

SUMMARY

The **Fair Labor Standards Act (FLSA)** requires enterprises engaged in interstate or foreign commerce and state and local governments to pay overtime of $1\frac{1}{2}$ times an employee's regular rate of pay for hours worked in excess of 40 hours in a workweek. The FLSA regulations concerning overtime pay have been revised, effective August 23, 2004. The new salary level required for an employee to be exempt from overtime protection is \$455 per week, and the various "white collar" exemptions have been revised.

There are several overtime pay requirements outlined by the FLSA and its regulations, such as properly calculating a workweek, when to pay overtime, what notices an employer must post in the workplace, and the fact that the right to overtime protection may not be waived by an employee. In addition, employers must properly calculate employees' regular rates of pay, factoring in additional compensation when necessary.

Employers must consider situations where an employee has multiple jobs or works under a joint employment arrangement, and know whether to factor in holiday and sick pay, on-call time, and travel time, all without averaging the overtime hours of more than 1 workweek. Further considerations for employers are exempt occupations, industry specific rules, and the various administrative issues related to the distribution of overtime, requiring overtime, and unauthorized overtime.

OVERTIME PAY REQUIREMENTS

The FLSA, also known as the federal Wage and Hour Law, requires enterprises engaged in interstate or foreign commerce and state and local governments to pay overtime of $1\frac{1}{2}$ times an employee's regular rate of pay for hours worked in excess of 40 hours in a workweek.

The FLSA does *not* require that overtime be paid for hours worked in excess of 8 hours per day or on weekends or holidays. However, states are permitted to provide workers greater overtime protections than those offered by FLSA.

Workweek. A workweek consists of seven consecutive 24-hour periods. It need not coincide with the calendar week, but may begin on any day and at any hour of the day (29 CFR 778.105). For instance, some companies have adopted a workweek that runs Saturday through Friday.

Time of payment. Although overtime must be computed weekly, FLSA does not require that it be paid on a weekly basis; it requires only that overtime be paid on the next regular payday covering the period in which the overtime is earned. If the amount of overtime owed cannot be calculated until after the next regular payday, the payment must be made as soon as possible, but no later than the next regular payday after the calculation can be made.

Notices (posting). Covered employers must post notices outlining the federal minimum wage and overtime regulations. The notices must be posted conspicuously and in enough places so employees can see them as they enter and exit the workplace. Posters are available from the U.S. Department of Labor (DOL) Wage and Hour Division.

Agreements to waive overtime barred. Employees may neither waive their right to be compensated for overtime hours worked nor agree to a lower overtime rate than that required by FLSA. Therefore, even if employees have made such an agreement, they retain their right to recover overtime pay required by FLSA.

HOW TO CALCULATE OVERTIME

CALCULATING THE REGULAR RATE OF PAY

For nonexempt employees, the overtime rate is $1\frac{1}{2}$ times their regular rate of pay. The regular rate must include: the reasonable cost of meals, lodging, and other facilities provided to the employees (NOT for the benefit of the

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employer), nondiscretionary bonuses, on-call pay, shift differentials, and cash benefit payments from Section 125 Cafeteria Plans and other forms of compensation not specifically excluded from overtime laws by the FLSA.

There are eight narrowly construed exceptions to inclusion of payments in the regular rate:

- Gifts—the amount should not be so substantial that employees would consider it part of their wages
- Vacation, holiday or sick leave pay, and other similar payments not made as compensation for hours worked, production, or efficiency
- Discretionary payments or certain bona fide profit sharing plans or talent fees
- Bona fide fringe benefits
- Premium overtime pay
- Holiday or weekend time and $\frac{1}{2}$ premium pay
- Extra nonovertime premium pay agreed on by employment contract or by collective bargaining agreement
- Certain stock option compensation provided under an employer plan that meets the requirements of 29 USC 207 (e)(8)

The FLSA regulations are designed to preclude an employer from setting an artificially low rate of pay on which overtime is calculated, and then providing additional compensation to the employee by other means. For any payment, the employer bears the burden of establishing that it need not be included in calculation of regular pay.

