

# The Complete Compliance and Ethics Manual 2023

## Wage and Hour Compliance Under Federal and State Laws

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### Introduction

Compliance with wage and hour regulations is a complex undertaking due to overlapping, and often contradictory, federal and state regulations. It is also one of the most significant risk areas for companies, given the explosion of costly class action claims with sizeable settlements and verdicts in the past 15 years. Year after year, class action wage and hour lawsuits have outpaced other types of employment litigation, including discrimination claims, in the federal courts. In recent years, private settlements in wage and hour cases have exceeded, on average, \$637 million per year,<sup>[2]</sup> and the U.S. Department of Labor's Wage and Hour Division has collected, in fiscal year 2020, more than \$250 million in back wages from employers.<sup>[3]</sup> Indeed, over this time, a number of major companies have agreed to multimillion dollar settlements. In addition to the cost and disruption of defending and settling these cases, wage and hour claims are generally excluded from employment practices' insurance coverage. Along with the financial and other costs, significant reputational harm can also stem from a wage and hour class action lawsuits.

Given these risks, it is critical that employers accurately track hours worked by nonexempt employees and remain vigilant in ensuring that their payroll practices (including their classification of employees as exempt or nonexempt) comply with the federal, state, and other applicable laws and regulations.

These materials cover the basic landscape of wage and hour compliance, including the federal Fair Labor Standards Act (FLSA) and its provisions related to minimum wages and other benefits, overtime, hours worked, meal and rest periods, child labor, record keeping, and equal pay. In addition, these materials address exemptions from overtime under the FLSA. Finally, these materials address the classification of independent contractors and the importance of that issue under the FLSA.<sup>[4]</sup>

### Federal Fair Labor Standards Act and State Laws Overview

The FLSA is administered by the U.S. Department of Labor's Wage and Hour Division. The FLSA sets the basic federal minimum wage, overtime pay, child labor, and record-keeping requirements for covered employers and workers.

Covered workers are generally those engaged in or producing goods for interstate commerce, using the instrumentalities of interstate commerce (phone, wire, etc.) and the vast majority of employees of federal, state, and local governments. The FLSA also generally applies to employers with at least two employees and an annual dollar volume of sales or business of at least \$500,000, as well as government contractors and subcontractors. Certain exemptions apply to specific types of businesses or specific types of work.

In addition to the FLSA, various states have their own laws related to minimum wages, overtime pay, hours worked, child labor, and record keeping. These state laws have their own sets of associated civil and criminal penalties. For example, California's wage and hour laws are generally found in the wage orders of the California Industrial Welfare Commission. If the FLSA and state laws conflict, the law that is more favorable to the

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employee applies.

## Minimum Wage and Other Benefits

Workers covered by the FLSA are entitled to a minimum wage of no less than \$7.25 per hour (effective July 24, 2009).<sup>[5]</sup> Proposed legislation in 2021 would have raised the federal minimum wage to \$15.00 per hour, but as of this writing, no such federal legislation has been enacted.

Most states, as well as the District of Columbia, also have minimum wage laws, which may differ from federal requirements. As of this writing, seven states had no state minimum wage or a rate lower than the federal rate (in which case the federal minimum wage applies); 14 states mirrored the federal minimum; and the rest imposed rates higher than the federal rate.<sup>[6]</sup> The District of Columbia has the highest minimum wage at \$15.20 per hour, though the minimum wage in some cities is higher. For example, in San Francisco, California, the minimum wage increased from \$16.07 per hour to \$16.32 per hour on July 1, 2021.<sup>[7]</sup> Many states have passed legislation that will increase the minimum wage in coming years, some in phases, and many municipalities have done the same. Some of these laws differentiate between regions or industries. For example, New York's minimum wage rose to \$15.00 per hour in New York City at the end of 2018 (for large employers) and at the end of 2019 (for small employers)—and will increase from \$14.00 to \$15.00 per hour for all employers in Westchester, Nassau, and Suffolk counties at the end of 2021. In the rest of New York State, the minimum wage increased from \$11.80 to \$12.50 per hour at the end of 2020 and will continue to increase at a rate pegged to economic indices at the end of each year until it reaches \$15.00 per hour. In general, where an employee is covered by federal, state, and/or local minimum wage laws, and the minimums are different, the employee is entitled to the highest minimum wage among the applicable laws.

The FLSA does not require employers to offer severance pay, sick leave, vacations, holidays, or other benefits, such as tuition assistance or life or accident insurance. That said, many states and local ordinances mandate some or all of these benefits for workers covered under their laws.

