

Fair Labor Standards Act (FLSA) Overview of Federal and State Policies

Department of Human Resources

- Fair Labor Standards Review
- Overview of Exemptions FLSA
- Worktime/Recordkeeping Requirements
- Unauthorized Overtime
- Overtime and Overtime Exceptions
- Police Pay and Gap Hours
- Compensatory Time Off



Major Provisions of FLSA

- Establishes Minimum Wage (\$7.25 effective 7/24/09)
- Exemptions
- Overtime and Hours of Work
- Recordkeeping Requirements
- Child Labor Restrictions
- Enforced by US Dept. of Labor, Wage Hour Division
- **Each university accountable - policy**

US Department of Labor, Wage Hour Division

- DOL Wage Hour Offices in Charlotte and Raleigh
- Overtime violation liable 2 years back pay
- Willful violations liable 3 years
 - May be prosecuted criminally and fined
 - May also be subject to civil penalty
- In 2010, 90% of employee class action lawsuits were work/hour (other 10% are FMLA, ADA, etc.)

What Does Exempt Mean?

- FLSA regulations:
 - Exempt or not covered by FLSA (for overtime and minimum wage)
 - Non-Exempt or subject to the FLSA = covered by the FLSA
(also called Subject to the FLSA)

Exempt Employees

- A FLSA exempt employee is “salaried”; that is, paid on an annual basis.
 - Pay **not affected** by fluctuations in hours worked or hours in excess of 40 per week.
 - Non-exempt state “salaried” employees **are affected** by fluctuations in hours worked thus do not meet exempt criteria
 - No additional compensation due exempt employee who works over 40 hours
 - Subject to recordkeeping and equal pay of FLSA
 - Number of hours worked “is a matter determined between the employer and the employee” or what is necessary to complete job

Current Minimum Salary Level: \$455

- For most employees, the minimum salary level required for exemption is **\$455 per week or \$23,660**. NC Pay Plan minimum is \$23,332
- Must be paid “free and clear”
- Employees who make less than \$455 per week **CANNOT** be exempt, no matter what their duties are, even if their pro-rated pay is higher than \$455 a week
- Example 20 hour a week employee earning \$400 a week would be non-exempt since they earn less than \$23,660.

Executive Duties



Executive Exemptions

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

- Employee must be paid not less than \$455 per week;
- Primary duty is management of the enterprise or of a customarily recognized department or subdivision;
Key now is “**primary duty**” not just % of exempt time
- Customarily and regularly directs the work of two or more other employees; and
- Authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status of other employees are given particular weight.

Is Primary Duty Management or Not?

Factors to consider include, but are not limited to:

- Relative importance of the exempt duties;
- Amount of time spent performing exempt work;
- Relative freedom from direct supervision; and
- Relationship between the employee's salary and the wages paid to other employees for the same kind of nonexempt work
- Primary duty **does not have to be 50% of job duties; it can be less**

Executive Criteria Guidelines

- Working foreman is not executive
- Same work as non-exempt subordinates = non-exempt
- Not just supervisor (must be in charge)
- Easiest of three exemption criteria to use
- May train employees in non-exempt duties

Administrative Duties



Administrative Exemptions

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

- The employee must be compensated on a salary at a rate not less than \$455 per week;
- The employee's primary duty is 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 and;
- The employee's **primary duty** includes the **exercise of discretion and independent judgment (key)** with **respect to matters of significance.** (level or nature of work)

Administrative Criteria Guidelines

- Only use the administrative exemption if executive or professional does not apply
- MUST have exercise of independent discretion and judgment to qualify for this exemption
- Work must be directly related to assisting with the running or servicing of the business
- Does not include working on a manufacturing production line or selling a product in a retail or service establishment (no production type duties)
- Most disputed titles are Accountant, Administrative Assistant and Executive Secretary.
- When in doubt, leave non-exempt

Management or General Business Operations (not limited to)

- Tax
- Finance
- Accounting
- Budgeting
- Auditing
- Insurance
- Quality Control
- Purchasing
- Procurement
- Advertising
- Marketing
- Research
- Safety and Health
- Human Resources
- Employee Benefits
- Labor Relations
- Public and Government Relations
- Legal and Regulatory Compliance
- Computer Network, Internet and Database Administration

