



AWARE

Alternatives for Worker Action, Rights, and Education

Essential Workers

Essential Protections



WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

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

Introduction

DISCLAIMER

The Department of Labor provides this AWARE Resource Handbook as a public service. This resource book provides general information but does not carry the force of law or legal opinion. The United States Code, the Federal Register and the Code of Federal Regulations remain the official sources for statutory and regulatory information

This book was designed for distribution in the context of training delivered by a Wage and Hour Division representative who will be available to answer any questions you have regarding this material. If you come across a potential violation of the laws we enforce, we encourage you to contact your trainer, or your local WHD office to discuss the issue.

Many states and localities have laws that are more protective than the federal laws covered in this book. When an employer is subject to one or more laws, the employer must comply with all of them. The final section of this resource book contains contact information for other federal agencies, as well as state and local agencies, that enforce other labor laws.

FOREWORD

The U.S. Department of Labor's Wage and Hour Division (WHD) is committed to protecting all workers in the United States, with a focus on protections for essential, low-wage workers in the United States most likely to face exploitation. WHD strives to prevent violations from happening, and to resolve them when they do occur. Essential workers deserve to take home all of their hard-earned wages.

This resource book provides an overview of selected federal labor laws that establish basic protections for workers, including essential workers, such as minimum wage, overtime, family and medical leave, and safe housing and transportation conditions in agriculture.

WHD strives to educate workers, their advocates, and others who regularly interact with essential workers, and enable them to more effectively guide and support workers who need WHD assistance. This resource book provides an opportunity for advocates to learn the basics about WHD protections, and carry that information forward to the sometimes difficult-to-reach populations who need it. We understand that many exploited workers, for a variety of reasons, may not otherwise contact WHD. As a result, we seek every opportunity to ensure that our information gets into the hands of those who need it.

For information about all of the laws enforced by WHD, visit our website at www.dol.gov/agencies/WHD or call our toll-free help line at 866-4US-WAGE to speak with a trained WHD professional. Assistance is confidential, and we can communicate with callers in more than 200 languages. WHD enforces the law regardless of a worker's immigration status.

The Fair Labor Standards Act (FLSA)

THE FAIR LABOR STANDARDS ACT (FLSA)

INTRODUCTION

THE FAIR LABOR STANDARDS ACT (FLSA)

The FLSA is a federal law that sets minimum wage, overtime, and record keeping requirements, and provides child labor protections. The U.S. Department of Labor (DOL), Wage and Hour Division (WHD) enforces this law and investigates complaints by workers who feel that their rights have been violated. WHD also investigates companies in industries where there are likely to be violations, but complaints have not been filed.

WHAT THIS CHAPTER INCLUDES:

Most workers in the U.S. are entitled to the current federal minimum wage (\$7.25 per hour-). The chapter begins with a series of worksheets to help you compute a worker's hourly pay. Calculations may be necessary, particularly if the worker receives wages through piece rate work, tips, commissions, or a salary. Calculations may need to be made each week, if amounts paid and/or hours worked vary.

The next section of the chapter explains which employees are covered (subject to) and which are exempt from the minimum wage law. Then, you will learn how to help workers determine if they are working overtime and not receiving overtime pay. The rules governing which types of employees are eligible for overtime pay are explained.

- ▶ *To find out more about the FLSA visit the WHD website at www.dol.gov/whd/flsa.*

MINIMUM WAGE

Most workers are covered by the minimum wage law regardless of the way they are paid (hourly rate, piece rate, tips, salary or commission). Covered workers are generally entitled to at least the current federal minimum wage (\$7.25 per hour).

Note: Some states mandate a minimum wage higher than the federal standard. In these states, the higher wage applies.

This chapter includes a series of worksheets that can be used to determine if a worker is being paid at least the current federal minimum wage (\$7.25 per hour). To use these worksheets you must first determine how the worker is paid. Ask the worker how he or she is paid, then turn to the appropriate worksheet.

- ▶ **WORKWEEK** A workweek is a fixed period of any seven consecutive days, chosen by the employer (for example, 12:00 AM Wednesday-11:59 PM Tuesday). When determining a worker's hourly rate, each week must be analyzed independently. An employer is not permitted to average two or more workweeks to determine if minimum wage has been paid.

Example: Luisa is paid by the piece every week. Last week she had a difficult job and problems with her sewing machine, so she only earned \$200 for 40 hours, averaging \$5 per hour. This week she had an easier job and made \$500 for her 40 hours of work, averaging \$12.50 per hour. Luisa heard that she must be paid at least the minimum wage every week and complained to her boss about the week she earned only \$200. Her boss told Luisa that since she averages at least minimum wage, she is paid legally. Is this true?

No. Each workweek stands alone. Employees covered by the FLSA must be paid at least the current minimum wage for all hours worked in every workweek.

HOURLY RATE (REGULAR RATE) AND GROSS WEEKLY STRAIGHT TIME PAY

An employee's actual hourly rate (regular rate) is calculated by dividing the gross weekly straight time pay by the employee's total hours worked for which the compensation was paid.

- ▶ **GROSS WEEKLY STRAIGHT TIME PAY** Gross weekly straight time pay is all of a worker's pay, including all extra payments such as production bonuses, commissions, and any other pay the employee receives, before any deductions are taken. However, it does not include certain limited exclusions including any premiums paid for overtime. In many cases, where employee hours vary, gross weekly straight time pay is different from week to week.
- ▶ **HOURLY RATE** Gross Weekly Straight Time Pay / Total Hours Worked Weekly

Example 1: Rob is paid \$80 per day, and he received an extra \$50 because one of his jobs was very difficult. He also worked on Sunday, for which he was paid \$10 an hour, in cash, for seven hours. He worked Monday-Saturday at \$80 per day, plus the seven hours on Sunday. The workweek at Rob's company starts on Monday morning and ends Sunday night. Now calculate his gross weekly straight time pay.

From Monday - Saturday, Rob worked six days at \$80 per day	(6 days x \$80) =	\$ 480
Add in the \$50 "bonus"		\$ 50
On Sunday, Rob worked seven hours at \$10 per hour	(7 hours x \$10) =	\$ <u>70</u>
Add these together and Rob's total gross weekly straight pay is:		\$ 600

Let's take it one step further and figure out Rob's actual hourly rate, also called his regular rate of pay:

Monday	7 hours
Tuesday	10 hours
Wednesday	9 hours
Thursday	11 hours
Friday	10 hours
Saturday	6 hours
Sunday	7 hours
Total	60 hours

Rob's hourly rate equals his gross weekly straight time pay divided by his hours worked, so \$600/60, or \$10.

As you will see in the overtime section, Rob is due an overtime premium of half-time for all hours worked beyond 40 in a workweek, which in this case is 20 hours (60 hours worked minus 40 regular hours). Rob has been paid \$10 for each hour worked, so now he is due half of that, $\$10/2 = \5 per hour for the 20 hours he worked beyond 40, or \$100.

Example 2: Maria works as a cleaner on a cleaning crew. She is paid by the job. Maria also drives the crew around from job to job, and for that she is paid \$40 per week in addition to her cleaning jobs. This week she did five jobs that paid \$40 each. She also did three smaller jobs that paid \$10 per crew member. Calculate her gross weekly straight time pay.

Maria did five jobs at \$40 each	(5 x \$40) =	\$ 200
She did three jobs at \$10 each	(3 x \$10) =	\$ 30
She received \$40 for driving		\$ <u>40</u>
Add these together and Maria's total gross weekly straight time pay is:		\$ 270

Maria worked 31 hours cleaning this week and three hours driving her crew from job to job, so she worked a total of 34 hours this week. Maria's hourly rate equals her gross weekly straight time pay divided by her hours worked, so $\$270/34$, or \$7.94.

SAMPLE HOURLY PAY WORKSHEET

Many employees are paid by the hour. If an employee is paid by the hour and receives additional pay, or works extra time that is not recorded, the following formula can be used to determine his/her actual hourly rate, also called the regular rate:

► **HOURLY RATE** Gross Weekly Straight Time Pay / Total Hours Worked Weekly

A. What is your gross weekly straight time pay?	\$350
<p>Gross weekly straight time pay is the total amount an employee is paid before any deductions, and less any over- time premium. Gross pay = basic hourly pay or salary PLUS commission, production bonuses, or any other pay an employee receives.</p> <p>If you are paid monthly, monthly salary ÷ 4.333 = weekly salary.</p> <p>If you are paid semi-monthly (twice per month), semi-monthly pay ÷ 2.1666 = weekly salary.</p>	
B. How many hours do you work per week? (If the worker is not sure, see the Hours Worked Worksheet on page 18)	35*
<p>“Workday” in general, means all of the hours between the time an employee begins work and ends work on a particular day.</p> <p>Work time generally includes:</p> <ul style="list-style-type: none"> • Waiting for repairs to equipment necessary for work • Time spent traveling between worksites during the workday • Time spent before or after a shift performing work-related activities • Time spent after a shift, completing unfinished work • Waiting for materials to arrive during the workday • Breaks less than 20 minutes long 	
C. Divide A by B to determine the worker’s hourly rate: A (\$350 straight time pay) / B (35 hours worked) = C (hourly rate of \$10)	\$10
<p>If the hourly rate is less than the current minimum wage (\$7.25 per hour), or the employee worked unpaid hours in an overtime workweek, you should advise the worker that there may be a violation of the wage and hour law, and that s/he has a right to file a complaint with WHD. If the worker is receiving at least the current minimum wage and did not work unpaid hours in an overtime workweek, there does not appear to be a violation of the federal wage law. Check to see if an additional state or local minimum wage law is also in effect.</p>	

DEDUCTIONS

Deductions such as taxes, social security, child support or health insurance payments can be made even though this may result in the worker taking home less than minimum wage. Other deductions such as charges for uniforms, cash shortages, breakage, or personal protective gear cannot be made if the worker’s gross hourly rate would be reduced below minimum wage. You should ask the worker if there are any deductions from his/her paycheck that s/he did not approve or does not understand. If the worker has been subject to improper deductions and those deductions bring the worker’s hourly rate below the current federal minimum wage, you should advise the worker that there may be a violation of the wage and hour law and that s/he has a right to file a complaint with WHD.

* If the worker works more than 40 hours per workweek, refer to the **Overtime** section of this chapter (pages 24-26).

BLANK HOURLY PAY WORKSHEET

Many employees are paid by the hour. If an employee is paid by the hour and receives additional pay, or works extra time that is not recorded, the following formula can be used to determine his/her actual hourly rate, also called the regular rate:

► **HOURLY RATE** Gross Weekly Straight Time Pay / Total Hours Worked Weekly

<p>Gross weekly straight time pay is the total amount an employee is paid before any deductions, and less any overtime premium. Gross pay = basic hourly pay or salary PLUS commission, production bonuses, or any other pay an employee receives.</p> <p>If you are paid monthly, monthly salary ÷ 4.333 = weekly salary.</p> <p>If you are paid semi-monthly (twice per month), semi-monthly pay ÷ 2.1666 = weekly salary.</p>	
<p>B. How many hours do you work per week? (If the worker is not sure, see the Hours Worked Worksheet on page 18)</p>	*
<p>“Workday” in general, means all of the hours between the time an employee begins work and ends work on a particular day.</p> <p>Work time generally includes:</p> <ul style="list-style-type: none"> • Waiting for repairs to equipment necessary for work • Time spent traveling between worksites during the workday • Time spent before or after a shift performing work related activities • Time spent after a shift, completing unfinished work • Waiting for materials to arrive during the workday • Breaks less than 20 minutes long 	
<p>C. Divide A by B to determine the worker’s hourly rate: A (straight time pay) / B (hours worked) = D (hourly rate)</p>	
<p>If the hourly rate is less than the current minimum wage (\$7.25 per hour), or the employee worked unpaid hours in an overtime workweek, you should advise the worker that there may be a violation of the wage and hour law, and that s/he has a right to file a complaint with WHD. If the worker is receiving at least the current minimum wage and did not work unpaid hours in an overtime workweek, there does not appear to be a violation of the federal wage law. Check to see if an additional state or local minimum wage law is also in effect.</p>	

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* If the worker works more than 40 hours per workweek, refer to the **Overtime** section of this chapter (pages 24-26).

SAMPLE PIECE RATE WORKSHEET

Employees paid per piece still must be paid at least the federal minimum wage (\$7.25 per hour) for all hours worked. Use the worksheet below to determine if the worker's piece rate amounts to at least the minimum wage.

	\$2
B. How many items do you produce each week in a typical week?	125
C. How many hours do you work per week? (If the worker is not sure, see the Hours Worked Worksheet on page 18)	40*
<p>“Workday” in general, means all of the hours between the time an employee begins work and ends work on a particular day.</p> <p>Work time generally includes:</p> <ul style="list-style-type: none"> • Waiting for repairs to equipment necessary for work • Time spent traveling between worksites during the workday • Time spent before or after a shift performing work related activities • Time spent after a shift, completing unfinished work • Waiting for materials to arrive during the workday • Breaks less than 20 minutes long 	
D. Multiply A and B to determine weekly gross pay: A (\$2) x B (125 items) = D (\$250)	\$250
E. Divide D by C to determine the worker's hourly rate: D (\$250) / C (40 hours) = E (\$6.25)	\$6.25
<p>If the hourly rate is less than the current minimum wage (\$7.25 per hour), you should advise the worker that there may be a violation of the wage and hour law, and that s/he has a right to file a complaint with WHD. If the worker is receiving at least the current minimum wage there does not appear to be a violation of the federal minimum wage law. Check to see if an additional state or local minimum wage law is also in effect.</p>	

In this case the worker is earning only \$6.25 per hour. Advise the worker to keep a record of his/her hours and pay and see if the worker wants to file a complaint with WHD.

DEDUCTIONS

Deductions such as taxes, social security, child support or health insurance payments can be made even though this may result in the worker taking home less than minimum wage. Other deductions such as charges for uniforms, cash shortages, breakage, or personal protective gear cannot be made if the worker's gross hourly rate would be reduced below minimum wage. You should ask the worker if there are any deductions from his/her paycheck that s/he did not approve or does not understand. If the worker has been subject to improper deductions and those deductions bring the worker's hourly rate below the current federal minimum wage, you should advise the worker that there may be a violation of the wage and hour law and that s/he has a right to file a complaint with WHD.

* If the worker works more than 40 hours per workweek, refer to the **Overtime** section of this chapter (pages 24-26).

BLANK PIECE RATE WORKSHEET

Employees paid per piece still must be paid at least the federal minimum wage (\$7.25 per hour) for all hours worked. Use the worksheet below to determine if the worker's piece rate amounts to at least the minimum wage.

B. How many items do you produce each week in a typical week?	
C. How many hours do you work per week? (If the worker is not sure, see the Hours Worked Worksheet on page 18)	*
<p>“Workday” in general, means all of the hours between the time an employee begins work and ends work on a particular day.</p> <p>Work time generally includes:</p> <ul style="list-style-type: none"> • Waiting for repairs to equipment necessary for work • Time spent traveling between worksites during the workday • Time spent before or after a shift performing work related activities • Time spent after a shift, completing unfinished work • Waiting for materials to arrive during the workday • Breaks less than 20 minutes long 	
D. Multiply A by B to determine weekly gross pay: $A (\text{pay per item}) \times B (\text{items produced}) = D$ (weekly gross pay)	
E. Divide D by C to determine the worker's hourly rate: $D (\text{weekly gross pay}) / C (\text{hours worked}) = E$ (hourly rate)	
If the hourly rate is less than the current minimum wage (\$7.25 per hour), you should advise the worker that there may be a violation of the wage and hour law, and that s/he has a right to file a complaint with WHD. If the worker is receiving at least the current minimum wage there does not appear to be a violation of the federal minimum wage law. Check to see if an additional state or local minimum wage law is also in effect.	

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Deductions such as taxes, social security, child support or health insurance payments can be made even though this may result in the worker taking home less than minimum wage. Other deductions such as charges for uniforms, cash shortages, breakage, or personal protective gear cannot be made if the worker's gross hourly rate would be reduced below minimum wage. You should ask the worker if there are any deductions from his/her paycheck that s/he did not approve or does not understand. If the worker has been subject to improper deductions and those deductions bring the worker's hourly rate below the current federal minimum wage, you should advise the worker that there may be a violation of the wage and hour law and that s/he has a right to file a complaint with WHD.

* If the worker works more than 40 hours per workweek, refer to the **Overtime** section of this chapter (pages 24-26).

This publication is under revision in light of rulemakings involving tips and tipped workers. For the most up-to-date information on tips and tipped workers under the FLSA, please see [Fact Sheet #15](#) and [Fact Sheet #15A](#).

TIPPED EMPLOYEES

The FLSA applies to employees who receive tips whether an employer pays the full federal minimum wage in cash or uses a tip credit toward its minimum wage obligation.

