

Exempt

VERSUS

Nonexempt

FLSA Overtime Guidelines

You Need to Know



**A SPECIAL REPORT
FOR EXECUTIVES**

Exempt versus Nonexempt: FLSA Overtime Guidelines You Need to Know

PBP Executive Reports are straightforward, fast-read reports designed for busy executives. PBP Executive Reports excel at cutting the fluff, eliminating jargon and providing just the information today's executives need to improve their organizations' performance.

This PBP Executive Report was compiled and edited by the editorial staff of *Supervisors Legal Update* and *What's Working in Human Resources*, two of the most respected newsletters serving business professionals. It delivers the information you need to understand FLSA's exempt versus nonexempt issues and ensure compliance.

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Executive Summary

The federal Fair Labor Standards Act (FLSA) is a comprehensive employment law and much of it is fairly straightforward.

But the part that's most complicated – and most misunderstood – is the section detailing the rules on how employers must categorize employees for the purpose of deciding who's eligible for overtime pay – called “nonexempt” employees – and who isn't – called “exempt” employees.

A survey of employers by one Washington, DC-based law firm revealed that a majority of employers were unknowingly in violation of some parts of the FLSA.

Of course, the real problem occurs when an employee believes that misclassification under FLSA is more than a “mistake” – that the employer is purposely skirting the law. Then you're dealing with a lawsuit and a possible Department of Labor audit.

Of course you want to avoid all that, especially because:

- Violations are expensive. A pay error of a few hundred dollars could mushroom into thousands of dollars in legal fees and penalties – which could have been avoided with proper procedure in the first place.
- The law, and each employer, is under a microscope. When the FLSA was passed, labor groups charged that it was too business-friendly, so the government takes every opportunity to prove it goes tough on violators.

(While this report deals exclusively with the federal FLSA, the question of exempt versus nonexempt is further complicated by a confusing array of state laws governing who gets overtime and who doesn't. The state laws, and how to follow them, is dealt with briefly on page 18.)

Included in this Executive Report:

- **The basics of FLSA.**

- First and foremost, according to the law, the burden of proof on whether or not an employee is eligible for overtime pay falls on the employer. It's not up to the employee to prove the case; it's up to the employer. That means all employees are considered eligible for OT pay until the employer shows otherwise.

- Employees who are eligible for OT pay don't need authorization or permission to work overtime and get paid for it. Simply put, anytime an eligible employee works more than 40 hours in a week, that employee must receive 1^{1/2} times his or her normal hourly pay. It's not enough for an employer to say: "I never OK'd you to work overtime, so you're not getting paid for it."
- **The "primary duties" test for employees who are exempt from overtime.** FLSA lays out a set of tasks that determine whether an employee falls into the exempt category. The general, loose rule is that an employee is exempt if he or she spends more than 50% of the workweek on those tasks. But it's not always that simple. Sometimes the scope or influence of a person's job, or the potential responsibilities – such as standing in for a regular manager who's absent – will carry more weight than the 50% rule.
- **Categories of exemptions.** The law recognizes what the primary duties and standards are for an exempt employee:
 - **Pay.** Exempt employees must make at least \$455 a week, or \$23,360 a year.
 - **Executive.** An employee meets the exempt standards when the primary duties consist of:
 - managing an enterprise or a department or subdivision
 - regularly directing the work of two or more employees
 - having the authority to hire and fire **or** to make recommendations about an employee's work status
 - **Administrative.** An employee meets the exempt standards when the primary duties consist of:
 - nonmanual work directly related to management or general business
 - exercising discretion or independent judgment on significant matters, such as policy or finance
 - **Professional.** An employee meets the exempt standard by having:
 - advanced knowledge in a field of science or learning
 - knowledge acquired by a prolonged specialized instruction
 - **Computer professional.** An employee meets the exempt standards when the primary duties consist of working with computer systems for the purposes of:

- analysis
- design
- creation and modification
- development of documentation

Note: *Not* included in this category are:

