



DEPT OF LABOR (DOL)

WAGE AND HOUR RULE CHANGES

EXEMPT VERSUS NON-EXEMPT STATUS

The US Department of Labor's fair labor standard act (FLSA) outlines mandated regulations all employers must follow with regard to payment of wages to employees. In short, the regulations state that any employee must be paid the federal minimum wage for all hours worked. Hours in excess of 40, during any single workweek, must be paid at one and a half times the regular rate of pay. Commonly at issue among employers is the determination of which employees are eligible for overtime pay.

Recently, the Department of Labor issued a new ruling outlining overtime eligibility criteria. Stated as exempt or non-exempt, those who are "exempt" don't get overtime pay. Those who are "non-exempt" do get overtime pay for eligible hours worked. Following are the criteria highlights. As you read it over, know that the HR consultants at Empo look forward to getting your calls on this often-confusing topic.

There are two categories to consider when determining if an employee is eligible to receive overtime pay; first, what is their wage and second, what are their job duties. This is not an "either or" situation, BOTH categories must be satisfied in order for an employee to be called exempt or in lay terms, not going to get any overtime pay.

WAGES:

- Exempt employees, who are not eligible for overtime, must be paid a minimum of \$455 per week, which annually calculates to \$23,660.
- Computer employees making a minimum of \$27.63 per hour are also not eligible for overtime.
- Highly compensated employees (salary or hourly) of \$100,000 or more are not eligible.
- There is no minimum wage level for outside sales persons.

Note: paying wages on a "salary" basis doesn't automatically equate to not getting any overtime. Qualifying for overtime is based on the minimum amount of money an employee makes plus their job.

JOB DUTIES:

- Administrative
 - Primary duty of an administrative employee must be the performance of office or non-manual work directly related to management of, or the general operation of the business. This employee is regularly exercising independent judgment and discretion that can significantly impact the business and its bottom line.
- Executive
 - Primary duty of an executive must be the management of an organization or of a specific department or division in that organization. They must regularly direct the work of at least two or more full-time employees and have full authority to hire, fire, promote or significantly contribute to the hiring, firing, or promoting of employees.
- Outside Sales
 - Primary duty of a sales person must be the making of sales, obtaining orders, or signing of contracts for services or products. They must continually be engaged in this work away from the company's place of business or their home office.
- Computer Employees
 - Described as computer systems analysis, programming, or software engineering, these duties include user consultation, determining software/hardware specifications, design, development, documentation, software test creation, and system or program prototypes. Equipment repair or helpdesk functions do not apply.
- Other
 - Creative, science, and learning professions. Call for discussion of criteria.

JOB POSITIONS THAT ARE COMMONLY MISUNDERSTOOD:

- Inside sales – people who are engaged in sales activities, but seldom or never leave the employer's place of business are not exempt. They must be paid overtime for all hours worked over 40 in a single workweek.
- Administrative – people who are generally directed in their work activities, meaning a supervisor explains or regularly follows up on their work, are not exempt from overtime.
- Customer service - people who work in call centers; either in a central location or from home, are not exempt from overtime.
- Managers – who have part-time people reporting to them are not exempt from overtime.

OVERTIME RATE OF PAY CALCULATION:

To determine what the overtime rate of pay should be, employees are mandated to include:

- Regular wage rate
- Shift differential rate
- Commission
- Bonuses
- Incentive pay
- On call pay

DEDUCTIONS FROM PAY:

Employers often want to understand, “when can I deduct pay from an employee's paycheck?”

First rule, you cannot deduct pay from any employee for poor performance. It is illegal to do so. Empo has processes and suggestions for managing employee performance, but reducing pay is not one of them.

If the employee is a non-exempt person, eligible to receive overtime pay, pay them for the hours they work. If they don't work, they don't get paid. UNLESS the employee is using earned and approved paid time off hours such as vacation, sick, or personal time.

If the employee is exempt and does not receive any overtime, pay reductions are pretty much never allowed. In rare circumstances a medically related absence may qualify, but call Empo to discuss this before initiating the reduction in pay. Allowing an exempt employee to “take time off without pay,” is also tricky business. Call Empo so we can review these on a case-by-case basis.

Remember, it is illegal to reduce an employee's pay due to poor performance. You cannot reduce an employee's rate of pay if they fail to show up for work or are tardy, if they fail to meet their sales quotas, or if they make mistakes in their work. You can, however, deal with those issues in a different manner that is legal. Call your Empo HR consultant to discuss these situations.

CONSEQUENCES OF ILLEGAL PAY REDUCTIONS:

The most common treatment is to "back pay," any employee who has had improper deduction, twice the amount they would have normally gotten. For example, the employee should have been paid an overtime for 44 hours, but wasn't. They would likely receive 88 total hours pay, as determined by a judge's decision.

Making up a payment to the employee who was shorted on their paycheck can just be the beginning. The investigation of a single complaint about an incorrect paycheck can reveal more than you want the Department of Labor (DOL) to know. That investigation allows them the opportunity to review your pay practices for all your employees. Trust us when we say you don't want to go there.

SUMMARY:

Paying employees correctly is of utmost importance.

- Make sure you understand exempt and non-exempt criteria
- Review your organization job descriptions. Do they accurately reflect the "job duties?" Remember, "job duties" is one-half the equation for determining exempt or non-exempt. (Note: any DOL investigation will start by asking for them)
- Are you accurately capturing hours worked? If your non-exempt employees aren't currently completing timesheets or punching a time clock, set a process in place to do so. How else would you verify for the DOL the hours an employee worked?
- Consider your time off policies. Are you allowing an exempt employee to take unpaid time off? Does your leave of absence policy inadvertently use language to allow it?

Any time you have questions on your pay practices, talk to Empo. Supporting your business is our business!

