

Wage and Hour Guide for Employers

Prepared by the Wage and Hour Sub-Practice Group of EBG
Collective Action Litigation – Advice and Counsel – Employer Audits

PART 1: FAIR LABOR STANDARDS ACT (FLSA) OVERTIME EXEMPTIONS

Executive

1. Primary duty is management of enterprise department or subdivision
2. Customarily and regularly directs the work of two or more employees
3. Must have power to hire and fire, or recommendations must be given “particular weight”

The employee must also be paid on a salary basis of at least \$455 per week.

- » Can manage a mix of full time and part time employees, if equals 2 full time employees
- » To determine primary duty, look at amount of time spent, job description, hiring criteria, how paid
- » To analyze “particular weight,” determine whether recommendation is part of job duties, frequently made, or frequently relied upon

29 C.F.R. §§ 541.100 – 541.106

Administrative

1. Primary duty is performance of office or non-manual work directly related to management or general business operations of employer
2. Must exercise discretion and independent judgment with respect to matters of significance

The employee must also be paid on a salary basis of at least \$455 per week.

- » “Production workers” (those producing core product or service) may not be eligible

- » Specific exempt job titles: team project leader (lead major projects); administrative assistant (if delegated authority re: matters of significance); human resource managers (must make or interpret employment policies); purchasing agents (w/ authority to bind company on significant purchases)
- » Internet, database and computer network administrators now meet administrative exemption

29 C.F.R. §§ 541.200 – 541.203

Professional

Performance of work:

1. Requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, or
2. Requiring invention, imagination, originality or talent in recognized field of artistic or creative endeavor

The employee must also be paid on a salary basis of at least \$455 per week.

- » Examples: doctors, lawyers, nurses, engineers, scientists
- » College or advanced degrees are standard, but a combination of work experience and training will suffice in some cases
- » Accountants usually meet this exemption, but accounting clerks and bookkeepers do not
- » Graphic artists may qualify, but must exercise a high level of invention, imagination, originality and talent

29 C.F.R. §§ 541.300 – 541.304

Outside Sales

1. Primary duty is making sales
2. Must customarily and regularly be engaged away

from the employer's place of business in performing this duty

- » Work done in furtherance of sales is considered part of making sales
- » Inside duties such as writing sales reports, updating catalogues, planning itineraries and attending sales conferences are considered part of making sales
- » Inside salespeople not eligible: no telephone, mail or internet sales
- » Former rule – no more than 20% non-exempt duties; new rule – outside sales must only be “primary duty”

29 C.F.R. §§ 541.500 – 541.504

Computer Professional

- 1 Application of systems analysis techniques and procedures to determine hardware, software or system functional specifications;
2. The design, development, documentation, analysis, creation, testing or modification of:
 - a) computer systems or programs; or
 - b) computer programs related to machine operating systems; or
3. A combination of these duties

- » Does not apply to computer operation, manufacture or repair
- » Does not apply to employees whose work is highly dependent upon the use of computers and computer software programs (i.e., auto cad)
- » Must be paid on a salary basis of at least \$455 per week, or can pay on hourly basis if at least \$27.63/hr

29 C.F.R. §§ 541.400 – 541.401

Highly Compensated Employee Exemption

1. An employee with a total annual compensation of at least \$100,000 is deemed exempt if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee
2. “Total annual compensation” must include at least \$455 per week paid on a salary or fee basis. Total annual compensation may also include commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period
3. If the employee's total annual compensation does not meet the required amount, the employer may, during the last pay period or a one month period after the end of the year, make a payment sufficient to achieve the required level

4. For employees who work less than one year, the employer may calculate exemption on a pro rata basis
5. The exemption only applies to employees performing office or non-manual work

29 C.F.R. § 541.601

Permissible Deductions From Exempt Employee Salary

The following is a list of permissible deductions from an exempt employee's salary, which will not violate the “salary basis” requirement:

1. When an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability
2. For absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability. Deductions for such full-day absences also may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted the leave allowance thereunder
3. For unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules, or for infractions of safety rules of major significance
4. An employer is not required to pay the full salary in the initial or terminal week of employment
5. An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act

29 C.F.R. § 541.602

PART 2: FAIR LABOR STANDARDS ACT (FLSA) NON-EXEMPT EMPLOYEES

Minimum Wage

1. Non-exempt employees must be paid at least the federal minimum wage for all hours worked

Federal Minimum Wage:

- » July 24, 2009: \$7.25 per hour

29 U.S.C. § 206

Overtime

1. Non-exempt employees must be paid at least the federal minimum wage for all hours worked

a) Overtime:

