



TEXAS ASSOCIATION *of* COUNTIES

FLSA

**Non-Exempt or Exempt
You Decide**

HR Consultant



What is the Fair Labor Standards Act?

Federal Law Enacted in 1938...

Local Government Added in 1974

FLSA sets:

- Minimum Wage Requirements
- Overtime Pay
- Recordkeeping
- Child Labor Restrictions
- Equal Pay Act
- Nursing Mothers Break



FLSA Minimum Wage

Federal Minimum Wage for Non-Exempt Employees

- \$7.25 per hour starting 7-24-09



Not Required Under FLSA

- Vacation Pay or Holiday Pay
- Sick Leave Pay
- Severance Pay
- Premium Pay
- Overtime per day
- Pay Raises or Fringe Benefits
- Breaks



Employee Classifications

- Non-Exempt Employees
- Exempt Employees

*****Elected Officials are not defined as employees under the FLSA***



Examples of Non-Exempt

- Deputy Clerk, Accounting Clerk
- Maintenance
- Dispatcher
- Deputy Sheriff
- Detention Officer
- Equipment Operator
- Court Reporter
- LVN



Non-Exempt Requirements

- Overtime must be paid for actual hours worked over 40 hours in a workweek.
- Workweek is 7 consecutive 24 hour days (168 consecutive hours)
- You must identify the workweek
- Paid leave is not counted as “work time”
- Each 7 day work week stands alone
- Overtime pay is 1 ½ x regular rate per overtime hour worked over 40.



207(k) Exemption For Law Enforcement

- Under the FLSA C.F.R. 553.211

Deputy Sheriffs, Deputy Constables, and Security Personnel in a Correctional Institute have a partial overtime exemption.

- Court must adopt - not self executing.
- Must set work period not greater than 28 days and 171 hours



Compensatory Time

- Comp Time is allowed in lieu of pay for local government.
- 1 ½ times in hours the overtime worked.
- You must keep records.
- It must be agreed to in advance, in writing (in your policy manual).
- Maximum legal accruals are 240 hours for non-law enforcement and 480 for law enforcement. You must pay when employees have earned beyond these limits.
- Employees must be allowed to use in a reasonable period.



Compensatory Time Continued

- You can force employees to take comp time.
- Comp time is never erased from the books – it is taken or paid.
- County can buy back part or all.
- County must pay at employee termination.



Exempt Employees

- Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees who are employed in a bona fide capacity of:
 - * Executive * Administrative
 - * Learned Professional * Computer
 - * Highly Compensated



Three Tests for Exemption

- Salary Level
- Salary Basis
- Job Duties



Salary Level Test

- The minimum salary level must be:
 - * Annually: \$23,660.00
 - * Monthly: \$ 1,971.66
 - * Bi-Weekly: \$ 910.00
 - * Weekly: \$ 455.00



Salary Basis Test

- Must be paid “Free and Clear”
- Employee must receive a predetermined amount of pay each pay period
- Pay cannot be reduced because of quantity or quality of work performed



Salary Basis Test

- Must pay full salary for any week in which the employee performs any work
- Pay cannot be reduced because of quantity or quality of work performed



Exempt Deductions Allowed

- Seven exceptions from the “no pay-docking” rule:
 1. Only Full Day absences for personal reasons.
 2. Only Full Day deduction of sick or disability leave based on a bona fide policy that provides wage replacement.



Exempt Deductions Allowed

3. Unpaid disciplinary suspension of one or more full days in good faith for violations of workplace conduct rules (must have policy).
4. Deduction for a major safety violation (must have policy).
5. To offset any amounts received as payment for jury duty, witness fees, or military pay.



Exempt Deductions Allowed

6. Unpaid leave taken pursuant to the Family and Medical Leave Act.
7. Proportionate part of an employee's full salary may be paid for time actually worked in the first and last weeks of employment.



Exempt Employees Improper Deductions

- Deduction for a partial day absence to attend parent-teacher conference
- Deduction for a day of pay because employer closed due to inclement weather
- Deduction for two day absence due to minor illness when employer does not provide wage replacement benefits (sick leave).★



Effect of Improper Deductions

- An actual practice of making improper deductions from salary will result in the loss of the exemption:
 - During time period in which improper deductions were made
 - For all employees in the same job classification

Isolated or inadvertent improper deductions will not result in loss of exempt status if the employer reimburses the employee if employer has a safe harbor policy.



Safe Harbor Policy

- Exemption will not be lost if the employer:
 - Has a *clearly* communicated policy prohibiting improper deductions including a complaint mechanism; and
 - Reimburses employees for all improper deductions; and
 - Makes a good faith commitment to comply in the future.

