

Fair Labor Standards Act

Work-based Learning Guide 2016

The Fair Labor Standards Act (FLSA): An Overview

The FLSA, the federal labor law, regulates employment relationships in four areas: minimum wages, overtime, child labor, and equal pay. Because Congress' authority to create labor standards is based on its power to regulate commerce, the Act applies only where certain commerce tests are met.

Two questions must be answered to determine whether the FLSA applies:

- 1) Does an employment relationship exist?
- 2) Is the enterprise, business, or employee involved in interstate commerce?

Criteria 1. In general, where a person who is not an independent contractor performs work for an employer with the employer's knowledge, an employment relationship exists and the employer must comply with the FLSA. The FLSA does not apply, however, if work is performed in the course of training rather than employment, and those criteria are discussed below.

Criteria 2. The commerce test may be satisfied on the basis of: 1) the size or nature of the enterprise/business; or 2) the nature of an employee's duties. Although an enterprise may not meet the commerce test, the FLSA still applies to employees of any business who are engaged in interstate commerce in the course of their work, such as interstate communication by mail or telephone, and interstate shipping or receiving of products. In effect, the FLSA reaches into almost all workplaces.

Work-based Learning and Employment Under the FLSA

Students in work-based learning programs may engage in a range of types and intensities of activity in the workplace – from gaining career awareness through job shadowing to learning occupational and employability skills by working in internships or youth apprenticeships.

A work-based learning experience:

- Is a planned program of job training and work experience that benefits students and is appropriate to their abilities. It may include training related to pre-employment and employment skills, similar to what would be offered at a vocational school, and is coordinated with the school-based component;
- Encompasses a sequence of activities that build upon one another, increasing in complexity and promoting mastery of basic skills;
- Is structured to expose students to all aspects of an industry, promoting development of broad, transferable skills; and

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- Provides for real or simulated tasks or assignments, including actual operation of employer facilities and equipment, which push students to develop higher-order critical thinking and problem solving skills.

Work performed by students in work-based learning programs may be either 1) employment subject to the FLSA or 2) training that is not subject to the FLSA.

To be designated as training – and **not** covered by FLSA provisions requiring employer payment of wages to students enrolled in work-based learning experiences, **all four** of the following criteria must be met:

- Trainees/students do not displace regular employees, whether through lay-off, reduction in working hours, or reduced hiring. Students may work under close observation/supervision of regular employees;
- Employer does not receive immediate benefit from activities of trainees or students, and on occasion, employer operations may actually be impeded. Through the delivery of on-going instruction for students at the work-site, including close supervision by regular employees throughout the learning experience, any work that students perform is offset by the burden to the employer from the training and supervision provided;
- Trainees/students are not entitled to a job at the end of the learning experience, although employers may offer jobs to students who complete training; and
- Employer and trainees/students understand that trainees/students are not entitled to wages or other compensation for time spent in training, although a stipend for expenses may be offered. Stipends may not be substituted for wages and are generally limited to reimbursement for expenses such as books, tuition, or tools.

Schools and employers can best comply with federal law by establishing training plans and training agreements that identify learning activities, responsibilities of all parties, and expectations for the work-based learning experience, including appropriate coordination between school-based elements and work-based elements.

Iowa Code Chapter 92, the state child labor law, covers both paid and unpaid work, street occupations and migratory labor, permitted occupations and occupations not permitted for children under 18, group insurance provisions, penalties, work permits, and migrant labor permits, as well as permitted instruction and training.

To comply with federal labor laws when work-based learning experiences are established for training, and especially for training in certain hazardous occupations, program development must focus on the *student-learner*. Specific questions should be directed to a qualified attorney, the Iowa Division of Labor Services through their Web site <http://www.iowadivisionoflabor.gov/> and/or the United States Department of Labor Web site: <http://www.dol.gov/whd/childlabor.htm>. Phone numbers and other contact information can be found in the final section of this Guide.

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FLSA and Hazardous Occupations

The FLSA prohibits “oppressive child labor,” which is generally defined as 1) the employment of minors 16 and 17 years old in an occupation deemed hazardous (see list below), and 2) the employment of minors under 16 in any occupation. However, regulations can be issued permitting employment of children 14 and 15 years of age in non-manufacturing and non-mining occupations where the employment does not interfere with schooling and where conditions are not detrimental to health and well-being. The FLSA also makes special provisions for minors in agricultural work.

Iowa law prohibits many of the same occupations identified below with federal prohibitions, but it is not always consistent. Be sure to check both laws when considering placement in hazardous occupations for work-based learning experiences.