- » 1 ½ times an employee's regular rate of pay
- » Regular rate of pay must be determined for non-exempt employees paid on a piece-rate, salary, or commission basis by dividing their earnings by the number of hours actually worked

29 C.F.R. §§ 778.100 – 778.115

- » Nondiscretionary bonuses (i.e., performance incentives) are to be included in an employee's regular rate of pay to determine overtime payment obligations

Bonuses are considered to be discretionary if:

1. The fact that the payment is to be made and the amount are determined at the sole discretion of the employer; and
2. The bonuses are not paid under a prior contract, agreement, announcement, or promise that would cause the payments to be considered "regular"

29 C.F.R. § 778.211

b) Workweek

- » Regularly recurring period of 168 hours (7 consecutive 24-hour periods)
- » May begin on any predetermined day and hour of day

29 C.F.R. § 778.105

Tipped Employees

1. "Tipped Employee": Employee who typically receives over \$30 of tips per month
2. Employees must receive at least the federal minimum wage

- » Tips actually received by tipped employees may be counted as wages; but
- » Employers must pay tipped employees at least \$2.13 per hour in direct wages

29 C.F.R. § 531.50

1. On-call Time:

- » On Employer's Property: Generally, on-call time is compensable (unless living on property)
- » Off Employer's Property: Generally, on-call time is not compensable (unless activities are restricted)

Example:

A paramedic is scheduled to work a 12-hour "on-call" shift, which requires her to remain at the dispatching center to respond to emergencies. All time spent at the dispatching center is compensable time.

Compare:

Maintenance employees at a large manufacturing facility are scheduled to be "on-call" one weekend each month. During such time, the employees may do as they please, including staying at home, but must "check-in" with their supervisor by telephone at the beginning and end of each day. The maintenance employee's "on-call" time is not compensable.

29 C.F.R. § 785.17

2. Sleeping Time:

If employee is required to be on duty:

- » 24 Hours or Less: All time is compensable, even if permitted to sleep
- » 24 Hours or More: Employer and employee may agree to exclude sleep time from hours worked, however, sleeping facilities must be provided

29 C.F.R. §§ 785.21 – 785.22

3. Lectures, Meetings, & Training Programs:

Compensable unless all the following elements are met: time spent is (1) outside normal working hours; (2) voluntary; (3) not job related; and (4) no other work is concurrently performed

29 C.F.R. § 785.27

4. Travel Time:

- a) Home to Work:
 - » Not compensable
- b) One-Day Special Assignment in Another City:
 - » If employee ordinarily works at a fixed location, all time spent traveling to and returning from another city on the same day is compensable. However, time the employee normally spends traveling to/from work can be deducted from the otherwise compensable time.
- c) Overnight Travel:
 - » Time spent away from home on overnight travel that coincides with the employee's normal work hours is compensable. In addition, time spent on non-work days that coincides with the employee's normal work hours is also compensable.

29 C.F.R. §§ 785.34 – 785.40

PART 3:

TEXAS WAGE & HOUR LAWS

Payment On Separation

Voluntary Resignation:

- » Due on Next Regular Pay Day
Texas Labor Code § 61.014(b)

Termination:

- » Due on 6th Day After Termination
Texas Labor Code § 61.014(a)

Payment On Wages

Deductions:

- » All deductions must be authorized in writing or otherwise allowed by law (i.e., child support or taxes) Texas Labor Code § 61.018

Timing:

- » All non-exempt employees must be paid at least twice monthly; exempt employees must be paid at least monthly Texas Labor Code § 61.011

Posting:

- » Pay days must be posted on a bulletin board in the workplace Texas Labor Code § 61.012

Minimum Wage

Hourly Amount:

- » Same as federal minimum wage
Texas Labor Code § 62.051

Wage for Tipped Employees:

- » Same as under federal law
Texas Labor Code § 62.052

Breaks:

- » None required

Meal Periods:

- » None required

Payment:

- » Must compensate employees for breaks or meal periods less than 30 minutes 29 C.F.R. § 785.19

Overtime

Accrual:

- » Employers can lawfully limit accrual (“use it or lose it” is permissible)

Payment on Termination:

- » Employers are not required to pay accrued vacation or sick time unless there is an agreement to pay (i.e., policy)

Child Labor

Minimum Age:

- » Cannot employ children under 14 years
Texas Labor Code § 51.011

Hours of Employment (14 & 15 yrs):

- » Cannot employ more than 8 hours per day, or 48 hours per week
- » Cannot employ between 10 pm and 5am on a day preceding school day
- » Cannot employ between midnight and 5 am on all other days

Texas Labor Code § 51.013

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