



FLSA Webinar Q&A

The information contained in this FAQ is for general use and guidance only. It cannot be used as legal advice by any employer because employer locale and situations may vary. When faced with a question about legal compliance, please consult with a lawyer familiar with these issues.

Q: What types of income are excluded from the \$500,000 annual revenue threshold?

A: A nonprofit's charitable activities are not considered "ordinary commercial activities" and revenues from these activities are not included when deciding if an organization is subject to FLSA as an enterprise. The \$500,000 annual revenue threshold includes only income from commercial activities, such as running a store or selling goods or services that would normally be sold by a for-profit company. The annual revenue threshold does not include income from charitable sources, such as from donations, grants or membership fees. For further assistance regarding coverage principles under the Fair Labor Standard Act, please contact [your nearest Department of Labor Wage and Hours Division district office](#)

Q: The nonprofit I work for is not covered by the FLSA as an enterprise because our annual revenues from ordinary business activities are below \$500,000 but is it correct that most nonprofit staff are still covered?

A: Even if a nonprofit organization is not covered under FLSA's enterprise coverage, some (or all) employees might still be covered as individuals, because of the tasks they perform as part of their job. Regardless of enterprise coverage, the FLSA applies for employees who engage in interstate commerce. The definition of "interstate commerce" is very broad, and includes any activity that involves interstate connections, including phone calls, credit card usage, sending or receiving mail, and more. Rare use of interstate commerce, by an employee who does not access a computer or make business phone calls for example, will not usually cause the FLSA to apply, but even occasional use of a computer to order supplies, cloud based software applications, mailing out of state etc., will cause the employee to be protected by the FLSA. To learn more about FLSA coverage, refer to [Fact Sheet #14](#), or the [Nonprofit Guide](#) for example of individual coverage.

Q: Is there a threshold for the "interstate commerce" test? We're an organization with an annual budget below \$500K, and only work within our state's borders. But the question about online supply ordering makes it sound like even doing that once or twice a year could be considered interstate commerce?



A: That is correct. Any engagement in interstate activity automatically means coverage under the FLSA for the employee(s) engaged in this activity, regardless of the other characteristics of this activity.

Q: Do these provisions operate the same way for a religious organization?

A: Although there are no “blanket” exceptions for religious entities under FLSA, there are some unique provisions for individuals and organizations that are defined as religious. We recommend consulting with an employment attorney to clarify your organization’s specific situation.

Q: Regarding the duties test, could you go into more detail on how this applies to highly experienced nonprofit program staff?

A: An employee can be classified as “exempt” from federal overtime eligibility only if she or he performs duties which qualify as exempt (the “duties test”) **and** she or he is paid on a salary basis that is above the minimum salary threshold set by the FLSA (the “salary basis test.”) The most common duties-based exemptions that apply to nonprofit program staff are executive, administrative and professional. Please refer to [Fact Sheet#17A](#) to learn more about the duties test. Consult with an HR professional or attorney if you need help determining an employee’s classification. A biannual internal audit or review of classifications is recommended.

Q: How do you take into account on-call time? For example, would a domestic violence advocate who has the hotline cell phone at home evenings and weekends be paid for the time she or he is carrying the phone, but not actively on a call?

A: Under the FLSA, “[a]n employee who is required to remain on his or her employer’s premises or so close to the employer’s offices that the employee cannot use their time effectively for their own purposes is working while on-call”. On-call employees who are not required to stay on premises are dealt with on a case-by-case basis. DOL has a special [“advisor” system](#) to help determine how on-call employees should be compensated.

Under Washington State law, “on-call” time also assesses whether “on call” time must be compensated based on whether the employee can use the time effectively for his or her own purposes, and provides some [additional guidance](#).



Q: Is the salary threshold for part time staff prorated (is the salary threshold for half-time staff half of the \$47500)

A: No, the standard salary level requirement may not be prorated for part-time employees. If an employee works any amount of time in a workweek, she or he must earn the full standard salary level (\$913 per week, beginning on December 1, 2016) to qualify for the overtime exemption.

Q: We run a summer camp during July and August. Staff members are required to live on site. They receive a certain amount every two weeks. We do not calculate hours. Do we need to change how they are being paid?

A: You probably do. However, summer camps are a complex aspect of FLSA, and we strongly recommend seeking the advice of a local employment attorney who will help you determine what needs to be done in order to be in compliance. FLSA offers an exemption for “[seasonal amusement or recreational establishments](#)”, that may apply in your case but it is best for you to consult with a lawyer if you run summer camp.

Q: Can nonexempt employees be paid a salary as long as they are paid extra for hours over 40 a week?

A: Yes, in some circumstances. The designation of an employee as “salaried, nonexempt” means that the employer is paying the employee a consistent salary that meets federal and state minimum wage requirements instead of paying an hourly rate based on actual hours worked. In addition, the designation means the employer determines that the employee’s primary job duty fails to meet the requirements for an exemption under FLSA and is classifying the employee as nonexempt. Although the employer pays the nonexempt employee on a salary basis, the employer must have the employee track and record actual time worked, and, if overtime is worked, the employer must calculate the regular hourly rate on which the overtime rate is based, and pay for all overtime worked. (Source: SHRM website).

