

INFORMATION MEMO

Fair Labor Standards Act: An Overview

Describes the most common employee protections under this federal law requiring a minimum wage, and overtime compensation for extra hours worked under the Act. Understand city responsibilities for record keeping, child labor standards, how to define a workweek, and when you may offer compensatory time off in place of paid overtime.

RELEVANT LINKS:

29 U.S.C. § 201-219.
See LMC information memo *Fair Labor Standards Act: Determining Exempt vs. Non-Exempt Status*.

29 U.S.C. § 206(a)(1)(C).

Minn. Stat. § 177.24, subd. 1.
MN Dep't of Labor and Industry:
Minimum wage rate will be
adjusted for inflation as of Jan. 1,
2024.

Minn. Stat. § 177.23 subd. 7.

A guide to Minnesota's overtime
laws.
U.S. Dep't of Labor: Fact Sheet
#7: State and Local Governments
under the fair labor standards act
(FLSA).

29 U.S.C. § 207.

29 C.F.R. § 778.106.

29 C.F.R. § 570.

29 C.F.R. §§ 516.2 –9.

I. Coverage

All cities are covered by the Fair Labor Standards Act (FLSA). However, some employees are “exempt” from the overtime provisions of the Act.

II. Requirements

The FLSA requires cities to:

- Pay at least the federal minimum wage (currently \$7.25/hour) to all non-exempt employees for all hours worked. In situations where both the federal and the state FLSA address an issue, the employer is required to follow the law that is of greatest benefit to the employee. Effective January 1, 2024, Minnesota's minimum wage will increase to \$10.85 per hour for large employers (up \$.26/hour from \$10.59 per hour in 2023), and to at least \$8.853 per hour for small employers (up \$0.22/hour from \$8.63 per hour in 2023). The League generally advises cities with a total budget of \$500,000 or more to comply with the higher Minnesota minimum wage rate (i.e., as of January 1, 2024 paying the \$10.85 hour rate). Note that the definition of “employee” exempts certain types of city employees and that there is a separate minimum wage for small employers as defined by statute).
- Pay at least one-and-one-half times the employee's *regular rate of pay* for all *hours worked over 40 in the workweek* OR grant *compensatory time off* at the rate of one-and-one-half hours off for each hour worked over 40 in the workweek (words in italics are defined below). While the Minnesota FLSA requires all employers, regardless of gross annual revenue, to pay overtime for all hours worked in excess of 48 hours in a seven-day period, local government employers are also covered under the federal FLSA rules.

This material is provided as general information and is not a substitute for legal advice. Consult your attorney for advice concerning specific situations.

RELEVANT LINKS:

29 U.S.C. § 207 (j).

29 C.F.R. §§ 785.10 - .45.

Minn. R. 5200.0120 Subp. 1.

29 C.F.R. § 785.18.

Minn. Stat. § 177.254.

29 C.F.R. § 785.19.

Minn. Rules 5200.0060.

Minn. R. 5200.0120 Subp. 1.

Thus, because in many cases both federal and state FLSA laws will apply to local governments, then the stricter requirement (overtime for over 40 hours in a workweek) would need to be followed.

- Pay overtime wages on the regular payday for the pay period in which the wages were earned.
- Comply with the child labor standards.
- Comply with the record-keeping requirements.

Many cities pay overtime for hours worked over eight in one day; however, this is not a requirement of the FLSA (except for certain municipal hospitals and nursing homes). Some cities have this requirement in their personnel policies or union agreements. These should be honored unless and until they are changed.