- repair specialists
- help-desk personnel
- Web-page designers
- **Outside sales.** An employee meets the exempt standards when the primary duties consist of:
 - working outside the employer’s normal place of business
 - making sales and obtaining orders
- **Highly compensated.** An employee meets the exempt standards if:
 - the employee’s total annual compensation is at least \$100,000 annually, \$23,660 of which is salary
 - the employee performs some type of nonmanual work
 - the employee performs at least one of the primary duties listed under the **executive**, **administrative** or **professional** exemptions
- **Using the job description as the building block.** Properly classifying employees and avoiding problems start with building the right job descriptions.
 - Have supervisors review the descriptions and match them against actual duties.
 - Revise descriptions as needed, noting responsibilities and authorities that had been “understood” but not documented.
 - Reclassify as needed, especially when there’s a broad reorganization and duties change.
- **Pay deductions.** The law allows or bars certain types of pay deductions for exempt employees. For instance, you *can’t* make deductions based on the quality or quantity of an exempt’s work. However, you can make deductions for:
 - Full-day’s absence for personal reasons when the employee has no leave to cover the absence
 - Amounts equal to what the employee receives for jury duty, witness fees or military service

- Full or partial days for major safety violations
 - Full-day's absence for unpaid FMLA leave and partial days for unpaid intermittent FMLA leave
 - Full-day's absence for personal reasons when the employee has no leave to cover the absence
 - Full days for conduct violations, such as sexual harassment or violence.
- **Calculating hours worked.** FLSA sets rules on how hours must be calculated for employees who receive OT pay:
- Nonexempt “on-call” employees who are free to carry on normal activities outside the workplace generally are not considered to be working while waiting to be called.
 - Nonexempt employees in training should be considered working when the training is mandated by the employer.
 - Nonexempt employees in travel status should be considered “on the clock” when:
 - they’re actually doing work, no matter the time or place.
 - they’re traveling during normal business hours, even if they’re not performing work
 - for all hours of travel when they’re doing same-day travel
- **‘Safe harbor’ provision.** Employers who mistakenly deduct from an exempt employee’s pay can avoid some penalties by:
- Communicating to employees the policy on deductions
 - Having a procedure for dealing with employee complaints
 - Promptly reimbursing employees for mistakes
 - Making good-faith efforts to comply with the law
- **Recordkeeping.** As with most areas of employment law, good documentation is always important for supporting your case when classifying an employee.
- Keep accurate, comprehensive records regarding hours worked and pay issued.
 - Make sure the recordkeeping is current and ongoing. Courts look unfavorably on trying to do “make-up” or after-the-fact recordkeeping.

The Executive Report

Exempt versus Nonexempt: FLSA Overtime Guidelines You Need to Know

Some managers have asked why they need to have a solid understanding of the overtime guidelines of the Fair Labor Standards Act (FLSA). After all, they say, if some employees don't get the OT pay they're entitled to, the fix is easy: We'll recompute after we discover the error and write them a check for the owed amount.

If only it were that easy. There are at least two reasons why it's not:

1. **It's expensive.** The fix isn't always just to write a check for the difference. Often employees in that situation think they've been wronged. And then they do what people often do when they think they've been wronged – they hire a lawyer and sue.

Once you get into court with an FLSA violation, you're looking at legal fees, damages *and* the OT amount owed. Plus, if the violation involves more than one employee, you could be looking at a class-action suit where the company has to pay the employees' lawyers.

So a violation of a few hundred dollars in OT pay ends up costing in the neighborhood of \$10,000 to \$20,000 after all is said and done.

2. **It's under a microscope.** When the FLSA was passed, some labor groups complained that it was too employer-friendly. To counter that, FLSA's supporters in government vowed that violators wouldn't get off easy.

As a result, the federal government aggressively pursues violations, and punishments are severe and costly to the company.

FLSA: The basics

FLSA has many parts covering many aspects of employment law, including minimum wage and child-labor restrictions. The parts of the FLSA that affect all employers are those that cover pay, and especially overtime pay. Here are the main questions you'll want answered:

- Who's eligible for OT pay?
- How do they qualify for OT pay?
- Who's not eligible ("exempt") for OT pay?
- How do we determine who's exempt?

