


Center for Local Government Excellence



HR LAW: FLSA *and* FMLA

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October 2019 Center for Local Government Excellence

Course Objectives



- **FMLA**
 - Definitions
 - General Requirements
 - Common Issues
- **FLSA - Exempt vs Non-Exempt Employees**
 - Exempt vs Non-Exempt
 - Overtime Rules
 - Common Exemptions
 - Proposed Changes
 - Other Matters



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Fair Labor Standards Act (FLSA)

29 U.S.C. §201, et seq.

Main components are :

- Minimum Wage (\$7.25/hour)
- Overtime Pay (Time and a Half)



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FLSA



Exempt vs Non-Exempt

- **Non-Exempt** – Employees that are covered by the FLSA protections, i.e. must receive at least minimum wage and generally required to receive overtime pay.
- **Exempt** – Employees that are provided some form of exemption from one or more of the general protections under the FLSA, i.e. executive level employees, members of certain professions, and certain white collar workers.

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The slide features a blue header with the text "FLSA" in white. On the left, there is an icon of three stylized human figures. On the right, there is a cartoon character of a bee wearing a yellow hard hat and a red and white shirt. Below the header, the title "Employee vs Independent Contractor" is written in blue. Two bullet points follow, and a red text block is at the bottom.

FLSA

Employee vs Independent Contractor

- FLSA applies only to employees and does not apply to independent contractors.
- The Department of Labor and the IRS both have tests in order to determine whether an individual should be considered an employee or an independent contractor.

Entities should consult with their legal counsel in making any determination that an individual is an independent contractor.

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The slide features a blue header with the text "FLSA" in white. On the right, there is a graphic showing a man and a woman with arrows pointing to "EMPLOYEE" and "INDEPENDENT CONTRACTOR" respectively, with "OR" in between. Below the header, the title "Employee-Employer Relationship Factors" is written in blue. A paragraph follows, and then a numbered list of two factors.

FLSA


Employee-Employer Relationship Factors

The factors that a court will consider in determining whether an individual is an employee or an independent contractor include:

1. The nature and degree of control by the employer over the manner in which the work is to be performed;
2. The extent to which services rendered are an integral part of the business;

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FLSA




Employee-Employer Relationship Factors (Cont'd)

3. The permanency and duration of the relationship between the individual and the employer;
4. The amount of the alleged contractor's investment in facilities and equipment;
5. The alleged contractor's opportunities for both profit and loss;
6. Whether the service rendered requires a special skill compared to other regular skills utilized and obtained in the workplace; and
7. The degree of dependence on the Employer for maintaining the alleged contractor's business.

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General Overtime Rules

- An employer must generally provide one and a half times a non-exempt employee's regular hourly rate (aka Time and a Half) for each hour or part of an hour that the employee actually works in excess of 40 hours in a week.
 - * **Paid leave, vacation leave, or paid holiday leave does not count towards establishing the 40 hour limit for overtime purposes.**
- FLSA required overtime may be paid in the form of cash or paid leave (compensatory time) as established by written policy by government employers; however, there are limits to accrual of compensatory time (generally 240 hours) beyond which the government employer must provide cash payment for any additional overtime work.

29 U.S.C. §207(O)

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FLSA




Common Exceptions:

- White Collar Exemptions;
 - Salary Basis Test; and
 - Job Duties Test;
 - Primary Duties
 - Types of Positions Exempted:
 - Executive;
 - Administrative;
 - Professional
- Police and Fire

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FLSA



White Collar Exemptions

- FLSA “White Collar” Exemptions are generally based upon an employee satisfying both the salary basis thresholds and job duty requirements.
- In other words, an employee must generally perform the right type of job and make above a certain level of pay in order to be deemed “Exempt” under the FLSA.
- These employees are generally exempted from the overtime pay requirements of the FLSA.

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FLSA

Salary Basis Test

- Generally, in order to be deemed “Exempt” under the FLSA, an employee must be paid at least **\$684***/week (formerly \$455/week) or **\$35,568***/year (formerly \$23,660/year) on a salaried basis. * Effective January 1, 2020

29 C.F.R. §541.600


- Certain professions are deemed “Exempt” regardless of the salary paid to the employee.



Examples:
Physicians;
Lawyers; and
Certain Teachers.

