

Overtime

- Some Kinds Of Payments Can Be Excluded from the overtime calculation.
- For Example: Pay For Unworked Holidays, True Gifts, Pay For Unworked Vacation Time, “Discretionary” Bonuses.



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Workweek

- Each work week stands alone!
- No Averaging of weeks.
- Exception: Some governmental agencies may provide comp time
- No comp time for private employers



Hours Worked

- Must Keep Accurate Records Of All Time A Nonexempt Employee Works Each Workday And Each Workweek.
- Includes All Time Employer Knows Or Has Reason To Know About – Not Just Time The Employer Required Or Asked The Employee To Work.
- DOL's View: If You Don't Want To Pay For The Work, You Must Prevent It From Being Done.

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Overtime Policies

- “No Overtime” Policies
- Require Supervisor Approval in Advance.
- Signing Timecards



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Hours Worked

- The Three Keys:
- Evaluate Which Activities Are "Hours Worked."
- Develop A System And Policies.
- Make Sure Your Supervisors Enforce The Policies.

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Trouble Areas

- Meals
- Early work
- Breaks
- Late work
- On-Call
- Work at home
- Meetings/Training
- Travel



What Are "Exemptions"?

- "Exempt": Not Subject To One Or More FLSA Requirements
- Some apply only to the overtime requirements, some apply to the minimum-wage, record keeping and overtime requirements
- Default rule: Everybody is non-exempt, unless an exemption clearly applies

"White Collar" Exemptions

- Executive, Administrative, Professional
- Also "Computer Employees", "Highly Compensated" varieties
- Three general requirements for most of them:
 1. Paid on a "salary basis"
 2. Salary is at least a certain amount
 3. Employee performs specific kinds of work ("duties")

Executive Exemption

The logo for Fisher Phillips, featuring the company name in white text on a red, tilted rectangular background.

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- Primary duty is managing the enterprise or a customarily-recognized department or unit;
- Customarily and regularly directs the work of two or more other employees;
- Authority to hire or fire, or suggestions and recommendations about hiring, firing, advancement, promotion, other status changes are given particular weight; and
- Paid on a "salary basis" at a rate of at least \$648 a week (for now).

Administrative Exemption

- Primary duty is office or non-manual work directly related to management or general business operations of the employer or the employer's customers;
- This work includes the exercise of discretion and independent judgment as to matters of significance; and
- Paid on a "salary basis" at a rate of at least \$648 a week (for now).
- Possibly one of the most often erroneously-applied FLSA exemptions – very narrowly interpreted

Professional Exemption

- Paid on a “Salary Basis” or a “Fee Basis” at a rate of at least \$648 a week, and;
- “Primary Duty” Is:
 - Work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.
 - Work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

Computer Employee Exemption

- Paid on a “Salary Basis” or a “Fee Basis” at a rate of at least \$648 a week, and;
- Applies to computer systems analysts, computer programmers, software engineers, or other similarly skilled workers whose primary duty is:
 - The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to, user or system design specifications.
 - The design, documentation, testing, creation or modification of computer programs related to machine operating systems.
 - A combination of these duties, the performance of which requires the same skill level.

Outside – Sales Employees

- Primary Duty Is Making Sales, Or Obtaining Orders Or Contracts For Services Or For The Use Of Facilities For Which The Customer Or Client Will Pay.
- The Employee Is Customarily And Regularly Engaged In This Activity Away From The Employer's Place Or Places Of Business.
- No pay requirement.

Salary Basis

- Employee Must Regularly Receive Each Pay Period A Predetermined Amount Constituting All Or Part Of His Or Her Compensation, Which Amount Is Not Subject To Reduction Because Of Variations In The Quality Or Quantity Of Work Performed.
- Employee Need Not Be Paid The Salary For Any Workweek In Which He Or She Performs No Work

Permissible Deductions

- Full-Day Absences For Personal Reasons.
- Full-Day Absences For Sickness, Disability, Or Accident If There Is A Bona Fide Sick-Pay Plan, Policy, Or Practice.
- To Impose A Penalty In Good Faith For Violating Safety Rules Of Major Significance.
- To Offset Amounts Received As Jury Fees, Witness Fees, Or Military Pay.

Permissible Deductions

- To Pay For-Time-Worked Proportionate Part Of The Salary For The Initial Or Terminal Week Of Employment.
- To Provide Unpaid Leave Under The Federal Family And Medical Leave Act.
- Must Be Computed In Increments Of A Day's Pay Or In Multiples Of That Amount For Each Whole Day Missed (1/5th, 1/6th, Etc.), Except For FMLA leaves.

Are They Really Exempt?

- Default position: Each employee is non-exempt, that is, each is subject to FLSA's requirements
- Exemptions are strictly interpreted
- Specific requirements apply
- The employer has the legal burden to prove when challenged that each one is met
- Otherwise, the employer loses

Are They Really Exempt?

- Exemptions relate to individuals – Not to job descriptions, pay classifications, positions, job groups, conventional wisdom, etc.
- Detailed, accurate, current job information is essential
- Must be based upon actual work, real facts
- Opponents will dig-into what the employees actually do
- Job descriptions alone do not "make employees exempt"

Are They Really Exempt?

- Outlines, checklists: Helpful, but aren't the final answer
- Most points can't be reduced simply to "Yes", "No"
- Quick-and-easy evaluations usually leave serious vulnerabilities
- Independent understanding and analysis of each factor and circumstance are essential

What If They're Non-Exempt?

- Different ways to pay non-exempt workers, such as:
 - Pay by-the-hour?
 - Pay a salary as straight-time compensation for 40 hours (or some other number)?
 - Pay a salary as straight-time compensation for all hours?

What About Bonuses for Non-Exempt?

- Nondiscretionary bonuses and incentive payments for non-exempt employees must be accounted for in overtime calculations.
- If an employee gets a \$50 bonus for a week in which they worked 50 hours, then the regular rate would be \$1.00 higher for overtime purposes. So you would owe an additional \$0.50 hour on the 10 hours of overtime.

Accurate Timekeeping

- If non-exempt, must keep accurate records of worktime:
 - Know everything that counts
 - Have a system and policies for capturing the time accurately
 - Train employees to follow
 - Train supervisors/managers to enforce
 - Periodically see whether the time records appear to be accurate

What Else Should You Do?

- Exemptions aside, are you sure you're 100% in compliance?
- Find out now where you stand, especially if it's been a while since you looked
- Are you sure you are accurately recording worktime, properly computing overtime, making only lawful deductions, correct about all "contractors" . . . ?

Non-Compliance Consequences

- Back wages, plus equal amount ("liquidated damages")
- Civil money penalties up to \$1,100 per person
- 2-year limitations period, 3 years if "willful"
- Court-ordered compliance in the future (possible "contempt of court" for later violations)

Non-Compliance Consequences

- Pay plaintiff's "reasonable" attorney's fees, costs (and yours)
- Possible individual management liability
- Possible criminal penalties
- Distraction and disruption
- Adverse publicity