Who's eligible for OT pay?

The rules of FLSA say you should start with considering that all your employees are eligible for OT pay. It's up to the employer to show that the employee is exempt, and not eligible.

In other words, an employer cannot say to an employee, "Prove that you're 'nonexempt,' that you meet the guidelines for receiving OT pay." It is up to the employer to prove that the employee *doesn't* meet the guidelines. If an employer can't prove that, the employee must be paid OT after having worked the required hours.

How do they qualify for OT pay?

Any nonexempt employee must receive 1^{1/2} times the employee's hourly rate of pay for all hours worked more than 40 in a workweek.

Suppose an employee works more than 40 hours in a week without authorization from the boss to do so. Can you deny OT pay? The answer is a clear, definite "no." Authorization doesn't matter. If the eligible employee puts in more than 40 hours, the company must pay that employee 1^{1/2} times the employee's hourly rate of pay for all hours worked over 40.

Suppose an employee works more than 40 hours in a week even after the boss forbids it. Can you deny OT pay? Again, the answer is "no." Even if an employee ignores orders and works more than 40 hours, the company

must pay that employee 1^{1/2} times the employee's hourly rate of pay for all hours worked over 40.

Of course, refusing to follow the supervisor's orders can be dealt with as a performance issue, but not as a pay issue.

Who's not eligible (exempt) for OT pay?

FLSA lists two major "tests" for determining whether an employee is exempt from eligibility for OT pay.

- **Salary basis.** An exempt employee must be paid the same amount – a true "salary" – every week, no matter how many hours he or she works. That amount must be at least \$455 a week, or \$23,660 a year. That part is fairly straightforward.
- **Primary duties.** The main tasks an employee is expected to perform must fall into the executive, professional or administrative categories listed in the FLSA. Let's break down each of those categories to give a clearer picture of this part of the FLSA

Primary duties

Employees who spend 50% or more of their time performing tasks that fall into the "exempt" category generally are not eligible for OT pay. FLSA points out, however, that the 50% rule isn't the only standard for making the determination.

Employees could spend less than 50% of their time on exempt tasks and still be ineligible for OT pay. For instance, someone whose title is "assistant manager" might be called upon to stand in for the manager and make crucial decisions during that time.

In that instance, even though the person might not be in the manager's position 50% of the time, the assistant manager could be classified as exempt from OT pay because of the weight of the responsibility.

Note: FLSA clearly states that you can't classify someone as exempt *just by* putting "manager" in the person's title. That person must actually fill

some managerial, administrative or professional duties.

Let's look at what those duties entail under FLSA.

Executive exemption

Anyone who meets the executive exemption standard of FLSA must first of all be paid at least \$455 a week. That's always the basic part.

After that, it gets a little more complicated. So let's detail how the exemption works. To qualify for the executive exemption, an employee's primary duties must include:

- Management of an enterprise or of a department or subdivision.
- Customarily and regularly directing the work of two or more employees, and
- The authority to hire and fire, or to make recommendation regarding hire/fire, promotions or other changes in an employee's status, such as a job or location transfer.

Administrative exemption

As you might expect, the administrative exemption also has the requirement of the \$455-a-week minimum.

Let's look at and describe the other requirements of this exemption.

- **Nonmanual work directly related to management or general business.** Typically, these are people who do nonmanual jobs that cover several parts of the organization.

'Fill-in' managers: Exempt or nonexempt?

Your organization might employ people who act as fill-in managers – who jump around from one department to another and regularly fill in for managers who are on vacation, out sick, etc.

Fill-ins, then, don't regularly manage the *same* department or people as a primary duty, but they are involved in managing most of the time.

So are fill-ins considered exempt or nonexempt?

Every situation is different, but generally fill-ins meet the standard for the executive exemption and thus are exempt from OT pay.

The key here is whether they spend time managing – not whether they manage the same department or people all the time.

Some examples: accountants and other finance people, human resources, marketing.