The FLSA prohibits employers from keeping employees' tips for any purpose, including allowing managers or supervisors to keep any portion of employees' tips whether directly or through a tip pool. This is true regardless of whether the employer takes a tip credit; even where a tipped employee receives at least \$7.25 per hour in wages directly from the employer, an employer may not require the employee to turn over his or her tips to the employer.

The FLSA permits employers to require employees to share or "pool" tips with other eligible employees. As a general matter, the Act does not impose a maximum contribution amount or percentage on valid mandatory tip pools. When an employer collects tips for mandatory tip pools, the employer is required to fully distribute tips no later than the regular payday for the workweek or pay period in which the tips were collected.

As explained below, there are two kinds of mandatory tip pools - traditional and nontraditional.

When an employer uses a tip credit towards its minimum wage obligation:

All employees who are covered by the minimum wage provisions of the FLSA are entitled to receive at least the federal minimum wage (\$7.25 per hour) for all hours worked. Employers of tipped employees who meet certain criteria can take a partial credit toward the minimum wage based on the tips that an employee receives ("tip credit"). Employers using this tip credit must pay tipped employees a direct wage of at least \$2.13 per hour and may satisfy the rest of their minimum wage obligation by taking a credit based on each employee's tips. The maximum credit in a non-overtime workweek is \$5.12 per hour.

Employees who are employed in an occupation in which they customarily and regularly receive more than \$30 per month in tips are considered tipped employees. An employer that takes a tip credit can require tipped employees to contribute tips only to a "traditional" tip pool, which is limited to employees who customarily and regularly receive tips, such as servers, bellhops, counter personnel (who serve customers), bussers, and service bartenders. An employer that implements a traditional tip pool must notify tipped employees of any required tip pool contribution amount, may only take a tip credit for tips each tipped employee ultimately receives, and may not retain any of the employees' tips for any other purpose. Employers and managers and supervisors may not receive tips from a traditional tip pool. See Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act (FLSA).

Note: Several states **do not allow** a reduced direct wage with credit for tips, and require that tipped employees receive the full state minimum wage in direct wages. Some states allow employers to take a tip credit towards their state minimum wage obligations but require that tipped employees receive a minimum cash wage of greater than \$2.13 per hour. See [Minimum Wage for Tipped Employees, January 2021](#). Certain states may have additional restrictions with respect to tip pooling. Check with the state or local labor department for more information.

Employers must comply with certain requirements to use the tip credit.

The employer must provide all of the following information, verbally or in writing, to all tipped employees:

1. the amount of cash wage the employer is paying a tipped employee

Note: This cash wage must be at least \$2.13 per hour. If the employer does not pay any cash wage, the employer cannot take any credit for tips toward the minimum wage.

2. the additional amount claimed by the employer as a tip credit, which currently cannot exceed \$5.12 per hour in a non-overtime workweek (the difference between the current minimum required cash wage of \$2.13 and the current minimum wage of \$7.25)
3. that the tip credit claimed by the employer cannot exceed the amount of tips actually received by the tipped employee; that is, the employer cannot take a credit of \$5.12 in tips if the employee receives less than \$5.12 per hour in tips in any workweek
4. that all tips received by the tipped employee are to be retained by the employee except in furtherance of a tip pool limited to employees who customarily and regularly receive tips

5. that the tip credit will not apply to any tipped employee unless the employee has been informed of these tip credit provisions

The employer must also permit the employee to retain all tips, except for those directed to a traditional tip pool. Employers

who fail to provide the required information cannot use the tip credit, and must pay the tipped employee a direct cash wage of at least the federal minimum wage (\$7.25 per hour), and allow the tipped employee to keep all tips received.

Employers electing to use the tip credit must be able to show that tipped employees receive at least the minimum wage when direct (or cash) wages and the tip credit amount are combined. If an employee's tips combined with the employer's direct (or cash) wages do not equal the current federal minimum wage, the employer must make up the difference in that pay period.

Example of payment of wages to tipped employees in non-overtime workweek when the employer is using a tip credit.

A. What is the hourly direct wage paid by the employer? (This must be at least \$2.13 per hour) \$2.75

B. What is the tip credit claimed by the employer? \$4.50

If the employer figured the tip credit correctly, this amount plus the direct wage will be equal to the current federal minimum wage (\$7.25 per hour). The employee must receive **at least** the amount claimed by the employer as a tip credit in tips for the employer to be eligible for the credit. If the employee does not receive tips equal to or greater than the amount claimed by the employer as a tip credit, the employer must make up the difference in the direct wage paid to the employee in that workweek.

C. Add A and B. (This should equal the current federal minimum wage.) \$7.25

When an employer pays the full federal minimum wage:

When an employer pays its employees a cash wage of at least \$7.25 per hour, the employer may impose a mandatory "non-traditional" tip pool: a tip pooling arrangement that includes employees who are not employed in an occupation in which employees customarily and regularly receive tips. For example, an employer that implements a non-traditional tip pool may require tipped employees, such as servers, to share tips with non-tipped employees, such as dishwashers and cooks. An employer that imposes a mandatory non-traditional tip pool must pay a cash wage equal to the full minimum wage to both the tipped employees who contribute to the pool and the non-tipped employees who receive tips from the pool. In addition, as with a traditional tip pool, employers and managers and supervisors may not receive tips from a non-traditional tip pool. An employer must keep records of which employees receive tips and the amount of tips received on a weekly or monthly basis.

On the next page you will find a worksheet to help you determine whether a tipped employee has actually been paid the minimum wage.

Deductions such as taxes, social security, child support or health insurance payments can be made even though this may result in the worker taking home less than minimum wage. Other deductions such as charges for uniforms, cash shortages, breakage, or personal protective gear cannot be made if the worker's gross hourly rate would be reduced below minimum wage. You should ask the worker if there are any deductions from his/her paycheck that s/he did not approve or does not understand. If the worker has been subject to improper deductions and those deductions bring the worker's hourly rate below the current federal minimum wage, you should advise the worker that there may be a violation of the wage and hour law and that s/he has a right to file a complaint with WHD.

* If the worker works more than 40 hours per workweek, refer to the **Overtime** section of this chapter (pages 24-26).

BLANK TIPPED EMPLOYEE WORKSHEET

The employer of a tipped employee must be able to show that the employee receives at least the federal minimum wage (\$7.25 per hour) when direct wages and tips are combined. It is helpful to have an employee's paystub when answering the following questions.

Note: Several states **do not allow** a reduced direct wage with credit for tips, and require that tipped employees receive the full state minimum wage in direct wages, or require that tipped employees receive a direct wage greater than the minimum cash wage required under the FLSA (\$2.13 per hour). Check with the state or local labor department for more information.

B. What is your hourly rate paid by the employer? (If it is less than the current minimum federal cash wage of \$2.13 per hour, there may be a violation.)	
C. Subtract B from A. This is the maximum tip credit the employer can claim against its minimum wage obligations. A (minimum wage) - B (cash wage) = C (maximum tip credit)	
Note: The employer cannot take a tip credit unless all of the requirements, including proper notice, are met. The employee cannot be required to turn these tips over to the employer. The tip credit just reduces the amount of cash wages that the employer is obligated to pay.	
D. How much do you make in tips in the workweek?	
E. How many hours do you work per week? (If the worker is not sure, see the Hours Worked Worksheet on page 18)	*
<p>"Workday" in general, means all of the hours between the time an employee begins work and ends work on a particular day.</p> <p>Work time generally includes:</p> <ul style="list-style-type: none"> • Waiting for repairs to equipment necessary for work • Time spent traveling between worksites during the workday • Time spent before or after a shift performing work related activities • Time spent after a shift, completing unfinished work • Waiting for materials to arrive during the workday • Breaks less than 20 minutes long 	
F. Multiply C by E. This is the amount of tips the employee must receive to cover the amount of the tip credit taken by the employer. C (maximum tip credit) x E (hours worked) = F (required tips) (If the employee did not receive at least this much in tips for this workweek, there is likely a minimum wage violation.)	
G. Subtract D from F. F (required tips) - D (tips received) = G (difference required from employer) This difference is the amount the employer must pay to the employee so that the employee earns \$7.25 per hour for the workweek. (If the employee did not earn enough in tips to equal the amount of tip credit taken, there is a potential tip credit violation.)	

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* If the worker works more than 40 hours per workweek, refer to the **Overtime** section of this chapter (pages 24-26).

SAMPLE SALARIED EMPLOYEE WORKSHEET

Even people paid on a salary basis, unless specifically exempted from the minimum wage requirements, (see Exemptions page 24), are required to be paid at least the applicable minimum wage (\$7.25 per hour). Use the worksheet below to determine if the salary covers the federal minimum wage requirements.

<p>Gross weekly straight time pay is the total amount an employee is paid before any deductions, and less any over- time premium. Gross pay = basic hourly pay or salary PLUS tips, commission, production bonuses, or any other pay an employee receives.</p> <p>If you are paid monthly, monthly salary ÷ 4.333 = weekly salary.</p> <p>If you are paid semi-monthly (twice per month), semi-monthly salary ÷ 2.1666 = weekly salary.</p>	
<p>B. How many hours do you work per week? (If the worker is not sure, see the Hours Worked Worksheet on page 18)</p>	45*
<p>“Workday” in general, means all of the hours between the time an employee begins work and ends work on a particular day.</p> <p>Work time generally includes:</p> <ul style="list-style-type: none"> • Waiting for repairs to equipment necessary for work • Time spent traveling between worksites during the workday • Time spent before or after a shift performing work related activities • Time spent after a shift, completing unfinished work • Waiting for materials to arrive during the workday • Breaks less than 20 minutes long 	
<p>C. Divide A by B to determine the worker’s hourly rate: A (\$375 straight time pay) / B (45 hours worked) = C (hourly rate of \$8.33)</p>	\$8.33
<p>If the hourly rate is less than the current minimum wage (\$7.25 per hour), you should advise the worker that there may be a violation of the wage and hour law, and that s/he has a right to file a complaint with WHD. If the worker is receiving at least the current minimum wage there does not appear to be a violation of the federal minimum wage law. Check to see if an additional state or local minimum wage law is also in effect.</p>	

DEDUCTIONS

Deductions such as taxes, social security, child support or health insurance payments can be made even though this may result in the worker taking home less than minimum wage. Other deductions such as charges for uniforms, cash shortages, breakage, or personal protective gear cannot be made if the worker’s gross hourly rate would be reduced below minimum wage. You should ask the worker if there are any deductions from his/her paycheck that s/he did not approve or does not understand. If the worker has been subject to improper deductions and those deductions bring the worker’s hourly rate below the current federal minimum wage, you should advise the worker that there may be a violation of the wage and hour law and that s/he has a right to file a complaint with WHD.

* If the worker works more than 40 hours per workweek, refer to the **Overtime** section of this chapter (pages 24-26).

BLANK SALARIED EMPLOYEE WORKSHEET

Employees paid on a salary basis, unless specifically exempted from the minimum wage requirements (see Exemptions, page 24), must be paid at least the federal minimum wage (\$7.25 per hour). Use the worksheet below to determine if the salary covers the federal minimum wage requirements.

<p>Gross weekly straight time pay is the total amount an employee is paid before any deductions, and less any over- time premium. Gross pay = basic hourly pay or salary PLUS tips, commission, production bonuses, or any other pay an employee receives.</p> <p>If you are paid monthly, monthly salary ÷ 4.333 = weekly salary.</p> <p>If you are paid semi-monthly (twice per month), semi-monthly salary ÷ 2.1666 = weekly salary.</p>	
<p>B. How many hours do you work per week? (If the worker is not sure, see the Hours Worked Worksheet on page 18)</p>	*
<p>“Workday” in general, means all of the hours between the time an employee begins work and ends work on a particular day.</p> <p>Work time generally includes:</p> <ul style="list-style-type: none"> • Waiting for repairs to equipment necessary for work • Time spent traveling between worksites during the workday • Time spent before or after a shift performing work related activities • Time spent after a shift, completing unfinished work • Waiting for materials to arrive during the workday • Breaks less than 20 minutes long 	
<p>C. Divide A by B to determine the worker’s hourly rate: A (straight time pay) / B (hours worked) = D (hourly rate)</p>	
<p>If the hourly rate is less than the current minimum wage (\$7.25 per hour), you should advise the worker that there may be a violation of the wage and hour law and that s/he has a right to file a complaint with WHD. If the worker is receiving at least the current minimum wage there does not appear to be a minimum wage violation.</p>	

DEDUCTIONS

Deductions such as taxes, social security, child support or health insurance payments can be made even though this may result in the worker taking home less than minimum wage. Other deductions such as charges for uniforms, cash shortages, breakage, or personal protective gear cannot be made if the worker’s gross hourly rate would be reduced below minimum wage. You should ask the worker if there are any deductions from his/her paycheck that s/he did not approve or does not understand. If the worker has been subject to improper deductions and those deductions bring the worker’s hourly rate below the current federal minimum wage, you should advise the worker that there may be a violation of the wage and hour law and that s/he has a right to file a complaint with WHD.

* If the worker works more than 40 hours per workweek, refer to the **Overtime** section of this chapter (pages 24-26).

SAMPLE COMMISSION WORKSHEET

Employees who are paid partially or totally on a commission basis, if not exempt (see page 19), are still due at least the minimum wage for all of their hours of work. Their daily and weekly hours of work must be recorded, along with their weekly gross pay.

They must make enough money each workweek to earn at least the applicable minimum wage (\$7.25 per hour) or the employer is responsible for making up the difference.

Note: Some employees who are paid by commission are exempt from overtime provisions.

	\$2
B. How much do you generally earn in commission each week?	\$300
C. How many hours do you work per week? (If the worker is not sure, see the Hours Worked Worksheet on page 18)	53*
<p>“Workday” in general, means all of the hours between the time an employee begins work and ends work on a particular day.</p> <p>Work time generally includes:</p> <ul style="list-style-type: none"> • Waiting for repairs to equipment necessary for work • Time spent traveling between worksites during the workday • Time spent before or after a shift performing work related activities • Time spent after a shift, completing unfinished work • Waiting for materials to arrive during the workday • Breaks less than 20 minutes long 	
D. Multiply A by C to determine the worker’s total hourly pay: A (hourly rate of \$2) x C (53 hours worked) = D (total hourly pay of \$106)	\$106
E. Add B and D to determine the worker’s weekly gross pay: B (weekly commission of \$300) + D (total hourly pay of \$106) = E (weekly gross pay of \$406)	\$406
F. Divide E by C to determine the worker’s hourly rate: E (weekly gross pay of \$406) / C (53 hours worked) = F (hourly rate of \$7.66)	\$7.66
If the hourly rate is less than the current minimum wage (\$7.25 per hour), you should advise the worker that there may be a violation of the wage and hour law and that s/he has a right to file a complaint with WHD. If the worker is receiving at least the current minimum wage there does not appear to be a minimum wage violation.	

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BLANK COMMISSION WORKSHEET

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They must make enough money each workweek to earn at least the applicable minimum wage (\$7.25 per hour) or the employer is responsible for making up the difference.

Note: Some employees who are paid by commission are exempt from overtime provisions.

B. How much do you generally earn in commission each week?	
C. How many hours do you work per week? (If the worker is not sure, see the Hours Worked Worksheet on page 18)	*
<p>“Workday” in general, means all of the hours between the time an employee begins work and ends work on a particular day.</p> <p>Work time generally includes:</p> <ul style="list-style-type: none"> • Waiting for repairs to equipment necessary for work • Time spent traveling between worksites during the workday • Time spent before or after a shift performing work related activities • Time spent after a shift, completing unfinished work • Waiting for materials to arrive during the workday • Breaks less than 20 minutes long 	
D. Multiply A by C to determine the worker’s total hourly pay: $A \text{ (hourly rate)} \times C \text{ (hours worked)} = D \text{ (total hourly pay)}$	
E. Add B and D to determine the worker’s weekly gross pay: $B \text{ (weekly commission)} + D \text{ (total hourly pay)} = E \text{ (weekly gross pay)}$	
F. Divide E by C to determine the worker’s hourly rate: $E \text{ (weekly gross pay)} / C \text{ (hours worked)} = F \text{ (hourly rate)}$	
If the hourly rate is less than the current minimum wage (\$7.25 per hour), you should advise the worker that there may be a violation of the wage and hour law and that s/he has a right to file a complaint with WHD. If the worker is receiving at least the current minimum wage there does not appear to be a minimum wage violation.	

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* If the worker works more than 40 hours per workweek, refer to the **Overtime** section of this chapter (pages 24-26).

