



**LEAGUE of  
MINNESOTA  
CITIES**

## INFORMATION MEMO

# Fair Labor Standards Act: Determining Exempt vs. Non-Exempt Status

*Learn how to determine which employees are covered (non-exempt employees) and which employees are not covered (exempt employees) under the Fair Labor Standards Act. Understand the two tests (salary test and duties test) that qualify an employee as exempt and become familiar with general definitions and guidelines of this law.*

### RELEVANT LINKS:

29 U.S.C. § 201-219.  
See LMC information memos *An Overview of the Fair Labor Standards Act (FLSA)*, and *Police and Fire Employees and the Fair Labor Standards Act (FLSA)*.

Minn. R. Ch. 5200.  
Minn. Stat. § 177.21.  
Minn. Stat. Ch. 181.

29 C.F.R. § 541.700(a)

Federal Register: Defining and Delimiting the Exceptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees.

## I. Coverage

The federal Fair Labor Standards Act (FLSA) became law in 1938 and requires, among other things, that cities compensate covered employees at the rate of time-and-one-half for hours worked over 40 in one workweek as well as maintain employee wage records. In Minnesota, the primary statute governing minimum wage, overtime and recordkeeping is the Minnesota Fair Labor Standards Act (MLFSA). In general, an employer must follow the law which provides a greater benefit to the employee. In this memo you will learn which employees are covered (non-exempt) employees and which are not covered (exempt) employees. However, police and fire department employees have some unique exemptions discussed elsewhere.

All cities are covered by the FLSA, but some employees are “exempt” from the overtime provisions of the act. To be “exempt,” employees must meet both of two separate tests:

- A duties test. Whether the employee’s primary duty meets the definition of the particular exemption.
- A salary level test. Since 1938, the DOL has increased the salary levels many times- in 1940, 1949, 1958, 1963, 1970, 1975, 2004, 2019 and now in 2024, with a scheduled increase as of January 1, 2025, and subsequent changes on a triennial basis. Inherent to this level test is a salary basis test requiring an employee to be paid a predetermined and fixed salary “that is not subject to reduction because of variations in the quality or quantity of work.”

Non-exempt employees must be paid overtime for all hours worked over 40 in one work week; while exempt employees do not earn overtime. Being “salaried” does not mean the same thing as being “exempt.”

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:

Federal Register: Defining and Delimiting the Exceptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees.

Federal Register: Defining and Delimiting the Exceptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees.

29 U.S.C. § 213.

29 C.F.R. § 541.100.

See Appendix A flow chart, "Executive Exemption under FLSA". U.S. Dep't of Labor: Final Rule: Restoring and Extending Overtime Protections.  
29 C.F.R. § 541.100(a)

29 C.F.R. § 541.701.

With a few exceptions (e.g., doctors, lawyers), any employee who does not earn \$684 per week is not considered exempt. Again, this salary threshold increases in two phases, beginning July 1, 2024, with automatic increases every three years thereafter. The first increase to the salary threshold is July 1, 2024, to \$844/week (equivalent to \$43,888/year), and then rises to \$1,128/week (equaling \$58,656/year) as of January 1, 2025.

For the two phased increases, the DOL permits employers to either meet the increase salary thresholds on July 1, 2024, and January 1, 2025, or opt for a single adjustment at the July 1 date to the higher threshold of \$1128/week (equivalent to \$58,656/year). Beginning July 1, 2027, and every three years thereafter, the salary thresholds will automatically update, as part of a triennial updating process to keep pace with changes in earnings, using the methodology in effect at the time of each update. Future DOL salary threshold updates will be published in the Federal Register with a notice of no less than 150 days before the effective date and the Wage and Hour Division will publish the updated threshold on their website before the effective date as well.

Previous salary threshold increases have been challenged in court, so it is possible this final rule may be challenged as well.

## II. Duties test

There are generally four types of exemptions used by cities.

Employees must meet the criteria outlined in one of the following four exemptions (executive, administrative, professional, and computer) in order to meet the "duties" test and be considered exempt. There are additional special considerations for performing a combination of exempt duties and for highly compensated individuals.

### A. Executive duties

Executive employees must:

- Be paid at least \$684 per week on a salary basis (equivalent to \$35,568/annually) as of January 1, 2020. This salary threshold increases in two phases, beginning July 1, 2024, with automatic increases every three years thereafter. The first increase to the salary threshold is July 1, 2024, to \$844/week (equivalent to \$43,888/year), and then rises to \$1,128/week (equaling \$58,656/year) as of January 1, 2025.