Those employees regularly deal with several parts of the organization.

■ **The exercise of discretion and independent judgment on significant matters.**

Generally, the best way to determine whether someone meets this requirement is to ask: Does this person make policy or just implement policy?

Someone who makes policy is exercising discretion and independent judgment on significant matters. Someone who just follows policy does not exercise that discretion or independent judgment.

Another way to put it: The exempt person formulates the procedures manual; the nonexempt person just follows the manual.

Another way to judge the significance of a person's decisions is to consider the financial impact of those decisions. The greater the amount of money involved, the more likely it is that the decision-maker is exempt.

Note that the exempt's decisions can be subject to review at a higher level. What matters is that the person has the power to make decisions of significance, not that someone else takes a look at those decisions.

Professional exemption

Again, the \$455-a-week minimum is required for this exemption.

Outside of salary, here's what you should be looking for when placing people in the "professional" category of exemptions:

How do we classify 'administrative assistants'?

Do administrative assistants meet the the FLSA standards for OT exemption? Generally speaking, no.

There are exceptions. An administrative assistant to a big-company CEO, for instance, might be supervising others or making significant independent decisions.

Usually, however, an administrative assistant – or what used to be called a "secretary" – is eligible for and must receive OT pay for all time worked above 40 hours in a week.

- **Advanced knowledge in a field of science or learning.** Examples of people who have such advanced knowledge are doctors, lawyers, engineers, architects and accountants. In many instances, such employees must have some professional certification or license to practice their profession – such as CPA.
- **Knowledge acquired by a prolonged course of specialized intellectual instruction.** FLSA doesn't specify that people in the "professional" category must hold advanced degrees, but most do.

Computer professionals

A special category of exempt professional has evolved since the FLSA was mandated: computer professionals.

Because of the nature of the work in that field, some special rules apply:

Pay. The usual \$455-a-week minimum applies to the computer-professional category, but this category is the only one that also sets an hourly minimum, too: \$27.63.

Duties. The standards for duties for this category are narrowly defined and specific to the profession.

Computer professionals are expected to be involved in computer systems, software and machine-operating systems. And they must, as primary duties, perform analysis, design, develop, create or modify those systems, as well as build documentation.

Can you require exempts to punch a time clock?

You can require exempt employees to punch a time clock or follow any other method of attendance recordkeeping your organization uses.

Since many exempts fall into the category of "professional" employees, they usually aren't required to punch a time clock to record hours worked – since actual hours worked has no bearing on the exempt employee's salary.

It's OK if you decide to forego timekeeping for exempts, but you can require it if your company chooses to do so, for whatever reasons – such as verifying the amount of time an employee worked on a particular customer's project or just to verify attendance.

And the way time is recorded is totally up to the organization. You can use time clocks, attendance sheets or any other reasonable method.

Who doesn't meet the 'computer professional' standard?

The Department of Labor has specifically designated some computer-related work as “not professional” and therefore not in the exempt category (*see sidebar at right*).

Those that do not meet the standard are:

- computer repair specialists
- help-desk personnel, and
- Web-page designers.

Companies that employ people in those positions generally cannot place them in the exempt category unless the jobs come with added duties and responsibilities over and above what we normally consider appropriate for those jobs.

Outside sales employees

FLSA recognizes many types of *outside* sales employees as exempt from OT pay.

One qualification that sets these positions apart from most of the other exempt types: salary, or the lack of it. The position requires no salary basis or minimum as a stipulation for being in the exempt category.

The standards for the outside-sales exemption are:

- The job must be regularly and customarily performed away from the employer's place of business (*see sidebar at right*), and
- The employee must make sales and obtain orders. So, for instance, a delivery driver who just fills a standing order for a

The special case of computer 'integrators'

After several companies requested clarification, the Department of Labor ruled that “integrators” do not meet the standard for exempt computer professionals.

An integrator is a specialized employee who takes software developed by another employee, and loads it onto customers' computers.

As part of the job, the integrator normally writes the code necessary to blend the software in with the customers hardware and network.

