Fair Labor Standards Act and Pay Administration [printable version]

Lesson Content
FLSA Categories and Exemptions

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FLSA Categories and Exemptions

Categories

For the purpose of determining entitlement to premium pay for overtime work, employees fall into two broad categories:

- **Exempt employees**—those employees who are not covered by the FLSA. For these employees, entitlements are determined based on Title 5 of the United States Code (USC) and the corresponding rules in 5 Code of Federal Regulations (CFR) Part 550, Subpart A, Premium Pay.

- **Nonexempt employees**—those employees who are covered by the FLSA. For these employees, the primary rules for determining overtime entitlements are in 5 CFR Part 551, Pay Administration, under the FLSA. The rules in 5 CFR Part 550 also are applicable to nonexempt employees when crediting hours of work over 8 in a day. This will be explained later in this module in the section "Travel for Nonexempt Employees."

Exemption decisions

5 CFR Part 551 establishes the criteria by which the FLSA exemption status of Federal positions/employees is determined. DHRC applies the criteria and determines the FLSA status when a position is classified.

- A basic principle is that every position/employee is nonexempt unless the exemption criteria are clearly met. In other words, the default status is nonexempt, i.e., covered by the FLSA, and the burden is on the employing agency to demonstrate that exempt positions meet the criteria.

- If there is a reasonable doubt as to whether a position meets the criteria, the position must be designated nonexempt.

- Decisions are ultimately based on duties performed. Therefore, even if the content of a position description supports exemption, the position description becomes immaterial if the work assigned and performed by the employee does not meet the criteria. Attention to position description accuracy for exempt employees is essential to ensure the correct FLSA status.

- The FLSA status of the position/employee is recorded in Block 7 of the Optional Form (OF) 8, Position Description, attached to a position description, and in Block 35 of the Standard Form (SF) 50, Notification of Personnel Action. Supervisors may also obtain a listing of exempt/nonexempt employees in their organization by contacting their DHRC.

Exemption categories

The exemption criteria in 5 CFR Part 551 define three categories of exempt positions:

1. Executive—This category includes most supervisory positions but may exclude supervisors at the General Schedule (GS)–5 and 6 levels, and some Federal Wage System (FWS) supervisors.

2. Professional—This category includes positions at the GS–11 level and above in professional occupations such as engineering , accounting, and auditing.

3. Administrative—This category covers a wide variety of positions at the GS–11 level and above. In DLA, administrative positions most typically are involved in management or general business functions such as budget analysis and supply management.

Note: As a general rule, positions located in overseas areas are exempt.

FLSA Categories and Exemptions

Patterns in DLA

In applying the criteria discussed above to DLA positions, some broad patterns have developed:

- Exempt employees/positions:
  - Supervisors at any grade
  - Professional or administrative occupations at the GS-11 level and above, such as Budget Analysis (0560), Safety and Occupational Health (0018), Environmental Protection (0028), Financial Administration and Management (0501).

- Nonexempt employees/positions:
  - Nonsupervisory positions at GS–10 and below—This group of nonexempt positions covers both professional and administrative positions at the GS–10 level and below, e.g., a GS–830–9, Mechanical Engineer.
  - Some positions at the GS–11 level—e.g., GS-11 positions with various titles in the 1102 series, GS-1910, Quality Assurance Specialist, GS–1670–11, Equipment Specialist and GS–2032–11, Packaging Specialist. In large part, these jobs are nonexempt because they do not match or closely resemble one of the examples of management or general business functions outlined in the regulations.

Role of the supervisor

As previously noted, DHRC makes FLSA exemption determinations. The information above on FLSA exemption criteria is intended to provide you with a general understanding of how those determinations are made. Your role as a supervisor is to be aware of the FLSA status of your employees and to understand and apply the overtime, compensatory time, and travel requirements accordingly. The information presented in the next several segments of this module is intended to provide you with a basic understanding of these requirements.