## RELEVANT LINKS:

29 C.F.R. § 541.102.

- “Customarily and regularly” supervise two or more employees (at least 80 hours’ worth of employee work per week).  
The regulations define “customarily and regularly” as a “frequency greater than occasional but ...less than constant.” “Tasks or work performed ‘customarily and regularly’ includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.”
- Have the authority to hire or fire other employees or have their recommendations on hiring/firing, advancement, promotion, or other change of status decisions be given “particular weight.”

“Managing” includes spending approximately 50 percent of work time on management activities such as:

- Interviewing, selecting, and training employees.
- Setting and adjusting employee rates of pay and hours of work.
- Directing employee work.
- Evaluating employee performance.
- Handling employee complaints/grievances.
- Disciplining employees.
- Planning work and determining techniques.
- Determining materials, supplies, equipment, and tools to be used.
- Planning and controlling the budget.
- Providing for employee safety.

29 C.F.R. § 541.103.

“Department or subdivision” means a unit with permanent status and a continuing function. For example, in a larger city, there may be separate subdivisions within the public works department for “streets,” “utilities,” and “parks,” and these subdivisions may meet the definition of a “department or subdivision” under the FLSA regulations. However, “department or subdivision” does not mean a group of employees assigned from time to time to work as a team on a specific job or project.

29 C.F.R. § 541.105.

“Particular weight” refers to the requirement that a certain amount of consideration be given to an employee’s recommendations if that employee’s position is to meet the executive exemption. The following questions are used to determine “particular weight”:

- Is it part of the employee’s job duties to make hiring/firing/job change recommendations?
- How often does the employee make such recommendations?
- How often are the employee’s recommendations taken (vs. overridden) by the council or higher management?

## RELEVANT LINKS:

See section IV-B.

29 C.F.R. § 541.200.  
29 C.F.R. § 541.201(a).

See Appendix B flow chart, “Administrative Exemption under FLSA”. U.S. Dep’t of Labor: Final Rule: Restoring and Extending Overtime Protections. Federal Register: Defining and Delimiting the Exceptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees.

29 C.F.R. § 541.202(a).

29 C.F.R. § 541.201.

29 C.F.R. § 541.202.

An employee can still meet the executive exemption duties test if he or she sometimes performs non-exempt work (e.g., the labor or production work of the employees he or she supervises). However, the employee’s “primary duty” must be management.

## B. Administrative duties

The administrative exemption is meant to apply to employees who have the primary duty of performing office or non-manual work directly related to the management or general business operations of the employer (the city). Administrative employees must:

- Be paid at least \$684 per week on a salary basis (equivalent to \$35,568/annually) as of January 1, 2020. This salary threshold increases in two phases, beginning July 1, 2024, with automatic increases every three years thereafter. The first increase to the salary threshold is July 1, 2024, to \$844/week (equivalent to \$43,888/year), and then rises to \$1,128/week (equaling \$58,656/year) as of January 1, 2025.

The office or non-manual work must require the exercise of discretion and independent judgment on significant matters. Discretion and independent judgment involves comparing and evaluating possible courses of conduct, and action in decision making, which is the opposite of routine work.

“Matters of significance” are defined as the “level of importance or consequence of the work performed.”

If the employee’s primary duty is to administer the business affairs of a city, the employee is likely an “administrator.” If the employee’s primary duty is providing the goods/services of the organization, the employee is likely a “production” employee. Work performed in areas such as finance, accounting, insurance, purchasing, human resources, computer network, Internet, and database administration is likely to be seen as administering the business affairs of the city.

To determine whether an employee exercises discretion and independent judgment on significant matters, the city should ask these questions:

- Does the employee have authority to formulate, interpret, or implement management policies?
- Does the employee carry out major assignments and perform work that affects business operations to a substantial degree?
- Does the employee have authority to commit the city in matters with a significant financial impact?

## RELEVANT LINKS:

29 C.F.R. § 541.202(c).

29 C.F.R. § 541.300.

See Appendix C flow chart, "Professional Exemption under FLSA". U.S. Dep't of Labor: Final Rule: Restoring and Extending Overtime Protections. Federal Register: Defining and Delimiting the Exceptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees.

29 C.F.R. § 541.301.

- Does the employee have authority to waive or deviate from established policies and procedures without prior approval?
- Does the employee have authority to negotiate and bind the company on significant matters?
- Does the employee provide expert advice to management?
- Is the employee involved in planning long- or short-term business objectives?
- Does the employee investigate and resolve important matters for management?
- Does the employee handle complaints, arbitrate disputes, or resolve grievances?