Activities Prohibited under Federal Hazardous Occupation Orders (HOs)

HO #	DESCRIPTION OF PROHIBITED ACTIVITY
1	manufacturing and storing explosives
2	motor-vehicle driving and outside helper
3	coal mining
4	logging and saw milling
5*	using power-driven woodworking machines, including saws
6	exposure to radioactive substances
7	operation of power-driven hoisting devices, including forklifts, cranes, and non-automatic elevators
8*	use of power-driven metal forming, punching, and shearing machines
9	mining other than coal mining
10*	slaughtering or meat packing, processing, or rendering, including the use of power-driven meat slicers
11	operation of power-driven bakery machines
12*	use of power-driven paper-products machines, including paper balers
13	manufacturing of brick, tile, and kindred products
14*	use of circular saws, band saws, and guillotine shears
15	wrecking, demolition, and ship-breaking
16*	roofing operations
17*	excavating, including work in a trench as a plumber

*Student-learners aged 16 or 17 in vocational education programs may be employed in these seven Hazardous Occupations (HOs) only if they are employed under a written agreement that meets the five conditions listed in 29 CFR 570.50(c), as follows:

1. Any work in a hazardous occupation is incidental to training;
2. Work in the hazardous activity is intermittent, for short periods only, and is under the direct and close supervision of a qualified person;
3. Safety instruction is provided; and
4. A schedule of progressive work processes is provided; or
5. The work is part of an apprenticeship registered with the US Department of Labor’s Bureau of Apprenticeship and Training or with a state apprenticeship council.

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Remember, in Iowa, the state child labor law, Iowa Code Chapter 92, applies.

- Students who are 14 or 15 years old may **not** work in either the Hazardous Occupations listed above, or in the following areas designated under federal Child Labor Regulation 3:
- Manufacturing, mining, and processing, including filleting fish, dressing poultry, cracking nuts, or laundering performed by commercial laundries;
- Transportation of people or property, whether by rail, highway, air, water, pipeline, or other means;
- Cooking and baking, other than within view of the public at soda fountains, lunch counters, snack bars, or cafeteria serving counters;
- Work in packing houses, freezers, or meat coolers, and all preparation of meats for sale except wrapping, sealing, weighing, pricing, and labeling;
- Work in storage, warehouses, and workrooms, including loading and unloading trucks, trains, or conveyors, except office work;
- Public messenger service;
- Communication;
- Work on construction sites other than in the office;
- Work connected with maintenance or repair of the business, machines, or equipment, including boilers or engine rooms and areas that have pits, racks, or any lifting apparatus to inflate tires that are mounted on a rim equipped with a removable retaining ring;
- Outside window washing that involves working from windowsills;
- All work requiring use of ladders, scaffolds, or their substitutes;
- Any job involving power-driven machinery, including hoists, conveyor belts, and lawnmowers, except office equipment, dishwashers and other machinery used in a food service operation other than food slicers, grinders, choppers, cutters, and bakery-type mixers.

Again, Iowa Code Chapter 92 provisions regarding prohibited occupations applies to 14- or 15-year-olds in work-based learning programs.

- *Exemptions to the FLSA* must meet the following criteria:
- Student-learners are enrolled in a cooperative vocational training program under a recognized state or local educational agency.
- A written training agreement is in place.
- A signed training agreement is on file with the school and employer.
- The work is intermittent and for short periods of time.
- Safety instructions are given by the school and correlated by the employer with on-the-job training.
- A plan exists for on-the-job performance of organized and progressive work processes.

Iowa Code 92.17 contains exemptions for state child labor laws, including agriculture.

Hazardous Occupations in Agriculture under FLSA

Federal labor law provisions for work in agriculture are less restrictive than those for non-agriculture operations. However, the FLSA uses the term “agriculture” to refer to family farms, not agricultural operations that ship their products across state lines or those that work on or process products other than their own. Activities prohibited by federal law as hazardous occupations in agriculture include:

- Operating or assisting in the operation of machinery and equipment, including corn picker, cotton picker, grain combine, hay mower, forage harvester, hay baler, potato digger or mobile pea viner, feed grinder, crop dryer, forage blower, auger conveyor, the unloading mechanism of a non-gravity self-unloading wagon or trailer, power post-hole digger, power post driver, non-walking rotary tiller, or tractors of over 20 PTO horsepower, and connecting or disconnecting an implement or any of its parts to or from such a tractor
- Working in a yard, pen, or stall occupied by specified animals
- Felling, loading, bucking, or skidding timber more than six inches in diameter
- Working from a ladder or scaffold at a height of over 20 feet
- Driving a vehicle transporting passengers or riding on a tractor; for farm jobs, minors may drive on the farm but not on a public highway
- Working in certain silos, storage areas, or manure pits
- Handling toxic chemicals, blasting agents, and anhydrous ammonia

Exemptions to federal law: Minors aged 14 and 15 who have a 4-H or agricultural education training certificate and student-learners enrolled in career and technical agriculture programs may engage in any non-hazardous job outside of school hours and may perform some farm work activities otherwise prohibited. A written agreement must provide the same conditions listed in 29 CFR 570.50(c) as shown for HOs affecting 16- and 17-year-olds above.