Creditable Travel Time

Introduction

As a result of the Federal Workforce Flexibility Act of 2004, Public Law 108-411, a separate form of compensatory time for time spent in official travel status was implemented effective January 28, 2005, and final regulations were issued effective May 17, 2005. In addition, effective April 27, 2008, prevailing rate (wage) employees are covered under the compensatory time off for travel provision. As such, in accordance with 5 CFR 550, subpart N, an agency must credit an employee with compensatory time off in travel status if

1. the employee is required to travel away from the official duty station, and

2. the travel time is not otherwise compensable hours of work under another legal authority.

Travel between home and a temporary duty station

The following table describes travel between home and a temporary duty station:

If an employee is . . .	Then . . .
required to travel directly between his or her home and a temporary duty station outside the limits of the employee's	the travel time is creditable as time in travel status, if otherwise qualifying under this training module. However, the agency must deduct from such travel

official duty station	hours the time the employee would have spent in normal home-to-work or work-to-home commuting.
authorized one mode of transportation and uses an alternative mode of transportation or travels at a time or by a route other than that authorized by his or her agency	the approving official of compensatory time off must determine the estimated amount of time in travel status the employee would have had if the employee had used the mode of transportation authorized by the agency or traveled at the time or by the route authorized by the agency. In determining time in travel status, the agency must credit the employee with the lesser of the estimated time in travel status or the actual time in travel status.

Travel between home and a temporary duty station, continued

If an employee is . . .	Then . . .
on a multiple-day travel assignment and chooses, for personal reasons, not to use temporary lodgings at the temporary duty station but to return home at night or on a weekend	only the travel from home to the temporary duty station on the first day and travel from the temporary duty station to home on the last day (that is otherwise qualifying as time in travel status) is mandatorily creditable (subject to the deduction of normal commuting

	time). Travel to and from home on other days is not creditable travel time unless the agency, at its discretion, determines that credit should be given based on the net savings to the Government from reduced lodging costs, taking into consideration the value of lost labor time attributable to compensatory time off.

Creditable Travel Time

Time spent traveling to or from a transportation terminal as part of travel away from the official duty station

The following table describes travel to or from a transportation terminal as part of travel away from the official duty station:

If . . .	Then . . .
an employee is required to travel between home and a transportation terminal (e.g., airport or train station) within the	the travel time outside regular working hours to or from the terminal is considered to be equivalent to commuting time and is not creditable

limits of his or her official duty station as part of travel away from that duty station	time in travel status.
the transportation terminal is outside the limits of the employee's official duty station	the travel time to or from the terminal outside regular working hours is creditable as time in travel status, but is subject to an offset for the time the employee would have spent in normal home-to-work or work-to-home commuting.
the employee travels between a work site and a transportation terminal	the travel time outside regular working hours is creditable as time in travel status, and no commuting time offset applies.
the employee's travel involves two or more time zones	the time zone from the point of first departure must be used to determine how many hours the employee actually spent in travel status.

Noncreditable Travel Time

Introduction

This section identifies periods of time spent in travel status which are not creditable under the Compensatory Time Off for Travel regulations.

Time spent in travel status which is compensable under another statute or regulation

Compensatory time off for travel may only be earned for time in a travel status when such time is not otherwise compensable. Compensable refers to periods of time creditable as hours of work for the purpose of determining a specific pay entitlement. The following are other statutes or regulations under which travel time is compensable:

- Nonexempt (under FLSA) employees traveling away from the official duty station on **non-workdays** during hours that correspond to the employee's regular working hours would not be entitled to compensatory time (under this authority) for those hours. However, if the travel carried over into hours not corresponding with regular working hours, compensatory time off for travel time could be granted under this authority for these hours. In this situation, an employee would be entitled to receive compensation (overtime) for some hours and compensatory time off for others.

- Exempt (under FLSA) employees traveling and meeting one of the following four criteria in 5 CFR 550.112(g)(2) would be in a pay status and not be eligible for compensatory time off. For all other travel, these staff would more than likely be eligible to receive compensatory time off.

  1. The travel involves the actual performance of work while traveling. One example is an employee traveling as a passenger on an aircraft, who has been directed to perform work (e.g., preparing a report) while en route. Although the work performed would normally be done in an office setting, the fact that management has directed that the work be completed while the employee is traveling meets this condition.