The more "yes" answers to the above questions, the more likely the employee would be considered exempt under the administrative exemption.

An employee can still qualify for the administrative exemption even if his or her decisions or recommendations are reviewed at a higher level and occasionally revised or reversed.

## C. Professional exemption

Professional employees must:

Be paid at least \$684 per week on a salary basis (equivalent to \$35,568/annually) as of January 1, 2020. This salary threshold increases in two phases, beginning July 1, 2024, with automatic increases every three years thereafter. The first increase to the salary threshold is July 1, 2024, to \$844/week (equivalent to \$43,888/year), and then rises to \$1,128/week (equaling \$58,656/year) as of January 1, 2025

Primarily perform work that requires knowledge of an advanced type in a field of science or learning ("learned professionals"), or work requiring invention, imagination, originality, or talent in a recognized artistic or creative field ("creative professionals").

In general, to meet the "learned professional" definition, the employee must do work that is mostly intellectual and requires the consistent exercise of discretion and judgment (not routine mental, manual, mechanical, or physical work). The employee must use the advanced knowledge to analyze, interpret, or make deductions from varying facts or circumstances. Advanced knowledge cannot be obtained at the high school level.

## RELEVANT LINKS:

Dep't of Labor, Wage &  
Hour Div., Fact Sheet 17D:  
Exemption for Professional  
Employees Under the Fair  
Labor Standards Act (FLSA).  
29 C.F.R. § 541.303.  
29 C.F.R. § 541.304.

29 C.F.R. § 541.302.

29 C.F.R. § 541.400.

See Appendix D flow chart,  
"Computer Exemption under  
FLSA".  
U.S. Dep't of Labor: Final  
Rule: Restoring and  
Extending Overtime  
Protections.  
29 C.F.R. § 541.600(d).  
Federal Register: Defining  
and Delimiting the  
Exceptions for Executive,  
Administrative, Professional,  
Outside Sales, and Computer  
Employees.

Lawyers, doctors, accountants (but not accounting clerks or bookkeepers), and engineers are examples of professionals that are likely to meet the requirements of this exemption. Occupations that can be performed with only the general knowledge of an academic degree in any field are not likely to qualify under this exemption. Nor are occupations in which the employees generally learn "on-the-job" rather than by obtaining an advanced degree.

Keep in mind the salary basis test does not apply to bona fide teachers, doctors, or lawyers.

To qualify for the "creative professionals" exemption, the employee must perform work in fields such as music, writing, acting, and graphic arts. These must be determined on a case-by-case basis; cities may want to contact the League or work with a consultant/attorney in determining these exemptions.

## D. Computer exemption

While Minnesota law also exempts anyone employed in a bona fide executive, administrative, or professional capacity from overtime pay requirements, the state does not exempt computer systems analysts, programmers, software engineers, or other similarly skilled workers from its minimum wage or overtime requirements like Federal law does.

Thus, assuming the computer employee does not meet the other exemptions (executive, administrative or professional), that employee in Minnesota would be eligible for minimum wage as well as overtime pay.

For reference, under federal FLSA computer employees must meet the following tests:

Be paid at least \$684 per week on a salary basis or at least \$27.63/hour if paid on an hourly basis (equivalent to \$35,568/annually) as of January 1, 2020. This salary threshold increases in two phases, beginning July 1, 2024, with automatic increases every three years thereafter. The first increase to the salary threshold is July 1, 2024, to \$844/week (equivalent to \$43,888/year), and then rises to \$1,128/week (equaling \$58,656/year) as of January 1, 2025

Perform work in the area of computer systems analysis, computer programming, or computer software engineering.

## RELEVANT LINKS:

29 C.F.R. § 541.708.

U.S. Dep't of Labor: Final Rule: Restoring and Extending Overtime Protections.  
Federal Register: Defining and Delimiting the Exceptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees.

29 C.F.R. § 541.601.

Federal Register: Defining and Delimiting the Exceptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees.

Have a primary duty consisting of:

- Using systems analysis techniques and procedures to determine hardware, software, or system-functional specifications.
- Designing, developing, documenting, analyzing, creating, testing, or modifying computer systems or programs based on and related to user or system design specifications.
- Designing, documenting, testing, creating, or modifying computer programs related to machine operating systems.
- A combination of the above duties requiring the same level of skills.