Cafeteria plans. Under the FLSA, employer contributions to “bona fide [benefits] plans” are not included in the regular rate. However, *cash benefits payments* to employees under a cafeteria plan must be included in the regular rate for purposes of calculating overtime.

OVERTIME MATH

In general, overtime for employees not paid a straight hourly wage is figured by converting to an hourly rate as follows:

Salaried with fixed 40-hour week. The overtime rate is $1\frac{1}{2}$ times the rate per hour (weekly salary divided by 40) for all hours over 40 hours per week.

Salaried with fixed week of fewer than 40 hours. The overtime rate is $1\frac{1}{2}$ times the rate per hour (weekly salary divided by number of hours that the salary is intended to compensate) for all hours over 40 hours per week. For example, if an employee is paid a weekly salary of \$350 for a 35-hour week, the rate per hour is \$10. The employee must be paid \$10 for hours 36 to 40 worked in a week and \$15 for any additional hours worked in a week. Alternatively, the employer and employee may agree that the salary paid represents compensation for all hours up to 40 per week. In this case, no additional compensation would be owed for hours 36 to 40, and the overtime rate would be the same as for an employee with a fixed 40-hour week.

Salaried with irregular week. Employees who are paid a salary and whose hours vary from week to week receive an overtime premium calculated as follows: For each hour worked over 40, add one-half the rate per hour for that week. The rate per hour is the weekly salary divided by the actual number of hours worked in the workweek. For example, a \$400 per week employee earns \$8 per hour in a 50-hour week. Half this amount, \$4, is the overtime premium per hour. With 10 hours of overtime, the employee receives \$40 in overtime pay in addition to his or her salary.

Semimonthly salaries. The salary is multiplied by 24 and divided by 52 to obtain a weekly rate.

Monthly salaries. The salary is multiplied by 12 and divided by 52 to obtain a weekly rate.

Job or day rate. If the employee is paid a flat sum for a day's work or for doing a particular job without regard to the number of hours worked, and if he or she receives no other form of compensation for services, his or her regular rate is determined by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. The employee is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek.

Piecework. When an employee is employed on a piece-rate basis, his or her regular hourly rate of pay is computed by adding together his or her total earnings for the workweek and dividing by the number of hours worked in the week. For overtime work, the pieceworker is entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek.

NATIONAL *(continued)***RECEIPT OF ADDITIONAL COMPENSATION**

The following example demonstrates the calculation of overtime for an employee who has received *other* forms of compensation: An employee works 45 hours in a week and also receives a \$50 bonus and \$50 in lodging. His or her regular rate of pay is \$12 per hour. The employer must combine all the sources of compensation: $(45 \text{ hours} \times \$12) + (\$50 \text{ bonus}) + (\$50 \text{ lodging}) = \$640$. This total divided by hours worked will provide the employee's true hourly rate for the week, \$14.22, and time-and-a-half must be calculated from this number $(\$14.22 \times 1.5 = \$21.33)$. So this employee's total pay for the week would be: $(40 \text{ hours} \times \$12) + (5 \text{ hours} \times \$21.33) + (\$50 \text{ bonus}) + (\$50 \text{ lodging}) = \$686.67$.

MULTIPLE JOBS

If an employee is working two separate jobs at different rates for the same employer, overtime is owed if the employee works a combined total of more than 40 hours in a workweek. The overtime should be calculated based on a regular rate of pay that is the weighted average of the rates for each job. For example, if an employee works 30 hours at \$10 per hour and 20 hours at \$8.00 per hour, the weighted average is \$9.20 $(30 \text{ hours} \times \$10 \text{ per hour} + 20 \text{ hours} \times \$8 \text{ per hour} \div 50 \text{ hours})$. The overtime pay is \$46 $(\frac{1}{2} \text{ of } \$9.20 \text{ per hour} \times 10 \text{ hours})$. Alternatively, the employer and employee may agree in advance that overtime will be paid based on the rate for the type of work that was performed during the overtime hours.

Warning: Exempt salaried employees often want to work additional hours for their employer doing nonexempt work (such as data entry) to augment their salary. If this work is paid on an hourly basis, the employee may no longer be exempt and overtime will be owed including overtime for hours over 40 per week that the employee works in his or her formerly exempt job. This problem can be avoided by paying the employee a fixed salary for the second job that does not vary from week to week based on the number of hours worked. In addition, the hours worked in the second job must not be so large that the employee's "primary duty" is no longer work that qualified for the professional, administrative, or executive exemptions.