While there appears to be some software development required of the job, the Department of Labor has ruled it's not enough to put integrators into the exempt category.

So all integrators – or whatever title an organization uses for the position – must be paid time-and-a-half for all weekly hours over 40.

product such as bread is not considered exempt, even if that driver gets a commission on the order.

Highly compensated employees

FLSA has an exempt category based partly on money earned, and employees who fall into that category are considered “highly compensated.”

Here’s how it works:

- The employee’s total annual compensation must be at least \$100,000 – at least \$23,660 of which must be salary. So the amount over \$23,660 can consist of commissions or other incentive pay according to a set plan, but it can’t be one-time bonuses or awards
- The employee must perform some type of office or nonmanual work, and
- The employee must perform at least one of the duties described in the tests for executive, administrative or professional exemptions.

Note: The \$100,000 figure is based on a full year’s employment. If an employee works less than a full year, the figure is prorated to the time worked. So, for example, an employee who works six months out of the year may be considered “highly compensated” if that employee earns \$50,000, or half of the \$100,000 figure.

For that reason and others, it’s a good idea to keep accurate records on the number days an employee – exempt or nonexempt – works each year. Without that data, you can’t support prorating the pay eligibility of a

Inside sales: Nonexempt

The Department of Labor has ruled that inside sales people are classified nonexempt and must be paid time-and-a-half for all weekly hours over 40.

Those classified as inside sales people work the majority of time at the employer’s place of business.

Some do their work on the telephone, face to face with customers who come to the site, or a combination of both.

But unless they’re regularly “on the road” making customer calls, they’re considered nonexempt.

The exception: Some financially successful inside sales employees (*see “Highly compensated employees”*).

highly compensated employee. However you can't use an employee's time off under the Family and Medical Leave Act when prorating. That time is considered the same as time worked.

The job description: Your building block

The job description is your basic document for correctly classifying employees as exempt or nonexempt. If the description is up-to-date and accurate, you'll have most of what you need to make a classification decision that will stand up to scrutiny.

Here are three steps to help you ensure your job description make the grade:

1. Have supervisors review the descriptions against employees' actual duties
2. Revise the descriptions as needed, and make sure to document any discretion or authority the employee has that's been "understood" but not written down, and
3. Reclassify employees as needed, and pay special attention to reclassifying if there's been a broad restructuring of duties in your organization.

Handling reclassification

One of the touchiest parts of administering FLSA rules comes when you review an employee's duties and realize the

DOL Opinion Letter: Exempts' pay and leave for weather- related absences

If because of inclement weather your company closes for less than a full week, you must pay exempt employees their full weekly salary. No deductions can be made from exempts' pay for partial weeks missed because of weather-related closures.

That's straight from a U.S. Department of Labor Opinion Letter.

If the exempt employee has enough banked leave to cover the closure, you may debit the leave. If the employee has no leave, the full week's salary must be paid.

If you remain open during inclement weather but the exempt employee remains at home, the employer must pay the full weekly salary, but you can deduct missed time from any available leave. If no leave is available, you can deduct from the employee's salary for a *full day's* absence.

(Note: U.S. DOL Opinion Letters do not have the force of law, but they do reflect the department's official stand on specific issues.)

employee has been classified incorrectly: An exempt should be nonexempt, or vice versa.

Consider that you may be dealing with one of two situations:

- **An employee who's been reclassified as exempt** must be told he or she is no longer eligible for OT pay – after receiving it in the past, sometimes for years.
- **An employee who's been reclassified as nonexempt** – and is now eligible for OT pay – realizes he or she has worked OT in the past and not been paid for it.

Either way, you're dealing with someone who may be unhappy and seek revenge by filing a lawsuit or a complaint with the DOL.

What to do? With either employee, you're probably looking at someone who feels the sting of losing money. If possible, look into adjusting salaries to make up for the loss.