Safe harbor is lost if the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints



Clearly Communicated Policy

- Best evidence of a clearly communicated policy is a written policy distributed to employees prior to the improper pay deductions by:
 - Providing a copy of the policy to employees at time of hire
 - Putting the policy in the employee handbook



Practices That Do Not Violate Salary Test

- Taking deductions from exempt employees accrued leave accounts
- Requiring exempt employees to keep track of and record their hours worked
- Requiring exempt employees to work specified schedules
- Implementing bona fide, across the board schedule changes



Exempt Primary Job Duties

PRIMARY DUTY

The principal, main, major or most important duty that an employee performs is their primary duty.

My job is to _____ .



Exempt Primary Job Duties

PRIMARY DUTY

- Relative importance of the EXEMPT duties compared to other duties.
- Amount of time spent on EXEMPT duties.
- Freedom from direct supervision.
- Relationship between EXEMPT employees salary and wages paid to other employees.



Exempt Primary Job Duties

PRIMARY DUTY

- Employees who spend more than 50% of their time performing exempt work will generally satisfy the primary duty requirements.



Executive Exemption

- Primary duty is management of the enterprise or of a customarily recognized department or subdivision;
- Customarily and regularly directs the work of two or more other employees; and
- Has the authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status of other employees is given particular weight.



Executive Exemption

Management is...

- Interviewing, selecting and training employees
- Setting and adjusting pay and work hours
- Evaluating employee productivity and efficiency
- Handling employee complaints and grievances
- Disciplining employees
- Planning and dividing work among employees
- Providing safety and security for employees
- Planning and controlling the budget
- Monitoring or implementing legal compliance measures



What is Customarily and Regularly?

- A frequency that must be greater than occasional but which, of course, may be less than constant
- Includes work normally and recurrently performed every week
- Does not include isolated or one-time tasks



Two or More...

- The phrase “two or more other employees” means two full time employees or the equivalent
- Full time means 40 hours
- Supervision may not be counted but once



Administrative Exemption

- Primary duty is the performance of office or non-manual work directly related to the management or general business operations; and
- Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.



Administrative Management

- Refers to the type of work performed by the employee
- Work must be directly related to assisting with the running or servicing of the business

Examples: Accounting, Auditing, Purchasing, Human Resources, Legal Compliance, Computer Administration, Budgeting



Administrative Discretion and Independent Judgment

- The comparison and evaluation of possible courses or conduct, and acting or making a decision after the various possibilities have been considered
- Must be exercised with respect to “matters of significance”, which refers to the level of importance or consequence of the work performed



Administrative Discretion and Independent Judgment

- Factors include, but are not limited to:
 - Whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices
 - Whether the employee carries out major assignments conducting the operations of the business



Administrative Discretion and Independent Judgment

- Factors include, but are not limited to:
 - Whether the employee performs work that affects the business operations to a substantial degree, even if the employee's assignments are related to the operation of a particular business segment
 - Whether the employee has the authority to commit the employer in matters that have significant financial impact

Administrative Discretion and Independent Judgment

- Factors include, but are not limited to:
 - Whether the employee has the authority to waive or deviate from established policies and procedures without prior approval
 - Whether the employee has the authority to negotiate and bind the county on significant matters



Administrative Discretion and Independent Judgment

- Factors include, but are not limited to:
 - Whether the employee provides consultation or expert advice to management
 - Whether the employee investigates and resolves matters of significance on behalf of management



Administrative Discretion and Independent Judgment

- Factors include, but are not limited to:
 - Whether the employee represents the county in handling complaints, arbitrating disputes or resolving grievance



Administrative Discretion and Independent Judgment

- Discretion and Independent Judgment *does not* include:
 - Applying standard policy and procedures
 - Clerical or Administrative work
 - Recording or tabulating data
 - Performing repetitive, recurrent or routine work



Learned Professional Exemption

- To qualify for the learned professional employee exemption, all of the following tests must be met:
- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.



Learned Professional Exemption

- “Primary duty” means the principal, main, major or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.
- “Work requiring advanced knowledge” means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment. Professional work is therefore distinguished from work involving routine mental, manual, mechanical or physical work. A professional employee generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.



Learned Professional Exemption

- Fields of science or learning include law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but is not in a field of science or learning.
- The learned professional exemption is restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best evidence of meeting this requirement is having the appropriate academic degree. However, the word “customarily” means the exemption may be available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. This exemption does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.



Learned Professional Exemption

- The employee's primary duty must be the performance of work requiring advanced knowledge
- In the field of science or learning
- Customarily acquired by a prolonged course of specialized intellectual instruction



Professional Advance Knowledge

- Predominantly intellectual in character
- Includes work requiring the consistent exercise of discretion and judgment
- Cannot be obtained at the high school level – possess degree
- Is not routine mental or manual work



Learned Professional Occupations

Lawyer

Certified Accountant

Doctor

Teacher Architect

Pharmacist

Engineer

Actuaries

Funeral Directors

Scientist

Registered Nurses



Computer Exemption

- To qualify for the computer employee exemption, the following tests must be met:
- The employee must be compensated either on a salary or fee basis at a rate not less than \$455 per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;



Computer Exemption

- The employee's primary duty must consist of:
- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
- The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
- The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
- A combination of the aforementioned duties, the performance of which requires the same level of skills.