III. Definition of “hours worked”

“Hours worked” includes all hours the employee actually performs duties that are for the benefit of the city, including:

- Rest periods or “breaks” of 20 minutes or less. Per the Minnesota FLSA, employers must permit employees who work eight or more consecutive hours sufficient time to eat a meal and adequate time to use the restroom. The meal period is unpaid only if the employee is completely relieved from duties. The Federal Labor Standards Act contains no provision requiring meal breaks. However, the federal regulations state if meal breaks are provided, they are unpaid only if an employee is completely relieved from duty. Ordinarily, provided the employee is off-duty, thirty minutes, is considered a sufficient unpaid meal break, but of course can be longer. Less than 20 minutes for a mealtime is generally considered not sufficient and must be paid.
- Meetings and training programs.
- Travel between work sites during the workday.
- Time spent performing duties after hours or on weekends due to emergencies (call backs).
- The Minnesota Department of Labor has defined “hours worked” to include, “training time, call time, cleaning time, waiting time, or any other time when the employee must be either on the premises of the employer or involved in the performance of duties in connection with his or her employment or must remain on the premises until work is prepared or available.”

RELEVANT LINKS:

29 C.F.R. § 782.12.

DOL Opinion Letter FLSA2018-1.
29 C.F.R. § 785.14.
Minn. R. 5200.0120, Subp. 2.

Minn. Stat. § 177.254.
Minn. Stat. § 177.253.

29 C.F.R. § 785.18.

Minn. Stat. § 181.939.

29 U.S.C. § 207(r).
DOL: FLSA Break Time for
Nursing Mothers Provision.
Minn. Stat. § 181.939.

- Any time performing duties outside of the normal shift, even if it is not “authorized.” (Although unauthorized hours must be compensated, nothing precludes an employer from taking disciplinary action for failure to follow a policy that requires prior approval before working overtime). This can include duties performed away from the primary job site (e.g., city hall), such as work performed at home.

All of the “hours worked” must be added together to determine if the employee exceeded 40 hours in one workweek. When computing “hours worked,” a city does not need to include time the employee was gone for vacation, sick leave, or holidays, even if the time off is paid time off. Although some cities have policies or union contracts requiring such hours to be included, it is not required under the FLSA.

There are also several examples of time that does not have to be included as “hours worked.”

- On-call hours where the employee wears a pager and is free to come and go as he or she chooses, or merely leaves a telephone number where he or she can be reached but is not required to wait by the phone. As a case in point, in the Department of Labor Opinion Letter linked to the left, the Department established on-call time was not considered “hours worked” for county ambulance service personnel since pager call-backs were relatively infrequent, the five-minute response time was not a significant hindrance to the employee’s personal time, and employees were not disciplined for failing to respond within five-minutes from the call to the ambulance garage.
- Meal periods of at least one-half hour where the employee is not performing any work.
- Breaks for Nursing Mothers - FLSA requires employers with 50 or more employees to allow nursing mothers reasonable unpaid break time to express milk for a nursing child age one year or younger. However, Minnesota’s nursing mother’s and lactating employee break law applies to any employer with one or more employees and does **not** limit any timeframe on the nursing mothers accommodations, thus a limit to the 12 months following the birth of the employee’s child is not permissible under MN law. In Minnesota the break time may run concurrently with any paid break time already provided to the employee., but the city may not reduce any employee’s compensation for time used for the purpose of expressing milk.

RELEVANT LINKS:

DOL: Wage and Hour Division,
Travel Time.

29 U.S.C. § 207 (e).

29 C.F.R. § 778.109.

29 C.F.R. § 778.103.
29 C.F.R. § 778.104.
Minn. R 5200.0130.

U.S. Dep't of Labor: Final Rule:
Regular Rate under the FLSA.
Federal Register: Regular rate
under the FLSA.

U.S. Dep't of Labor: Final Rule:
Regular Rate under the FLSA.

Further, the city must make reasonable efforts to provide a clean, private and secure room or other location, in close proximity to the work area, other than a bathroom or toilet stall, that is shielded from view and free from intrusion from coworkers and the public, with access to an electrical outlet.

- Ordinary home to work travel.

IV. Regular rate of pay

The regular rate of pay includes all compensation for employment, including base wages, longevity pay, on-call, or standby pay, educational incentive pay, and most other forms of pay. The regular rate is calculated as an hourly rate, regardless of whether employees are paid on an hourly basis or by another method. Further, the regular rate must generally be calculated workweek-by-workweek, and cities may not average hours over two or more weeks, even when employees are paid on a biweekly basis.

