

FAQ

GENERAL

Q: What is the Fair Labor Standards Act?

A: The Fair Labor Standards Act (FLSA) is a federal act, passed in 1938, that requires the payment of minimum wage and overtime to all non-exempt employees. The Act also contains requirements regarding exempt, or non-covered employees, with respect to how they are paid and treated in order to maintain their exemption.

Q: Under FLSA regulations, how do you determine who is exempt (and thus, not entitled to overtime) under the Act?

A: There is basically a two-part test in order for an employee to be considered exempt under the Act. An employee must pass both parts in order to be considered exempt. The tests are:

1. The salary level test – the employee makes above a certain salary level, now **\$23,660** annually, and
2. The duties test – the employee's duties consist of certain executive, administrative or professional functions.

However, there are exceptions – teachers, doctors and lawyers are not required to meet these tests. They are automatically considered exempt, regardless of their salary level.

Q: My employee is paid a salary, so how could she be entitled to overtime?

A: The FLSA states that if an employee is non-exempt, that employee is entitled to overtime whether you are paid on an hourly or salary basis. The employee's hourly rate is calculated by dividing their weekly salary rate by 40.

Q: How is overtime calculated?

A:

- Hourly employees. Example: If John is paid \$20/hr and works 45 hours in a week, he is entitled to $(\$20 \times 5 \text{ hours of overtime} \times 1.5, \text{ or time and a half}) = \150 in overtime, in addition to the $(\$20 \times 40 \text{ hours of work}) = \800 at the regulator rate. So, John would be paid a total of \$950 that week.
- Salaried employees. Example: If Sue is paid \$600 a week and works 45 hours a week, she is working the equivalent of $(\$600/40) = \15 hourly rate. Thus, she would be entitled to $(\$15 \times 5 \text{ hours of overtime} \times 1.5) = \75 in overtime, in addition to the \$600 weekly rate. So, Sue would be paid a total of \$675 that week.

Q: I'd like to manage overtime by prohibiting it in my unit without prior approval. If I tell my employees not to work overtime, is that good enough?

A: In a word, no. The law requires payment of overtime, even if worked in violation of policy or directive. The recourse for supervisors in such a situation is to address the conduct just like the violation of other work rules.

Q: Can an employee chose to opt out of the FLSA protections?

A: No, there is no ability to opt out of the FLSA protections. If an employee is non-exempt, they must be paid and treated accordingly.

Q: What about my part-time employees? Is their salary prorated under the FLSA?

A: No. For example, if an employee makes \$22,000 and is a .50 FTE, they will be considered non-exempt even though their FTE salary would be \$44,000.

Q: I would prefer to use compensatory time for my employees, as opposed to paid overtime. Is that a possibility?

A: Yes, depending on whether your employees are collectively bargained for and depending on your specific unit policies. See the section below entitled "Compensatory Time."

Q: What about trainees generally? Who can be classified in this category?

A: Under the FLSA, trainees are not considered employees, generally, if the benefit to the trainee outweighs the benefit to the employer in the course of the relationship. Some of the factors considered are as follows:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school.
2. The training is for the benefit of the trainees or students.
3. The trainees or students do not displace regular employees, but work under their close observation.
4. The employer that provides the training derives no immediate advantages from the activities of the trainees or students, and on occasion operations may actually be impeded.
5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period.

Q: What about employees working overseas? Does the FLSA apply to them?

A: Employees working the entire workweek overseas are not covered by the FLSA. Employees working any portion of the workweek in the U.S. are covered by the FLSA for the entire week.

Q: What if an employee has more than one job?

A: To determine whether the person is exempt, you will look at the two part test. In terms of salary threshold, you will add all wages together to determine if the employee meets the \$455/week standard. In terms of duties test, the DOL's guidance states that we must consider all of the jobs together and determine whether the employee's primary duty is exempt work or non-exempt work.

Q: How will I be able to figure out which of my employees are exempt?

A: Check the time-tracking chart at:

<https://www.hr.msu.edu/flsa/documents/Overtime%20Eligibility%20and%20Time%20Tracking%20Chart.pdf>. Call Human Resources if you have any questions.

Q: I am the budget officer in my unit and am responsible for implementing the policies. They seem complex. Is there help?

A: Yes, numerous resources and the latest communication will be collected and maintained at www.hr.msu.edu/flsa. You can always contact Human Resources or Academic Human Resources

CHANGES TO THE LAW

Q: Were the FLSA regulations modified in 2016?

A: Yes, but then a federal court enjoined the regulations. So, the final FLSA regulations passed in 2016 are currently **not effective**.

The reason for the regulation change, as explained by the Department of Labor (DOL) at the time, was that one of the exemption tests under the Act, the salary level test, was no longer effective. The DOL stated that the test lost its effectiveness because the salary level had not been modified to keep up with inflation. Many agreed that the salary level was too low. There was, however, disagreement regarding how high it should be and how much time an employer should have in which to become compliant with such a sudden and dramatic change in level.

A federal court enjoined the regulations ruling that the change to the salary level test was too significant and that the change was a departure from the statute. The ruling is being appealed, but with a new administration, it is likely the DOL will change its approach.

Q: What does this mean? Which FLSA regulations do we follow?

A: The previous FLSA regulations, which were passed in 2004.

Q: What will happen next? Will the 2004 regulations be modified?

A: It is unknown at this time how this DOL will view the 2004 regulations. There are legal challenges pending. We will continue to update the campus community as things unfold.

Q: Is it still important to follow FLSA regulations, given the injunction and uncertain status of the 2016 regulations?

A: Yes. MSU is still responsible for following the 2004 regulations and the statute itself has not changed. MSU could be found liable for failing to follow the law, as interpreted by the DOL in the 2004 regulations.