Learned Professional Duties



Learned Professional

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

- The employee must be **compensated** on a salary basis at a rate not less than \$455 per week
- The employee's primary duty must be the performance of work requiring **advanced knowledge, requiring consistent use of discretion and judgment**
- In a field of science or learning, and
- Customarily acquired by a prolonged course of specialized intellectual instruction
- Professional exemption means that only occupations that customarily require advanced specialized degrees may be considered as “Learned Professional Fields”

Advanced Knowledge

- Predominately intellectual in character
- Includes work requiring the **consistent** exercise of discretion and judgment
- The advanced knowledge is generally used to analyze, interpret or make deductions from varying facts or circumstances
- **Not** work involving routine mental, manual, mechanical, or physical work
- **Cannot** be attained at the high school level
- Recent rulings favor professional license, i.e. Engineering, CPA, CSW
- Professional status jobs include lawyers, ministers, doctors, pharmacists, professors, architects, etc.

Discretion and Independent Judgment

- The comparison and evaluation of possible courses of conduct, acting or making a decision after various possibilities have been considered
- Must be exercised with respect to “matters of significance,” which refers to the level of importance or consequence of the work
- Decisions and recommendations may be reviewed at a higher level and, upon occasion, revised or reversed

Occupations that do NOT meet Professional Exemption

- Paralegals
- Veterinary Technicians (licensed)
- Accounting Clerks & Accounting Technicians
- Engineering & Electronic Technicians
- Research Technicians
- Trainees
- Technicians and Technologists (generally)
- Some Social Workers and Pilots