JOINT EMPLOYMENT

If an employee works for two completely independent employers at the same time, no overtime is owed as long as the employee works no more than 40 hours for either employer. If, however, an employee is employed jointly by two or more employers, overtime is owed if the employee's combined hours for the joint employers exceeds 40 in a workweek. DOL's Wage and Hour Division considers that a joint employment relationship exists in the following circumstances:

- Shared employment where there is an agreement between employers to share an employee's services, such as when two employers on the same premises arrange to employ a janitor or watch person to perform work for both firms. Even though each employer carries the employee on its payroll for certain hours, the employee is considered jointly employed by both companies, and both are responsible for making sure that proper overtime is paid.
- Where one employer is acting directly or indirectly for another employer, such as a temporary agency that sends an employee to one or more assignments with various companies. The temporary agency is responsible for proper overtime payment if the employee works more than 40 hours in a workweek on the assignments that it provides. The particular company where an employee is assigned is jointly responsible with the temporary agency only if the employee works more than 40 hours in a workweek for that establishment.
- Where the employers are related to each other because one employer controls, is controlled by, or is under common control with the other employer.

Warning: A joint employment relationship will exist if a regular employee is assigned to a second job with the same employer through a temporary agency. An example would be a clerical worker who works nights and weekends through an agency and is assigned to his or her primary employer to do emergency filing.

HOLIDAY/SICK PAY NOT INCLUDED

Only hours actually worked count in the overtime calculation. Therefore, holidays not worked, vacation days, sick days, etc., are not counted. The fact that an employee receives holiday pay, vacation pay, or sick pay is of no consequence for overtime purposes. The test is hours worked rather than hours paid.

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ON-CALL/TRAVEL TIME

Under some circumstances, time spent on call and traveling is considered work time and therefore must be compensated. If such time is work time, it must be included in the overtime calculation. See the national and state *HOURS OF WORK* and *TRAVEL TIME* sections, if state sections are included in your binder.

AVERAGING HOURS PROHIBITED

Each workweek must be considered separately in determining overtime hours, regardless of the length of the pay period. Therefore, time over 40 hours worked in one week may not be offset against time under 40 hours worked in another week (except for certain arrangements permitted for hospital and nursing home employees, firefighters, and law enforcement personnel).

EXEMPT OCCUPATIONS

There are many occupations that are exempt from FLSA's overtime pay requirements, and employers may require exempt employees to work more than 40 hours in a workweek without having to pay them a premium for overtime hours.

Among the occupations exempt from FLSA overtime requirements are:

- Employees of interstate motor carriers, airlines, and railroads
- Outside buyers of poultry and dairy products
- Any employee employed as a seaman
- Motor vehicle sales and service personnel
- Trailer, boat, or aircraft sales persons not working for manufacturers
- Certain drivers and helpers on local delivery
- Agricultural employees, including employees working for nonprofit or cooperative agricultural water storage or suppliers
- Employees engaged in the initial transportation of fruits and vegetables from a farm
- Taxi drivers
- Employees of police and fire departments with fewer than five employees
- Live-in domestic workers
- Movie theater employees

A few categories of workers have partial exemptions from the FLSA's overtime requirements. These include:

- Certain employees of amusement and recreational establishments located in national parks and similar facilities if paid overtime for hours after 56 hours in a workweek
- Bulk or wholesale petroleum distributors if paid overtime for hours after 56 hours in a workweek
- Employees receiving literacy training for 10 hours per workweek

In addition, there are many exceptions, categorized as "white collar jobs," that must meet specific criteria to qualify for the exemption. The FLSA regulations pertaining to these exemptions have been revised, effective August 23, 2004. For more details, consult the national *EXEMPT PERSONNEL* section.

Employers must make every effort to accurately classify employees, especially in light of the newly revised regulations, and failure to do so may result in penalties or other sanctions.

INDUSTRY-SPECIFIC RULES

Public sector employees. Public sector employees may be compensated for overtime work with time off in lieu of actual pay. For details, see **TIME-OFF PLANS/COMPENSATORY TIME** in this section.

