



Care Workers

An Overview of the Fair Labor Standards Act (FLSA)

Presented by:



WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

dol.gov/agencies/whd
1-866-4-US-WAGE



Essential **Workers**

Essential **Protections**

Presentation Outline

- Employment Relationship
- Misclassification
- Coverage
- Minimum Wage
- Overtime
- Hours Worked
- Recordkeeping
- Child Labor
- Family and Medical Leave Act
- How to File a Complaint

Employment Relationship



In order for the FLSA’s minimum wage and overtime pay provisions to apply, there must be an employment relationship between the “employer” and the “employee.”

Misclassification

Misclassified employees are often denied:

- Minimum wage
- Overtime pay
- Health insurance
- Workers' compensation
- Unemployment insurance



Misclassification

Misclassified workers may really be an employee even if the worker:

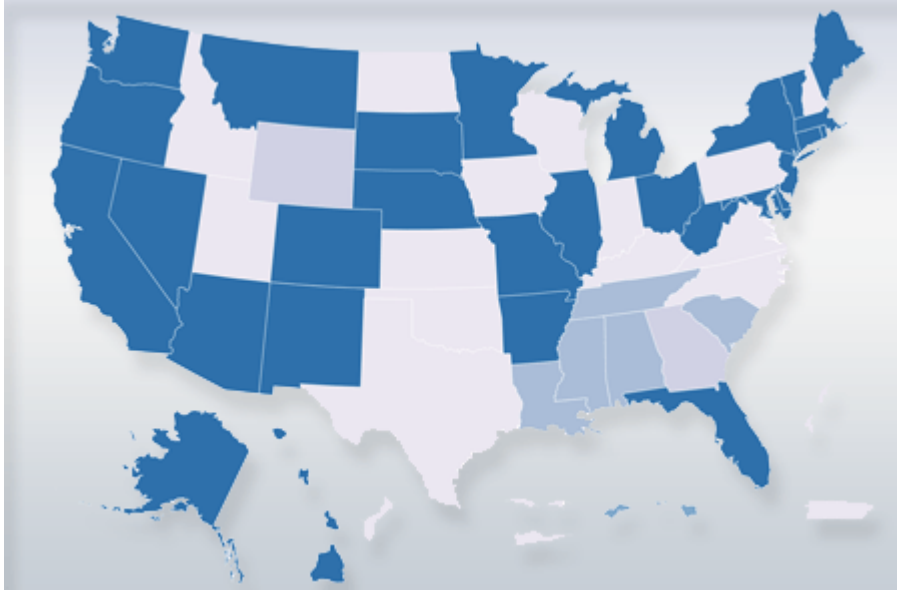
- Agrees to be paid by cash or by check, on the books or off the books
- Receives a 1099 tax form
- Signs an independent contractor agreement
- Engages in work away from company property
- Is registered as an independent contractor or other business entity under state law

Misclassification - Registries

Definition: A registry is a company that matches people in need of services with care workers. The registry has little to no involvement with the employment arrangement or relationship after a match is made.

[View Field Assistance Bulletin No. 2018-4](#)

FLSA Coverage



Over 148 million workers in more than 10 million workplaces are protected or covered by the FLSA, which is enforced by the Wage and Hour Division of the U.S. Department of Labor.

[View Fact Sheet #14: FLSA Coverage](#)

Two Types of FLSA Coverage



Two Types of Coverage



Enterprise Coverage

Enterprise, as a whole, is covered and all employees are entitled to FLSA protections



Individual Coverage

Enterprise, as a whole, is NOT covered; however individual employees are covered and entitled to FLSA protections

Named Enterprises

A business may also be a “named enterprise.” Named enterprises include hospitals, organizations providing medical or nursing care for residents, schools, preschools, and government agencies (federal, state, and local).

Named enterprises are covered regardless of their annual gross volume of sales or business (ADV).

Minimum Wage

FLSA covered employers generally must pay employees at least the **federal minimum wage of \$7.25 per hour.**



Calculations: Minimum Wage

The minimum wage is calculated on a weekly basis:

$$\text{Hourly Rate} = \frac{\text{Gross Weekly Straight Time Pay}}{\text{Total Hours Worked Weekly}}$$

Hourly rate must be at least \$7.25 per hour.

