

PERSONNEL NOTEBOOK

For Your Most Important Resource

MYTH BUSTERS ABOUT OVERTIME

Employers know that when an employee works more than 40 hours in a workweek federal regulations require that he/she be paid overtime at one-and-one-half (1½) times his/her normal rate of pay. They also know that there are exceptions to this law. Under the Federal Labor Standards Act (FLSA), an employee whose job is classified as executive, professional, administrative, outside sales, or computer employee who is paid at least \$455 per week is exempt from the overtime requirements. That's why these types of employees are called "exempts," and those who are not exempt from the overtime regulations are called "nonexempts." Many employers feel this is all they need to know, but regulations are seldom that simple.

There are many myths about overtime, some more obvious than others. Let's take a look at some of the fringe areas surrounding overtime.

Computer Employees: When the FLSA was written back in 1938, it didn't mention computer employees because there weren't any. But, the FLSA update, known as the Fair Pay Act of 2004, officially includes them as exempt employees; *however, the majority of computer employees are not exempt.* The exemption is granted only to such work types as system analysts, programmers, software engineers, design developers or a similar level of skills and those who consult on such. The exemption does

not apply to job types such as computer operators, data entry employees, or website designers. *The computer employee is the only FLSA classification that can be paid on an hourly basis and still not be eligible for overtime.* As long as he/she is being paid at least \$27.63 per hour, no overtime premium pay is required.

Outside Sales: Employees who customarily and regularly work away from the employer's place of business are exempt; inside sales people are not. *Delivery drivers who also unload and deliver products but whose primary work is selling are classified as exempt.* Installation sales people, such as refrigerator sales/delivery workers, are also considered exempt if the primary work is selling. But, field technicians whose primary function is installation, application of chemicals, or repair and who also sell the products or services are not exempt.

Piece Work: Any work that can be quantified into work units can be paid on the basis of completing one unit or on what is commonly referred to as a piece-work basis. Factory workers are often paid this way, and *even landscape workers are sometimes paid on a piece-work basis.* Paying \$22.50 for one flat, square acre of lawn maintenance or \$26.75 for maintaining oddly shaped or uneven terrain is an example of piece work.

But, the employee must still be paid overtime if he/she works more than 40 hours in the workweek. The overtime is calculated by totaling all such earnings for the workweek and dividing it by the number of hours it took to earn it. That becomes the calculated rate on which the overtime premium rate must be applied. Another acceptable method is to increase the piece rate by 1½ times the regular piece rate for each overtime hour.

Business Owners: *An employee who has at least 20 percent equity in the company and who is actively engaged in its management is classified as an exempt employee, regardless of the type of work he/she does on the job.*

High School Dropouts: *An employee who does not have a high school diploma or has not completed the eighth grade may be required by the employer to attend remedial reading and other basic skills beyond 40 hours in the workweek and may not be paid the overtime premium rate. The employee must still be paid straight time for all the hours worked, including the class time, but the class time is not considered overtime and is not include in the calculation for overtime. Also, the class material cannot be related to the employee's job.*

\$100K Exemption: *Even though an employee's work is classified as nonexempt, if the annual earnings reach \$100,000 and at least \$455 of it is a regular weekly pay, and if the employee qualifies under even one requirement from within any of the exemptions, he/she is classified as exempt, regardless of the type of work.*

Weekly Salary for Hourly Workers: An hourly paid employee can be paid a flat weekly salary, regardless of how many hours worked. The employee must still be paid overtime for work beyond 40 hours, but the overtime rate is one-half (1/2) the calculated rate for each overtime hour. The concept is that the employee has already agreed to a flat rate for the entire week, but he hasn't been paid the extra 1/2 rate that comes with overtime so that part must now be paid. Specific steps must be put in place, so

get some guidance before venturing into this area. (See the *Personnel Notebook* "Paying Hourly Workers a Weekly Salary" on the association's website.)

Working Foreman and Supervisors Can Be Exempt: *The foreman, supervisor, or team leader employee working alongside his/her assigned crew can still be an exempt salaried employee. The old 80/20 rule, whereby the employee's job classification was based on the 80 percent portion of the work, no longer applies. The requirement now is that the primary purpose of the job determines the classification. If the primary purpose of the job is the responsibility for the performance and work product of the crew, the regular reporting on progress and supporting details, the authority to hire and fire (or have a significant influence on it), the supervision of at least two full-time equivalent employees, and a salary of at least \$455 per week, then the exempt classification can apply. Normally, if 50 percent or more of the time is spent on the supervisory role, the rest can be applied to working with the crew.*

Keeping Time Sheets on Salaried Employees Is not illegal: The regulations state that an exempt/salaried employee's basic weekly pay may not be adjusted based on the quality or quantity of his/her work.. If the exempt employee works one hour in the workweek, he/she must be paid for the entire week (there are a few unique exceptions such as for FMLA leave). If the employee worked 60 hours, the pay is still the same. If the exempt employee is docked for missing a day or missing hours within a day, the employee's exemption may be lost along with all other employees with similar jobs. So, employers normally do not keep time sheets or records on salaried employees for fear of losing their exemption. However, as long as their weekly pay is not being based on hours worked, *keeping track of exempt employees' time does not create a problem. In fact, it is recommended that time sheets/records be kept on all employees for several reasons:*

- In the event the Department of Labor (DOL) in an audit or in response to an employee complaint determines that the employee is misclassified as an exempt (the No. 1 FLSA violation reported by the DOL) and changes the classification to nonexempt, the employer is normally required to pay back wages and overtime for the previous two years. (In some cases three years).