  2. The travel is incidental to travel that involves the performance of work while traveling. This is applicable to work that can only be performed while traveling and, therefore, excludes work that is performed simply as a result of management direction. An example is when the employee travels to a destination to board a boat upon which he will perform work while traveling. The travel to the boat would constitute hours of work. This type of situation would be rare in DLA.

  3. The travel is carried out under arduous and unusual conditions that the travel is inseparable from work. An example is traveling over unusually adverse terrain by foot or on horseback. This type of situation would be rare in DLA.

  4. The travel results from an administratively uncontrollable event. Based on precedent-setting Comptroller General decisions, the following general principles hold in applying this condition:

     - A training course conducted by a private entity that includes both Federal and non-Federal participants is not solely for the benefit of the Government and, therefore, outside the administrative control of Federal agencies. Travel to such a course would be credited as resulting from an administratively uncontrollable event.

- On the other hand, a course that is provided by a Federal training center (whether it is DLA, Department of Defense (DOD), or another Federal agency) is clearly within Federal control and cannot be credited as administratively uncontrollable. Similarly, if a training course is provided by a private vendor exclusively for the benefit of Federal agencies, scheduling of the course would be within Federal control, i.e., not administratively uncontrollable.

Note: Compensatory time off for travel time cannot be used to substitute for otherwise compensable travel time which is not received due to the biweekly pay cap.

Noncreditable Travel Time

Time spent at a temporary duty station between arrival and departure

Time spent at a temporary duty station between arrival and departure is not time in travel status. Time in travel status ends when the employee arrives at the temporary duty worksite or his or her lodging in the temporary duty station, wherever the employee arrives first. Time in travel status resumes when an employee departs from the temporary duty worksite or his or her lodging in the temporary duty station, from whichever the employee departs last.

Extended waiting time

If an employee experiences an extended (i.e., not usual) waiting time between actual periods of travel during which the employee is free to rest, sleep, or otherwise use the time for his or her own purposes, the extended waiting time is not creditable as time in travel status. However, an extended waiting period which occurs during an employee's regular working hours is compensable as part of the employee's regularly administrative workweek.

Exempt Employees—Overtime Provisions

Provisions

Overtime entitlements for exempt employees are governed by 5 CFR Part 550. Key provisions include:

- Overtime is payable for hours of work that exceed 8 in a day or 40 in a week. Paid leave (annual, sick, etc.) counts toward both of the thresholds, but time in a nonpay status (e.g., leave without pay) does not.
- The 8-hour threshold applies regardless of whether the employee fulfills 40 hours for the week. For example, if an employee works 10 hours on Monday, 8 hours on Tuesday through Thursday, then works 4 hours on Friday and takes 4 hours of leave without pay, the employee would still be entitled to overtime pay for the extra 2 hours on Monday.
- If an employee is on a compressed schedule, the threshold for paying overtime is the number of hours scheduled for the day, i.e., if the employee is scheduled for 9 hours, only hours in excess of 9 are payable as overtime.
- Employees on flexible schedules (e.g., Maxi-Flex) that permit earning credit hours cannot receive overtime pay for those hours.

- The overtime rate for exempt employees is 1.5 times their basic pay (including locality pay). This rate is capped at 1.5 times the GS–10, Step 1 rate. For example, if a GS–8 employee in step 8, 9, or 10 exceeds the GS–10, Step 1 rate, the employee will receive only 1.5 times the GS–10, Step 1 rate.

- For some employees at higher grade levels, the effect of the cap is that the overtime rate is less than the employee's basic rate. This occurs at GS–12, steps 6 and above, and all steps for GS–13 and above.

- For exempt employees, only work that is officially ordered or approved is recorded as overtime. In accordance with DLA Regulation 1422.2, Civilian Personnel Overtime and Holiday Premium Pay, overtime must be scheduled in writing and in advance, to the maximum extent possible. This requirement for official approval of overtime is of major significance to employee claims for back pay based on an assertion that the employee has worked overtime without proper compensation. For the claim to be accepted, the employee must demonstrate that management either ordered or approved the hours worked.