Minimum Wage

May include:

- Wages (salary, hourly, and piece rates)
- Bonuses
- Shift differentials
- Reasonable cost or fair value of room, board, other “facilities” provided by employer for employee’s benefit

Lodging and Boarding - 3(m)

Requirements for an Employer Claiming a Section 3(m) Credit:

- Providing the lodging is common in the industry;
- the employee voluntarily accepts the lodging;
- the lodging doesn't break any federal, state, or local law;
- the lodging mostly benefits the employee, not the employer; and
- the employer keeps accurate records of how much the furnishing and lodging costs.

[View Field Assistance Bulletin No. 2015-1](#)

Lodging and Boarding 3(m) - Example

- Determine a weekly amount of the credit
- Only counts toward minimum wage obligation

A live-in domestic service employee receives \$6 per hour as well as room and board, for which the reasonable cost is \$100 per week.

If the employee works 30 hours in a workweek, the \$180 (\$6 x 30 hrs of work) cash wages is added to the \$100 in section 3(m) credit for a total of \$280 received in the week,

Regular rate = \$9.33 ($\$280 / 30$).

Hours Worked



An employee must be paid for all of the time considered to be “hours worked” under the FLSA. This may include time spent engaged to wait, on-call, in training, sleeping, or traveling. Work not requested but “suffered or permitted” is work time.

[View Fact Sheet #22: Hours Worked](#)

Waiting Time

Hours Worked

- Employee unable to use “waiting time” effectively for own purposes
- “Waiting time” controlled by employer

NOT Hours Worked

- Employee completely relieved from duty
- Time period long enough for employee to use for own purposes

On-Call Time

Hours Worked

- Employee must stay on employer premises
- Or, must be so close to the employer's premises that the time cannot be used effectively for employee's own purposes

NOT Hours Worked

- Employee must provide contact information
- Can use time effectively for own purposes