SAMPLE HOURS WORKED WORKSHEET

	Start Time	Stop Time	Total Hours	Meals/Break Time	Hours Worked
Monday	8:00	6:00	10	- 0.5	9.5
Tuesday	7:00	3:00	8	- 1.0	7
Wednesday	8:15	4:15	8	- 0.0	8
Thursday	9:00	7:00	10	- 0.75	9.25
Friday	7:30	4:30	9	- 0.5	8.5
Saturday	9:00	1:00	4	- 0.0	4
Sunday	N/A	N/A	N/A	N/A	N/A
Total Hours Worked Weekly:					46.25

For each day of the week, record the start and stop time and any time taken off for meals and breaks of 20 minutes or longer. Then total the number of hours worked by counting the hours from start to stop and subtracting any breaks. In the example above, on Monday the employee started work at 8 AM and stopped at 6 PM and took a 30-minute lunch, for 9.5 hours worked (the 10 hours between 8 AM and 6 PM minus 30 minutes for lunch). After figuring out the hours worked for each day, add the daily totals to determine the total hours worked for the workweek.

HOURLY RATE

- ▶ **HOURLY RATE** $\text{Gross Weekly Straight Time Pay} / \text{Total Hours Worked Weekly}$

This formula determines an employee's hourly rate, also known as the regular rate of pay. Gross weekly straight time pay is the total amount an employee is paid weekly, before deductions, minus any overtime premiums. Total hours worked will be shown in the chart above.

BLANK HOURS WORKED WORKSHEET

	Start Time	Stop Time	Total Hours	Meals/Break Time	Hours Worked
Monday					
Tuesday					
Wednesday					
Thursday					
Friday					
Saturday					
Sunday					
Total Hours Worked Weekly:					

For each day of the week, record the start and stop time and any time taken off for meals and breaks of 20 minutes or longer. Then total the number of hours worked by counting the hours from start to stop and subtracting any breaks. For example, if the employee starts work at 8 AM and stops at 6 PM and takes a 30-minute lunch, the employee has 9.5 hours worked (the 10 hours between 8 AM and 6 PM minus 30 minutes for lunch) for that day. After figuring out the hours worked for each day, add the daily totals to determine the total hours worked for the workweek.

HOURLY RATE

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This formula determines an employee's hourly rate, also known as the regular rate of pay. Gross weekly straight time pay is the total amount an employee is paid weekly, before deductions, minus any overtime premiums. Total hours worked will be shown in the chart above.

GUIDELINES

FLSA REQUIREMENTS

THE FLSA REQUIRES:

- Payment of the current federal minimum wage of \$7.25 per hour
- Payment of overtime pay at time and one-half a worker's regular rate of pay for hours worked over 40 in a workweek
- Accurate record keeping for employees, including a breakdown of daily and weekly hours worked, wages paid, and deductions made
 - ▶ Protections for young workers under the Child Labor portion of the Act
 - ▶ Break time and space for a covered nonexempt nursing mother to express breast milk for her nursing child for one year after her child's birth. For more information about the FLSA's break time for nursing mothers provisions, see WHD's website at www.dol.gov/agencies/whd/nursing-mothers.

THE FLSA DOES NOT REQUIRE:

- Vacation, holiday, severance or sick pay
- Meal or rest periods, holidays off or vacations
 - ▶ Employers are often subject to state and local labor laws as well as federal laws. When federal and state rules are different, the rules that provide the most protection or benefits will apply. Check with the appropriate state or local agency to determine state law and ensure that any stricter requirements are complied with.

WHO IS COVERED BY THE MINIMUM WAGE AND OVERTIME LAW?

FLSA COVERAGE

THE FLSA COVERS EMPLOYEES OF:

- Federal, state or local government agencies
- Hospitals or institutions primarily engaged in the care of the sick, the aged, or the mentally ill or mentally disabled who live on the premises
- Pre-schools, elementary or secondary schools or institutions of higher education
- Any company/organization with annual dollar volume of sales or receipts of at least \$500,000

THE FLSA COVERS INDIVIDUALS WHO:

- Produce goods for interstate commerce (such as garments that are shipped out of state)
- Regularly use instrumentalities of commerce such as telephone, email, etc. (such as a waitress who swipes credit cards, or a secretary who sends mail out of state on a weekly basis)
- Ship goods in interstate commerce (such as a warehouse worker)

MINIMUM WAGE EXEMPTIONS

There are some workers who, because of the types of jobs that they hold, are exempt from, or not protected by, minimum wage requirements. Workers who are exempt need not be paid the current federal minimum wage (\$7.25 per hour).

EXEMPT JOBS MAY INCLUDE:

- outside salespeople (door-to-door sales, for example)
- employees at certain kinds of seasonal amusement/recreational establishments

- casual babysitters
- newspaper delivery people
- many “white collar” salaried workers
- agricultural workers on small farms

Example: Carla sells kitchen knives door-to-door for a home products company and works between 35 and 40 hours per week. The company pays her \$2.50 per hour, plus commission on whatever she sells. In some weeks, when sales are slow, Carla only makes \$40 in commissions. Carla has kept track of her hours and pay for a couple weeks in a row and notices that she is only getting paid about \$3.50 an hour. Can WHD help Carla get the federal minimum wage?

No. Since Carla works as an outside salesperson selling products away from the employer’s place of business, she is exempt from the federal minimum wage (\$7.25 per hour) protection. Carla should check with her state or local department of labor to see if other regulations apply.

EMPLOYMENT RELATIONSHIP

A worker is entitled to minimum wage and overtime pay protections under the FLSA if there is an employment relationship between the worker and their employer and there is coverage under the FLSA.

The FLSA defines employment broadly and focuses on the economic realities of the worker's relationship with the employer. Some workers who are employees under the FLSA may be incorrectly classified by their employers as independent contractors, interns, trainees, or volunteers. Misclassification of employees as independent contractors is a particular concern. Independent contractors are workers who, as a matter of economic reality, are in business for themselves as opposed to being economically dependent on the employer for work. Six factors which address the economic realities of the worker's relationship with the employer are helpful in determining whether the worker is an employee or independent contractor. No single factor or set of factors is determinative. Instead, the totality of the working relationship **determines whether a worker is an employee or an independent contractor**.

Below are factors that are helpful in analyzing whether a worker is an employee or independent contractor under the FLSA:

- a. *Opportunity for profit or loss depending on managerial skill.* This factor primarily looks at whether a worker can earn profits or suffer losses through their own independent effort and decision making. Relevant facts include whether the worker negotiates their pay, decides to accept or decline work, hires their own workers, purchases material and equipment, or engages in other efforts to expand a business or secure more work, such as marketing or advertising. Taking such actions, or having a real opportunity to take such actions but making a business decision not to (for example, because the potential profit to be gained may not justify the expense that would be incurred), suggests that the worker is an independent contractor. Not taking such actions, or having only a theoretical opportunity to take such actions (for example, the worker must get approval from the employer), suggests that the worker is an employee. A worker who decides to work more hours or take on more jobs when paid a fixed rate per hour, day, or job is generally not exercising managerial skill like an independent contractor even if those decisions may lead to more earnings.
- b. *Investments by the worker and the employer.* This factor primarily looks at whether the worker makes investments that are capital or entrepreneurial in nature. Investments by a worker that support the growth of a business, including by increasing the number of clients, reducing costs, extending market reach, or increasing sales, weigh in favor of independent contractor classification. A lack of such investments weighs in favor of employee classification. Costs to a worker of tools for a specific job and costs that the employer imposes on the worker are not capital or entrepreneurial investments that suggest independent contractor classification. In addition to considering the nature of any investments by the worker, the worker's investments should be compared to the employer's investments in its overall business. The worker's investments do not need to be equal to the employer's and should not be compared only in dollar amounts or size. The focus should be on whether the worker makes similar types of investments as the employer (even if on a smaller scale) or investments of the type that would allow the worker to operate independently in the worker's industry or field. Such investments by the worker in comparison to the employer weigh in favor of independent contractor classification, while a lack of investments that support an independent business suggest employee classification.
- c. *Degree of permanence of the work relationship.* This factor primarily looks at the nature and length of the work relationship. Work that is sporadic or project-based with a fixed ending date (or regularly-occurring fixed periods of work), where the worker may make a business decision to take on multiple different jobs suggests independent contractor classification. Work that is continuous, does not have a fixed ending date, or may be the worker's only work relationship suggests employee classification. The lack of a long working relationship does not necessarily suggest that the worker is an independent contractor unless it is because of the worker's business decision. Short-term jobs for multiple employers may be due to the seasonal or temporary nature of the work or industry, and not the worker's business decision to market their services to multiple entities, and therefore may suggest employee classification.
- d. *Nature and degree of control.* This factor primarily looks at the level of control the potential employer has over the performance of the work and the economic aspects of the working relationship. Relevant facts include whether the potential employer: controls hiring, firing, scheduling, prices, or pay rates; supervises the performance of the work (including via technological means); has the right to supervise or discipline workers; and takes actions that limit the worker's ability to work for others. Where the potential employer maintains more control over these aspects of the work relationship, this factor weighs in favor of employee classification, and where the potential employer maintains less control over these aspects of the work relationship, this factor weighs in favor of independent contractor classification. Control that is for the sole purpose of complying with a specific, applicable federal, state, tribal, or local regulation, rather than the employer's own internal policies or customer standards, does not weigh in favor of an employment relationship.

- e. *Extent to which the work performed is an integral part of the employer's business.* This factor primarily looks at whether the work is critical, necessary, or central to the potential employer's principal business, which suggests employee classification. Where the work performed by the worker is not critical, necessary, or central to the potential employer's principal business, this suggests independent contractor classification. This factor does not depend on whether any individual worker in particular is an integral part of the business, but rather whether the work they perform is an integral part of the business. .
- f. *Skill and initiative.* This factor primarily looks at whether the worker uses their own specialized skills together with business planning and effort to perform the work and support or grow a business. The fact that a worker does not use specialized skills (for example, the worker relies on the employer to provide training for the job) suggests that the worker is an employee. Additionally, both employees and independent contractors can be skilled, so the fact that a worker is skilled does not suggest one classification or the other. The focus should be on whether the worker uses their skills in connection with business initiative. If the worker does, that suggests independent contractor classification; if the worker does not, that suggests employee classification.

Additional factors may be considered if they assist in assessing whether the worker is in business for themselves or is economically dependent on the employer for work.

TYPICAL PROBLEMS INCLUDE:

- **Volunteers:** An employee may not volunteer services to for-profit private sector employers. A public sector employee may not volunteer his/her services to the employer to perform the same type of service that s/he performs as an employee.
- **Trainees or students:** Depending on the circumstances of their activities for the employer, trainees or students may be considered employees under the FLSA.
- Employees misclassified as independent contractors (see below).

MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS:

This determination is very important because the FLSA's minimum wage and overtime pay protections apply to covered employees. These protections do not apply to independent contractors.

Some workers may not understand that misclassification costs them money in terms of lost wage protections. And even if they recognize the problem, many employees are afraid to assert their employment rights for a variety of reasons.

TYPICAL PROBLEMS INCLUDE:

- **Job titles or labels.** The Department's investigation reveals that workers thought they were independent contractors because of their job title. However, job titles, or labeling someone an independent contractor, do not make a worker an independent contractor under the FLSA.
- **Contracts and Agreements.** The Department's investigation reveals that workers thought they were independent contractors because they signed contracts stating that they were independent contractors. However, signing an independent contractor agreement does not make a worker an independent contractor under the FLSA.

EXAMPLES:

Example 1: Juan works as a painter for a large construction company that is covered by the FLSA. He works painting the new homes that the company builds and he is paid by the room. The company provides all of the paint and supplies, assigns and schedules his work, and sets his pay rate per room. The company advertises the business to clients, bids on new business, and has all the opportunity to make (or lose) money. The company says Juan is an independent contractor, as he is paid by the room, not by the hour. Juan works as many as 60-70 hours per week, and is never paid any overtime. Juan does not work for any other contractors. Is Juan an employee?

Yes. Juan is likely an employee, and as such, he would be entitled to the FLSA's minimum wage and overtime pay protections. He should contact the local WHD office.

Example 2: Janice responded to a help-wanted post that she saw online and now works as a dishwasher in a local restaurant. She works approximately 10-12 hours per day, six days per week. She has never held this type of job before, and simply works whatever hours her boss tells her to work. She gets paid \$400 per week, regardless of how many hours she works. She does not get paid overtime. When she divides her salary by the number of hours she typically works, she makes less than \$7.25 per hour. Her boss told her that she and her co-workers get paid flat salaries because the restaurant decided to make them independent contractors, and not employees. Is Janice an employee?

Yes. Janice is likely an employee, and as such, she would be entitled to the FLSA's minimum wage and overtime pay protections. She should contact the local WHD office.

The FLSA uses a broad definition of who is an employee. Many other labor laws contain their own definitions of who is an employee. For example, the IRS, the Social Security Administration, and individual states may each have a different definition of the employment relationship. Because of the different definitions, it is possible for a worker to be an employee under the FLSA, but not an employee under another law. If you have a question about a specific situation that involves payment of wages, minimum wage, or overtime pay, call your local WHD office.

If you have a question about whether you are an employee for federal tax purposes, call the IRS; if you have a question about whether you are an employee for Social Security purposes, call the Social Security Administration; if you have a question about whether you are an employee for worker's compensation purposes, call your state Worker's Compensation agency; and if you have a question about whether you are an employee for unemployment benefit purposes, call your state Unemployment Insurance office.

HOURS WORKED

Employers must pay employees for all the time worked in a workday. "Workday," in general, means all of the hours between the time an employee begins work and ends work on a particular day. Sometimes, the workday extends beyond a worker's scheduled shift or normal hours, and when this happens, the employer is responsible for paying for that extra time.

WORK TIME GENERALLY INCLUDES:

- a. Waiting for repairs to equipment necessary for work
- b. Time spent traveling between worksites during the workday
- c. Time spent before or after a shift, performing work related activities that are necessary for the job
- d. Time spent completing unfinished work after a shift
- e. Time spent waiting for materials to arrive during the workday
- f. Breaks less than 20 minutes long

Example: Marissa works for a large cleaning company with 150 employees. She works with four other women cleaning houses, and they usually clean 4 per day. Marissa is paid \$8.00 per hour and she is paid for all the hours she spends cleaning, usually 40 hours per week. Since the houses are in different neighborhoods, the crew leader, Elsie, drives the crew from house to house. This time spent driving during the workday may be as much as 1 hour. Elsie says that the company does not pay for this travel time because they are not doing any real work. Is the company right?

No. Time spent traveling from job to job during the day is compensable work time. Marissa and the other employees on her crew must be paid for this time. If the driving time brings Marissa's total weekly hours worked to more than 40, she must be paid at her overtime rate for the hours worked over 40.

WORK SUFFERED OR PERMITTED

A worker must be paid for all work performed whether or not the employer approves the work in advance. For example, an employee may voluntarily work at the end of the shift to finish an assigned task. Those hours are work time, even if the employer did not ask the employee to work past his or her shift. It is an employer's duty to limit the amount of hours worked.

Example: Denise works alone as a cashier in a convenience store from 11 PM until 7 AM, five days per week. Since Denise works alone she cannot take a meal break. Also, she cannot count her cash drawer, complete her shift paperwork or count the cigarettes as required until after 7 AM, when her relief arrives. Denise typically finishes with all of her work at 7:30 AM. Denise gets paid \$7.25 per hour and is paid only until 7 AM. She asked her boss about the extra time and he responded that "it is not his fault" that Denise cannot finish her work before the end of her shift. Does Denise have a valid complaint?

Yes. Time spent at the end of Denise's shift is considered work time and must be paid. If the employer requires her to do this work and has not been paying for such time, there has been a violation of the FLSA's minimum wage requirement. Also, if Denise works more than 40 hours in a workweek and is not paid at one and a half times her regular rate for all the hours she worked over 40 in a workweek, there is a violation of the FLSA's overtime pay requirement.

REST PERIODS

Rest periods of less than 20 minutes are common in the workplace, and must be paid for as work time. Longer rest periods, like meal breaks, can be subtracted from daily hours if the workers do not perform any work and are completely free of any job responsibilities or activities during that time. If an employee is required to perform job duties while eating, such as waiting on customers or answering the phone, he or she must be paid for that time.

Note: Unauthorized extensions of employer authorized breaks are not counted as hours worked in some circumstances.

DEDUCTIONS FROM WAGES

Deductions made from wages for such items as cash or merchandise shortages, employer-required uniforms, and tools of the trade are not legal if they reduce an employee's wages below the required minimum wage (\$7.25 per hour).