## E. Combination exemption

Employees who perform a combination of various types of exempt duties may qualify for exemption if the exempt duties, taken altogether, comprise the employee's primary duty. However, the employee must still be paid at least \$684 per week (equivalent to \$35,568/annually) as of January 1, 2020. This salary threshold increases in two phases, beginning July 1, 2024, with automatic increases every three years thereafter. The first increase to the salary threshold is July 1, 202

4, to \$844/week (equivalent to \$43,888/year), and then rises to \$1,128/week (equaling \$58,656/year) as of January 1, 2025.

## F. Highly compensated employees

In 2004, the DOL created an HCE (Highly Compensated Employees) test for certain highly compensated employees based on the "rationale that employees who earn at least a certain amount annually- an amount substantially higher than the annual equivalent of the weekly standard salary level- will almost invariably pass the standard duties test." Thus, this test serves as a streamlined alternative for very highly compensated employees based on the rationale "a very high level of compensation is a strong indicator of an employee's exempt status, thus eliminating the need for a detailed duties analysis." As outlined in the regulations, to be exempt under the HCE test as of July 1, 2024, an employee must earn at least \$132,964/year (up from \$107,432/year), of which at least \$1,128 per week (the standard salary level) must be paid on a salary or fee basis the employee customarily and regularly performs at least one of the exempt duties or responsibilities of an executive, administrative, or professional employee. Employers can satisfy up to 10 percent of the new salary level (equivalent to \$112.80 as of July 1, 2024) through the payment of nondiscretionary bonuses and incentive payments (including commissions) paid annually or more frequently, but does not include payments for medical insurance, life insurance, retirement plans or other fringe benefits.

## RELEVANT LINKS:

29 C.F.R. § 541.602(a).

Federal Register: Defining and Delimiting the Exceptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees.

29 C.F.R. § 541.602(b).

29 C.F.R. § 541.602(b) (5).

29 C.F.R. § 541.710(a).

This HCE test applies only to employees whose primary duty includes performing office or non-manual work. The \$132,964 increases to \$151,164 as of January 1, 2025, and then is scheduled for subsequent updates every three years, starting on July 1, 2027. The DOL permits employers to choose to make a single adjustment on July 1 to the higher amount of \$151,164 if they so choose rather than making an increase on July 1, 2024, and January 1, 2025.

### III. Salary basis

To be compensated on a salary basis, the employee:

- Must receive a predetermined full amount of pay each pay period, without regard to the number of days or hours worked. The employee must be paid at least \$684 per week (equivalent to \$35,568/annually) as of January 1, 2020. This salary threshold increases in two phases, beginning July 1, 2024, with automatic increases every three years thereafter. The first increase to the salary threshold is July 1, 2024, to \$844/week (equivalent to \$43,888/year), and then rises to \$1,128/week (equivalent to \$58,656/year) as of January 1, 2025.
- Cannot be paid by the hour.
- Cannot be subject to deductions from pay based on quality or quantity of work.
- Must receive the full salary for any week in which any work is performed.

Deductions from the weekly salary can be made when:

- The employee is absent for a day or more for personal reasons unrelated to illness or injury.
- The employer imposes penalties for a major safety violation (e.g., suspension without pay). The suspension must be for a violation of workplace conduct rules and be imposed pursuant to a written policy, applying to all employees.
- No work is performed in that week.

Public-sector employers who have a personal leave and sick leave system that employees must use for partial-day absences due to personal reasons or illness/injury can make deductions for these partial-day absences when:

- Accrued leave is exhausted, and the employee takes a partial or full day off.
- The employee did not request paid leave, or the paid leave was denied, but the employee still takes the time off as unpaid leave (partial or full day).
- The employee requests the use of unpaid leave (partial or full day off).



## RELEVANT LINKS:

29 C.F.R. § 541.710(b).

Deductions from the pay of an exempt employee of a public agency for absences due to budget-required leave-without-pay programs shall not disqualify the employee from being paid “on a salary basis” except in the workweek in which the budget-required leave without pay occurs and for which the employee’s pay is accordingly reduced.

29 C.F.R. § 541.604(a).

A city may pay an exempt employee extra compensation for additional hours worked beyond the person’s normal work schedule. Paying the extra compensation, on any basis, even time-and-one-half, does not change the employee’s designation as an exempt employee, assuming that the position has met both the salary and duties tests.

