



# OVERTIME

## *Is Your Nonprofit at Risk?*

September 19, 2019

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# Overview

- Why this is a good time to learn/review.
- Who is eligible for overtime?
- What time counts toward overtime?
- What pay is included in calculating overtime?
- What is the federal Department of Labor up to?



## WHO GETS OVERTIME?



# WHO GETS OVERTIME?

- Almost all employees in the U.S. are entitled to receive overtime, unless they are exempt from this requirement.
- “Non-exempt” employees must receive overtime pay for all hours **worked** OVER 40 in one week.
  - No federal requirement to pay overtime between 35 and 40 hours
  - No comp time
- **Overtime pay** is time and one half times an employee’s regular rate of pay.
  - Example: an employee whose regular rate is \$10 per hour is entitled to \$15 per hour in overtime.
- Overtime pay must be paid even if unauthorized.
  - Can discipline



# WHO IS EXEMPT?

Employees meeting **all three** conditions are exempt:

- (1) primarily perform certain types of duties;
  - (2) meet the weekly salary threshold; *and*
  - (3) are paid on a salary basis.
- 
- **Exceptions:**
    - No minimum salary for teachers, doctors, and lawyers
    - Computer professionals must be paid at weekly threshold OR at least \$27.63/hour



# MINIMUM SALARY THRESHOLD

- Federal law sets minimum wage and salary threshold.
- States may set higher minimum wages and thresholds.
- New York State salary threshold has increased in stages since December 31, 2016.
  - Different standards based on size of employer and location of employees.
- Large Employers in NYC (11 or more employees):
  - \$1,125/wk (\$58,500/yr) effective December 31, 2018
- Small Employers in NYC (10 or fewer employees):
  - \$900/wk (\$46,800/yr)
  - \$1,012.50/wk (\$52,650/yr) effective December 31, 2018
  - \$1,125/wk (\$58,500/yr) effective December 31, 2019



# “WHITE COLLAR” DUTIES

- Executive: Primary duty to manage the organization or a department. Regularly supervises at least 2 full-time employees. *Manages people*
- Professional: Primary duty is the performance of work requiring advanced knowledge or artistic skill and consistent exercise of discretion and judgment. *Manages knowledge*
- Administrative: Primary duty is the performance of work directly related to general business operations of the organization involving consistent exercise of discretion and judgment in matters of significance. *Manages functions*
- Computer Professional: Primary duty is using skills of computer systems analyst, computer programmer, software engineer or other similarly skilled worker.
- *Common denominator is that exempt employees consistently exercise discretion and independent judgement on matters of importance*



# SALARY BASIS

- Exempt employees must be paid same weekly salary, regardless of how much or how little they work.
  - also regardless of quantity or quality of work
- Federal law provides for a limited number of pay deductions, in **full day** increments, without loss of exemption.
  - FMLA permits partial-day deductions for intermittent leave.
- Any other deductions violate the “salary basis” requirement and cause loss of the exemption (*e.g.*, docking an exempt employee for a half-day’s absence).
- Include a “safe harbor” provision in personnel policies that will allow you to correct improper salary deductions after EE brings them to your attention.





**IS THERE A PROBLEM?....**

**AND HOW TO FIX IT**



# SELF ASSESSMENT

- Review all jobs at or near the exempt threshold of \$58,500/\$52,650
  - are exempt duties primary duties of the position?
  - review and if necessary update job descriptions to accurately reflect duties
  - maintain salary basis test
  - determine if overtime is worked regularly
  - determine how much overtime is worked regularly
- Consult an attorney to maintain privilege



## REMAINING EXEMPT

- If the job is to remain exempt, then:
  - raise the weekly salary to at least the salary threshold (current/future)
    - Wage Theft Prevention Act
- Salary compression issues throughout organization
- Eliminate non-exempt duties to greatest extent possible



## RECLASSIFICATION TO NON-EXEMPT

- Limit hours to forty in one workweek
  - may need to reassign some duties
- Lower base salary to maintain overall compensation including anticipated overtime
- May but need not convert to hourly wage
- Can continue to pay salary, but determine what hours are covered
- Communicate status, base rate and overtime rate in compliance with WTPA



# RECLASSIFICATION PROCESS

- NYS employers must give 7 days written notice
- Communicate with affected employees
- General announcement to all employees
- Educate line supervisors
- Negotiate effects with union if applicable
- Avoid inappropriate use of “independent contractors” and volunteers



# MANAGING RECLASSIFIED EMPLOYEES

- Adjust schedules as needed for evening and weekend work to maintain forty hour week
- Track working hours (train employees and managers)
- Review policies that differentiate between exempt and non-exempt employees
- Review job titles and job descriptions
- Morale issues and retention



# WORKING REMOTELY

If non-exempt employees work remotely, it is important to carefully track hours worked:

- Maintain timesheets (hard copy or digital form)
- Have a mechanism for verifying hours worked
- Require any overtime to be authorized in writing, in advance, subject to discipline
- But even unauthorized time worked must be compensated.