Minors under 12 may perform jobs on farms owned or operated by their parents, or with their parents’ written consent, outside of school hours in non-hazardous jobs on farms not covered by minimum wage requirements. Minors aged 12 and 13 may work outside of school hours in non-hazardous jobs, either with their parents’ written consent or on the same farm as their parents. Minors 16 years and older may perform any agricultural job, hazardous or not, for unlimited hours.

Exemptions in Iowa: All agricultural activities are exempt if they follow the rules established in Iowa Code Chapter 92.17.

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FLSA and the Employee-Employer Relationship for Persons with Disabilities

For purposes of the Fair Labor Standards Act, where all of the following criteria are met, the US Department of Labor does not consider that physically and/or mentally challenged students' initial participation in a school-sponsored work-based learning program constitutes an employment relationship. Although Iowa law does not address this issue, the federal criteria are:

- Participants will be youth with physical and/or mental disabilities for whom competitive employment at or above the minimum wage level is not immediately obtainable, and who, because of their disability, will need intensive on-going support to perform in a work setting.
- Participation will be for vocational exploration, assessment, or training in a community-based placement work site under the general supervision of public school personnel.
- Community-based placements will be clearly defined components of individual education programs (IEP) developed and designed for the benefit of each student. The statement of needed transition services established for the exploration, assessment, training, or cooperative vocational education components will be included in the student's IEP.
- Information contained in a student's IEP will not have to be made available; however, documentation as to the student's enrollment in the community-based placement program will be made available to the Departments of Labor and Education. The student and the parent or guardian of each student must be fully informed of the IEP and the community-based placement component and have indicated voluntary participation, with the understanding that participation in such a component does not entitle the student-participant to wages.
- The activities of students at the community-based placement site do not result in an immediate advantage to the business.

When reviewing the potential for an employment relationship, Iowa looks at twenty questions from the IRS, and the US Department of Labor considers several factors, including:

- There has been no displacement of employees, vacant positions have not been filled, employees have not been relieved of assigned duties, and the students are not performing services that, although not ordinarily performed by employees, clearly are of benefit to the business.
- The students are under continued and direct supervision by either representatives of the school or by employees of the business.
- Such placements are made according to the requirements of the student's IEP and not to meet the labor needs of the business.
- The periods of time spent by the students at any one site or in any clearly distinguishable job classification are specifically limited by the IEP.

An employment relationship **will** exist unless all criteria are met. If an employment relationship does exist, participating businesses can be held responsible for full compliance with the FLSA, including the child labor provisions and applicable state laws.

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At any time, businesses and school systems may consider participants to be employees and may structure the program so participants are compensated according to the requirements of the FLSA. Whenever an employment relationship is established, the business may use the special minimum wage provisions identified in Section 14(c) of the FLSA. For more information on wages, including minimums and subminimums, see the section on Wages in this Guide and Iowa Code Chapter 91A, the Wage and Payment Collection law.

While the existence of an employment relationship will not be determined exclusively on the basis of the number of hours, as a general rule, each component will not exceed the following limitation during any one school year:

- Exploration 5 hours per job experienced
- Assessment 90 hours per job experienced
- Training 120 hours per job experienced

Based strictly on the cumulative time involved, 120 hours is an arbitrary classification when occupational exploration, assessment, and training components of the community-based activities cannot be separated. However, once an individual has been involved in a particular occupational category for 215 hours, a critical analysis using the other criteria must be made, particularly whether the business is gaining an immediate economic advantage from activities of the program participant, to determine whether the individual is now an employee.

Students are not entitled to employment at the business following the completion of their IEP. However, once a student has become an employee, the student cannot be considered a trainee at that particular community-based placement unless in a clearly distinguishable occupation.

More Information...

The United States Department of Education and the United States Department of Labor (DOL) also provide Web sites with information about the Fair Labor Standards Act and employment issues, including links to School-to-Work and other work-based learning programs. Check these sites:

<http://www.doleta.gov>

<http://www2.ed.gov/about/offices/list/ovae/index.html?src=mr>

Iowa Workforce Development, Iowa Division of Labor Services, maintains up-to-date information on its Web site. Check regularly for information on child labor, occupational safety and health, and other labor-related issues.

<http://www.iowaworkforce.org/labor/>

Comparison of State and Federal Child Labor Laws

A brief comparison chart of important state and federal child labor law information follows. Topics covered include age certificates and work permits, affected employers, training programs, agricultural employment, wages, hours and occupations (including special prohibitions and exceptions), penalties, waivers, and contact information.

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Other sections of the *WBL Guide 2016* address specific labor and legal issues, including wages, taxes, recordkeeping, insurance, and legislation. All material provided is for general informational purposes only. Specific questions and issues should always be discussed with a qualified attorney and/or with the appropriate state or federal agency.