TYPICAL PROBLEMS INCLUDE:

- a. Cashiers or wait staff being required to reimburse shortages in cash drawers
- b. Workers paying for employer-required uniforms and sometimes their maintenance
- c. Workers being required to pay for lost or damaged equipment

Example: At the large construction firm where Martin works as a carpenter's helper the owner often deducts money from the workers' paychecks. If a worker loses or breaks a tool, the cost is taken from his paycheck. Last week, an expensive electric saw was ruined when Martin was using it, and now the employer is taking \$100 per week out of Martin's paycheck until the saw is paid for. Martin is paid \$8.25 an hour and the \$100 per week deduction will make it hard for him to pay his rent. Can the employer take out this much money?

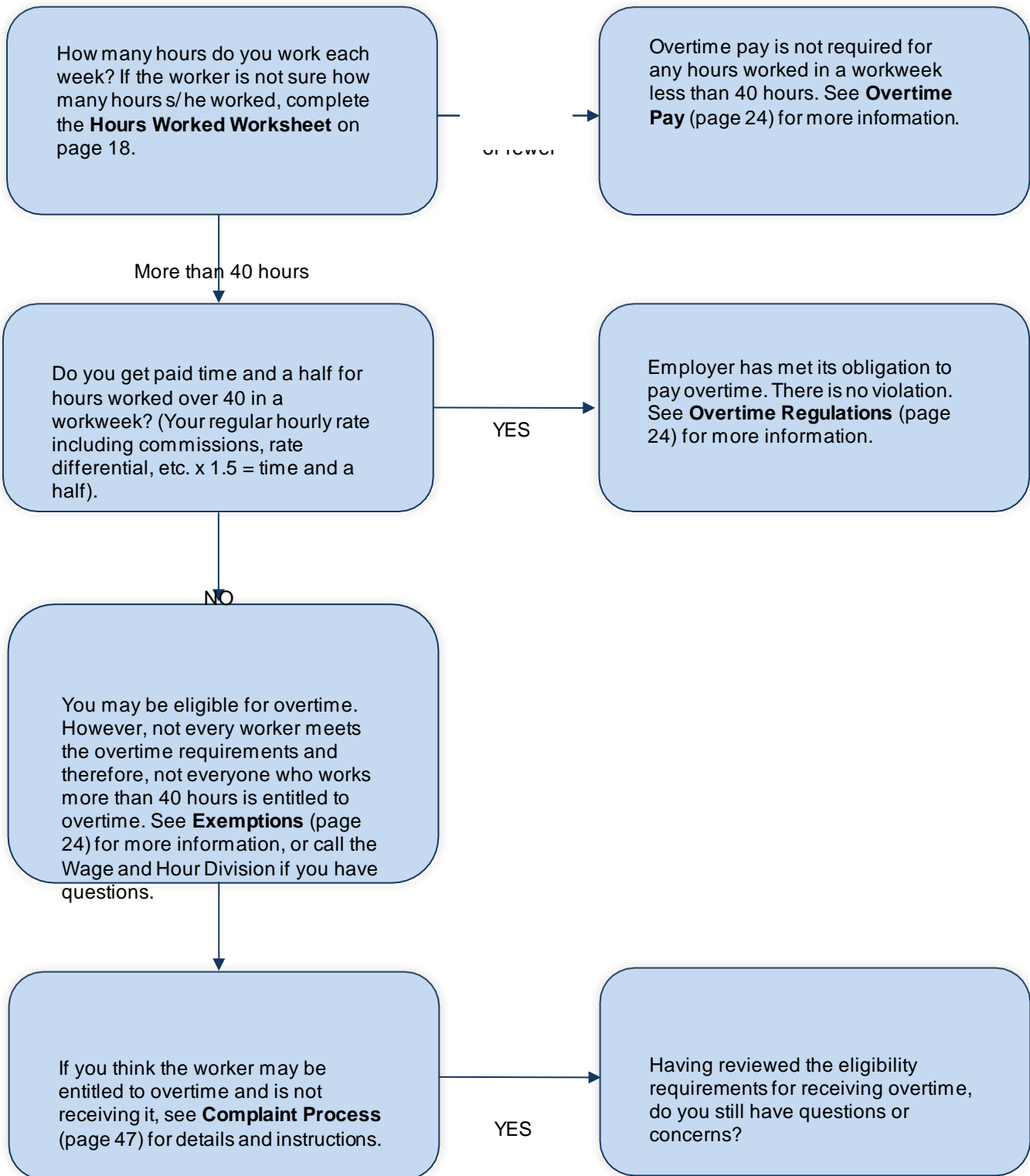
No. The employer may deduct some money, but the deductions cannot be taken from an employee's paycheck if they reduce the employee's gross hourly rate below minimum wage. Some states or localities may have stricter rules about deductions, so you may want to check with your local or state government labor department.

LODGING

The reasonable cost or value of board, lodging, or facilities furnished for the employee's benefit by the employer may be considered part of wages. The expression "reasonable cost" as used in the FLSA means that the credited cost cannot be more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished by him to his employees, and cannot include any profit to the employer or any affiliated person. Facilities furnished in violation of any federal, state, or local law, ordinance, or prohibition will not be considered facilities customarily furnished (e.g., housing that has been denied an occupancy permit, or that fails a MSPA housing inspection). The crediting of an employer by facilities furnished to employees as wages will depend on whether such facilities are furnished primarily for the benefit or convenience of the employee, as determined by WHD. Where the primary benefit of such facilities is to the employer's business interest, credit will be denied. Employees must receive the benefit of the facility for which the employer is taking a wage credit. The reasonable cost to the employer of furnishing board, lodging or other facilities must be included in the regular rate of pay when computing overtime.

OVERTIME FLOWCHART

- ▶ Employers and employees cannot make an agreement to violate the FLSA. For example, an employer cannot make an agreement to pay straight time for overtime, if the worker is entitled to overtime. Even if both parties are satisfied with the arrangement, a violation of the FLSA exists.



OVERTIME GUIDELINES

OVERTIME PAY

Overtime pay, at a rate of not less than one and one-half times an employee's regular rate of pay, is generally required for any hours worked in excess of 40 hours in a workweek. State or local laws may differ. The FLSA does not limit the number of hours employees, 16 years old or older, can be required to work in a day or a week.

The overtime regulations apply to any worker who is subject to the FLSA and not exempt (see **Coverage** on page 19 and **Exemptions** on page 24). For example, if a dishwasher works for \$7.50 an hour, s/he must be paid time and a half for every hour worked over 40 in a workweek. In this case, the overtime rate is \$11.25 per hour (1.5 x \$7.50).

OVERTIME REGULATIONS

Overtime regulations stipulate:

1. Each workweek stands alone (workweeks cannot be averaged)
 2. Overtime payment is due only after 40 hours worked (vacation, sick and other paid time not actually worked do not count toward the 40 hour total)
 3. Overtime pay is not due after eight hours in a day
 4. Overtime pay is not necessarily required for work on weekends or holidays
 5. Overtime pay cannot be taken as compensatory time (time off) unless the employer is a state or local government (private employers cannot offer time off instead of overtime)
 6. Overtime pay should be recorded separately on the employee's statement of earnings (pay stub)
 7. Employees may be due overtime pay regardless of how they are paid (salary, commission, hourly, piece-rate)
- ▶ Tipped employees who work over 40 hours per week are due time and a half of their regular rate of pay for overtime. Their regular rate including any tip credit taken must be at least the minimum wage, currently \$7.25 per hour.

OVERTIME WORK SUFFERED OR PERMITTED

Work performed over 40 hours in a workweek is overtime regardless of whether the employer approves the work in advance or not. For example, an employee may voluntarily work at the end of the shift to finish an assigned task. Those hours are work time even if the employer did not ask the employee to work past his or her shift. It is an employer's duty to limit the amount of hours worked.

- ▶ **WORKWEEK:** A workweek is a period of 168 hours during 7 consecutive 24 hour periods. There can be no averaging of two or more workweeks to determine minimum wage or overtime.

Example: Jasmine works for a large janitorial company cleaning office buildings. Lately she has not been able to get all her work done during her regular 40 hours of work because three extra rooms were added to her workload. When she turned in her time sheet last week, her supervisor told her that since she did not "make" her stay late that she would not be paid for the extra time. Should Jasmine get paid?

Yes. It is an employer's responsibility to monitor and limit the amount of hours an employee works each workweek. Therefore, it was Jasmine's supervisor's responsibility to send her home at the end of her shift if she did not want Jasmine working overtime.

EXEMPTIONS

There are some workers who, because of the types of jobs that they hold, are exempt from, or not protected by, overtime requirements. Workers who are exempt need not be paid a premium rate when they work over 40 hours in a workweek. Examples of workers who may not be entitled to overtime include:

1. over-the-road truckers, helpers, and loaders
 2. most agricultural workers
 3. certain retail workers who earn most of their money in commissions
 4. automobile salespeople, partsmen and mechanics
 5. many “white collar” salaried workers
 6. outside salespeople
- ▶ Most domestic service employees working in a private home, such as cooks, housekeepers, chauffeurs, or nannies are covered by the FLSA if they work more than eight hours a week for one or more employers, and are entitled to overtime if they work more than 40 hours in a workweek.

Example: Mario drives an 18-wheel truck for a long-haul trucking company delivering lumber from New York to Maryland. When the company is busy he can make this trip more than 4 times a week and work in excess of 60 hours. Mario gets paid \$7.50 per hour and has never been paid overtime. A friend mentioned that he gets paid one and one-half times his hourly rate of pay for any hours over 40 he works in a workweek. Should Mario be paid overtime as well?

No. Mario is not entitled to overtime payment. Truck drivers, who drive trucks with a gross vehicle weight of over 10,000 pounds, and who cross state lines on a regular basis are among the workers exempt from overtime. As long as Mario is paid at least the minimum wage for all the hours he works, his employer has not violated the FLSA.

WHITE COLLAR EXEMPTIONS

The FLSA exempts executive, administrative, and professional employees, certain computer employees, and outside sales employees from the FLSA's minimum wage and overtime requirements, provided they meet certain tests regarding job duties and responsibilities and (in general) are paid a minimum amount "on a salary basis." In order to be considered "salaried," employees must receive their full salary for any workweek in which they perform any work without regard to the number of days or hours worked. This rule applies to each exemption that has a salary requirement (outside sales employees, doctors, lawyers and teachers have no salary requirement). The special requirements which apply to each category of employees are summarized below.

EXECUTIVE EXEMPTION

To qualify for the executive employee exemption, all of the following tests must be met:

1. The employee must be compensated on a salary basis (as defined in the regulations) at a rate of at least \$684 per week. Beginning January 1, 2020, up to 10 percent of the minimum salary level may be composed of nondiscretionary bonuses, commissions, and incentive payments paid on an annual or more frequent basis.
2. The employee's primary duty must be managing the enterprise in which the employee is employed, or managing a customarily recognized department or subdivision of the enterprise.
3. The employee must supervise at least two other full-time employees or their equivalent.
4. The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

ADMINISTRATIVE EXEMPTION

To qualify for the administrative employee exemption, all of the following tests must be met:

1. The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$684 per week. Beginning January 1, 2020, up to 10 percent of the minimum salary level may be composed of nondiscretionary bonuses, commissions, and incentive payments paid on an annual or more frequent basis.
2. The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers.
3. The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

PROFESSIONAL EXEMPTION

To qualify for the learned professional employee exemption, all of the following tests must be met:

1. The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$684 per week. Beginning January 1, 2020, up to 10 percent of the minimum salary level may be composed of nondiscretionary bonuses, commissions, and incentive payments paid on an annual or more frequent basis.
2. 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.
3. The advanced knowledge must be in a field of science or learning.
4. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

To qualify for the creative professional employee exemption, all of the following tests must be met:

1. The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$684 per week.

2. The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

COMPUTER EMPLOYEE EXEMPTION

To qualify for the computer employee exemption, the following tests must be met:

1. The employee must be compensated either on a salary or fee basis (as defined in the regulations) at a rate not less than \$684 per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour. Beginning January 1, 2020, for those paid on a salary basis, up to 10 percent of the minimum salary level may be composed of nondiscretionary bonuses, commissions, and incentive payments paid on an annual or more frequent basis.
2. The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing one or more of these primary duties:
 - a. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications
 - b. 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
 - c. The design, documentation, testing, creation or modification of computer programs related to machine operating systems
 - d. A combination of the aforementioned duties, the performance of which requires the same level of skills

OUTSIDE SALES EXEMPTION

To qualify for the outside sales employee exemption, all of the following tests must be met:

1. The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer
2. The employee must be customarily and regularly engaged away from the employer's place or places of business in performing such primary duty

HIGHLY COMPENSATED EMPLOYEES

Highly compensated employees whose primary duty includes performing office or non-manual work, and who (beginning January 1, 2020) are paid total annual compensation of \$107,432 or more (which must include at least \$684 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption. Employers may not use nondiscretionary bonuses and incentive payments (including commissions) to satisfy any portion of the \$684 weekly standard salary level requirement for highly compensated employees.

Some common problems and misconceptions that may call for further analysis:

- Employers without a formal sick leave policy docking salaried, exempt employees for time missed from work because of sickness
- Employees not receiving full salary payments each week
- Employees performing routine production type duties that seem related to general business operations but which have no bearing on setting of management policies
- Employees who hold degrees performing jobs which are not professional in nature or to which the degree they hold is not applicable
- Employers confusing acquired job skills with the exercise of independent judgment and discretion
- Employees placed on salary and classified as exempt without regard to duties or salary level

Child Labor Provisions of the Fair Labor Standards Act

CHILD LABOR PROVISIONS OF THE FLSA

INTRODUCTION

CHILD LABOR PROVISIONS OF THE FAIR LABOR STANDARDS ACT

This chapter contains an overview of the child labor provisions in the Fair Labor Standards Act (FLSA). These provisions ensure that the employment of minors does not interfere with their education or with their health and well-being. This chapter will help you determine when a worker should file a complaint with the U.S. Department of Labor (DOL) Wage and Hour Division (WHD). WHD is responsible for enforcing the provisions of the FLSA.

As you will learn, it is important to consider the age of the child when looking at the FLSA child labor provisions because it impacts the type of work a child is permitted to perform, how many hours a day, and when he/she can work. FLSA child labor provisions also differ depending on whether the employment is agricultural or non-agricultural.

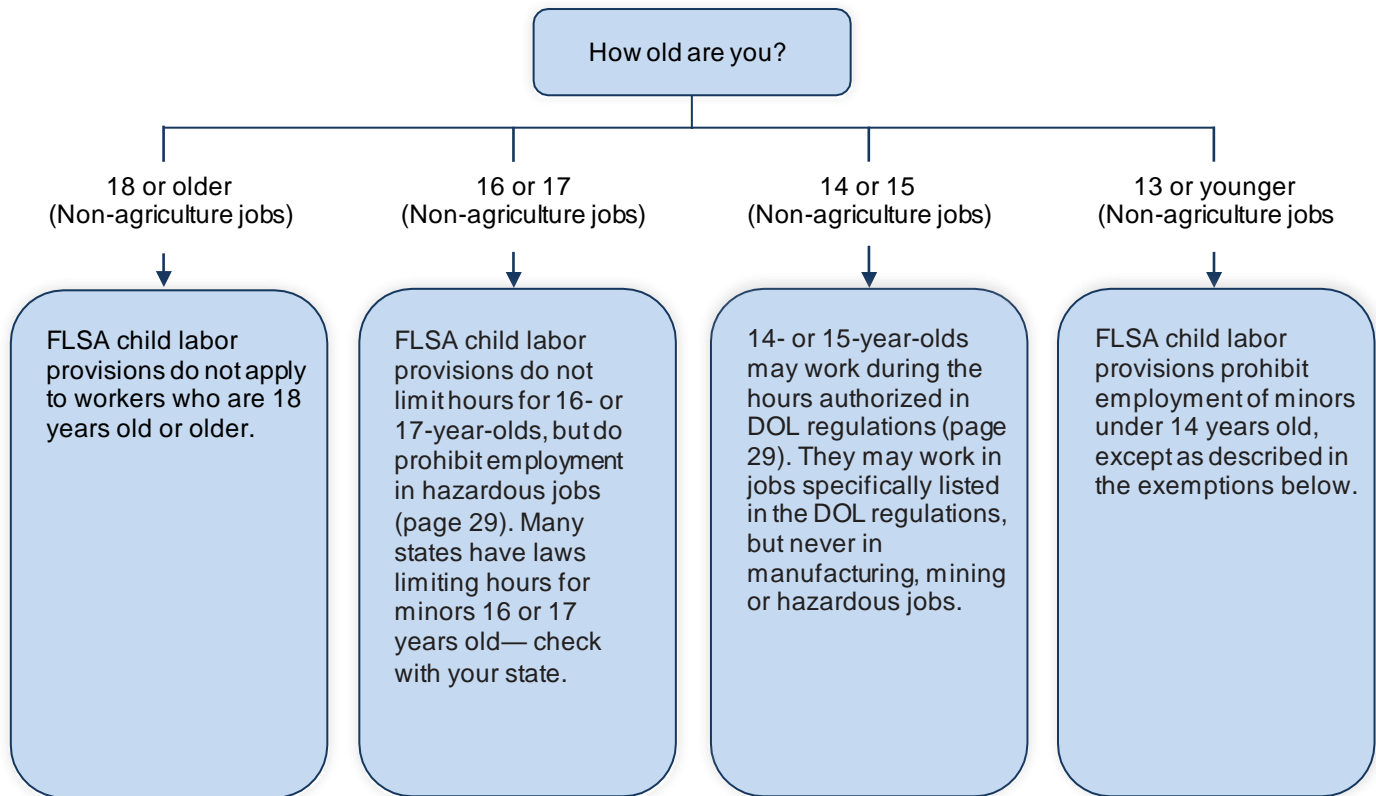
WHAT THIS CHAPTER INCLUDES:

This chapter is divided into two parts, non-agricultural jobs and agricultural jobs. Each part begins with a flowchart to assist you in determining if a violation has occurred. Details about the information in the flowcharts appear next. The chapter ends with instructions on how to file a complaint.