Creative Professional Duties

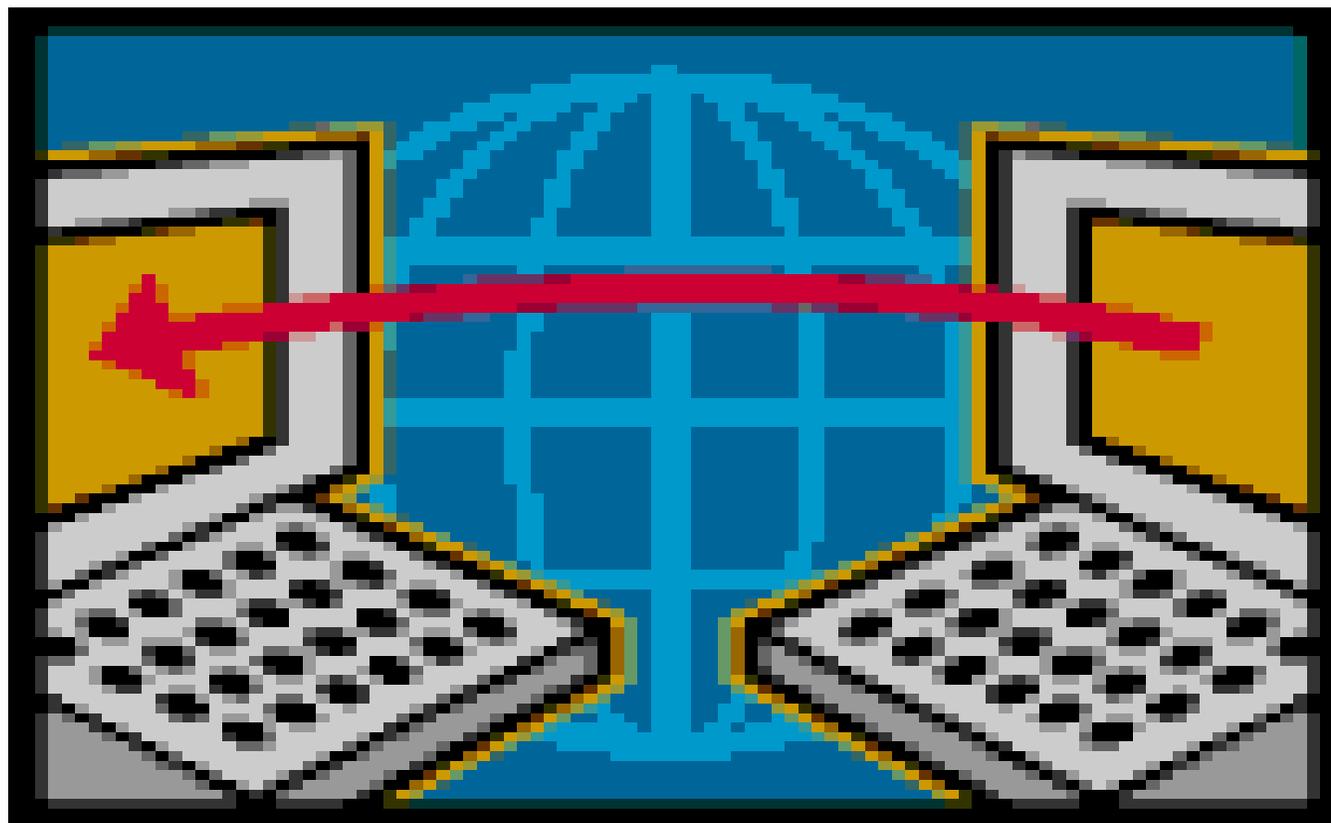


Creative Professional Duties

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

- The employee must be compensated on a salary basis at a rate not less than \$455 per week
- 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
- Includes music, writing, acting, and other creative occupations.

Professional Computer Exemption



Professional Computer Exemption

- To qualify for the computer employee exemption, the following tests *must* be met:
- The employee must be compensated either on a salary or fee basis at a rate not less than \$455 per week, or if paid on a hourly basis not less than \$27.63 an hour
- *Work must be in:*
 - The application of systems analysis, techniques and procedures to determine hardware, software of systems functional specifications
 - The design, development, documentation, analysis creation, testing or modifications of computer systems or programs, either based on and related to user or system design specifications or related to machine operation systems; or
 - A combination of the two (i.e. Business Technology Applications, System Programmer/Analyst/Specialists)

Banded IT Classes Exempt Status

- Non-exempt
 - All Technician levels – all IT Classes
 - All Analyst Contributing Levels – all IT Classes
 - Help Desk positions
- Determined based on job duties
 - All Analyst Journey and Advanced levels
 - Operations Analyst
 - IT Security Specialist
 - Technology Support
 - IT Project Manager
 - For those other IT classes, possible use of the administrative exemption criteria (must have independent discretion and judgment)

Exemption Decision Making Guidelines

- If unsure or borderline, **leave the position non-exempt**
- **Potential liability** if position ruled exempt when it should be non-exempt.



Non-Exempt Employees



Non-Exempt Employees

- Non-exempt employees paid on hourly basis or “salaried” non-exempt
- Duties don’t meet exemption criteria
- Compensated at time and one-half (or compensatory time off) for all hours worked over 40 in workweek
- Must record all hours worked daily and weekly

Occupations that generally are Non-exempt include:

- “Blue Collar” workers (production, maintenance, construction, boiler operators)
- First Responders (law officers, firemen, EMT’s etc.)
- Inspectors in general
- Paralegals
- Cooks (unless trained as a Chef)
- Technicians and Technologists
- Operators, Administrative Support, Clerical workers

Independent Contractors

- Not covered under FLSA
- No employer/employee relationship
- Key components
 - Extent which services rendered are an integral part of the employer's business
 - The permanency of the relationship
 - The amount of the worker's investment in facilities and equipment
 - Profit and loss opportunities for the worker
 - The control the employer has over the worker

Work Time

- Work is all time the employee is “*required, suffered, or permitted*” to be on employer’s premises on duty, or at a prescribed work place, except for meals.
- **Management is responsible for controlling work time.**
- Hours worked without management knowledge or approval probably is work time (first time)
- Unauthorized work outside regular schedule subject to disciplinary action
- Unproductive hours may still constitute hours worked
- Employees should not be “permitted” to work extra hours without supervisory approval

Avoiding Overtime Liability

- Management **sets** and communicates work schedules and may **adjust** work schedules to avoid overtime
- Flexible schedules are encouraged, but operating needs of unit are #1 priority
- Non-exempt employees may be sent home after 40 hours work in workweek

Tips to Prevent Unauthorized Work

- Adopt a clear time and attendance policy
- **Require managers** to review weekly timesheets
- Employees should be **required to review and certify accuracy** of timesheets
- Train all staff about time keeping
- Uniformly address policy violations by employees or supervisors – apply to all employees regardless of rank

