



OVERTIME

Is Your Nonprofit at Risk?

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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):
 - \$975/wk (\$50,700/yr)
 - **\$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 \$50,700
 - 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

- 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 required 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 over time 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)
- Secretary of Labor has indicated should be \$33,000/yr
- Federal DOL to issue Proposed Rulemaking early 2019
 - Over 200,000 responses to Request for Information
 - Listening Sessions scheduled for 7 cities during September
- Possible changes:
 - Duties test for executive, administrative, and professional
 - Salary threshold
 - amount
 - method of updating
 - frequency of updating
 - 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

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



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QUESTIONS???

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