  Note: As will be addressed later in this module, this is a significantly different standard from that which applies to FLSA nonexempt employees.

Exempt Employees—Compensatory Time Off

Policy

When employees work irregular or occasional overtime, compensatory time off may be granted instead of overtime pay. Compensatory time is merely an alternate form of compensation for the overtime. It is important to note that the provision for compensatory time only applies to irregular or occasional overtime work, i.e., work that is not scheduled in advance of the workweek. In other words, if work is scheduled in advance of the workweek, it cannot be recorded as compensatory time. For example, if the supervisor directs an employee on Friday to work 2 additional hours on the following Thursday, such work must be paid as overtime. On the other hand, if the supervisor directs the employee on Tuesday to work 2 additional hours on Thursday, the work may be recorded as compensatory time.

For exempt employees whose basic pay is less than GS–10 Step 10, compensatory time may be granted instead of overtime payment only at the employee's request. In other words, if a GS–7 Step 1 exempt supervisor does not request compensatory time, the employee will receive overtime pay.

For exempt employees whose basic pay exceeds GS–10 Step 10, management has the authority to unilaterally authorize compensatory time instead of overtime pay, if it is irregular or occasional overtime not scheduled in advance of the workweek.

Use of compensatory time

DLA policy requires that compensatory time earned since January 1997 must be used within 26 pay periods. At the end of 26 pay periods, unused compensatory time is paid out as overtime at the rate in effect at the time the compensatory time was earned.

Before January 1997, DLA policy permitted the unlimited accrual of compensatory time. Compensatory time earned before January 1997 is "grandfathered." This means that it is credited to the employee until it is used or until the employee separates from DLA, at which time it is paid.

Exempt Employees—Travel

Policy

Time spent traveling by an exempt employee outside the tour of duty may be credited as hours of work and, therefore, compensated under the overtime/compensatory time rules outlined in the previous section only if it meets one of the following four conditions:

1. The travel involves the actual performance of work while traveling. One example is an employee traveling as a passenger on an aircraft, who has been directed to perform work (e.g., preparing a report) while en route. Although the work performed would normally be done in an office setting, the fact that management has directed that the work be completed while the employee is traveling meets this condition.

2. The travel is incidental to travel that involves the performance of work while traveling. This is applicable to work that can only be performed while traveling and, therefore, excludes work that is performed simply as a result of management direction. An example is when the employee travels to a destination to board a boat upon which he will perform work while traveling. The travel to the boat would constitute hours of work. This type of situation would be rare in DLA.

3. The travel is carried out under arduous and unusual conditions. An example is traveling over unusually adverse terrain by foot or on horseback.

4. The travel results from an administratively uncontrollable event. Based on precedent-setting Comptroller General decisions, the following general principles hold in applying this condition:

   - A training course conducted by a private entity that includes both Federal and non-Federal participants is not solely for the benefit of the Government and, therefore, outside the administrative control of Federal agencies. Travel to such a course would be credited as resulting from an administratively uncontrollable event.

   - On the other hand, a course that is provided by a Federal training center (whether it is DLA, DOD, or another Federal agency) is clearly within Federal control and cannot be credited as administratively uncontrollable.

   - Similarly, if a training course is provided by a private vendor exclusively for the benefit of Federal agencies, scheduling of the course would be within Federal control, i.e., not administratively uncontrollable.

Nonexempt Employees—Compensatory Time Off

Policy

Similar to exempt employees, nonexempt employees may be granted compensatory time for irregular or occasional overtime work. However, for all nonexempt employees, compensatory time can be granted only upon the employee's request. There is no authority for management to unilaterally direct compensatory time in lieu of payment for overtime. The policy on use of compensatory time, the grandfathering of time earned before January 1997, and the payout provisions are the same for nonexempt as for exempt employees.

Nonexempt Employees—Travel

Policy

The rules for determining whether travel time is considered as hours of work for nonexempt employees are found primarily in 5 CFR Part 551. These rules state that travel is hours of work if the employee:

- Drives a vehicle or performs other work while traveling.
- Travels as a passenger on a 1-day assignment (i.e., travels out and back the same day), away from the official duty station.