Work Week

- A **regularly recurring** period of 168 consecutive hours
- Can begin anytime on any day of the week
- **Only changed if intended for the long term**
- **EACH WEEK STANDS ALONE FOR OVERTIME PURPOSES**
- **ECU's workweek is Sunday-Saturday**
- Major exception – Police Officers
 - Work period of 28 consecutive days
 - Overtime **occurs over 171 hours in work period**
 - Must be certified, have powers of arrest, trained in law enforcement



Recordkeeping

Non-Exempt (subject) includes:

- **Hours worked each workday and workweek**
- Regular hourly rate of pay
- Premium pay for overtime
- Total wages per pay period
- Amount of earnings per pay period, make sure hours are recorded according to payroll guidelines.
- **Cannot alter accurate records**
- Must maintain payroll records for 3 years; time records for 2 years

Recordkeeping

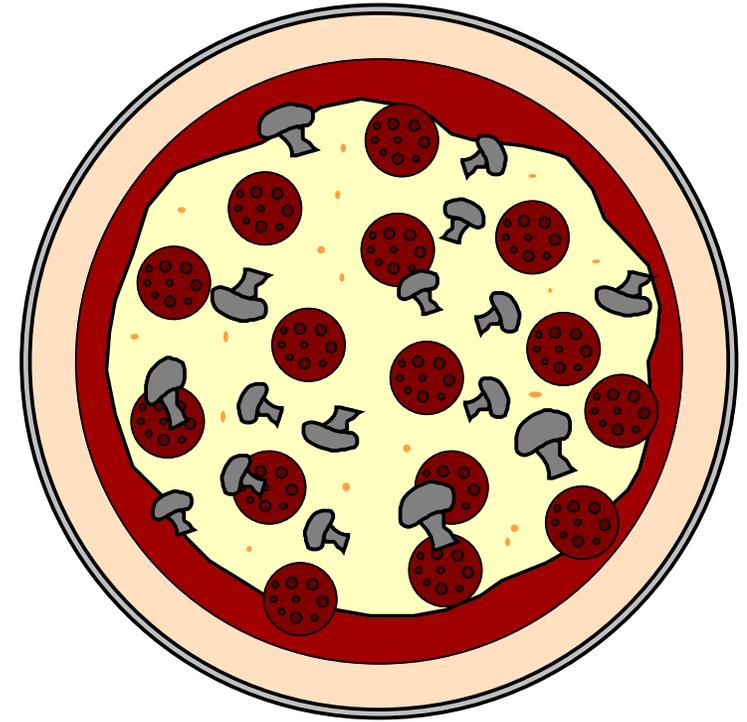
- Treat all employees consistently.
- Ensure employees fill timesheets out weekly. Otherwise you lose track of time worked.
- If employer is not in compliance, then usually the employee is going to win in court.

FLSA does not cover or require

- Benefits Hours - including Vacation, Holiday, Bonus Leave or Sick Leave – only hours that are worked
- Meal periods
- Break periods (considered work time but not required)
- Number of hours worked in a week or a day
- Pay Raises and Benefits
- Discharges

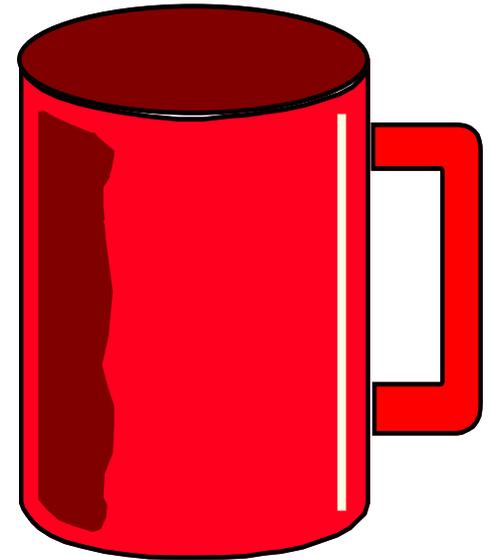
Meal Period

- Must be at least 30 **consecutive uninterrupted** minutes.
- Employee must be free from all work.
- Standard meal periods can vary from 30-60 minutes.
- **NC and Federal Law does not require a meal period**
- Meal period is **not** paid time.



Breaks

- **Not required by law**
- Departments may authorize two 15 minute breaks for 8 hours
- Breaks are not leave
- **Breaks are work time**
- Supervisors can deny breaks and can pull employees out of breaks if needed



On-Call Time

- An employee who is required to be on call on his employer's premises or so close that he cannot use the time effectively for his own purposes is working while "on-call".
- If required to leave word at his home or where he can be reached **is not working** while on call.
- Not to be confused with on-call pay.