Of course that's not always possible, so you may have to defend your decision against some sort of legal complaint. If that's the case, be ready with:

- **An explanation of why and how things changed.** Presumably the person's job changed, and often the case is that the job evolved over time from one type of position to another. Document that the change took place in steps and that the steps, taken as a group, led to a change in classification.
- **Notes of major changes** – Keep notes of changes involving the organization as a whole or just the employee – that affected the

DOL Opinion Letter: No salary deductions for exempts' equipment damage, but...

Suppose an exempt employee causes damage to or loss of company equipment due to the employee's negligence. Can the company deduct the cost of repairs or replacement from the employee's salary?

No, according to a U.S. Department of Labor opinion letter. Such a deduction would violate the FLSA rules on exempts' pay.

However, you can, as a matter of policy, require that exempts and others reimburse the company for equipment loss or damages.

So you can get a check from the employee, but you can't deduct from salary.

(Note: U.S. DOL Opinion Letters do not have the force of law, but they do reflect the department's official stand on specific issues.)

classification. Did you do a reorganization? Did you change who the employee reported to or the level of the employee's responsibility?

Handling deductions

How you handle deductions from exempts' salaries can be just as important as any other aspect of applying the law.

In summary, improper deductions can lead to a loss of an employee's exempt status, violations of the law and requirement for paying overtime.

So the first and foremost "can't" for deductions is:

- You can't reduce exempts' salary based on the quality or quantity of the employee's work. The law assumes that exempts get the same weekly pay, without respect to how much they produce or the quality of what they produce.

Let's look at some major "cans" of deductions for exempts.

Full-day deductions

FLSA allows some salary deductions that can be done only in full-day increments, and not hourly or partial-day deductions.

- You can deduct for a full day's absence for personal reasons when the employee has no vacation time that can be used to cover the day. Keep in mind, again,

FAQ: Deducting leave for exempts

Q: Can employers charge exempts sick or vacation time in less-than-full-day increments?

A: Yes. If your customary system of accounting for sick or vacation time is on a less-than-full-day basis – such as hourly – you can charge exempts' time on that basis.

FAQ: Partial-day suspensions

Q: Suppose an exempt employee breaks a workplace-conduct rule and is suspended Tuesday at noon and all day Wednesday. What can be deducted from the employee's salary?

A: If the rule covered a major safety violation, you can deduct for a day-and-a-half's salary (half of Tuesday and all day Wednesday).

For any other type of violations, you can deduct only for one full day, since FLSA does not allow partial-day deductions for violations not related to safety.

that the deduction must be made in full-day increments to maintain the employee's exempt status.

- **You can** deduct for a full day's absence when the employee is sick but has no sick leave. Of course, if you have an official sick-leave plan, and the employee has built up days in the plan, those days can be used in lieu of salary deductions. Again the deductions can be only in full-day increments.
- **You can** deduct for amounts the employee receives for jury duty, witness fees and military pay. In other words, an exempt's salary can be reduced by the same amount the employee gets for jury duty, serving as a witness or serving in the military. Some companies handle this by having a policy in which the employee signs over the check to the employer, rather than doing a salary reduction.
- **You can** deduct for *major violations* of safety rules. This is one of the few times FLSA allows non-time-based deductions – essentially, penalties – from exempts' salaries. If you're going to deduct for safety violations, it's probably a good idea to document what those violations would be, so there's no dispute about what's "major." For instance, "not wearing a hardhat" in a designated area might be considered a major violation.
- **You can** deduct for full days' suspensions for violations of workplace-conduct rules, such as those governing sexual harassment or violence. Any suspension of this type should be detailed in a written policy that applies to all employees, exempts and nonexempts.
- **You can** deduct for full day's absence for any unpaid leave the employee takes under the Family and Medical Leave Act.

Partial-day deductions

FLSA allows some narrow salary deductions that can be done in partial-day increments.

- **You can** deduct partial days for unpaid intermittent leave taken under the Family and Medical Leave Act. Most intermittent leave is taken on an hourly basis – as, for example, medical appointments – so the law allows employers to deduct such time off from exempts' salaries on an

hourly or partial-day basis.