## Overtime

Employees covered by the FLSA are entitled to an overtime premium for all time worked above 40 hours in a workweek, at a rate of at least one and one-half times the employee's regular rate of pay. The FLSA does not require an overtime premium for work on Saturdays, Sundays, or holidays unless the hours worked on those days exceed 40 in a workweek. Extra pay or shift premiums for working nights or weekends are a matter of agreement between the employer and the employee (or applicable state or local law), but if paid, must be factored into the regular rate for purposes of calculating the overtime premium. An employer who requires or permits an employee to work overtime is generally required to pay an overtime premium for such work, even if the employer did not request the work.

The majority of states have overtime pay requirements that match or exceed those imposed by federal law, and many states have special requirements. General information on specific state requirements can be found on the website of each state's department of labor or equivalent agency. For example, California requires employers to pay overtime at one and one-half times the regular rate of pay for all working time exceeding eight hours in any day, and at two times the regular rate of pay for all working time exceeding 12 hours in any day or eight hours on the seventh consecutive day of work in a workweek.<sup>[8]</sup> Many class action lawsuits involve allegations that an employer misclassified employees as exempt from the overtime laws and therefore failed to pay the requisite overtime.

Under the FLSA, employers who are found to have willfully violated the overtime pay requirements are subject to

civil penalties for each such violation. Similarly, state laws have various fines and penalties for failure to pay required overtime wages. In private lawsuits under the FLSA and under the laws of many states, employees can recover double the amount of unpaid overtime wages, half of which is recoverable as liquidated damages for the violation.

## **Hours Worked**

Employees in overtime-eligible positions are entitled to be paid not only for the time they spend engaged in productive work for their employer, but also for certain other time throughout the day. (See below for discussion of travel/commute time, waiting time, and on-call time.) It is therefore crucial for employers to understand exactly which hours in a workweek are compensable, as the answer is not always intuitive. The FLSA does not have any limit on the number of hours in a day or week worked, as long as overtime is paid for hours worked in excess of 40 in a workweek.

## **Travel/Commute Time**

Generally, time spent in the normal “home to work” or “work to home” commute is not compensable under the FLSA. However, time spent in certain travel activities—such as travel during working hours—is considered work time for which employees must be paid. For example, time spent traveling to pick up supplies or equipment in the middle of a workday is considered compensable travel time or hours worked. Employers with overtime-eligible employees who travel as part of their jobs must be familiar with the variety of rules regarding the compensability of travel time.

## **Waiting Time**

In certain circumstances, the time an employee spends waiting to work, such as waiting for customers or phone calls, supplies or equipment, or instructions may be compensable under the FLSA and/or state laws. This determination generally turns on whether the employee has been “engaged to wait” by the employer or is “waiting to be engaged” by the employer. If the employee has been engaged to wait—for example, if the employer asked the employee to remain available for an assignment or the arrival of customers—the employee is considered on duty, and thus the time spent waiting is compensable as hours worked. In these circumstances, the period during which the employee is not actively working and waiting is unpredictable and usually of short duration and, in any event, the employee cannot use the time effectively for their own purposes. The employee’s time belongs to and is controlled by the employer and therefore must be treated as hours worked. By contrast, if the employee is waiting to be engaged, the employee is off duty, and time spent waiting is not compensable as hours worked under the FLSA. These periods generally include complete relief of duties for periods long enough that the employee can use the time effectively for their own purposes, and the employee is typically advised as to when they will need to return to work.

## **On-Call Time**

An employee who is required to remain on their employer’s premises or so close thereto that they cannot use the time effectively for their own purposes is working on call. Not all on-call time is compensable as hours worked; the determination is highly fact specific. Generally, employees who are required to remain on the employer’s premises or so close thereto that they cannot use the time effectively for their own personal purposes are considered working while on call and must be compensated for the time. By contrast, an employee who is allowed to leave the employer’s premises, but who is required to stay within a certain distance of the location and be available by phone, generally is not considered to be working while on call. All circumstances must be taken into

consideration before determining the compensability of such on-call time.

## Meal and Rest Periods

The FLSA does not require that employers provide meal periods or breaks. When an employer offers short breaks, typically five to 20 minutes, the FLSA treats those breaks as compensable time that should be included in calculating an employee's work hours. Under the FLSA, bona fide meal periods, typically lasting at least 30 minutes, are not compensable and need not be included in calculating an employee's work hours. Many states have specific requirements for hours worked and break or meal periods that differ from the FLSA.

