



Legal Minute

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Fair Labor Standards Act: New Overtime Regulations

By Sheila Gladstone

What is Required Under the Fair Labor Standards Act (FLSA)?

The FLSA is the major federal law governing wages and hours. It requires employers, including nonprofits, to pay employees a minimum wage and overtime pay for all hours worked in excess of 40 hours in a workweek, unless the employee is an exempt employee. Employers are generally required to pay employees one and a half times their regular rate of pay for their overtime hours.

Under the new regulations, **effective August 23, 2004**, workers may be exempt if they are “white-collar exempt” employees, *bona fide* executives, administrators, professionals, computer professionals, and outside sales employees. The regulations also add special exemptions for business owners and highly compensated employees (those making over \$100,000). A safe-harbor provision was also added to allow employers with a written policy addressing pay deductions for exempt employees, accompanied by an employee complaint process, to correct wrongful deductions without penalty.

What are Some Common Myths about Overtime Laws and Regulations?

Paying an employee a salary makes them exempt - **not true**.

Giving an employee an exempt-sounding job title makes them exempt - **not true**.

What are the Two Main Tests to Determine if an Employee is Exempt from Overtime Pay?

With only a few exceptions, exempt white-collar employees must be paid a true salary of at least \$455 per week (\$23,660 per year)—the “**salary test**.” Exempt employees must also meet the “**duties test**”—essentially an analysis of the “primary duty” of the employee, which is the most important duty of the employee based on a review of all the employee’s job functions.

What are the Duties Test Exemptions?

Executives: Exempt executives are the top leaders of the organization, those with true executive authority. Their primary duty involves managing the organization, and disciplining, hiring, and firing other employees. They routinely supervise two or more employees, and have discretion and independent judgment in running their operations. The most common examples are the president, executive director, CEO, department head, general manager, or branch manager. Supervisors who spend most of their time doing the same work as the employees they supervise are generally not exempt.

Administrators: Exempt administrators have almost as much authority as exempt executives, but usually without the supervision duties. Their primary duty involves non-manual work directly related to the management or general business operations of the organization, such as accounting, budgeting, auditing, quality control, purchasing, marketing, research, safety and health, personnel management, human resources, employee benefits, legal compliance, and similar activities. Administrators are often thought of as the back office management staff. Like executives, they have discretion and independent judgment regarding significant matters affecting the entire organization. Examples include general manager, HR manager and payroll manager.

Professionals: Exempt professionals include “*learned professionals*” and “*creative professionals*.” *Learned professionals* have undergone a prolonged and specialized period of academic instruction, and generally hold at least a four-year college degree in their field. Usually, they must hold a state license to practice their professions. They also have a great deal of discretion and independent judgment in their work. These professionals include doctors, attorneys, CPAs, engineers, architects, scientists, registered nurses, other licensed medical professionals, and teachers. *Creative professionals’* primary duty is performing work requiring invention, imagina-

tion, originality or talent in a recognized artistic or creative field, such as music, writing, acting and the graphic arts. The following generally meet these requirements: actors, musicians, composers, soloists, certain painters, certain journalists, writers, cartoonists, essayists and novelists.

Computer Professionals: Computer professionals are at the very top of their field—those who write computer software, analyze computer networks, determine what machines and software are needed, and diagnose and fix problems with computer network systems. This category does not include computer technicians, skilled in using certain hardware or software, or office staff, who may have expertise in certain software programs and who instruct others how to use them. Computer professionals may be paid either a salary or hourly, as long as the hourly rate is at least \$27.63 per hour.

Can an Employer Dock an Exempt Employee's Pay?

Very few deductions are permissible. A salary does not change based on the amount or quality of work performed. It cannot be docked for poor work or for missing a few hours of work in a day. There are a very few exceptions, such as deductions of a full day for absences due to personal business, medical reasons (if the company has a proper leave plan), or disciplinary suspensions resulting from infractions of major safety rules or workplace conduct rules. Partial-day deductions are permissible under the Family and Medical Leave Act. Finally, partial weeks worked at the beginning and end of employment may be paid on a pro rata basis, and accrued leave banks may be docked for partial days. Aside from those technical and limited exceptions, the general rule requires that a workweek in which any work is performed must be paid in full.

What is the "Safe Harbor" Provision?

The new regulations contain a "safe harbor" provision that allows an employer to pay back wrongful deductions instead of having the employee reclassified as a non-exempt employee. There are *three conditions*: the employer must (1) have a clear and well-known policy prohibiting improper deductions from salary and a way for employees to complain; (2) reimburse employees for illegal deductions; and (3) commit in good faith to follow the law in the future. The safe harbor is lost, though, if the employer violates its own policy by continuing to make illegal deductions after an employee's valid complaint. See Sample Policy on Exempt Employee Pay Deductions in the Legal Resource Library at www.texasbar.org.

What are the Penalties for Violations of FLSA?

The Department of Labor enforces the FLSA and may recover back wages for employees who have been underpaid in violation of the law. Violations may result in civil or criminal action.

What are Some Best Practices Tips?

Have an accurate and detailed job description to determine whether an employee is exempt from overtime pay. Have clear policies and procedures for deductions from pay of exempt employees.

Conclusion:

The new regulations really haven't changed much. Exempt employees are still the exception rather than the rule. They are still the most senior, highest-ranking, or professionally-certified employees in your organization. They are still the ones whose decisions affect the company as a whole, and the ones to whom the other employees look for leadership.

Where Can I Obtain Additional Information?

For more information regarding the FLSA, visit the Wage and Hour Division's Web site at www.wagehour.dol.gov or call the toll-free help line, available from 8 a.m. to 5 p.m. in your time zone, at 1-866-4US-WAGE (1-866-487-9243). More information, including video training seminars, is available on the Department of Labor (DOL) website: www.dol.gov, under the heading, "Overtime Security."

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