

# 2024 FLSA Checklist for Employers in the Manufacturing Industry

By Joshua R. Adams

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### Joshua R. Adams

(He/Him)

Principal

980-465-7239

Joshua.Adams@jacksonlewis.com

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Wage and hour issues continue to challenge most employers, especially those in the manufacturing industry. The manufacturing industry tends to be more process- and systems-oriented and generally employ many hourly workers who are not exempt from overtime pay under the Fair Labor Standards Act (FLSA).

It is imperative manufacturers ensure they are on the right side of legal compliance. Indeed, non-compliance can trigger audits, investigations, and litigation — all of which can be disruptive, time-consuming, and costly for manufacturers. The U.S. Department of Labor (DOL), which is charged with investigating alleged violations under the FLSA, assesses *hundreds of millions of dollars* each year in penalties to employers.

With the new year, we offer this short (by no means exhaustive) checklist of common pay issues the manufacturing industry:

### 1. Donning and Doffing

The FLSA requires employers to compensate non-exempt employees for all time worked, as well as pay the minimum wage and overtime compensation. Whether pre-shift (donning) and post-shift (doffing) activities are included as compensable time is not always clear. Activities including putting on or taking off protective gear, work clothes, or equipment could be compensable time under the FLSA depending on the unique facts of the situation. At bottom, to be compensable, such activities must be found to be integral and indispensable to the “principal activity” of the employer’s work under the FLSA and the Portal-to-Portal Act of 1947.

Courts differ on whether time spent donning and doffing is compensable because these issues often implicate mixed questions of law and fact. Moreover, collective bargaining agreements can affect whether time spent changing clothes and washing is compensable for the purposes of determining hours worked for minimum wage and overtime calculations under the FLSA. Employers should carefully review their policies to ensure the compensability of pre-shift or post-shift activities being performed by non-exempt employees.

### 2. Rounding Time

Accurately keeping up with time worked by non-exempt employees is critical to compliance with the FLSA. Further, employees forgetting to clock-in and clock-out timely is a persistent issue. While the FLSA allows employers to round employees’ clock-in and clock-out times rather than pay by the minute, it is generally unnecessary (and not recommended) with today’s sophisticated time clocking systems. If employers choose to round time, they must ensure that any rounding policy is neutral on its face and neutral in practice — that is, the policy rounds both in the favor of the employer and the employee at roughly an equal weight. For employers engaging in rounding, audits are crucial as even a facially neutral rounding policy that, in practice, has disproportionately benefited the

employer and cumulatively underpays the employees can be found to violate the FLSA.

### 3. Meal Breaks

Under the FLSA, employers must compensate for short rest breaks that last 20 minutes or less. However, employers do not have to compensate employees for a *bona fide* meal break, which ordinarily lasts at least 30 minutes. Importantly, an employee must be completely relieved from work duties during this uncompensated time and cannot be interrupted by work (even for a short time). Indeed, some courts have held that, where a meal break has been interrupted by work, the entire meal break (not just the time when work was performed) becomes compensable.

To ensure compliance under these rules, employers should have policies and practices in place so that employees can take an uninterrupted meal break. Employers should also have a well-communicated reporting system in place for employees to record any interrupted meal break to ensure the employee is compensated for the meal break or, when possible, a new meal break is scheduled.

### 4. Regular Rate

A common and incorrect assumption many employers make is that overtime pay under the FLSA is calculated at one-and-a-half times a non-exempt employee's hourly rate when they work more than 40 hours in a workweek. In fact, the FLSA states overtime is calculated based on the non-exempt employee's "regular rate" of pay. The FLSA requires that all payments to employees for hours worked, services rendered, or performance be included in the "regular rate" unless the payment is specifically excluded in the law. Thus, any non-discretionary bonuses, shift differential pay, and other incentive payments such as commissions should be included in the regular rate of pay calculation for purposes of calculating overtime under the FLSA.

This is relatively easy when a bonus is paid during a week where the non-exempt employees work more than 40 hours, but it can become complicated when the additional pay is paid on a monthly or quarterly basis. In this scenario, the payment must be averaged out over that longer time period to determine the regular rate such that overtime can be properly calculated. Thus, employers should review their payment processes on the front end to ensure compliance before any small errors or omissions (quite literally) multiply out of control.

Finally, state wage laws should always be top of mind as well. Employers should work with their employment counsel to ensure compliance with all state wage requirements.

Jackson Lewis attorneys in the Manufacturing Industry Group and Wage and Hour Practice Group are available to assist with any questions about wage and hour-related issues, assisting in wage and hour audits, or otherwise providing guidance and legal assistance with the DOL investigations or litigation.

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