29 C.F.R. § 541.602(b)(3).

The city may not dock an exempt employee’s wages for an absence due to jury duty, attendance as a subpoenaed witness, or for a temporary military leave. However, if the city does not provide paid time for these situations, the only “penalty” is that the employee will not be considered exempt for the week in which the absence occurs; in most of these situations, the employee is unlikely to work overtime.

The city also may offset from paid time any amount paid to the employee for the service.

U.S. Dep’t of Labor: Final Rule: Restoring and Extending Overtime Protections.

Part-time employees must meet the same requirements as full-time employees to be exempt, including the requirement to be paid at least \$684/week (equivalent to \$35,568/annually) as of January 1, 2020. This salary threshold increases in two phases, beginning July 1, 2024, with automatic increases every three years thereafter. The first increase to the salary threshold is July 1, 2024, to \$844/week (equivalent to \$43,888/year), and then rises to \$1,128/week (equaling \$58,656/year) as of January 1, 2025.

29 C.F.R. § 541.603(d).

In 2004, the U.S. Department of Labor amended the regulations to provide a “safe harbor” for improper salary deductions. An employer who violates the salary basis test by making an improper deduction in an exempt employee’s paycheck can avoid liability by:

*Overtime and Compensatory Time, LMC Model Policy.*

- Maintaining a clearly communicated policy prohibiting improper pay deductions.
- Including a complaint mechanism in the policy.
- Reimbursing employees for the improper pay deduction.
- Making a good faith commitment to comply in the future.

## IV. General definitions and guidelines

### A. Exempt vs. non-exempt work

Exempt work is the work performed by executive, administrative, professional, and computer employees.

29 C.F.R. § 541.707.

## RELEVANT LINKS:

29 C.F.R. § 541.700.

The definition of exempt work includes “closely related work” that exempt employees perform. An example of “closely related work” is when the finance director uses computer software to prepare a budget presentation for the city council. While technically this may be a non-exempt duty, it is closely related to his or her exempt duty of preparing the budget. By definition, any work that is not exempt work is non-exempt work.

### B. Primary duty

To qualify for any of the above exemptions, an employee’s primary duty must be executive, administrative, professional, or computer work.

Primary duty means the principal, main, major, or most important duty that an employee performs. Factors to consider include:

- The relative importance of the exempt duties compared with other types of duties. (If the job exists mainly for the purpose of performing the exempt duties, it is likely to be considered exempt).
- How much time the employee spends performing exempt work. (Ideally it should be 50 percent or more of the time, but this is not an absolute requirement).
- How much supervision the employee receives and how free the employee is to determine how to spend his or her time. (The more independence and freedom, the more likely it is to be considered exempt).
- The relationship between the employee’s salary and the wages paid to other employees for the kind of non-exempt work performed by the employee. (If the employee’s pay is relatively close to the level of non-exempt workers, this may harm the employee’s chance of being considered exempt).

### V. Special exemptions

#### A. Separate seasonal amusement and recreational establishments

29 U.S.C. § 213(a)(3).

Employees working in separate seasonal amusement and recreational establishments are exempt from the federal wage and hour law if the establishment is physically separated from the rest of the city’s operations, either by distance or structurally (e.g., a fence). In addition, it must be open no more than seven months of the year, or its average receipts for any six months of the preceding year must not be more than one-third of its average receipts for the other six months of the year.

## RELEVANT LINKS:

Minn. Stat. § 177.24.

Federal Register: Defining and Delimiting the Exceptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees.

Minn. Stat. § 177.23 subd. 7(14).

Minn. Stat. § 177.25.  
Minn. Stat. § 177.24.

29 U.S.C. § 207(p)(2).

29 C.F.R. § 778.602 (b).

If the city does not meet this federal exemption, and meets the large employer definition, then effective January 1, 2024, the city will pay \$10.85 per hour (up \$0.26/hour from \$10.59 per hour in 2023), and small employers will pay at least \$8.85 per hour (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).

Beginning in 2017 and each year after, the Department of Labor and Industry determines with feedback of stakeholders any appropriate minimum wage increase. The minimum wage increase, if any, will be effective in August of the following year. If it does meet this federal exemption, one or more of the following state law exemptions and provisions may apply:

- The city is not required to pay minimum wage/overtime to any individual under 18 working less than 20 hours per workweek for a city as part of a recreational program.
- During the first 90-days of training, as of January 1, 2024, a large employer may pay employees under the age of 20 a wage of \$8.85/hour (up \$0.22/hour from \$8.63/hour in 2023).

