

Fair Labor Standards Act of 1938

The Fair Labor Standards Act (FLSA), a Federal law with broad application that contains provisions and standards on minimum wages, maximum hours allowable without overtime pay, child labor, and recordkeeping, was enacted in 1938. Congress has amended the law several times since its inception. FLSA requirements generally apply to employees of employers engaged in interstate commerce or who produce goods and services for interstate or foreign commerce, including goods that become parts of products shipped by others.

The minimum wage provision of FLSA requires every employer (unless specifically exempt) to pay a minimum wage to each employee who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce (2).² The minimum hourly wage increased from \$4.75 to \$5.15 per hour beginning September 1997. The legislation that increased the minimum wage also established a subminimum wage (\$4.25 per hour) for employees under 20 years of age during their first 90 consecutive calendar days of employment with an employer. Migrant and seasonal farmworkers and H-2A nonimmigrant agricultural workers performing temporary or seasonal work, who meet the age and time criteria, are subject to the subminimum wage provisions.³

The maximum hours provision requires all employers, unless specifically exempt, to compensate employees for any hours they work over 40 hours per week (2). This provision sets the compensation rate for hours worked in excess of 40 per workweek at not less than one and one-half times the employee's regular pay rate.

The child labor provision prohibits employers from using "oppressive child labor" in commerce or in producing goods for commerce (2). The minimum age

for performing any job is 16 in the agricultural sector and 18 in the nonagricultural sector. Employment restrictions are placed on workers younger than the minimum age. These employment restrictions on younger workers differ between the agricultural and nonagricultural sectors.⁴

The recordkeeping provision requires covered employers to keep records on wages, hours worked, and other items, as specified in Department of Labor recordkeeping regulations. The records are not required to be kept in any prescribed form, and time clocks are not required. If an employer has employees subject to minimum wage or overtime pay provisions of FLSA, the following information must be recorded: (1) personal information, including employee's name, home address, occupation, sex, and birthday if under 19 years of age; (2) the hour and day at which the workweek begins; (3) total hours worked each workday and each workweek; (4) total daily or weekly straight-time earnings; (5) regular hourly pay for any week when overtime is worked; (6) total overtime pay for the workweek; (7) deductions from or additions to wages; (8) total wages paid each pay period; and (9) date of payment and pay period covered.

How the Law Applies to Agricultural Employment

Table 1 summarizes FLSA provisions and their application to agricultural employment. The basis for agricultural exemptions is determined by the way the law defines terms, and by U.S. Department of Labor regulations and U.S. Supreme Court decisions.

FLSA contains two exemptions especially important for agricultural employers. Agricultural employers who did not use more than 500 man-days of agricultural labor during any calendar quarter of the preceding calendar year, or are primarily engaged in the range production of livestock are exempt from the minimum wage provisions. Using more than 500 man-days of agricultural labor would require employing six or more workers each day of the week for 13 weeks. In 1997, 513,568 farms (79 percent of farms with hired labor expenditures) employed fewer than five hired farmworkers (14). Thus, most farm employers are not covered by the minimum wage

²A "workweek is a fixed and regularly recurring interval of seven consecutive 24-hour periods. It may begin at any hour of any day set by the employer and need not coincide with the calendar week. Once set, the workweek commences on the same day and at the same hour in each succeeding week" (2).

³H-2A temporary foreign workers are nonimmigrant aliens authorized to work in agricultural employment in the United States for a specified time period, normally less than 1 year.

⁴For additional information, see appendix A and (18).