Hospitals. Overtime may be computed on a 14-day basis by agreement between the employer and the employee prior to performance of the work and if time-and-a-half is paid for all hours over 8 in 1 day or 80 in 14 days (FLSA Sec. 7j).

Belo contracts. For employees who normally work irregular hours and are often on their own, such as field service personnel, a special form of contract arrangement for calculating overtime, known as a Belo contract, is permitted. Such contracts must do the following:

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- Specify a realistic minimum hourly rate.
- Include overtime at 1½ times that rate for all hours over 40.
- Guarantee a weekly rate regardless of the hours worked, even if fewer than 40.
- Cover no more than 60 hours.
- Contain a specific agreement between the employer and employee (preferably in writing).

TIME-OFF PLANS/COMPENSATORY TIME

FLSA permits *public sector* employers to give employees compensatory (comp) time off in lieu of monetary overtime compensation. Comp time must be given at a rate of at least 1½ hours for each hour of employment for which overtime compensation is required (FLSA Sec. 7(o)). Employees whose jobs involve public safety, emergency response, or seasonal activities may accrue 480 hours of compensatory time. Other employees may accrue no more than 240 hours of compensatory time. Beyond that, they must be paid money for overtime.

Private employers are not authorized under federal law to give comp time and must give *monetary* overtime compensation. However, a narrow exception exists for private employers that pay employees every 2 weeks or less frequently. In such cases, an employer may give an employee compensatory time off, provided that the comp time is taken *in the same pay period*. For example, if an employee works 2 hours of overtime in the first week of a 2-week pay period, an employer may give the employee 3 hours (time-and-a-half) time off in the second week of the pay period in lieu of overtime pay.

Note: Officials at DOL's Wage and Hour Division report that most time-off plans violate the law. Therefore, before implementing such plans, employers should submit them to the Division for review.

ADMINISTRATIVE ISSUES/OVERTIME DISTRIBUTION

DISTRIBUTION OF OVERTIME

Because employees often want to participate equally in overtime assignments, the question of overtime distribution is usually detailed in the union contract or is specifically defined by work practice. Distribution of overtime is a constant source of controversy in industry, both union and nonunion.

A practical method of evenly distributing overtime is for the department supervisor to maintain a roster recording each employee's overtime work. A properly kept roster will prevent the unfair distribution of overtime and will help settle disputes between employees and the supervisor. A roster also must be set up to meet the practical needs of the specific operation. Obviously, a machine operator cannot contend for overtime with a toolmaker, because the first requirement is that the employee be qualified to do the work. Also, a distinction is often made between Saturday overtime and overtime at the end of the workday. In whatever form a roster is maintained, the simpler it is, the better it will function. Ordinarily, in maintaining a roster, an employee who declines overtime is charged with a "time at bat" and his or her name goes to the bottom of the roster.

Whether overtime is considered desirable because of the premium pay or undesirable because of the loss of free time, employees of similar skill should have equal opportunity or equal burden for overtime assignments.

REQUIRING OVERTIME WORK

Even under most union contracts, it is well-established that an employer has the right, within reasonable limits, to require employees to work overtime.

It is important to give employees adequate notice. For occasional and intermittent overtime, notice before noon is usually considered adequate. For more extended overtime, however, a full 24-hour notice is usually expected. In general, the more notice, the easier it will be for employees to plan their schedules.

In many cases, the Unemployment Compensation Department has refused to give employees unemployment compensation when they were discharged for consistently refusing to work overtime.

Note: To ensure that such discharges are "for cause," employers should give reasonable notice of overtime, distribute overtime fairly by way of a roster, and subject the employee to progressive discipline.

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UNAUTHORIZED OVERTIME

If an employer allows an employee to work overtime, even though no supervisor has requested the additional work hours, the additional hours being worked are still considered as work time that must be compensated at the applicable overtime rate. An employer is considered to have allowed an employee to work overtime if it knew or should have known that an employee was on the premises working. Employers that want to bar unauthorized overtime should have an explicit policy that designates who has the authority to authorize overtime and how the authorization must be made. The policy should be strictly enforced.