On December 12, 2019, the U.S. Department of Labor (DOL) announced a Final Rule effective January 15, 2020, defining what forms of payment employers must include and may exclude in the FLSA's "time and one-half" calculation when determining overtime rates.

The DOL addressed call back types of pay designed to compensate employees for unanticipated work after the employee's scheduled hours have ended. The Final Regs stated call back pays made "without prearrangement" are excludable from the regular rate of pay, whereas call back pays for anticipated work are included in the regular rate of pay calculation. Previously there was a restriction in §§ 778.221 and 778.222 that "call-back" pay and other similar payments must be "infrequent and sporadic" to be excludable from an employee's regular rate. In the Final Rule, the reference to "infrequent and sporadic" has been eliminated, but again, employers will want to determine whether there was a prearrangement or anticipated need for work. Only those call back pays without prearrangement are excludable from the regular rate of pay.

The Final Regulations also clarify employers may exclude the following payments when calculating an employee's regular rate of pay:

- Costs of providing certain parking benefits, wellness programs, onsite specialist treatment, gym access and fitness classes, employee discounts on retail goods and services, certain tuition benefits (whether paid to an employee, an education provider, or a student-loan program), and adoption assistance.

RELEVANT LINKS:

FOH 32d03e(b).
29 C.F.R. § 778.219(a).

29 C.F.R. § 778.211.

LMC Information Memo: *Public Purpose Expenditures*.

- Payments for unused paid leave, including paid sick leave or paid time off.
- Certain penalties employers must pay under state and local scheduling laws (not currently common in Minnesota).
- Business expense reimbursement for items such as cellphone plans, credentialing exam fees, organization membership dues, and travel expenses that don't exceed the maximum travel reimbursement under the Federal Travel Regulation system or the optional IRS substantiation amounts for certain travel expenses.
- Certain bonuses/sign on incentives and longevity incentive payments. Per the regulations, in order for a bonus to qualify for exclusion as a discretionary bonus under section 7(e)(3)(a) the employer must retain discretion both as to the fact of payment and as to the amount until a time quite close to the end of the period for which the bonus is paid. The sum, if any, to be paid as a bonus is determined by the employer without prior promise or agreement. Cities will want to consult with their legal counsel on the nuances of any hiring or retention incentives offered since the MN State Auditor has previously released guidance requiring the programs to be in writing with clear objectives prior to a recognition program or incentive be awarded.
- Complimentary office coffee and snacks; and
- Contributions to benefit plans for accidents, unemployment, legal services, or other events that could cause future financial hardship or expense.

Because this rule involves somewhat complex interpretations of payroll and human resources policies and practices, we strongly suggest your city request review by your attorney prior to implementing any changes.

The regular rate of pay also does not include tuition. The final rules effective in January 2020 note provided tuition reimbursements not tied to an employee's hours worked, services rendered, or other conditions related to the quality or quantity of work performed are indeed excludable from the regular rate of pay. Nor does it include expense reimbursement, or premium pay for overtime hours required by the FLSA itself or by union agreement. However, some cities may specify the regular rate of pay will include such items either by policy or union agreement. In such cases, the policy or agreement must be honored until it is changed.

RELEVANT LINKS:

29 C.F.R. § 778.105.

LMC information memo,
*Fair Labor Standards Act Police
and Fire Employees.*

29 C.F.R. § 553.23.

29 U.S.C. § 207(o)(5).

Beck v. Cleveland, 390 F.3d 912
(6th Cir. 2004) (citing Department
of Labor's Wage and Hour August
19, 1994 opinion letter).

V. Workweek

The workweek is a “fixed and regularly occurring period of 168 hours—seven consecutive 24-hour periods,” thus, it can be any period of time the city chooses consisting of seven days in a row. It can begin at any time of day. However, the city must consistently use the same seven-day period (for example, Sunday at 12:00 a.m. through Saturday at 11:59 p.m. of every week). The city can also have different workweeks for different groups of employees as long as each employee group is told what their workweek is, and it is documented in writing. In addition, police officers and firefighters can have a longer work week, up to 28 days. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade overtime requirements.