- **You can** deduct partial days for *major violations* of safety rules. There's overlap here, since violations of safety rules also can be penalized with full-day deductions, so it's up to the employer to decide when the penalty is full day or partial day.

Calculating hours worked

We've covered a lot of material on determining who's exempt, who's not and how to maintain the exempt status for an employee. Let's look at things from another angle and go over the ways to calculate hours worked for employees who are nonexempt – and eligible for OT pay.

FLSA has some strict rules about how the calculations should be done, and failure to comply can carry harsh penalties.

So let's look at some common but tricky situations that call for calculating nonexempts' hours.

'On-call' time

"On-call" time typically involves the situation where an employee wears a "beeper" and must be available to take calls to go to work. The employee is free to leave the place of employment and carry on normal off-work activities – such as going to a movie – but must come in to work or carry out an assignment when called.

FAQ: Deducting for company products

Q: An employer has a policy of allowing exempt employees to purchase company products at a discount and deducting the cost of the products from the employees' salary. Is there a risk that the OT exemption would be lost if after the deductions, an employee's salary dipped below the \$23,660 mark?

A: Probably not. The law is unclear about instances like that. As noted on p. 15, the DOL has barred employers from deducting for loss or damage to company-owned property, but deductions for purchases haven't been addressed.

So an employer is probably OK allowing such deductions. But the safe approach would be to avoid deductions and have the employees pay separately.

FAQ: A contract says no OT pay

Q: Can an employee who's considered nonexempt – and eligible for OT pay – sign a contract agreeing not to put in for OT for weekly hours over 40.

A: An employer and employee can draw up such a contract, but it won't hold in court if the employee later decides he or she does want OT pay. OT for nonexempts is a right that can't be signed away.

Are the on-call hours paid time? And must they be figured into overtime calculations? No. An on-call employee who's off the employer's premises and free to carry on normal activities doesn't get paid for those on-call hours.

The employee isn't "on the clock" until after receiving the come-in phone call and starting work activities.

Exception: On-call time can be considered normal working hours if the employee gets frequent calls. Let's say, for instance, a computer-repair person is on call in case of a machine breakdown. That person gets a call to walk another employee, over the phone, through the repair of a machine. Then the person gets another call of the same type 30 minutes later, and another call after that, and so on. In that situation, the employee's on-call time is considered working hours and must be used to calculate pay.

Training time

Many types of training scenarios call for the time to be considered paid working hours – such as when an employee is at work and being trained to do a job function.

For training time to be considered *nonpaid* time, *all four* of the following stipulations must exist:

1. Attendance is outside the employee's regular working hours
2. Attendance is fully voluntary
3. The training is not directly related to the employee's job, and
4. The employee does not perform productive work during training.

Dealing with state FLSA laws

No one document of this type can adequately cover the state variations of FLSA. Each state has its quirks, and some of those are related to special consideration given by the state legislature to certain industries in a state.

For instance:

- One state allows special OT rules for workers in the maple-syrup industry
- Another permits owners of forestry operations to use special provisions for computing wages and overtime rates.

In any case, all employers are required to follow the rules of the FLSA. No state can pass laws that give workers *fewer* rights than the federal FLSA does.

To learn the special rules in your state, your best bet is to check with your state Labor Department.

One typical scenario would involve a bookkeeper who wants to move up to an accounting job with the company.

That person decides to go to school at night to pursue an accounting degree. Such training is not “on the clock” because it’s outside normal working hours, voluntary, doesn’t relate to the job of bookkeeper (since the employee could perform that job without the training) and no work is done during the training.

Travel time

When a nonexempt is “on the road,” you’ll have to pay close attention to the circumstances and timing of the travel to determine whether travel time is paid time.

So let’s look at the three “rules” for making a correct decision about whether a nonexempt gets paid while in travel status.

Rule 1: All working time is paid time. That is, if a nonexempt employee is *doing substantive work* in a hotel room, in a car, on a plane, etc., the employee must be paid for that time.

So, for instance, if a nonexempt employee sits next to a customer on a plane at 8 p.m. and explains how to use software purchased from your company, that employee must be paid for the time – and paid OT if the time causes the weekly hours to exceed 40.