- ▶ *For more information on the FLSA child labor provisions, see WHD's website at www.dol.gov/whd/childlabor.htm or www.youthrules.dol.gov.*

NON-AGRICULTURE FLOWCHART

Ask the questions in the flowchart to determine if the FLSA permits a young worker to be employed in a non-agriculture job. Refer to the appropriate sections of this chapter for further information. If a violation is suspected, follow the complaint procedures described in the **Complaint Process** section at the end of this chapter. Check state and local laws that may apply; they may be more protective than federal law.



EXEMPTIONS

Minors of any age may deliver newspapers; perform in radio, TV, movie and theatrical productions; or gather evergreen and make evergreen wreaths at home, or babysit on a casual basis.

Minors of any age may be employed by their parents or legal guardians in their solely owned non-farm business EXCEPT, minors younger than 18 may not be employed by their parents in hazardous occupations and minors younger than 16 may not be employed in mining or manufacturing, or in any hazardous occupations.

NON-AGRICULTURE GUIDELINES

RULES FOR VARIOUS AGE GROUPS

In addition to the FLSA minimum wage and overtime protections, workers younger than 18 years of age are protected by additional regulations that limit the types of jobs they can do and how many hours they can work. State or local laws may be more protective than the FLSA and all laws may apply. Check your state or local laws.

EMPLOYEES 16 AND 17 YEARS OLD

FLSA child labor provisions permit minors 16 or 17 to work unlimited hours, in non-hazardous non-agricultural jobs.

Example: Matt just turned 16 and is really excited to get a job. He applied at a large local restaurant for a position in the kitchen where he could work two nights a week and all day Saturday and Sunday. Matt's mother is concerned about whether it's legal for a 16-year-old to work so many hours in a week. Can Matt legally work the proposed schedule?

Yes. There are no restrictions on the number of hours 16- and 17-year-olds can work each week under the FLSA. Minimum wage and overtime requirements apply to Matt, so he should record his hours to ensure that he is paid correctly. Matt's mom should also contact state and local agencies to see if additional laws apply. Also, Matt should know that there are some jobs in the kitchen, such as operating power-driven bakery machines that are prohibited as hazardous for anyone under 18.

EMPLOYEES 14- OR 15-YEARS-OLD

Minors 14 and 15 years old can only engage in non-agricultural employment in certain designated industries and occupations, outside of school hours, and under certain conditions. For example, 14- and 15-year-olds can do office work or run a cash register. Fourteen- and 15-year-olds are prohibited from working in manufacturing, mining, most processing work, and any work in the designated hazardous occupations. In fact, any work not specifically permitted for this age group is prohibited.

Fourteen- and 15-year-olds can work limited hours as follows: no more than three hours on a school day (including Fridays); no more than 18 hours in a school week; no more than eight hours on a non-school day; no more than 40 hours in a non-school week, and not before 7 AM or after 7 PM, except between June 1 and Labor Day (the first Monday in September), when they may work until 9 PM.

Note: School hours vary from district to district. School hours are those set by the public school district in which the minor is living while employed—even if the minor does not attend that school. Work done before and after school hours, on weekends and on non-school days is considered outside of school hours.

EMPLOYEES 13 AND YOUNGER

In general, minors younger than 14 years old may not work in non-agricultural jobs. There are some exceptions to this rule, but in general terms, 14 is the minimum age for employment. The law does provide some exemptions from this rule, allowing workers of any age to deliver newspapers; perform in theatrical, motion picture, or broadcast productions; gather evergreens and make evergreen wreaths; and work in a business solely owned by their parents, except in mining, manufacturing, and occupations declared to be hazardous by the Secretary of Labor. Agricultural work has its own set of rules. See the agriculture guidelines on pages 31-33 for more information.

EMPLOYED BY PARENTS

Minors of any age may be employed by their parents or legal guardians, except minors younger than 18 may not be employed in hazardous occupations, and minors younger than 16 may not be employed in mining or manufacturing or hazardous occupations.

HAZARDOUS OCCUPATIONS

Seventeen hazardous non-farm jobs are prohibited for teens younger than 18. Generally, they may not work at jobs that involve:

1. Manufacturing or storing explosives
2. Driving a motor vehicle or being an outside helper on a motor vehicle with some exceptions

3. Coal mining
4. Forest fire fighting and fire prevention, timber tract and forestry service occupations, and logging and sawmill operations
5. Power driven woodworking machines
6. Exposure to radioactive substances and/or ionizing radiations
7. Power driven hoisting equipment
8. Power driven metal forming, punching and shearing machines
9. Mining other than coal mining
10. Meat and poultry packaging or processing and the operation of power-driven meat processing equipment
11. Power driven bakery machines
12. Power driven baling and compacting machines and paper processing machines
13. Manufacturing brick, tile and related products
14. Power driven circular saws, band saws, guillotine shears, chain saws, wood chippers, reciprocating saws, and abrasive cutting discs
15. Wrecking, demolition, and ship-breaking operations
16. Roofing operations, and any work on or about a roof
17. Excavation operations

NOTE: There are some exceptions to these prohibitions, including specific exceptions for apprentices and student learners. For questions about exceptions, check our website at www.youthrules.dol.gov or call your local WHD office.

RECORDKEEPING

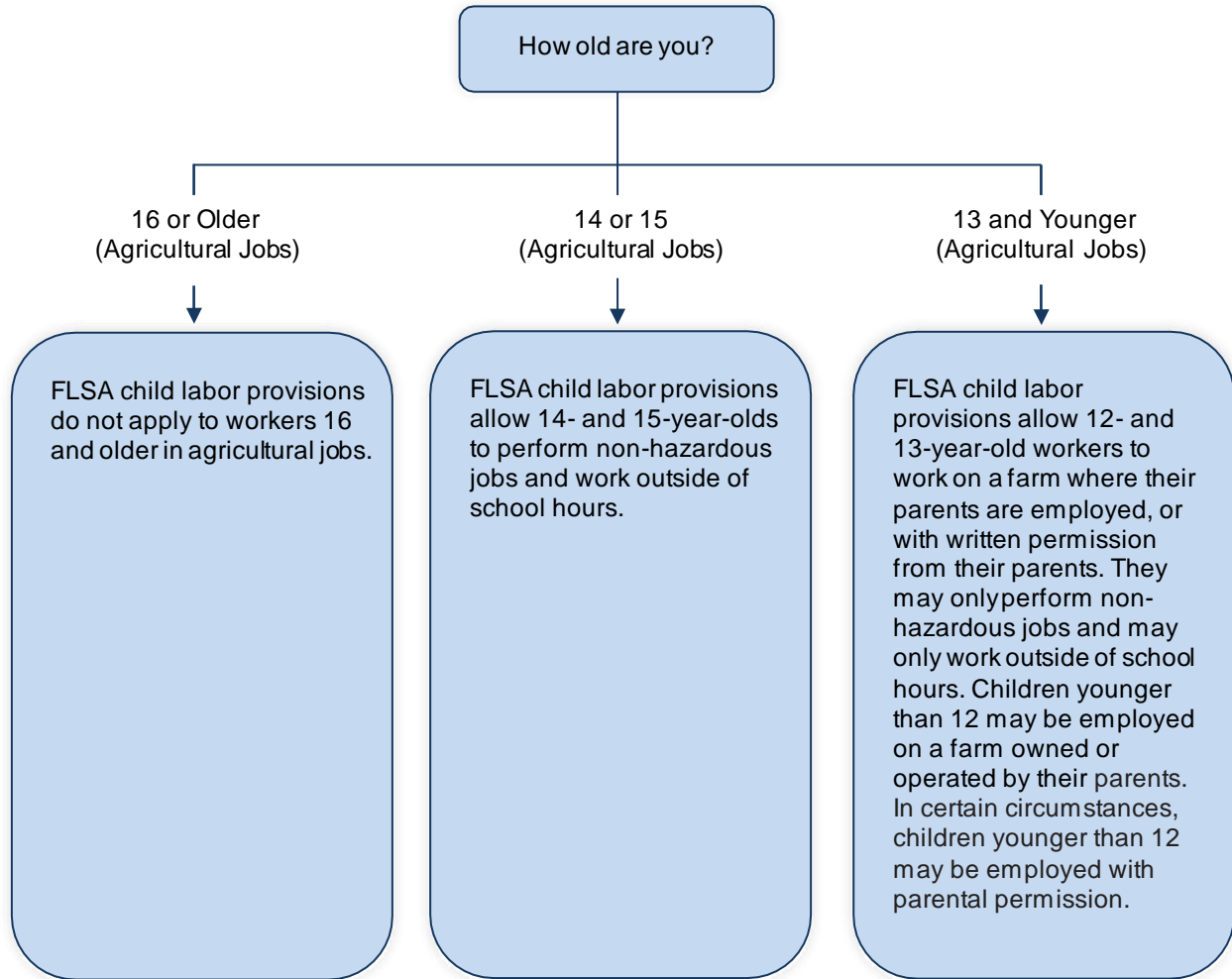
The following should be kept for each employee:

- Employee's full name
- Address, including zip code
- Birth date, if younger than 19
- Gender
- Occupation
- Time and day of week when employee's workweek begins
- Hours worked each day
- Total hours worked each workweek
- Basis on which employee's wages are paid (e.g., "\$7.50 an hour", "\$300 a week", "piecework")
- Regular hourly pay rate
- Total daily or weekly straight-time earnings
- Total overtime earnings for the workweek
- All additions to or deductions from the employee's wages
- Total wages paid each pay period
- Date of payment and the pay period covered by the payment

AGRICULTURE FLOWCHART

Ask the questions in the flowchart to determine if the FLSA permits a young worker to be employed in an agricultural job. Refer to the appropriate sections of this chapter for additional information. If a violation is suspected, follow the complaint procedures described in the **Complaint Process** section at the end of this workbook. Check state and local laws that may apply; they may be more protective than federal law.

Note: Youth of any age may work at any time in any job on a farm owned or operated by their parents, or a person standing in place of their parent.



AGRICULTURE GUIDELINES

RULES FOR VARIOUS AGE GROUPS

EMPLOYEES 16 AND OLDER

Sixteen years is the minimum age for employment in agriculture during school hours and for agricultural occupations declared hazardous by the Secretary of Labor.

EMPLOYEES 14 AND 15 YEARS OLD

Fourteen- and 15-year-olds may be employed outside of school hours in non-hazardous agricultural jobs.

EMPLOYEES 13 AND YOUNGER

Children 12 and 13 years old may be employed outside of school hours, in non-hazardous jobs, on a farm where their parents or a person standing in the place of the parent are employed. On farms where a parent or a person standing in the place of the parent is not employed, 12- and 13-year-old children must have written parental consent to work. These child labor provisions apply regardless of farm size or the number of man-days of labor used on the farm.

Children younger than 12 years may be employed outside of school hours, with consent of their parents, in non-hazardous jobs on a small farm where all employees are exempt from the minimum wage provisions. Children of any age may be employed on farms owned or operated by their parents or by a person standing in the place of the parent.

Note: School hours vary from district to district. School hours are those set by the public school district in which the minor is living while so employed. This is true even if the minor does not attend public school. Work done before and after school hours, on weekends and on non-school days is considered outside of school hours.

HAZARDOUS JOBS

The following agricultural jobs are declared hazardous and may not be performed by anyone younger than 16 unless specifically exempted as listed in the next section.

Hazardous agricultural jobs include:

1. Operating a tractor of more than 20 PTO horsepower, or connecting or disconnecting an implement or any of its parts to or from a tractor with more than 20 PTO horsepower
2. Operating or helping to operate (including starting, stopping, adjusting, feeding, or any other activity involving physical contact associated with the operation of) a:
 - a. corn picker, cotton picker, grain combine, hay mower, forage harvester, hay baler, potato digger, or mobile pea viner
 - b. feed grinder, crop dryer, forage blower, auger conveyer, or the unloading mechanism of a non-gravity-type self-unloading wagon or trailer
 - c. power post hole digger, power post driver, or non-walking-type rotary tiller
3. Operating or helping operate a:
 - a. trencher or earthmoving equipment
 - b. fork lift
 - c. potato combine
 - d. power-driven circular, band, or chain saw
4. Working on a farm, in a yard, pen, or stall occupied by a:
 - a. bull, boar, or stud horse maintained for breeding purposes
 - b. sow with suckling pigs, or cow with newborn calf (with umbilical cord present)

5. Felling, bucking, skidding, loading, or unloading timber with a butt diameter of more than 6 inches
6. Working from a ladder or scaffold at a height of more than 20 feet
7. Driving a bus, truck, or automobile when transporting passengers, or riding on a tractor as a passenger or helper
8. Working inside:
 - a. a fruit, forage or grain storage area designed to retain an oxygen deficient or toxic atmosphere
 - b. an upright silo within two weeks after silage has been added or when a top unloading device is in operating position
 - c. a manure pit
 - d. a horizontal silo while operating a tractor for packing purposes
9. Handling or applying (including cleaning or decontaminating equipment, disposal or return of empty containers, or serving as a flagman for aircraft applying) certain agricultural chemicals that are usually identified by the word "poison," an illustration of a skull and crossbones, or by the word "warning" on the label
10. Handling or using a blasting agent, including (but not limited to) dynamite, black powder, sensitized ammonium nitrate, blasting caps, and primer cord
11. Transporting, transferring, or applying anhydrous ammonia

EXEMPTIONS FROM HAZARDOUS JOBS

Certain minors may perform hazardous agricultural jobs if one of the following exemptions applies:

Minors younger than 16 employed by their parents or legal guardians on a farm owned or operated by them may perform any hazardous job listed above.

Minors 14 and 15 years old, who have certificates indicating that they have successfully completed 4-H or vocational agriculture tractor or machine operation training programs, may perform work for which they have been trained. This exemption pertains to items one and two on the list of hazardous jobs. Farmers employing these minors must keep a copy of the certificates of completion on file with the minor's personnel records.

Student-learners in a bona fide vocational agricultural program may perform items one through six on the list of hazardous jobs pursuant to a written agreement signed by the employer and a school official that provides, among other things, that students will be enrolled in a course of study and training; that the work of the student-learner will be incidental to that training; and that the work will be done on an intermittent basis and will be performed under the direct and close supervision of a qualified and experienced adult. Employers must keep copies of the agreement on file with the minor's personnel records.

RECORDKEEPING

The following records must be kept for minors working in agriculture:

- Written consent of the parent or legal guardian when such consent is required
- Where applicable, a copy of a tractor or machine operation program certificate of completion, if the minor performs such hazardous jobs
- Where applicable, a copy of a written student-learner agreement must be kept by the applicable school and employer

In addition, the following records should be kept for each employee:

- employee's full name
- address, including zip code

- birth date, if younger than 19
- gender
- occupation
- time and day of week when employee's workweek begins
- hours worked each day
- total hours worked each workweek
- Basis on which employee's wages are paid (e.g., "\$7.50 an hour", "\$300 a week", "piecework")
- Regular hourly pay rate
- Total daily or weekly straight-time earnings
- Total overtime earnings for the workweek
- All additions to or deductions from the employee's wages
- Total wages paid each pay period
- Date of payment and the pay period covered by the payment

**The Migrant and Seasonal Worker Protection Act
(MSPA)**

&

**The H-2A Labor Provisions of the Immigration and
Nationality Act (INA)**

THE MIGRANT AND SEASONAL WORKER PROTECTION ACT (MSPA)

INTRODUCTION

THE MIGRANT AND SEASONAL WORKER PROTECTION ACT

The Migrant and Seasonal Agricultural Worker Protection Act (MSPA) was enacted to protect migrant and seasonal farmworkers on matters of pay, work and work-related conditions. The MSPA also requires farm labor contractors to register with the U.S. Department of Labor (DOL) and assures necessary protections for migrant and seasonal agricultural workers, agricultural associations, and agricultural employers.

