

# The FLSA and Ag's Exemption From Paying Overtime Wages

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## Overview

Agricultural law is often “law by the exception.” One of those areas of exception involves the exemption from paying overtime wages to workers engaged in agricultural employment. Recently, a federal court issued a decision involving the issue of whether transporting field workers for non-work related activities was within the exemption.

The scope of the exemption for paying overtime for agricultural employment – it’s the topic of today’s post.

## Fair Labor Standards Act (FLSA)

The FLSA ([29 U.S.C. §§ 201 et seq.](#)) requires that agricultural employers who use 500 man-days or more of agricultural labor in any calendar quarter of a particular year must pay the agricultural minimum wage to certain agricultural employees in the following calendar year. Man-days are those days during which an employee performs any agricultural labor for not less than one hour. The man-days of all agricultural employees count in the 500 man-days test, except those generated by members of an incorporated employer’s immediate family. [29 U.S.C. § 203\(e\)\(3\)](#). Five hundred man-days is roughly equivalent to seven workers working five and one-half days per week for thirteen weeks ( $5.5 \times 7 \times 13 = 501$  man-days).

Under the FLSA, “agriculture” is defined to include “among other things (1) the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities; (2) the raising of livestock, bees, fur-bearing animals, or poultry; and (3) 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.” [29 U.S.C. § 203\(f\)](#). For related entities, where not all of the entities involve an agricultural trade or business, the question is whether the business operations are so intertwined that they constitute a single agricultural enterprise exempt from the overtime rules. See, e.g., [Ares v. Manuel Diaz Farms, Inc., 318 F.3d 1054 \(11th Cir. 2003\)](#).

## Wage Requirement

The minimum wage must be paid to all agricultural employees except: (1) members of the employer's immediate family, unless the farm is incorporated; (2) local hand-harvest, piece-rate workers who come to the farm from their permanent residences each day, but only if such workers were employed less than 13 weeks in agriculture in the preceding year; (3) children, age 16 and under, whose parents are migrant workers, and who are employed as hand-harvest piece-rate workers on the same farm as their parents, provided that they receive the same piece-rate as other workers; and (4) employees engaged in range production of livestock. [29 U.S.C. § 213\(a\)\(6\)](#). Where the agricultural minimum wage must be paid to piece-rate employees, the rate of pay for piece-rate work must be sufficient to allow a worker reasonably to generate that rate of hourly income.

The FLSA requires covered employers to compensate employees for activities performed during the workday. But, the FLSA does not require that compensation be paid to employees for activities performed



outside the workday such as walking, riding or traveling to and from the actual place of performance of the employee's principal activity, and for activities which occur before and after the employee's principal activity. On the question of whether an employee is entitled to compensation for time spent waiting at stations where required safety and health equipment is distributed, donned and doffed, and traveling to and from these stations to work sites at the beginning and end of each workday, the U.S. Supreme Court has ruled that such activities are indispensable to an employee's principal activity and are, therefore, a principal activity itself. However, the Court ruled that unless an employee is required to report at a specific time and wait to don required gear, the time spent waiting to don gear is preliminary to the first principal activity of the workday and is not compensable unless compensation is required by the employment agreement or industry custom and practice. See, e.g., [IBP, Inc. v. Alvarez, et al., 546 U.S. 21 \(2005\)](#). See also [De Asencio v. Tyson Foods, Inc., 500 F.3d 361 \(3d Cir. 2007\)](#), cert. den., sub nom. [Tyson Foods, Inc., v. De Asencio, 128 S. Ct. 2902 \(2008\)](#).

**Overtime.** The FLSA requires payment of an enhanced rate of at least one and one-half times an employee's regular rate for work over 40 hours in a week. However, an exemption denies persons employed in agriculture the benefit of mandatory overtime payment. [29 U.S.C. §213\(b\)\(12\)](#). The 500 man-days test is irrelevant in this context. In addition, there are specific FLSA hour exemptions for certain employment that is not within the FLSA definition of agriculture.

The 1977 "strawberry" amendment allows an agricultural employer who is required to pay the federal agricultural minimum wage to apply for an administrative waiver permitting the employment of children of others, ages 10 and 11, outside of school hours and for not more than eight weeks in the calendar year. [29 U.S.C. § 213\(c\)\(4\)](#). Applicants for the waiver must submit objective data showing a crop with a short harvesting season, unavailability of employees ages 12 and above, a past tradition of employing younger children, and the potential of severe economic disruption if this work force is not available. In addition, the applicant must demonstrate that the level and type of pesticides and other chemicals used will not have an adverse effect on the health or well-being of the individuals to whom the waiver would apply. Compliance with adult field worker standards will not necessarily satisfy this requirement.

### Recent Case

In [Ramirez v. Statewide Harvesting & Hauling, No. 20-11995, 2021 U.S. App. LEXIS 15215 \(11th Cir. May 21, 2021\)](#), aff'g., [2019 U.S. Dist. LEXIS 235412 \(M.D. Fla., Sept. 30, 2019\)](#), the defendant, a fruit-harvesting company, employed primarily temporary foreign guest workers as H-2A harvest workers. As such, the defendant was required to provide housing (and housing amenities) and meals (or free access to a kitchen). The defendant provided cooking facilities rather than meals and contracted for crew leaders to transport the harvest workers to such places as grocery stores, laundromats and banks on a weekly basis. Each trip took four hours, and the crew leaders were not paid overtime when they worked over forty hours in a week. The defendant acknowledged that the crew leaders worked over 40 hours per week on occasion, but claimed that the crew leaders were engaged in "agricultural" employment and, as such, the defendant was exempt from paying overtime wages. Both parties motioned for summary judgment.

The federal trial court referred the motions to a magistrate. The magistrate concluded that the defendant did not fall within the definition of a "farmer." The magistrate also determined that the transportation of the field workers did not involve work performed on a farm and that the trips were more than just a minor part of the workers job responsibilities. While this indicated that that exemption would not apply, the magistrate recommended that time spent transporting the workers was exempt from the requirement to pay overtime wages because the defendant provided the transportation to be compliant with the H-2A program.

The trial court determined that the activities of the crew leaders were not performed by a farmer. As such, the transportation activities that occurred wholly off of the farm were not exempt from the requirement to pay



the overtime wage rate of time and a half for the hours worked exceeding 40 hours per week. [29 U.S.C. §207\(\(a\)\(1\)](#).

The appellate court affirmed, finding that the transportation of the workers did not involve “farming.” The appellate court also determined that the transportation activity did not constitute “secondary agriculture” because it wasn’t performed by a farmer or performed on the farm. In addition, the appellate court concluded that the defendant was not a “farmer” because it did not “own, lease, or control” the farms or crops that the workers harvested. See [29 C.F.R. §780.131](#). The appellate court also determined that the defendant could not utilize the primary and secondary definition of “agriculture.” The activity at issue did not occur on a “farm.” Thus, because the activity of the crew leaders in transporting the field workers to town and back was not performed on a farm or by a farmer, the appellate court affirmed the plaintiff’s motion for summary judgment.

### Conclusion

Agriculture often has special rules that apply in the context of the law, including tax law. The overtime exemption under the FLSA is just one of those unique areas. But, to use the rule for agriculture, one must satisfy the applicable definitions.

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