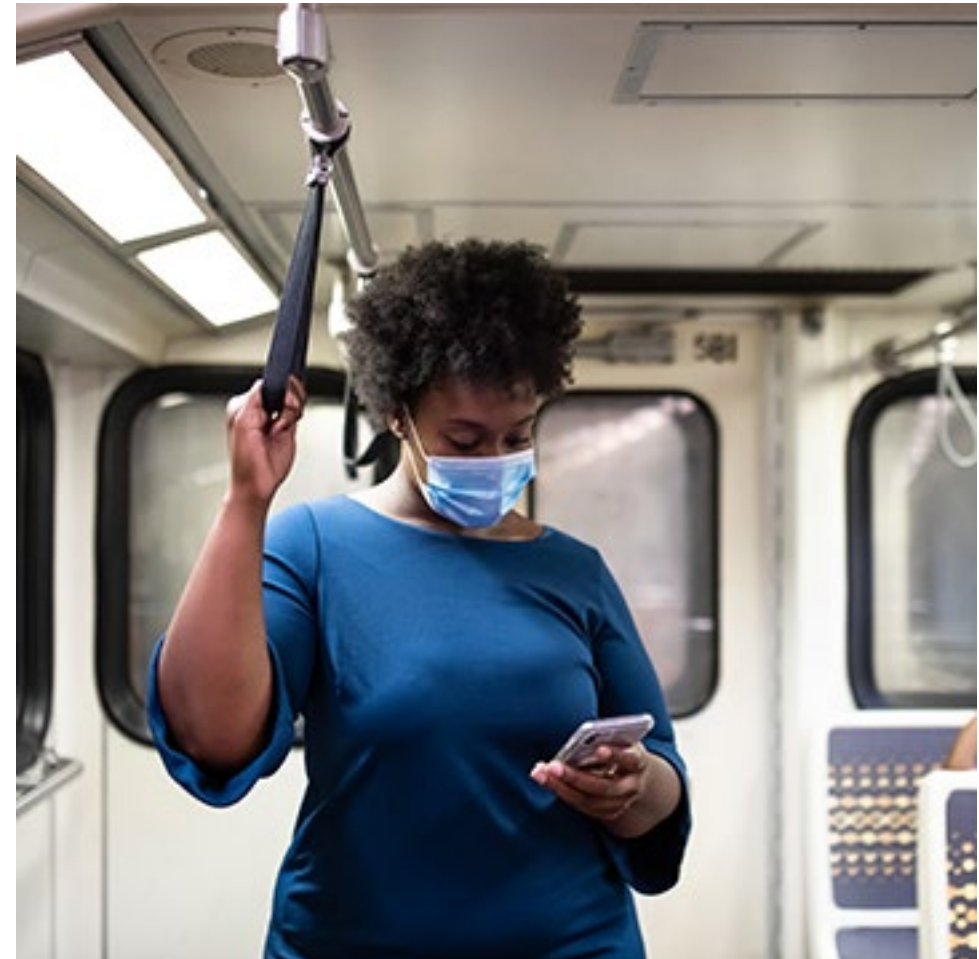
Meetings and Training

- Time spent in mandatory job-related meetings or training is considered *hours worked* and must be paid.
- This is true for trainings before the start of the workday or at the end.



Travel Time

- Commuting from home to work generally is not compensable work time.
- Travel between job sites during normal workday is work time and thus compensable hours worked.



Rest and Meal Periods

- Short rest breaks (20 min or less) are compensable.
- Bona fide meal periods (typically 30 minutes or more) need not be paid as hours worked.
- Worker must be completely relieved of duty for meal period not to be paid time.



Break Time & Space for Nursing Mothers

The FLSA provides nursing employees, for up to 1 year after the child's birth, with:

- Reasonable break time to express breast milk
- A place, other than a bathroom, that may be used to express milk



Sleep Time

Three categories of employees:



Shifts of less
than 24 hours



Shifts of 24
hours or more



Live-ins

Employees on duty for less than 24 hours are considered *working* even if allowed to sleep, engage in personal pursuits; no sleep time deductions are permitted.

Sleep Time



Duty: Shifts of 24 hours or more

Requirements:

- Adequate sleeping facilities
- Employee can **usually** enjoy an uninterrupted night's sleep
- Expressed or implied agreement

Sleep Time



Duty: Live-in employees

Two types:

- Live-in – permanent
- Live-in – extended periods of time

[View Field Assistance Bulletin No. 2016-1](#)

Overtime



- Compliance determined by workweek
- Each workweek stands alone
- Workweek is 7 consecutive 24-hour periods (168 hours)

Overtime

Regular Rate

- Determined by dividing total earnings in workweek (except for statutory exclusions) by total number of hours worked in workweek

$$\text{Gross Weekly Straight Time Pay} \div \text{Total Hours Worked} = \text{RR}$$

- Regular Rate may not be less than the applicable minimum wage
- Total earnings include commissions, certain bonuses, and cost of room, board, and other facilities provided primarily for the employee's benefit

Steps for Computing Total Pay

- 1. Hourly Pay Due =**
Hourly Rate x All Hours Worked
- 2. Total Compensation =**
Hourly Pay + Other compensation (commissions, nondiscretionary bonuses, etc.)
- 3. Regular Rate =**
Total Compensation ÷ Total Hours Worked
- 4. Half-Time Rate =**
Regular Rate x .5
- 5. Overtime Pay Due**
Half-Time Rate x Overtime Hours Worked
- 6. Total Wages:**
Overtime Pay Due + Straight Time Pay Due

Example #1

- Employee is paid \$750 for this workweek
- Employee works 50 hours this workweek
- The employee does not receive any other compensation this week

Example #1 Continued

Hourly Rate: \$15
Hours Worked: 50
Additional Pay: \$0

1. Straight Time Pay Due:

$$\$15 \times 50 \text{ hours} = \$750$$

2. Half-Time Rate:

$$\$15 \times .50 = \$7.50$$

3. Overtime Pay Due:

$$\$7.50 \times 10 \text{ OT hours} = \$75$$

4. Total Wages Due:

$$\$750 + \$75 = \$825.00$$

Eight and Eighty (8 and 80) Overtime Exception

Hospitals and residential care establishments may pay employees overtime after 40 hours in a 7-day workweek or alternatively, use the "8 and 80" system. Under the "8 and 80" system, the care facility may pay employees - with whom they have a prior agreement - overtime after 8 hours in any workday and 80 hours in a fourteen-day period.