Computer Exemption

- The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in the primary duties test described above, are also not exempt under the computer employee exemption.



Highly Compensated

- Must be paid over \$100,000 annually
- Whose primary duty includes office or non-manual work and who customarily and regularly performs any one or more of the exempt duties of an executive, administrative or professional employee identified in the regulations



Information

- More information can be found at www.dol.gov/fairpay

Information contained in this presentation can be found on the Department of Labor Website.



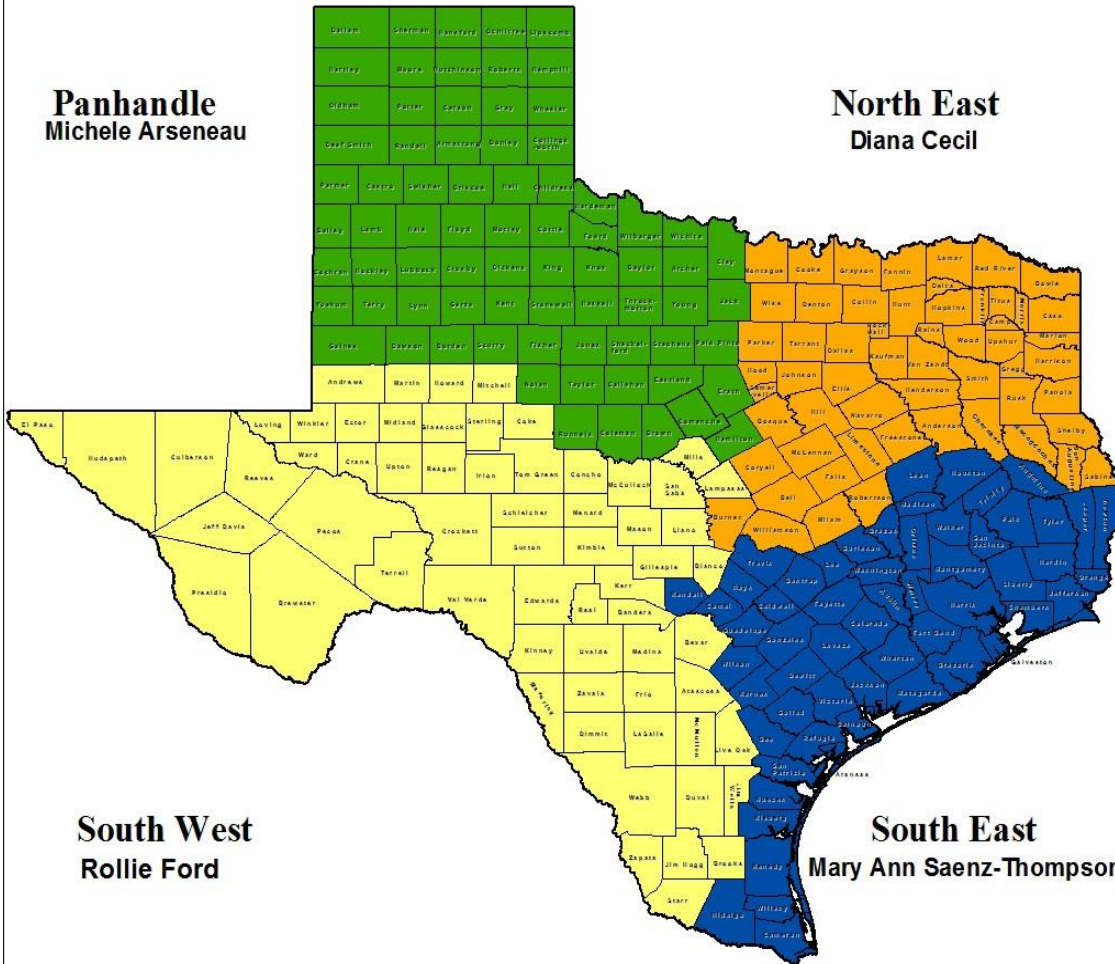
**Texas Association of Counties
Human Resources Consultants**

Panhandle
Michele Arseneau

North East
Diana Cecil

South West
Rollie Ford

South East
Mary Ann Saenz-Thompson



Panhandle

- Michele Arseneau
- 512-461-1667
- michelea@county.org

Northeast

- Diana Cecil
- 512-924-6360
- dianac@county.org

Southeast

- Mary Ann Saenz-Thompson
- 512-921-9056
- maryanns@county.org

Southwest

- Rollie Ford
- 512-680-1994
- rollief@county.org

Member Service

- Elizabeth Sutherland
- elizabeths@county.org
- 1-800-456-5974