  Note: Travel within the local area that is considered within the confines of the official duty station is not covered.
- Travels on a non-workday during hours that corresponds to his or her regular working hours.

As an example, an employee has a regular tour of 8:00 a.m. to 4:30 p.m., Monday through Friday. If the employee travels during those hours on Saturday or Sunday, the time would be credited as hours of work.

If an employee is on a flexible (not compressed) schedule, the regular hours are determined based on the employee's predominant arrival time. If that time is extremely variable, the arrival times for the previous 2 weeks can be averaged.

For a 1-day assignment that involves travel, the normal home-to-work and work-to-home commuting times are deducted from the time spent traveling. This applies when the employee travels directly from his or her residence to the alternate duty site for the day.

Travel outside the regular tour of duty that meets one of the four conditions in 5 CFR 550, as previously discussed in this module in “Travel for Exempt Employees,” is also creditable as hours of work. For review, the four conditions are that the travel

- involves the performance of work while traveling
- is incident to travel that involves the performance of work while traveling
- is carried out under arduous and unusual conditions, or
- results from an administratively uncontrollable event.

Employee Claims

Introduction

Employees have different avenues for filing back pay claims for overtime compensation, depending on whether or not they are represented by a bargaining unit. If you are unsure whether an employee is in a bargaining unit or not, please contact DHRC. Keep in mind that the payment of dues is irrelevant in determining which employees are members of a bargaining unit.

Employees not represented by a bargaining unit

Employees who are not represented by a bargaining unit may file with either DLA or the Office of Personnel Management (OPM), but not both simultaneously. For a claim filed with DLA, the employee should contact his or her Employee Relations Specialist to find out the procedures for filing a grievance outlined in DLAI Administrative Grievance System. After following the grievance procedures, an employee may pursue the claim with OPM. An OPM decision is the final administrative determination on a claim. Employees may also file directly with OPM, without benefit of an Agency decision.

Employees represented by a bargaining unit

For bargaining unit employees, the exclusive avenue for filing a claim is through the negotiated grievance procedure (unless FLSA matters are specifically excluded from coverage). If a grievance is unresolved, it can be taken before an arbitrator. Arbitration can only be invoked by the union local that represents the bargaining unit. If dissatisfied with the response to the grievance, the affected employee cannot invoke arbitration without the union local's concurrence. For bargaining unit employees, the negotiated grievance procedure is exclusive. OPM will not process a claim from a bargaining unit member unless the procedure specifically excludes FLSA matters.

Supervisory Responsibilities

Introduction

As a supervisor, you have a number of important responsibilities related to employee work schedules and overtime entitlements. These responsibilities are relevant to both exempt and nonexempt employees. If work schedules are not closely observed, the "suffered or permitted work" concept applicable to nonexempt employees may increase the potential for supportable back pay claims. However, management must ensure that all employees, regardless of exemption category, work in accordance with their official tours of duty.

Directing travel

In directing travel by employees, the Governmentwide policy found in 5 CFR 610.123 should be observed: Insofar as practicable, travel during nonduty hours should not be required of an employee. The Master Agreement between DLA and the DLA Council of AFGE locals (Article 28, section 3) reiterates this policy: To the maximum extent possible, travel should be scheduled so that employees perform travel during regularly scheduled work hours.

Scheduling meetings and work activities

Consistent with this policy, meetings and work activities that require employee travel should be scheduled so that employees travel during duty hours. Instead of scheduling a meeting to begin at 8:00 a.m. on Monday morning, the meeting should be scheduled at a later hour to permit an employee to travel to the site during duty hours.

Adjusting an employee's tour of duty

Another alternative might be to adjust the employee's tour of duty to correspond to the travel requirement. For example, if an employee needs to begin travel at 7:00 a.m. in order to be at an alternate worksite for a meeting scheduled to begin at 8:00 a.m., the tour for the day could be adjusted so that it begins before 8:00 a.m. In making the adjustment, the amount of time the employee spends in normal home-to-work commuting should be excluded. If the normal commute is 30 minutes, the tour in this case would be adjusted to 7:30 a.m. rather than 7:00 a.m.

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