After the 90 days, the minimum hourly rate for the employee working for a large employer becomes the 2024 minimum wage rate of \$10.85/hour). The city must pay time-and-one-half overtime for all hours worked over 48 in one workweek.

## B. Occasional and sporadic employment

Employees who freely choose to work part-time for the city in a different job than their normal job on an occasional and sporadic basis do not need to be paid time-and-one-half for the additional hours if the duties in the two jobs are substantially different.

## C. 1040/2080 Plans for unionized employees

A 1040/2080 plan provides a partial exemption from the FLSA overtime requirement. Such plans are only valid in union environments, and the parameters of the plan must be defined in a collective bargaining agreement. While a 1040/2080 plan provides the employer with increased flexibility, such plans may also present bookkeeping and payroll challenges.

Examples of how overtime might be calculated under a 1040/2080 plan are provided in the regulations.

## RELEVANT LINKS:

Dep't of Labor, Wage &  
Hour Div., Admin. Ltr. Rul.  
(Apr. 1, 1985).

Minneapolis Office -  
National Labor Relations  
Board.

29 C.F.R. § 778.404.

### 1. 1040 Plans

Overtime compensation is not required for hours worked over 40 in a workweek if there is an agreement that no employee shall be employed more than 1,040 hours during a period of 26 consecutive weeks.

When such a plan is in place, unionized employees can work an average of 40 hours per workweek (over the 26-week period, for a total of 1,040 hours) without receiving overtime compensation for each hour worked over 40 in a given week.

At the end of the 26-week period, all hours worked over 1,040 must be compensated as overtime at time-and-one-half. In addition, employees must receive overtime for any hours worked in excess of 12 hours in a workday or 56 hours in a workweek.

### 2. 2080 Plans

This plan is more complicated than the 1040 plan. Employees must be guaranteed at least 1,840 hours of work and may not work more than 2,240 hours in a 52-week period even if they are paid overtime. Exceeding 2,240 hours during the 52 weeks may negate the plan and retroactively entitles employees to overtime compensation for any week in which they worked more than 40 hours.

At the end of the 52 weeks, all hours worked over 2,080 must be compensated as overtime at time-and-one-half. Like the 1040 plan, employees must be paid overtime for hours worked in excess of 12 hours in a workday or 56 hours in a workweek.

To be valid, a 1040/2080 plan must be created as part of a collective bargaining agreement. In addition, the employee representative(s) must be certified as "bona fide" by the National Labor Relations Board (NLRB). While the NLRB does not generally have jurisdiction over public employers, a Wage and Hour Opinion Letter, dated Nov. 1, 1985, advises that the NLRB has the authority to process petitions from unions of government employees requesting certification as "bona fide" for the purpose of forming a 1040/2080 plan. Petitions for certification may be filed in the NLRB Regional Office.

### D. Belo Plan

The Belo Plan was named after a Supreme Court decision, *Walling v. Belo Corporation* (316 U.S. 624 (1942)) and was given legislative sanction by FLSA amendments. A Belo Plan provides guaranteed compensation that includes a predetermined amount of overtime.

## RELEVANT LINKS:

It offers employees with irregular hours of work a set weekly income and enables the employer to anticipate labor costs and payroll calculations.

The U.S. Department of Labor (DOL) notes that few jobs qualify for a Belo Plan as the interpretation of “irregular hours of work” is strictly enforced.

There are a number of requirements for a valid Belo Plan, including the following:

- A specific agreement must be in place between the employer and the employee(s). There is no requirement that the agreement be in writing. However, it is a good practice to put it in writing so as to avoid any ambiguity surrounding the arrangement.
- The employees’ duties must necessitate irregular hours of work. In other words, the irregular hours must be dictated by the work itself, not scheduled by the employer. The employees’ work must fluctuate such that they sometimes work more than 40 hours a week and other times work less than 40 hours a week. If virtually the only work hours that fluctuate are those over 40, the DOL has usually held that the irregular hours requirement is not met.
- The weekly overtime payment must be guaranteed. For example, if the Belo Plan calls for 60 hours of work and the employee works 40 hours, he or she still gets full payment. The employer must pay a premium rate at time-and-one-half for all guaranteed hours over 40, or the Belo Plan will not be valid.
- The number of weekly hours guaranteed cannot exceed 60 hours per week. Any hours worked beyond 60 in any workweek must be compensated at an additional time-and-one-half.

## VI. Further assistance

If you have any additional questions, please contact the League’s Human Resources and Benefits Department.

800.925.1122  
651.281.1200  
HRbenefits@lmc.org

