

Overtime Pay

So, what do employers need to know about overtime? Basically, unless an exemption exists, an employee must be paid at least minimum wage and overtime at 150% of normal rate for hours worked in excess of 40 per week. Employees cannot waive or sign away the right to minimum wage and overtime. If a significant portion of your work force is exempt from overtime, employees are probably misclassified. If you are in doubt, get professional help to avoid the possibility of stiff penalties and law suits.

There are three tests for determining who is eligible for overtime ("non-exempt") and who is not ("exempt"):

1. The "salary-basis" test. To be exempt from overtime, workers must be paid a set salary, not an hourly wage. This test existed under the old federal overtime law, and did not change with the 2004 stipulations.

2. The "salary-level" test. This test has been amended under the 2004 law. In order to be exempt from overtime, employees must earn a minimum salary of \$455 a week, or \$23,660 a year. That is triple the prior minimum salary of \$155 a week, or \$8,060 a year. A newer stipulation to this test is that white-collar employees who earn more than \$100,000 a year are automatically exempt from overtime pay.

3. The "duties" test. This test establishes eligibility based on the type of work an employee performs every day. Under the federal law, an employee whose job duties are deemed "administrative, "professional," or "executive" in nature does not qualify for overtime. These include "learned" professionals such as lawyers, doctors, registered nurses and engineers. However, technicians, beauticians, licensed practical nurses, and other "skilled trades people" are owed overtime, as well as firefighters, police sergeants and other emergency personnel deemed to be "first responders."

The following duties are deemed exempt from overtime:

Administrative Employee Exemption:

The administrative employee exemption applies to:

- Those who engage in office or non-manual labor directly related to the management or general business operations of the company or its customers; and
- use discretion and independent judgment regarding matters of significance.

The positions that fall under this category are:

- assistant departmental managers
- office managers
- human resource personnel

This exemption typically does not apply to:

- clerks
- cashiers
- secretaries

- those whose main duties involve bookkeeping, payroll preparation, sending out monthly statements of account or routine clerical duties.

An employee who simply applies protocols or provisions from a manual on a case-by-case basis is not exempt.

Executive Employee Exemption:

The executive employee exemption applies to:

- Those who manage an enterprise or a recognized department of an enterprise;
- regularly direct the work of two or more employees; and
- have the authority to hire or fire employees (or their recommendations as to hiring or firing employees are given great weight).

This exemption often covers business owners and managers.

Learned Professional Employee Exemption:

This applies to those who perform work requiring advanced knowledge in a field of science or learning, which is acquired by specialized instruction. For example, this typically applies to attorneys, dental hygienists, registered or certified medical technologists and nurses and accountants, but not accounting clerks or bookkeepers.

Outside Sales Employee Exemption

The outside sales employee exemption covers:

- Those who make sales or obtain orders/contracts for services purchased by a customer; and
- are regularly away from their employer's place of business.

Outside sales employees do not need to be paid a minimum salary to be exempt from overtime.

Highly Compensated Employee Exemption

This exemption refers to:

- Those who perform office or non-manual work and are paid a total annual compensation of \$100,000 or more, (which must include at least \$455 per week); and
- regularly perform at least one of the duties of an exempt executive, administrative or professional employee.

This applies to most "white collar" employees earning over \$100,000.

Computer Employee Exemption

This rules exempt those who are compensated \$455 a week salary or at a rate no less than \$27.63 per hour for each hour worked, and are engaged in at least one of the following:

1. the application of systems analysis techniques and procedures; or

2. the design, development, documentation, analysis, creation, testing or modification of computer systems or programs; or
3. the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
4. a combination of 1 through 3.

Others who may be exempt from overtime include: live-in domestic help, agricultural workers, drivers engaged in the interstate shipment of goods, employees of small newspapers, companions other than nurses, taxi drivers, certain parts and sales employees and mechanics in auto dealerships.

Defining a "work week": A workweek can be any configuration and federal law defines a workweek as any 168 consecutive hour period (7 days x 24 hours). The 168-hour workweek cannot be changed to avoid overtime pay. If a flexible workweek requires employees to work over 8 hours in a 24-hour period, see your state labor department. Some states do require overtime pay for work over 8 hours.

Hour not included in overtime: Paid vacation and holidays, paid sick days, jury duty and other paid work hours are not used to calculate overtime.

Paying different rates: Overtime is based on the regular rate of pay for the work week, not on any one hourly rate. Add up the total compensation for the week and divide by the total hours to get at the average rate of pay and compute overtime pay based on this rate. When an employee is paid a regular rate and a piece rate, federal wage and hour law requires you combine all pay provided to the employee for the workweek and divide the total by 40 to get the average hourly pay.

Time in lieu of overtime pay: You pay give employees time off in lieu of overtime pay, provided that the time off is taken in the same workweek. Only certain government and municipal employees can be granted time off in one workweek for overtime worked in another workweek.

Recordkeeping Requirements for Employers

Employers must maintain the following for all exempt employees:

- Full name and any employee symbol or number identifier used on any records.
- Social security number.
- Home address, including zip code.
- Date of birth if under 19 years of age.
- Sex and occupation.
- Dates, amounts and nature of additions and deductions to wages.
- Total wages paid each pay period.
- Date of payment and the pay period covered by the payment.

Employers should periodically review the job duties, written job descriptions and pay structures of their employees to ensure they are properly classified as exempt or nonexempt.

State Overtime Rules May Differ from Federal Rules

Employers are reminded that some states also have overtime laws that may differ from the federal requirements. Therefore, if an employee is subject to both state and federal overtime

laws, the employee is entitled to the overtime rule that will provide the higher rate of pay. However, federal regulations exempt highly compensated employees earning over \$100,000 annually from overtime, if they perform at least one job duty of an exempt executive, administrative or professional employee.

For information on a particular state's overtime requirements, and how they contrast with the federal requirements, visit <http://www.dol.gov/esa/programs/whd/state/state.htm>