On-Call Pay (Beeper Pay)

- Being required to be reachable by phone or pager **is not work time by itself**
- Eligibility for on-call pay is limited to jobs usually in health care, IT and maintenance. Pay varies from a minimum of 94 cents an hour and up
- Currently ECU's hourly rates are: SHRA \$1.25; CSS \$1.50 and positions within the Building Environmental and Facility Maintenance classes \$2.00
- **Have to be able to come back to work**

Emergency Call Back

- Defined as when an employee has left the work site and is requested to respond on short notice to an emergency work situation
- Employees returning to work receive a minimum of two hours compensation as time off or additional pay at the straight-time rate of pay for each occasion of callback.
- Employees responding via telephone/computer shall receive a minimum of 30 minutes as time off or additional pay at the straight-time rate for each occasion of callback.
- Hours are counted in regular rate calculations for overtime
- Time on callback is subtracted from the on-call hours

Attendance at Training

Required training is work time – optional or voluntary training is not

Not work hours if (all four must be met):

- 1) Attendance is outside regular work hours
- 2) The training is not directly related to job. Directly related means to help handle job more efficiently -- NOT for another job or new duties (unless required)
- 3) Employee performs no productive work
- 4) Attendance is in fact voluntary

Travel Time



Whether travel time is considered as hours worked depends on the circumstances and should be determined on a case-by-case basis.

Home to Work

- Normal travel from home to work is not work time.
- Considered a normal incident of employment.
- This is true whether the employee works at a fixed location or at different job sites.

Home to Work on Special One-Day Assignments in Another City

- When an employee who regularly works at a fixed location in one city is given a special one-day assignment in another city, such travel cannot be regarded as home-to-work travel.
 - EXAMPLE -- Employee who works in Raleigh with regular working hours from 8:30 a.m.- 5:30 p.m., is given a special assignment in another city, with instructions to leave Raleigh at 7:00 a.m.
 - The employee arrives at 12 noon, ready for work. The special assignment is completed at 3:00 p.m., and the employee arrives back in Raleigh at 8:00 p.m.
 - Such travel cannot be regarded as ordinary home-to-work travel occasioned merely by the fact of employment. It was performed for the State's benefit and would qualify as an integral part of the "principal" activity that the employee was hired to perform on that particular workday.
 - All the time involved, however, need not be counted as work time. Since, except for the special assignment, the employee would have had to report to the regular work site, the travel between home and the airport, or the usual time required to travel from home to work may be deducted, such time being in the "home-to-work" category.
 - Also, the usual mealtime would be deductible.

Travel that is All in the Day's Work

Time spent by an employee in travel, as part of the employee's principal activity, such as travel from job site to job site during the workday, must be counted as hours worked.

When an employee is required to report at the employer's premises, or at a meeting place, to receive instructions or to perform other work there, the travel time for this designated place to the work place is part of the day's work and must be counted as hours worked.

Travel that is All in the Day's Work Example

If an employee normally finished work at a particular job site at 5:00 p.m., and is required to go to another job that is finished at 8:00 p.m., and is required to return to the employer's premises arriving at 9:00 p.m., all of the time is working time.

However, if the employee goes home instead of returning to the employer's premises, the travel after 8:00 p.m. is home-to-work travel and is not hours worked.

Travel Away From Home Community

- Travel that keeps an employee away from home overnight is travel away from home.
- Travel time away from home community is work time when it cuts across the employee's regular scheduled workdays.
- The time is not only hours worked on regular working days during normal working hours but also during the corresponding hours on nonworking days.

Example - Employee regularly works from 8:30 a.m.-5:30 p.m., Monday through Friday, travel time during these hours is work time on Saturday and Sunday as well as the other days.

Regular meal period time is not counted.

Time spent in travel away from home outside of regular working hours (8:30 - 5:30) as a passenger on airplane, train, bus, or car is not considered as work time.

