



IS YOUR ASSOCIATION COMPLIANT WITH THE FLSA?

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The Fair Labor Standards Act (the “FLSA”) applies to almost all employers, including associations. Among other things, the FLSA establishes minimum wage, overtime pay, and recordkeeping requirements for the private and public sector. The Wage and Hour Division of the U.S. Department of Labor (the “DOL”) administers and enforces the FLSA with respect to private employment. While higher paid executives-type employees are usually exempt from FLSA requirements, you may find that your lower level administrative employees such as an “assistant membership director” or “meeting coordinator” are covered under the FLSA, even though they are salaried employees. Although these employees typically earn much more than the minimum wage, they often are entitled to overtime pay.

Recently, we have spoken to several associations that have assumed that all of their employees are exempt from the FLSA because: (i) these employees were paid a salary; or (ii) these employees had some managerial duties. This assumption is simply not true, and could get the association into trouble with the DOL.

If an organization fails to comply with the FLSA, it can be subject to significant penalties. The DOL can force an organization to pay back pay, liquidated damages, attorneys’ fees and costs as well as other fines. Therefore, it is very important for an association to understand the FLSA, and ensure that its employees are properly classified under this law.

This article discusses: (i) how to determine which employees are exempt or non-exempt under the FLSA; and (ii) what procedures need to be followed for all non-exempt employees.

A. COMMON ASSOCIATION EXEMPTIONS FROM THE FLSA

Not all employees are covered under the FLSA. Executive, administrative and highly compensated employees¹ are exempt from the FLSA’s minimum wage and overtime pay requirements. In order to help determine which employees fall under these exemptions, descriptions of each of these exemptions are set forth below.

1. The Executive Exemption.

¹ There are other exemptions to the FLSA requirements, but the exemptions set forth above are the most common for associations.

An exempt executive is defined as an employee who:

- (i) Receives a salary of at least \$455.00 per week;
- (ii) Has the primary duty of managing the company in which the employee is employed or of a department thereof;
- (iii) regularly directs the work of two or more other employees; and
- (iv) has the authority to hire and fire other employees.²

2. The Administrative Exemption.

An exempt administrative employee is one:

- (i) Who receives a salary of at least \$455.00 per week;
- (ii) Whose primary duty is 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
- (iii) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.³

The most difficult part of this test has always been the requirement that the employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance (item 2(iii) above). The revised 2004 FLSA regulations attempt to clarify this requirement by setting forth a list of factors to be considered in making this determination. They include:

- (a) Whether the employee has authority to commit the employer in matters that have significant financial impact;
- (b) Whether the employee has authority to waive or deviate from established policies and procedures without prior approval; and
- (c) Whether the employee has authority to negotiate and bind the company on significant matters.

Pursuant to Section 541.202(c) of the FLSA Regulations, the exercise of discretion and independent judgement implies that "the employee has the authority to make an independent choice, free from immediate direction or supervision."

It is important to note that clerical work is not exempt under the administrative exemption. Therefore, regardless of title, an employee whose job duties include setting up conference calls, doing clerical work, answering phones, performing repetitive or routine work or providing assistance to a person of higher authority, is a non-exempt employee.

3. The Highly Compensated Employee.

² 29 C.F.R. § 541.100

³ 29 C.F.R. § 541.200

A highly compensated employee is one:

- (a) who has a total annual compensation of at least \$100,000;
- (b) whose base salary is at least \$455.00 per week; and
- (c) who regularly performs any one or more exempt duties or responsibilities of an executive or administrative employee.⁴

B. THE FLSA REQUIREMENTS FOR NON-EXEMPT EMPLOYEES.

Employees that are not covered under any FLSA exemption are referred to as “non-exempt” employees. In the event that an association employs non-exempt employees, certain procedures must be followed. Below is a summary of requirements regarding the treatment of non-exempt employees under the FLSA:

1. Minimum Wage. Non-exempt workers are entitled to a minimum wage of at least \$7.25 per hour. However, the FLSA does not require vacation or sick pay.
2. Overtime. Non-exempt workers must be paid overtime at a rate of not less than one and one-half times their regular rates of pay after 40 hours of work in a workweek.
3. Recordkeeping. The FLSA requires that employers keep records on wages, hours and other information. Such information includes the: (i) employee’s name, home address, occupation, and gender; (ii) hour and day when the workweek begins; (iii) total hours worked each workday and each workweek; (iv) total daily or weekly straight-time earnings; (v) regular hourly pay rate for any week when overtime is worked; (vi) total overtime pay for the workweek; (vii) deductions from or additions to wages; (viii) total wages paid each pay period; and (ix) date of payment and pay period covered.
4. Posting in Office. Finally, to comply with the FLSA, an employer must post a notice in a conspicuous place explaining the FLSA, including the current minimum wage rate and overtime requirements.

Let us look at typical problems for associations. Assume that you have an employee in your membership department whose job is reviewing membership applications, making sure that all the required information is on the application, contacting the applicant if further information is needed, sending the completed application to the membership chair for approval and then notifying the applicant when his/her application has been approved. The employee is a salaried employee earning \$35,000 per year. The employee would probably be entitled to overtime. Your association must keep track of the hours worked by the employee and pay overtime in any week where the employee works more hours than required. If your work week is a 40 hour week, the employee earns \$16.83 per hour and is entitled to overtime payments of \$25.25 for each hour of overtime worked.

⁴ 29 C.F.R. §601

Now assume that you are a DC based association and have a convention in San Diego. The employee in question is requested to attend the convention and perform certain job responsibilities. During a typical day, the employee attends the 6:30am staff meeting, sits at the registration desk, takes tickets at the membership luncheon, attends a meeting of the membership committee and then attends the membership dinner. All of those activities are assigned activities. The membership dinner is over at 11:00pm. That employee has worked from 6:30am to 11:00pm. The employee is entitled to overtime for the hours worked in excess of 8 hours. Furthermore, what about the day that the employee traveled to San Diego? The employee is entitled to base pay plus overtime for the travel time as well as time worked that day.

Ultimately, if you have questions regarding whether an employee is exempt or non-exempt under the FLSA, we recommend that you contact legal counsel. They can help you make proper employee classifications under the FLSA, and provide guidance if your association has not been complying with the FLSA.

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