The MSPA requires farm labor contractors, agricultural employers, and agricultural associations to disclose to migrant and seasonal agricultural workers information about wages, hours, and other working conditions, including housing and transportation, when provided. Workers must be provided with written statements of earnings and deductions. If housing is provided, it must meet the applicable safety and health standards. Vehicles used to transport migrant and seasonal agricultural workers must be safe and properly insured. Drivers of these vehicles must be properly licensed.

In addition to the MSPA, farmworkers may also have rights under the Occupational Safety and Health Act (OSH Act), the H-2A program, and the Fair Labor Standards Act (FLSA). The OSH Act field sanitation regulations require covered employers to provide adequate toilets, drinking water, and handwashing facilities in the field. The H-2A program allows employers to hire temporary nonimmigrant workers in agriculture and provides worker protections. Lastly, the FLSA may, in certain circumstances, require employers to pay minimum wage and overtime premiums to farmworkers.

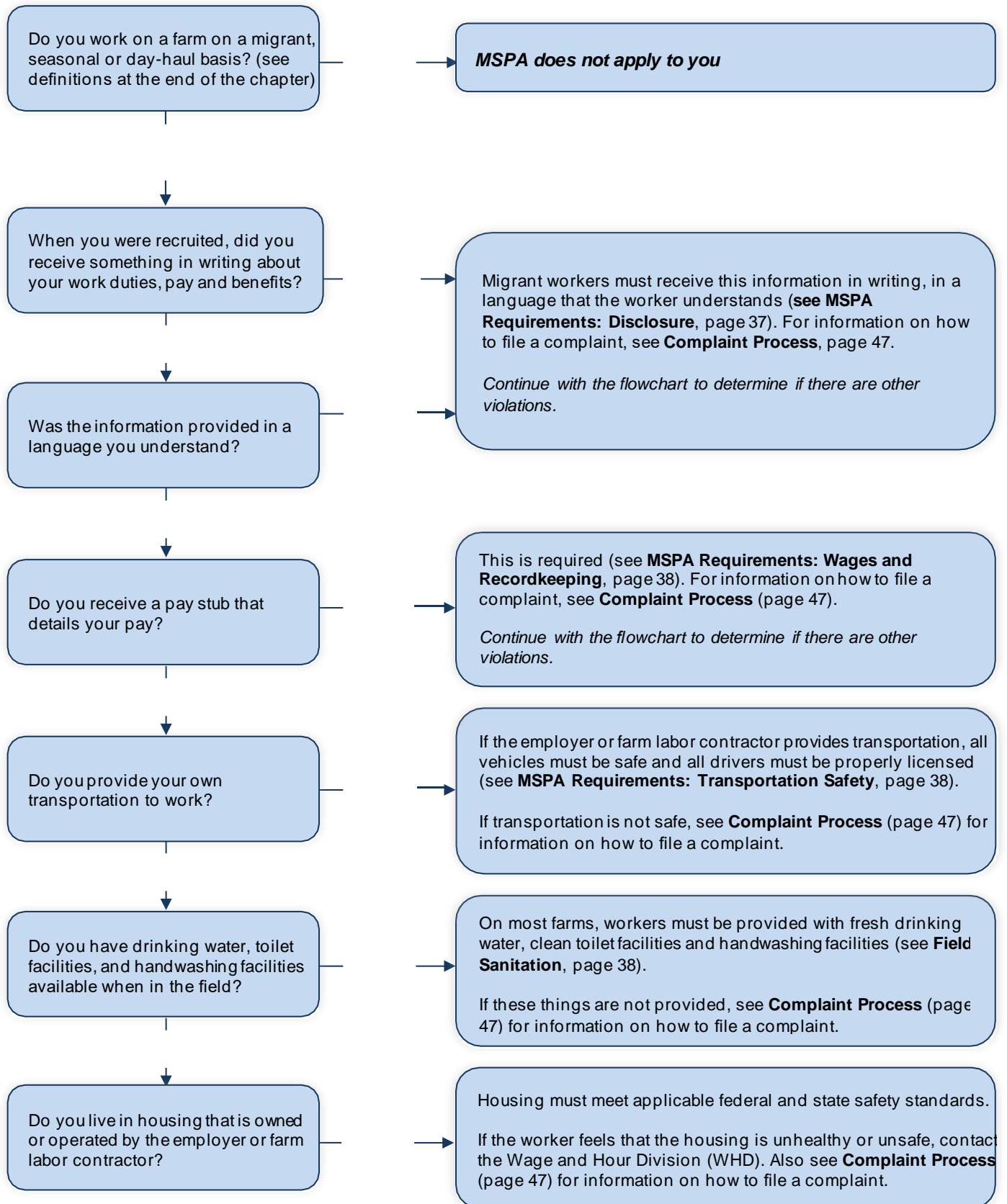
WHAT THIS CHAPTER INCLUDES:

This chapter begins with a discussion of the MSPA. The information will help you to determine if a worker is covered by this statute and if a violation has occurred. Similar information is then provided about the OSHA field sanitation regulations and the H-2A program.

- ▶ For more information on the MSPA, H-2A and other farmworker protections, see WHD's website at www.dol.gov/whd/ag/index.htm.

FARM LABOR FLOWCHART

Use this flowchart to help workers with concerns about farm labor. Based upon the answers, refer to the appropriate section(s) in this chapter. If a violation is suspected, review the complaint procedures in the **Complaint Process** section at the end of this chapter.



GUIDELINES

WHO IS COVERED?

While there are exceptions, generally the MSPA protects migrant or seasonal agricultural workers in their interactions with farm labor contractors, agricultural employers, agricultural associations, and providers of migrant housing. The MSPA generally applies to anyone who recruits, solicits, hires, employs, furnishes or transports migrant or seasonal workers. It also applies to certain people who provide housing to migrant workers.

Example: Thomas is a migrant worker on a farm with 35 workers who harvest blueberries. Before he came to this farm, the foreman told him he would earn \$7.50 per hour. Now that he is working, he finds he is being paid by piece rate and he averages \$7.25 per hour instead of \$7.50. Thomas thinks he is not being paid correctly. Does he have a valid MSPA complaint?

Yes. Thomas should have been given the terms and conditions of his work in writing when he was recruited. His employer must disclose how he is to be paid and how much, and should pay all wages when due. Thomas should call WHD to file a complaint.

The following list of terms will help workers determine if they are protected by MSPA:

Migrant Agricultural Worker An individual employed in agricultural employment of a seasonal or other temporary nature who is required to be absent overnight from his/her permanent place of residence.

Seasonal Agricultural Worker An individual who is employed in agricultural employment of a seasonal or temporary nature, but not required to be absent overnight from his/her permanent place of residence.

Agricultural Employment Includes employment in farming in all its branches and includes (among other things) the cultivation and tillage of the soil; dairying; the production, cultivation, growing and harvesting of any agricultural or horticultural commodities; the raising of livestock, bees, fur-bearing animals, or poultry; the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.

Farm Labor Contractor Any person, other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other valuable consideration paid or promised to be paid, recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.

Agricultural Employer Any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, or nursery, or who produces or conditions seed, and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.

MSPA REQUIREMENTS

DISCLOSURE

Each migrant worker and each day-haul worker in certain activities must be given written disclosure at the time of recruitment containing the terms and conditions of his or her employment. In the case of a seasonal worker, the terms and conditions of employment must be disclosed verbally when an offer of employment is made and must be provided in writing upon request. This disclosure must be in a language the worker understands. **The written disclosure must contain the following worker information and terms and conditions of employment:**

1. Name and address of employer and specific place of employment
2. Periods of employment
3. Crops and operations workers will perform
4. Wage rate, payment terms, deductions to be made
5. Whether transportation, housing, or any other benefit is to be provided to the migrant worker and the cost (if any) that will be charged to the migrant worker
6. Whether workers' compensation coverage or unemployment insurance is provided
7. Whether a strike or labor dispute is in progress

8. The existence of any sales commissions or similar arrangements with the farm labor contractor, agricultural employer, or agricultural association on sales by merchants to the workers

In addition, the employer must also post, in a conspicuous place at the job site, a poster setting out the rights and protections offered by MSPA. A housing provider must post or give each migrant worker a statement of the terms and conditions of housing occupancy prior to occupancy.

FARM LABOR CONTRACTOR REGISTRATION

All Farm Labor Contractors must register with the U.S. Department of Labor (DOL) and obtain a certificate of registration before performing any farm labor contracting activities. A farm labor contractor must be specifically authorized to provide housing or transportation to migrant or seasonal agricultural workers prior to providing the housing or transportation. Persons employed by farm labor contractors to perform farm labor contracting activities also must register with DOL.

WAGES AND RECORDKEEPING

All covered, non-exempt employers of MSPA covered workers must pay all wages owed when due (at least semi-monthly). The employer must keep payroll records for each worker and retain them for three years. Each worker must be provided with a detailed pay stub. **The pay stub must show:**

1. Basis on which wages are paid (hourly, piece rate, etc.)
 2. Number of piecework units earned (for piece rate workers)
 3. Number of hours worked each day and each week (even if the worker is paid on a piece rate)
 4. Total pay period earnings (gross pay); specific sums withheld and the purpose of each withholding
 5. Net pay
 6. The employer's name, address, and federal tax ID number; the employee's name, permanent address, and Social Security number
- ▶ A covered employer must pay at least the promised wage which must not be less than the federal/state minimum wage. Wages must be paid as promised, no less often than every two weeks (or semi-monthly).

HOUSING

Most housing occupied by a migrant agricultural worker must be certified by county, state, or federal officials as meeting applicable safety and health standards. A copy of the certification of occupancy must be posted at the site.

TRANSPORTATION SAFETY

All vehicles used to transport MSPA-covered agricultural workers must be insured, operated by a licensed driver, and meet federal and state safety standards (except valid carpools).

FIELD SANITATION (OCCUPATIONAL SAFETY AND HEALTH ACT)

In some states, WHD also enforces field sanitation standards in covered agricultural settings. The regulation requires that covered employers provide toilets, potable drinking water and handwashing facilities to hand-laborers in the field. In general, the field sanitation standards apply to any agricultural employer employing 11 or more workers who perform "hand labor" field work on any day in the last 12 months.

THE GENERAL REQUIREMENTS ARE:

1. Potable (fit to drink) drinking water, in single-use cups, or by fountains, readily accessible to employees (water must be suitably cool and in adequate supply)
2. One toilet and handwashing facility for each 20 employees, located in close proximity to each other and within a quarter-mile walk of the place of work in the field
3. Facilities must be maintained in accordance with public health sanitation practices
4. Each protected employee must be notified of the location of drinking water and facilities, given reasonable time to use them, and educated on the value and purpose of these facilities
5. Workers cannot be charged for these facilities

Some states have additional or more stringent requirements, and employers must follow all applicable laws. Check with the local state department of labor or local health department to find out about state or local regulations.

H-2A

The H-2A temporary agricultural program establishes a means for agricultural employers who anticipate a shortage of U.S. workers to bring temporary, nonimmigrant, foreign workers to the U.S. to perform agricultural labor or services of a temporary or seasonal nature. The program is administered by the Employment and Training Administration (ETA), and the contractual obligations of participating employers are enforced by WHD.

The regulations governing the H-2A Program also apply to the employment of other workers by an employer of H-2A workers in any work included in the job order or in any agricultural work performed by the H-2A workers during the period of the ETA-approved job order. Such workers are engaged in corresponding employment and are entitled to no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers.

Participating employers and associations are required by law to comply with the following conditions:

RECRUITMENT/HIRING

Employers must engage in “positive recruitment” of U.S. workers, including contacting certain former U.S. employees. The employer must hire qualified, eligible U.S. workers until 50% of the certified work contract period has passed.

WAGES

The wages cannot be less than the rate specified in the job offer/worker contracts. The employer must agree to pay to all workers working within the scope of the H-2A job order whichever of the following is the highest wage rate in effect at the time work is performed: the Adverse Effect Wage Rate (AEWR), the prevailing rate for a given crop/area, the agreed-upon collective bargaining rate, or the Federal or applicable state minimum wage.

HOUSING

Housing must meet the applicable safety and health standards and must be provided at no cost to all employees (both foreign and domestic) who are not reasonably able to return to their permanent residences the same day.

TRANSPORTATION

The employer must provide transportation and subsistence from the place of recruitment to the place of employment, or must reimburse the worker’s inbound transportation costs when the worker completes 50% of the work contract period.

Workers living in housing provided by the employer must also receive free daily transportation between the housing and the work site. The employer is also responsible for providing return transportation and subsistence to workers who complete the contract or who are terminated without cause.

All transportation provided by the employer must meet applicable safety standards, be properly insured, and be operated by licensed drivers.

WORKERS’ COMPENSATION

The employer must provide each worker with workers’ compensation insurance coverage at no cost to the worker.

MEALS

The employer either must provide three (3) meals a day to each worker, or must furnish free and convenient cooking and kitchen facilities. Where the employer provides the meals, the employer must disclose in the job order the charge for such meals.

TOOLS AND SUPPLIES

All tools and supplies necessary to perform the job must be provided by the employer at no cost to the worker.

THREE-FOURTHS GUARANTEE

The employer must guarantee to offer each worker employment for a total number of hours that equal at least three-fourths (3/4) of the workdays in the contract period. For example, if a contract is for a 10-week period, during which a normal workweek is specified as 6 days a week, 8 hours per day, the worker would need to be guaranteed employment for at least 360 hours (e.g., 10 weeks x 48 hours/week = 480 hours x 75% = 360).

PREFERENTIAL TREATMENT

Giving preferential treatment to H-2A workers over domestic workers is prohibited. In addition, the job offer may not impose any additional restrictions or obligations on domestic workers that will not also be imposed on the H-2A workers.

RECORDS AND WRITTEN EARNINGS STATEMENTS

The employer must make and keep accurate records regarding the employment and earnings of employees. In addition, the employer must provide each worker a detailed earnings statement on or before each payday, which must be at least twice monthly.

DEDUCTIONS

With the exception of deductions that are required by law, the job offer must specify all deductions the employer intends to make. All deductions must be reasonable and may not include any profit to the employer or to any affiliated person.

DISCLOSURE

Written information about the benefits, wages, and working conditions of the employment must be provided to each worker by the first day of work. This information must be provided to an H-2A worker no later than the time at which the worker applies for the visa. This disclosure must be in a language the worker understands. The employer must also post, in a conspicuous place at the job site, a poster setting out the rights and protections offered to workers under the H-2A program.

ADDITIONAL ASSURANCES

The H-2A program contains a number of other related requirements ranging from additional assurances the employer must give the Department of Labor (as a pre-condition to participation in the program), to prohibitions against retaliation against workers who exercise their rights under the law, to compliance with other applicable employment-related laws, including the prohibition against an employer holding or confiscating a worker's passport or other immigration documents. In addition, participation in the H-2A program requires that the employer contractually forbid any foreign labor contractor or recruiter whom the employer engages, either directly or indirectly, in international recruitment of H-2A workers from seeking or receiving payment or other compensation from prospective employees. Employers and their agents are also prohibited from passing on to employees any employer-related fees or costs associated with participation in the program.

The Family and Medical Leave Act (FMLA)

THE FAMILY AND MEDICAL LEAVE ACT (FMLA)

INTRODUCTION

THE FAMILY AND MEDICAL LEAVE ACT

The Family and Medical Leave Act (FMLA) gives many employees the right to take leave from work for certain family and medical leave reasons. They may take leave because of their own serious health condition, the serious health condition of a parent, child or spouse, for the birth, adoption, or foster care placement of a child, or for certain reasons related to a family member's military service. They are entitled to return to the same or equivalent job.

The FMLA defines which employees are protected by the law, the reasons for which they may take leave, how long they may remain on leave, and their rights upon returning to work. As you will learn, one of the key provisions of the Act is that eligible employees can take up to 12 workweeks of unpaid leave during a 12-month period for a qualifying reason. When employees then return to work, they must be allowed to resume their original jobs or be placed in equivalent jobs with equivalent pay and benefits.

WHAT THIS CHAPTER INCLUDES:

This chapter begins with a flowchart to help you determine if an employee is covered by the FMLA and what aspect of the Act applies to the situation. The rest of the chapter provides detailed information to help you further understand an employee's rights under the FMLA. The chapter ends with guidance on how to assist an employee in filing a complaint.