Q: Is Comp time still a possibility, for example when a non-exempt employee works extra hours for an event?

A: Compensatory (“comp”) time is an area of controversy under wage and hour law. When federal and state law conflict with one another on a subject, the employer is obligated to follow the law that is more favorable to the employee. Federal law (FLSA) prohibits comp time for non-profits: “Non-profits are not permitted to utilize compensatory time for salaried employees instead of paying overtime. Only public agencies, such as state and local governments, are permitted to use compensatory time instead of paying overtime.” (Source: New Overtime Rule Webinar Q&A).



However, Washington state law allows employers to offer comp time to non-exempt employees, in exchange for overtime pay, as long as comp time is only awarded at the employee's specific request and the employee's choice whether to take time or pay is truly voluntary. There is no definitive ruling deciding which law is more favorable to employees, but it can certainly be argued that providing employees the opportunity to select a preference between extra pay and extra time off is more favorable than denying that choice. Because the penalties for violating overtime rules if comp time is enforced incorrectly are so high, many employers and advisors conclude it is preferable to use comp time very sparingly or not use it at all. Learn more about comp time in WA [here](#) and refer to [WA Labor and Industries employment standards](#). [RCW 49.46.130\(2\)\(b\)](#) and [WAC 296-128-560](#) allow employees to request compensating time off in lieu of overtime pay.

Q: When an employee requests comp time, how is it calculated? Does the employee get 1 hour of comp time for every overtime hour worked, or 1.5 hours of comp time for every overtime hour worked?

A: If the employee requests for comp time, then the employer must offer comp time off at the time-and-a-half rate applicable to overtime hours, and not simply hour-for-hour. Additionally, if an employee has comp time accrued at the time he or she separates from employment for any reason, the employer must pay the employee the value of the comp time on the employee's final paycheck. Refer [WAC 296-128-560](#)

Q. Will newly overtime-eligible employees have to record their hours on a daily basis?

A: There is no particular form or order of records required and employers may choose how to record hours worked for overtime-eligible employees. However, the employer must establish some method for tracking and recording hours worked. The FLSA requires that employers keep certain records for each nonexempt worker so workers can be sure that they are paid the wages they earn. Employers have options for accounting for workers' hours - some of which are very low cost. For example, where an employee works a fixed schedule that rarely varies, the employer may simply keep a record of the schedule and then indicate the changes to the schedule that the worker actually worked when the worker's hours vary from the schedule ("exceptions reporting"). See [Fact Sheet 21: Recordkeeping Requirements under the Fair Labor Standards Act \(FLSA\)](#).

For employees with a flexible schedule, an employer does not need to require an employee to sign in each time she starts and stops work. The employer must receive an accurate record of the number of daily hours worked by the employee, not the specific start and end times. Therefore, an employer could allow an employee to provide the total number of hours she or he worked each day, including the number of overtime hours, by the end of each pay period.

Q: Do we need to pay overtime for a non-exempt employee who is attending a training or conference?



A: Attendance at lectures, meetings, training programs and similar activities are often considered “working time” and should be paid. Training time is not counted as working time if three criteria are met, namely: the event is outside normal hours; it is voluntary and not job related; and no other work is concurrently performed while the person is attending the training. For additional details and information about training time and meetings, refer to [Fact Sheet #22](#).

Q: Does overtime begin to accrue if an employee's work day, including any out-of-town travel, is more than 8 hours per day?

A: Under the FLSA and Washington law, overtime eligibility is calculated on a weekly basis, not a daily basis. Overtime accrues once an employee works for more than 40 hours in one workweek. Overtime does not accrue automatically if a workday is longer than 8 hours.

Q: Must employers count holiday leave, vacation and sick leave hours taken during the workweek toward the overtime requirement?

A: No. The [Fair Labor Standards Act](#) (FLSA) requires employers to pay nonexempt employees time and one-half of the employees’ regular rate of pay for all hours worked over 40 in a workweek. Employers do not have to count paid holidays, paid time off (PTO), vacation, personal and sick leave hours taken by an employee toward the calculation of the overtime requirement, because these hours are not actually “worked” and are therefore not considered as hours counted toward overtime under the FLSA [\(29 C.F.R. §779.18\)](#).

Q: How do you calculate work time for travel time to and from a conference or work assignment out of town?

A: There are multiple factors to consider. However, the principles that apply in determining when travel time is included in work hours depend upon the kind of travel involved. Please refer to [FLSA hour worked advisor](#) and [Washington’s Administrative Policy ES.C.2](#) for more details.

We appreciate the advice of [Kelby Fletcher](#) and [Aviva Kamm](#) at [Stokes Lawrence](#) in the preparation of these responses.

All employers, for profit and not for profit, should have their employment practices audited for legal compliance, not only with applicable wage and hour requirements, but also with non-discrimination laws, among others. An audit would include review of employee handbooks, offer letters and other employment practices.