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Salary Basis Test (Cont'd)

- “Highly Compensated” employees receiving an annual salary of **\$107,432*** (formerly \$100,000) or more are generally deemed “Exempt” under the FLSA regardless of their position. * Effective January 1, 2020
- While “salaried” employees in the private sector are generally required to be paid regularly regardless of the hours actually worked, pay for government employees may be reduced for hours not worked.

29 C.F.R. §541.710

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FLSA




Job Duties Test

- In addition to the Salary Basis Test an employee generally must also meet the Job Duties Test in order to be deemed “Exempt” under the FLSA.
- The Job Duties Test focuses on the Primary Duties of the employee.

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Job Duties Test - Cont'd

An employee’s primary duty is the principal, main, major, or most important duty that the employee performs.

29 C.F.R. §541.700


Factors to be considered in making this determination for the purpose of “Exempt” status include:

1. The relative importance of the exempt duties;
2. The amount of time spent performing exempt work;
3. Relative freedom from direct supervision; and
4. Relationship between the employee’s salary and wages paid to other employees for the same kind of non-exempt work.

There is no bright-line test and the determination is highly fact-specific.

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Common Exempt Duties

- **Executive Exemption** – Management positions with supervision duties and authority to hire/fire or make suggestions and recommendations on hiring, firing, and promotions.
29 C.F.R. §541.100
- **Administrative Exemption** – Office, non-manual work related to management or general business operations of the employer, and must have ability to exercise discretion and independent judgment with respect to matters of significance.
29 C.F.R. §541.200

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Common Exempt Duties – Cont’d

- **Learned Professions** – Generally individuals whose positions require advanced knowledge in a field of science or learning such as doctors, lawyers, teachers, accountants, engineers, chefs, actuaries, etc.
29 C.F.R. §541.301
- **Computer Professional Exemption** – IT related jobs generally involving designing, creating, repairing, managing software, programs, or hardware systems.
29 C.F.R. §541.400

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Police and Fire

The FLSA provides a different method for determining overtime for police and fire fighters due to their shift work in lieu of the traditional 40 hour work week.

Federal

- 29 C.F.R. § 553.230 provides a chart for determining the maximum hours under the FLSA for Fire and Law Enforcement based upon the days in their shift.

Louisiana

- Louisiana also provides for limitations on maximum hours for Police under R.S. 33:2213 which varies by city.
- R.S. 33:1994 adopts the maximum hours for Firemen as established under 29 C.F.R. §553.230.
R.S. 33:1994.1 restricts consecutive hours worked for firemen, except in certain emergency or disaster situations, to 72 hours.

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FLSA

Federal	Maximum Hours Standards	
Work Period/ Length of Shift (Days)	Fire Protection	Law Enforcement
28	212	171
21	159	128
14	106	86
7	53	43


Excerpt from 29 C.F.R. §553.230

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On Call Pay



- The Attorney General in AG Op. No. 15-0048 discusses requirements for local government policies concerning payment for on call employees.
- Key issue is whether an employee that is on call is otherwise constrained from engaging in personal endeavors.

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FLSA



Compensatory Time for Exempt Employees

- A public entity can provide for its Exempt employees to receive compensatory time (paid time off) for working overtime hours.
- In order to do so the public entity must:
 - Establish a formal written policy;
 - Apply the policy prospectively only; and
 - May not require an employee to forfeit earned compensatory time by virtue of future policy changes.

The public entity can through policy prospectively require its Exempt employees to forfeit any unused earned compensatory time at the end of the calendar/fiscal year, but again this may not be applied to compensatory time earned under a previous policy.


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Family and Medical Leave Act (FMLA)

29 U.S.C. §2601, et seq.

Intended to provide eligible employees of covered employers with 12 weeks of unpaid leave in order to address birth of child, serious health conditions, care of injured covered service member, etc.