Table 1--Fair Labor Standards Act of 1938: Summary of applicability to agriculture and penalties for violations

Provisions	Exemptions for agriculture	Basis for agricultural exemptions	Enforcement
Minimum wage			
Requires employers, unless exempt, to pay any employee at least the legally established Federal minimum wage (\$5.15 an hour as of September 1, 1997).	Partial	1. Employer did not use more than 500 man-days of agricultural labor during any calendar quarter of the preceding calendar year. 2. Employees are members of employer's immediate family. 3. Employees are employed as hand-harvest laborers paid on a piece-rate basis; they commuted daily from their homes and were not employed in agriculture more than 13 weeks in the preceding calendar year. 4. Employees are 16 years of age or younger and employed as hand-harvest laborers paid on a piece-rate basis equal to employees older than 16 years, and are employed on the same farm as parents or someone standing in place of parents. 5. Employees are primarily engaged in range production of livestock.	Responsible agency Wage and Hour Division Employment Standards Administration, U.S. Department of Labor. Penalties \$10,000 fine or month imprisonment, or both, after a prior conviction for willfully violating provisions. Liable for unpaid wages and an additional equal amount as liquidated damages plus attorney fees and reasonable costs incurred by the plaintiffs when a party is convicted of violating minimum wage and maximum hour provisions.
Maximum hours			
Requires employers, unless exempt, who employ any employee for a workweek in excess of 40 hours to pay the employee at least 1-1/2 times the employee's regular pay rate for the hours worked in excess of 40.	Total	Employment in agriculture, except in a packing shed or processing plant that handles produce for more than one farm.	Same as above
Child labor			
Employing anyone under the legal minimum age (16 years of age unless otherwise specified) in a nonexempt occupation is considered "oppressive child labor."	Partial (any employment permitted must be during nonschool hours).	1. If employee is 14 or 15 years of age and not employed in a hazardous occupation as defined by the Secretary of Labor. 2. If employee is 12 or 13 years of age and employed with the written consent of his or her parents, or a person standing in place of his or her parents, or if the prospective employee is employed on the same farm as the parents or person standing in place of the parents. 3. If employees under 12 years of age are employed with written parental consent on farms where employees are exempt.	Civil penalty of up to \$10,000 for each violation of child labor provision.

Source: Compiled by USDA, ERS from 29 Code of Federal Regulations and Title 29 United States Code.

provision. Agricultural employers, except those operating packing sheds or processing plants that handle produce for more than one farm, are exempt from the maximum hours provisions (table 1). For employers to qualify for these exemptions, their employees, in almost every case, must be employed exclusively in an exempt occupation for the entire workweek, and the employer claiming the exemption is required to provide proof that the exemption applies.

Definitions

Definitions presented in this section are restricted to key terms. Readers seeking more detailed information should contact the nearest office of the Wage and Hour Division, U.S. Department of Labor, and should consult *29 Code of Federal Regulations* and *Title 29 United States Code*.

Agriculture is defined for purposes of FLSA as:

“...farming and all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market” (12).

Section 15(g) of the Agricultural Marketing Act extends the definition of *agricultural and horticultural commodities*:

“...agricultural commodity includes, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producers of the crude gum (oleoresin) from which derived: Gum spirits of turpentine, and gum rosin, as defined in the Naval Stores Act, approved March 3, 1923 (U.S.C. 91-99). As defined in the Naval Stores Act, ‘gum spirits of turpentine’ means spirits of turpentine made from gum (oleoresin) from a living tree and ‘gum rosin’ means rosin remaining after the distillation of gum spirits of turpentine” (2).

The U.S. Department of Labor regulations and decisions of the U.S. Supreme Court define agriculture further. The U.S. Department of Labor includes fish farming activities in agriculture and considers all employees engaged in such operations to be employed in agriculture (2).

The U.S. Supreme Court distinguished agriculture under the FLSA as consisting of two parts, primary and secondary (28). *Primary agriculture* “...includes farming and all its branches such as cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities and the raising of livestock, bees, fur-bearing animals, or poultry” (2). An employee employed in any of these activities is considered to be engaged in agriculture whether employed or not by a farmer or on a farm. *Secondary agriculture* includes any activities or practices performed by a farmer (including employees of a farmer) or on a farm as an incident to or in conjunction with such farming operations. These activities include preparing commodities for market and delivering commodities to storage, to market, or to a carrier for transporting to market (2). As a result, employment that falls outside of the primary or secondary meaning of agriculture, as defined in FLSA, is not employment in agriculture. Therefore, to be employed in agriculture, one must be employed: in farming, by a farmer, or on a farm.