VI. Compensatory time off

Cities are not required by the FLSA to provide the option of compensatory time off in lieu of paid overtime. (Be aware that a city policy or union contract may require the city to provide this option). As noted above, under certain circumstances, a city may give compensatory time off in lieu of paid overtime. Cities may do this when it is:

- Established as a term or condition of employment (at time of hire).
- Negotiated under a collective bargaining agreement.
- Mutually agreed upon with individual employees, before the overtime hours are worked (a record of the agreement must be retained).

Some cities establish a “checkbox” on their employee timesheets whereby a non-exempt employee can indicate his or her preference to be paid for overtime either through cash payment or compensatory time off. Since the employee is given the choice, this method is likely to be seen as meeting the intent of the law.

Unless modified by the collective bargaining agreement, the employee must be allowed to take compensatory time within a reasonable time period, unless it “unduly disrupts” the city’s operation.

(Courts have found that cities are not “unduly disrupted” if cities are required to pay one employee overtime in order to allow another employee to use compensatory time off). Cities cannot establish “use it or lose it” policies for compensatory time earned in lieu of overtime because compensatory time is a replacement for earned overtime and therefore is owed to the employee, as required by the law.

RELEVANT LINKS:

29 U.S.C. § 207(o).

29 C.F.R. § 553.24.

LMC information memo,
FLSA: Police and Fire Employees.

See HR Reference Manual *Chapter 1*, Section IV-E-1-a on
Constructive receipt.

29 C.F.R. § 570.
Minn. Stat. § 181A.01.
Minn. R. 5200.0900 - .0960.
HR Reference Manual, Chapter 2.

29 U.S.C. § 206(g)(1).
U.S. Dep't of Labor wage and hour
division: Fact sheet #32: Youth
Minimum wage- Fair Labor
Standards Act.

Minn. Stat § 177.24, subd. 1(e).
MN Dep't of Labor and Industry:
Minimum wage rate will be
adjusted for inflation as of Jan. 1,
2024.

The FLSA sets an accrual limit of 240 hours of compensatory time for most employees (160 hours at time-and-one-half). Certain “public safety,” “emergency response,” and “seasonal” employees may be subject to a higher limit of 480 hours (320 hours at time-and-one-half). Most cities set a lower limit (e.g., 40 hours) because of the difficulty of granting employees so much time off.

Remaining compensatory time must be paid at the time the employee terminates employment at what may be a higher rate of pay, so the cost of payout increases over time.

To avoid this, some cities periodically cash out compensatory time (for example, paying off all compensatory time balances each December before starting the new year). This should be established in writing as a city policy and/or in a union agreement. However, providing employees the ability to choose when the compensatory time is paid out, unless properly designed, can create significant taxability issues for both cities and employees alike under the tax doctrine known as Constructive Receipt. For additional information on Constructive Receipt implications, please refer to the link to the left.

VII. Child labor standards

The FLSA has certain restrictions on the type of work and the hours of work that may be performed by minors. The requirements of the FLSA must be coordinated with state laws on child labor.

VIII. Youth minimum wage

As of January 1, 2024, both large and small Minnesota employers must pay employees under age 18 at least \$8.85 per hour (increased by \$0.22/hour from \$8.63 in 2023). Since small employers must pay at least \$8.85 per hour to all employees as of January 1, 2024, the youth wage rate now does not allow small employers to pay employees under the wage of 18 less than the \$8.85 hour minimum.

While federal law permits cities to pay a “youth minimum wage” of not less than \$4.25 an hour to employees who are under 20 years of age during the first 90 consecutive calendar days after initial employment and as long as their work does not displace other workers, this federal youth wage must also be coordinated with Minnesota law. Under Minnesota Law, the “youth wage rate” as of January 1, 2024, is set at \$8.85/hour (up \$0.22/hour from \$8.63 in 2023). The rate may increase again on January 1, 2025.