Louisiana Pregnancy Disability Leave
R.S. 23:341, et seq.
>25 Employees




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FMLA


Definitions

- Covered Employer
- Eligible Employee
- Serious Health Condition



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FMLA




Definitions – Cont'd

Covered Employer –

- Public agencies (local, state, or federal), regardless of the number of employees they employ;
- Public or Private Elementary and Secondary schools*, regardless of the number of employees they employ; and
 - * 29 U.S.C. §2618 provides for special rules for employees of local educational agencies.
- Private-sector employers, with 50 or more employees in 20 or more work weeks in the current or preceding year.
29 U.S.C. §2611(4)

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FMLA




Definitions (Cont'd)

Eligible Employee –

- Work for covered employer;
- Have worked 1,250 hours during the 12 months prior to taking leave;
- Work at a location where the employer has 50 or more employees within 75 miles; and
- Have worked for the employer for 12 months (need not be consecutive but generally within last 7 years).
29 U.S.C. §2611(2)

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FMLA



Definitions (Cont'd)
Serious Health Condition –

Means an illness, injury, impairment, or physical or mental condition that involves:


- Inpatient care in a hospital, hospice, or residential medical care facility; or
- Continuing treatment by a health care provider.

29 U.S.C. §2611(11)

Pregnancy including prenatal appointments, incapacity due to morning sickness, and bed rest are considered Serious Health Conditions for the purposes of the FMLA.

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FMLA



General Requirements


An eligible employee is entitled to 12 work weeks of unpaid leave during any 12 month period for any of the following:

- Birth of Child;
- Placement of child with the employee for adoption or foster care;
- Care for a spouse, child or parent with a serious health condition;
- Serious Health Condition that makes employee unable to work; and
- Qualifying exigencies arising out of the fact that the employee’s spouse, child, or parent is on covered active duty or has been notified of an impending call or order to covered active duty in the Armed Forces.

29 U.S.C. §2612(a)(1)

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FMLA



General Requirements – Cont’d

- An eligible employee is entitled to 26 work weeks of unpaid leave during any single 12 month period to care for a spouse, child, parent, or next of kin who is a covered service member (military person).
- This is in addition to the employee’s entitlement to 12 weeks for the other general purposes.


29 U.S.C. §2612(a)(3)

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FMLA

Common Issues:


- Employee Notice
- Certification of Serious Health Condition
- Intermittent Leave
- Using Paid Leave
- Americans with Disabilities Act (ADA)



Source: National Partnership for Women and Families (www.nationalpartnership.org).

■ Introduced paid family leave bill.
■ Enacted paid family leave, with access to benefits beginning in July 2018.
■ No recent state activity.
■ Enacted program allowing use of sick leave.
■ All care left service member.
■ All Home Infant Care subsidies established or expanded.
■ Enacted laws to research costs of providing paid family leave.
■ Temporary Disability Insurance benefits apply to pregnancy and children.

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FMLA

Employee Notice

- An employee is generally required to comply with an employer's policy or custom for requesting leave and applicable call-in procedures when requesting FMLA leave.
- Foreseeable leave should generally be requested 30 days in advance, absent policy or custom to the contrary and when practicable.
- When leave is not foreseeable or is foreseeable less than 30 days in advance, the employee must provide notice as soon as practicable.
- An employee is initially required to provide sufficient information for the employer to determine if the FMLA may apply to the leave request, but is not required to specifically request FMLA leave the first time they seek leave for a FMLA qualifying reason. However, if an employee seeks subsequent FMLA leave for the same reason, they must specifically reference either the qualifying reason for the leave or the need for FMLA leave.

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FMLA

Certification

- An employer can require that an employee certify a serious health condition, but must give the employee at least 15 days to obtain the medical certification.
- An employer may not request recertification sooner than 30 days, and if the initial certification is for a period of greater than 30 days, no sooner than that initial period has elapsed. However, an employer may require additional certification every 6 months and annually for an absent employee.
- An exception is allowed to authorize an employer to seek additional certification in cases where:
 - an employee seeks an extension of leave previously granted;
 - There is a significant change in the circumstances described in the previous certification; or
 - Where an employer receives information that casts doubt upon the employee's stated reason for the absence or continuing validity of the certification.

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FMLA




Intermittent Leave

- When medically necessary, an employee is not required to take their FMLA leave all at once, but may take it intermittently in either:
 - Separate blocks of time for single qualifying reason, or
 - Through a reduced weekly or daily work schedule.
- FMLA leave for the birth of a newborn child, adoption, or placement of a foster child may only be taken intermittently with approval from the employer and must conclude within 12 months after the birth or placement.

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FMLA



Paid Leave


- An employee may utilize paid leave in lieu of unpaid leave while on FMLA leave if they comply with the employer’s policies on the use of the paid leave. Any paid leave will run concurrently with the employee’s eligible unpaid FMLA leave.
- An employer can require that an employee utilize accrued paid leave in response to an FMLA qualifying leave request.