How does the DOL determine how many hours the employee worked? They ask the employee! Whatever the employee estimates will be accepted as wages due, unless the company can produce proof otherwise. Time sheets are how that is established. They can save the company thousands of dollars.

- In the event of an emergency, particularly in large companies, knowing who is at work on any given day can be crucial. *Having a time sheet showing who came in today and knowing who is now in the parking lot watching the fire can save lives.* The fireman will usually ask.
- Incomplete records on vacation, sick leave, FMLA leave, etc. are not uncommon, particularly when an employee is leaving the company. Accurate records are good to have.

One more mythbuster that may surprise you. Once you have paid the guaranteed weekly pay (\$455) to your exempt, you may pay him/her extra for any overtime hours they work! You may also pay bonuses for any overtime work they provide without endangering their exempt status..

Compensatory Time is Not Allowed for Hourly Workers: Comp time is the act of allowing employees to work extra hours when you need them, and then giving them that time off later when they need it. Sometimes that means the employee might work a number of Saturdays or even holidays now and accumulate an extra week off at vacation time or for an upcoming maternity leave. However, *comp time is not allowed for hourly paid, private industry*

employees, but it is for exempt and government employees.

Overtime Is not Based on Paydays; It's Based on Workweeks: Some employers will have an employee work 48 hours in the first week of the pay period, and then only 32 hours in the second week for an average of 40 hours each week and assume that no overtime is due. Some employers, in an attempt to be fair, will allow the employee 1½ times more hours off in the second week to fully compensate for the premium rate. Both actions are violations of the FLSA.

Overtime must be based on the number of hours worked in one workweek and cannot be based on the two-week pay period. The workweek is the 168-hour period that you have decided to use as your established workweek in any consecutive seven-day period. (It's the law.)

Overtime is not About the Money; It's About the Law: A common practice has long been to avoid all the complicated calculations about overtime and just to pay employees a lump sum for it. Often, the amount paid is much more than is required. For example, a company works it crew earning \$10 per hour on Saturday for eight hours. The regular pay for that would be \$80. The overtime would add another \$40 (total = \$120). Instead, the company pays for the straight time (\$80) and, in place of the overtime, it pays a flat \$100 for every employee who works overtime (total = \$180). So, the company is happy and the employee is happy, but the FLSA folks are not happy. The money is not the issue. The issue is that no overtime was paid. *It gets worse: The \$100 must be added to the base pay on which the overtime rate must be calculated.* It becomes part of the hourly pay.

Bonuses, Awards, and Facilities Provided Must Be Added to the Base Hourly Rate: It's Christmas and, as the owner, you decide to give every employee a bonus of \$100. Your general manager advises that instead the bonus be based on the productivity records that show which crews did the better job this year. If you follow

your GM's advice, you will have to add the bonus to the base pay of each employee to calculate any overtime he/she may have worked that week.

Even if you give everyone the same amount, but you base the bonus on how good a year your company had, you will still have to add whatever each person receives to the base pay on which any overtime worked that week must be based. This also applies if you are providing an employee with free living quarters or meals. These things are considered part of the employee's wages.

The concept is that if the bonus is in any way related to the quality or quantity of work the employee's produced, then the bonus or gift is considered wages and must be added to the base for overtime calculation. Even if the bonus is given because the company had a profitable year, then *the bonus is also considered wages and must be added to the base pay for overtime calculation.*

However, if you did as you originally intended and just gave everyone the same \$100 bonus for no business-related reason at all, then it's an outright gift and not part of wages.

You Can Freely Change a Salaried Employee to Hourly: Although an hourly paid employee (nonexempt) cannot be changed to a salaried employee (exempt) unless he qualifies under one of the exempt categories, an exempt employee can be changed to a nonexempt employee anytime the company wishes.

This can also apply to salaried employees who might be assigned to snow work in the winter season. Although you can continue to pay exempt snow workers on a salary basis, if you choose, you can temporarily reassign him/her to an hourly paid job doing snow work. It may be something both parties like. The company pays

the same rate for all contracted snow work, and the employee has a chance to gain overtime. It may also be a choice of that or not working at all. If the exempt work and nonexempt work are both done—during the same workweek and if overtime occurs during that workweek, the employee must be paid overtime based on all the hours worked that week. The overtime rate is calculated on a weighted basis combining in ratio both exempt and nonexempt work.

A 48-Hour Week Doesn't Always Mean Overtime: Overtime pay is required for all hours worked over 40 in the workweek; that's, hours worked not hours paid. An employee who is on vacation two days during the week and then works five straight days is not entitled to any overtime. The same applies to paid sick leave, paid jury duty, paid bereavement leave, paid holidays, etc. Overtime pays only starts at the 41st hour of work, not pay.

The Employee Must Be Paid Overtime Even if Forbidden to Work Overtime: The regulations require the employee to be paid for any overtime hours worked, whether allowed to work or not.

Even if the company has a known policy that no employee is allowed to work overtime without the written approval of the supervisor, and an employee decides to work overtime anyway, even if the employee performs no work, he/she must still be paid. You may discipline the employee and possibly terminate him/her, but any overtime worked must be paid.

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