RELEVANT LINKS:

Minn. Stat. § 177.24, subd. 1(c).
MN Dep't of Labor and Industry:
Minimum wage rate will be
adjusted for inflation as of Jan. 1,
2024.

29 C.F.R. § 516.4.
29 C.F.R. § 525.14.

Download posters at the U.S.
Department of Labor website.

29 C.F.R. §§ 516.2 –9.

29 C.F.R. § 553.50.

29 C.F.R. § 516.5.

Minn. Stat. § 177.30.

Another change in state law increases the 90-day training wage for employees under age 20 to \$8.85/hour on January 1, 2024, for large employers, with another possible increase on January 1, 2025.

Following the first 90-days, an employee of a large employer aged 18 or older, would then be paid \$10.85/hour, beginning January 1, 2024.

A small employer is not eligible for an under 20 years wage reduction rate, because the small employer minimum wage rate in 2024 is already \$8.85/hour for small Minnesota employers.

IX. Record-keeping requirements

The FLSA requires employers to:

- Display a minimum wage poster.
- Maintain detailed records of hours worked and wages paid to non-exempt employees and similar records on exempt employees, including: name, employee number, home address, birth date if under 19, sex, occupation, workweek, regular rate of pay, hours worked each day and total for week, total daily or weekly straight time earnings, total premium pay for overtime, total additions to or deductions from wages each pay period, total wages paid each pay period, and date of payment and the pay period covered.
- Maintain records on compensatory time earned, used, and paid in cash as well as union agreements regarding compensatory time, even if they are verbal agreements.
- Preserve payroll records and union agreements for at least three years.

In May 2019, a new law, the Minnesota Wage Theft Prevention Act, was passed which includes in part, labor standards recordkeeping requirements for a period of three years to include the following records:

- Name, address and occupation of each employee.
- Each employee's rate of pay and the amount paid each pay period.
- Each employee's hours worked each day and each workweek, including, for all employees paid at piece rate, the number of pieces completed at each piece rate.
- A list of personnel policies with brief descriptions of each policy that were provided to each employee, including the date the policies were given to the employee.
- A copy of the new notice that is required to be provided to and signed by each employee at the start of employment and a copy of any written changes to the notice that were provided to each employee.

RELEVANT LINKS:

2023 Minn. Laws Ch. 53, art. 1 § 3
amending Minn. Stat. § 181.032.

- For each employer subject to Minn. Stat. §§ 177.41 to 177.44 (Minnesota Prevailing Wage Act), and while performing work on public works projects funded in whole or in part with state funds, the employer shall furnish under oath signed by an owner or officer of an employer to the contracting authority and the project owner every two weeks, a certified payroll report with respect to the wages and benefits paid each employee during the preceding weeks specifying for each employee: name; identifying number; prevailing-wage master job classification; hours worked each day; total hours; rate of pay; gross amount earned; each deduction for taxes; total deductions; net pay for week; dollars contributed per hour for each benefit, including name and address of administrator; benefit account number; and telephone number for health and welfare, vacation or holiday, apprenticeship training, pension and other benefit programs.
- Other information the commissioner finds necessary and appropriate to enforce Minn. Stat. §§ 177.21 to 177.435.
- Effective January 1, 2024, employers will need to include the total number of earned sick and safe time hours accrued and available for employee use to an employee statement of earnings, as well as the total number of earned sick and safe time hours used during the pay period.

The records must be either kept at the place where employees are working or kept in a manner that allows the employer to comply with a Minnesota Department of Labor Commissioner's demand within 72 hours.

Minn. Stat. § 181.939 subd. 3.

Effective July 1, 2023, MN law was amended requiring an employer to inform employees in writing of their rights to express milk and pregnancy accommodation at the time of hire and when an employee requests parental leave, as well in an employee handbook. The MN Commissioner of Labor will be providing text to be included in the notice.

800.925.1122
651.281.1200
HRbenefits@lmc.org

X. Further assistance

If you have questions on this topic, please contact the League's Human Resources and Benefits Department.