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FMLA

ADA


- Employers should note that some FMLA qualifying situations may also qualify as a disability under the ADA, thus requiring compliance with its provisions as well.
- The EEOC has determined that leave in some circumstances may be considered a reasonable accommodation under the ADA.



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FLSA & FMLA

Questions



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HR LAW: Strategic Enforcement Issues

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Strategic Enforcement Issues

Prepare for Worst Case Scenarios

- Public
- Private



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Strategic Enforcement Issues

HIRING

- **Qualifications**
- Non-arbitrary
- **Cannot Disqualify on:**
 - ❖ **Race**
 - ❖ **Sex**
- **Cannot ask:**
 - ❖ **Religion**
 - ❖ **Marital Status**
 - ❖ **Child Care**
 - ❖ **Sexual Orientation**



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Strategic Enforcement Issues

HIRING – cont'd:

- Disparate Treatment
- Disparate Impact



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Strategic Enforcement Issues

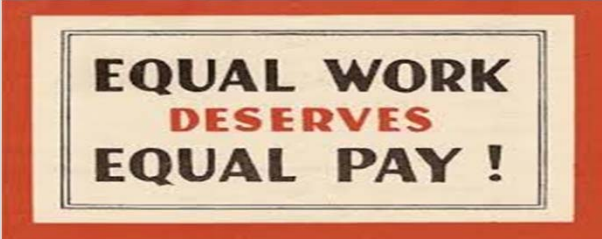
Enforcement Priorities



- ADA
- Pregnancy
- LGBT
- Has an accommodation been sought?

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Strategic Enforcement Issues



- * **Patterns in practice**
- * **Written manuals**
- * **Supervisory training**

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Strategic Enforcement Issues



**Racial
Harassment**



**Sexual
Harassment**

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Strategic Enforcement Issues



- Overtones**
- Suggestions**
- Hostile Work Environment**
- Intentional Acts**

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Strategic Enforcement Issues

Supervisory Liability


◆ *Prima facie*



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Strategic Enforcement Issues

Language is Critical!



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Strategic Enforcement Issues

***OBERGEFELL ET AL. v.
HODGES, DIRECTOR, OHIO DEPARTMENT
OF HEALTH, ET AL.
135 S.Ct. 2584 (06/26/15)***

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Strategic Enforcement Issues

**Most significant changes in workplace
because of Obergefell are:**


- A. FMLA**
- B. Health coverage**
- C. Beneficiaries**

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Strategic Enforcement Issues

Social Media

- Facebook
- Twitter
- Instant Messaging



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Strategic Enforcement Issues

Recent Publications

- Harvard rescinds offers to incoming freshmen over hateful memes
- 10 Tips for Federal Employees on the Personal Use of Social Media

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Strategic Enforcement Issues

REASONABLE ACCOMMODATION



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Strategic Enforcement Issues

Reasonable Accommodation (Cont'd)

➤ EEOC has given life to the ADA filing and successfully prosecuting cases involving conditions such as diabetes, cancer, intellectual disabilities, and epilepsy, often difficult to cover prior to the Amendments.



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Strategic Enforcement Issues

Hard not to Accommodate - Significant Questions

- 1) Did they ask for an accommodation ?
- 2) What is the job ?
- 3) What does best qualified mean ?

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Strategic Enforcement Issues

Pregnancy Discrimination



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Strategic Enforcement Issues

Disparate Treatment

- ➔ If I were not pregnant, would you accommodate me?
- ➔ If I were not pregnant, would you reassign me?
- ➔ Is the lack of accommodation a pretext for discrimination?



Young v. United Parcel Serv., Inc.,
135 S.Ct. 1338, 191 L.Ed.2d 279 (2015)

Strategic Enforcement Issues

Religious Discrimination



Strategic Enforcement Issues

Religious Discrimination

EEOC v. Abercrombie and Fitch (Cert. Granted)



731 F.3d 1106 (10th Cir. 2013)

Strategic Enforcement Issues

EEOC v. Abercrombie and Fitch (Cert. Granted)


“DON’T LOOK RIGHT”

Justice Scalia writing for Court said...

“An employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decision.”

Strategic Enforcement Issues

Questions



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