[View Fact Sheet #54: The Health Care Industry and Calculating Overtime Pay](#)

[View Fact Sheet #31: Nursing Care Facilities](#)

Example #2

- An employee works 72 hours in a two-week period
- The first week, the employee works a total of 48 hours six days in a row
- The second week, the employee works 24 hours
- The employer and the employee have an agreement to be paid overtime on an “8 and 80” system.

Example #2 Continued

WEEK 1	WEEK 2
Sunday: 8	Sunday: 0
Monday: 8	Monday: 0
Tuesday: 8	Tuesday: 8
Wednesday: 8	Wednesday: 0
Thursday: 8	Thursday: 8
Friday: 8	Friday: 8
Saturday: 0	Saturday: 0
Total Hours Worked: 48	Total Hours Worked: 24
	Two-week period total: 72 hours worked

Example #3

- An employee's hourly wage is \$15 per hour.
- An employee works 76 hours in a two-week period.
- The employee worked more than 8 hours on two days during this two-week period.
- The employer and the employee have an agreement to be paid overtime on an "8 and 80" system.

Example #3 Continued

WEEK 1	WEEK 2
Sunday: 10	Sunday: 0
Monday: 8	Monday: 0
Tuesday: 8	Tuesday: 8
Wednesday: 8	Wednesday: 0
Thursday: 8	Thursday: 8
Friday: 0	Friday: 8
Saturday: 10	Saturday: 0
Total Hours Worked: 52	Total Hours Worked: 24
	Two-week period total: 76 hours worked

Example #3 Continued

Hourly Rate: \$15
Hours Worked: 76
Overtime Hours: 4

1. Straight Time Pay Due:

$$\$15 \times 76 \text{ hours} = \$1,140$$

2. Half-Time Rate:

$$\$15 \times .50 = \$7.50$$

3. Overtime Pay Due:

$$\$7.50 \times 4 \text{ OT hours} = \$30$$

4. Total Wages Due:

$$\$1,140 + \$30 = \$1,170$$

Flat Rates

Employers in the care industry sometimes pay employees on a "per visit" basis or a flat rate for work completed. However, this practice could cause minimum wage and overtime violations.



Example #4

- An employee was paid \$200 a day on a day-rate basis.
- The employee worked five days a week.
- The employee worked 45 hours in the work week.

Example #4 Continued

1. Day Rate:

$$\$200 \times 5 = \$1000$$

2. Regular Rate:

$$\$1000.00 \div 45 = \$22.22$$

3. Half-Time Rate:

$$\$22.22 \div 2 = \$11.11$$

4. Overtime Pay Due:

$$\$11.11 \times 5 = \$55.55$$

5. Total Wages Due:

$$\$1000 + \$55.55 = \$1,055.55$$

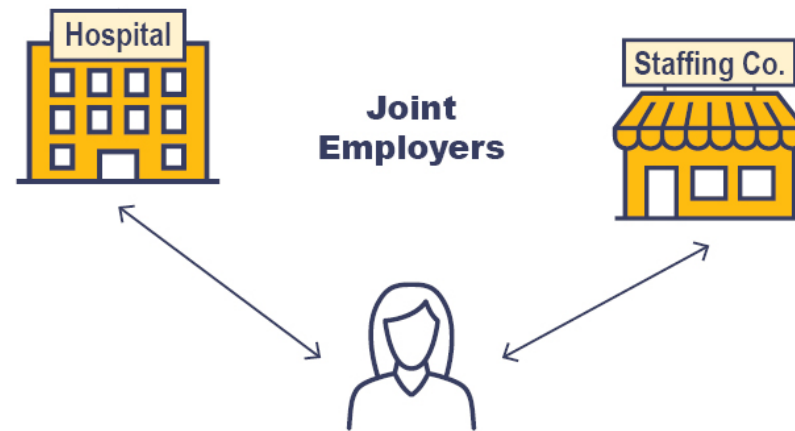
Recordkeeping

Your employer must keep records of all wages paid to you and all hours you worked, no matter where the work is done.