Travel Away From Home Community Example

- An employee who has headquarters in Raleigh leaves for Asheville on Sunday at 2:00 p.m., and arrives in Asheville at 7:00 p.m.
- The 3-1/2 hours traveled between 2:00 p.m. and 5:30 p.m. are hours worked and must be included in the total hours worked within the workweek.
- If the total hours worked exceeds 40 per week, the employee is to be compensated in accordance with the State's overtime time-off policy.
- The 1-1/2 hours traveled between 5:30 p.m. and 7:00 p.m. are not considered as time worked for the purpose of determining total hours worked. It shall, however, be considered as time earned and may be given as time off on straight-time basis.

Overtime

- Occurs when a non-exempt employee physically works more than 40 hours in a work week
- **Each work week stands alone**
- Overtime must be pre-approved by a supervisor or management
- Overtime **excludes** all leave hours and paid time off including:
 - Vacation and Sick Leave
 - Holidays
 - Call-Back Time Not Worked
 - Travel Time Off
 - Equal Time Off
 - Comp time Off
 - Community Service Leave
 - Gap Time



Comp Time and Overtime Compensation

When a non-exempt employee works more than 40 hours in a week, state policy is to give compensatory time off at the rate of one and one-half times the amount of time over 40 hours worked

- 60 minutes worked = 90 minutes comp time
- Overtime may be paid out at the rate of 1.5 times the hourly regular rate for all overtime hours worked.
- **Overtime pay (instead of comp time) should only be used when there is a business need.**

Example -- Not enough staff for employees to take comp time off.

Regular Rate

An employee's regular rate includes the following:

- Hourly Rate of Pay
- Longevity Pay
- Shift Premium Pay
- On-Call Pay

Regular Rate: Example

- Employee earns \$10 per hour and works 48 hours in one work week.
 $\$10 \times 48 \text{ hours} = \480
- Her shift is covered by shift premium pay (10%).
 $\$1 \times 48 \text{ hours} = \$ 48$
- She is eligible for \$520 in longevity pay.
 $\$520 / 52 \text{ wks} = \$ \underline{10}$
 $= \$ 538$
 $\$538 / 48 \text{ hrs} = \11.21
as regular rate.

Overtime Calculation

Calculated as regular 40 hour salary plus one and one-half times the regular hourly rate for all hours worked over 40.

- 48 hours worked X \$11.21 = \$538.08 (Regular pay)
- 8 hours OT worked X \$11.21 X 0.5 = \$ 44.84 (OT premium pay)
- \$538.08 **plus** \$44.84 = **\$582.92**

Compensatory Time Off

- A condition of employment, agreement or understanding prior to performance of work
- **Must use Comp Time off within 52 weeks** from when the OT occurred
- If not, pay out at regular rate of pay.
 - May accrue up to 240 hours Comp hours (160 hours worked). 480 hours (240 hours worked for law enforcement) If they accrue more, then **overtime must be paid**
 - **Comp Time is to be used before vacation or bonus leave is used**
 - Should always be flexible to allow time to use Comp Time. Only excuse is to “unduly disrupt” operations

Shift Premium Pay

- Additional compensation for employees who are regularly scheduled to work on either an evening or night shift, or on a weekend shift
- SHRA Employees:
 - 10% of regular hourly rate
 - 4 pm to 8 am
- CSS Employees:
 - 14% of regular hourly rate for evening shift and weekend day
 - 19% of regular hourly rate for weekend evening shift
 - 3 pm to 8 am

Holiday Premium Pay

- Employees who are required to work on designated holidays shall be given, in addition to regular salary, premium pay equal to one-half of their regular straight-time hourly rate for such hours as are worked on these days. In addition, holiday compensatory time off shall be given, not to exceed 8 hours.
- Holiday premium pay is paid in addition to overtime pay.
- Covers both FLSA non-exempt and exempt employees.

Gap Hours

- Time in between the max hours of work required to meet the work schedule and the overtime threshold (not overtime)
- For part time non-exempt SHRA employees whose regular work schedule is less than 40 hours a week or
- Law enforcement employees that work more than 160 hours but less than 171 hours in a 28 day period
- Each University elects to either treat Gap Hours as straight time comp time or straight time pay
- **ECU elected to treat Gap Hours as straight time pay**
- Gap Hours may offset holiday leave

Occasional and Sporadic Employment

- Employees who work **solely at their own option** may work occasionally or sporadically on a part-time basis without overtime for same public agency
- **Work must be in a different capacity than the one they are normally employed**
- Cannot be forced or suggested by employer **to avoid overtime**

Questions?