FACULTY AND ACADEMIC STAFF – specific questions

Q: Are faculty exempt?

A: Most faculty are exempt either because they are over the FLSA salary threshold or because they teach and teachers are exempt regardless of how much they make – the salary threshold test does not apply to teachers.

Q: Are Research Associates exempt?

A: Most Research Associates are exempt because the minimum Research Associate salary has been set by the Provost at well above the current salary level threshold of \$23,660. See the Provost's

memo on Research Associates' salaries:

https://www.hr.msu.edu/flsa/documents/DDC_FLSA_Memo_12-21-16.pdf.

Q: Are graduate students considered employees?

A: No, the DOL has stated it will not assert an employment relationship when the primary relationship with the institution is that of a student.

Q: I am a Budget Officer in an academic unit. What if a faculty member forwards time sheets of a staff member to me and expects me to approve them?

A: If the faculty member supervises the staff member, this is a violation of policy. You should notify Academic Human Resources. Supervisors have an active role to play under the policy and cannot delegate that to someone else.

Q: What about the application to veterinarians?

A: Veterinarians are considered exempt under the practice of medicine exemption regardless of their salary level. See 29 CFR 541.304; *Clark v. United Emergency Animal Clinic, Inc.*, 390 F3d 1124 (9th Cir. 2004). Veterinary residents and interns are also exempt under the medical exemption as long as they have earned the appropriate degree required for practice of their profession. See 29 CFR 541.304(c).

TIME TRACKING

Q: What constitutes supervisory approval on a time sheet? If I email the timesheet to a Budget Officer indicating I approve, is that sufficient approval per the policy?

A: Yes, instructions on the MSU approved time sheet state that in the event the timesheet is used in an electronic manner, the use of the MSU NetID email address will be required as the signature authority for the transaction.

Q: My non-exempt staff have never before had to track time by hours worked each day. Why now?

A: The FLSA requires records to be kept for each non-exempt worker, including hours worked each day. The way in which time must be kept according to the new FLSA policies is a best practice. It is important to carefully and accurately record time to ensure proper payment of employees. To the extent you have not recorded time this way in the past, it is expected going forward.

Q: What about APA/APSA levels 11 and under, as well as non-union/confidential levels 11 and under? Do they have to track their time since they are currently entitled to overtime under their contract?

A: No.

Q: I track my employees' time for them. I write down the hours they have worked each day. Is that sufficient?

A: No, employees need to be able to track their own time.

Q: I have my own time tracking system we have already been using for support staff. Is that sufficient?

A: Units can use their own time tracking procedure on the staff side as long as it, at a minimum: (1) gives the employee the ability to record the number of hours worked each day; (2) provides for some sort of employee AND supervisory sign-off weekly; (3) is retained for 3 years at the unit level.

Q: My non-exempt employee checks email every night. I can tell because I get email from her regularly at 7:00 or 8:00 p.m. Is this a problem?

A: Maybe. The DOL has indicated that a de minimis (small) amount of checking email is not compensable. However, as soon as it becomes more than de minimis, it is compensable. This should be made clear to non-exempt employees.

Q: As a supervisor, I don't sign off on the time of my employees, the person in charge of budget and HR in our unit does. Is that OK?

A: No, you need to sign off on your non-exempt employees' time. The reason for this is that as a supervisor, you set the work schedule and hours of your employees and are responsible for ensuring that they are paid for the time they work.

Q: What if my employees do not work in the same proximity as me? Should I have someone else sign the time sheet?

A: Human Resources can answer these questions on a case-by-case basis. Generally, as a supervisor, you should have knowledge of the work schedule of your employees and, thus, you should be able to recognize a deviation from your expected work hours.

Q: Is the swipe of an employee's ID sufficient for the employee sign-off requirement in a department that uses a card swipe/punch system for time entry?

A: Yes. Employees in units using a time card swipe/punch system will record their hours by swiping or punching their time card. Likewise, the employee signs off on his/her time on a weekly basis by entering time in a way that a supervisor can then access to approve on a weekly basis.

COMPENSATORY TIME

Q: My non-exempt employee works a schedule under which she is permitted to work an hour late every Monday and earn an hour of comp time. Is that permissible under the compensatory time policy?

A: Yes, if the applicable collective bargaining agreement allows for comp time. However, going forward, you must ensure that she completes the [Agreement to Accept Compensatory Time in Lieu of Overtime Pay](#) prior to the first time comp time is earned, as well as follow the other requirements contained in the Support Staff Compensatory Time Policy.

Q: Do non-exempt employees need to complete the Agreement to Accept Compensatory Time in Lieu of Overtime Pay each time they earn comp time?

A: No, it needs to be completed once – prior to the first time comp time is earned.

Q: **Do exempt employees, who are entitled to comp time under their collective bargaining agreement, need to complete the Agreement to Accept Compensatory Time in Lieu of Overtime Pay?**

A: No.

Q: **Can we require a payout of accrued comp time at the end of a grant, project or at the end of each year? Can we set our own cap on comp time that is lower than the 240-hour cap in the policy?**

A: Yes, you can require a payout of comp time. However, you cannot require a “use-it-or-lose-it” system. The comp time must be paid at the end of the project, grant, year, etc. In addition, the payout criteria should be communicated to employees ahead of time. You can set your own lower cap on comp time; the Agreement to Accept Compensatory Time in Lieu of Overtime Pay contains an area in which a department can indicate its lower cap.

Q: **Do I have to retain the Agreement to Accept Compensatory Time in Lieu of Overtime Pay form at the department? Should I send it to HR?**

A: It is to be retained at the department level for three years. You do not need to send it to HR.