Rule 2: All travel during the employee’s normal working hours is paid time, even if the travel takes place on a nonwork day.

To understand how this applies, take the example of the nonexempt

The mistake of ‘averaging out’

Some employers have been penalized for failure to pay overtime because of a simple bookkeeping error called “averaging out” hours.

What often happens is that an employer issues paychecks every two weeks and has some employees who at times work partial weeks and at other times work more-than-40-hour weeks.

So let’s say an employee works 30 hours the first week of the pay period and 50 hours the second week.

A timekeeper might just decide to list that employee as having worked 80 hours for the pay period – 40 hours each week. That’s illegal under the FLSA.

The law clearly states that nonexempt employees must receive time and a half for all *weekly* hours over 40.

employee who usually works 9 a.m. - 5 p.m., Monday through Friday.

Any time that employee travels between 9 a.m. and 5 p.m. must be paid and figured into overtime calculations if the person exceeds 40 hours in a week. And the time *must be considered paid even if that 9-5 travel took place on a Saturday or Sunday.*

So a nonexempt employee who's dozing in his plane seat on the trip home must be considered on the clock if the travel takes place 9-5 any day of the week.

Rule 3: All same-day travel time is paid time, except for time that substitutes for the nonexempt employee's normal commute.

Let's use another example to explain how the law applies here.

We'll use that same 9-5, nonexempt employee in Rule 2, and we'll say he normally works at an office 30 minutes from home. That employee takes a train at 7 a.m. to travel to a nearby city for a work assignment. He does the job, gets back on the train the same day, gets to the originating train station at 7 p.m. the same day and drives home.

Here's how the employee's work time is figured:

- The time spent driving to the station isn't paid time because it's considered a substitute for the commuting time the employee has when going to the normal place of business.
- All travel time from 7 a.m. to 7 p.m. is considered paid time, even though the employee normally doesn't start work until 9. That's where the same-day rule differs from other travel rules.
- Once the employee leaves the train and starts the drive home, he's no longer on paid time. As with the morning drive in, the evening drive is considered a substitute for normal commuting time.

'Safe harbor' provision

You can see that keeping on top of who's exempt, who's nonexempt, who gets OT pay and under what conditions can be complicated.

The Labor Dept. recognizes that, too, and as part of FLSA, has instituted what's called the "safe harbor" provision that you can lean on to avoid penalties if you've discovered that you made a mistake in deductions that results in a loss of exempt status for that employee.

The safe harbor provision notes that if you've made improper deductions, the exemption won't be lost if you:

- Clearly communicate the policy on prohibiting improper deductions
- Have a procedure for dealing with employee complaints
- Promptly reimburse employees for mistakes, and
- Make a good-faith effort to comply with the rules in the future.

Recordkeeping

Almost all employers keep some type of records for their employees, but FLSA lays out exactly what types of records are required to support decisions or if the Labor Dept. decides to do an FLSA audit.

Additionally, courts have detailed the types of records employers must produce when a lawsuit has been filed concerning an FLSA complaint by an employee. Here are the basic records required:

- Employee's full name and Social Security Number
- Employee's address, including ZIP code
- Gender and occupation
- Time and day of week when employee's workweek begins
- Hours worked each day
- Total hours worked each workweek
- Basis on which employee's wages are paid – hourly, daily, weekly, etc.
- Regularly hourly pay rate

- Total straight-time earnings
- Total wages paid each pay period
- All additions or deductions to pay, and
- Date of payment and the pay period covered by the payment.

Be aware that when records are incomplete or missing, courts will look to the side that has the best-kept records as the last word.

So if an employer can't produce records, courts will rely on an employee's records – even if they seem haphazard, such as “hours worked” scrawled on a note pad.

Similarly, courts and the Labor Dept. are unlikely to accept records that seem to have been compiled and assembled after a complaint has been filed. That means you're at a big disadvantage if a complaint has been filed and you haven't been keeping records right all along.

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