

For Your Most Important Resource—The Human Resource

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OVERTIME

How It Works and Related Wage Issues.

Whenever the issue of Overtime arises, the concentration is almost always on *who* gets overtime. In more practical terms it's 'Who is exempt and who is non-exempt?' (For more on this subject see the Personnel Notebook entitled 'Who Gets Paid Overtime In Your Company?') But the issue of overtime involves more than just who gets it.

Federal lawmakers are currently creating new regulations that will redefine who gets overtime (or who is exempt and who is not), as well as redefining who is and who is not an employee! In the meantime, lawsuits about overtime are on the rise. Americans now work more overtime than almost any other country

What Is Overtime?

All employers are required to identify their fixed workweek. This must be a 168-hour period of time and must be seven consecutive, 24-hour periods, such as starting on Monday at 12:01 am through to the following Sunday night at 12:00 am midnight. However, an employer may start that workweek on any hour of any day in the calendar week. They may also have different workweeks for different employees.

Any employee who works more than 40 hours during that period (not 8 hours in a day but 40 hours in a week) must be paid overtime.

Why Are Some Employees Exempt?

Technically, employees are identified as exempt in the overtime provisions of the Federal Labor Standards Act (FLSA) because they fall into one of the following categories:

They are either

- Executive
- Administrative
- Professional

or

- Outside Salespeople

But the concept of 'exempt vs. non-exempt' is focused on the following basic understanding:

Non-Exempt An hourly (non-exempt) employee is being paid to surrender the control of his (her) time to you, the employer. So, if a non-exempt employee shows up for work and stands in one spot all day, you still must pay him. Therefore you give him established orders

or assignments to start off each day by reporting somewhere specifically. You might also give him things to do as regular assignments and maybe what to do when there's nothing to do.

Exempt A salaried (exempt) employee is generally being paid to produce an end result. So sometimes allowances are made for how and when things are done as long as the end result is being accomplished. Exempt employees have more control over the time and methods used to accomplish the end result. They also may use more personal judgment over how and when things get done.

They are usually higher paid than non-exempts. Sometimes that's because their work has the potential of achieving more or creating more profit. (i.e. A Sales Rep. may not work as hard as a Landscaper but she has the potential to create much more volume, income and profit.)

But the higher pay is not because the job requires more intelligence. Accountants and Executive Assistants are not necessarily more intelligent than an Electrician or a Computer Repair Technician. A significant reason for the higher pay is the expectation that the individual will do what is needed to achieve the end result. If that means working longer hours or working on the problem at home or seeking new answers to problems, then that's what the exempt will do. They're not there to surrender their time to you. They're there to use their expertise, knowledge or extra hard work to achieve the desired end result. And that often means more hours and more responsibility.

You might be likely to terminate an hourly (non-exempt) employee for coming in late or failing to follow specific instructions. You would more likely terminate a salaried (exempt) employee for failure to meet the desired end result.

How Much Is Overtime Pay?

For hourly (non-exempt) workers it's 1 ½ times their normal hourly pay rate. If the normal pay is \$10 per hour then overtime pay must be at least \$15 per hour. If you are non-

exempt and working on a pay system other than hourly, such as on commission or piecework, your hourly rate must calculate to be at least minimum wage (Currently \$5.15 per hour. And overtime must be at least \$7.725 per hour.) This is based on the total amount earned divided by the number of hours worked.

Salaried If your employee is non-exempt, but you are paying them on an annual salary, you must still pay them overtime for any hours worked over 40 in the workweek. You need to calculate that annual salary into an hourly rate.

For example, if the employee earns \$25,000 annually, you would divide that by 2,080 hours (the number of work hours in a year) to arrive at the hourly figure of \$12.02. Overtime for that rate would be \$18.03 per hour.

Inside Sales Reps Those on commission must earn at least the minimum rate based on the total amount earned divided by the number of hours worked. Overtime must be calculated to at least \$7.725 per hour.

Piecework An employee working on piecework (being paid for each item produced) must also be paid overtime on that same basis. If the number of pieces produced times the piece rate does not earn the employee at least \$5.15 per hour and \$7.725 for overtime, then the employer must make up the difference.

Tips When we think of tips, we normally think of Waitresses. But many jobs are compensated by tipping, Chauffeurs, Taxi Cab Drivers and many service providers.

If an employee regularly receives more than \$30 per month in tips, the employer may consider tips as part of the wages. However, the employer must still pay at least \$2.13 per hour in direct wages. The employer must inform the employee of this action in advance.