As of January 1, 2021, 21 states imposed minimum length requirements for meal periods for adult employees, while 33 states maintained minimum length requirements for minor employees.<sup>[9]</sup> Some states—such as Vermont, which requires that employers provide “‘reasonable opportunities’ during work periods to eat and use toilet facilities”—have simple meal and rest-period requirements. Other states, such as California, maintain detailed requirements that generally obligate an employer to provide nonexempt employees with the opportunity to take a 30-minute, uninterrupted, duty-free meal break during each five-hour work period, unless the total work period for the day does not exceed six hours and there is mutual employer/employee consent to waive meal period. The employer must provide an opportunity for a second uninterrupted, duty-free meal break of at least 30 minutes for 10 hours of work, which can be waived by mutual agreement so long as the first meal period is not waived. Employees cannot waive a second meal period when working more than 12 hours in a day. California also has a detailed rest-period law entitling covered employees to take at least 10 minutes of paid break for every four hours of work or major fraction thereof, although some specialized industries, such as the motion picture industry, have special meal and rest break requirements. For work in states with no meal or break period requirements, such benefits are a matter of agreement between the employer and employee.

California and other states with meal and rest period requirements have seen a spike in class action wage and hour cases related to such matters in the last 15 years. Indeed, the California Supreme Court's 2012 decision in the matter of *Brinker v. Superior Court*<sup>[10]</sup> clarified an employer's duty to provide meal and rest breaks and has only increased the rate at which wage and hour cases are filed in California.

## Strategies to Effectively Implement Meal & Rest Periods for Qualified Employees

Strategies may include:

- Adopting clear written policies,
- Explaining meal break requirements to employees and managers,
- Training managers not to discourage or interfere with breaks,
- Disciplining employees and managers who violate the policy,
- Requiring that employees record meal and rest breaks,
- Monitoring and validating any technology used to record meal and rest breaks,
- Having employees certify break availability and any waivers or failure to take breaks, and
- Conducting annual audits of meal and rest periods and any technology used to capture such information.

## Nursing Mother Breaks

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The Patient Protection and Affordable Care Act of 2010 amended the FLSA to provide a break time requirement for nursing mothers. Specifically, it provides that covered employers are required to provide reasonable break time for an employee in a nonexempt role to pump breast milk for their nursing child for one year after the child's birth. Employers are also required to provide an appropriate place, other than a bathroom, which may be used by an employee to express breast milk. Employers are not required under the FLSA to pay for these breaks unless the employee is using what would be an otherwise compensated break for this purpose. That said, during these breaks, the employee must be completely relieved from their job duties or else the time must be paid.

Certain state laws may give greater protections to nursing mothers (e.g., compensated break time, break time for nursing mothers beyond one year from the child's birth, or break time for employees in exempt roles).

## **Child Labor**

The FLSA includes child labor provisions designed to protect the educational opportunities of minors and prohibit their employment in jobs and under conditions that may be detrimental to their health or well-being. Violations of these requirements are subject to civil money penalties for each employee who was the subject of a violation. But while there are specific limitations on the hours and the conditions under which persons under 16 years old may be employed, there are no federal limits on the number of hours employees 16 years or older may work in any workweek.<sup>[11]</sup>

Child labor is one area in which every state has its own laws. Many apply to persons under 16 or 18 years of age. Most state laws address the hours and types of work allowed for children, and many have restrictions for work on school days or during the school year. For specific information, contact a state's department of labor or equivalent agency.

## **Record Keeping**

Employers covered by the FLSA must display an official poster outlining the requirements of the FLSA and an employee's rights under it (which can be obtained from various vendors or on the Department of Labor's website).<sup>[12]</sup> In addition, employers covered by the FLSA must also keep employee time and pay records.

The FLSA requires employers to keep records on wages, hours, and other items, as specified in Department of Labor record-keeping regulations. Most of the information is of the kind generally maintained by employers in ordinary business practice and in compliance with other laws and regulations. The records do not have to be kept in any particular form and time clocks need not be used.

With respect to an employee subject to the minimum wage provisions or both the minimum wage and overtime pay provisions, the records that must be kept generally include:<sup>[13]</sup>

- Personal information, including employee's name, home address, occupation, sex, and birth date if under 19 years of age;
  - Hour and day when workweek begins;
  - Total hours worked each workday and each workweek;
  - Total daily or weekly straight-time earnings;
  - Basis on which the employee is paid;
  - Regular hourly pay rate for any week when overtime is worked;
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- Total overtime pay for the workweek;
- Deductions from or additions to wages;
- Total wages paid each pay period; and
- Date of payment and pay period covered.

In addition, states may maintain their own record-keeping requirements.

## **Equal Pay Provisions of the FLSA**

The equal pay provisions of the FLSA prohibit sex-based wage differentials between people employed in the same establishment who perform jobs that require equal skill, effort, and responsibility and which are performed under similar working conditions. These provisions, as well as other statutes prohibiting discrimination in employment, are enforced by the U.S. Equal Employment Opportunity Commission. Many state and local laws also contain similar or additional requirements for equal pay.

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