Employ means “to suffer or permit” to work, which the courts have interpreted to mean an economic dependence of an employee upon an employer (2). An employee may be economically dependent on more than one employer. In this case, a joint employment situation occurs.⁵

Man-day means “any day during which an employee performs any agricultural labor for not less than 1 hour” (12).

Calendar quarter of the preceding calendar year has been defined by U.S. Department of Labor regulations to be January 1-March 31, April 1-June 30, July 1-September 30, and October 1-December 31 of the preceding calendar year (2).

⁵See the discussion of “determining joint employment” under the discussion of the Migrant and Seasonal Agricultural Worker Protection Act of 1983, p. 27.

Immediate family of an employer under the FLSA includes a spouse, children, stepchildren, and foster children, parents, stepparents, and foster parents. The law is clear on this matter. “Other relatives, even when living permanently in the same household as the employer, will not be considered to be part of the immediate family” (2).

Thirteen weeks is a time period on which certain exemptions from the FLSA are based. The appropriate basis for determining whether a local worker has been employed in agriculture less than 13 weeks during the preceding calendar year is not necessarily a calendar week. According to U.S. Department of Labor regulations, a week is considered to be a “fixed and regularly recurring period of 168 hours consisting of 7 consecutive 24-hour periods during which the employee worked at least 1 man-day” (2). And, it is the total number of weeks that the employee worked for all employers in agriculture during the preceding calendar year that determines whether the 13-week test has been met. Most important, it is the employer’s responsibility to obtain a statement from the employee showing the number of weeks he or she was employed in agriculture during the preceding calendar year. This exemption does not apply to migrant workers.

Principally engaged in the range production of livestock means that the employee spends more than 50 percent of his or her time on land not cultivated, actively taking care of (or standing in readiness for the purpose of caring for) cattle, sheep, horses, goats, and other domestic animals ordinarily raised or used on the farm (2).

Oppressive child labor means employment of a minor in an occupation for which he or she does not meet the minimum age standards of the act (2). The minimum age has generally been set at 16 years for all occupations, except in agriculture. There are several exceptions to the child labor provisions.⁶

Wages paid to any employee include the reasonable costs to the employer, as determined by the Secretary

of Labor, for furnishing such employee with board, lodging, or other facilities, if these are customarily furnished by such employer to his employees (2). If these costs are excluded under the terms of a collective bargaining agreement, they cannot be counted as wages.

Enforcement

Each employer subject to any FLSA provision is required to maintain records of the wages, hours, and other employment conditions and practices for every employee. The Administrator of the Wage and Hour Division of the U.S. Department of Labor or a designated representative may enter a facility and inspect the employment conditions, practices, and employment records, and may conduct any investigation deemed necessary to determine if any violations have occurred. In addition to Wage and Hour inspections, if a compliance officer of the Occupational Safety and Health Administration conducting investigations is presented with information concerning noncompliance with FLSA, this information will be given to the Wage and Hour Division.

Any person convicted of willfully violating any FLSA provision is subject to a fine of not more than \$10,000 or imprisonment (after a prior conviction) of not more than 6 months, or both. An employer who violates the child labor provision is also subject to a civil penalty of up to \$10,000 for each violation.

Summary

The Fair Labor Standards Act has broad application and mandates severe penalties for willful noncompliance. Although there are many exemptions from the law, agricultural employers should be familiar with the law and its regulations.

Two important facts agricultural employers should know are: (1) to qualify for exemptions from the minimum wage and maximum hours provisions of the FLSA, an employee must not be employed in a non-exempt occupation for any portion of the workweek, and (2) the burden of qualifying for the exemption lies with the employer.

⁶See appendix A for minimum age requirements under FLSA.