This chapter addresses only FMLA leave for a serious health condition and for the birth or placement of a child. It does not address the details of the military family leave provisions of the FMLA or the special rules for school employees or airline flight crew employees. Generally, the military family leave provisions provide:

1. Up to 12 workweeks of leave for qualifying exigencies arising out of the fact that a family member of an employee is a military member on covered active duty, and
2. Up to 26 workweeks of leave in a single 12-month period for an eligible employee to care for a family member that is a covered service member recovering from a serious injury or illness.

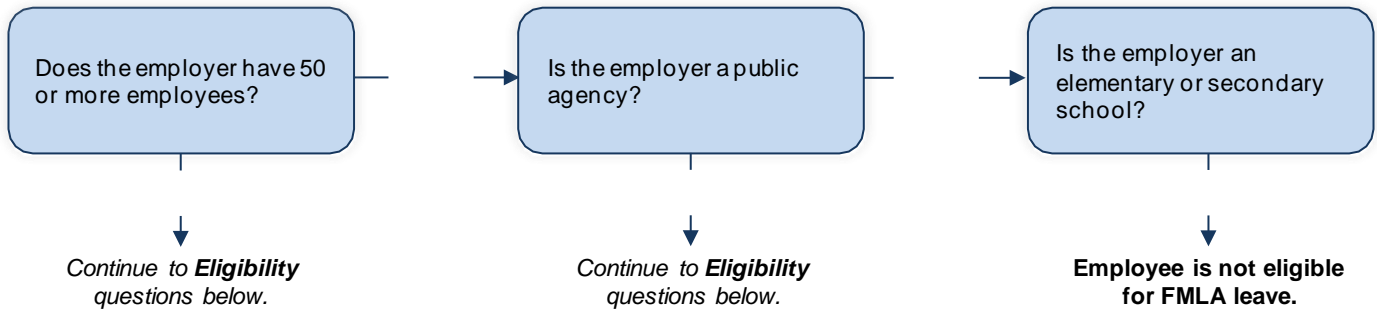
Questions about the military family leave provisions of the FMLA or special rules for school employees or airline flight crew employees may be directed to your local Wage and Hour Division (WHD) office.

- ▶ For more information on the FMLA, see WHD's website at www.dol.gov/agencies/whd/fmla.

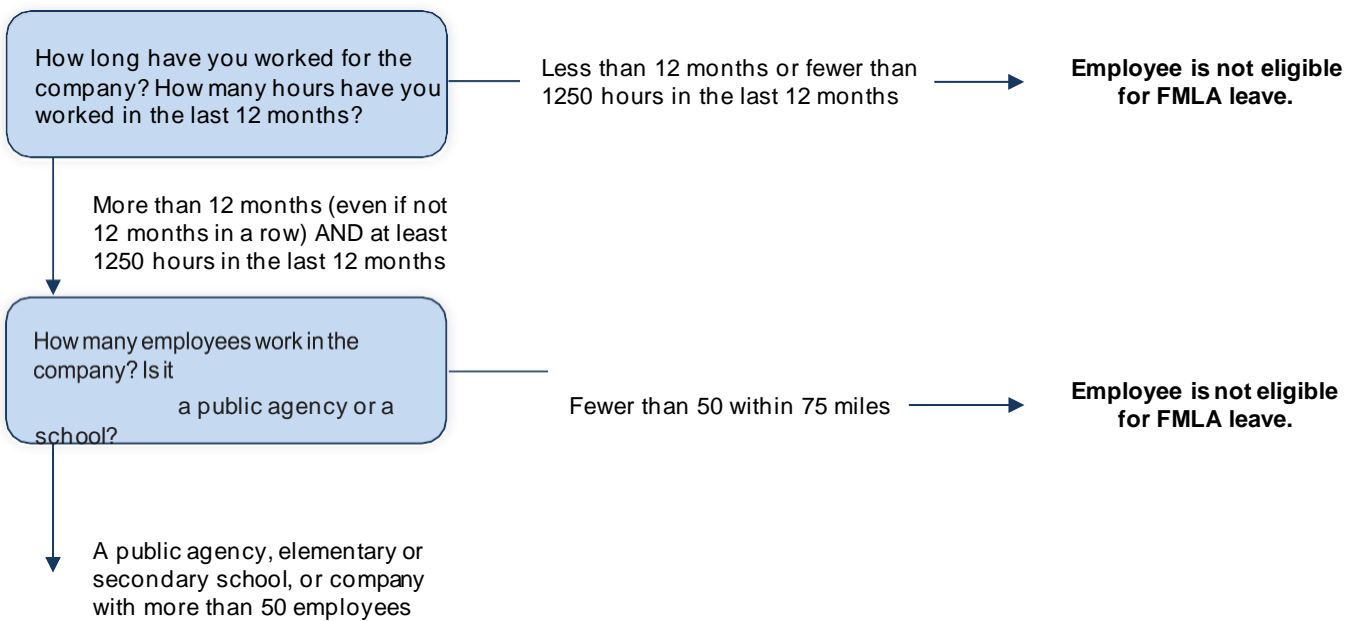
FMLA FLOWCHARTS

If an employee works for an FMLA-covered employer (see page 44) and is concerned about family or medical leave, ask the questions in the following flowcharts. Based on the answers, refer to the appropriate section(s) of the book. If a violation is suspected, refer to the **Complaint Process** section at the end of the book, or call your local WHD office if you have questions.

EMPLOYER COVERAGE

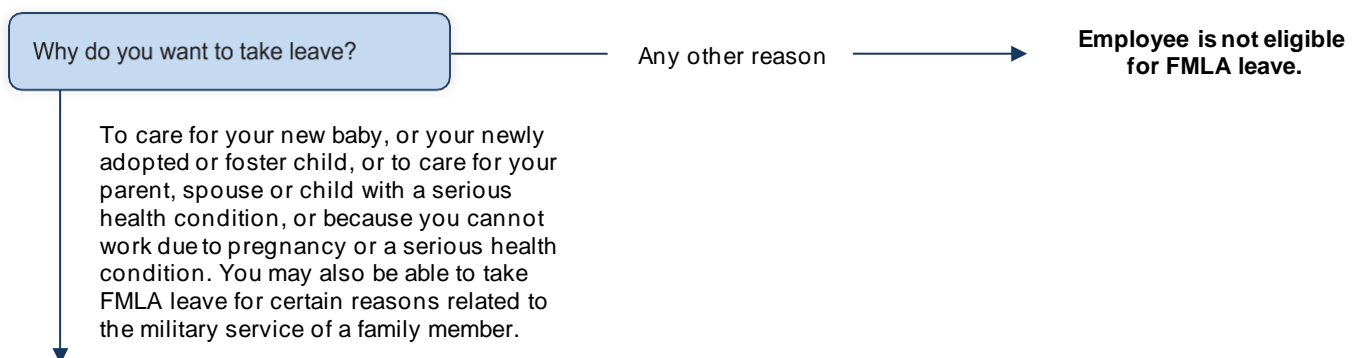


ELIGIBILITY



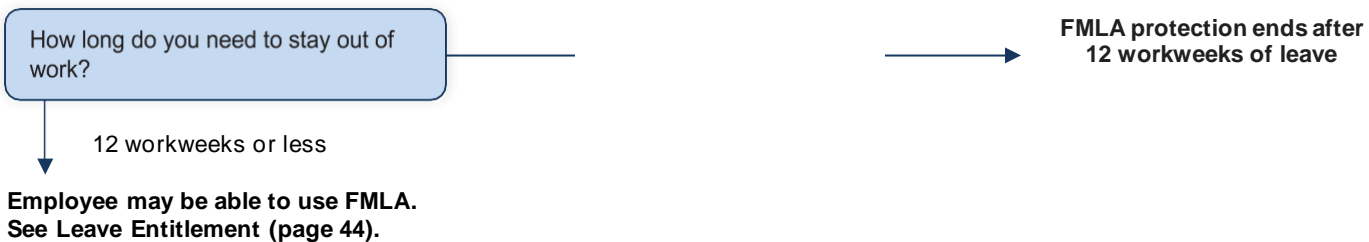
The employee is an eligible employee under the FMLA. See Leave Entitlement (page 44).

FMLA REASONS FOR LEAVE



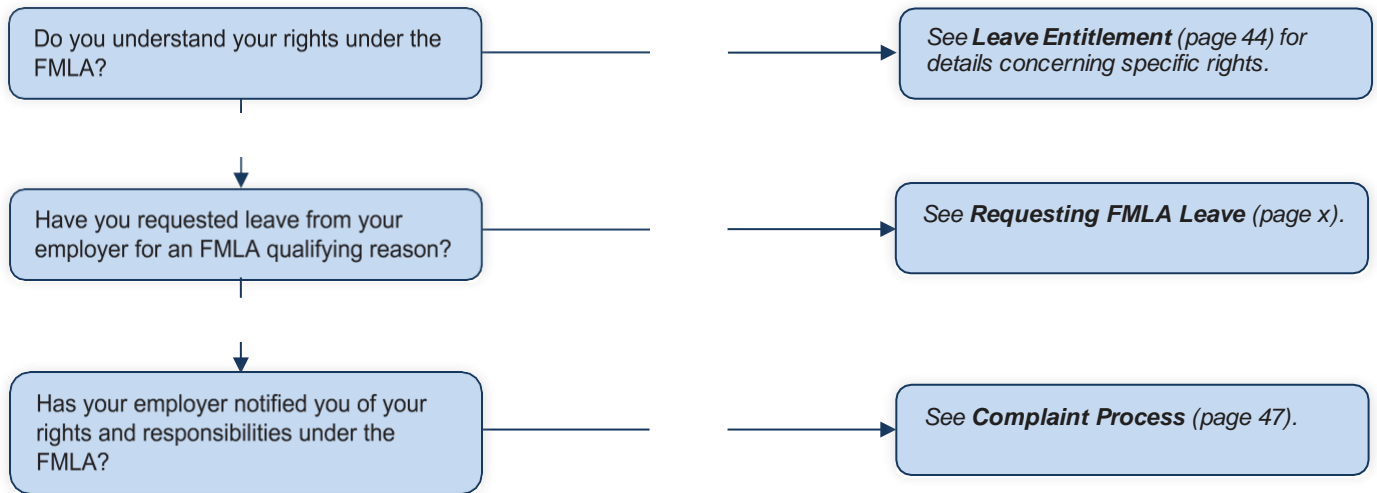
Employee can use FMLA. See Leave Entitlement (page 44).

LENGTH OF LEAVE ALLOWED

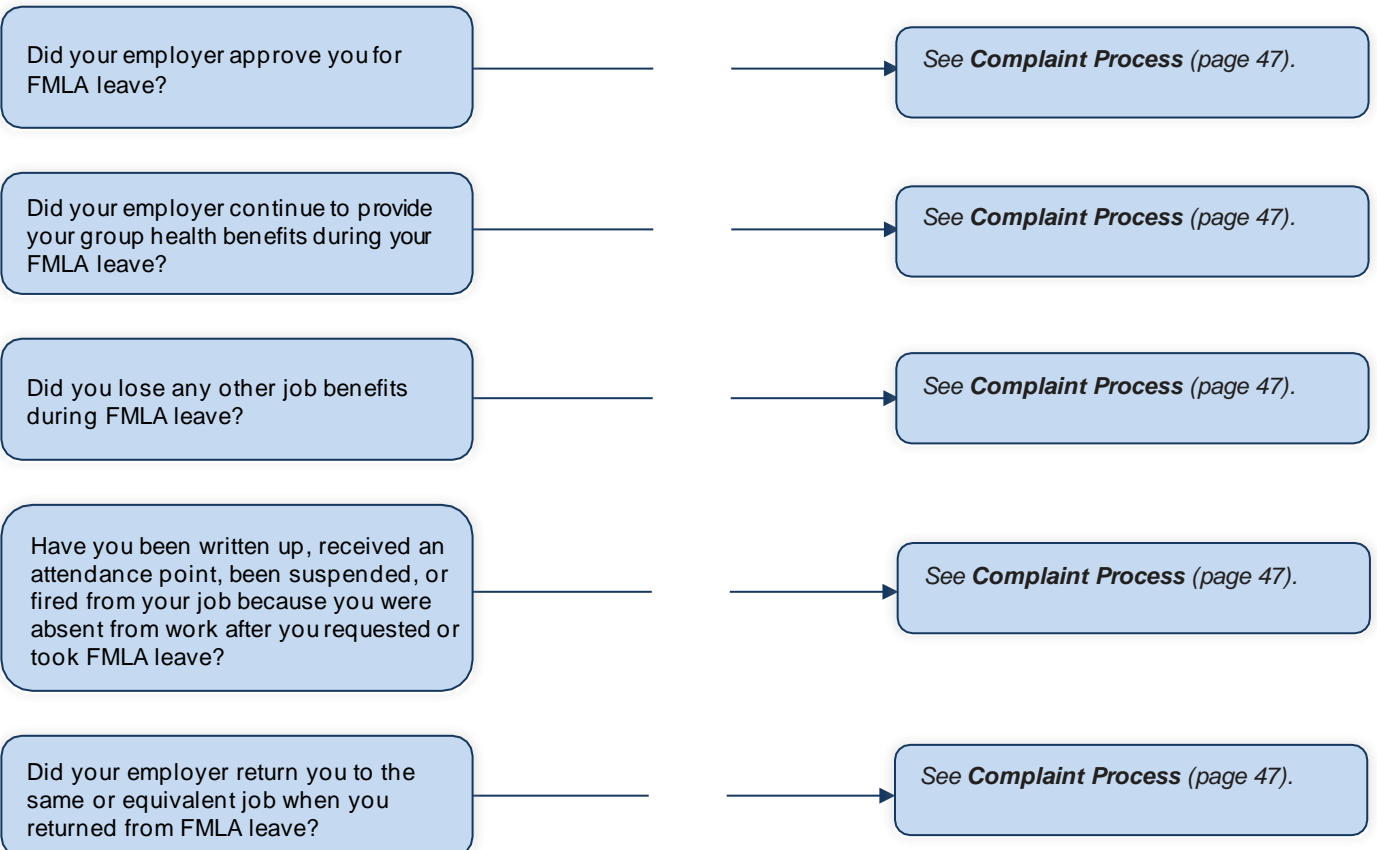


WHAT TO EXPECT

Employees who take leave under the FMLA are entitled to return to the same or an equivalent job. They are also entitled to keep their preexisting health insurance while on leave, and to this and other benefits when they return to work. Covered employers are required to notify you of your FMLA rights and responsibilities.



LEAVE DENIAL



GUIDELINES

EMPLOYER COVERAGE

FMLA applies to employers that employ 50 or more employees for 20 or more calendar workweeks during the current or previous year. FMLA also applies to all public agencies, including state, local and federal employers, and to local education agencies (public school boards, and public and private elementary and secondary schools). Additionally, an employer may be a covered employer if it takes over the business operations (i.e., becomes a “successor in interest”) of a covered employer.

EMPLOYEE ELIGIBILITY

To be eligible for FMLA benefits, an employee must work in the US or its territories for a covered employer (see above), have worked for the employer a total of 12 months (not necessarily 12 months in a row), have at least 1,250 hours of service in the 12 months before the FMLA leave is to start, and work at a location where at least 50 employees are employed by the employer within 75 miles of the employee’s worksite. Only the time actually worked, including overtime hours worked, is counted toward the hours of service requirement. Time not actually worked, including vacation, personal leave, sick leave, holidays, and any other form of paid time off (PTO) is not counted. Unpaid leave of any kind or periods of layoff also are not counted.

FMLA LEAVE REASONS

A covered employer must give eligible employees up to a total of 12 workweeks of unpaid job-protected leave during a 12-month period for one or more of the following reasons:

- the birth and care of a newborn child;
 - placement and care of a son or daughter for adoption or foster care;
 - to care for a spouse, child (under 18 or 18 and older and incapable of self care due to a disability), or parent with a serious health condition;
 - to take medical leave when an employee is unable to work because of a serious health condition, or incapacitated due to pregnancy or for prenatal care.
-
- ▶ Spouse means a husband or wife as defined or recognized in the state where the individual was married, including a common law marriage or same-sex marriage. Spouse also includes a husband or wife in a marriage that was validly entered into outside of the United States, if the marriage could have been entered into in at least one state.
 - ▶ Parents means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a child. The term does not include “parents-in-law.”
 - ▶ Child means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is under 18 years of age or who is 18 years of age or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to start. The onset of a disability may occur at any age for purposes of the definition of child under the FMLA.

NOTE: The military family leave provisions of the FMLA are beyond the scope of this chapter (see page 41). Questions about the military family leave provisions may be directed to your local WHD office.

BIRTH, ADOPTION, OR FOSTER CARE

Leave for birth and care, or placement for adoption or foster care, must conclude within 12 months of the birth or placement.

Example: Rebecca, an eligible employee who works for a company with more than 50 employees, has worked for her company for three years. She is pregnant and would like to take some time off to care for the baby. Her company offers six weeks of maternity leave but Rebecca was hoping to take more time. Can she use FMLA even though her company offers paid maternity leave?