In addition the total earnings (Including the \$2.13) divided by the hours worked must be at least equal to the minimum wage. If not, the employer must compensate them for the difference.

Also, employees must be allowed to keep their tips and not share them with the employer. However, the employee may participate in a valid tip pooling or sharing (with other employees) arrangement. Overtime is calculated on the same basis as with Piecework.

When Is It Due?

Overtime pay must always be paid on the regular payday for which it was earned.

Can You Require Employees To work Overtime?

Child labor Laws within the Federal Labor Standards Act (FLSA), list restrictions on workers who are 16 years of age or under. For workers over the age of 16, the employer may require overtime as deemed necessary. With the exception of Nurses, there are no federal laws prohibiting required overtime. An employee who refuses to work overtime may be terminated for that reason.

Can State Laws Be Different?

States may enact their own overtime rates and standards as long as they do not reduce the benefit to employees or the requirements of employers as expressed in the federal regulations. For example, California requires overtime pay for all time worked over 8 hours in a day. And double time for 12 or more hours in a day. Both rates apply in the same day.

Can I Give Comp-Time Instead Of Overtime Pay?

The short answer is no. Only government employees are allowed Compensatory Time (Comp-Time), which generally means allowing employees to take time off later in exchange for the extra hours worked now.

Non-Exempts For private sector (non government) employees the FLSA does not address Comp-Time, but it does require overtime to be paid at the 1-½ times rate. Federal law also forbids employers and employees to enter into any agreement that waives any requirement of the FLSA.

Therefore, a Comp- Time agreement would be waiving a requirement in the FLSA and is not allowed.

Employees want Comp-Time. Employers want Comp-Time. Unions do not. Laws have been introduced in Congress to add Comp-Time to the provisions of the FLSA, but Union objections have prevented them.

Exempts It would seem likely that exempt employees could be granted Comp-Time since you are not required to pay them overtime anyway. But the problem is that once you start counting hours on an exempt for purposes of pay, you may be losing their exempt status. Exempts are not paid on an hourly basis. Once you start counting those hours you are stating that you *are* paying them hourly. (You may use an hourly rate to calculate wages for accounting/payroll purposes. But you cannot use an hourly rate to pay exempts.)

You can however, have an understanding with an exempt employee, that you will allow them extra time off as a professional courtesy and a recognition of extra work. But don't count hours! Do not pay an exempt for extra hours worked and do not exchange hours worked for hours not worked. For example, you may allow exempts a long weekend once in a while or letting them take a day off to handle a family or an emergency matter. Don't pay an exempt nor dock their pay for any hourly period.

Just as those professionals are putting in the hours as needed, allowing them to get away sometime when they're not so needed is also professional. Just don't count hours for pay purposes or you could lose that exemption.

How About Employees Who Are On A Stand-By or Cell Phone Basis?

Many non-exempt employees feel that being 'On-Call' means that they are working overtime and should be paid overtime. In some cases that can be true.

This issue is determined by identifying the freedom the individual has during this 'On Call' period. If they are reasonably able to control their own time, to do what they choose during that period, then pay is not required. The questions usually asked in these cases are: can this person go to a movie, visit friends, do repairs around the house etc. If so, there is no requirement to pay them. Even though they may not be free to leave town or shut off their messages, they are still free to reasonably control their own time.

If however, they are not able to do these kinds of things, you may have to compensate them for those extra hours and it could mean at the overtime rate.

Independent Contractors (ICs)

ICs are not employees so none of the overtime requirements of the FLSA apply to them.

A Few Other Points To Consider Regarding Overtime:

Humans have an internal body rhythm that cycles approximately every 24 hours. This is known as our 'Circadian Rhythm' (circa = about - dia = day). This has a great impact on people's working abilities. Some people working on shift work adjust to this quite well. Most people cannot adjust to the challenges against their Circadian Rhythm without some side effects. . People working variable shifts (one week of days, then one week of evenings, then one week of midnights) often experience mental, emotional and physical problems. Disorientation is often noticed in variable shift workers.

Human body temperatures drop at night, this temperature change affects behavior, including attentiveness, inability to react, peripheral hallucinations (seeing things out of the corner of their eye that aren't there) and the urge to go to sleep. People on continuous or extensive overtime may experience these same conditions.

Too much overtime is often a sign that you may be understaffed or that the work is not being managed well.

Statistically, people on overtime are not nearly as productive or as accurate as they are on regular hours. So you're paying more to obtain less and you're being exposed to a higher risk of accidents and unacceptable work. Is it worth it? If it is, you want to do it right.

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