when any part of a school service employee's daily shift of work is performed between the hours of six o'clock p.m. and five o'clock a.m. the following day, the employee shall be paid no less than an additional ten dollars per month. West Virginia Code §18A-4-8a(6) provides that any school service employee required to work on any legal school holiday (West Virginia Code §18A-5-2) shall be paid at a rate one and one-half times the employee's usual hourly rate. West Virginia Code §18-4-8a(7), requires county boards of education to compensate any full-time service personnel who are required to work in excess of their normal working day during any week which contains a school holiday for which they are paid at a rate of one and one-half times their usual hourly rate for the additional hours or fraction of additional hours worked. West Virginia Code §18-4-8(f) requires an employee who is a custodian, aide, maintenance, office or school lunch employee and who is required to work a daily work schedule that is interrupted and not a continuous period to be paid additional compensation equal to at least one-eighth of the employee's total salary, as provided by their state minimum salary and any county supplement for each day that the employee works an interrupted work schedule. West Virginia Code §18-4-8(e) requires that an employee whose regular work week is scheduled from Monday through Friday and agrees to perform any work assignments on a Saturday or Sunday to be paid for at least one-half day of work for each day he or she reports for work, and if the employee works more than three and one-half hours on any Saturday or Sunday, the employee is to be paid for at least a full-day of work.

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29. Question: Do on call employees have to be paid for the time spent waiting to work?

Answer: Generally, you have to pay employees who are on call only for the time when they are called in to work. The FLSA requires waiting time to be paid only if the employees must remain on or so close to the employer's premises, or are otherwise restricted, that they cannot use the time effectively for their own purposes. For example, if the employees only have to leave word about where they may be reached, they generally are not considered to be working while on call since the time can be used for their own purposes.

In determining whether an employee must be paid for time spent on call, courts look at how much control the employer has over the employee and whether the employee can effectively use the on call time for personal purposes. Factors that courts have looked at in deciding whether an employee has use of on call time for personal purposes include: (1) whether there was an on-premises living requirement; (2) whether there were excessive geographic restrictions on the employee's movements; (3) whether the frequency of calls was unduly restrictive; (4) whether a fixed time limit for response was unduly restrictive; (5) whether the on call employee could easily trade on call responsibilities; (6) whether use of a pager could ease restrictions; and (7) whether the employee had actually engaged in personal activities during on call time.

30. Question: Do you have to pay employees when they work unauthorized hours?

Answer: According to Department of Labor (DOL) regulations, if you are aware that an employee is working more time than is required, you must compensate the employee, even if you did not specifically request the additional work. For example, an employee voluntarily may continue to work at the end of the shift to finish an assigned task. If the employer knows or has reason to believe that the employee is continuing to work, the time is considered working time that must be paid. It is management's duty to prohibit employees, through discipline or other means, from working additional time if it does not want to pay for the work time. Merely having a rule against extra work is not enough. You also must make every effort to enforce the rule.

In addition, employers should not use misleading phrases such as "employees are not permitted to begin work more than 15 minutes before their scheduled starting times or to stop work more than 15 minutes after their scheduled quitting times." This wording may imply that employees may work up to an extra 30 minutes each day without counting the time as working time. The Supreme Court recognized (in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)) the "de minimis" rule that an insignificant amount of time does not have to be counted as work time, such as when an employee spends a few extra seconds or minutes at work. However, according to the DOL, this rule applies only where "there are uncertain and indefinite periods of time involved of a few seconds or a few minutes duration and where the failure to count such time is because of considerations justified by industrial realities."