Yes. FMLA allows Rebecca to take a total of 12 weeks of leave for the birth of a child and to bond with the newborn child within one year of birth. Assuming she has not taken any other FMLA leave within the leave year, after taking the 6 weeks paid maternity leave, which counts as FMLA leave, too, she will still have 6 more weeks of unpaid leave available under the FMLA for bonding with her baby.

SERIOUS HEALTH CONDITION

An eligible employee may use FMLA leave for either the employee's serious health condition or to care for a family member (the employee's spouse, parent, or child) with a serious health condition. A serious health condition under the FMLA is an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider. The most common serious health conditions that qualify for FMLA leave are:

- conditions requiring an overnight stay in a hospital or other medical care facility;
- conditions that incapacitate the employee or a family member (for example, unable to work or attend school) for more than three consecutive days and require ongoing medical treatment (either multiple appointments with a health care provider, or a single appointment and follow-up care such as prescription medication);
- chronic conditions that cause occasional periods when the employee or family member are incapacitated and require treatment by a health care provider at least twice a year; and
- pregnancy (including prenatal medical appointments, incapacity due to morning sickness, and medically required bed rest).

Employers may require employees to provide medical certification supporting the need for leave in most circumstances. An employer may deny FMLA leave if the employee fails to provide a properly requested medical certification.

Example: David's mother-in-law is undergoing chemotherapy and he wants to take leave to transport her to her chemotherapy sessions. His company is covered under the FMLA and David meets the eligibility requirements. Does David qualify for FMLA to care for his mother-in-law?

No. The FMLA allows leave to care for an immediate family member only if the family member is a spouse, parent, or child of the employee. Under the FMLA, the definition of "parent" does not include parents-in-law. So, David is not entitled to use FMLA leave to care for his family member in this scenario.

INTERMITTENT OR REDUCED SCHEDULE LEAVE

When medically necessary, employees may take FMLA leave intermittently or on a reduced schedule basis, which means taking leave as needed, such as a day, a week, or even a few hours at a time. FMLA leave may be taken intermittently or on a reduced schedule basis to care for a family member (a spouse, parent, or child) with a serious health condition, or because the employee has a serious health condition and is unable to work.

Example: Faith has a chronic serious health condition. She suffers from migraine headaches which are severe enough to make her incapable of working.

She needs to take a few days of leave one to two times a year because of her migraine headaches. Faith is eligible to use FMLA leave as she works 40 (forty) hours per week for a covered employer and has worked with her company for three years. She has not used FMLA leave before and only has a couple of days of sick leave. Can she use FMLA leave for her migraine headaches, even if she runs out of paid sick leave?

Yes. Faith may use FMLA leave intermittently, as needed, for her migraine headaches as long as she is eligible under the FMLA and has not already used 12 workweeks of FMLA leave during the leave year. Faith's employer may not require her to use more FMLA leave than she needs to take because of her medical condition. Provided her FMLA leave reason qualifies for paid sick leave under her employer's paid sick leave policies, her employer may require her – or she may choose - to use paid sick leave at the same time that she uses FMLA leave. If she does not have any paid time off available to use during her FMLA leave, she may use unpaid FMLA leave.

LEAVE NOTICE

Employees must give up to 30 days advance notice of the need to use FMLA leave when foreseeable; if the need for FMLA leave is foreseeable less than 30 days in advance, employees must provide notice as soon as practicable (generally the same day or next day). Employees must comply with their employer's usual notice and procedural requirements for requesting leave, absent unusual circumstances. Employers may require employees to provide medical

certification supporting the need for leave due to a serious health condition. Employers may also require periodic reports during FMLA leave of the employee's status and intent to return to work.

PAID LEAVE

Generally, FMLA leave is unpaid. However, employees may choose or employers may require the use of accrued paid leave (such as sick or vacation leave) to cover some or all of the FMLA leave period. The paid leave and the FMLA leave run concurrently. An employee's eligibility to use accrued paid leave is determined by the terms and conditions of the employer's normal leave policy. The employer is responsible for designating leave as FMLA leave if an employee's use of leave (paid or unpaid) qualifies under FMLA.

Example: Paul, who drives a truck, broke his leg playing soccer with his kids and is eligible to use FMLA leave while he is recovering. He can't afford to be without a paycheck for the four weeks he must stay home from work. Paul has four weeks of accrued paid time off (PTO), which he can use for any reason. Can Paul use his four weeks of accrued PTO during FMLA leave?

Yes. An employee may request, or an employer may require, the use of any accrued paid leave during FMLA leave if the leave qualifies under the terms and conditions of the employer's normal leave policy.

GROUP HEALTH PLANS

During any period of FMLA leave, a covered employer must maintain the employee's coverage under any group health plan on the same basis coverage would have been provided if the employee had continued to work. If appropriate, arrangements should be made for employees to pay their share of health insurance while on leave.

Example: Miguel has worked full-time for his company, which employs 100 people, for 14 months. He really likes his job. His wife is undergoing surgery and will be in the hospital for several days. She needs Miguel to help care for her while she is in the hospital and while she is recovering from surgery. Miguel's health benefits pay for his wife's medical care. Miguel told his wife he will not be able to stay home to care for her because they need his employer group health plan benefits to continue and he is worried that taking time off might hurt his position with the company. Is he correct?

No. Under the FMLA, Miguel can take up to 12 weeks of unpaid leave to care for his wife. During that time, his employer must maintain his group health plan on the same terms as though Miguel were still working. Miguel is also guaranteed job restoration through FMLA, which means that when he returns to work he will have his original job or one that is equivalent to his original job. His employer may not discriminate against him for exercising his right to take FMLA qualifying leave.

RETURN TO WORK

An employer may require an employee to report periodically on the employee's status and intent to return to work. If the employee is ready to return to work earlier than expected, the employer may require that the employee provide reasonable notice, that is, within two business days, of the changed circumstances. An employer cannot require an employee to take more leave than is medically necessary.

Note: An employer may have a uniformly-applied policy or practice that requires all similarly-situated employees who take leave for their own serious health condition to obtain and present certification from the employee's health care provider that the employee is able to resume work as a condition of restoring an employee. This fitness-for-duty certification can be requested only for the health condition that caused the employee's need for FMLA leave.

JOB RESTORATION

Upon return from FMLA leave, an employee must be restored to the employee's original job, or to an equivalent job. In addition, an employee's use of FMLA leave cannot result in the loss of any employment benefits that the employee earned or was entitled to before using FMLA leave.

- ▶ An "equivalent job" means a job that is virtually identical to the original job in terms of pay, benefits, and other employment terms and conditions (including shift and location).

Equivalent pay includes the same or equivalent pay premiums, such as a shift differential, and the same opportunity for overtime premium pay as the job held prior to FMLA leave. An employee is entitled to any unconditional pay increases that occurred while he or she was on FMLA leave, such as cost of living increases. In addition, an employer must grant pay increases conditioned upon seniority, length of service, or work performed if employees taking the same type of leave (i.e., paid or unpaid leave) for non-FMLA leave receive increases. Equivalent pay also includes any unconditional bonuses or payments.

Example: Joyce worked full time for a large factory as a line operator from 7:00-3:00 for four years prior to her emergency gallbladder surgery for which she took FMLA leave. Upon her return, her employer told her she would be working from 3:00-11:00 as a custodian, which pays \$2 less per hour. Is her employer allowed to do this?

No. Joyce's employer must restore her to her original job or an equivalent job. Joyce also needs to be returned to her same or a similar schedule.

Complaint Process

WAGE AND HOUR DIVISION COMPLAINT PROCESS

COMPLAINT PROCESS

All services are free and confidential, regardless of immigration status. Please remember that it is unlawful for your employer to terminate your employment, or in any other manner discriminate against you for filing a complaint with WHD.

WHO CAN FILE A COMPLAINT?

Any employee who believes that his or her employer has violated any of the laws enforced by WHD may file a complaint. This is true for current or former employees or anyone who is familiar with the employment practices of the employer or has reason to believe a violation has occurred. Anyone can call our toll-free help line: 1-866-4USWAGE (1-866-487-9243), TTY: 1-877-889-5627 to ask questions about the laws we enforce. The toll-free number is available Monday-Friday 8 AM to 5 PM Eastern Time.

A complaint may be filed by mail, by telephone, or in person at any WHD District Office. Offices can be located by checking our website at: www.dol.gov/whd/america2.htm.

CAN A THIRD PARTY FILE A COMPLAINT?

Yes.

WHD accepts complaints from third parties – those who file complaints on behalf of someone else. Third parties can include worker advocates or representatives, competitors of a business alleged to be operating in violation, or others with knowledge that substantiates that a violation of a law enforced by WHD may be occurring.

WHEN SHOULD A COMPLAINT BE FILED?

Most laws enforced by the WHD have a two-year statute of limitations (three years for willful violations). This means, for example, that any part of a back wage claim which was earned more than two years (three years for willful violations) before a federal court lawsuit is filed may not be collectible.

Accordingly, to ensure WHD can complete its investigation before the statute of limitation expires, employees or their representatives should file complaints with WHD as soon as the violation occurs. Filing a complaint with WHD does not stop the statute of limitations from running.

WHAT INFORMATION MUST BE INCLUDED IN A COMPLAINT? (See also pages 49-50)

1. The employee's name, address, and telephone number (with the best time of the day to be reached)
2. Employee's job title and a description of the kind of work done
3. For claims involving back wages, include rate, method and frequency of wage payment. Example: paid weekly at \$9 per hour or paid a salary of \$900.00 twice each month, and number of hours actually worked each week.
4. A description of the alleged violation(s). Example: "My employer failed to pay overtime for extra shifts or failed to pay for time spent loading the truck," "I work at a restaurant where a 14-year-old is bussing tables until midnight every day," or "I had surgery and was out for a month and my employer fired me."
5. Date(s) of the alleged violation(s)

6. The employer's name, name of the business, address, telephone number and nature of business. (School, farm, restaurant, etc.)
7. Any other information that describes the nature of the violation and the workers impacted

WHAT HAPPENS WHEN A COMPLAINT IS FILED?

WHD staff will review the complaint to determine if the complainant provided information indicating a violation of the laws we enforce. WHD staff will contact the complainant if the information provided is insufficient to make these determinations.

If WHD is unable to conduct an investigation or secure back wages as a result of an investigation, the employee retains the right to bring a private lawsuit in federal court to recover back wages.

CONFIDENTIALITY

All discussions with WHD are confidential. All complaints are confidential; the name of the complainant and the nature of the complaint are not disclosed. The only exceptions are: when the complainant gives permission and it is necessary to reveal a complainant's identity to pursue an allegation; and when the WHD is ordered to reveal information by a court. You can find additional information about the investigative process at [Fact Sheet 44](#).

HOW CAN I LEARN MORE ABOUT FEDERAL WAGE REQUIREMENTS?

For additional information, visit WHD online at www.dol.gov/agencies/whd or call the WHD toll-free information and helpline at **1-866-4-USWAGE** (1-866-487-9243), available 8 AM to 5 PM Eastern Time.

INFORMATION HELPFUL TO WHD WHEN FILING A COMPLAINT

This information is useful when contacting WHD. The more information you can provide, the better WHD will be able to address concerns raised. *If you don't have all of the information listed, call us anyway.*

EMPLOYEE INFORMATION

- Your name
- Your address (if you have a separate mailing address also have that available)
- Your telephone number, or a telephone number where you can be contacted and the best days and times to call you
- Your age and date of birth, if under 19
- Are you a current employee, a former employee, or a representative of a current or former employee?

EMPLOYMENT INFORMATION

- How long have you worked or did you work, for your employer? When did you start? If you are no longer an employee, when did you leave?
- Are you classified as an employee or an independent contractor? Did you get an IRS Form 1099?
- What is your job or job title? What duties did you perform?
- Are you involved in any type of interstate transactions, such as shipping or receiving goods, producing goods, making telephone calls, processing credit cards, etc.?
- What is the problem? How long has the problem been occurring? Does this same situation apply to others, or just to you?

PAYROLL AND HOURS WORKED

- How are you paid (salary, hourly, by piece or by job rate)? What is your rate of pay?
- How often are you paid (daily, weekly, every two weeks on the same day of the week, every other week, monthly, twice a month or semi-monthly)?
- Are you paid by check, direct deposit, cash or debit card?
- Do you have pay stubs or other documents (for example, pay stubs that show you being paid less than the minimum wage)?
- Is the pay stub in your name? Do you share a job with anyone?
- Are there deductions from your pay for things other than federal and state taxes, social security or Medicare? (i.e. uniforms, cash register shortages, breakage etc.)?
- How many hours do you work per week on average?
- Does your employer record your hours worked? Do you have a record of your hours worked?
- How are the records maintained? (i.e. time cards punch in/out, time cards written, sign in/out sheet etc.) Are the employer's records of your hours an accurate reflection of the hours you worked? Do you perform work prior to or after signing in/out?

EMPLOYER INFORMATION

- Where do /did you work? (location, address(es), as much information as possible)
- Name of your employer's business, including a trade name
- Name of your employer
- Address of your employer (number, street, city, state, zip code)

- Phone number of employer, including mobile number if available.
- Type of business (construction, retail store, manufacturing, restaurant, cleaning services, etc.)
- Does your employer have more than one location?
- If there is more than one location, can you identify other locations?
- Does your employer have a main office? Do you know where your employer's main office is?
- About how many employees work for your employer?
- Does the employer employ minors under 18 years old?
- Do you know what your employer's gross annual sales are? If not, can you estimate the approximate daily or weekly sales figures?
- What is your supervisor's name?
- What are the names of your co-workers? Do any of your co-workers want to speak with us or file a complaint?

FREQUENTLY ASKED QUESTIONS

Q: I don't think I'm being paid right. Can I file a complaint with WHD?

A: Yes. The Wage and Hour Division (WHD) takes complaints by phone and in writing. A current or former employee or someone who is familiar with the employment practices of the employer or has a reason to believe a violation has occurred may file a complaint. If you have any questions about whether or not a violation has occurred, please contact us.

Q: What if I'm not sure I want to file a complaint? Can I find out what a worker's rights are?

A: Absolutely! You can call or visit any WHD Office to ask about the laws or file a complaint on behalf of yourself or someone else.

By phone: **1-866-4USWAGE** (1-866-487-9243) TTY: 1-877-889-5627, Monday-Friday 8 AM to 5 PM Eastern Time

In person: You may also call or visit the local office near you. Local contact information will be provided by your instructor or check our website at www.dol.gov/whd/america2.htm

By email: Send us an email from www.dol.gov/whd/contact_us.htm

Q: Does it cost anything to file a complaint?

A: No. There are no charges to file a complaint or for WHD to conduct an investigation. DOL is a federal agency and does not charge for its services.

Q: I haven't worked for this employer for a while. How long do I have to file a complaint?

A: The Fair Labor Standards Act contains a two-year statute of limitations (three years for willful violations). This means that any wages earned more than two years before a federal court lawsuit for backwages is filed may not be collectible. To ensure we can complete our investigation before the statute of limitation expires, employees should file complaints with WHD as soon as possible.

Q: If I talk to someone at WHD, will it be confidential? I don't want to lose my job.

A: All discussions with WHD are confidential. All complaints are confidential. Neither the name of the complainant nor the existence and nature of the complaint are disclosed during any part of the process, except in rare circumstances.

Sometimes it is necessary to disclose a complainant's identity, with the complainant's permission, to pursue an allegation; WHD would also be obliged to comply with a court order to disclose this information.

Q: Some employees at my job are not documented to work. Is everyone who works entitled to the minimum wage?

A: WHD enforces the law without regard to an employee's immigration status. No employer should have an unfair advantage because it doesn't pay its employees. WHD will enforce pay for hours worked for all covered, non-exempt employees.

Many employees, employers, and their representatives have questions about a March 2002 United States Supreme Court decision, *Hoffman Plastic Compound, Inc. v. NLRB* (Hoffman). This decision states that the National Labor Relations Board (NLRB) lacked authority to award back pay to an undocumented worker who was laid off from his job because of union activities. In Hoffman, the NLRB sought back pay for time an employee would have worked if he had not been illegally discharged, not for time actually worked. The NLRB enforces a law that permits but does not require back pay as a remedy. Under the FLSA, DOL (or an employee) seeks back pay for hours an employee has actually worked, as this law requires payment for such work. Accordingly, DOL will seek back wages under this law regardless of immigration status.

Q: Some people on my job don't speak English and they want to talk to you.

A: Contact us. WHD is a multilingual organization. We can communicate with callers in more than 200 languages

RESOURCES FOR STATE AND LOCAL LABOR LAWS

LOCAL INFORMATION