NOTE: Remember that any remote work, including checking email, counts as working time.



## **WHAT IS WORKING TIME?**





# MEAL AND REST PERIODS

- Meals: Working time if employee actually works
  - includes checking email or answering the phone
- Breaks: Breaks of 20 minutes or less must be paid as working time
  - Unauthorized extensions need not be paid or included as working time if written policy
  - Lactation breaks: must be provided; paid if under 20 minutes



# PAID TIME OFF

- Under federal law, payment for holidays, vacation or sick days is NOT required unless the employer has established a policy to grant such pay.
  - New York City requires employers with at least five employees to provide paid safe and sick time
  - New York State requires paid leave for bonding with new child or medical care for a family member
- Paid time off, such as holidays and vacation days, when no work is performed, does not count as “time worked.”
- Meal periods when no work is performed, whether paid or unpaid, are not working time.
- Only time *actually worked* counts toward overtime!



# LECTURES AND COURSES

Time spent attending job-related lectures or courses is working time unless:

- course is held outside normal working hours,
- course is unrelated to employee's regular job,
- attendance is truly voluntary, AND
- no productive work is performed.



# OFF THE CLOCK WORK

- Non-exempt employees who arrive early and begin working must be compensated for that time.
- Requiring meetings prior to or after a scheduled shift means those periods must also be compensated.
- Other examples of impermissible off the clock work include:
  - cleaning equipment,
  - doing paperwork,
  - dropping off mail or depositing checks on the way home
  - taking phone calls on the way home or at home.



# TRAVEL TIME

- Time spent commuting to and from work is not working time.
- Time spent traveling to different worksites during normal work hours is working time.
- Out-of-town travel:
  - travel from home to the airport or train station is not working time.
  - travel during the employee's normal working hours is time worked.
  - According to the US DOL, travel outside normal work hours as a passenger does not constitute hours worked, but if employee is driving (other than normal commuting) then time counts as hours worked;
    - ***but consider paying for this time!***



# ON-CALL PERIODS

- Not compensable working time if employee can effectively use the time for his/her own purposes.
  - Reasonable restrictions (i.e., a no-alcohol policy) will not convert on-call time into compensable hours.
- Sleep time – if an employee is on duty for 24 hours or more, both parties can agree to exclude meals and sleeping time.
  - No more than 8 hours of sleep time can be excluded, and the employee must have access to sleeping facilities allowing uninterrupted sleep.
  - If employee cannot sleep for at least 5 uninterrupted hours, the entire period becomes hours worked.
- On call schedules may be subject to challenge:
  - Reporting pay may be required under NYS law



# SPECIAL EVENTS

- If required to work during event, must be paid.
- If not required to work, but must attend, best practice is to pay.
- Time at event may trigger overtime!



## **WHAT IS THE REGULAR RATE?**





# DETERMINING THE REGULAR RATE OF PAY

- Regular rate of pay is the basis for overtime pay.
- Not all compensation is included in the regular rate of pay.
- The regular rate is computed before any kind of payroll deduction is made.
  - Regular rates are not based on take-home pay.
- The regular rate of pay may be stated as a fixed hourly rate (e.g. \$15.00 per hour).
- Otherwise, the regular rate of pay is derived by dividing the compensation for the workweek by the number of hours worked.
- *Remember that the employee must receive at least minimum wage for each hour worked!*



# DIFFERENT RATES OF PAY

If a non-exempt employee performs different jobs having different rates of pay during the same workweek, there are two options for computing overtime pay:

- **weighted average:**
  - total earnings are computed to include compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs; OR
- **before** work is performed, agree with employee that overtime rate will be based only on the rate for the type of work he/she is performing during the overtime hours.
  - GET IT IN WRITING!
- The employee must be paid at least minimum wage for all hours worked.



# FEDERAL UPDATE

- Current salary threshold \$455/wk (\$23,660/yr)
- Proposed rule: \$679/week (\$35,308/yr)
  - ***significantly below NYS threshold***
  - ***would affect certain professionals but not teachers, doctors, and lawyers***
- Duties test for executive, administrative, and professional unchanged
- Salary threshold unchanged
- Clarifications to “regular rate of pay”



# RESOURCES

U.S. Department of Labor guidelines on exemptions for employees under the FLSA:

<https://www.dol.gov/whd/overtime/final2016/index.htm>

<https://www.dol.gov/whd/#>

New York Department of Labor :

[http://labor.ny.gov/workerprotection/laborstandards/labor\\_standards.shtm](http://labor.ny.gov/workerprotection/laborstandards/labor_standards.shtm)

<https://www.labor.ny.gov/legal/counsel/pdf/overtime-frequently-asked-questions.pdf>



# QUESTIONS???

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