[View Fact Sheet #21: Recordkeeping Requirements](#)

Joint Employment

An employee may have two or more employers who are both responsible for paying the minimum wage and overtime for all hours the employee works.



Companionship Services Exemption

- In some limited circumstances, consumers and their families or households are not required to pay a home care worker federal minimum wage and overtime pay.
- If a home care worker provides fellowship and protection nearly all the time (80% of the time), which means she spends most of her work time watching over the consumer and keeping the consumer company, then an exemption from the wage requirements might apply.

Companionship Services - Definition

- A home care worker spends no more than 20% of their total working time in a workweek assisting with care activities such as bathing, dressing, toileting, grooming, cooking, cleaning, etc.;
- The worker does not perform any medically related tasks, which are tasks that are usually done by a nurse or certified nursing assistant, such as tube feeding or catheter care; and
- The worker does not perform any general household work that is mostly for members of the household other than the consumer, such as doing laundry or cooking meals for the entire household.

Companionship Services Exemption

- Under the FLSA, a home care worker might be employed both by the person receiving services (or his or her family or household) and an outside employer, such as an agency.
- Third party employers **may not** claim the companionship or live-in worker exemptions and are required to pay home care workers the federal minimum wage and overtime compensation.

Companionship Services Exemption

- Even if the person receiving services qualifies for the companionship services exemption, **third party employers always have to pay home care workers the federal minimum wage and overtime compensation.**

Child Labor

- Child labor provisions under FLSA are designed to protect the educational opportunities of youth and prohibit their employment in jobs that are detrimental to their health and safety.
- Child Labor rules restrict the hours that youth under 16 years of age can work and lists hazardous occupations too dangerous for young workers to perform.

[View Fact Sheet #43: Child Labor Provisions for Nonagricultural Occupations](#)

Child Labor

- **16 and 17 year olds**

Unlimited hours; may work in any occupation other than those declared hazardous by Secretary of Labor

- **14 and 15 year olds**

May work outside school hours and for limited periods of time; only specific non-manufacturing, non-hazardous jobs, and specific conditions apply

- **Children under 14**

With limited exceptions, no employment permitted in covered, non-agricultural occupations

Child Labor

EXAMPLE: POWER-DRIVEN HOISTING APPARATUS



Bans minors under 18 from operating or assisting in the operation of power-driven hoists, including those designed to lift and move patients, unless assisted by a trained adult under certain conditions.

Family and Medical Leave Act

- Up to twelve workweeks of unpaid leave per leave year for qualifying reasons
- Up to twenty-six workweeks of military caregiver leave during a single 12-month period
- Job protection
- Protection of benefits and status while on leave
- Return to the same or an equivalent position

Common Violations Found In The Care Industry

- Failure to pay proper overtime, including salaried workers
- Improper deductions for meal breaks not taken
- Unpaid hours worked for time spent in travel
- Unpaid training time
- Unpaid on-call hours
- Completing pre- and post-shift work
- Misclassification as independent contractor



FLSA Compliance Assistance

- Call WHD toll free and confidential information and helpline: 1-866-4US-WAGE (1-866-487-9243) or visit www.dol.gov/agencies/whd
- Visit the nearest Wage and Hour Division Office (WHD Offices) : www.dol.gov/agencies/whd/contact/local-offices
- Employment Laws Assistance for Workers and Small Businesses (ELAWS): www.dol.gov/agencies/whd/compliance-assistance/elaws-advisors

How to File a Complaint

- Complaints can be submitted by phone.
- Complaints can come from third parties.
- Complaints are confidential.
- WHD does not ask workers about their immigration status.
- No fee to file a complaint.

Who May File a Complaint

- Employees – Former and Present
- Parent/Guardian
- School Officials
- Other Employers
- Advocacy Groups
- Other Agencies



Complaint Intake Information

Employee's name

- Contact information
- Address and phone number
- Employee's duties/work
- Circumstances or actions that caused potential violation of the law
- Copies of pay stubs or personal hours worked records if available

Employer's name

- Point of contact
- Address and phone number

This information is not required, but helps develop the case.

Retaliation

Employers ***cannot*** retaliate or discriminate against someone who files a complaint or participates in an investigation.

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